THE COMMISSION ON ADMINISTRATIVE JUSTICE

(Office of the Ombudsman)

Hata Mnyonge ana Haki

RIGHTING ADMINISTRATIVE WRONGS

A Compendium of Advisories, Determinations and Case Law by the Kenyan Ombudsman

The Office of the Ombudsman

Hata Mnyonge ana Haki

Vision

To be an effective overseer of responsiveness and servant-hood in public offices at National and County levels.

Mission

To enforce administrative justice and promote constitutional values by addressing maladministration through effective complaints handling and dispute resolution.

Core Values

Fairness

Diversity

Accountability

THE COMMISSION ON ADMINISTRATIVE JUSTICE

(Office of the Ombudsman)

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CAJ 29/ June 2016

STATEMENT OF THE CHAIRPERSON

I am delighted to present the Compendium of Advisory Opinions, Determinations and Judicial Decisions involving the Commission on Administrative Justice (Office of the Ombudsman). The production of the Compendium is a milestone in the history of the Commission and covers the period from November 2011 to March 2016. It is a testament of the achievements of the Commission since inception in November 2011 under my stewardship and my two colleagues, Dr. Regina Mwatha and Ms. Saadia Mohamed.

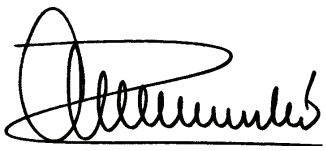
As you are aware, the Commission is established under Article 59(4) of the Constitution and the Commission on Administrative Justice Act [Chapter 102A of the Laws of Kenya] to enforce administrative justice and promote constitutional values in the public sector by addressing maladministration through effective complaints handling and dispute resolution. In particular, the Commission is empowered to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, as would be prejudicial, constitute improper conduct, or amount to abuse of power, unfair treatment, manifest injustice or unlawful, oppressive or unresponsive official conduct. Accordingly, the Commission undertakes administrative review in the event of maladministration such as delay, inefficiency, discourtesy, ineptitude or unresponsiveness, and provides redress. Moreover, in line with its mandate under Section 8(h) of the Act, the Commission issues Advisory Opinions on improvement of public administration, including review of legislation, codes of conduct, processes and procedures. Additionally, the Commission participates in strategic public interest litigation on matters of national importance before the court as a way of promoting public administration.

Pursuant to the above mandate, the Commission has received 227,160 complaints and inquiries out of which it, has resolved 185,339 at a resolution rate of 82% through various mechanisms, delivered hundreds of Determinations, a few of which are included in this compendium, issued 37 Advisory Opinions and participated in 40 matters of public interest before the Court since inception in 2011. These activities are part of the broad strategies developed by the Commission to promote transparent governance, ethical leadership and respect for human rights in the country. It is worth noting that the Determinations have provided redress of administrative injustices within the meaning of Article 59(2)(j) of the Constitution, 'take remedial action' and also guided public officers on matters relating to the right to fair administrative action. In addition, the Advisory Opinions and Court Decisions have guided public discourse on public administration and broken new jurisprudence in administrative justice and good governance in Kenya.

While the Commission has made tremendous progress in this regard, the absence of a document where such information is compiled has been decried. Further, while the Commission has disseminated its activities through various media, a number of public officers and members of the public are yet to access such information in one document thereby negatively impacting on improvement of public administration. It is in this regard that the Commission has developed this Compendium to bridge the gap and provide an easy and one-stop shop access to such information which will not only enhance knowledge on administrative justice, but also develop a rich jurisprudence on Ombudsmanship and good governance thereby improving public administration. The Compendium contains the Advisory Opinions, Determinations, relevant Acts of Parliament and Judicial Decisions in matters where it has participated as well as selected relevant comparative jurisprudence from South Africa and Uganda.

I recommend the Compendium to public officers, civil society organisations, members of the public and other stakeholders for their information and also as part of our accountability to the public. It is our hope that it will not only guide public officers in complying with the principles of administrative justice and good governance, but also enable them to fully co-operate with the Commission in this endeavour. As always, we are determined to deliver on our mandate as demonstrated by this Compendium. In this regard, I call upon all stakeholders to partner with us in this journey, for we will surely succeed with you on our side.

Dated this 8TH day of JULY 2016



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

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1.1.1 ADVISORY OPINION TO THE PRESIDENT REGARDING APPOINTMENT OF DIRECTORS TO THE CENTRAL BANK OF KENYA

Your Excellency, as you are aware this Commission is a Constitutional Commission established under Article 59(4) of the Constitution, and the Commission on Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, and manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Additionally, the Commission has a quasi-judicial mandate to deal with maladministration, and to adjudicate on matters relating to administrative justice. Further, and through Advisory Opinions, the Commission is expected to render proposals on improvement of public administration, including review of processes and procedures where appropriate.

Your Excellency, our attention has been drawn to the information in the media relating to the appointment of the Directors to the Central Bank of Kenya. In particular, our attention has been drawn to the inordinate delay in appointing the Directors since the expiry of the term of the immediate former directors in March 2015. While we note that the Chairman of the Board of Director, Mr. Mohammed Nyaoga, was appointed on 19th June 2015, the absence of Directors for over one year has meant that the Board cannot carry out its duties as required by the Central Bank of Kenya Act thus inhibiting the operations of the Bank.

Your Excellency, we wish to draw your attention to Section 11(2) of the Central Bank of Kenya Act, which provides for the procedure for appointment of the Board of Directors. The Section provides that:

> *"The directors appointed under paragraph (d) of subsection (1) shall be appointed by the President with the approval of Parliament and shall hold office for a period of four years but shall be eligible for re-appointment for one further term of four years"*

Further, Section 12(1) states that "*the Chairperson **shall** convene meetings of the Board not less than **once in every two months**"* while Section 12(2) provides that *"a quorum for any meeting of the Board shall be the Chairperson, the Governor and **three directors**."*

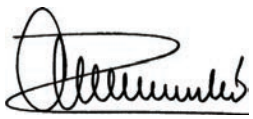
Your Excellency, the above cited provisions expressly vest the appointment of the Directors of the Bank in your Office. In addition, they provide for meetings of the Board to be held once in every two months with the quorum of at Five members, including at least three Directors. The upshot of the foregoing is that no meetings of the Board have been held since March 2015 which expressly contravene the above cited provisions of the Act. Ultimately, it means that the Board has been unable to carry out its functions in line with the law due to the absence of the Directors.

Your Excellency, the effect of the above foregoing cannot be understated due to the susceptibility of constitutional and legal challenges that may arise for any decision taken by the Bank in the absence of the Board. Specifically, the challenge may arise in the context of Article 231(4) of the Constitution on the printing of new currency which remains suspended due to the absence of the Directors. Similarly, the Board has been unable to discharge its policy and strategic functions in relation to the fulfilment of the mission of the Bank. For instance, issues relating to the stability of the financial sector are usually carried out by the Board whose absence means that the Bank cannot effectively monitor the financial sector.

Your Excellency, in recent times the role of Central Bank in economic development has become more critical. Moreover, substantial risks and negative consequences associated with improper banking practices have also been unearthed since the appointment of the current Governor of the Bank. In light of this, the regulator must be at the forefront of good corporate governance. Simply put, the supervisory role of the Central Bank of Kenya cannot operate efficiently in the absence of good corporate governance. We cannot overstate the likely implications of an inadequate and non-functional Board on the economy of the country. It is, therefore, important to examine the oversight functions of the Board, including *"keeping under constant review the performance of the Governor in discharging the responsibility of that office."* This is a check-and-balance relationship that drives the effectiveness of the Bank.

In light of the above, we humbly request you to appoint the Directors of the Bank as a matter of urgency in accordance with the Central Bank of Kenya Act to enable the Bank carry out its functions effectively.

DATED this **11th** Day of **April 2016**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.2 ADVISORY OPINION ON THE APPOINTMENT OF A SUBSTANTIVE HOLDER OF THE OFFICE OF THE REGISTRAR OF POLITICAL PARTIES

Your Excellency, as you are aware this Commission is a Constitutional Commission established under Article 59(4) of the Constitution, and the Commission on Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, and manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Additionally, the Commission has a quasi-judicial mandate to deal with maladministration, and to adjudicate on matters relating to administrative justice. Further, and through Advisory Opinions, the Commission is expected to render proposals on improvement of public administration, including review of processes and procedures where appropriate.

Your Excellency, our attention has been drawn to the delay in appointing a substantive holder of the Office of Registrar of Political Parties. In particular, we note that the current holder of the Office, Ms. Lucy Ndung'u has been acting for over Four Years since the enactment of the Political Parties Act, 2011. While we note that the Political Parties Act provided for a transition to the new dispensation, the position of the Registrar was to be filled in accordance with the law without further delay. The "acting capacity" by the then Registrar was a temporary measure and part of the transition process to the new regime under the Act; it was never intended to be perpetual. It is trite law that a person cannot hold office in that capacity *ad infinitum.* The import of the foregoing is that the position has been vacant since a substantive holder has not been appointed.

Your Excellency, we wish to draw your attention to Section 34(a) and the Seventh Schedule of the Political Parties Act which provide for the procedure for appointment of the Registrar and Assistant Registrars. The Section provides that:

> *"...occurrence in the vacancy in the Office of the Registrar of Political Parties or the Assistant Registrar, the President shall, with the approval of the National Assembly, appoint a Selection Committee comprising—*
>
> *a. a Chairperson who shall be nominated by the President*
> *b. one person nominated by the Law Society of Kenya;*
> *c. one person nominated by the Institute of Certified Public Accountants of Kenya;*
> *d. one person nominated by the Association of Professional Societies in East Africa;*
> *e. two persons nominated by the political parties represented in the National Assembly according to their proportion of members in the Assembly; and*
> *f. two persons nominated by the political parties represented in the Senate according to their proportion of members in the Senate."*

To this end, the Seventh Schedule stipulates a clear procedure and timeline for nomination by the Selection Committee. In particular, Section 6 of the Seventh Schedule clearly states that:

> *"Whenever a vacancy arises in the office of Registrar or Assistant Registrar, the President shall,* ***within twenty-one days of the vacancy****, with the approval of the National Assembly, appoint a Selection Committee consisting of the persons specified in Section 34(1)"*

Once nominated and approved, the Selection Committee is required to competitively appoint a new Registrar by advertising the vacancy within seven (7) days, interview the shortlisted candidates and forward names of three nominees to the President for appointment.

It is clear from the foregoing that the Act envisaged that the position of Registrar of Political Parties would be filled immediately on its enactment owing to the significant responsibilities bestowed upon the holder of that Office. In this regard, the failure to appoint a substantive Registrar would contravene the express provisions of the Act and create unnecessary legal and political challenges.

In light of this, we humbly advise that the position be declared vacant as a matter of urgency to facilitate the recruitment of a substantive holder in line with Article 10 and 232 of the Constitution. The need for a substantive holder of that Office becomes significant as approach the general elections scheduled for August 2017.

DATED this **11th** Day of **April 2016**

DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.3 ADVISORY OPINION ON SUCCESSION PLANNING IN STATE AND PUBLIC OFFICES

I. INTRODUCTION

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The Commission's attention has been drawn to the recent debate regarding retirement of Judges in the country. While the Commission is cognisant that the matter has been and continues to be the subject of proceedings before the Court, it has noted that the debate has raised an ancillary, but fundamental issue of succession in State and Public Offices. The Commission further notes that while the Court will make a definitive pronouncement on the age of retirement of Judges, the decision may not address the broader question of succession in the Judiciary or the wider public service. The Commission notes that while the present situation has presented itself in the context of the Judiciary, it is an issue that cuts across all sectors of the Public Service, and which could be due to a vacuum in the legal and administrative frameworks which has the potential of causing a constitutional crisis.

The Commission notes that whereas it is important to determine the retirement age of Judicial Officers, it is equally critical that the question of succession in State or Public Offices be determined for certainty in public administration. The proceedings before the court will not address this issue. The foregoing has prompted the Commission to issue an

Advisory Opinion on the matter in accordance with its advisory jurisdiction under Article 59(2) (h), (i) & (j) of the Constitution as read with Section 8(h) of the Act as hereunder.

II. SUCCESSION PLANNING UNDER THE PRESENT DISPENSATION

Succession planning plays an important role in the development and stability of the public service. It not only ensures uninterrupted service delivery, but also leads to strategic management, leadership development, certainty and fairness in public administration. It takes cognisance of the fact that the exit of officers from service for various reasons, if not handled properly, can create a shut-down of services and instability. It is in this regard that Kenya's present dispensation provides for succession in State and Public Offices. In the first place, the Constitution provides for succession in all State Offices, including the Office of the President. It, for instance, provides an elaborate mechanism of succession of the President under Article 141 which involves both an outgoing and incoming Presidents.

However, while there are procedures for appointment to other State and Public Offices, the process is not elaborate and creates the potential of a vacuum in such offices in instances where the appointment process is not commenced early enough before the retirement of the holder of a given office. This has been particularly evident in some State Offices whose positions remained vacant for long after the expiry of the office holders. A case in point is the Kenya National Commission on Human Rights whose new Members were appointed long after the expiry of the term of the then members. The situation is likely to worsen in the coming months given that various State Offices like Commissions will have the tenure of the members expiring. Similarly, the Judiciary will be affected regardless of the outcome of the matters presently in Court. Further, it is worth noting that certain offices such as those of the Chief Justice, Commission Chairpersons and Independent Office Holders should not remain vacant without substantive holders owing to the nature of their duties. In light of this, there is need to provide mechanisms for effective succession planning in State and Public Offices in Kenya.

III. SUCCESSION PLANNING IN THE JUDICIARY AND THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

Succession planning is integral in the context of our electoral cycle in which two State Offices, the Independent Electoral and Boundaries Commission (IEBC) and the Judiciary play important roles. It is, therefore, imperative that the offices are properly constituted to avoid creating a legal vacuum within months of the next elections. However, this is one of the significant challenges that both the Judiciary and IEBC are likely to face.

a) Succession Planning in the Independent Electoral and Boundaries Commission

The Independent Electoral and Boundaries Commission is the sole body charged with the responsibility of conducting elections to any elective office established by the Constitution or an Act of Parliament. To this end, it is the body that declares the results of an election. In the case of election of the President, Article 138(10) of the Constitution makes it mandatory for the results of election to that office to be declared by the Chairperson of IEBC, and to transmit a written notification of the results to the Chief Justice and the incumbent President.

It is instructive to note that the IEBC Commissioners were gazetted on 9th November 2011 and subsequently sworn-in on 14th November 2011 for a fixed term of six (6) years. In case the date of gazettement is considered as the date of appointment, then the term of Commissioners will end on 8th November 2017, whereas it will be 13th November 2017 if it is the date of swearing-in. Regardless of the date taken, there is a prospect of the process going beyond the end of the term of the IEBC Commissioners which would create a constitutional crisis as illustrated in the scenario hereinafter:

- The date of the next General Elections will be on 8th August 2017 as announced by IEBC;
- The results of the election must be declared within Seven (7) days as per Article 138(10) of the Constitution, which takes it to 15th August 2017;
- A Petition on the validity of presidential election must be filed in the Supreme Court within seven (7) days after the date of declaration of results as per Article 140(1), thus taking it to 22nd August 2017;
- The Supreme Court has Fourteen (14) days to determine the Petition [if not extended as proposed by the Judiciary], thus taking the process to 5th September 2017;
- In case the Court finds the election to be invalid, a fresh election must be held within Sixty (60) days after the determination [Article 140(3)], which takes it to 4th November 2017;
- The results of the election must be declared by IEBC within Seven (7) Days after the elections which takes the process to 11th November 2017;
- In the event a person is aggrieved by the results of the fresh Presidential election, he can file a petition in the Supreme Court to challenge the election of the President-Elect within Seven (7) Days after the declaration of the results, and the Court would have to determine the matter within Fourteen (14) Days after the filing of the petition. This would take the process to 2nd December 2017, and even then, the Court could make a decision for fresh elections;
- By this time, there would be no substantive Chairperson or Commissioner at IEBC!

It is instructive to note that the tenure of the Commissioners has been set by Article 250(6) of the Constitution as six years and cannot be extended without an amendment of the Constitution by referendum (A. 255). The foregoing creates the possibility of a constitutional crisis due to the role of the IEBC Chairperson in presidential election. Further, it is worth noting that IEBC, like other Commissions, must have at least three Commissioners for it to be deemed properly constituted, and the fact of Commissioners forming the Commission; their roles cannot be performed by the Secretariat.

b) Succession Planning in the Judiciary

In relation to the Judiciary, the Supreme Court is the only court that determines the validity of a presidential election, and the Chief Justice or Deputy Chief Justice administers the oath of office of President to the President-Elect. These are enormous tasks that are not transferrable to any other person or institution and which, if not handled properly within the Constitution, could lead to a constitutional crisis.

It is worth noting that the positions of three out of the seven Judges of the Supreme Court may well be vacant before the next General Elections in August 2017. These are the positions for the Chief Justice, Deputy Chief Justice and a Judge. This creates the possibility of the Supreme Court not being properly constituted as required by Article 163(2) of the Constitution insofar as only four Judges instead of the minimum five will be available to preside over matters at the Court. Further, it could derail the swearing in of the President-Elect due to the absence of the Chief Justice, and/or Deputy Chief Justice one of whom must preside over the ceremony. This could create a constitutional crisis in case a presidential election petition is filed before the Court

which must be determined within fourteen days of filing. While the Chief Justice has commendably expressed his intention to retire early, as early as 2016, the two other Judges of the Court have contested their retirement in Court as permitted by law. However, while the matter has been determined by the High Court and is currently the subject of appeal at the Court of Appeal, we opine that the decision of the Court of Appeal ought to be accepted as final in the interest of justice. A further appeal to the Supreme Court would be inappropriate and riddled with conflicting interests. This is because of the Seven (7) Judges of the Supreme Court, Two (2) including the Chief Justice are members of the Judicial Service Commission who took the view that retirement of Judges ought to be at 70; Two (2) other Judges are the subject of the appeal, while the remaining Three (3) Judges were part of the Bench that expressed the opinion that Judges ought to serve up to 74 years.

Further, we note with concern the recent amendment to the Judicial Service Act, which on the face of it, appears unconstitutional. The amendment requires the Judicial Service Commission to recommend names of three candidates each to the President for appointment as the Chief Justice or Deputy Chief Justice. This is a departure from the previous case where only one name for either position would be recommended to the President for appointment. Specifically, the amendment offends the Constitution for the following reasons:

i) Article 166(1)(a) of the Constitution provides that 'the President **shall** appoint the Chief Justice and the Deputy Chief Justice, **in accordance with the recommendation** of the Judicial Service Commission, and subject to the approval of the National Assembly.'

ii) In using the word 'shall', there is no discretion given to the President in the appointment of the Chief Justice or the Deputy Chief Justice. It should be noted that, by giving more than one name, the amendment gives the President a discretion which is not contemplated by the Constitution.

iii) The wording of the Article is in singular (recommendation) as opposed to plural (recommendations) which clearly, therefore, limits the idea of recommending several names to the President.

iv) Arguments to compare this provision with the appointment of Chairpersons of Commissions under Article 250(2)(a) is erroneous since the latter allows Parliament greater latitude as to recommend more than one name as they may deem fit.

v) To argue to the contrary would suggest that in the event of vacancies in the rank of Judges, the Judicial Service Commission would be similarly required to forward names three times the number of vacancies to enable the President select a third of them which would clearly contravene Article 166(1)(b) and 172(1)(a) of the Constitution.

vi) In any event, the spirit of the Constitution as encapsulated in Article 259(1)(a) requires a purposive interpretation of the Constitution. The purpose of the wordings of Article 166 was always to limit the whims and discretion of the Presidency in appointing the Chief Justice and his Deputy.

Separately, we also note with concern the unfortunate trend of undertaking substantive amendments to various laws through an omnibus Statute Law (Miscellaneous Amendments) Bill whose effect is to negate public participation in the legislative process.

IV. WAY FORWARD

On the basis of the foregoing analysis, we specifically advise as follows:

i.) There should be proper succession planning for all State and Public Offices which ensures that incoming officers are appointed well in advance before the end of the tenure of the outgoing officers to enable them acquaint themselves with the offices. Accordingly, the appointment process for State and Public Officers should be commenced six (6) months before the expiry of the tenure of the outgoing officers. This would also ensure ample time to address any issue that may arise in the appointment process.

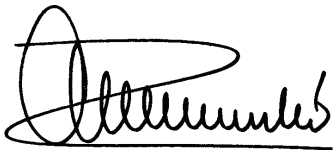
ii.) In the context of the Judiciary, there is need for the Chief Justice (as Chair of the Judicial Service Commission) to immediately commence the appointment process of the new Chief Justice to avert a constitutional crisis that may arise. Having signaled that he will leave office by June 2016, the process should commence no later than January 2016.

iii.) The determination of matters regarding the retirement age of Judges that are presently before the Court should be fast tracked, and determined on high priority, since they have a bearing on succession planning in the Judiciary. This will reduce any uncertainty and anxiety that may affect service delivery by the Judiciary.

iv.) The aforestated amendment to the Judicial Service Act should be repealed to make the Act be in consonance with the Constitution. Further, the Speaker of the National Assembly and the Attorney-General should ensure that substantive amendments to any legislation is done through a specific Bill rather than an omnibus Statute Law (Miscellaneous Amendments) Bill and also ensure public participation in the legislative process.

v.) In the interests of the country, and for the greater public good, IEBC Commissioners should be encouraged to voluntarily and honourably leave office about the same time as the Chief Justice, to enable appointment of their successors in good time to prepare for the 2017 General Elections. Since this would not be on account of removal for misconduct, their full benefits would be secured as if they had served their full term.

DATED this **5th** day of **January 2016**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.4 ADVISORY OPINION TO PARLIAMENT ON THE VETTING OF PERSONS NOMINATED TO THE POSITIONS OF CABINET AND PRINCIPAL SECRETARIES

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The attention of the Commission has been drawn to the nomination of Cabinet Secretaries and Principal Secretaries by His Excellency the President and the subsequent pronouncements by the Honourable Speaker of the National Assembly on 2nd December 2015 concerning the vetting of the said candidates by the National Assembly. While we appreciate the powers of the President to nominate individuals for the aforestated positions, we wish to point out that the same should be exercised in accordance with the Constitution. Any deviation from the Constitutional provisions and precepts would, therefore, impugn the Constitution. Having said that, we wish to point out the particular issues raised regarding the aforestated nominations for consideration during the approval process as follows:

i) That the nomination of Hon. Sen. Charles Cheruiyot Keter and Hon. Daniel Kazungu Musee who are sitting Members of Parliament to the positions of Cabinet Secretaries for Mining, and for Energy and Petroleum respectively may be unconstitutional if, at the point of vetting, they have not presented a letter of resignation from their elected positions. They are ineligible for appointment to such positions while still serving in their aforesaid positions. We have analysed the Constitution and noted that Article 152(3) of the Constitution makes sitting Members of Parliament ineligible for appointment as Cabinet Secretaries. The said provision states that 'a Cabinet Secretary shall not be a Member of Parliament.' The import of this provision is that any sitting Member of Parliament is not eligible for appointment as a Cabinet Secretary. In the event that they are nominated, they should first resign from their positions as Members of Parliament before consideration for vetting by the National Assembly. In our humble opinion, to be vetted, approved then resign before swearing in is a breach of the Constitution since eligibility is a constant requirement at nomination, during vetting, at the point of approval and on the occasion of swearing-in. It is not clear whether the two nominees have resigned from their positions as they await the vetting. It is our opinion that the Assembly should ensure that they are first eligible for consideration for vetting by producing proof of resignation from their current positions.

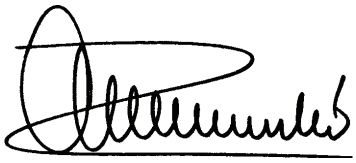
ii) That the Ruling by the Hon. Speaker of the National Assembly of 2nd December 2015 concerning the vetting of serving nominees for the positions of Cabinet Secretaries and Principal Secretaries was correct and we fully concur, except if the issue related to the position of Attorney General or Secretary to the Cabinet.

iii) That it there is no information to the effect that the nominees for the positions of Principal Secretaries were competitively recruited and recommended by the Public Service Commission in line with A.155(3)(a) of the Constitution. We have noted this concern and wish to request the National Assembly to ascertain compliance with this requirement before considering the approval of the nominees to the position of Principal Secretary.

iv) That the nomination by His Excellency may have breached the Constitution insofar as it did not comply with the gender and regional requirement principles under Article 10 of the Constitution. We note that the gender principle is not only a requirement under the said Article, but also under Articles 27 and 81 of the Constitution. Notably, Article 27(8) requires the State to '…implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.' The positions of Cabinet Secretaries and Principal Secretary are appointive in nature and must, therefore, comply with this principle. Further, we wish to point out that this position has been affirmed by the Supreme Court in the Gender Principle Case and the High Court in a number of matters. In this regard, we hope that the National Assembly will consider the principle as they undertake the vetting process to ensure compliance with the Constitution.

We hope that the above stated issues will be brought to the attention of relevant Committees and will receive due consideration and attention by the National Assembly during the vetting process to ensure compliance with the Constitution.

DATED this **10th** day of **December 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.5 ADVISORY OPINION TO THE SPEAKERS OF THE NATIONAL ASSEMBLY AND SENATE ON THE STATUTE LAW (MISCELLANEOUS AMENDMENTS) (NO. 2) BILL, 2015

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

We make reference to the Statute Law (Miscellaneous Amendments) (No. 2) Bill, 2015, published on 18th September 2015 in the Kenya Gazette Supplement No. 165 (National Assembly Bills No. 58). The proposed Bill seeks to amend specific provisions of the Industrial Training Act, Cap 237, the National Hospital Insurance Fund Act, 1998 (No. 9 of 1998)the Copyright Act, 2001 (No.12 of 2001), the Kenya Institute of Curriculum Development Act, 2013 (No. 4 of 2013) and the Kenya Law Reform Commission Act, 2013 (No. 19 of 2013). We wish to express or concern over the amendments proposed to the several legislations outlined therein and would like to highlight the following regarding the same.

A. **The mischief of the proposed amendments**

Upon perusal of this Bill, one cross-cutting theme is the intention to change the structure of appointments of members and chairpersons of Boards, Commissions and Councils of statutory public entities. The proposed framework seeks to concentrate the power to make such appointments on the President as regards Chairpersons and Cabinet Secretary responsible for the various Ministries as regards members. This practice re-enacts the previous system where such appointments were either done behind the scenes or in boardrooms and this bred cronyism and stifled independence of the concerned official, who would then serve on the whims of the appointing authority. This is a great departure from the spirit of the Constitution of Kenya, 2010, which entrenches the need for consultative approaches, openness and transparency as well as public participation in appointments.

Furthermore, the proposed amendments set a trend of removing the requirement of competitive recruitment in the public service, contrary to Article 232 of the Constitution. This Article establishes the principles of public service, which among others, require fair competition and merit as the basis of appointments and promotions in public service. This is an international best practice which requires that appointments to public offices be made based on well-defined criteria that includes public advertisement of vacancies, equality of opportunity for all who are eligible, merit based eligibility and gender equity. That is the very basis that vetting of state and public officers of certain ranks was introduced under the Constitution. Competitive recruitment ensures that every Kenyan with relevant qualifications has the opportunity to be considered for any suitable appointment. It further helps in inculcating a culture of responsibility, professionalism and accountability by persons appointed to public offices.

B. **Bloated Membership in Statutory Boards and Commissions**

Some of the proposed amendments seek to unjustifiably increase the number of members to the statutory Commissions and Boards established under the respective laws. For instance, the proposed amendment to the National Hospital Insurance Fund (NHIF) Act seeks to increase the members of the NHIF Board from seven to seventeen. On the other hand, the proposed amendments to the Kenya Law Reform Commission Act seeks to increase the number of the members of the Kenya Law Reform Commission from seven to nine. The necessity of the increase as well as the justifiability of the numbers has, however, not been explained.

It is worth noting that in the recent past, this country has struggled with parastatal reforms which are yet to be concluded. Some of the reforms included the setting up of the Task Force on Parastatal Reforms in 2013, Draft Policy on Parastatals and a number of Bills, among other reforms. One of the issues that ailed parastatals was the unnecessarily high numbers of board members which was not sustainable, thus calling for reforms. The report

of the Task Force, for instance, recommended that Board members of state corporations should be between seven and nine members including the Chairperson. It is, therefore, unnecessary to continue increasing the numbers of members to the Boards or Commissions especially where the increase cannot be justified.

C. **Specific amendments and their necessity thereof**

i) **The National Hospital Insurance Fund Act, 1998 (No. 9 of 1998)**

Our concern regards the number of members to the National Hospital Insurance Fund Board and we reiterate our position in (B) above. Allowing the Cabinet Secretary to appoint five more members is unnecessary since the membership provided for in section 4(1) of the Act sufficiently addresses representation of various groups and professionals. In any event, section 4(1) ensures that the Cabinet Secretary has two representatives and adding five more representatives is unnecessary. This proposed amendment is also devoid of the requirement of competitive recruitment and thus violates Article 232 of the Constitution.

ii) **The Kenya Institute of Curriculum Development Act, 2013 (No. 4 of 2013)**

The proposed amendment deliberately removes the requirement of competitive recruitment in contravention of Article 232 of the Constitution. It is important to note that the Kenya Institute of Curriculum Development Act of 2013 provided a well-structured procedure for the appointment of the Chairperson and members of the Kenya Institute of Curriculum Development Council, which mandated the creation of a selection panel to conduct the recruitment. This provision ensured that the constitutional principles are complied with. On the other hand, the proposed amendment to this Act seeks to abolish this provision including the requirement of a recruiting panel, and instead, vests exclusive power on the Cabinet Secretary to single-handedly appoint the chairperson and the members of the Council. The proposed amendment is unwarranted, retrogressive and unconstitutional and should be shelved in totality.

iii) **The Kenya Law Reform Commission Act, 2013 (No. 19 of 2013)**

The urgency to make the proposed amendments is uncalled-for since this Act, and specifically the same section 8(1) was amended in 2014, vide Statute Law (Miscellaneous Amendments) Act 2014, published in the Kenya Gazette Supplement No. 160 (Acts No. 18) and those amendments are yet to be implemented. The effect of the 2014 amendment was to ensure representation of diverse interest groups in the membership of the Kenya Law Reform Commission by introducing representation of the Law Society of Kenya, the office Director of Public Prosecutions and the office of the Chief Justice.

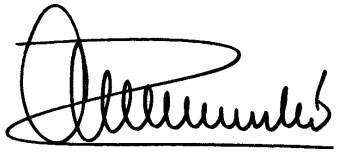
Notwithstanding the above, it is critical to point out that the proposed amendment seeks to remove the requirement of competitive recruitment and gives discretion to the President to single-handedly appoint the Chairperson of the Commission. The same discretion is extended to the Attorney General as the Cabinet Secretary responsible for matters relating to justice. It is, thus, retrogressive and should not pass.

Furthermore, the proposed amendment makes reference to the Cabinet Secretary responsible for matters relating to justice while at the same time making reference to the Attorney General as if the two were separate individuals and just serves to create confusion. It is the very reason that, as per the proposed amendment, the Attorney General will ultimately be required to appoint four representatives to the Commission, which serves no good, but only bloats the membership. We opine that it would suffice to adopt the title Attorney General when referring to the Cabinet Secretary responsible for matters relating to justice as he is currently the responsible Cabinet Secretary for such matters.

Additionally, we are of the view that section 8(1) (c) (d) and (g) of the proposed amendment is very restrictive in terms of the persons to be nominated by the Law Society of Kenya, the Council of Governors and the Chief Justice since it reserves the positions to a certain status of Advocates, being Senior Counsels and a Judge of the Court of Appeal respectively, hence discriminating against other qualified persons not having that status. Our proposal is to retain the position as per the 2014 amendments and fully implement the same.

In light of the above, we strongly opine that the proposed Bill is unwarranted since it impugns cardinal constitutional principles, is retrogressive and should be shelved in totality. However, in the event that the same should pass, then significant reviews should be made to protect the objectivity and integrity in the public service.

DATED this **20th** Day of **November 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.6 ADVISORY OPINION TO THE SPEAKERS OF THE NATIONAL ASSEMBLY AND SENATE ON THE PARLIAMENTARY SERVICE BILL, 2015

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

Our attention has been drawn to the Parliamentary Service Bill, 2015 that seeks to repeal the Parliamentary Service Act, 2000. While the necessity of the Bill cannot be gainsaid, we wish to highlight the following provisions which we believe are retrogressive and unconstitutional.

a) Section 11 (1) (b)

This provision seeks to vest the functions of the Salaries and Remuneration Commission on the Parliamentary Service Commission, (hereinafter referred as PSC) contrary to Article 230 of the Constitution. As a constitutional principle, the mandate of reviewing the remuneration and benefits of all state officers rests exclusively with the Salaries and Remuneration Commission. Furthermore, the review of the remuneration and benefits of all public officers can only be done on the advice of the Salaries and Remuneration Commission. Thus, by tasking the PSC to execute that mandate, the Bill contravenes the Constitution and this provision should be revised.

b) Section 17 (4)

The above section seeks to water down the security of tenure for the Clerks of the two Houses of Parliament. Security of tenure is an essential condition for maintaining the independence of the Clerk from political manipulation or partisan control by the members of Parliament. Thus, the Clerk should have a form of protected status and by limiting the period of service for the Clerk to four years, the Bill creates a situation where the Clerk will serve at the whims of the political regime in place at a particular time, who may intimidate the Clerks by non-renewal of their contracts. Consequently, this may undermine the authority of the Clerks as the accounting officers of both Houses of Parliament.

The practice currently is that the Clerks' term of appointment is not fixed and this resonates with the practice in many jurisdictions. However, if there were compelling reasons for the PSC to depart from this norm, the concern on determining the term of service becomes critical in the years of service and on renewability. It is to be noted that the Constitution adopts the philosophy of a single term of six or eight years to break it from political terms.In defining the period of the fixed term, the more appropriate proposal would be to adopt similar provisions to those relating to the terms of the Auditor General or the Controller of Budget which is a term of eight years and non-renewable. It is important to make the term non-renewable so as to seal any possibilities intimidation of the Clerks by the members of Parliament failing to renew their contracts.

c) Section 23 (4)

The above section empowers the PSC when reviewing its organizational structure to appoint a reputable human resource firm. We are of the view that this provision is too restrictive as it limits the options of the PSC in selecting the firm and ideally preserves the same to a private firm. We find this restriction oblivious of the fact that there may arise situations where the review of the organisational structure would be better spearheaded by a public institution and this provision excludes such a scenario. The consequence of this is that it locks out competent public institutions from undertaking the organizational review process of the PSC. Best practice in organisational reforms in the public sector demands an internal oriented review process involving employees, stakeholders, user groups and political leaders as

opposed to an external process of consulting firms. That, however, is not to say that resort cannot be made to consulting firms. It is, thus, our considered opinion that it is not appropriate to put such restriction in law.

d) Section 49 (a)

The import of the above section in the Bill is to amend the Public Finance Management Act, 2012 by re-defining the term 'accounting officer' of the Parliamentary Service Commission to include the Clerk of the Senate, the Clerk of the National Assembly and any other officer as may be designated by the Commission. This in itself is unconstitutional as it contravenes Article 127 (3) of the Constitution of Kenya, 2010. The Constitution makes it clear that the Clerk of the Senate is the Secretary to the Commission and by extension the accounting officer. The Bill cannot, therefore, purport to create two individuals as the accounting officers of the Commission.

e) Section 44

This section in the Bill seeks to unreasonably and unjustifiably limit the right to access to information as provided under Article 35 of the Constitution. The essence of guaranteeing access to information in any government is to give room to transparency and accountability as well as strengthening the democratic structure. It is not in contention that the right to access to information is not an absolute right, but that the limitations ought to be applied subject only to clearly defined rules established by law. It is also worth noting that the said rules should be reasonable and justifiable. Article 24 of the Constitution prescribes circumstances under which fundamental rights and freedoms may be limited. One of the factors to be considered is the nature and extent of the limitation which should be specifically provided for by the limiting legislation.

Further, the right to access to information is based on the principle of maximum disclosure and non-disclosure should be the exception. A law limiting the right must, therefore, guarantee effective and broadest possible access to public information. The Bill as drafted makes non-disclosure the general rule and the limitations set give a wide discretion to the Commission in declining to release information. It is our considered view that it is imperative to make disclosure the general rule and the limitations more precise and narrow.

f) Section 50

It is our view that this section seeks to irregularly oust the provisions of the Kenya Citizenship and Immigration Act, 2011 in relation to the members of the Parliamentary Service. It further makes special provisions and gives unlimited privileges to a certain group of persons, being Members of Parliament, their 'spouse(s)' and some officers of the Parliamentary Service against the provisions of the Kenya Citizenship and Immigration Act.

The basis of issuance of a diplomatic passport is to facilitate travel of a person conducting diplomatic and official government business and are restricted to persons in specific categories and playing specific roles. A holder of such a document is considered an ambassador of the country and enjoys particular prescribed privileges and immunities. It is, therefore, issued subject to the discretion of the Government and must be restricted as much as possible and any entitlement to it should be reasonable.

This section, therefore, fails to recognise the fact that a diplomatic passport is a privilege acquired and exercised by virtue of holding a particular office or having a particular status and that the privilege lapses upon cessation of holding of the office or upon termination of the status, unless provided otherwise. Thus, the section presupposes a situation where the identified persons will exercise the privilege perpetually.

Noting the group of persons as outlined in the above provision, being members of Parliament, their total number and their spouses, this may swell the number of persons entitled to such passports to unimaginable limits as well as opening up this privilege unreasonably. The end result will make the benefit of a diplomatic passport an entitlement to every person and not a privilege anymore.

Furthermore, if passed as it is, this provision will create unequal treatment of state and other public officers since it gives the members of the Parliamentary Service a right to diplomatic passports, a right which is not enjoyed by other state or public officers like the members of other Constitutional Commissions.Additionally, granting the privilege of a diplomatic passport to the spouses of the members of the Parliamentary Service has not been justified since the definition of who a spouse is has not been specified. The term 'spouse(s)' as it is in this provision may be subjected to various interpretations, unless the same is clearly defined.

g) Section 51 (5) (a)

This section states that a person, who, immediately before the commencement of the Act, held office as the Clerk of a House of Parliament shall continue to hold that office as if appointed under this Act. This provision as it is can be interpreted in many contexts and may adversely affect the employment of the Clerks of the two Houses. Possible questions that arise are whether the Clerks

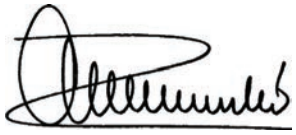
would serve for the remainder of their terms or whether their term of service will commence upon the passage of this Bill. It would be critical to clearly define the same.

h) Implication on the County Governments

Our view is that the Bill will have significant impact on the role of the Senate over the county governments in the same measure as it affects the Clerk of the Senate in the performance of his duties. Consequently, we advise the National Assembly to shelve the proposed amendments and reconsider the Bill in light of the above.

Having outlined the above, we hereby humbly request you to reconsider this Bill having regard to the above critical issues.

DATED this **11th** Day of **November 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.7 ADVISORY OPINION TO THE SPEAKERS OF THE NATIONAL ASSEMBLY AND SENATE ON THE PROPOSED AMENDMENT TO THE INDEPENDENT POLICING OVERSIGHT AUTHORITY ACT, 2011

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

We make reference to the Statute Law (Miscellaneous Amendments) Bill, 2015 published in the Kenya Gazette Supplement No. 164 (National Assembly Bills No. 57) of 18th September 2015. We note that the National Assembly has sought public participation in the enactment of the above captioned Bill in line with Article 118(1) of the Constitution. We have carefully examined the Bill, in particular the proposal for the amendment to the Independent Policing Oversight Authority Act, No 35 of 2011 and noted that it seeks to amend section 14 of the Act to empower the President to remove the Chairperson or a Member of the Independent Policing Authority (IPOA) if he deems necessary, without the procedure of receiving a recommendation from a tribunal established for that purpose. We have further noted that there is no justification for the proposed amendment which raises fundamental issues that relate to the Constitution and independence of IPOA. In particular, we note the following:

a) There is no justification for the Proposed Amendment in the Bill or the mischief that it intends to cure. This goes against one of the cardinal principles in law making which requires legislation to address a mischief or seal the existing gaps in the law. It has not been shown how the current framework that is sought to be amended impedes policing or the work of IPOA. None of these has been identified by the Bill which leads to the conclusion that the Proposed Amendment lacks the necessary threshold and may not serve a positive purpose.

b) The mandate of IPOA is important and forms part of the police reforms geared towards attaining the objects of Article 144 of the Constitution. Historically, there have been a number of reports of Task Forces established by the Government that called for the establishment of an **INDEPENDENT** policing oversight body in Kenya to ensure accountability and respect for human rights by the police. For instance, the Post-Election Violence, commonly known as the Waki Commission, recommended the establishment of an independent police oversight body with the mandate to investigate police conduct and provide co-ordination oversight over the operations of the police. Similarly, the National Task Force on Police Reforms (Ransley Task Force) also recommended the establishment of an independent police oversight mechanism. This was eventually realised when IPOA was established in 2011 as an independent civilian oversight body over the police.

   Given the mandate of IPOA, it was necessary to make it truly independent by not only giving it operational and financial independence, but also securing the tenure of the Chairperson and its Members. Accordingly, the Act as presently designed provides an elaborate provisions on security of tenure, including stringent procedure for removal of the Chairperson and Members of IPOA under Section 14 to insulate them from arbitrary removal from office.

c) The Proposed Amendment will erode the independence of IPOA with serious negative consequences on its effectiveness. Indeed, it will not only contravene the Constitution, but also violate Section 4 of the Act which states that IPOA is not subject to any person, office or authority in the performance of its functions. It is noteworthy that independence is at the heart of effectiveness of any oversight body such as IPOA; it cannot be expected to deliver on its mandate where its independence is compromised. One of the pillars of independence is the security of tenure of members of an oversight body. Specifically, the appointment, terms and conditions of service and removal of such members should be secured to ensure that they do not serve

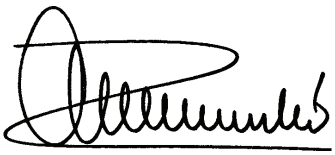
at the pleasure of any person or authority, including the President. They can only be removed based on objective grounds as set out in the Constitution and/or the law by an independent and credible institution.

The Commission notes that the Proposed Amendment will take away the security of tenure of the Chairperson and Members of IPOA which will affect its overall independence and effectiveness. In other words, they will no longer enjoy the security of tenure thereby negating the principles and values of the Constitution and expectations of Kenyans.

d) The Proposed Amendment negates the values and principles of the Constitution insofar as it seeks to concentrate state power in the Office of the President. It is worth noting that the design of the Constitution was to address the over-concentration in the core Executive which had created an imperial presidency in the old constitutional dispensation. It, therefore, decongested power from the core Executive to other State Organs. By seeking to concentrate power in the hands of the President, the proposed amendment violates the Constitution.

In light of the above, the Commission is of the considered view that the Proposed Amendment does not promote constitutionalism and the rule of law, and therefore lacks merit in regard to constitutionalism. Accordingly, we advise the National Assembly to reject the Proposed Amendment in totality.

DATED this **27th** Day of **October 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.8 ADVISORY OPINION TO THE SENATE AND COUNCIL OF GOVERNORS ON THE FRAMEWORK FOR CO-OPERATION BETWEEN THE SENATE AND THE GOVERNORS

A. INTRODUCTION

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249)(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of democratic values and principles. Further, Article 59(2)(h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

B. BACKGROUND

i) Inaugural Meeting

In recent times, there has been a dispute between the Senate and the Council of Governors in relation to operations and nature of working relationship. In particular, the dispute relates to the establishment and composition of the County Development Boards and oversight by the Senate over County Governments. The dispute, which has been raging on for some time now, has led to a standoff which is likely to undermine devolution and good public administration.

On the basis of the foregoing, the Commission invoked its mandate under Articles 59(2)(h-k) and 252 of the Constitution and Section 8(f) of the Commission on Administrative Justice Act of 'promoting alternative dispute resolution methods in the resolution of complaints relating to public administration.' To this end, the Commission invited the Senate and the Council of Governors for a meeting on 15th August 2014. The Commission also invited the Controller of Budget and the Commission on Revenue Allocation to the meeting as mediators. Accordingly, the inaugural meeting was held on 15th August 2014 at the Sankara Hotel, attended by the following officials:

1. **Mediation Panel**

- Dr. Otiende Amollo (Commission on Administrative Justice)
- Dr. Regina Mwatha (Commission on Administrative Justice)
- Mrs. Agnes Odhiambo (Controller of Budget)
- Cmmr. Micah Cheserem (Commission on Revenue Allocation)

2. **Representatives of the Senate**

- Sen. Ekwee Ethuro — Speaker, Senate
- Sen. Kembi Gitura — Deputy Speaker, Senate
- Sen. Kiraitu Murungi — Senator, Meru
- Mr. Jeremiah Nyegenye — Clerk of the Senate

3. **Representatives of the Council of Governors**

- Hon. Isaac Rutto — Governor, Bomet and Chair of CoG
- Hon. Nderitu Gachagua — Governor, Nyeri County
- Hon. Ahmed Abdullahi — Governor, Wajir County
- Mrs. Jacqueline Mogeni — Ag. Chief Executive Officer

During the inaugural meeting, the following issues forming the dispute were identified and considered:

i) The creation, design and operations of the County Development Boards established vide the County Governments (Amendment) Act, 2014 (Insertion of Section 91A and repeal of Section 91 of the Act). It was noted that the Council had already taken this matter to court challenging its constitutionality vide the *Constitutional Petition No. 381 of 2014; Council of Governors versus the Senate and the National Assembly*. The matter was pending before the High Court for determination.

ii) Refusal by the Governors to honour summonses by the Senate Committees. It was also noted that this matter had was pending before the court, having been instituted by the Council.

iii) A resolution by the Senate to withhold funds for a select number of County Governments for failing to honour their summonses. It was similarly noted that this matter was pending before the court for determination.

iv) Oversight role of the Senate over County Governments, including the roles of individual Senators.

The issues were thereafter categorised into agreed and contentious issues as follows:

1. **Agreed Issues**

- Both Parties had a common interest to protect devolution.
- The Senate has an oversight jurisdiction over County Governments. However, the specifics and mode of exercise of the jurisdiction was flagged for further discussion.
- Any mechanism adopted by the Senate in exercise of the oversight jurisdiction should be based on decorum and mutual respect in accordance with the objects of devolution.
- Further joint and side meetings with the Parties should be convened to fast track the resolution of the dispute.

2. **Contentious Issues:**

- Existence and operationalisation of the County Development Boards. While it was agreed that there was need for a forum for Senators to participate in the activities of their respective counties, the nature of the forum and style of participation needed to be considered.

Separately, it was noted during the inaugural meeting that there were heightened hostilities between the two State Organs occasioned mainly by the media appearances by representatives of both parties. It was, therefore, agreed that the parties would reduce hostilities and differences, especially in the media.

ii) **Subsequent Meetings**

Although it was agreed that the second meeting would be held within two weeks of the inaugural meeting, this did not take place due to other prior official activities by the Parties, mainly the Council of Governors. However, the second meeting was held on 30th September 2014 which was attended by the following officials:

1. **Mediation Panel**

• Dr. Otiende Amollo	Commission on Administrative Justice
• Dr. Regina Mwatha	Commission on Administrative Justice
• Cmmr. Saadia Mohamed	Commission on Administrative Justice
• Mrs. Agnes Odhiambo	Controller of Budget
• Cmmr. Micah Cheserem	Commission on Revenue Allocation

2. **Representatives of the Senate**

• Sen. Ekwee Ethuro	Speaker, Senate
• Sen. Kembi Gitura	Deputy Speaker, Senate
• Sen. Amos Wako Senator,	Busia County
• Sen. Abdirahman Hassan	Senator, Wajir County
• Sen. Omar Hassan	Senator, Mombasa County
• Sen. Peter Mositet	Senator, Kajiado County
• Mr. Mohamed Ali	Director, Office of the Clerk to the Senate

3. **Representatives of the Council of Governors**

• Hon. Isaac Rutto	Governor, Bomet and Chair of CoG
• Hon. Salim Mvuria	Governor, Kwale and Vice-Chair of CoG
• Hon. Nderitu Gachagua	Governor, Nyeri County
• Hon. Ahmed Abdullahi	Governor, Wajir County
• Hon. Wycliffe Oparanya	Governor, Kakamega County
• Hon. Peter Munya	Governor, Meru County
• Mrs. Jacqueline Mogeni	Ag. Chief Executive Officer

It was noted that the hostilities between the Parties had reduced following the agreement during the first meeting. It was generally agreed that there was need for a framework for co-operation between the Senate and the Governors. The issues were also summed up as follows:

i) The respective roles and mandates of the Senate and individual Senators as leaders of their Counties, and those of Governors;

ii) Proposals on a model for structured and meaningful involvement of Senators in County matters, without interference with the Executive functions of the County Government (the Governor);

iii) Proposals on a model for structured involvement of Governors before passage of legislation affecting Counties, without interference with the legislative role of the Senate; and

iv) Proposals on when and how the Senate should be involved in reports and recommendations by oversight bodies on finance.

It was agreed that a Technical Team comprising the Senate (Clerk's Office), Council of Governors (Secretariat), Commission on Administrative Justice and the Controller of Budget would develop proposals on the above areas drawing from other jurisdictions for consideration in the following joint meeting. Consequently, the Technical Team held a meeting on 7th October 2014 at the Senate Offices. Another meeting held on 24th November 2014 was only attended by the Senate with the following representatives:

- Sen. Ekwee Ethuro — Speaker, Senate
- Sen. Kiraitu Murungi — Senator, Meru
- Sen. Amos Wako — Senator, Busia County
- Sen. Abdirahman Hassan — Senator, Wajir County
- Sen. Omar Hassan — Senator, Mombasa County
- Sen. Peter Mositet — Senator, Kajiado County
- Mr. Mohamed Ali — Director, Office of the Clerk to the Senate
- Ms. Eunice Gichangi — Director, Legal Affairs, Senate

The Senate proceeded to consider the proposals and subsequently submitted their proposal for consideration. Another meeting was held with the Chairman of the Council at his Office on the same day. Other proposals were submitted by the Council, Office of the Controller of Budget and Office of the Auditor General. The Commission also received proposals from three experts in devolution.The mediation process, however, could not be concluded within a reasonable period despite several requests by the Commission. In light of this, the Commission in line with its Advisory Opinion jurisdiction under Article 59(2) (h, i &j) of the Constitution as read with Section 8(h) of the Act, have elected to give an Advisory on the issues as hereinunder.

C. PURPOSE OF DEVOLUTION

The primary purpose of devolution in the Constitution of Kenya is the promotion of good governance through decentralization of power, resources and representation. This is specifically provided for under Article 174 of the Constitution which outlines the objects of devolution being, *inter alia:*

i.) To promote democratic and accountable exercise of power;

ii.) To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

iii.) To recognize the right of communities to manage their own affairs and to further their development;

iv.) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;

v.) To facilitate the decentralization of State Organs, their functions and services, from the capital of Kenya; and

vi.) To enhance checks and balances and the separation of powers.

D. CONSTITUTIONAL PLACEMENT OF THE SENATE AND THE GOVERNORS IN DEVOLUTION

The Senate and Governors (County Executives) play distinct, but interrelated roles in the devolved system of government in Kenya. Both are the heart of devolution in the country. In relation to the Senate, its role in devolution is mainly provided for under Article 96 of the Constitution thus:-

i) Representation and protection of the interests of the counties

ii) Enactment of laws concerning counties

iii) Determination of allocation of national revenue among counties in accordance with Article 217 of the Constitution [division of revenue]

iv) Exercise of oversight over national revenue allocated to the counties

v) Participation in the review of boundaries of counties in line with Article 188 of the Constitution

vi) Participation in the process of suspension of county governments or termination of such suspension in accordance with Article 192 of the Constitution or determination of suspension of transfer of funds to county governments in line with Article 225(5)(b) of the Constitution.

Further functions of the Senate are:

- Participation in the impeachment of a Governor in line with Section 33 of the County Governments Act

- Participation in the transfer of functions by determining an appeal by county governments against a decision by the Transition Authority rejecting the transfer of functions in accordance with Section 23 of the Transition to Devolved Government Act
- Receipt and consideration of the Annual Reports of the Summit and Council of Governors in line with Sections 10(1) and 22(1) of the Intergovernmental Relations Act.
- Consideration of the Annual Reports of Constitutional Commissions and Independent Offices or upon a Special Report submitted pursuant to request by the Senate on a particular issue in accordance with Article 254(1) and (2) of the Constitution.

In the performance of its functions, the Senate or any of its Committees has powers of the High Court to summon any person to appear before it for the purpose of giving evidence or providing information (Art. 125). It can also compel the production of documents and enforce the attendance of witnesses and examine them on oath, affirmation or otherwise among others.

In relation to the Governors, they are the chief executive officers of their counties, leading the counties' executives and administrations. Specifically, the Governors are responsible for:

- Implementation of county legislation
- Implementation of any national legislation that requires implementation by county governments
- Management of all county administrative affairs, including development of county policies and delivery of services to the people.

E. RATIONALE FOR CO-OPERATION

Although the Senate and the County Executives are two distinct State Organs, they are required under the Constitution and legislation of devolution to work closely with each other. In particular, Articles 6(2) and 189 of the Constitution call for co-operation and consultation between the national and county governments. In the context of Senate and County Executives, the need for co-operation and consultation becomes imperative for the following reasons:

i) The Senate is mandated to represent and protect the interest of counties and their governments. Primarily, it has a special role in the enactment of legislation concerning counties and the allocation of revenue to the counties. This role inevitably requires the Senate and individual Senators to bring county concerns to the national level of government.

ii) At the hearts of the roles of the County Governments (Governors) is the obligation to deliver services to their respective counties. This can be done only if the county receives adequate funds from the distribution of national revenue; if the laws the county must implement are reasonable; and if there is proper co-ordination and co-operation between the county and the national government. The Senate and individual Senators have a role in each of these areas.

iii) An efficient and effective Governor and county government require to constantly be aware of national plans and policies. The Senators can be a valuable source of this information. In addition, the Senators may be crucial in facilitating county governments to negotiate with the national government for special assistance.

iv) The Governors need to participate in the legislation and other activities of the Senate, as may be appropriate, to ensure that such laws and policies are reasonable and give effect to the principles and objects of devolution.

Although the co-operation and consultation is critical, it should be done in accordance with the principle of separation of powers, paying due regard to the constitutional caveat of respect for the functional and institutional integrity of each other. This requires a framework for meaningful engagement which respects the functions of each State Organ. This would not only enhance effectiveness, but also ensure accountability in the performance of duties.

F. FRAMEWORK FOR CO-OPERATION BETWEEN THE SENATE AND THE GOVERNORS

We have examined the proposals by Senate and Council of Governors, and the Office of the Controller of Budget and Office of the Auditor General (in respect of financial oversight by the Senate), and the devolution experts on the various areas of co-operation between the two State Organs and advice as follows:

a) Participation of Senators in County Matters

While appreciating the efforts for ensuring the involvement of elected representatives in county matters, we note that such efforts have been ineffective. In this regard, we are of the considered view that a consultative forum should be established at the county level to enable the Senators to effectively undertake

their duty of representing the counties at the national level. This is especially important considering that the representation role of Senators is akin to that of an ambassador or intermediary insofar as ensuring that the voice of the counties are heard and represented at the national level. This platform should purely be advisory and consultative. This position is further informed by the decision of the High Court which nullified the County Governments (Amendment) Act, No. 13.

b) **Participation of County Governments in Legislative Enactment**

We noted the efforts of the Senate to involve county governments in matters that affect them. We also noted the concern by the Council of Governors that the involvement has not been sufficient and effective. Just like the preceding part above, it is important to ensure that the participation by county governments in legislative enactment respects the legislative function of the Senate. Accordingly, we advice as follows:

(i) The Consultative Forum at the county level could be used as one of the ways of ensuring participation by county governments in matters under consideration by the Senate.

(ii) There should be invitation to the county government through the Council of Governors, County Speakers Forum, County Secretaries and Clerks of Assemblies, to participate in matters relating to county governments under consideration by the Senate. Such invitation could be made from the conceptualization stage of Bills or other matters that originate from the Senate, and in relation to matters that originate from elsewhere like the National Assembly, they could take the form of targeted public participation by way of oral or written memorandum as may be appropriate. Where appropriate, meetings could be held between the Senate and the Council of Governors for further deliberations.

(iii) The leadership of the Senate (Speaker and Clerk of the Senate) and that of the Council of Governors (Chairman and Chief Executive Officer) should hold regular consultative meetings to discuss issues of mutual interest to them.

c) **Involvement of the Senate in Reports of Office of the Controller of Budget and Office of the Auditor General**

The oversight role of the Senate flows from Article 96(3) of the Constitution which mandates it to exercise oversight over national revenue allocated to county governments.

It should be noted that County Assemblies also have concurrent oversight mandate under Article 185(3) of the Constitution. The County Assemblies, therefore, have the primary responsibility with the Senate having a secondary or 'backstop' responsibility. This approach is important in that it enables the County Assemblies to perform their oversight roles effectively without being overshadowed by the Senate. Having considering the proposals from the Senate, Council of Governors, Office of the Controller of Budget and the Office of the Auditor General, we advice as follows:

i) Within one month of receipt by the Senate and relevant County Assembly of a report of an oversight body:

   a) The relevant County Assembly shall, through the appropriate Committee and in Plenary, consider the report and make recommendations thereon.

   b) The Senate shall, through the appropriate Committee and in Plenary, consider the report with a view to identifying the emerging issues.

ii) The County Assembly shall, where it adopts the report of the oversight body, submit a copy of the report to the Senate

iii) The Senate shall consider the report of the County Assembly within 60 days of receipt thereof provided that such action shall only be taken after receipt of the monitoring report of the Action Implementation Plan from the oversight bodies.

iv) While identifying the emerging issues in terms of paragraph (1)(b), the Senate shall not commence an inquiry on the issues until the County Assembly has considered the report in terms of paragraph (1)(a) unless:-

   a) the relevant County Assembly has failed to consider the report within the stipulated timeline;

   b) it is evident that the consideration of the report has been marred by complicity or collusion between the County Assembly and the County Executive;

   c) the action taken by the County Assembly is otherwise unsatisfactory;

   d) the emerging issues bring to the fore systemic or wanton levels of maladministration or misappropriation of funds;

   e) the emerging issues are of public or national interest;

f) the Senate resolves to consider the report of the oversight body; or

g) issues referred to the Senate by the oversight bodies in the report of the status of implementation of the reports.

v) After the consideration of the report of an oversight body by the relevant County Assembly, the County Assembly or the oversight body may refer the report or aspects thereof to the Senate for consideration.

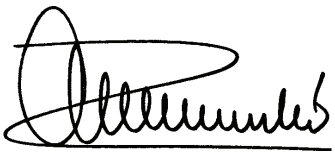
vi) In considering the report of a County Assembly or an oversight body, the Senate shall write to the Governor and invite the Governor to either appear in person or nominate such officer, not being below the level of County Executive Committee Member, to appear before the Senate to respond to the issues raised.

vii) The officer nominated under the foregoing paragraph may be accompanied by any other relevant officers.

viii) The Senate may require the personal attendance of the Governor where it is evident that the matters in question are of such a nature as to require the personal response of the Governor

In conclusion, we wish to reiterate the need for co-operation and consultation between the Senate and the County Governments in the execution of their respective mandates. To this end, we urge both State Organs to work closely with each other and seek to resolve their differences through mediation instead of the formal judicial process which ought to be the ultimate choice. It is our hope that this Advisory will go a long way in guiding the Senate and Council of Governors in taking appropriate action to addressing their differences, and may include effecting appropriate amendments of relevant legislation.

DATED this **22nd** Day of **July 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.9 ADVISORY OPINION TO THE PRESIDENT ON THE BOUNDARY DISPUTES BETWEEN COUNTY GOVERNMENTS

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249) (1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of democratic values and principles. Further, Article 59(2)(h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The Commission's attention has been drawn to the recent boundary controversies pitting different County Governments. The controversies have taken two perspectives: first disputes regarding the actual boundaries of the Counties, and second, disputes on the allegation that the current boundaries are unfair since they are based on historical injustices. The controversies have created tension and taken violent dimensions in some cases leading to loss of lives and property, and displacement of people in the specific areas where they have happened. The controversies have the potential of not only undermining the objects of devolution, but also national security. The foregoing calls for urgent actions by the relevant State Organs to address the issues underlying the controversies and stem the occurrence of such incidences in future between other County Governments. The foregoing state of affairs has prompted us to invoke our Advisory jurisdiction under Article 59(2) (h), (i) & (j) of the Constitution as read with Section 8(h) of the Act as hereunder.

a) Framework for Counties' Boundaries And Need For Delimitation By Affixing Beacons

The framework for County Governments is provided for by the Constitution and a number of laws. The Constitutional framework for Counties is anchored on Article 6(1) which provides that *'the territory of Kenya is divided into Counties specified in the First Schedule*.' The First Schedule outlines the 47 counties which form the present County Governments. The establishment of the 47 counties was guided by the Districts and Provinces Act, 1992, Chapter 105A of the Laws of Kenya, which clearly and comprehensively delineated the boundaries of the then existing 46 Districts and Nairobi City. These eventually became the present counties. On the basis of the above, it is the Commission's considered view that reference to the Act should be the first step towards addressing the current controversies. Thus, the first measure should be determining the actual boundaries of the counties and placing visible beacons. Absence of beacons has been one of the reasons for the disputes since some Counties seem not to know the location of the beacons. Indeed, this exercise should be undertaken for all counties as a matter of priority. We have analysed the Constitution and noted that this function vests in the President of the Republic in the context of safeguarding the sovereignty of the Republic as per Article 131(2) (b) as read with Article 6(1) and the Fourth Schedule of the Constitution. This should be achieved by assigning a Task Team to survey and place the beacons. This, the President may do directly, or through the relevant Cabinet Secretary.

b) The Issue of Unfair Boundaries

We note that another issue that has precipitated the disputes between some Counties is the alleged unfairness of the current boundaries ostensibly due to historical injustices. Whereas the Commission cannot determine the veracity of the allegations, we nonetheless note that the overall import is the proposed alteration of the existing boundaries of Counties. To this end, we note that there is a clear procedure set out under Article 188 of the Constitution for amending the boundaries of Counties which would address the above concerns. This provision provides for the establishment of an Independent Commission by Parliament [Senate and the National Assembly] to consider the question of alternation of boundaries of a County. In the event that the Independent Commission resolves to have the boundaries adjusted or altered, such Resolution must be passed by at least two-thirds of all the members of the National Assembly, and a similar threshold of all the county delegations in the Senate.

According to Article 188(2), the Resolution for alteration should be based the following grounds:

i) population density and demographic trends;
ii) physical and human infrastructure;
iii) historical and cultural ties;
iv) the cost of administration;
v) the views of the communities affected;
vi) the objects of devolution of government; and
vii) geographical features.

The above process is undoubtedly elaborate, inclusive and complex whose aim is to ensure that while the boundaries of Counties may be altered in appropriate cases, the integrity of the boundaries is jealously guarded. In other words, the procedure guards against any mischief that may be used to whimsically alter boundaries of Counties. It also takes cognisance of the fact that unless carefully thought out, changes of boundaries may lead to contestations and tensions between the affected Counties and Communities. In light of the foregoing, we are of the considered view that this option should not be invoked as a first preference; it should be the option of last resort when all else has failed.

c) Resolution of Disputes

Being alive to the possibility of disputes arising between various State Organs, the Constitution provides elaborate mechanisms for resolution of such disputes. One of the mechanisms in this regard is the settlement of disputes by negotiation, mediation and arbitration amongst county governments [A. 189 of the Constitution and the Inter-Governmental Relations Act, 2012]. While appreciating the issues that have been raised relating to the boundaries, we wish to advise that such should be done within the Constitutional confines, taking into account the need for consultation, co-operation and alternative dispute resolution. Further consideration should be had to use of available mediation mechanisms through institutions such as the Commission on Administrative Justice [S.8 (f)]; Constitutional Commissions generally including National Land Commission, [A.252 (1)(b)]; or a mediation panel [A.6(2) & 189(4)]. However, it should be noted that such mediation can only serve to determine the actual boundaries or quell hostilities, but cannot alter the boundaries.

d) Way Forward

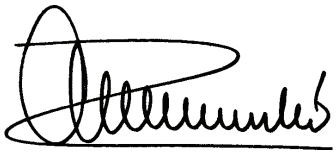
On the basis of the foregoing analysis, we specifically advise as follows:

iv.) His Excellency the President or through the responsible Cabinet Secretary should set up a special Technical Task Force comprising representatives of the Department of Surveys, Department of Lands and other relevant technocrats to affix the beacons as per the Districts and Provinces Act to establish the boundaries of all Counties.

v.) That where there are disputes relating to boundaries, like other cases, County Governments should embrace consultation, co-operation and alternative dispute resolution as redress mechanisms. This could take the form of an independent mediation or arbitration panel contemplated by Section 31 of the Inter-Governmental Relations Act.

vi.) The existing boundaries of Counties should be jealously guarded. However, in extremely special cases, Parliament [Senate and the National Assembly] should invoke the option for altering boundaries under Article 188 of the Constitution.

DATED this **15th** Day of **July 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.10 ADVISORY OPINION ON THE PROPOSED RESTRUCTURING OF THE ETHICS AND ANTI-CORRUPTION COMMISSION

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249) (1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of democratic values and principles. Further, Article 59(2)(h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The attention of the Commission has been drawn to the Ethics and Anti-Corruption Commission (Amendment) Bill, 2015, as contained in the Special Issue of the Kenya Gazette Supplement No. 87 (National Assembly Bills No. 33). The Bill, which has since been passed by the National Assembly, seeks to restructure the Ethics and Anti-Corruption Commission (EACC) by changing the terms of the Commissioner from full-time to part-time and increasing their number from Three to Five. We have considered the proposed amendments and noted that they seek to fundamentally change the structure of EACC. In particular, the amendments are likely to concentrate power in the hands of the Commission Secretary which is a departure from the present situation where it is dispersed for accountability and objectivity. We have also noted that the amendments have been introduced in the National Assembly for debate even before the publication and consideration of the report of the Task Force on Review of the Legal and Regulatory Framework for Fighting Corruption of which the Commission is a member.

While the Commission appreciates the efforts by the Government towards strengthening the fight against corruption and promotion of integrity, we have noted that the proposed amendments raise a number of Constitutional and legal issues that relate to the structure of EACC and good governance in general. The above matters are of utmost importance to the public and should, therefore, be considered before making the amendments to not only strengthen EACC, but also ensure that the actions are in consonance with the Constitution. In accordance with our mandate under Article 59(2) (h), (i) & (j) of the Constitution as read with Section 8(h) of the Act, we hereby render our Advisory Opinion on the matter.

a) Design of the Constitution

The Constitution of Kenya, 2010 was designed to address the over-concentration of state power in the core Executive which had created an imperial presidency in the old constitutional dispensation. The de-congestion of power from the core Executive was done in the following ways:

i) Reduction of presidential powers in absolute terms and distribution to other State Organs and Offices such as Parliament and County Governments and other agencies.

ii) Creation of Constitutional Commissions and Independent Offices under Chapter Fifteen to perform certain tasks and protect the sovereignty of the people.

iii) Adoption of the principle of collective exercise of authority as ultimately demonstrated in a collective Cabinet in Article 131(1)(b); the President exercises executive authority with the assistance of Cabinet, not individually as before. This is what is called a collective Cabinet Constitutionally.

The approach of the Constitution, therefore, is dispersal and decongestion of power in contradistinction with concentration of power.

b) Design and Structure of Constitutional Commissions

The existence of Commissions and Independent Offices in the Constitution was not accidental; it was informed by historical reasons and the need to monitor the core branches of Government in ensuring that they do not act in excess of their jurisdiction. The importance of these institutions is underpinned in Article 249(1)(a-c) of the Constitution that empowers them to protect the sovereignty of the people. It is instructive to note that this power to protect the sovereignty of people has not been granted to other arms of government expressly as it has been granted to Constitutional Commissions and

Independent Offices. A clear reading of the Constitution shows that Judicial, Legislative and Executive authority derives from the people of Kenya and exercised in accordance with the Constitution.

Due to the above, the approach of the Constitution is to insulate the Commissioners and Independent Office Holders from any interference to enable them achieve this objective [A. 249(2)]. It is for this reason that the Constitution provides for the appointment of Commissioners with executive powers and security of tenure to discharge the functions of Commissions. The structure of the Commissions, in particular the Constitutional threshold of Commissioners of between three and nine, was informed by the need for collective exercise of power instead of vesting it in one individual or office. This is one elementary and fundamental tenet of the Constitution. In light of the foregoing, it is important that any design or structure that is adopted for EACC must ensure that it remains an independent State Organ as envisaged under Article 249(2) of the Constitution. Having examined the amendments, it is our position that they depart from this tenet and are, therefore, against the letter and spirit of the Constitution.

c) Commissions vis-à-vis Independent Offices

In the design of the Constitution, there is a distinction between Commissions and Independent Offices. While the design of Commissions is based on a collective exercise of authority, Independence Offices are designed in such a way that the Chief Executive exercises such authority. This is the case with Independent Offices such as the Director of Public Prosecutions, the Controller of Budget and Office of the Auditor General.

In the case of EACC, which is a Constitutional Commission under Article 79 and Chapter Fifteen, we have noted that a proposal has been made to change its structure so that the Secretary/Chief Executive Officer would be referred to as the Director General with part-time Commissioners whose role would be merely advisory. This proposal has a number of Constitutional and legal implications. First, it would change the design of EACC from that of Commission as provided for in the Constitution to that of an Independent Office. Second, the terminology 'Director General' is not known in the language of the Constitution. Instead, the Constitution uses the terms Secretary and Chief Executive Officer. In our view, such a fundamental change to EACC cannot be done by legislative and would require a Constitutional amendment.

d) The Place of Commissioners

It is worth of note that the design of Commissions in the Constitution is different from that of state corporations that have boards that sit after a given period and perform only a policy making and oversight role. They are deliberately designed in such a way that Commissioners exercise executive authority hence the independence to enable them perform their duties.

In the first place, the Commissioners play an important role in Commissions. According to Article 250(1) of the Constitution, Commissions are fully constituted when they have at least three Commissioners. It is, therefore, correct to state that a Commission is constituted by Commissioners. Accordingly, the powers and functions granted to Commissions are to be exercised by Commissioners. It is for this reason that the Constitution expects most Commissions to have full-time Commissioners except in special Commissions whose membership comprise other State Officers. In our view, it would be a negation of the Constitution for legislation to transfer the exercise of executive powers and functions from Commissioners to another person such as the Secretary to the Commission or the Secretariat.

Second, the place of Commissioners is further illustrated by the high qualifications, experience and rigorous appointment process prescribed by Parliament. This was intended to ensure appointment of people with competence and integrity as Commissioners to perform the functions of Commissions. Moreover, the Constitution endows the Commissioners with the security of tenure under Article 250 (7-9) as a way of ensuring their independence. We are of the view that the above would not have been necessary if the Commissioners were not to exercise full authority over the Commissions' mandates. Further, the proposal to make the Commissioners part-time while at the same time increasing their number from three to five is a contradiction. Increasing the number while stating that Commissioners have little work, and that they should address only policy matters reflects a contradiction of principles. If they have little work, why add the numbers and cost to the taxpayer?

Third, one of the arguments advanced for part-time Commissioners is the cost. According to the proponents of this view, part-time Commissioners are cheaper to maintain than full-time Commissioners. The reality for the last three years, however, indicates that the converse is true. Part-time Commissioners have been more expensive than full-time Commissioners since they are paid allowances for every sitting, and these are

quite frequent. An analysis of audits will show that it is ultimately cheaper to engage a Commissioner full-time, bind their time to the task commissioned and hold them accountable to the people through Parliament on their performance.

Fourth, if the Commissioners are part-time, they would be allowed to engage in other gainful employment whether public or private. We are of the considered view that part-time Commissioners may not be appropriate for EACC as it would be detrimental to the performance of their duties. This situation may yield ground to conflict of interest or encourage rent-seeking practices leading to loss of public confidence in the institution. The result, as has been with Parliament and other part-time Commissions, is to end up with actively practicing Advocates taking up cases in defence of persons accused of corruption. The resultant situation will undermine the fight altogether.

e) Public Participation and Appointment of Commissioners

Public participation is at the heart of our Constitutional dispensation. Indeed, it is one of the principles and values of governance under Article 10 of the Constitution. In the context of legislation, Article 118 obligates Parliament to ensure public participation in Parliamentary processes. We have, however, noted that there was little or no public participation in the legislative process leading to the passage of the Bill.

Separately, we have noted that the amendments have removed the requirement of a Multi-Stakeholders Panel to recruit the Chairperson and Members of EACC. The Panel comprises bodies such as the Public Service Commission, Office of the Attorney-General and Department of Justice, Association of Professional Societies in East Africa, the Judicial Service Commission among others. Instead, this role has been granted to the Public Service Commission (PSC). While we appreciate the role of PSC in public service, we are of the view that the proposal would have serious implications on the independence of EACC. The Panel was intended to infuse diversity, objectivity and credibility in the recruitment process. In any event, it is doubtful whether PSC can solely recruit the Chairperson and Members of EACC yet it lacks disciplinary control over them. Moreover, this would create an inconsistency since all other Commissioners are appointed through a similar Multi-Stakeholders Panel.

f) Designation of the Commission Secretary

The position of Commission Secretary is created under Article 250(12) of the Constitution as the Chief Executive Officer. It is worth noting that the Secretary is not part of the membership that constitutes a Commission under Article 250(1) which provides that *'each Commission **shall** consist of at least three but not more than nine members.'* The import of the foregoing is that a Commission is properly constituted by Commissioners.

Further, the Constitution by design does not give any powers or functions to the Secretary save for serving as Secretary and Chief Executive Officer to the Commission (read Commissioners). Being an appointee of the Commissioners, he or she is under the direct supervision and control of the Commissioners. It would, therefore, be an affront to the Constitution to transfer the constitutional powers and functions of the Commissioners to the Secretary. Further, it would result in an unfortunate situation of a Chief Executive Officer vested with full powers and knowledge of the Commissions' activities, but who is not accountable to the people for the exercise of those powers, and who will be answerable in disciplinary terms to part-time Commissioners without knowledge of the goings-on of the Commission.

In the proposed framework, a heavy burden is placed on the Commission Secretary yet his/her benefits, remuneration and tenure are not protected by the Constitution leaving him/her amenable to external interference.

More fundamentally, any legislative protection as may be accorded to the Secretary would be decidedly inferior as compared to Constitutional protection of the Commissioners. History has shown that such legislative protection is only as secure as the dominant opinion in Parliament at any time, and can be lost in one afternoon.

g) Weakening EACC and Constitutional Commissions

Whereas we are aware that the proposed amendments are in good faith so as to strengthen the fight against corruption and promotion of integrity, we are of the considered view that the same will serve to weaken EACC in particular, and Constitutional Commissions in general, due to the following:

i) While it may appear to shift power and functions from the Commissioners to the Commission Secretary, it is in truth a shift of power from the Constitutional Commissions to other arms of government since the Secretary would be amenable to control through administrative edicts, or legislative changes.

ii) The action will shift and redirect accountability from the people to whom Commissions are accountable (A. 1 & 249) to the Executive and Parliament to

whom any appointed Chief Executive Officer would be answerable.

iii) It will undermine the ideals of creating Constitutional Commissions which was to promote national values such as good governance and ensure neutrality and objectivity in the exercise of power hence the Constitutional requirement that the composition of Commissions should reflect the regional and ethnic diversity of the people of Kenya.

iv) It will undermine the fight against corruption so far as the activities of EACC are likely to grind to a halt if the Secretary is removed from office noting the absence of Constitutional security of tenure. It is worth of note that the idea of having Commissioners was to create a collective responsibility and protection in numbers which is critical in the fight against corruption.

v) It will undermine the very reason why Commissioners of diverse backgrounds are appointed to enrich the Commission with their knowledge and experience on a daily basis.

h) Amending Laws on Account of Individuals

It is our opinion that it is not a sound practice to amend the law by restructuring a State Organ simply because the individuals who held office did not perform or that others who can perform have been differently designated. In our view, there is no problem with the structure of EACC. Historical hitches in appointment, incompatibility of individuals or individual questions of integrity are not reasons to restructure. It should be noted that other Commissions similarly structured have not experienced similar issues.

The Ethics and Anti-Corruption Commission has had challenges right from its establishment which was manifested in the appointment of the Commissioners and the challenges in working relationship among the Commissioners *inter-se* and also with the Secretariat. These challenges cannot be attributed to structural framework of the institution.

i) Way Forward

On the basis of the foregoing analysis, we specifically advise as follows:

(i) That while it is important to strengthen the legal framework for the fight against corruption, the process should be done within the Constitution.

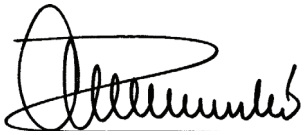
(ii) Any process to bolster the fight against corruption should appreciate the role of the Commissioners, and safeguard the independence and accountability of EACC.

(iii) The Commissioners of the Ethics and Anti-Corruption Commission should serve on full-time basis to enable them fully discharge their duties, insulate them from any incidences of conflict of interest and make them accountable to the public.

(iv) Care should be taken to ensure persons appointed to the Commission are not only qualified, but are objective, courageous, passionate and dedicated to the war on corruption.

(v) To avoid unclarity of roles, the provisions of the Anti-Corruption and Economic Crimes Act, 2003 that appear to confer parallel roles to the Chief Executive Officer should be repealed and it be made clear the full authority vests in the Chairperson. Whoever Parliament deems to be the ideal Kenyan to be crowned the ultimate anti-corruption czar will be so appointed Chairperson of the Commission, and accorded two able deputies.

DATED this **10th** Day of **July 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.11 ADVISORY OPINION TO THE PRESIDENT ON THE DIRECTIVE TO COUNTY COMMISSIONERS REGARDING THE CO-ORDINATION AND DELIVERY OF COMPREHENSIVE HIV/AIDS SERVICES TO COUNTIES

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249)(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of democratic values and principles. Further, Article 59(2)(h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

Your Excellency, our attention has been drawn to your Directive vide a letter of 23rd February 2015 to the County Commissioners to work with County Directors of Education and Medical Services to collect up to date data and prepare a report on all school going children who are HIV positive. The Directive also sought information on the guardians or care givers of the children, expectant mothers as well as breastfeeding mothers who are HIV positive. The information, which was to be collected in a prescribed data matrix that links the names of the groups to their home area, school (in the case of children), was to be submitted to your Office by 15th March 2015.

Your Excellency, the Directive raises legal and ethical issues that relate to the right to privacy and confidentiality for persons living with HIV/AIDS (PLWHA). In accordance with our mandate under Article 59(2) (h), (i) & (j) of the Constitution as read with Section 8(h) of the Act, we hereby render our Advisory Opinion on the matter which we hope will enable you to take appropriate action in the matter.

A. LEGAL FRAMEWORK FOR CONFIDENTIALITY FOR PLWHA

Confidentiality is an integral part of the international human rights legal instruments of which is Kenya is a party. In particular, the Universal Declaration of Human Rights and the International Covenant on Civil and Political Rights provide for the right to privacy. This right protects every individual against arbitrary or unlawful interference with his privacy. In relation to children, the right to privacy and confidentiality has been stated by the Committee on the Rights of the Child to impose an obligation on States Parties to the Convention on the Rights of the Child 'to refrain from imposing mandatory HIV/AIDS testing of children in all circumstances and ensure protection against it.' These international instruments are applicable in Kenya by virtue of the country being a signatory and Article 2(6) of the Constitution of Kenya 2010.

The Constitution of Kenya, 2010 extensively anchors the right to confidentiality in its express provisions on the right to privacy under Article 31. In the context of PLWHA, this provision ensures that information on their HIV status is kept confidential and is not released without their consent. It also ensures that they are not tested without their consent or put in situations where they are required to disclose their HIV status without their free-will. The right is further secured under the HIV and AIDS Prevention and Control Act, 2006 which prohibits compulsory testing. Specifically, section 13 of the Act provides that no person can be forced to undergo mandatory testing. According to section 14 thereof, testing can only be done after informed consent is provided. Confidentiality is further protected by the requirements of non-disclosure of information concerning the result of an HIV test. In relation to children, additional protection is provided for under section 19 of the Children Act, 2001 which provides for their right to privacy. Similar provisions on informed consent testing, confidentiality and non-disclosure are found in the National Guidelines for HIV Testing and Counseling in Kenya of 2010 and the Health Information System Policy (2010 – 2030), both of which are key policy documents guiding the country's response to HIV/AIDS. The legislative and policy frameworks have been reinforced by various decisions of the High Court and the HIV Tribunal that have upheld the right to privacy and confidentiality of PLWHA.

B. IMPORT OF THE DIRECTIVE

Your Excellency, we have noted your noble intention of seeking to overcome the challenges of HIV/AIDS among adolescents in accordance with the Global Initiative Campaign that you launched on 17th February 2015. To this end, we appreciate the efforts of the Government

towards developing appropriate responses and support services to PLWHA, including children. However, we wish to bring your attention to the import of the Directive which, in our humble view, is not in tandem with the law, and will lead to a violation of the right to privacy and confidentiality for the children, their guardians and care givers, and women with HIV as well as violations of other rights secured in international law, the Constitution of Kenya 2010 and other relevant laws. Specifically, the Directive has the potential of the following consequences:

i) It may lead to forced or compulsory testing of every student, guardian, caregiver, and expectant and lactating mothers since the information sought may not be readily available. This trend is already starting to emerge as demonstrated by the recently publicized Policy of the County Government of Nyamira which requires County employees to go for HIV testing. As earlier stated, HIV testing should be voluntary, out of free will, without any duress, undue pressure or influence, fraud or misrepresentation. This would expressly violate the provisions of the Constitution, the HIV and AIDS Prevention and Control Act, the Children Act and various policy documents relating to HIV/AIDS.

ii) It is likely to lead to disclosure of information regarding the status of the children, their guardians and care givers, and women with HIV thereby negating the right to privacy and confidentiality in violation of Article 31 of the Constitution, Sections 20, 21, 22 and 23 of the Act, and the above cited policy documents.

iii) May lead to breaches of other rights such as the right to equality and freedom from discrimination (Art. 27), right to dignity (Art. 28), and right to freedom and security of the person (Art. 29).

iv) May enhance the discrimination, stigmatization, sexual and physical abuse of the children, their guardians and care givers, and women with HIV which may negate the noble intention of the Government since they may fear seeking testing or appropriate treatment due to fear of disclosure of information.

v) May lead to withholding of important information by infected or affected persons out of concern that their privacy and confidentiality of information would be breached.

vi) It amounts to a limitation of a right secured under the Constitution, but does not satisfy the grounds under Article 24 and would, therefore, amount to a breach of the Constitution. While noting that the right to privacy is not absolute, a limitation thereof must be sanctioned by the law and be reasonable and justifiable. None of these exists in the Directive.

vii) May lead to a breach of the country's obligations under the aforementioned International Human Rights instruments.

viii) May give rise to a number of legal claims against the Government for violation of the rights of the children, their guardians and care givers, and women with HIV under the Constitution, various Acts and international law.

ix) Overall, it may end up affecting the well-being of the children, their guardians and care givers, and women with HIV thereby negating the very purpose of the Government's efforts and responses to address HIV/AIDS.

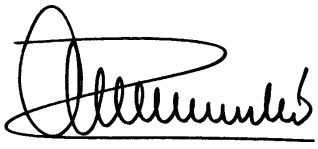
C. WAY FORWARD

Your Excellency, given the above, and the sensitivities and complexities of the matter, we are of the considered view that the Directive may be counter-productive in the national HIV response. It may undermine the efforts by the Government to address the scourge and erode the gains addressing HIV. To this end, we wish to emphasize the centrality of protection of human rights in the context of national responses and strategies to HIV. This requires responses or strategies that conform to the Constitutional values and principles as well as Kenya's obligations under the relevant international laws. In this regard, we advise as follows:

- That His Excellency issues another Directive recalling the earlier one of 23rd February 2015 due to the above mentioned grounds; and
- That there should be more consultations among the relevant stakeholders on the matter, including ways of getting the required information without infringing on the rights of persons living with HIV.

Your Excellency, we assure you of our highest regards and commit to every effort to support the Government in its commitment in addressing HIV/AIDS.

DATED this **24th** Day of **March 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.12 SECOND ADVISORY OPINION TO THE PRESIDENT ON THE DIRECTIVE TO COUNTY COMMISSIONERS REGARDING THE CO-ORDINATION AND DELIVERY OF COMPREHENSIVE HIV/AIDS SERVICES TO COUNTIES

Further to our advisory opinion, of 24th March 2015, we suggest that the underlying intent of the directive can be achieved without violation of the Constitution and the law in the following manner:

i. There is need for the Cabinet Secretary of Health to urgently commence the process of formulating the long overdue privacy guidelines that are envisioned within the provisions of Section 20 of the HIV & AIDS Prevention and Control Act 2006.We note that the Act was passed in 2006 and a period of nine (9) years has since passed without the regulations being developed. These guidelines should be developed in a consultative manner with the relevant stakeholders and within a specified period of time.

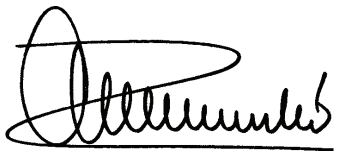
ii. In addition to that, what should be done is a conscious policy of encouraging voluntary testing and counseling of the adolescent youths and pregnant mothers. This will be of great benefit and will assist in the collection of data without violating the Constitution and the law. Further, through consultation between the National and County governments, there is need to ensure access to testing and counseling services to all HIV exposed infants and adolescents so that those who are not under any form of care are identified and provided with appropriate services within the confines of the Constitution and the relevant laws. In this regard, a family centered approach is one way to ensure this.

iii. There is need for the Cabinet Secretary of Health and other relevant agencies to share the existing and available data on the information requested as the same is readily available. For example, data on HIV infection has always been available with the National Aids Control Council (NACC) which conduct annual survey on HIV trends including new infections, infections within age brackets and other parameters. We note that the Act does not outlaw *per se* the disclosure of test results for the purpose of an epidemiological study or research that is authorized by the Cabinet Secretary as provided for in **Section 22 (1)g**. In such instances, no names are given and such information can be availed through a conscious policy whereby the data collected can be transmitted from the doctors and health facilities frequently for example on a weekly basis. Once the data is shared, the same can be analyzed as against your directive to determine the gap or supplementary data that is needed. However, if any supplementary data is to be collected, then it must be done in line with the guidelines that will have been developed in accordance with Section 20 of the Act.

iv. With regard to psycho-social support to children and adolescents living with HIV, we propose that HIV status should be considered as part of a larger vulnerability index which includes poverty of household, orphan-hood and other indicators rather than providing social support to children solely on the account of their HIV status. This will ensure that children and adolescents under social support do not face ridicule, isolation and stigma from their HIV negative peers.

We remain willing to support your Excellency in this cause and trust that the above measures will go a long way towards eradicating the stigma and discrimination related to HIV and AIDs.

DATED this **7th** Day of **May 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.13 ADVISORY OPINION TO THE PRINCIPAL SECRETARY FOR TRANSPORT ON RECRUITMENT PROCESS OF THE MANAGING DIRECTOR OF THE KENYA AIRPORTS AUTHORITY

The Commission on Administrative Justice (Office of the Ombudsman) is a Constitutional Commission established under Article 59(4) of the Constitution, and the Commission on Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, and manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Additionally, the Commission has a quasi-judicial mandate to deal with maladministration, and to adjudicate on matters relating to administrative justice. Further, and through Advisory Opinions, the Commission is expected to render proposals on improvement of public administration, including review of processes and procedures where appropriate.

The Commission makes reference to the above captioned matter and wish to advise as follows:

i) The responsibility to communicate the Determination of the Commission to all agencies represented on the Kenya Airports Authority Board rests on the Ministry of Transport and Infrastructure. In this regard, the Ministry, through the Principal Secretary, is not absolved of the responsibility to communicate the Determination of the Commission of 25th June 2014 to the relevant agencies for implementation.

ii) The Commission is an independent body established by the Constitution to perform specific functions. We are not under the direction or control of the office of the Attorney General in the performance of our functions. According to the Constitution, the advise of the Attorney General primarily targets the Executive, and does not encapsulate the functions or operations of Independent Constitutional Commissions, as in the present matter.

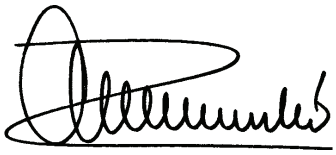
iii) The Commission and the Office of the Attorney General are two distinct offices created by the Constitution to perform their respective functions, and the opinion of the Attorney General should not be sought after a matter has been dealt with by the Commission on its merits. In other words, public bodies are not at liberty to seek and invite the contrary opinion of the Attorney General where the Commission has considered an issue in exercise of its constitutional mandate. In our considered view, doing so would undermine the independence and existence of the Commission. In this regard, once the Commission has made a Determination, it is not open to public offices to determine whether to comply or not, and seek a different opinion to avoid implementation. If dissatisfied, the legitimate avenue is to seek judicial review in Court, a fact which is acknowledged by the opinion of the Attorney General. It is, in our respectful view, unfortunate that the office of the Attorney General acknowledges this fact, but goes ahead to give a different opinion to the Ministry as if it is were a Court of judicial review.

iv) The analysis by the office of the Attorney General is erroneous, and at variance with ombudsmanship in contemporary times, and as reflected in the constitutive instruments. Specifically, the opinion also fails to consider the Constitution and the Commission on Administrative Justice Act, Chapter 102A of the Laws of Kenya. In particular, the opinion is based on the traditional model of the Ombudsman in the context of common law which does not necessary apply in Kenya given Article 59(2)(j) and Chapter Fifteen of the Constitution, and Sections 8(d) and 26(c) of the Act.

v) That the action by the Ministry and the office of the Attorney General is a veiled attempt to exculpate Mr. Joseph Irungu by using circumlocutous arguments to avoid responsibility.

Based on the foregoing, we advise that the Ministry should implement the Determination of the Commission dated 25th June 2014 as a matter of good administration in line with the Constitution and the Commission on Administrative Justice Act.

DATED this **7th** Day of **April 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.14 ADVISORY OPINION TO THE ASSOCIATION OF KENYA CREDIT PROVIDERS ON ALTERNATIVE DISPUTE RESOLUTION FOR CREDIT INFORMATION SHARING IN KENYA

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249 of the Constitution, the Commission alongside others has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of democratic values and principles. Further, Article 59 (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty. Section 8 (f) of the same Act empowers the Commission to work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration.

The Commission makes reference to the joint consultative meeting held in our offices on the 17th February, 2014 and your follow up letter of 24th February 2014 with regard to the above captioned in which you seek our advice on the following:

1) The structure of the proposed Alternative Dispute Resolution (ADR) mechanism as documented in Chapter 3 of the CIS ADR Handbook.
2) The possibility of a representative of the CAJ sitting in the proposed steering committee of the CIS ADR office.
3) The inadequacy of the Draft CIS Bill and Regulations.
4) Any other aspects of our proposals

a) The Structure of the proposed ADR mechanism

The Commission welcomes the idea of an Ombudsman but wishes to clarify that it only deals with public officers and public entities as opposed to private persons and private entities. We also note that there is an emerging concept of the private ombudsman in the various sectors in various jurisdictions which cannot be conclusively dealt with in this advisory. Nonetheless, it ought to be emphasized that the private ombudsman scheme is contractual and this means it can only founded on the consent of the parties. Be that as it may, we note the usage of the word 'ombud's office'. Our understanding is that the choice of word is intended to avoid the ongoing gendered debate on the ombudsman office. We propose that you adopt the phraseology ombudsman as traditionally used which in itself does not denote gender. It should be noted that the word in itself is not an English word but Swedish and does not in way depicts gender.

On the ADR mechanism proposed, we make the following recommendations:

1) That you consider replacing the name ombuds office with the name ombudsman office as discussed above.
2) That there be a level of independence in the office of the ombudsman. The jurisdiction of the ombuds office cannot be directed by the Steering Committee.
3) That the ombuds office should meet the international principles of an ombudsman i.e. impartiality and neutrality, independence, confidentiality and informality.
4) That the composition of the steering Committee be lean so as to increase its effectiveness. The current composition as designed is bloated and might not work effectively. Further, the Judiciary cannot have a representative in the Steering Committee by virtue of its adjudicative role. We propose between five (5)to seven (7) members in the Steering Committee.
5) That in the same way the CAJ sends report to the Legislature including complaints, the same should apply to the omduds office contemplated by AKCP. The ombuds person should not be vilified in the work that he does.
6) The structure will be determined by the preliminary issue on whether the scheme is one of a private ombudsman or not. If the same is anchored in legislation, then the Commission on Administrative Justice will have jurisdiction and exercise oversight over it and the officers therein.

b) Involvement of the Commission on Administrative Justice in the Steering Committee

The involvement of the Commission as a member of the Steering Committee invites a comment. First, if the whole framework is anchored in legislation, the entity becomes

a public one. This means that it will fall squarely under the jurisdiction of the Commission including the overall performance contracting regime of the Commission. In the event that this is adopted, it would not therefore be proper that CAJ sends a representative in an entity it exercises oversight over, including the officers therein. This will definitely amount to conflict of interest as CAJ cannot be a judge in its own cause.

Suppose the entity was private in nature, can the CAJ send a representative to the steering Committee? The answer would still be in the negative. The Commission receives complaints against public officers and public entities as per the constitutive Act. By the very fact that the entity is private in nature, the CAJ cannot be involved.

How then can the Commission on Administrative Justice be involved? If the lender is a public institution, then the Commission will have jurisdiction by dint of the constitutive Act. In the event that the Credit Information Sharing Bill, 2013 is enacted into law, then the entity ceases from being a private entity and therefore falls under the overall jurisdiction of the Commission on Administrative Justice. Institutions like the Higher Education Loans Board (HELB) falls within the jurisdiction of the Commission and the Commission continues to exercise oversight in line with the Commissions mandate. For private entities the Commission can enter into a partnership for information sharing, complaint referral mechanism and offer of advisory opinions.

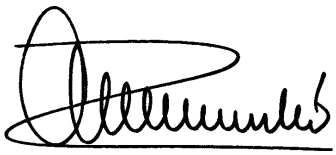
c) Adequacy of the Draft CIS Bill and the Regulations

As discussed earlier, the most important question is how the Credit Reference Bureaus if the Bill is enacted into law will relate with the Commission on Administrative Justice. The Commission on Administrative Justice has a mandate to receive complaints against public officers and public entities in both spheres of government. The Credit Reference Bureaus contemplated by the Bill will be creatures of parliament, therefore public entities which are amenable to the jurisdiction of CAJ. It is important that this is addressed. On the content of the Bill we note the following;-

i) Section 11 (1) of the Bill empowers the cabinet secretary to make regulations providing for the use of ADR mechanisms in dealing with any disputes that may arise in the collection, processing, storage and sharing of information under the proposed Act. We note that the proposed ADR mechanism proposed in Chapter 3 of the CIS ADR Handbook will be rendered nugatory if the Bill was to sail through in its current form as the same will vest exclusively in the Cabinet Secretary

ii) Further, the cabinet secretary is empowered through regulations to provide for penalties for non-compliance with the provisions of the Act, regulations or any directive. We wish to advise that offences and penalties are a preserve of Parliament and should appear on the face of an Act of parliament and cannot be delegated to a cabinet Secretary. Section 11 (1)e in its current form cannot pass the constitutionality test as stipulated in A. 2 (4) of the Constitution.

DATED this **4th** Day of **April 2014**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.15 ADVISORY OPINION TO KENYANS FOR JUSTICE AND DEVELOPMENT ON THE DEVOLUTION OF FUNCTIONS IN PUBLIC HEALTH

We acknowledge with thanks receipt of your letter of 19th March 2014 in which you have requested a copy on any Advisory Opinion we may have rendered on the devolution of functions in public health. We wish to clarify that we have not rendered a Formal Advisory Opinion on the issue previously, but the undersigned, as chairperson of the Commission and in his capacity as a former Member of the Committee of Experts, has previously engaged with the Transition Authority (TA) Chairperson on the issue. The view previously consistently expressed is as follows;

(1) The Constitutional Interpretation (Schedule IV)

The Constitution, in the 4th Schedule, provides for the distribution of functions between the National government and the County governments. Part 1 of the Schedule lists **Health Policy** and **National referral hospitals** as a preserve of the National government. Part 2 on the other hand lists County health services, including, **in particular**, **county health facilities**, pharmacies, ambulance services and **promotion of primary health care**, ***inter alia,*** as the functions of the County governments. The Constitution, purposely, does not mention the erstwhile Local Government run hospitals, Provincial and District hospitals. Nevertheless, it specifically gives the promotion of primary health care to the County governments. 'Promotion of primary health care' on the other hand has not been defined. Similarly, what the Constitution refers to as 'County Health Facility' for County governments and the 'National referral health facilities' for the National government are not defined. These were intentionally left for the Health Policy to determine, based on need, ability and resources.

In construing the Constitution, it is important to read the provisions together with the preparatory work of the Committee of Experts. If this is done, it will be clear there is no blanket requirement to devolve public health services ***en masse*****,** and especially in a "big bang" mode. The actual intention of devolving health services was to safeguard and give continuity to the hospitals that were previously being run by the defunct Local Authorities under the Local Government Act. Secondly, it was to promote both accessibility and efficiency in the health sector, especially primary health care given its necessity in a developing country. It is on this basis that we have consistently supported a cautious devolution of the health service, focusing on primary health services and previous Local Government run facilities at this inchoate phase of devolution.

Under **A.187 (3)** of the Constitution, a function or power not assigned by the Constitution or National legislation to a County is a function or power of the National government. It would therefore have been proper if all former District, Provincial and National hospitals were been defined in the Health Policy and gazetted as falling within the ambit of the National government as National Referral Health Facilities. Given the centrality of an efficient Health System, the constrained resources so far accorded the Counties, and the fact that the Right to Health is enshrined in Article 43 of the Constitution with an obligation on the state (read National Government) to ensure compliance [A.20 (51)], it was our view that the bulk and weight of the Public health burden would remain with National Government. On the other hand, dispensaries and health facilities falling below the District hospital would be devolved to the County governments. Similarly, promotion of primary Health care, being so important especially in Rural Kenya, would be appropriately funded for County government to implement.

Primary Health Care, as defined by the World Health Organization, is essential health care; based on practical, scientifically sound, and socially acceptable method and technology; universally accessible to all in the community through their full participation; at an affordable cost; and geared toward self-reliance and self-determination (WHO & UNICEF, 1978).

(2) Transfer of functions under A. 187 of the Constitution

Under **A.187**, a function or power of government at one level may be transferred to a government at the other level by agreement between the governments if, the function or power would be more effectively performed or exercised by the receiving government; and the transfer of the function or power is not prohibited by the legislation under which it is to be performed or exercised. It was advised to us by the Transition Authority that a decision was reached at the Summit to transfer most non-policy functions in health to the County governments. In the event, it therefore appears that there was mutual agreement between the two levels of government to transfer health services to County governments, apart from the National referral hospitals. Is such agreement precluded by the Constitution? The answer is in the negative. As long as there is mutual agreement, any function, including health, can be lawfully transferred if all necessary tenets are adhered to.

In the circumstances, only two issues arise

(a) *Were all necessary prerequisites and tenets observed before the transfer?*

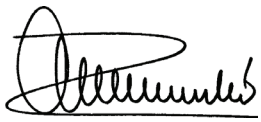
(b) *Was the wholesale transfer necessary?*

On the first issue, I offer no opinion, as that would fall for the Transition Authority to verify.

On the second issue, and based on the foregoing, it is my view that the wholesale transfer, done without a phased scheme of almost all Health Services, was not required by the Constitution, not necessary, and portends great risk to provision of quality and accessible Health care services to the citizens of Kenya.

As earlier indicated, the foregoing reflects views the undersigned had given to the Transition Authority on various occasions previously, and should not be construed to support or oppose any position as may seek to be advanced by any party, unless, the issues were clearly presented and the context clarified.

DATED this **24th** Day of **March 2014**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.16 ADVISORY OPINION TO THE PRESIDENT ON THE IMPLEMENTATION OF THE REPORT OF THE COMMISSION ON INQUIRY INTO THE HELICOPTER PLANE CRASH ON 10TH JUNE 2012

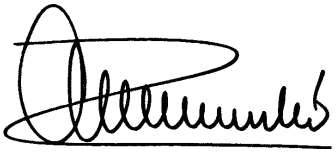
The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

We make reference to the above captioned matter of great public concern which directly touches on our mandate, and which has generated considerable media attention. As you are aware, His Excellency the President Mwai Kibaki, as he then was, appointed a Commission of Inquiry headed by Justice Kalpana Rawal to investigate the circumstances surrounding the Helicopter Accident that occurred in Kibiku Area of Ngong on 10th June 2012. The Commission undertook the task and presented the Report to the President on 28th February 2013. According to Section 7(1) of the Commissions of Inquiry Act (Chapter 102 of the Laws of Kenya), the Report ought to also be submitted to the National Assembly for consideration.

In spite of the above, we have noted that the Report has never been published or forwarded to relevant institutions for implementation. We have taken cognizance of the justification for the amendment to the Commissions of Inquiry Act in 2010 that made it mandatory for such Reports to be submitted to the National Assembly for consideration. It is our considered opinion that the implementation of the Report would be critical to improving public administration in Kenya. In this regard, the delay in publishing and implementing the Report would negate the aspirations of Kenyans of ensuring that reports of Commissions of inquiry or Task Forces are fully implemented to improve governance and prevent similar occurrences in future.

As the institution tasked by the Report to oversee its recommendations, the Commission believes that the National Assembly should consider the Report and transmit it to us for implementation. In this regard, we humbly request you to formally transmit the Report to us for necessary action. We believe that this would not only be in line with the Constitutional role of the National Assembly, but would also assure the public of the Government's commitment to improving public administration in Kenya.

DATED this **17th** Day of **June 2014**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.17 ADVISORY OPINION ON THE DELAY IN APPOINTMENT OF JUDGES BY THE PRESIDENT

Your Excellency, this Commission is a Constitutional Commission established under Article 59(4) of the Constitution, and the Commission on Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Additionally, the Commission has a quasi-judicial mandate to deal with maladministration, and to adjudicate on matters relating to administrative justice. Further, and through Advisory Opinions, the Commission is expected to render proposals on improvement of public administration, including review of processes and procedures where appropriate.

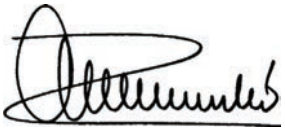
Your Excellency, we wish to express concern regarding delay in appointing the nominees of the Judicial Service Commission for the position of Judges of the High Court. The Commission is particularly concerned by the unjustified delay in making the said appointments even after the names were forwarded to your Office upon the conclusion of the process by the Judicial Service Commission in January 2014.

Your Excellency, we wish to restate the requirement of Article 166(1)(b) of the Constitution which provides that the President SHALL appoint all other Judges in accordance with the recommendation of the Judicial Service Commission (JSC). This provision makes it obligatory for the President to appoint the nominees for the position of Judges once the names have been forwarded by the JSC. This requirement is further buttressed by Article 132 on the functions of the President, which includes making appointments to offices such as those of Judges, as in the present instance.

Your Excellency, the Constitution envisages a seamless and expeditious appointment process of Judges, which invariably requires the relevant Offices to undertake their respective roles in line with the Constitution. We have, however, noted the delay of Five Months in making the appointment and no reason has been offered at all. It is our considered view that such delay is inordinate and may be contrary to Article and 129 of the Constitution which requires Executive Authority to be exercised in accordance with the Constitution, and in a manner compatible with the principle of service to the people of Kenya, and for their well-being and benefit. In addition, it may negate the requirements under Article 3 of the Constitution of respect, upholding and defence of the Constitution by every person.

Your Excellency, we take note of the role of the Judiciary in our new dispensation. In particular, the Judiciary is required to administer justice without undue delay and in accordance with the Constitution. Accordingly, failure or delay in making the appointments once the names have been recorded may be deemed to be against this principle and the Constitution in general. In this regard, we wish to humbly request you to formally appoint the Judges in line with Article 166(1)(b) of the Constitution at the very earliest convenience, to avoid further legal challenges.

DATED this **16th** Day of **June 2014**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.18 ADVISORY OPINION ON THE DRAFT TEACHERS SERVICE COMMISSION CODE OF REGULATIONS AND CODE OF CONDUCT AND ETHICS

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The Commission makes reference to the draft Teachers Service Commission on Code of Regulations and Code of Conduct and Ethics for teachers and wishes to advise as hereinbelow:

1. Jurisdiction of the Commission on Administrative Justice

The Commission on Administrative Justice is a Constitutional Commission established under Article **59(4)** and Chapter fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011. The Commission is empowered among others to investigate any conduct in state affair or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice (**A.59 (2) h**). Further, the commission is required to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. The commission is empowered to report on the above and to take remedial action (Article **59 (2) (i) & (j)**).

Although Article**. 249** vests on all constitutional commission the duty to promote constitutionalism, protect the sovereignty of the people among others, each individual commission has its own specific mandate. For example, while the TSC has the mandate to recruit and employ teachers, the National Gender and Equality Commission has a mandate to question the composition of such appointments as to gender equality and other parameters. Similarly, while the TSC is mandated under **A. 237 (2) e** of the constitution to exercise disciplinary control over teachers, the CAJ has overarching and residual administrative jurisdiction. Therefore **A. 59 (h) (i) & (j)** empowers the CAJ to deal with matters of administrative injustice and thus should be read together with **A. 237 (2) e.**

In terms of legislation, section 31 of CAJ Act, the Commission may investigate an administrative action despite a provision in any written law to the effect that the action is final or cannot be appealed, challenged, reviewed, questioned or called in question. One issue that is clear from the foregoing is that nothing precludes a teacher who has exercised all internal avenues, including review from lodging a complaint with the Commission on a question of due process or administrative injustice.

That further, under section 2 of CAJ Act, “administrative action” has been defined as any action relating to matters of administration and includes a decision made or an act carried out in the public service. The Commission thereof is both constitutionally and statutorily mandated to deal with matters already finalised by way of review by a constitutional commission, person or state organ where the complaint relates to procedural fairness or matters within its mandate.

It is also important to note the provision of section 26 of CAJ Act which gives the Commission powers to ‘adjudicate’ on matters relating to administrative justice meaning that it can deal with substantive matters. Nevertheless, for purposes of the teachers’ disciplinary matters, we purpose to restrict the Commission to issues of process and will entertain complaints within those parameters. The Commission exercises powers akin to judicial review as it is known today.

2. The Proposed Approach

The Commission on Administrative Justice proposes to engage with the TSC in a cooperative and consultative manner as opposed to confrontation. The Commission receives complaints from teachers on

matters relating to discrimination in employment, unfair dismissal, abuse of power by the school heads, delayed promotions and arbitrary transfers. Though, the bulk of the complaints relates to the fairness of the disciplinary process. In the interest of a harmonious working relationship, we propose a framework of an inbuilt mechanism where teachers can have recourse to the Commission on matters of due process. We propose a mechanism modelled in a manner that does not look like supervision but working together to minimize legal costs. The Commission's intervention is intended to be limited to matters of due process as opposed to the substantive allegations raised by the complainants. The Commission, therefore, intends to restrict itself to procedural fairness and allegations falling within the Commission's mandate under section 8 of CAJ Act.

This approach in our opinion will serve among others to reduce legal costs incurred by the TSC in prosecuting and defending matters in Court. Further, the award of costs by CAJ is discretionary and at the same time the commission does not charge for its services. We wish to note that there is evolving jurisprudence that the Courts are very reluctant to interfere with the ombudsman decisions. In this regard, this approach would be beneficial to both the Commission on Administrative Justice and the Teachers Service Commission. We propose a team of two representatives from the two commissions, CAJ and TSC to work on the specifics on how the above can work.

3. General Comments on the Code of Regulations

Having looked at the Code of Regulations, the Commission proposes to restrict itself to **Chapter XI** in so far as the same relates to disciplinary process and would like to submit as follows:

a) The Commission notes that the design of the previous Act (now repealed) had provided for an Appeals Tribunal which has since been abolished by the new Act. It is not clear why such a decision was arrived at. In our opinion, we believe the removal was premised by the creation of new Constitutional offices such as the office of the ombudsman and the introduction of additional administrative requirement of Article 47 of the Constitution.

b) Under regulation **133 (4)**, we concur in principle that the TSC when arriving at its decision shall not bound by the findings of any Court in criminal proceedings relating to a teacher's disciplinary case. While we note that the standard of proof in criminal cases is beyond reasonable doubt, we suggest that the provision be rephrased to provide that TSC may take into consideration the observations made by the Court.

c) When the TSC has made a decision, it is proper that an external body should review its final decisions. The Teachers Service Review Committee established under regulation **151** of the Regulations cannot be said to be independent of the Commission. Its composition has 8 members with 5 from TSC, the other three members have no voting rights. We propose that The Commission on administrative Justice should be the final arbiter after review by dint of section **31** of its Act.

d) We also note that the timelines are missing for concluding certain crucial processes. For example it would be proper to put a time limit on the review process to avoid delay. The previous regulations had timelines guiding the appeal process.

e) Under regulation**151 (2),** on the composition of the Teachers Service Review Committee, the Committee has 8 members, an even number and its notable that five (5) out of the Eight (8) of its members are members of the commission. Further, a clear reading of Sections **46, 13 (2)** and **13 (4)** of the Teachers Service Commission Act, 2012, it is clear that the three members have no voting rights when it comes to making decisions. This composition as it is now does not meet the Constitutional threshold of fair administrative action.

f) We note that under the regulations, the disciplinary panel shall be chaired by a commissioner of TSC. Since the Teachers Service Review Committee comprises the Chairperson and two other commissioners, it is only fair that a member who sits in the disciplinary panel should not be part of the Teachers Service Review Committee.

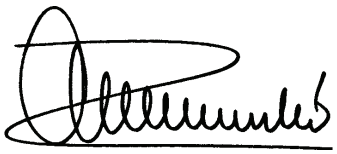
Having noted the above, and without prejudice, we propose that:

i.) The Commission be specifically mentioned in **Part XI** of the Code of Regulations as an entity where teachers can seek recourse on matters of due process.

ii.) It be recognized that the commission on Administrative justice can receive a complaint at any stage of the disciplinary process on issues of due process, notwithstanding that there exists other internal review mechanism or that all the internal mechanism have been exhausted.

We are proposing the above in the interest of ensuring a harmonious working relationship between the Commission on Administrative Justice and the Teachers Service Commission.

DATED this **2nd** Day of **April 2014**



CMMR. OTIENDE AMOLLO, EBS

CHAIR OF THE COMMISSION

1.1.19 ADVISORY OPINION TO THE NATIONAL POLICE SERVICE ON THE DRAFT SERVICE STANDING ORDERS

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

We make reference to the above captioned matter and wish to advise as follows regarding the draft National Police Standing Orders. The Commission on Administrative Justice receives complaints from police officers on matters of delay in dealing with appeals, unresponsive conduct generally, abuse of power by superiors and unfair treatment in promotions, transfers and deployment. However, the majority of the complaints by police officers are on unfair dismissal, more specifically touching on the fairness of the disciplinary process. The submissions therefore have been restricted to **Chapter 29** of the Standing Orders in so far as the Chapter deals with the disciplinary process. We wish to note the following:-

a) **A. 246 (3)b** of the Constitution states that the National Police Service Commission shall, while observing **due process**, exercise disciplinary control over and remove persons holding or acting in offices within the Service. Whereas the issue of **'due process'** is not specifically mentioned in **A. 245 (4)c** in the case of the Inspector General exercising disciplinary control, the same must be read into it. Similarly, any dismissal of a police officer by the Inspector-General must involve due process. This is clear when read together with Article 47 which guarantees the right to fair administrative action to all citizens. Therefore, there should be no discrimination in the disciplinary process based on rank in so far as due process is concerned.

b) That by virtue of **A. 59 (b)** and **(i)** of the Constitution and **S. 31** of the CAJ Act, the Commission on Administrative Justice may investigate an administrative action despite a provision in any written law to the effect that the action is final or cannot be appealed, challenged, reviewed, questioned or called in question. One issue that is clear from the foregoing is that nothing precludes a Police officer who has exercised all internal avenues of appeal from lodging a complaint with the Commission on Administrative Justice on a question of due process or administrative injustice. However, the Commission's intervention will be restricted to matters of due process as opposed to the substantive allegations raised by the complainants. The Commission, therefore, will restrict itself to procedural fairness and allegations failing within the Commission's mandate under **S. 8** of its constitutive Act.

c) That further, under **S. 2** of the CAJ Act, "administrative action" has been defined as any action relating to matters of administration and includes a decision made or an act carried out in the public service. The Commission thereof is both constitutionally and statutorily mandated to deal with matters already finalized either by way of appeal or review by a constitutional commission, person or state organ where the complaint relates to procedural fairness or matters within its mandate.

d) That **S. 26** of the CAJ Act gives the Commission powers to adjudicate on matters relating to administrative justice meaning that it can deal with substantive matters. Nevertheless, for purposes of Police Disciplinary matters, we purpose to restrict the Commission to issues of process and will entertain complaints within those parameters. The CAJ exercises powers akin to judicial review as it is known today.

Having noted the above, and without prejudice, we submit the following:

(i) A specific mention of the Commission on Administrative Justice in Chapter 29 of the Draft

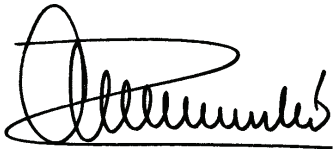
Standing Orders as one of the offices that members of the police service can complain to on issues of due process.

(ii) A recognition that the Commission can receive complaints at any stage of the disciplinary procedure on issues of due process, notwithstanding that there exist other internal review or appellate mechanisms or that all the internal mechanisms have been exhausted.

We are proposing the above in the interest on ensuring a harmonious working relationship between the Commission on Administrative Justice and the National Police Service.

We also note with appreciation that the Standing Orders are being reviewed to take into consideration the changes brought by the new constitution and the enactment of the National Police Service Act. In particular, the draft Standing Orders requires that all enquiries against discipline should be conducted expeditiously and in conformity with **A. 47** of the Constitution and the National Police Service Commission regulations. There is also an introduction of time frames including that a case should be concluded within three months. We applaud all this new developments and hope for a better, efficient and disciplined police service.

DATED this **18th** Day of **March 2014**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.20 ADVISORY OPINION ON THE EXPENDITURE BY COUNTY GOVERNMENTS ON FOREIGN TRIPS

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249 of the Constitution, the Commission alongside others has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of democratic values and principles. Further, Article 59 (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The Commission's attention has been drawn to the reports in the media on the expenditure by county governments across the country on foreign trips. In particular, it has been reported that county governments have spent millions of shillings to finance non-essential trips by their members. The reports further indicate that the trips have focused on a number of popular destinations, some of which may not add any value to the purposes of county government. The county governments, on the other hand, have stated that the trips are essential for their learning and development and that the money for such trips was approved in their budgets.

The foregoing raises a number of important issues on the management of counties, which are likely to undermine devolution in relation to the operations and development of the counties. How relevant are the foreign trips especially in relation to the destinations visited by the counties? To what extent should counties spend on foreign trips? Have the trips been conducted within the approved budgetary allocations? Are there cheap alternative ways of learning about the best practices in other countries without having to travel abroad? The foregoing state of affairs has occasioned us to invoke our advisory jurisdiction as hereunder.

A. PURPOSE OF DEVOLUTION

The primary purpose of devolution in the Constitution of Kenya is the promotion of good governance through decentralization of power, resources and representation. This is specifically provided for under Article 174 of the Constitution which variously outlines the objects of devolution as, inter alia:

i.) To promote democratic and accountable exercise of power;

ii.) To give powers of self-governance to the people and enhance the participation of the people in the exercise of the powers of the State and in making decisions affecting them;

iii.) To recognize the right of communities to manage their own affairs and to further their development;

iv.) To promote social and economic development and the provision of proximate, easily accessible services throughout Kenya;

v.) To facilitate the decentralization of State Organs, their functions and services, from the capital of Kenya; and

vi.) To enhance checks and balances and the separation of powers.

The aforementioned objects are critical in ensuring the success of devolution in Kenya. To this end, county governments should conduct their affairs in a manner that accords to the objects and principles of devolution.

B. FISCAL PRUDENCE AND RESPONSIBILITY

Fiscal prudence and responsibility is one of the main tenets of our new constitutional dispensation. Indeed, it is one of the key pillars of the Constitution, and whose observance can, by and large, determine the successful realisation of the objects and principles of the Constitution. It is worth of note that fiscal prudence and responsibility is important for both the national government and county governments. In this regard, the Constitution in Chapter Twelve has extensively provided the principles and framework for public finance for the national government and county governments. In particular, Article 201(d) and (e) requires national government and county governments to maintain fiscal discipline by **'ensuring that public money is used in a prudent and responsible manner,' and exercising responsible financial management.'**

The need for financial discipline is further provided for under the Public Finance Management Act which requires the national government and county governments to ensure that public finances are managed in accordance

with the principles set out in the Constitution [Section 102(1)(a) & (b) of the Public Finance Management Act]. On the basis of the foregoing, county governments, like the national government, must exercise fiscal prudence and responsibility in accordance with the Constitution, the Public Finance Management Act, and any other relevant law or regulation. They must, for instance, avoid wasteful expenditure on any activity whose objectives can be otherwise achieved with minimal or no expenditure.

C. FOREIGN TRIPS BY COUNTY GOVERNMENTS

As has been mentioned above, the need for a devolved system of government was driven by the need for good governance, public participation and efficiency in service delivery. It is important to note that devolution, as provided under the Constitution, is unique and has different facets, whose implementation may present a number of challenges. This is especially so given the fact that Kenya has been under a different system of governance for over four decades, and further, from the fact that implementation of the devolved system has just commenced. In this regard, undertaking comparative studies on countries with devolved system of governance, including visits to such countries may be necessary. Due to this, a number of county governments have conducted study visits to a number of countries as a way of learning about the best practices on the various aspects of devolution.

In examining the foreign visits by county governments, the Commission has noted the concerns about the choice of countries, frequency of the visits, expenditure on the visits, sizes of delegations, necessity of such visits and the non-co-ordination of the visits as between the county government, national government and the host country. Towards this end, the Commission has considered the provisions of the Constitution, the Public Finance Management Act and other relevant laws on devolution.

Specifically, the Commission wishes to point out the requirement for county governments **to promote democratic and accountable exercise of power** [A.174(a) & 175(a)]; **enhance public participation in matters that affect them** [A174(c)]; **promote social and economic development and the provision of proximate**, **easily accessible services** [A.174(f)]; and **enhance checks and balances** [(174(i)]. These provisions are further bolstered by the principles of public finance that require **openness, accountability, including public participation in financial matters** [201(a)]; **prudent and responsible use of public money** [201(d); **responsible financial management** [201(e)]; and **avoidance of wasteful expenditure**. These provisions are critical for the success of devolution, and further form the basis upon which the legality and legitimacy actions are assessed. On the basis of the foregoing, the Commission wishes to state as follows in relation to the issues that relate to the foreign visits by county governments.

i.) Necessity and Choice of Foreign Visits

While the Commission appreciates the place and role of comparative studies in our devolved system of governance, we wish to point out that such activities should be well planned, based on necessity and circumstances of the concerned county. This invariably requires a systematic approach commencing with the needs assessment to identify critical aspects such as a diagnosis of the prevailing circumstances, the existing gaps, and the nature or type of intervention needed to bridge the gaps for success. The mapping exercise has the potential of identifying key areas for intervention and the means of undertaking such interventions with maximum outcomes at minimal costs.

The Commission further opines that once the county governments have determined the type of intervention needed, the next step should be to determine the means of undertaking the intervention, which may include a comparative study either through training, foreign visits or desk research. In relation to visits to foreign countries, it should be borne in mind that Kenya has a Presidential system of government with a unique system of devolution, which may not be similar to that in other countries. In this regard, county governments should exercise due diligence and ensure relevance of the countries to be visited. While the Commission takes cognizance of the limited time for the counties to prepare their first budgets and that public participation in the process might not have been optimal, it wishes to point out that the counties should ensure prudent and responsible use of the funds.

Based on the issues raised relating to foreign visits by county governments, it appears that they may not have properly considered the important aspects or stages of determining the necessity and means of undertaking the comparative studies. This would explain the reason why some counties commenced their operations with foreign trips immediately after taking oath of office; some countries have become popular destinations for the study tours; unduly large sizes of the delegations have been on foreign trips; and the opposition of such foreign trips by some Members of the County Assemblies in some counties. In this regard, the Commission wishes to state that the necessity and choice of the countries for

foreign visits should be based on the following:

(i) Issue under consideration, the gaps and the nature of interventions needed – whether it is an issue that requires the county government's consideration.

(ii) The available intervention options to the county government with maximum output at a minimal cost – whether an expert engaged or desk top review would not suffice.

(iii) In case a study visit is needed, the choice of the country should be relevant to the issue under consideration, the size of the delegation and the cost of the visit.

(iv) Other areas requiring the attention of the Members of County Assemblies around the period of visits, such as budgets, motions or approval of appointments.

(v) In all cases, a foreign visit should always be a matter of last resort.

ii.) Use of Alternative Means of Conducting Comparative Studies

One of the hallmarks of financial prudence should be a consideration of whether there are alternative means of undertaking the studies, which would produce maximum output at a minimal cost. In relation to the comparative studies, the available alternative means include use of Internet or extant literature for research and invitation of an expert for training or technical assistance. The use of alternative means becomes paramount and appropriate for the following reasons:

i.) It involves the participation of a large number of people who would otherwise not have an opportunity to make a physical visit;

ii.) It offers an accessible, faster, cost effective and convenient means of benchmarking with other jurisdictions; and

iii.) It provides a platform for obtaining and sharing information on the best practices for more than one jurisdiction at once.

The Commission wishes to point out that the information on some of the best practices from other jurisdictions are already available in literature, most of which can be found on the Internet. In addition, there are a wide range of experts with practical knowledge and skills on the best practices who could be consulted by the County Governments on the issues under consideration. Further, we wish to encourage county governments to invite the Transition Authority, Commission for the Implementation of the Constitution, Kenya Law Reform Commission on any other institution or person or this Commission, to clarify such issues as may be of concern to them.

On the basis of the foregoing analysis, we specifically advise as follows:

i.) That the County Governments should take cognizance of the purpose of devolution and conduct their affairs in a manner that accords to objects and principles of devolution. Towards this end, the **Governors and Speakers of the County Assemblies should exercise fiscal discipline by ensuring that public money is used in a prudent and responsible manner.** They should avoid wasteful expenditure on any activity, including the foreign trips, whose realization can be achieved with minimal or no expenditure.

ii.) That the County Governments should embrace a participatory approach to identifying the specific areas requiring interventions in terms of best practices from other countries, and the nature of interventions to bridge the gaps. Where the intervention involves travelling to another country, they should consider the choice and relevance of the country to be visited, size of the delegation, frequency of the visits, expenditure and the general outcome. In such circumstances, a small delegation which reports to the larger team is desirable.

iii.) That the County Government should ensure prudent allocation of resources during the budgeting process based on the constitutional and statutory guidelines. Failure to adhere to the guidelines would amount to a breach of the Constitution, the Public Finance Management Act and constitutes misallocation of resources, which is actionable under various anti-corruption and integrity related legislation.

iv.) That the County Governments should use alternative ways of learning about the best practices in other countries through the use of available literature or by inviting internal or external experts to make presentations to the Members of the County Assemblies and other officers in the counties. They could, for instance, employ research assistants, on temporary basis, to assist in conducting research on the various best practices under consideration.

v.) Pursuant to Article 59(2)(h-k) of the Constitution and Section 8 of the Act, **the Commission may, in appropriate instances, conduct systematic investigations around the visits to determine whether the visits were necessary, and make**

appropriate adverse findings, with necessary consequential action, where such expenditure is found necessary.

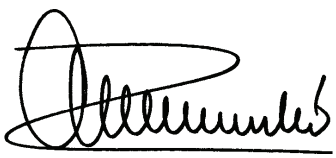
vi.) The Commission hereby reminds the Speakers of the County Assemblies and Members of the County Assemblies that they are State Officers within the meaning of Article 260 of the Constitution and are, therefore, covered by the requirements of Chapter Six and Article 232 (accountability for administrative acts) of the Constitution. **As such, where it is found that expenditure was improper, they would be personally and collectively held liable, which may include individual surcharge, criminal charge of abuse of power, finding of malfeasance and unfitness to hold public office, and may be disqualified from being eligible to be elected or appointed to public office.**

vii.) The Commission is currently working with the Transition Authority to undertake a mapping analysis so that in the event that a county seeks to conduct a study tour, we would provide advice, on necessity, choice of country, size of delegation, duration of the visit and composition of the delegation.

viii.) As provided for under the preamble and Article 174 of the Constitution, Kenya is one indivisible nation with 47 county governments. As such, there is need for co-ordination between the county governments and the national government in relation to the foreign trips by the county governments. In this regard, we wish to call upon the county governments to work closely with the Ministry of Foreign Affairs and the Transition Authority for co-ordination of such trips.

ix.) Where it is found necessary to conduct study tours, the report of such visits should be prepared and tabled in the County Assembly. The report should capture the objectives of the visit, lessons learnt, expenditure and the benefits of the visits. The report should also be issued to the respective Governor and Senator of the County, Transition Authority, Auditor-General, Controller of Budget and the Commission on Revenue Allocation.

DATED this **4th** Day of **March 2014**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.21 ADVISORY OPINION TO THE PRESIDENT ON THE DIFFERENCES BETWEEN THE NATIONAL ASSEMBLY AND THE JUDICIARY

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59 (4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 252(1) (b) of the Constitution, the Commission has the powers necessary for conciliation, mediation and negotiation. Further, Article 59 (h) and (i) of the Constitution which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions or proposals on improvement of Public Administration.

Your Excellency, our attention has been drawn to apparent differences between the Speaker of the National Assembly on the one hand, and the High Court, the Judicial Service Commission and the Chief Justice on the other hand. This standoff was apparently triggered by the decision of the Judicial Service Commission (JSC) to initiate investigations on the conduct of the erstwhile Chief Registrar of the Judiciary, Mrs. Gladys Boss Shollei, resulting in her removal from office. In our opinion, the matter is likely to affect good public administration and bears comment. In accordance with our mandate under Article 59(2) (h), (i) and (j), as read with section 8(h) of the Commission on Administrative Justice Act, we hereby render our Advisory Opinion which we hope will help address the outstanding matters, and smoothen public administration in this respect.

Your Excellency, in the course of examining the dispute, we have picked out four issues which require urgent clarity. First, we would like to point out the provisions of **Article 251(4)** of the Constitution which is very critical at this point. Once the National Assembly has considered a petition for removal of a member of a Constitutional Commission and conveys the same to the President, the President has no discretion but to appoint a tribunal to consider the same. Article **251 (4)(b)** is couched in mandatory terms and gives the President no discretion. In its clear terms, the President **'shall appoint a tribunal.'** Further, it is worth noting the provisions of **Article 2 (2)** of the Constitution which states that no person may claim or exercise State authority except as authorized by the Constitution. Similarly, **Article 129 (2)** states that executive authority shall be exercised in a manner compatible with the principles of service to the people of Kenya, and for their well-being and benefit.

That said, and the improprieties notwithstanding, there is a Constitutional obligation upon the President to appoint a tribunal. It is upon the tribunal to examine all the issues before it and make a determination. If the tribunal concludes that Parliament erred in its conduct in sending the report to the President despite the Court order then it will terminate the process at that stage. However, if it finds in the alternative it would proceed to examine the issues and forward its recommendations to the President.

Second, and notwithstanding the foregoing, on the issue of whether or not to suspend the six (6) named JSC members, it is our humble view that the six (6) members can and should be allowed to continue serving pending the outcome of the tribunal. The Constitution under **Article 251 (4) (a)**makes the suspension discretionary. This is in the interest of allowing continuity and preventing the judiciary from grinding to a halt. The Constitution in its design did not envisage removal of commissioners' *en mass,* a situation that would result in crippling the operations of the Judicial Service Commission and the Judiciary as a whole.

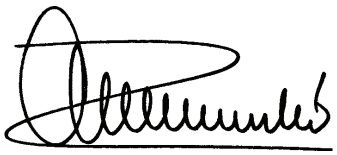
Third, it is our considered opinion that it was clearly improper for Parliament to have ignored a High Court Order issued in **Petition No. 518 of 2013**. It is a well-established principle all over the world and in our constitution that the ultimate responsibility for the interpretation and enforcement of the Constitution lies with the Judiciary. The High Court is constitutionally empowered to interpret the Constitution and retains the residual jurisdiction to oversee the exercise of quasi-judicial functions by all organs of government, including Parliamentary Committees while conducting quasi-judicial functions. Your Excellency, we singularly implore you to make known to the leadership of the National Assembly that disregard of Courts and public pronouncements of contempt can easily result in the breakdown of law and order, with disastrous consequences for our lovely country.

Your Excellency, finally, we are also of the view that it was improper for the six (6) JSC commissioners to have ignored the Summons issued by the Parliamentary Committee on Justice and Legal Affairs. There is a distinction between the JSC's independence as a Constitutional Commission and the overall concept of the independence of the Judiciary. It was improper, in our opinion, for the JSC to hide behind the principle of judicial independence to seek to defeat the oversight role of Parliament. In this respect, we similarly implore you to make known to the leadership of the JSC that the Summons by the Parliamentary Committee derives from the sovereignty of the people in Article 1 of the Constitution. To that extent, and irrespective of ones view on its merits, Summons should be honoured and any objection raised before the Committee itself.

Your Excellency, we wish to draw your attention to the fact that there are two matters in Court touching on the above subject matter. The first case pits the former Chief Registrar of the Judiciary, Mrs. Gladys Boss Shollei against the Judicial Service Commission on the one hand while the second case is between the Judicial Service Commission, the Speaker of the National Assembly and the Attorney General on the other. We have applied and have been joined as *amicus curiae* in both cases. While we shall endeavour to persuade the Court among others that such disputes as are being witnessed presently ought not to be openly litigated in Court, and can be confidentially mediated or negotiated, we humbly implore you to impress upon the Attorney General and the leadership of the National Assembly that snubbing the Court by deciding not to enter appearance sends fundamental negative signals on the rule of law and is to be avoided

Your Excellency, we note and welcome indications that you have initiated a process towards reconciling the two arms of government and offer our humble Advisory as above in the hope that all these will serve to return matters to normalcy and avert an otherwise imminent constitutional crisis.

DATED this **29th** Day of **November 2013**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.22 ADVISORY OPINION TO THE PRESIDENT ON THE DIFFERENCES BETWEEN THE NATIONAL ASSEMBLY AND THE JUDICIAL SERVICE COMMISSION

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59 (4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 252(1) (b) of the Constitution, the Commission has the powers necessary for conciliation, mediation and negotiation. Further, Article 59 (h) and (i) of the Constitution which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration.

We take cognizance of the ongoing stalemate between the Speaker of National Assembly on one hand representing the Legislative arm of government and the High Court, the Judicial Service Commission and the Chief Justice on the other hand representing the Judicial arm of government. This standoff was triggered by the decision of the Judicial Service Commission (JSC) to initiate investigations on the conduct of the former Chief Registrar of Judiciary, Mrs. Gladys Boss Shollei, resulting in her removal from office. In our opinion, the matter is likely to affect good public administration and bears comment. In accordance with our mandate under Article 59(2) (h), (i) and (j), as read with section 8(h) of the Commission on Administrative Justice Act, we hereby render our Advisory Opinion which we hope will help address the outstanding matters, and smoothen public administration in this respect.

In the course of examining the dispute, we have picked out four issues which require urgent clarity. Firstly, we would like to point out the provisions of **Article 251(4)** of the Constitution which is very critical at this point. Once the National Assembly has considered a petition for removal of a member of a Constitutional Commission and sends the same to the President, the President has no discretion but to appoint a tribunal to consider the same. Article **251 (4)b** is couched in mandatory terms and gives the president no leeway. In its clear terms, the President 'shall appoint a tribunal.' Further, it is worth noting the provisions of **Article 2 (2)** of the Constitution which states that no person may claim or exercise State authority except as authorized under the Constitution. Similarly, **Article 129 (2)** states that executive authority shall be exercised in a manner compatible with the principles of service to the people of Kenya, and for their well-being and benefit.

Secondly, on whether or not to suspend the six (6) JSC members, we advise that the six (6) members be allowed to continue serving pending the outcome of the tribunal. The Constitution under **Article 251 (4) a** grants that discretion by using the word 'may'. This is in the interest of allowing continuity and preventing the judiciary from grinding to a halt. The Constitution in its design did not envisage removal of such a large number at one time a situation that would result in crippling the operations of a commission and the Judiciary as a whole.

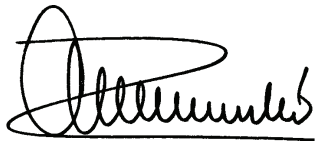
Thirdly, we note that it was improper for Parliament to have ignored a High Court Order issued in **Petition No. 518 of 2013**. It is a well-established principle all over the world and it needs to be underscored that the ultimate responsibility for the interpretation and enforcement of the Constitution is with the Judiciary. The High Court is constitutionally empowered to interpret the Constitution and retains the residual jurisdiction to oversee the exercise of quasi-judicial functions by all organs of government. It was therefore contemptuous for Parliament to disobey the orders.

Finally, we have noted that it was improper for the six (6) JSC commissioner to have ignored summarily and completely the summons issued by the Parliamentary Committee on Justice and Legal Affairs. There is a distinction between the JSC's independence as a Constitutional Commission and the overall concept of the independence of the Judiciary. It was improper in our opinion for the JSC to hide behind the principle of judicial independence to defeat the oversight role of Parliament.

That said, and the improprieties notwithstanding, there is a Constitutional obligation upon the President to appoint a tribunal. It is upon the tribunal to examine all the issues for consideration and make a determination. If the tribunal preliminary concludes that Parliament erred in its conduct, it would necessarily return its verdict in which event the process will terminate.

We also note that there are two ongoing matters in Court on the above subject matter. There is one case pitting the former Chief Registrar of the Judiciary, Gladys Boss Shollei and the Judicial Service Commission on one hand and there is another on between the Judicial Service Commission and the Speaker of the National Assembly on the other. We hold a similar view on both matters and have applied to be enjoined as amicus curiae in both cases. We endeavour to persuade the Court among others that such disputes as are being witnessed presently ought not to be openly litigated in Court. We intend to urge the Court that such matters ought to and must be confidentially mediated as provided for under Article 189 of the Constitution and Section 8 (f) of the Commission on Administrative Justice Act.

DATED this **15th** Day of **November 2013**



CMMR. OTIENDE AMOLLO, EBS

CHAIR OF THE COMMISSION

1.1.23 ADVISORY OPINION TO THE CHIEF JUSTICE REGARDING THE DECISION BY THE JUDICIAL SERVICE COMMISSION TO SEND THE CHIEF REGISTRAR OF THE JUDICIARY ON COMPULSORY LEAVE PENDING INVESTIGATIONS

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The Commission's attention has been drawn to a paid advertisers' announcement and other media reports that the Judicial Service Commission has recently resolved to send the Chief Registrar of the Judiciary on compulsory leave pending investigations. The Commission notes:

I. That on 17th and 19thAugust 2013, the Judicial Service Commission resolved to send the Chief Registrar, Mrs. Gladys Boss Shollei, on compulsory leave for a period of fifteen days to pave way for investigations on various allegations.

II. That it appears the latter decision was reached following a meeting of the JSC whereby the Commissioners voted 5-4 in favour.

III. That the JSC has since mandated two committees of the Judiciary to investigate the alleged accusations against the Chief Registrar and to report back to the full plenary.

IV. That the said Committees have since merged into one for these purposes, which has since invited comments and submissions from the public.

V. That the ambit of investigations is stated as "touching on but not limited to the process of procurement, employment, administration, finance and corporate governance of the Judiciary."

In the course of examining this issue, we have noted that issues have been raised about the legitimate reach of Article (172) (1) (c) in relation to the Chief Registrar; the legality of compulsory leave, and whether "officer" in S. 16 of Schedule Three of the Judicial Services Act would include the Chief Registrar, and the definition of Judicial Officer thereon; the statutory delegation of disciplinary processes to the Chief Justice under S. 15 of the Third Schedule and whether these can be recalled without amendments; the question of absence of S. 47 Regulations and its effects, among other issues. In our view, however, these are matters for later consideration by JSC.

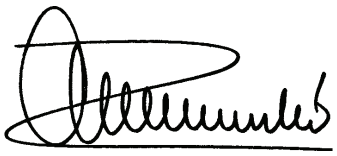
Presently, what has detained our attention are issues of due process, natural justice and the constitutional requirement of fair administrative action. This is particularly so, noting that the origination of the allegations appear to be internal to JSC, and the total membership of the twin committees investigating form an overwhelming majority of the total membership of the JSC. A further point of note is that the JSC membership comprises representatives of all Superior Courts in Kenya, including the Presidency of the Supreme Court, making judicial recourse cumbersome, even if available.

Thus, it is the considered view of this Commission that the process adopted makes the JSC the accuser, Investigator, Prosecutor and Judge in the same cause. In our humble view, the JSC, having preliminarily determined the need for investigations, should have invited the Ethics and Anti-Corruption Commission to investigate any issues of alleged corruption; the Auditor-General to investigate financial dealings; the Public Procurement Oversight Authority to investigate issues of procurement; and the Commission on Administrative Justice to investigate any issues of maladministration and mis-governance. In this event, each of these bodies would then present its findings to the JSC to make its determination on how to proceed. This, in our opinion, would provide a fair, unbiased and transparent process in keeping with the principles of Judicial authority under Article 159 of the Constitution. We humbly commend to you this course.

That said, our attention has further been drawn to an inquiry by the Parliamentary Legal Affairs Committee in which it has summoned the leadership of JSC to

appear before it and explain circumstances surrounding the Chief Registrar's investigations. While it is to be conceded that Parliamentary Committees has panels of the High Court during an Inquiry, and may summon any person in accordance with Article 125 of the Constitution, it is our view that it is improper to invoke this power against an independent commission in respect of an act done in furtherance of its constitutional mandate, even if impugned, as this would directly offend the provisions of Article 249 (2) (b) which insulates such Commissions and Independent Offices from direction or control by any person or authority. In any event, the danger of such a body issuing a cross-summons to the Parliamentary Committee under Article 252 (3) (b) necessitates additional caution and circumspection. On this matter, we urge that you find it fit to engage with the constitutional head of the National Assembly to avert any constitutional stand-off by advising the Committee to suspend any inquiry until all and any constitutionally mandated processes are exhausted.

DATED this **22nd** Day of **August 2013**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.24 ADVISORY OPINION TO TECHNICAL UNIVERSITY ON THE RELATIONSHIP BETWEEN ADMISSION REQUIREMENTS IN PUBLIC UNIVERSITIES AND THE RIGHT TO MANIFEST ONE'S RELIGION

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59 (4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 252(1) (b) of the Constitution, the Commission has the powers necessary for conciliation, mediation and negotiation. Further, Article 59 (h) and (i) of the Constitution which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration.

We acknowledge with thanks receipt of your letter dated 18th September, 2013, contents whereof we have noted and we thank you for inviting us to give an advisory which we hereby do. We have reviewed all the questions raised in your letter and noted the following for determination;-

i. That two students got admission to your university and have since refused to undertake medical checkup which is a prerequisite to admission in the courses they have been admitted to as stipulated in the regulations of the University. The students contend that their faith prohibits them from undertaking medical checkups.

ii. That it is a requirement of the University that all students pay Kshs. 2,000 every academic year as medical fees, which the students want waived due to the fact that their religion, Jehovah Witness, does no allow them to subscribe to medication.

iii. That in the foregoing, there is an apparent clash between the right to religion as provided for under A. 32 and the right to health as provided for under A. 43 (1)a of the Constitution.

Having analysed all the issues above and the delicate balance between the competing rights and interests, we note and recommend the following;

1. In terms of the Constitution of Kenya 2010:-

a) The Constitution guarantees to every Kenyan citizen the freedom of conscience, religion, belief and opinion (A. 32). However, it should be emphasized that the right to express and manifest one's religion and religious beliefs is one of those fundamental rights and freedoms that are not absolute(A.24 &25).

b) The limitation of such a right should however be through a law which must be reasonable and justifiable in an open and democratic state as stipulated in A. 24 of the Constitution.

c) That any limitation to such rights and fundamental freedoms are designed to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others (A.24 (1)d)

d) That in determining whether or not to limit a right, it is important also to consider the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose of such a limitation (A. 24 (1) e).

e) In this situation, we are confronted with a delicate balance between two competing rights, the right to religion (A.32)and the right to health, both of the two students belonging to Jehovah Witness and of the entire student population. The right of the two students to religion is in conflict with the University's admission Regulations.

f) We also note the provisions of A. 43 (1)&(2) which guarantee the right to the highest attainable standards of health including the right to emergency medical treatment. The right to health and the right to religion are both of equal importance. The fact that the students have exonerated

g) That in reconciling the competing interests, the protection of public order, morals, safety or health, and the protection of the rights and freedoms of others should take preeminence over individual interests.

2. In terms of the available laws and regulations limiting that right we note the following;

a) The Commission for University Education (CUE) is established by the Universities Act, No 42 of 2012, and has the mandate among others to develop policy for criteria and requirements for admission to Universities. Section 57 of the Act provides that a University may independently admit students to its programmes in accordance with its approved admission criteria. This Act gives universities a leeway to develop guidelines and regulation governing admission to university but under the overall supervision of the commission for university Education which develops policy.

b) The HIV/Aids Prevention and Control Act, No. 14 of 2006 in section 13(2) c prohibits compulsory testing. It provides that no person shall compel another person to undergo an HIV test as a precondition to, or for the continued enjoyment of admission into any educational institution. So the university should ensure that the testing is made voluntarily and not compulsorily. Further to that, Section 14 of the Act requires that if undertaking an HIV test on a child the written consent of a parent or a legal guardian of the child must be sought.

c) The Children Act (2001) and section 5contains a single broad provision prohibiting discrimination on ground of origin, sex, religion, creed, custom, language, opinion, conscience, colour, birth, social, political, economic or other status, race, disability, tribe, residence or local connection. A child is any person who has not attained 18 years.

The question at hand is whether the requirement to conduct medical checkup prior to admission to the University would amount to discrimination on religious grounds. We are of the opinion that the requirements of the University for a medical checkup cannot be said to be unreasonable and unjustifiable insofar as it seeks the harmonization and co-existence of students in the university. We also note the following;-

a) That the rights under A.32 are not absolute and can be qualified under A. 24 because they are not among the rights and freedoms that cannot be limited under A. 25.

b) That in the circumstance we opine that the test stipulated under A.24 for the valid limitation of fundamental rights and freedoms has been met. This is in particular the provisions of **A. 24 (1) d** and **A. 24 (1)e.**

c) That under A. 24 (4)of the Constitution, the requirements of equality have been qualified to the extent strictly necessary for the application of Muslim law before Kadhis' courts, to persons who profess the Muslim religion, in matters relating to personal status, marriage divorce and inheritance. The exemption does not cover members of the Jehovah Witness.

d) In terms of the relevant legislation, we note that the Commission of University Education is empowered by the Universities Act to develop policy on university education. The same Act gives individual universities to determine individual criteria for admission.

e) We also note that the checkups are to be conducted by a doctor of choice and not one imposed by the University. This is in line with article 24 (1) e of the Constitution.

It is our considered opinion that the government is under an obligation to subject freedom of religion to limitations designed to uphold morality, public order and the general welfare in any democratic state. The medical checkups are designed to safeguard the general student population and also to determine the suitability of the new student in the new area of study. It thus appears that the importance of the limitation as stated above fits well within Article 24 of the Constitution.

We are of the opinion that In democratic societies in which numerous religions co-exist with each other in the same population, it may be necessary to restrict peoples' manifestations of religious beliefs in order to reconcile the interests of the various groups and ensure that every person's beliefs are respected. In learning institutions, these rights may be limited by rules and regulations made by various organs of management to ensure order and smooth running of the institutions.

In conclusion, we note that Kenya is a secular state (A. 8 Const). We also take cognizance that Technical University is a public university admitting students from all faiths and conceding to such demands would amount to elevating one religion over the others. Having looked at all the issues in this instance we advise and recommend the following:-

i.) That the University should not make concessions as demanded as the right to religion is not absolute, the limitation of the right to religion in this instance is reasonable and justifiable as contemplated by A. 24.

ii.) That the university should expunge all requirements demanding for a compulsory HIV test since they violate the HIV/Aids Prevention & Control Act. However, where courses to be undertaken require compulsory testing the same should be done. (Sections 13 & 14)

iii.) That where the student has not attained the age of 18 years, a provision should be inserted requiring the consent of the parent and or the legal guardian of the child.

iv.) We also note that the elders of the church are not in a position to give a medical opinion insofar as they are not trained.

DATED this **2nd** Day of **October 2013**

CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.25 ADVISORY OPINION ON THE APPOINTMENT OF MEMBERS OF THE KENYA NATIONAL COMMISSION ON HUMAN RIGHTS

Your Excellency, this Commission is a Constitutional Commission established under Article 59(4) of the Constitution, and the Commission on Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Additionally, the Commission has a quasi-judicial mandate to deal with maladministration, and to adjudicate on matters relating to administrative justice. Further, and through Advisory Opinions, the Commission is expected to render proposals on improvement of public administration, including review of processes and procedures where appropriate.

Your Excellency, we have received a complaint from the Law Society of Kenya in respect of the appointment of the Chairperson and Members of the Kenya National Commission on Human Rights. The Commission is particularly concerned by the delay in making the said appointments even after the names were forwarded upon conclusion of the Court case regarding the appointments on 16th August 2013.

Your Excellency, we wish to give a brief background of the issue at hand. The Kenya National Commission on Human Rights (KNCHR) is a Constitutional Commission created under Chapter Four and Chapter Fifteen of the Constitution. Pursuant to Article 59(4) of the Constitution, Parliament enacted the Kenya National Commission on Human Rights Act in August 2011 to restructure the Kenya National Human Rights and Equality Commission.

Subsequent to the enactment of the Act, a Selection Panel headed by the Chairman of the Law Society of Kenya was constituted to commence the appointment of the Chairperson and Members of KNCHR. The Selection Panel interviewed the shortlisted candidates in August 2012, and pursuant to section 11(5) of the Act, forwarded the names of eight (8) nominees for the position of Member of KNCHR to His Excellency President Mwai Kibaki, as he then was, for appointment. However, the Selection Panel did not forward the names of the nominees for the position of Chairperson since they were unable to get suitable candidates for the position, and they advised that the position be advertised afresh.

However, the appointment process was temporarily stopped by a Court Order on 3rd September 2012 following a suit filed in the ***High Court Petition No. 385 of 2012.*** Despite the foregoing, on 28th September 2012, the Court allowed the Selection Panel to proceed with the interviews for appointment of the Chairperson. The Selection Panel proceeded to shortlist and interview candidates for the position of Chairperson, and thereafter forwarded the names of three nominees to the President for appointment on 28th December 2012. Your Excellency, the concern is that no appointment has been made for the position of Chairperson of KNCHR after forwarding of the names of three nominees in December 2012, noting the fact that the appointment of the Chairperson was not barred by the matter before the Court.

Your Excellency, in relation to the appointment of Members of KNCHR, the matter before the Court was eventually determined on 16th August 2013 when the Petition was dismissed thereby paving way for their appointment. The plea, therefore, is the need to make the appointments so as not to pose a danger to public administration in relation to full and effective implementation of the Bill of Rights under Chapter Four of the Constitution.

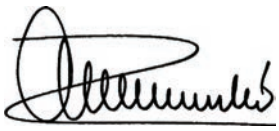
Your Excellency, we wish to draw your attention to Section 11(6) of the Kenya National Commission on Human Rights Act which is relevant to the issue at hand, and which outlines the procedure for appointment of the Chairperson and Members of KNCHR once the names of the nominees have been forwarded to the President by the Selection Panel. The said Section provides that the President shall nominate the Chairperson and Four Members of KNCHR within seven (7) days of receipt of the names forwarded by the Panel, and thereafter forward the names to the National Assembly for approval.

Your Excellency, the cited section provides the timeline and clarity to the process of appointment of the Chairperson and Members of KNCHR. It is our humble view that the timeline for the appointment of the Chairperson began running from 28th December 2012 for the above stated statutory period of seven (7) days, after which the name of the nominee would have been forwarded to the National Assembly for approval. On the other hand, the appointment of Members of the KNCHR could only be done after the determination of the suit against the appointment process, which eventually took place on 16th August 2013 with the dismissal of the suit. In this regard, the timeline became operational from 16th August 2013 for the statutory seven (7) days before the names of the four nominees are forwarded to the

National Assembly for approval.

Your Excellency, we take note of the important role that KNCHR has been empowered to play in our constitutional dispensation, particularly, in relation to the protection and promotion of human rights. In this regard, we wish to humbly request that the Chairperson and Members of the KNCHR be appointed at the very earliest convenience, to avoid further legal challenges.

DATED this **10th** Day of **September 2013**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.26 THE SPEAKERS OF THE NATIONAL ASSEMBLY AND THE SENATE ON THE CONSTITUTION OF KENYA (AMENDMENT), BILL, 2013

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The Commission takes cognisance of the proposed amendment to Article 260 of the Constitution in the Kenya Gazette Supplement No 100 (National Assembly Bills No. 15). The Bill proposes to amend Article 260 of the Constitution, an interpretive article and seeks to remove the office of Members of Parliament (MPs), Members of the County Assemblies (MCAs), Judges and Magistrates from the list of designated State officers. The commission is in receipt of views and concerns from various State Organs and individuals on the implications of the proposed amendment.

This amendment has numerous implications both on the Constitution and the Salaries and Remunerations Commissions Act, No 10 of 2011. Further, the proposed amendment will have grave implications on the role of independent commissions and independent offices. The Commission raises the following primary concerns:

In terms of the Constitution the amendment will have the following implications;

A Further reduction of the integrity threshold for state officers under Chapter six (6) of the Constitution and other sections of the Constitution as adumbrated below:-

i.) In terms of **Article 73 (1)a,** the amendment means that the officers (MP's, County Assembly Members, Judges and Magistrates) will not exercise their authority as a public trust.

ii.) In terms of **Article 73 (1) b**, the authority vested to the said state officers will no longer be a responsibility to serve but one vesting them power to rule.

iii.) For Judges and Magistrates, it means that their selection will not be on the basis of personal integrity, competence and suitability. **(A. 73 (2)a)**

iv.) Similarly, the amendment removes the requirement of objectivity and impartiality in decision making among those officers including the requirement that their decisions should not be influenced by nepotism, favouritism, other improper motives or corrupt practices **A. 73 (2)b**

v.) The amendment removes the requirement of selfless service, honesty in execution of public interest and the requirement of a declaration of any personal interest that may conflict with public duties in Judges and Magistrates. Further the requirement of accountability and discipline and commitment to service is removed in Judges and Magistrates. **A. 73 (2) (c)(d) & (e).**

vi.) It is a constitutional requirement that any state officer takes and subscribes to the oath or affirmation of office. This requirement will be watered down. **A. 74**

vii.) Article **75** is on the conduct of state officer, whether in public or private life. State officers are to avoid compromising any public or official interest in favour of a personal interest, conflict between personal interests and public official duties and conduct that would be demeaning the office held. All this will be watered down with regard to Judges and Magistrates were the amendment to succeed **A. 75 (1) (a)(b)& (c)**

viii.) In terms of Article **75 (2) & (3)** on the disqualification clause, the same would not apply to Judges and Magistrates.

ix.) The amendment will have far reaching implications on financial probity of state officers. First, maintaining bank accounts outside Kenya, accepting a loan in circumstances that comprise the integrity of a state officer and accepting gifts provisions will not apply to the excluded officers (MP's, County Assembly Members, Judges & Magistrates). **(A. 76)**

x.) **Article 77 (1)**is on restriction as to double employment and exemption of Judges and Magistrates means they may practice law or engage in other gainful employment.

xi.) In terms of Article **77 (2),** it would mean that Judges and Magistrates can hold office in a political party.

xii.) The amendment will have implications on Judges and Magistrates who retire and will be exempted from Article **77 (3)** thereby holding two or more concurrent remunerative positions.

xiii.) Noting to **A. 78** on dual citizenship election to Parliament or County Assembly, and appointment to magistracy will no longer be restricted to citizens of Kenya who are not dual citizens. The eligibility threshold will hence have been lowered.

xiv.) The Leadership and Integrity Act will cease to apply to the officers intended for removal from the category of state officers under **A. 80**thus removing the substratum of the provisions.

xv.) Noting the definition of 'state organ' and subsequent reference of the same in Articles **6(3), 94 (6);** the amendment would imply a state organ whose membership has no state officers. it would be an abnormality if the National Assembly and the Senate, as state organs, were to be composed of non-state officers.

xvi.) Article **94 (4)** states that Parliament shall protect the Constitution and promote the democratic governance of the Republic. By amending the Constitution to invite the possibility to set their own salaries, the MP's will be abrogating their constitutional duty.

xvii.) **Article 99 (1)b** on qualification and disqualification for election as a Member of Parliament requires one to satisfy educational, moral and ethical requirements prescribed by the constitution. It waters down this requirement for MP's.

xviii.) There is a danger in removing Judges and Magistrates from the ambit of State Officers. Due to financial independence of the Judiciary, it would be difficult to control the Judicial Service Commission's usage of allocated funds. Similarly, it is possible for County Assembly members to determine their own salaries as they will be outside the mandate of the Salaries and Remuneration Commission (SRC).

xix.) Under **Article 210**, No law may exclude or authorize the exclusion of a State officer from payment of tax by reason of the office held by him or by the nature of the work he does. If the amendments succeeds, not only would members of Parliament exempt themselves, but County Assemblies may well follow suit.

xx.) Under **Article 230 (4) a -** the Salaries and Remuneration Commission(SRC) is mandated among others to set and regularly review the remuneration and benefits of all State officers. The Constitutional amendment will remove the mandate of determining salaries for the MP's and other officers from the Salaries and Remuneration Commission (SRC). Essentially, the role of the SRC will be otiose.

xxi.) In terms of Chapter 15 on Constitutional Commission, the amendment in essence removes the MP's and other officers from the oversight of a number of commissions, including the CAJ, the Ethics & Anti-Corruption Commission, and the Salaries & Remuneration Commission.

xxii.) Finally, the amendment will have protocol implications as it will essentially render the mentioned officers' lower ranking public officers compared to other state officers thus having a negative effect

on their powers, responsibilities and remuneration.

Beyond the specific effects adumbrated above, the following ought to be noted

(a) In the design of the Constitution of Kenya 2010, the terms state, state office, state officer and state organ are carefully defined and applied in such an intricate manner, that to seek to amend the definition of "State Officer" without amending the other related terms is not only impossible, but will fundamentally alter the structure, design and integrity of the entire Constitution

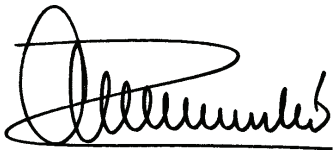
(b) To the extent that the terminology "state organ" is entrenched in Article 6, while the foundations of the Chapter Six principles are captured in Article 10(2)(c), an amendment that seeks to reduce the threshold of integrity, accountability and good governance in state officers is one as would require a referendum in accordance with Article 255(1)(d)

(c) In seeking to obliterate the essential independent jurisdiction of the Salaries & Remuneration commission, the Amendment would still require a referendum as it would essentially interfere with the Independence of Commission under A.255(1)(g)

(d) It should be noted at all times that National and County governments are distinct (A. 6(2)]. When weakening the roles and functions of independent institutions meant to regulate the governments, some County governments may ran rogue and reject any interventions from national government entities. This will be the biggest threat to statehood, and the Republic of Kenya.

While we appreciate the independent role of Parliament in law making, we humbly wish to covey our thoughts on this matter to the extent that it may affect public administration and in accordance with S.8(h) of the Commission on Administrative Justice Act.

DATED this **2nd** Day of **September 2013**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.27 ADVISORY OPINION TO THE PRESIDENT ON THE APPOINTMENT OF MEMBERS OF THE TEACHERS SERVICE COMMISSION

Your Excellency, this Commission is established under Article 59(4) and Chapter Fifteen of the Constitution of Kenya and the Commission on Administrative Justice Act 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Additionally, the Commission has a quasi-judicial mandate to deal with maladministration, and to adjudicate on matters relating to administrative justice. Further, and through Advisory Opinions or proposals, the Commission is expected to render proposals on improvement of public administration, including review of processes and procedures where appropriate.

Your Excellency, we have received complaints in respect of the constitution of the Teachers Service Commission, and the looming danger of not having a fully functional Commission, which in turn poses a danger to public administration in the education sector, hence our involvement through this letter.

Your Excellency, we wish to give a brief background of the issue at hand. The Teachers Service Commission (TSC) is a Constitutional Commission created under Chapters Thirteen and Fifteen of the Constitution. Pursuant to the Constitution, Parliament enacted the TSC Act in August 2011 to restructure TSC in accordance with the Constitution. Subsequent to the enactment of the TSC Act, a Selection Panel was constituted to commence the appointment of the Chairperson and Members of TSC. The Selection Panel interviewed the shortlisted candidates and, pursuant to Section 8(6) of the TSC Act, forwarded the names of the nominees to His Excellency President Mwai Kibaki for approval. The President, in consultation with the Rt. Honourable Prime Minister, duly nominated a Chairperson (Mr. Kiragu wa Magochi) and three Members (Mr. Adan Sheikh Abdullahi and Mr. Fredrick Haga Ochieng' , Mr. James Kahindi Ziro) and subsequently forwarded their names to the National Assembly for approval in December 2012. However, the National Assembly rejected the names on 3rd January 2013 when they were presented before it for consideration.

His Excellency, The President, in consultation with the Rt. Honourable Prime Minister thereafter submitted a fresh list of nominees to the National Assembly pursuant to Section 8(11) of the TSC Act. The fresh list submitted contained the names of a new nominee (Mr. Cleopas Tirop) and three of the previous nominees (Mr. Kiragu wa Magochi, Mr. Adan Sheikh Abdullahi and Mr. Fredrick Haga Ochieng') all who had been rejected by the National Assembly. Subsequently, on 9th January 2013, the National Assembly approved the names of the nominees for Member of TSC, but rejected the nominee for Chairperson of TSC (Mr. Kiragu wa Magochi). However, the approved nominees did not assume office since the matter was then taken to the High Court by a litigant to determine whether there was compliance with the TSC Act in the conduct of the appointment process. Ultimately, the Court delivered its judgment (copy enclosed)where it found that the process failed to comply with the TSC Act insofar as the second list contained names of individuals who had been rejected by the National Assembly. The upshot was that once Parliament rejects a name, the same name cannot be presented afresh to Parliament. Thus, only the one new nominee whose name had not been presented could be sworn in, and thus Mr. Cleopas Tirop has since been sworn in.

Your Excellency, we wish to draw your attention to the provisions of Section 8(11) of the Teachers Service Commission Act which is relevant to the issue at hand, and which outlines the relevant procedure that should have been used in determining the second list of nominees. The Section provides that:

> ***"Where the National Assembly rejects any nominee, the Speaker shall within five days communicate its decision to the President and request the President to submit fresh nominations from amongst the persons shortlisted and forwarded by the Selection Panel under subsection (6)."***

Your Excellency, the cited Section provides for the submission of fresh names from the list of the candidates who were shortlisted and interviewed by the Selection Panel, but who were not part of the rejected names by the National Assembly. Indeed, this position was emphasized by the Court when it stated that

> ***'once all the nominees were rejected, it was not open to the President in consultation with the Prime Minister to submit fresh nominations which contained the persons so rejected by the National Assembly.'***

As further stated by the Court, the rejection of the nominees by the National Assembly left the President with the responsibility of submitting fresh nominations from the persons shortlisted and forwarded by the Selection Panel under Section 8(6) of the TSC Act. The Court averred that:

"…the list, in so far as it contains names of persons rejected by the National Assembly DID NOT constitute "fresh nominations" and therefore in breach of Section 8 (11) of the TSC Act and is to that extent set aside."

Your Excellency, the foregoing state of affairs, has resulted in a perilous situation where only one of four persons recommended was Sworn-in as member, while about half of the current members will have their term expire around June 2013. The Teachers Service Commission may then be crippled.

It is our understanding of the law that once the list was nullified by the Court, the proper procedure is for Your Excellency to submit a fresh list with names of persons earlier shortlisted, but whose names have not been considered in Parliament. This is to be done, while ensuring meritocracy, regional balance, and gender ratio considerations.

Your Excellency, the performance rankings, gender and regional extraction of the first seven ranked in order of performance (full list attached) was as follows:

No.	Name	Percentage(%)	Rank	County
	Cleopas Tirop	81.4	1	Uasin Gishu
	Dr. Salome W. Gichura	78.7	2	Nyeri
	Julius O' Jwan, PhD	71.8	3	Homabay
	Frederick Haga Ochieng	71.6	4	Siaya
	Adan Sheikh Abdullahi	70.3	5	Garissa
	Saadia Abdi Kontoma	69.7	6	Wajir
	Kahindi Ziro James	68.6	7	Kilifi

Your Excellency, you will note that inexplicably, those ranked Nos.1, 2, 3 and 6 were not recommended to Parliament. Only Nos. 4, 5, 7 and a Mr. Kiragu Wa Magochi, who does not appear to have been interviewed or ranked, were recommended to Parliament. The anomalies having been rectified by Court process, we believe it to be lawful, reasonable and logical that those earlier overlooked should be considered, saving any regional or gender considerations not apparent on the face of the record. The result would be to forward to Parliament the following three names;

No.	Name	Percentage(%)	Rank	County
	Dr. Salome W. Gichura	78.7	2	Nyeri
	Julius O. Jwan, PhD	71.8	3	Homabay
	Saadia Abdi Kontoma	69.7	6	Wajir

Your Excellency will note that while the three do not hail from the respective counties as the three rejected, they each hail from the same regions as each of those rejected. Additionally, they rank highest on merit and render a gender balance of 50: 50 in terms of the four vacancies.

Your Excellency, it is our considered view, which we humbly wish to commend to you, that it is safer and lawful to regularize this anomaly by treating the appointment of TSC Commissioners in batches; regularizing the initial batch of four, even as a fresh selection panel is constituted to start the process of recruiting fresh Commissioners to replace those whose term expires in June 2013. The dangers of crippling an important Institution such as the Teachers Service Commission in this transitional period is too costly to fathom.

Once again, we assure your Excellency of our highest regards and commit to every effort to support the government in its commitment in improving public administration.

DATED this **17th** Day of **May 2013**

CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.28 ADVISORY OPINION ON THE RELATIONSHIP BETWEEN THE NATIONAL GOVERNMENT, COUNTY GOVERNMENTS AND COUNTY COMMISSIONERS

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59 (4) and Chapter 15 of the Constitution of Kenya, as read with The Commission on Administrative Justice Act, 2011. Under Article 249 of the Constitution, the Commission alongside others has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of democratic values and principles. Further, Article 59 (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

In recent times, there has been controversy on the nature of the relationship between devolved governments and the national government. This has led to conflicting claims and power struggles witnessed between the County Commissioners and County Governors. Governors have made various demands including recognition to fly the national flag, to enjoy diplomatic passports, to be addressed as 'His Excellency the Governor' among others. The Governors have stated that they are being undermined by the national government in what they term as an intention by the national government to defeat 'real' devolution of power as provided for by both the letter and spirit of the Constitution. How should the county governors be addressed? What is the status and role of county commissioners? This uncertainty and state of affairs has occasioned our invocation of the advisory jurisdiction as hereunder.

(a) Whether Kenya is a unitary state

Kenya is one indivisible state with 48 governments. Although the territory of Kenya is divided into 47 counties, it remains one indivisible sovereign nation, in the words of the preamble to the Constitution. The powers and roles of the national government and those of the county governments are well defined in the Constitution. It should be noted that a function or power that is not assigned by the Constitution or by national legislation to a county government is a function or power of the national government. The county governments exercise their roles as donated by the Constitution. The two are **distinct but interdependent and shall conduct their affairs on the basis of consultation and cooperation (A. 6(2)**. However, the distribution of powers and functions between the two levels of government as stipulated in the 4th Schedule of the Constitution should be respected. During the review process, some agitated for federalism, while others strongly pushed for a minimum "financially devolution". In the end, our devolved system is less than a federal structure, but neither is it a token financial devolution to be controlled from the centre. There is no autonomous "peoples government" of county X, yet the national government cannot also purport to control governors and county governments as if they were departments of the executive.

(b) Transfer of duties & funds

The Constitution, in the transitional clauses (**6th Schedule, A. 15**) contemplates a phased transfer of functions to county governments by the national government over a period of not more than three (3) years. It further contemplates an established criterion that must be met before particular functions are devolved to county governments in a bid to ensure that county governments are not given functions which they cannot perform. The body charged with this role is the Transition Authority (TA) established by the Transition to Devolved Government Act (**No 1 of 2012).**The Act specifies the procedure and criteria to be met before certain functions are transferred to the county governments. It is important that the Transition Authority transfers as many functions as practicable, and as soon as possible, for purposes of fast-tracking the operations of the County Governments. We urge the Transition Authority (TA) not to take a conservative approach that would slow implementation of devolution, and to adopt a facilitative approach. Unless there are serious grounds showing that a county will not be capable of performing a particular function, the assumption should be in favour of transfer. The transfer of functions should be followed by the transfer of funds without which county governments will not have the capacity to perform the new functions.

(c) Allocation of offices& Assets

While it is true that all assets belonging to the erstwhile Ministry of Local Government in all counties before the coming into force of the devolved governments remains the property of the national government, there should be a clear and formal process for allocating offices and

transfer of assets to the County Governments by dint of **section 35** of the Transition to Devolved Government Act. This is important as there can be a temptation by the national government to use the issues of assets to stifle the county governments, thus interfering with their authority. Specifically, it is advisable that all offices and assets held by the Ministry of Local governments through various city, municipal and county councils should be formally and immediately transferred to the county governments.

(d) Status and Role of County Commissioners

The Constitution requires that the national government restructures the system of government commonly known as Provincial Administration (PA) to accord with, and respect, the system of devolved government. The current indications are that Provincial Administration has been retained with only minimal changes. It has been re-designed to parallel the new county structure. Thus, County Commissioners and other officers down to the village have been re-designated. Whereas posting of national government officials at any level, however described, only for purposes of, and restricted to the functions prescribed in part 1 of Schedule Six, would not by itself be objectionable, the present formulation and status of Provincial Administration must raise anxiety. It is a fact that the national government remains in charge of the country's Security, Military, the Courts and National Economic Policy among other major functions. However the following should be emphasized;-

(i) The retention of the wording **'Commissioners'** carries with it the old order of domination and superintendence. Perhaps a less imposing terminology would be adopted. There is further need to train the designated national government officials to respect the functional autonomy of county governments. This should be done by independent Constitutional experts/ offices.

(ii) The continued retention of Provincial Commissioners (PC's) and Regional Commissioners (RC's) is inappropriate as there are no provinces or regions in the new structure. Kenya is divided into 47 counties and the retention of PC's and Regional Commissioners does not accord with the new system.

(iii) In any event, the process of appointment of the County Commissioners was not transparent nor representative by gender and region as already observed in **High Court petition No.208 of 2012** and **HC Misc. No. 207 of 2012**. Thus, irrespective of whether the offices are retained or titles changed, it is necessary to restart the process in order to have a transparent, representative and responsive process. This should be done through the Public Service Commission. Holding onto a process that has been impugned by the High Court portends disrespect to the Constitution.

(iv) The county budget should be a preserve of the county assembly, and the national government through the Transitional Authority should have a limited advisory role in the process.

(e) Security issues Between National & County Governments

It ought to be emphasized that the National Security is a function of the national government. The National Police Service is headed by the Inspector General (IG) who exercises independent command. Thus, the county representative of the Inspector General should continuously brief both the governor, and the national government representative at the county, on security matters. It should be made clear that county governments have a leeway to establish their policing services but restricted to the functions allocated to them (see Article 247 of the Constitution and Schedule 4)

(f) Staffing of the County Governments and Continued Secondment of staff by the National Government

Article **235** of the Constitution empowers county governments to recruit and exercise disciplinary control over their own staff. The national government through the Transition Authority has so far seconded various officers to assist in establishment of the county structures. More recently, the Transitional Authority advertised 47 positions for lawyers to be seconded to each county to help in advising and the drafting of county legislation. It is our view that while secondment may have been necessary earlier, once elections are held, county governments can only be supported to recruit their own staff. All further secondments, unless specifically requested, should cease.

(g) Salutation and Flag

Our attention is drawn to a dispute over salutation, with governors demanding to be addressed as 'Excellencies.' Further, they have demanded to fly the national flag.

First, the tone and tempo of the Constitution is to reduce overly formal salutations that detract from the sovereignty of the people and diminish servant leadership. Further, while hoping this will diminish, there may still remain salutations in respect of the President which accrue, not only because he is head of government, but also because

he is head of state. In the body of Nations, only one state called Kenya exists. Such is the reason why even the Prime Minister settled for the 'Right Honourable' yet he was co-head of government. Thus, and as happens in other jurisdictions with comparable presidential systems with devolved structures, it should suffice to refer to "X the Honourable Governor of Y County".

On the National flag, the National Flag, Emblems and Names Act (Cap 99) would have to be amended, by participation of both the National Assembly and the Senate, as a Bill concerning county governments (A.109).

That notwithstanding, it may well serve the governors better if each were to fly the unique flag of their respective counties to emphasize the point of being head of one of the 48 governments, than struggle to fly the flag representative of the 48th government, from whom they so crave separateness.

(h) Resolution of Disputes

Being alive to the fact that disputes would arise between the National Government and County Governments, the constitution states that in any dispute between the two levels of government, reasonable efforts shall be made to settle the dispute by negotiation, mediation and arbitration. In terms of legislation, the Intergovernmental Relations Act establishes a framework for consultation and co-operation between the national and county governments and amongst county governments. It establishes mechanisms for the resolution of intergovernmental disputes pursuant to Articles 6 and 189 of the Constitution.

The Act creates a summit bringing together the President and the 47 governors, and mandates it to resolve disputes by way of alternative dispute resolution with judicial proceedings as the last option. The Act also creates a County Government Council with various functions among which include resolution of disputes between counties. The entire dispute resolution mechanism created by legislation will require strengthening. The summit has forty seven (47) governors and is chaired by the President. Either the Chair will dictate, or the governors will gang up against the chair and have their way on account of numbers. On the other hand, the Council comprises purely of persons with an interest on the outcome, (governors) against the most basic principle of adjudication.

It is to be noted, however, that pending rationalization of these laws, the governments can invoke any of the following

i.) Refer the dispute for resolution by the Commission on Administrative Justice (see section 8(f) and (g), and

ii.) Constitute an independent mediation/arbitration for panel as contemplated by Section 31 of the Intergovernmental Relations Act

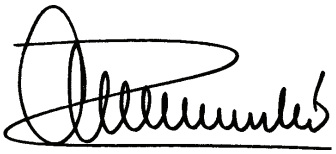
iii.) Appoint a mutually acceptable "Intermediary" as contemplated by Section 33 of the Intergovernmental Relations Act.

iv.) Subject to persuading the Court that the issue is not yet "contentious", refer the matter to the Supreme Court for its **Advisory** opinion under Article 163(6)

v.) Finally, and if all or any of the foregoing fail, refer the matter to the High Court for determination of the issues in contention.

It is our hope and belief that to the extent that Kenyans overwhelmingly voted in favour of the Constitution of Kenya 2010, they endorsed the idea of devolution as contained therein. We must all make it work, without overly romanticizing the concept, and without structurally suffocating it either. Let us respect the sovereignty of the people and make this Constitution work.

DATED this **10th** Day of **April 2013**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.29 ADVISORY OPINION TO THE PRESIDENT ON THE IMPLEMENTATION OF THE REPORT OF THE COMMISSION ON INQUIRY INTO THE HELICOPTER PLANE CRASH ON 10TH JUNE 2012

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

Your Excellency, allow me to take the opportunity to thank you for appointing a Commission on Inquiry headed by Justice Kalpana Rawal to investigate the circumstances surrounding the Helicopter Accident that occurred in Kibiku Area of Ngong on 10th June 2012 and which resulted in the demise of Hon. George Saitoti (Minister for Provincial Administration and Internal Security), his assistant, Hon. Joshua Orwa Ojode and four other public officers. The Commission is particularly pleased to note that the Commission accomplished its task and presented Report to you on 28th February 2013.

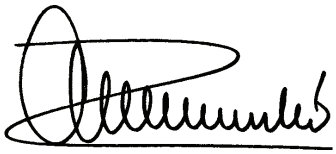
Your Excellency, the implementation of this Report will be critical in improving good governance and public administration in Kenya. In this regard, the Commission takes cognizance of our past where the Reports of Commissions of Inquiry have not been adequately implemented partly due to the absence of an institution to spearhead their implementation.

Your Excellency, this situation has been remedied by the new Constitution through the creation of an institutional framework to promote Constitutionalism, part of which includes the implementation of Reports of Commissions of Inquiry. One such institution is the Commission on Administrative Justice established under Article 59(4) of the Constitution and the Commission on Administrative Justice Act 2011, and whose mandate includes investigating any conduct in state affairs, or any act or omission in public administration in any sphere of Government, that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice. We are also mandated to address incompetence, misbehaviour, inefficiency or ineptitude within the public service.

Your Excellency, the Report of the Commissions of Inquiry would constitute an administrative action within the meaning of Section 2 of the Commission on Administrative Justice Act, for which the Commission is responsible.

In the premises, Your Excellency, we humbly request you to publish the Report, and to further transmit to ourselves a copy of the same for further necessary action. We believe that the implementation of this Report is key to improving public administration in Kenya. In addition, it will give effect to Article 35(3) of the Constitution which requires the State to publish and publicise any important information affecting the nation. We assure you, Your Excellency, that we have the capacity and capability to ensure full implementation of the said Report within a specific timeline.

DATED this **2nd** Day of **April 2013**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.30 ADVISORY OPINION TO THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION ON PUBLIC OFFICERS FOUND CULPABLE OF MALFEASANCE AND UNSUITABLE TO HOLD PUBLIC OFFICE

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

In accordance with the Constitution, part of the mandate of the Commission is to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, by any state or Public Office, as would constitute **Improper conduct, abuse of power**, unlawful, oppressive or unresponsive official conduct (A.59(2)(h)–(j); inquire into allegations of maladministration, administrative injustice, incompetence, **misbehaviour**, inefficiency or ineptitude within the public service. In each of these categories, the Commission is mandated to take appropriate remedial action.

Additionally, and with other Constitutional Commissions, the Commission is required to protect the sovereignty of the people, promote Constitutionalism, and secure observance by all State organs of democratic values and principles (A.249), including the requirement of integrity in Article.10 and 232.

In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administration of justice, obtain relevant information from any person or Governmental authority, and to compel the production of such information.

Thus, to the extent that the Commission focuses on abuse of power, misbehavior, improper conduct and unresponsive conduct, we have a complimentary, but not subordinate, role on Integrity issues as relates only to State and Public Officers. In this respect, the Commission hereby forwards to you the following three categories of serving Public Officers, or persons who previously served as such, and who, in the respectful view of the Commission, fail the Integrity test and ought to be disqualified from running for office for the General Elections of 4th March 2013 on account of failing the moral and ethical requirements of the Constitution (A.99(1)]; having served in a previous electoral body; or were found to have misused or abused state or public office [A.99(2)(h)]. For clarity, the Commission has an adjudicatory role in respect of some matters; but its pronouncements herein are **Recommendations**. We fully recognize that the Independent Electoral and Boundaries Commission is Constitutionally mandated to make the determination on eligibility to run for elective office. We note that subsequent to this determination by yourselves, an aggrieved party has the final option of challenging the decision by Judicial Review, and we would earnestly encourage an expeditious determination as to allow such challenges to be finally determined by the Courts, within a prescribed time, as not to interfere with the Elections calendar.

a) PUBLIC OFFICERS CONVICTED OF ABUSE OF POWER

The Commission is empowered by Article 59(2)(i) of the Constitution and Section 8(b) of the Commission on Administrative Justice Act to investigate complaints of **abuse of power** within the Public Sector and take appropriate remedial action. In line with the foregoing and S.26(d) of the Act, the Commission sought and obtained a list of Public Officers who have been convicted of abuse of office over the years from the Ethics and Anti-Corruption Commission and the Office of the Director of Public Prosecutions (copies enclosed). Having received the long list of over one hundred and sixty names, the Commission sought to isolate names of only persons who served as Public Officers at the time, and who were convicted of abuse of power. Additionally, and in order to ensure fairness, the Commission sought

confirmation from the Judiciary on whether appeals may have been preferred by any of the convicted Public Officers on their respective cases (copy enclosed).

No	Name	Case No.	Public Institution	Position
1.	John Ndirangu Kariuki	25/02 NAIROBI	Nairobi City Council	Mayor
2.	Gideon Osoro Makori	481/02 NAIROBI	Ministry of Agriculture	Personnel Officer
3.	Margaret Wangui Gachara	ACC 279/04 NAIROBI	National Aids Control Council	Director
4.	Francis Zaasita Menjo	CR 1927/06 NAIROBI	Rift Valley Institute of Science & Technology	Principal
5.	Evans Mukolwe	ACC 5/06 CR 170/29/06 NAIROBI	Kenya Wildlife Service	Director
6.	George Fred Onyango	ACC 4372/06 CR 141/64/64 NAIROBI	Ministry of Lands	Senior Lands Officer
7.	Francis Oyugi	ACC 20/07 CR 141/167/07 NAIROBI	Kenya Wines Agency	Managing Director
8.	John Njenga Ndug'u	ACC 20/07 CR 141/169/07 NAIROBI	Kenya Wines Agency	Finance Director
9.	John Faustin Kinyua	ACC 31/08 CR 141/457/08 NAIROBI	Kenya Re-Insurance Corporation	Finance Director
10.	Charles Gichane	ACC 31/08 CR 141/457/08 NAIROBI	Kenya Re-Insurance Corporation	
11.	Silvester Mwaliko	ACC 8/05 NAIROBI	Ministry of Home Affairs	Permanent Secretary

While the Commission sought to confirm that none of those named may have had their convictions overturned on Appeal, the Commission was not able to reach each of the individuals to cross-check the information. Generally, in accordance with Article 99(2)(h) of the Constitution, the persons listed are ineligible to run for any elective office, or to hold any other public office, for having been found to have misused or **abused** public office. Unless any one person produced an authentic certified order of acquittal on appeal issued by the Superior Court, we Recommend that you so hold.

b) PUBLIC OFFICERS WHO ARE UNRESPONSIVE, AND WHO HAVE ENGAGED IN MISBEHAVIOUR AND OTHER MALFEASANCE IN THE PUBLIC DOMAIN

As part of its complaints handling process, the Commission receives and processes complaints ***suo motu*** or from the public against public officers. Two of the public officers against whom complaints of misbehaviour and unlawful conduct have been processed are Hon. Ferdinand Waititu and Hon. Gideon Mbuvi, the Members of Parliament for Embakasi and Makadara Constituencies respectively. The particulars of the complaints against the Hon. Members of Parliament were as follows:

Hon. Ferdinand Waititu was accused of hiring about 50 unruly youth to forcefully take a plot (LR 126/49) in Kamulu Area owned by **Nile Road Primary School** on 25th August 2012 when he attempted to seize the land and ordered the youths, while also present, to demolish the perimeter wall. This resulted in the destruction of property, demolition of the Perimeter Wall, theft of the fencing materials and the contractor's personal effects and roughing up of the contractor. The matter was reported to the Police who were reluctant to take action against Hon. Waititu. When the Commission got seized of the matter, we wrote to the Police to take the appropriate action in relation to the crimes allegedly committed by Hon. Waititu and the others regarding the matter. The Commission also found the allegations serious as to amount to violation of the Constitution, and the Commission on Administrative Justice Act and the Public Officer Ethics Act in relation to public administration. Accordingly, the Commission also wrote to Hon. Waititu to confirm the veracity of the allegations

against him and respond as to why a finding of malfeasance in public administration and unsuitability to hold public office should not be made against him. Hon. Waititu did not respond whereupon the Commission wrote appropriately worded reminders with warnings of dangers of unresponsiveness. To date there has not been any response from the Honourable Member.

The Commission, while considering the matter above, also took note of the various actions of the Honourable member, which are in the public domain, and which clearly are inconsistent with Integrity requirement in the Constitution. These include indictments in several criminal cases ranging from corruption, hate speech, incitement to violence to disobedience of the law.

In Criminal Application Number 35 of 2007 (Nairobi), Hon Waititu was charged with the offence of soliciting and receiving a benefit contrary to Section 39(3)(a) of the Anti-Corruption and Economic Crimes Act. In addition, he allegedly attempted to bribe an officer of the Kenya Anti-Corruption Commission, as it then was, with Kshs. 23,000 for which he was subsequently charged.

Secondly, Hon Waititu publicly engaged in hate speech, inciteful to violence against the Police and certain communities and disobedience disdain for the law and participated in violence within the City of Nairobi, particularly, in Embakasi Constituency for which he has always been arrested and charged in Court. In September 2012, he made a statement against the Maasai Community in Kayole Estate inciting his constituents to violence. Indeed, his conduct made H.E. the President to relieve him of his duties as the Assistant Minister for Water and Irrigation. Similarly, on 13th December 2010, Hon Waititu displayed hooliganism by leading his constituents in KPA Slum in Embakasi Constituency to attack the Police and allegedly uttered the words 'protect the eviction and throw stones at the Police.'

While there are allegations, some of which are still pending in Court, the frequency, publicity and nature of the same are such that the Commission takes "Judicial Notice" to declare that Hon. Waititu's absence of integrity is of public notoriety.

Regarding Hon. Gideon Mbuvi (alias Sonko), he was accused of misbehaviour and bribery in relation to an alleged physical assault on the National Assembly Senior Sergeant-at-Arms, Mr. Harun Omon Okal at the Parliament Buildings. Hon. Mbuvi was himself shown publicly stating in the media that he met Mr. Okal at the Intercontinental Hotel where he bribed him with Kshs. 25,000 via mobile money transfer for him to drop the complaint he had made against the Member of Parliament at the Parliament Police Station on 11th October 2012. Hon. Mbuvi further claimed that he had recorded the conversation between him and Mr. Okal at the Intercontinental Hotel during which the bribe was given. Mr. Okal was thereafter reported to have withdrawn the matter from the Police Station on 18th October 2012.

When the Commission got seized of the matter, we found the allegations serious as to amount, if true, to violation of the Constitution, the Commission on Administrative Justice Act, the Leadership and Integrity Act and the Public Officer Ethics Act in relation to public administration. Accordingly, the Commission also wrote to Hon. Mbuvi to confirm the veracity of the allegations against him and show cause why a finding of malfeasance in public administration and unsuitability to hold public office should not be made against him. Hon. Mbuvi did not respond whereupon the Commission wrote a reminder requesting a response lest he be found culpable of malfeasance in public administration and unsuitable to hold public office. Once again, there was no response from the Hon. Mbuvi.

In addition, Hon. Mbuvi has been not only arraigned in Court in several criminal charges relating to fraud, but also publicly conducted himself in a manner that demeans the office he holds as a Member of Parliament. For instance, he has been charged in Criminal Courts in Nairobi and Mombasa with obtaining money by false pretences. In addition, he was also charged in Court with assault after he allegedly beat up a Police Officer, Chief Inspector Linus Shimoli at the Departure Lounge of the Jomo Kenyatta International Airport in 2011. Secondly, Hon Mbuvi has displayed disobedience of the law (Court Orders) and conducted himself in a demeaning manner such as the time he rolled himself several times on the streets of Nairobi and hit a brick wall several times in full glare of the public.

As with Hon. Waititu, While Hon Mbuvi's cases may be pending and cannot invite disqualification on account of conviction, the issue of unresponsiveness to the Commission's correspondence, combined with his theatrical display of contempt of law and order have led the Commission to take "Judicial Notice to recommend that Hon. Mbuvi does not meet the Constitutional Standards of Integrity in public and private conduct.

Based on the foregoing, the Commission discussed and unanimously resolved to recommend that the two Members of Parliament, that is, Hon. Ferdinand Waititu of Embakasi Constituency and Hon. Gideon Mbuvi of Makadara Constituency, be held unsuitable to hold

public office and barred from participating in the General Elections scheduled for 4th March 2013.

c) PUBLIC OFFICERS FOUND CULPABLE OF MALFEASANCE IN PUBLIC ADMINISTRATION, INEPTITUDE, INEFFICIENCY *et al*

This category constitutes the former Commissioners of the defunct Electoral Commission of Kenya (ECK) which mishandled the 2007 General Elections whose outcome led to the post-election violence leading loss of over 1,300 lives, massive displacement and destruction of property. The mismanagement of the elections by the Commissioners is well documented in the Report of the Independent Review Commission headed by Justice Johann Kriegler, commonly known as the Kriegler Commission. The Kriegler Commission found that ECK mismanaged the elections, the particulars of which are captured in the IREC Report as follows:

i.) That ECK failed to provide leadership in the management of the General Elections in 2007 thereby contributing to a materially defective electoral process and outcome;

ii.) That ECK displayed institutional incompetence and lack of professionalism in managing the General Elections of 2007 and was, therefore, largely to blame for the mistakes and misunderstandings surrounding the elections;

iii.) That despite knowing the suspicions surrounding the General Elections of 2007, ECK did not intervene or investigate the various claims made to ensure sound management of the elections;

iv.) That ECK failed to ensure the integrity of the elections especially the counting, tallying and results announcement processes;

v.) That ECK's mismanagement of the electoral process was confirmed by the Chairman, Mr. Samuel Kivuitu when he stated that he was not happy about how the election was managed and that he did not know who had won the presidential elections;

vi.) That at least Four of the Commissioners led by Mr. Jack Tumwa, later admitted to the mismanagement, but sought to distance themselves. It is instructive to note that they only did this well after the event; and

vii.) That as a result of the mishandling the elections by ECK, Kenya regressed in its democratization and governance processes.

The Commission considered the IREC Report and concluded that it raised issues of grave concern relating to public administration. Indeed, the consequences of the mismanaged of 2007 General Elections by ECK as captured in the Report expressly amounted to abuse of power, unlawful conduct and impropriety in public administration. Moreover, it has been clear that the mismanaged of the elections and the subsequent events led to democratic regression in Kenya. While the Commission is cognizant of the processes that have been undertaken subsequent to the events of the 2007 General Elections, it is important to note the Constitutional and Statutory provisions on Leadership and Integrity in the Public Service whose implication would be that individuals who mismanaged the General Elections of 2007 be found unsuitable to hold public office.

Secondly, the provisions of Article 99(2)(b) on the qualification and disqualification for election as member of Parliament, bars any person who had held office as a member of the Independent Electoral and Boundaries Commission from contesting for election as a member of Parliament at any time within the five years immediately preceding the date of the election. The Commission believes that this provision would equally apply to the former Commissioners of ECK as the principle applies with equal force, except to the extent that the former ECK is not expressly mentioned in the New Constitution, only owing to the fact that by the time of writing the Constitution, their name had already changed even in the previous Constitution.

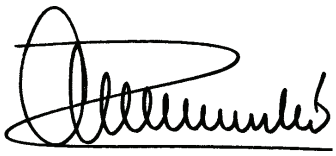
The following is the list of the former Commissioners of ECK at the time of the 2007 General Elections:

1. Mr. Samuel Mutua Kivuitu
2. Mr. Kihara Muttu
3. Mr. Jeremiah Matagaro
4. Mr. Jack Tumwa
5. Ms. Anne Wambaa
6. Mr. Muturi Kigano
7. Mr. David Alfred Njeru Ndambiri
8. Mr. Samuel Arap Ngeny
9. Ms. Anne Mwikali Muasya
10. Mr. Luciano Riunga Raiji
11. Mr. Joseph Hamisi Dena
12. Ms. Felista Naetu Ole Churie
13. Mr. Samuel Nyanchama Maugo

14. Ms. Mildred Apiyo Owuor
15. Mr. Joseph Kipruto Sitonik
16. Ms. Pamela M. Tutui
17. Mr. Shem Sanya Balongo
18. Mr. Ibrahim M. Abdi
19. Mr. Daniel Waisiko Wambura
20. Mr. Raymond Njenga James
21. Mr. James Mwenda Thiribi
22. Ms. Rachel Wanjala Kileta

The Commission has endeavoured to ensure due process in processing and compiling this list to secure the rights of above named individuals. The Commission believes that this is part of the process of ensuring good governance and servant leadership with integrity in Kenya in line with the new constitutional dispensation.

DATED this **14th** Day of **December 2012**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.31 ADVISORY OPINION ON THE APPOINTMENT OF MEMBERS OF THE NATIONAL LAND COMMISSION

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public.

Your Excellency, The Rt. Honourable Prime Minister, allow me to take the opportunity to express our concerns as relates to the appointment of commissioners to the National Land Commission. The Commission is particularly concerned by the delay in making appointments to the National Land Commission even after the matters that were in High Court were determined and concluded on 12th October 2012 by Justice David Majanja. The cases filed in High Court were HCCC Nos. 266 of 2012, 373 of 2012 and 426 of 2012 all of which are no longer pending before the court.

Your Excellency, The Rt. Honourable Prime Minister, I would like to draw your attention to section 8 of the First Schedule of the National Land Commission Act, 2012 which provides for the procedure for appointment of the Chairperson and Members of the National Land Commission. The Section provides that:

> The President shall, within seven days of receipt of the approved names from the National Assembly, by notice in the Gazette, appoint the Chairperson and Members of the Commission approved by the National Assembly.

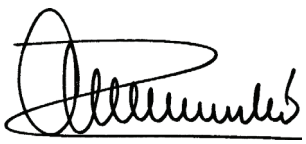
Your Excellency, The Rt. Honourable Prime Minister, the cited section provides the timeline and clarity to the process of appointment of the Chairperson and Members of the National Land Commission. We are of the view that since there were cases before the High Court relating to the appointment, this Section was not operational until after the determination of the matters before the High Court. However, with the final determination of all the cases relating to the appointment of the Chairperson and Members of the National Land Commission on 12th October 2012, the timeline under Section 8 of the First Schedule became operational.

Your Excellency, The Rt. Honourable Prime Minister, it is clear that the period after the final determination of the Court cases has now gone beyond the seven days provided by the Act.

Your Excellency, The Rt. Honourable Prime Minister, we take note of the important role that the National Land Commission has been empowered to play in our new constitutional dispensation, particularly, in relation to land matters. In our view, further delay in making appointments to the Commission might not only constitute a breach of the Constitution, but may also constitute an obstacle to speedy realisation of justice in land related claims. This is especially necessary in the build-up to the General Elections in March 2013.

In the premises, it is our humble request that the Chairperson and Members of the National Land Commission be appointed through gazettment in line with the Constitution and the National Land Commission Act, 2012 as a matter of urgency.

DATED this **21st** Day of **November 2012**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.32 ADVISORY OPINION TO THE PRESIDENT AND THE PRIME MINISTER ON THE ISSUE OF COUNTY COMMISSIONERS

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

In recent times, controversy has arisen on the legitimacy of the 47 County Commissioners deployed to the Counties by the President. Further and deeper controversy has also ensued following the failure by the Ministry of Internal Security & Provincial Administration to comply with the Orders of the High Court, and the decision to engage a private lawyer to pursue an appeal on behalf of the Ministry. This situation has left Kenyans confused, and the concerned County Commissioners wallowing in nothingness. It is this state of affairs that has occasioned our invocation of the advisory jurisdiction in S.8 (h) of the Commission on Administrative Justice Act, which enables us to provide advisory opinions and proposals on issues of Public Administration, including necessary processes and procedures.

In chronology, it will be recalled that the President appointed some 47 persons as County Commissioners on 11th May 2012. On 23rd May 2012, those appointments were revoked, and a new Gazette Notice published "**deploying**" the same 47 persons as County Commissioners. Two suits were filed challenging the "**appointments**" and/or "**deployments**". On 29th June 2012, the Hon. Justice Mumbi Ngugi rendered judgment (HCP. No.208 of 2012 and HC Misc. No.207(2012) as follows;

i.) ***The President had no power to appoint or deploy County Commissioners as he purported to do under Gazette Notice No.6604 of 11th May 2012 and Gazette Notice No.6937 of 23rd May 2012.***

ii.) ***Even if the President had had power to make such appointments or deployments, the deployments violated Article 10 and 27 of the Constitution.***

iii.) ***The purported deployment of County Commissioners by Gazette Notice No.6937 of 23rd May 2012 was therefore unconstitutional, null and void.***

Quite apart from the specific Orders above, it is our considered view that the judgment is important for a number of reasons

a) It restates the important principle that all, including the Presidency, are subject to the Constitution and the Law, and their actions amenable to review.

b) It invokes Article 27(8) of the Constitution on the need to observe the one third gender requirement in public appointments.

c) It underscores the requirement that public appointments should be open and transparent, and the criteria used clear and objective.

d) It highlights the requirement for public participation in Senior public appointments, and the need to provide an opportunity for the public to input on the suitability of the proposed appointees.

e) It finds that the President lacks the power to appoint or deploy the County Commissioners and ventures that even if he did, he would have needed to consult the Prime Minister. Once again, the Perennial question of "**Consultation**" finds judicial approval.

It will be noted that the judgment does not however make any finding on the suitability of the named County Commissioners, nor does it make any definite finding on whether the Public Service Commission, or any other entity, can legitimately "**appoint"** County Commissioners.

First, it is our unequivocal advise and position that Court Orders must be respected without let or hindrance. Thus, whatever other action is to follow, the Office of the President must immediately recall

the deployed County Commissioners by Gazette Notice.

That said, we note that the Attorney General advised against proffering an Appeal, which advise appears to have been ignored, and a private Advocate engaged to prosecute the Appeal. It is our view that while the Attorney General is the Principal Legal Adviser to Government, where his advise is not accepted, there lies a residual obligation to nevertheless represent Government in any appellate proceedings. While the Minister for Internal Security and Provincial Administration can legitimately directly instruct an Advocate, having been named as a Respondent in a Judicial Review Application, we believe it is wholly improper that an important public administration matter should be treated as if it were a private matter of the Minister only!

Is it advisable to pursue the Appeal? The answer is **yes**. First, the matter must be settled right to the highest Court of the Republic, whether the President, now or in future, can "**appoint**" or "**deploy**" County Commissioners, or other National Government representative by whatever name called. Further, there are other relevant issues beyond the appointment of County Commissioners which need to be settled by the Supreme Court. These are;

a) Whether Article 27(8) on the gender principle is **progressive** (see HCP No.102/2011) or **Instantly directory** (KSM HCP No.44/2011). What does the requirement on the state " to do its utmost" (Pg.17 of Judgment) and to "make an effort" (pg.17of Judgment) mean in the context of the Constitution? A definitive settlement of the matter will have a direct implication on all other appointments, be it of Cabinet Secretaries, Ambassadors, Principal Secretaries and all other positions. This matter should be settled by clear Judicial Interpretation now and not await nullification after appointments.

b) An examination of the import of the powers of the Presidency and the Executive in the transitional period. Towards this end the Court should determine whether the application of the provisions of the former Constitution is restricted to the provisions mentioned in Section 3(2) of the Sixth Schedule to the Constitution, or whether other provisions apply by virtue of Section 6, and 12 of the same Schedule. It will be recalled the same issue arose on the earlier High Court case on the date of elections but has not received reconsideration on Appeal.

c) The impact the findings in this case would have on the issue of the election date and the question whether the President has powers to dissolve Parliament.

d) To examine the instance, import and mode of "Consultation" between the Principals, and lay down guidelines so as to avoid recurrent disagreements on whether, and how, such consultations were had.

e) To elucidate and define what constitutes transparent recruitment.

f) Whether appointments of all officers contemplated under Article 132(2) of the Constitution, including Principal Secretaries and Ambassadors, are subject to Parliamentary approval, and the place of public participation in the appointments.

g) Whether, to the extent that the High Court has determined that the President lacked powers to appoint the County Commissioners under the Constitution, legislation can be enacted to grant him such powers?

WAY FORWARD

i.) First the Office of the President should recall the deployed County Commissioners.

ii.) Further, the Appeal should be pursued, preferably by the Attorney General on behalf of Government and the Ministry of Internal Security and Provincial Administration, for the reasons aforestated.

iii.) If, for any reason, the Attorney General cannot prosecute the Appeal, he should nevertheless invoke the Advisory jurisdiction of the Supreme Court under Article 163(6) for a determination on these matters, to the extent that deployment of National Government Officers to the Counties is a matter concerning County Government.

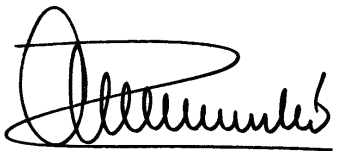
iv.) It is more desirable to have newly appointed representatives of National Government at the County level, who are well trained on the limits of their powers under Schedule Four, and the need to respect County government, than to continue having Provincial Commissioners without Provinces, or District Commissioners with old archaic illusions of imperial powers. Thus, in accordance with Article 234(2), the Public Service Commission should be tasked to recruit persons to be deployed as County Commissioners/representatives while observing the principles of gender representation, Regional

balancing, transparency and public participation. In doing so, the eligibility can still be restricted to those within the "scheme of Service of administrators."

v.) In this process, the Public Service Commission would incorporate the Transitional Authority, representatives of the Office of the two Principals, and other necessary bodies. After all, public administration should no longer be a secretive authoritarian affair, but one of stewardship, consultation, and accountability.

vi.) Meantime, Parliament should fast-track enactment of legislation to amplify schedule Four, and guide the mode by which the restructured Provincial Administration will **accord** with devolved government, and the modes of **respecting** devolution. This must be done urgently before elections for County governments. In this, process, the Transition Authority recently sworn-in must take a pivotal role in accordance with section 3(a) and 7(2)(a) of the transition To Devolved Government Act, 2012.

DATED this **24th** Day of **July 2012**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.33 ADVISORY OPINION TO THE CHAIRPERSON AND MEMBERS OF THE TRUTH, JUSTICE & RECONCILIATION COMMISSION

The Commission on Administrative Justice (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59 (4) and Chapter 15 of the Constitution of Kenya, as read with The Commission on Administrative Justice Act, 2011. Under Article 252(1) (b) of the Constitution, the Commission has the powers necessary for conciliation, mediation and negotiation. Further, Article 59 (h) and (i) of the Constitution which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration.

Under Section 26(c), the Commission is empowered to adjudicate on matters relating to administrative justice. Section 29(c) grants the Commission power to investigate any matter arising from the carrying out of an administrative action, upon a complaint to the Commission, or on its own initiative. Under section 2 (1),the Commission is empowered to deal with a decision made or an Act carried out in public service, or a failure to act in discharge of a public duty required of an officer in public service.

In light of the above Constitutional and Statutory mandate, the Commission, of its own motion invited the TJRC Chair Amb. Bethuel Kiplagat and the TJRC Commissioners, for a mediation process. Owing to reluctance by some of the parties, the mediation process did not achieve fruition, and the Commission therefore elected to consider the matters and render an Advisory Opinion.

At the outset, we wish to state that we have duly warned ourselves that certain aspects of this matter have been the subject of judicial proceedings, and have taken due regard of such pronouncements. It is important to note that this opinion is not a result of investigations conducted by the Commission. In any event the matters that were before the Courts have been concluded and the issues that fell for determination have been determined. This Opinion is therefore picking up from the resultant effect of the judicial decisions insofar as it relates to Administrative Justice and Public Administration, and to offer possible avenues for completion of the TJRC tasks without interferences with the Courts' Orders.

The TJRC is a Statutory Commission established by the Truth Justice and Reconciliation Act, Act No. 6 of 2008 (The TJRC Act). The TJRC Act was enacted after considering the fact that there have been gross violations of human rights, abuse of power and misuse of public office, and that there was need to give the people of Kenya a fresh start where justice is accorded to the victims of injustice and past transgressions. The framers of the TJRC Act were conscious of the fact that some of the transgressions against the Kenyan people could not be properly addressed by our judicial institutions due to procedural and legal hindrances. The Commissioners of the TJRC were duly appointed in accordance with the relevant provisions of the TJRC Act and no issues arose as to the suitability of any of the Commissioners at the time. Thereafter, an issue arose as to the suitability and/ or credibility of the Chairperson of the TJRC continuing to serve as such. The dispute ended up in Court through **Misc. App No. 470 of 2009 Republic vs. Truth Justice & Reconciliation Commission and another Ex-Parte Njeru Kathagu and 9 others.** In this suit the ex-parte Applicants alleged that:

a) Amb. Bethuel Kiplagat was unfit to be appointed as a Commissioner and Chairman of the TJRC on account of his past record as he was alleged to have been involved in defending torture, abuse of judicial process and policies of dictatorship in Kenya during the period he served as a diplomat and as the Permanent Secretary in the Ministry of Foreign Affairs.

b) TJRC Act specifically excluded holders of public office, both serving and retired, from membership of the TJRC because the actions of public officers are the subject of the investigations being undertaken by the TJRC and therefore the forwarding of the TJRC chair's name for appointment to the TJRC was therefore against the spirit and letter of the TJRC Act.

(c) The Oath of Office taken by the TJRC Chair was null and void as it was taken before publication of the notice of his appointment in the Kenya Gazzette.

In short, the Applicants were questioning the recommendation by the Selection Panel and nomination of Amb. Bethwel Kiplagat for appointment as Commissioner and Chairman of the TJRC. These allegations were also supported by a section of members of the public including a section of the civil society who questioned the suitability of the TJRC Chair to continue as such.

The Applicants sought an order of *Certiorari,* to quash the "Oath of Office" of Amb. Bethuel Kiplagat on account that it was irregularly administered and that the Selection Panel that proposed his name for appointment was not properly constituted. The Applicants contended that the Chief Justice had administered to the Chairman of the TJRC the oath of office on 3rd August 2009 before the appointment or publication on the 14th August 2009 which was done vide Gazette Notice Number 8737, and therefore it was irregular and called for questioning.

The Court found that according to the Gazette Notice, the appointment was made on the 22nd July 2009 before the oath of office was administered and it was only the publication that was done on the 14th August 2009 and therefore declined to grand the order of C*ertiorari* by holding that "there was nothing wrong with the publication of the notice of appointment after administrating the oath". It was also found that the selection panel was properly constituted.

The second prayer sought was that of *prohibition*, to prohibit Amb. Bethuel Kiplagat from running the offices of the TJRC as Chairman or participation in any way in the affairs of the TJRC. The Court looked at the jurisprudence that informs the issuance of such an order of *prohibition*, and found that the remedy of prohibition as sought by the Applicants was not available to them. The Application was dismissed with costs on the 28th November 2011.

As this matter was pending litigation, Amb. Kiplagat had joined the other Commissioners and signed a letter requesting the establishment of a tribunal to investigate the allegations against him. This was done on the 12th of April 2010 through a unanimous decision by TJRC. On 10th December 2010, the Chief Justice appointed a tribunal under Gazette Notice Number 15894 to investigate the conduct of the TJRC Chairperson, including, but not limited to, the allegations that his past conduct eroded and compromised his legitimacy and credibility to chair the TJRC.

Amb. Kiplagat had, on 2nd November 2010 released a signed media statement welcoming the decision of the Chief Justice to appoint a tribunal. After the appointment of the tribunal, Amb. Kiplagat filed an application before the tribunal challenging its jurisdiction to investigate his past conduct. The motion was however found by the tribunal to be fatally defective and incompetent and was struck out. The tribunal also found that it had jurisdiction to inquire into the past conduct of Amb. Kiplagat. He then moved to the High Court and filed **HC MISC. CIVIL APPLICATION NO. 95 OF 2011 BETHWEL KIPLAGAT VS THE CHIEF JUSTICE AND OTHERS** and sought to challenge the proceedings of the tribunal by way of Judicial Review. The matter came before His Lordship Justice Muchelule to determine whether to grant Leave, and whether the Leave granted to institute the proceedings should operate as a Stay of the proceedings before the tribunal. The Judge held that the Leave should operate as a stay after taking into account the matters that the tribunal was going to investigate. Nonetheless, the Judge did make some observations obiter, which we shall make reference to later in this Opinion.

This matter was however withdrawn by Amb. Kiplagat on the 1st day of December 2011. In the meantime, the tribunal's timeline had expired before it had released its report which prompted the TJRC to institute **JR CASE NO. 7 OF 2012 THE TRUTH JUSTICE AND RECONCILLIATION COMMISSION VS THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA AND BETHWEL KIPLAGAT**. The Applicant sought an Order of *Mandamus* compelling the Chief Justice to appoint a tribunal pursuant to Section 17 (2) of the TJRC Act. In the alternative, they sought an Order of Mandamus compelling the Chief Justice to reconstitute the tribunal appointed on 2nd December 2010 and an Order of *Prohibition* to prohibit/restrain Amb. Kiplagat from acting and or resuming office as Chairman and Commissioner of TJRC and/or entering the offices of TJRC. It is important to note that at this point Amb. Kiplagat had since "stepped aside."

In a lengthy and reasoned ruling delivered on 24th December 2012, His Lordship Justice Warsame determined that the TJRC had no legal capacity or authority to bring the present application against Amb. Kiplagat. The judge also held that much as a member of the TJRC may be removed from office for misbehaviour or misconduct, the misbehaviour or misconduct must have arisen at the time the Commissioner or Chairman was in office. On the pertinent question before the court, the judge held that there is no statutory power imposed upon the Chief Justice of the Republic of Kenya to appoint a tribunal to investigate and inquire into the **past** conduct of the TJRC Chair or any other Commissioner. He also held that the former Chief Justice had no powers, authority and/or jurisdiction to appoint a tribunal to inquire into the past conduct of the Chair of TJRC. He went ahead to dismiss the Application with costs against TJRC, which costs were to be borne by the Commissioners personally.

It is clear from this rather sad and unfortunate history of the TJRC that the allegations levelled against Amb. Kiplagat were never determined upon their merits. Indeed Justice Warsame after castigating TJRC Commissioners

for filing the Application which he considered frivolous nonetheless observed at Page 32 of his ruling that **"none of the allegations have been considered, investigated and determined".** But it is equally clear that those allegations, insofar as they relate to alleged conduct before appointment, cannot be legally used to bar Amb. Kiplagat from occupying the office of chair to the Commission.

After the aforementioned Ruling, Amb. Kiplagat returned to office to conduct his duties as the Chair of TJRC. He did not get a warm and generous reception from the rest of the Commissioners resulting in a standoff between the two. The other Commissioners were of the view that since the matters against Amb. Kiplagat had never been determined upon their merits, he could not sit and participate in the preparation and pronouncement of the TJRC Report.

Following this stalemate, the Commission, wearing its conciliation hat, sought to provide a forum for mediation between the two parties. Amb. Kiplagat attended to the Commission's offices on the 5th March 2012 and in a lengthy discussion lasting almost three hours gave his points of view of the whole matter. He agreed in the said meeting, to a reconciliation and mediation process to be steered by the Commission.

The other Commissioners of TJRC were also invited to a meeting with the Commission on the 6th March 2012. They elected to send the Chief Executive Officer, Mrs. Patricia Nyaundi who, after explaining that the Commissioners sent apologies as they were having formal hearings, also gave an account of the position as Viewed by the TJRC Commissioners. What followed were formal letters from the Commission dated 6th March 2012 addressed to Amb. Kiplagat and the Chief Executive Officer of TJRC, seeking formal concurrence of both Amb. Kiplagat and the other Commissioners to a mediation process. On the 14th March 2012, the Commission received a letter dated 12th March 2012 from the Chief Executive Officer of TJRC Mrs. Patricia Nyaundi informing the CAJ that the other Commissioners were consulting on the contents of the Commission's letter of 6th March 2012 and would as soon as possible revert to the Commission. The Commission has since not received further communication from her. On his part, Amb. Kiplagat called the Commission's offices on the 9th March 2012 and politely declined engaging in any further processes concerning the matter since, he noted, he was now settled in the TJRC offices and therefore saw no need of engaging in the mediation intended by the Commission.

In light of the Commission's powers and functions as already highlighted, and in view of the clear reluctance to engage in mediation by the parties, the Commission elected to switch from its mediative role under Section 8(f), 26 (c) and 29(2) to its Advisory role under section 8 (h) of the Commission on Administrative Justice Act 2011. Thus, to the extent that Amb. Kiplagat moved to resume office on the one hand, while the rest of Commissioners are determined to thwart his move on the other hand, these constitute "action" and "omission" respectively as defined in Section 2 (1) (a) and (b) of the Act. In the interests of the country, the Commission thus proceeds to render this Advisory Opinion as mandated by law.

The Commission has with abundant caution and care, considered the facts relating to this matter and the effect that the continuing stalemate would have on the integrity of the TJRC report due to be released. We have also carefully analyzed the judicial pronouncements that have been made concerning some aspects of this matter. Nonetheless, whilst the Commission respects the decision of the Courts and concurs with the basis of the decision therein, the same do not preclude the Commission from making its Recommendations from the perspective of public administration.

It is our view that the cumulative Court interventions have blurred the determination of a very important question, namely, whether Amb. Kiplagat, in light of the allegations levelled against him concerning his past conduct, is suitable to hold office as Commissioner and Chair of TJRC. The judicial pronouncements while sound in law, have effectively stopped inquiry and determination of the said question. Indeed, the law is clear and the Court is right on the question of which period the tribunal may investigate the conduct of the Chairperson. It cannot be the period prior to the enactment of the TJRC Act and before his appointment. However, the Integrity of the outcome of the TJRC's report must be protected and guarded in view of the enormous task that has been granted to the TJRC.

In our view, the contest is one between Legality and Integrity. While the legality favours the return of the Amb. Kiplagat to TJRC, it is up to the Commission itself to protect the integrity of the process. The question as to whether Amb. Kiplagat should participate in the remaining process of TJRC is a question not of legality but of integrity. What effect would he have on the integrity of the report if he substantively participated in its preparation?

The question is not about who is right in law but what

effect his participation is going to have on the strength of the report? We reiterate and agree with the observations that had been made much earlier by Justice Muchelule in HC Misc. No.95 of 2011 which we quote below *in extenso;*

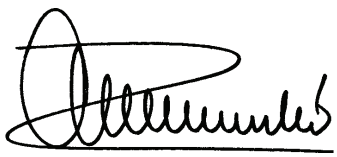
"**For me, the applicant is faced with a serious moral issue. His appointment was on the basis that his conduct, character and integrity were beyond reproach, and that he was going to be an impartial arbiter in whatever proceedings that were going to be conducted by him. It was expected that he was not involved, implicated, linked or associated with human rights violations of any kind or in any matter which the Commission is supposed to investigate. But now, he is faced with a situation where his past has allegedly been dug out and his own Commission may very well be seeking to investigate him. The issue is not whether the allegations being levelled against him are true. What is material is that the Commission will want to investigate the circumstances surrounding the death of Robert Ouko, the Wagalla Massacre and the Ndung'u Report on illegal/irregular allocation of public land and in each case he is being adversely mentioned. He cannot sit in judgement when the issues are being discussed. Justice will cry if he were allowed to sit in judgment, be a witness and an accused, all that the same time. My advise is that he should do the honourable thing."**

We agree fully that Amb. Kiplagat cannot be a judge in his own cause. We further observe that Amb. Kiplagat falls on the right side of the Law but on the wrong side of Integrity. We therefore advise as follows:

1. That Amb. Bethuel Kiplagat should be allowed to return and sit in his office in accordance with the Court Orders.
2. That having assessed the time left within which the TJRC is required to prepare and submit its report *vis a vis* the time it would take for any appeal filed by the TJRC to be determined, it would be ill advised for the TJRC Commissioners to believe that such determination will be made in time before preparation of their Report.
3. That Amb. Bethuel Kiplagat should not participate or interfere with the preparation of the TJRC report since such participation may have a negative effect to the acceptance of the Report. He should however be given an opportunity to review the report within a short time and to script an addendum to the report wherein he may agree or give his dissenting opinion. This is precented. In the Report of the Independent Electoral Review Commission (IREC or Kieggler Commission), two Commissioners duly expressed their dissent, and reasons thereof, which was included as an addendum to the report.
4. That Amb. Kiplagat be paid the entire difference in salary for the period in which he had stepped aside since he was on half salary.
5. Amb.Bethuel Kiplagat should however, in a show of good faith, waive the costs that had been granted to him by the Courts in the judicial processes between him and TJRC. Indeed, Amb. Kiplagat had indicated to the Commission that he was not keen in pursuing the costs granted to him by the Courts and only wanted reconciliation. If, however, he should elect not to do so, it would be worth pursuing an Appeal in light of S.32 of the TJRC Act which grants immunity from personal liability.
6. It has also not escaped our attention that the afflictions in TJRC have also been the subject of political interference. A threat by a section of Rift Valley Members of Parliament to reject the report of the TJRC if Amb. Kiplagat is excluded in the remaining process is unfortunate since it demonstrates sectarian support which ultimately undermines Amb. Kiplagat's authority. Seeking sectarian support by Amb. Kiplagat or any of the Commissioners, will only seek to erode the integrity of the Report.

We do observe that the hardships experienced by the TJRC have struck a sad and solemn note in public administration in Kenya. It is ironical that the very institution established to achieve lasting peace and harmonious co-existence among Kenyans, by providing for them a forum to discuss such matters freely and in a reconciliatory manner, should be the same one engulfed in wrangles. We believe the TJRC Commissioners have the courage, wisdom and ability to pull through this task, and we invite them to do so.

DATED this **12th** Day of **April 2012**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.34 ADVISORY OPINION TO THE SALARIES AND REMUNERATION COMMISSION ON THE PROPOSED SALARY STRUCTURE FOR GOVERNMENT OFFICERS

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

Having carefully studied the proposed structure, our observations are as follows;

i.) If the intention of the structure is to signify levels of respective offices as to guide determination of salaries and benefits, it hopelessly fails in that intention. The structure places “boxes” in “approximate” lines/levels and, in instances, presents some as a “continuum”. Simply put, you cannot quite tell where each “box” belongs.

ii.) The Constitution maintains a clear line of authority between the three traditional arms of Government, and the Independent Constitutional Commissions and offices which forms the “fourth arm” of Government, answerable to the people. The respective heads of the three arms should be placed at more or less the same level.

iii.) In my opinion, it is better to present the various offices within levels/bands, even while appreciating there would be variations within those bands/levels. Thus, I would classify the offices as follows;

A) LEVEL ONE

- The President
- The Chief Justice
- The Speaker of The Senate
- The Speaker of The National Assembly

Note:

The design of the Constitution is such that there is no upper House or Lower House. Each house has specific and separately important functions, and the respective Speakers’ salaries and benefits should be comparable.

B) LEVEL TWO

- Cabinet Secretaries
- Attorney General
- Chief of Defence Forces
- Inspector – General of Police
- Director, National Security Intelligence Service
- Director of Public Prosecutions
- Chairpersons of Full-Time Constitutional Commissions
- Deputy Chief - Justice
- Auditor General
- Controller of Budget
- Judges of The Supreme Court
- Leader of Majority
- Leader of Minority

Note:

1. In the Constitution of Kenya 2010, the office of Attorney-General has been reduced in protection, stature, power and responsibility. The benefits of that office should mirror that of the other Cabinet Secretaries.
2. The Inspector-General of Police, unlike the Deputies, is appointed for a single term of Four Years [A.245(6)]. Unless the remuneration is pegged at this level, the motivation to take this office and work independently may be absent.
3. While the Deputy Chief Justice and Judges of the Supreme Court fall in this level together, there would be a slight variance in terms of benefits. Slight because there are no distinct or uniquely

additional Constitutional duties the Deputy Chief Justice undertakes beyond deputising the Chief Justice.

4. Chairs of Full-Time Constitutional Commissions fall here not only because they essentially collectively head the "fourth arm" of Government, but also owing to the high qualifications required and restriction from holding "any other office or employment for profit, whether public or private" A.250 (6) (b).

5. The leaders of Majority and Minority in Parliament properly fall in this category as the Constitution identifies the "pecking Order" within Parliament as the Speaker, then Leader of Majority, and then Leader of Minority [A.108(4)].

C) LEVEL THREE

- Secretary to the Cabinet
- Deputy Speaker to the Senate
- Deputy Speaker to the National Assembly
- Judges of The Court of Appeal
- Vice-Chairpersons of Full-Time Constitutional Commissions
- Chairpersons of Parliamentary Committees
- Principal Secretaries
- Governor of Central Bank
- Chief Registrar of The Judiciary
- Clerk of Senate
- Clerk of The National Assembly
- Retired President

Note:

1. Deputy Speakers fall at this level rather than the second, since they are also elected members of the respective Houses.

2. All Vice-Chairpersons of Constitutional Commissions are procedurally approved as members, and only elected as such at the first sittings of the respective Commissions. Thus, while there will be a variance in remuneration within this level, the variance should not be too substantial.

3. Retired Presidents fall in this category because it is envisaged that with observance of term limits and democratic elections we will have more retired Presidents in the Country. Since, once fixed, the benefits and privileges cannot be adjusted to their disadvantage [A.15(3)], it is reasonable to fix the same at a modest level.

4. The Chairpersons of Parliamentary Committees are quite senior in the Constitution. Indeed, up to the "Harmonized Draft", it had been stated that they would have the same status, and enjoy the same benefits as Cabinet Secretaries. This phrase was removed because it was thought it was limiting rather than enhancing their status.

However, noting that unlike Cabinet Secretaries, the number and designation of the various Committees depends on Parliament through the Standing Orders, there is a legitimate fear that Parliament may bloat the number of Committees in order to find status for a majority of its members. Thus, on account of sheer numbers, it is reasonable to put this office in level three rather than two.

D) LEVEL FOUR

- Members of Senate
- Members of The National Assembly
- Governors
- Judges of The High Court
- Principal Secretaries
- Deputy Inspectors General of Police
- Secretary To Constitutional Commission
- Commanders of The Navy, Army and Air-Force
- Members of Statutory Commissions and Oversight bodies
- Retired Deputy President
- The Chief Kadhi

Note:

1. On account of numbers of Members of the National Assembly (at least 350), Senate (68), Governors (47), it is reasonable to put members in this category. In any event, in the context of rationalisation of salaries ***vis-a-vis*** work-load, it is clear the salaries and benefits of MPs will have to reduce.

   Further, to dispel ideas of superiority of offices as between Members of Parliament, Senator and Governor, it is important the remuneration is equal. Each of these offices are important, each with its distinct functions, and none superior to the other.

2. It is important that though they are not State Officers, Members appointed to various statutory Commissions or Oversight bodies are provided for within this band, with variances depending on

level of responsibilities, consideration being had on whether Full-/time or Part-Time.

3. Secretaries to the Commissions would fit here, not only because they are the Accounting Officers, but also noting their stated Constitutional responsibilities.

E) LEVEL FIVE

- County Assembly Speaker
- Kadhis
- Principal/Chief Magistrate
- Vice-Chancellors
- Heads of Parastatals

F) LEVEL SIX

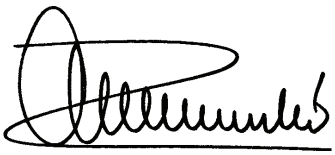
- Members of County Assembly

While the above categorisation may not be exhaustive, I believe it is indicative at least in terms of the offices specifically mentioned or contemplated by the Constitution.

I hope this may be helpful to you and would be happy to elaborate any aspects should this be necessary.

Kindly also note that the views expressed herein are my own, drawing from my involvement as a Member of the Committee of Experts, and from my own perceptions.

DATED this **15th** Day of **March 2013**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.35 ADVISORY OPINION TO THE MINISTRY OF JUSTICE, NATIONAL COHESION AND CONSTITUTIONAL AFFAIRS ON THE DRAFT LEADERSHIP & INTEGRITY BILL, 2012

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

A. GENERAL COMMENTS

1. The Bill in its preamble restricts itself to Chapter 6 of the Constitution. It should go beyond Chapter Six since the thread of good governance, leadership and integrity runs through the Constitution. It is embedded in the spirit of the Constitution. Legislation that is to give meaning to Chapter Six should therefore include Articles 1, 4, 10, 80 and 232 of the Constitution.

   In both Chapter 6 and Chapter 13 there is mention of two types of legislation. One that establishes institutions, (A.79 & 233) and another that obligates Parliament to pass a generic legislation to implement the Chapters (A.80 & 232). Article 79 and 233 provide for the legislation that establishes the Ethics and Anti-Corruption Commission and the Public Service Commission respectively.

   Articles 80 and 232(3) provide for legislation of general application. It should be noted that if the respective chapters were to be implemented and enforced solely by the EACC and PSC respectively, there would have been no need to provide for additional legislation different from those establishing them, and Article 80 and 232(2) would be rendered *otiose*. Various other Constitutional bodies have a complimentary role in enforcing integrity, and the Draft should acknowledge this.

2. We suggest to change the Title to "The Governance & Integrity Act". The title should be generic, so as to fully express the intention of the Constitution, and the draft legislation should therefore in its preamble not only be directed to State Officers, but it should also, with necessary modifications, be applicable to Public Officers, as contemplated by A.80(c). The two contemplated Bills on State Officers and Public Officers should be merged to result in one homogenous bill that provides clear standards applicable to both groups.

3. The main reason why legislation was provided for by Articles 80 and 232 (3) of the Constitution is not to replicate the prescriptions provided for by the Constitution but to give meaning to them. The bill is supposed to provide for procedures and mechanisms, and to prescribe the penalties in addition to those referred to in Article 75 (see Article 80 (a) and (b)). This bill does not live to the above expectations but largely replicates the prescriptions already provided for by the Constitution. The Bill should go further to identify the relevant body that enforces particular provisions since some of the provisions fall within the mandate of particular Constitutional Commissions established under Chapter 15.

   Further, the Bill in its design and intent mirrors the Public Officers Ethics Act 2003 which, apart from dealing with matters of less significance, preceded the Constitution in enactment and therefore cannot purport to give meaning to it. The Public Officers Ethics Act 2003 also contains provisions which were strenuously negotiated and therefore fall short of Constitutional provisions. The Bill should be bold, innovative and clear in penalties.

   In any event, most prescriptions in Chapter 6 amount to abuse of power, or prejudicial or improper conduct which would fall within the mandate of the Commission on Administrative Justice (CAJ). It would be of no benefit to Chapter 6 to leave its enforcement solely to the Ethics and Anti-Corruption Commission whose duties are investigatory and preventive, and not quite adjudicative. To put the EACC to maintain a register of gifts, or monitor improper but non-criminal private conduct of

State Officers is an unnecessary strain on the fight against corruption! Relevant Constitutional Commissions should be mandated to effect the different requirements on Leadership and Integrity.

4. The Bill in Section 3 seeks to create a Statutory Commission. In particular, the Joint Committee of the National Assembly and the Senate responsible for the ethics of members is stated to be "the Commission" for purposes of those identified offices including the Presidency and Constitutional Commissions.

   The question this begs is whether a statutory commission can oversee or superintend a Constitutional office. In our view, it would be a Constitutional fallacy, especially considering that the Constitution under Article 249 (2) grants independence to Constitutional Commissions and makes them not subject to direction or control of any person or authority. These Constitutional Commissions can however superintend each other *inter-se* and therefore there is need to re-look into Chapter 6 as read together with Chapter 13 and find which duties belong to which Commission and redistribute those tasks to the Constitutionally responsible Commissions. In any event, to create a Committee of Parliament to superintend Parliamentarians in terms of leadership and Integrity is the surest way to kill those provisions.

5. *Article 59 (h) to (k) of the Constitution provide as follows:*

   "(h) To investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice

   (i) To investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;

   (j)To report on complaints investigated under paragraphs (h) and (i) and take remedial action; and

   (k) To perform any other functions prescribed by legislation"

   These provisions, read with sections 4,8,26-30 of the Commission on Administrative Justice Act make it the Constitutional duty of CAJ to investigate any conduct in State affairs in any sphere of Government be it National or County Governments.

   If legislation were to be enacted under Article 80 which completely overlooks the CAJ, it would result in an unfortunate situation where CAJ invokes its competence under A.59(h), while another body invokes powers under A.80, resulting in a clash.

   It would not be in the interest of good governance if the CAJ would discharge its Constitutional mandate independently of the legislation contemplated under Chapter 6 and 13. It is of utmost urgency to therefore delineate the different tasks so that it is clear which task belongs to which Commission, and the modalities and penalties in the event of breach. Further, the Ethics and Anti-Corruption Commission Act has greatly eroded the power of the Ethics and Anti-Corruption Commission, and needs all possible support in carrying out its mandate generally. It is commissions such as CAJ which can use their very generous statutory provisions to breathe life into the leadership and integrity requirements of the Constitution.

B. SPECIFIC COMMENTS

1. Section 3

A Commission can only mean a Constitutional Commission under Chapter 15 of the Constitution. A statute cannot purport to create a statutory body, call it a Commission and place on it Constitutional Responsibilities, including oversight over Independent constitutional entities

2. Section 3 (2)(d)

A Joint Committee of the National Assembly and the Senate cannot be the responsible body for Members of Parliament. It would be repugnant to the rules of natural justice since members of Parliament cannot be judges in their own cause. This Section advocates for self regulation which would defeat the intent and purpose of Chapter 6, and which has not worked in the context of the wealth Declaration by MPs under the Public Officers Ethics Act.

3. Section 3 (3)

The IEBC is properly the responsible Commission for its employees and election officials. However, it is not properly suited to be the responsible Commission for Members of the County Assembly and Members of the County Executive since it would amount to bringing the Commission into the arena of excess political conflict. If the IEBC is made to discipline Members of County Government by establishing their Codes of Conduct and enforcing them, it will only work towards eroding the public confidence which is very vital considering

the primary mandate of conducting elections. This is because whatever decisions that the IEBC makes in disciplining or vetting Politicians as provided for by the Bill may be viewed from a political angle. This will bring the IEBC into disrepute yet it should be shielded from conflicts that may emanate from vetting and declaring eligibility of the political class.

The IEBC should just require candidates to have certificates from the requisite Constitutional Commissions which would then vet the candidates whether they pass the integrity test. Additionally Section 3 (3) does not include the Ward Representatives/Councillors who will form a large part of public administrators.

Section 3(4) also does not include Magistrates whereas Article 260 of the Constitution includes Magistrates in the definition of State Officers.

4. Section 10(2)

This Section is supposed to amplify and elaborate Article 76(1) of the Constitution. It is supposed to define what amounts to public or official occasion and to provide the type of gifts exempted from application. It is not to set out its own standards and supplant the Constitutional provisions.

5. Section 11

This clause should provide a definition of what amounts to gainful employment. It is pertinent to give meaning to the term since breach of the provision would attract penal sanctions and other consequences

6. Section 12

This clause mirrors the provisions of the Public Officers Ethics Act 2003 and therefore is of no use to the contemplated legislation since what the state officer is being prohibited from doing would amount to misconduct and falls within the Public Officers Ethics Act.

7. Section 13

This clause is clearly unconstitutional. Whereas Article 76(2) is **prohibitory**, and restricts a State Officer from holding a bank account outside Kenya except as may be allowed in limited cases, the Bill is instead **Permissive** and allows all such accounts provided there's notification!

This clause should just provide the exceptions to the general rule and not seek to permit what the Constitution prohibits. Disclosure cannot qualify a state officer to hold any account outside Kenya as purported!

8. Section 29 and 42

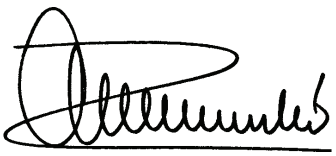
These sections are also unconstitutional for they contradict Article 35 on the Right to Access Information. This right cannot be limited by subjecting it to satisfaction of a Commission. Further, the right to access public information cannot be made subject to granting an "affected party" opportunity to make representation.

The records contemplated in these clauses are public records and not classified state information that if disclosed would threaten national security. These clauses also contradict Articles 33 and 34 of the Constitution. Clause 42 goes ahead to criminalize an act expected to be done in order to give effect to Article 35 of the Constitution!

9. Section 43

This clause should give the duty to issue certificates to all the Commission so identified and assigned the different jurisdictions under the constitution. It should not be limited to the Ethics and Anti-Corruption Commission since it cannot issue certificates in all circumstances to all persons seeking elective or appointive office. The Ethics and Anti-Corruption Commission cannot, for example, competently handle questions of dual citizenship, or payment of HELB loans and similar matters.

DATED this **20th** Day of **February 2012**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.36 ADVISORY OPINION TO THE SPEAKER OF THE NATIONAL ASSEMBLY ON THE DECLARATION FORMS UNDER THE PUBLIC OFFICER ETHICS ACT AND KINDRED MATTERS

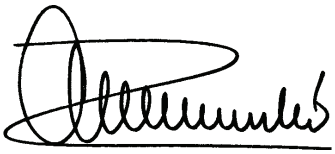
Kindly receive warmest regards from the Commission on Administrative Justice.

I received your letter of 30th November 2011 requesting filling and submission of the aforestated forms before 30th December 2011. I have duly filled the same and have the pleasure of forwarding the same to your Good Office.

Having done so, and having examined sections 2,3, 23, 26 to 39 of the Act, it appears there are no less than eight different entities to whom the declarations are to be made, with varying competencies in terms of collation, investigations and access by the public where necessary. Moreover, the Act does not appear to contemplate handling of such declarations where County elected and appointed Officers are concerned.

In light of Articles 1,35, 59 (I) (h) and (i), 249 and 252(3), and Chapter Six of the Constitution, read together with Sections 2, 8 and 26 of the Commission on Administrative Justice Act, it appears to us that the Commission on Administrative Justice is empowered to act as a single and central depository of all wealth Declaration Forms from Commissions, Independent offices, as well as the National and County Governments; to examine and investigate where necessary and to ensure ease of access to the information by the public where such a request has been made. In any event, and even if it became necessary to amend any Statutory Provisions, we believe it would be necessary in compliance with the letter and spirit of the Constitution.

DATED this **20th** Day of **December 2011**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

1.1.37 ADVISORY OPINION TO THE MINISTRY OF JUSTICE, NATIONAL COHESION AND CONSTITUTIONAL AFFAIRS ON THE DRAFT POLICY ON THE NATIONAL VALUES SYSTEM FOR KENYA

The Commission on Administrative Justice, also known as the Office of the Ombudsman, (hereinafter referred to as the Commission) is a Constitutional Commission established pursuant to Article 59(4) and Chapter 15 of the Constitution of Kenya, as read with the Commission on Administrative Justice Act, 2011. Under Article 249(1) of the Constitution, the Commission alongside others, has the mandate to protect the sovereignty of the people, while also ensuring observance by state organs of fair administrative action, democratic values and principles on which the Constitution is based. Further, Article 59(2) (h) and (i) of the Constitution, which is replicated by Section 8 (a) and (b) of the Act grants the Commission powers to investigate any conduct of State Officers, or any act or omission in Public Administration that is alleged or suspected to be prejudicial or improper, or to result in any impropriety or prejudice. Section 8(h) of the Act provides as one of the functions of the Commission to provide Advisory Opinions on proposals on improvement of Public Administration, including review of legislation, codes of conduct, processes and procedures while Section 2(1) empowers the Commission to deal with a decision made or an act carried out in public service or a failure to act in discharge of a public duty.

The Commission has carefully and anxiously considered the entire Draft Policy for the Operationalization and Institutionalization of National Values and Principles of Governance and has arrived at the following conclusions;

i.) The motivational and idea of summarising the various Constitutional Principles and Integrity requirements in well founded, and is to be commended.

ii.) Indeed, to the extent that the documents seeks to provide National Values to be considered by Courts, Commissions and Independent Offices, Government Organs and citizens generally in evaluating conduct, eligibility for office, performance and as a general guide, the Policy is timely.

iii.) Whereas we agree with the idea of "A Policy", we do not agree there are gaps as would necessitate creation of a "National Values Commission" as proposed.

iv.) The Draft proceeds on three false promises; "that Constitution has not... specifically provided for legislation to be enacted to operationalize the National Values and Principles of Governance referred to in Article 10" (Pg.59); that "the Constitution has not also bestowed the power and mandate to enforce Article 10(Pg.44) and that there is no provision for a "Coordinative function" as between Commissions in respect of the values provided. These are, with respect, incorrect assumptions:

(a) Article 10 forms the foundational Article on National Values and Principles of governance. On its face, it requires those who interpret the Constitution (principally Courts); enact legislation (Parliament) or implement Public Policy (essentially the Executive and Commissions/Independent offices) to observe the same. Clearly, the primary target groups are identifiable.

(b) Chapter Six (Leadership & Integrity) and Chapter Thirteen (Public Service) then adumbrate the principles most clearly. In both Chapters, provision of Legislation establishing an Ethics and Anti-Corruption Commission, while Article 80 requires Parliament to enact legislation establishing "Procedures and mechanisms for the effective administration of" the Chapter. On the other hand, after setting out the principles and standards, Article 232 (3) requires Parliament to enact Legislation to give effect to the Article, then, (specifically, Article 233 establishes the Public service Commission.

Considering the provisions above, as read with Article 59(1)(h), (i) and (j) of the Constitution, and the entire Commission on Administrative Justice Act, particularly Section 8 thereof, it is clear to us that the Commission on Administrative Justice Act serves as the Legislation contemplated in both Articles 80 and 232 (3) of the Constitution. What remains is agreement with the Ethics and Anti-Corruption Commission on the one hand, and the Public Service Commission, on the other, on areas of focus within the shared mandates so as to avoid duplicity.

(c) In other Chapters where the Principles are imported or restated, the Commission then shares the mandate with the respective organs as follows:

- On the Bill of Rights (Chapter Five) the primary enforcer is the Courts, but an aggrieved party may also elect to approach the Kenya National Commission

on Human Rights or the Commission on Administrative Justice in certain instances.

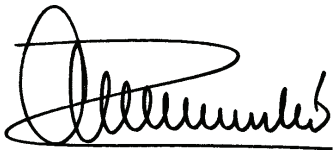
- On Representation of The People (Chapter Seven), it falls for the independent Electoral and Boundaries Commission in conjunction with the Commission on Administrative Justice when it comes to vetting for eligibility.
- On Devolution (Chapter Eleven), it falls for the Commission on Revenue Allocation and the Senate insofar as resources go, and to the Commission on Administrative Justice insofar as the National Values and Principles of governance and integrity are to be observed at the County government level.

(d) For each of their respective mandates, the Commissions supervise each other inter-se, as much as they supervise government. Thus, insofar as integrity, governance principles and national values go, the Commission on Administrative Justice has full competence and authority to demand and ensure observance of the principles as much from Government, as from all other Constitutional Commissions and Independent Offices.

(e) In our humble opinion, it is not necessary to consider setting up a **Statutory** Commission to undertake the very tasks that an existing **Constitutional** Commission is mandated to undertake. Moreover, it is a Constitutional heresy to suppose that a Statutory Commission can legally supervise and direct a Constitutional Commission being cognisant of Article 249(2).

In sum, it is our considered view that care should be taken in establishing a plethora of bodies undertaking similar functions to the extent of rendering all functionally moribund, and financially crippled. This is a caution we bet to place, even as we seek to introduce extra-Constitutional supervisory organs over the County Governments such as the proposed County Public Service Advisory Authority and like organs whose Constitutional foundation may be shaky.

DATED this **15th** Day of **December 2011**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

DETERMINATIONS

Determinations Contents

REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)
INQUIRY FILE NO. CAJ/PCPB/014/200/13

PAUL KUNGU KIMANI……..……..COMPLAINANT

VERSUS

THE PEST CONTROL PRODUCTS BOARD……RESPONDENT

DETERMINATION

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

B. THE COMPLAINT

3. The Commission received the complaint on 23rd July 2013 alleging as follows:

   a) *That prior to his deployment to the Ministry of Transport and Infrastructure, Paul Kungu Kimani worked as the Head of Accounts and Finance at the Pest Control Products Board (PCPB).*

   b) *That following his admission to Strathmore University to study an MBA Degree in 2007, he applied for a sponsorship by PCPB but his application was declined by the Training Committee.*

   c) *That on 9th June 2008, he appealed against the said decision to the Committee through the Chief Executive Officer, Ms. Gladys Njeri Maina but his appeal was only forwarded one year later after making several reminders.*

   d) *That in March 2008, the Training Committee heard his appeal and made recommendations to the Board to reconsider his sponsorship and approve it.*

   e) *That in 2009, the said Committee recommended to the Board that the complainant be given partial sponsorship but the same was not done.*

   f) *That no response was given by the Board on whether the partial sponsorship was accepted or denied.*

   g) *That subsequently, he was deployed to the Ministry of Transport and Infrastructure as a result of pursuing the matter.*

   h) *That he was unfairly treated since the CEO withheld his appeal for one year and also was not informed of the outcome of his appeal.*

I. THE ACTION AND RESPONSE

4. Having received the complaint, the Commission commenced an inquiry into the matter by writing to the Managing Director on 6th September 2013.

5. In responding to the allegations, PCPB vide a letter from the Chief Executive Officer Mr. Peter Opiyo dated 25th September 2013 stated as follows:

   a) *PCPB endeavored to train its work force through short and medium term courses in line with the Government directives and in view of its limited resources.*

   b) *Paul Kungu Kimani was deployed to PCPB by the Ministry of Agriculture from 24th November 2000 to 21st February 2010.*

   c) *On 15th February 2015, the Head of the Public Service and Secretary to the Cabinet issued a circular stating that the Government sponsorship for Post-Graduate Courses was henceforth limited to areas where skills were not readily available in the open market.*

   d) *On 21st May 2009, a Training Committee meeting was held where the matter was discussed.*

   e) *On 27th November 2009 at the 100thBoard Meeting, he presented his training sponsorship request under AOB and the Board directed the Finance and Administrative Committee to consider the matter and make recommendations to the Board.*

f) *During the next Board Meeting held on 28th January 2010, the Board resolved to use the prevailing GOK training circulars until the Board develops a training policy for its staff. The Board appreciated the need to identify and support staff training, but restated that the officer had not involved the Board at the initial stages of his commitment to undertake the course at Strathmore University.*

g) *The Board resolved that the request for sponsorship be declined and the officer be deployed to the Ministry which was his principal employer as PCPB had already hired an accountant.*

h) *PCPB did not at any time discriminate against the complainant in its training processes. In fact the complainant was monetarily facilitated in the following ways:*

i.) In July 2001, he was reimbursed Kshs. 24,000 vide cheque number 2470 for software and hardware examination fees soon after joining the Board.

ii.) He was also paid/reimbursed tuition fees for undertaking ACCA in the amount of Kshs. 18,800 vide cheque numbers 3991 paid to Strathmore College and Kshs. 11,292.55 ACCA examination fee vide cheque number 4006.

J. REJOINDER

6. The Commission thereafter sought and obtained further information from both the complainant and the PCPB on the matter.

K. ISSUES

7. Having received the responses from PCPB and the rejoinder from the complainant together with the supporting documents, the Commission proceeded to frame the issue for determination as follows:

a) Whether PCPB fairly handled the complainant's request for sponsorship.

L. ANALYSIS OF THE ISSUE

8. From the supporting documents, it is clear that the main dispute between the parties arose from the interpretation of the Circular Ref. OP.CAB.12/6A from the Office of the President. However, it is important to debunk some of the common arguments which have only served to obscure the issues between the parties and further alienated them from each other.

9. First, is the canvassing allegation leveled against the complainant by PCPB. It is alleged that the complainant acted un-procedurally by canvassing the Board members to consider his application for sponsorship favourably. This is contained in the extract of the Minutes of the 101st Board Meeting held on 28th January 2010. The complainant on the other hand denies the statement and avers that he was not accorded an opportunity to defend himself as enshrined in the Constitution. He further stated that the accusation was designed to sway the board against him. We, concur with the complainant. The rules of natural justice require that no person be condemned unheard. The *audi alteram partem* rule is considered a principle of fundamental justice. It includes the right of a party to confront his accusers, to have a fair opportunity to challenge the evidence against him and to have one's case heard properly. It follows that the canvassing allegation was unfounded and totally unhelpful to the present inquiry.

10. Second, is the question of making an application before engaging PCPB in relation to securing sponsorship. From the evidence adduced in the course of this inquiry, it is clear that the Board was of the opinion that PCPB is governed by the same regulation in the public service that one had to seek approval before undertaking a sponsored course. However, PCPB did not specify which regulations it relied upon. The complainant on the other hand submits that it was not a requirement for staff to seek prior approval of the Board before enrolling for an earmarked course, especially one that had been previously approved. He also pointed out the impracticality of involving the Board before admission since it was not guaranteed. We concur with the complainant and caution that this is an ultimately unhelpful argument which does not assist the inquiry.

11. Third, is the assertion by the complainant that the role of the Board was to sanction the recommendations of the Staff Training (STC) Committee and that the Board erred in deliberating technicalities which had already been discussed at the STC which recommended the complainant be given partial sponsorship. PCPB on the other hand argued that the STC only made recommendations to the Board which could either be adopted or rejected. We concur with PCPB. The Board, as the statutory body, bears the ultimate responsibility for the decision undertaken at the institution. The recommendations of a Technical Committee remain just that, recommendations. They have no effect and could not be lawfully implemented until passed by a resolution of the Board. Any other construction would lead to absurd results. It would also set a bad precedent for accountability safeguards and distort the chain of command.

12. We now turn to the crux of the matter; whether PCPB misrepresented facts by deliberately misinterpreting the Circular OP.CAB.12/6A on training of public officers to the detriment of the complainant. In interpreting the Circular, the first question should

be whether it applied to PCPB. The answer is in the affirmative. This is because it emanated from a lawful authority and was addressed to among others "All Chief Executives, State Corporations and Statutory Boards" of which the PCPB was one.

13. PCPB maintained that it was bound by the Circular which stated that Government sponsorship for Post-Graduate studies was henceforth limited to areas where skills were not readily available in the market. The complainant on his part maintained that the prevailing Government policy did not prevent public service institutions from sponsoring skills based on Post-Graduate programmes, but only placed more emphasis on job related short courses.

14. The circular itself is very clear. It relates specifically to training of public officers and lays the historical basis for training as having initially been aimed at institutional and capacity development to enable Kenyans to take over from the colonial administration. Thereafter, training was geared towards developing the professional, technical and managerial capacity of public service employees. In the 1990s, training shifted to building individual and institutional capacity whereby Government sponsored Post-Graduate studies. It is noted that this training had no emphasis on enhancement of productivity and service delivery. These are the reasons why it was decided that from the date of the Circular, there would be a paradigm shift and the Government will direct its training resources to job related short courses which enhance service delivery. The Circular goes on to explain how Accounting officers should implement the training.

15. From the plain reading of the Circular, it is clear that Post-Graduate training was to be limited to programmes where skills were not readily available in the job market. We therefore concur with PCPB on this question. Were the specific skills to be acquired by the complainant in the Master of Business Administration course available in the job market? The complainant has failed to address himself to this important question instead choosing to dispute the interpretation of the Circular. The letter from the parent Ministry dated 16th February 2010 Ref. MOA/HRM/4/19/10 VOL IV/273 clearly confirms the above stated interpretation.

16. The only other outstanding matter in this inquiry is whether taken as a whole, the complainant's sponsorship was handled unfairly and whether the CEO obstructed the process to deny the complainant his right to a fair and objective resolution of the Board. In this regard, there are two questions which we find on both counts in favor of the complainant. Firstly, it took over one year from 19th June 2008 to 5th May 2009 for the CEO to forward the appeal to the Staff Training Committee. Secondly, the complainant was not informed of the decision by the Board on his sponsorship until he raised the matter with the Office of the Ombudsman.

17. Despite assertions by PCPB that he should have raised the matter of malice and bias by the previous CEO in forwarding his appeal while she was still in office, we find that the complainant was right in asserting that PCPB is a body corporate, with perpetual succession, and consequently cannot avoid liability by any of its officers while in the course of duty. On the matter of not informing the complainant of the decision, it is not disputed by PCPB and an apology has been offered. Accordingly, we find that a fundamental breach of the complainant's right to a fair transparent and expeditious administrative action. At the very least, the delay in relaying the outcome prevented the complainant from sufficiently exercising his other rights which have since been overtaken by events.

M. REMEDIAL ACTION

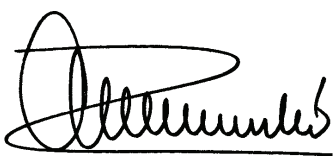
18. In light of the foregoing, the Commission **HOLDS** and **FINDS**:

    a) That the CEO is hereby declared to be a non-responsive public servant since he failed to convey the complainant's appeal to the Staff Training Committee for a period of over one (1) year.

    b) That the Respondent acted fairly and justly at arriving at the decision not to give full sponsorship as it acted in furtherance of lawful instructions by the Head of the Civil Service *vide* the circular dated 16th February 2010.

    c) That notwithstanding the failure by the CEO of Pest Control Products Board to convey the decision of the Board to the Complainant for over one year, we decline to recommend any monetary reward to the complainant since the same would not have conferred to the complainant any monetary benefit had it been conveyed on time.

DATED this **20th** Day of **April 2016**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Our Ref: CAJ/MSA/M.ICG/062/15/14-EM 29th March 2016

Ms. Rosemary Mutua

Tel: 0720406921

MOMBASA

Dear Madam,

RE: YOUR COMPLAINT REGARDING A DISPUTE IN MBUYUNI, CHAANI LOCATION IN MOMBASA COUNTY

Kindly receive warmest compliments from the Commission on Administrative Justice.

The Commission makes reference to your complaint lodged with us on 30th May 2014, wherein you raised the following allegations;

a) That you own a house standing on a parcel of land located in Mbuyuni, Chaani Location within Mombasa County.

b) That there has been a longstanding dispute with your neighbours regarding the spacing of your residential houses on a piece of land which you reside as squatters.

c) That you have faced numerous harassments and insults from the said neighbours including destruction of your property.

d) That you were allegedly insulted and harassed by the Area Chief, Chaani Location who has continued to demonstrate bias against you while you are pursuing your case.

The Commission wrote an inquiry to the Chief, Chaani Location who responded as follows:

a) That the land in question belongs to Kenya Ports Authority and the same is a subject of an ongoing court case.

b) That in 2012, he convened a meeting between you and your neighbour, Violet Abura to hear a boundary dispute.

c) That he decided that Violet Abura had not encroached on your space but the Chief escalated the matter to the Assistant County Commissioner for further deliberations after you were dissatisfied with his decision.

d) The Chief further stated that he has neither harassed nor threatened you and was fair when making the said decision.

The Commission further received a letter dated 24th March, 2015 from the Deputy County Commissioner stating the following;

a) That you have been embroiled in disputes with your neighbours regarding:

i. The extension of one Mr. Mwangangi Kakuria's house, your immediate neighbour, resulting to zero space between the two houses.

ii. The building of structures and a foundation by one Amon Ochieng on the same piece of land.

iii. The construction of a small wall by your immediate neighbour, one Ms. Violet Aburu.

b) That the land on which you live belongs to the Kenya Ports Authority.

c) That you reported about threats to your life and insults directed to you and you were advised to report to the Police Station.

d) That the Deputy Commissioner summoned the Complainants, the Assistant County Commissioner-Changamwe, the Chief, the Assistant Chief and directed that a committee comprising of non-interested parties to the dispute be formed to look into the issue and report back to him.

e) A visit was made to the disputed area by the Senior Assistant County Commissioner and Assistant County Commissioner-Changamwe and the following decisions were made:

i. The house being constructed in front of the first house be stopped and the area vacated.

ii. A structure coming up very close to your second house be demolished.

iii. Water guards to be installed by Mwangangi Kakuria and yourself to avoid rain water from splashing on the walls of the houses.

f) That you have lodged several cases at the law courts, among them criminal cases touching on an attack by youths on 23rd July, 2012 and an ongoing criminal case against one Amon Ochieng.

Additionally, the Commission on 23rd July 2015, upon your request, visited the said premises and the Chief's office where we managed to mediate the issues between yourself and the Chief and reconciled both of you. Thereafter, we proceeded to Mbuyuni village with the Assistant Chief and we were able to verify the issues.

Thereafter, on 20th August 2015, the Commission wrote to the Department of Lands, Planning and Housing-Mombasa County to resolve the issue of spacing since the houses in the said area have been built without any plan hence the dispute amongst neighbours. On 3rd September, the Department of Land, Planning and Housing responded as follows;

a. That you do not own any land in Mbuyuni village since the parcel of land belongs to the Kenya Ports Authority.

b. That there is an ongoing court case between the squatters and the Kenya Ports Authority.

c. That the Department has inventorised all squatter settlements in the County including Mbuyuni village with the second phase of the activity focussed on how the Department can provide security of tenure to the squatters.

d. That plans are underway to approach the Kenya Ports Authority and discuss on the possibility of surrendering the parcels of land for squatter settlement.

The Commission thereafter requested the office of the Deputy County Commissioner to convene a final meeting of all the parties with a view to creating peace and harmony as they await the outcome of the land dispute. On 25th November, 2015 the Deputy County Commissioner wrote to us stating the following:

a. That on 19th November, 2015 a meeting, which you attended, was convened at the Senior Assistant County Commissioner's office whose agenda was resolving the dispute between yourself and your neighbours: Amon Ochieng, Violet Aburu, Mwangangi Kakuria and Sabina Mghoi Ngure.

b. That it was resolved that both yourself and Mwangangi Kakuria put water guards by 30th November 2015 to avoid rain water from spilling on the walls of your houses.

c. That the dispute between yourself and Amon Ochieng be resolved by the court as it is subject of an ongoing criminal case.

d. That it was resolved that the issue concerning the space dispute between yourself and Mwangangi Kakuria be determined with the intervention of the Inspectorate Department, Mombasa County.

e. That the dispute between yourself and Sabina Mghoi concerning a pit latrine you are building close to Sabina's window be addressed by the Inspectorate Department, Mombasa County.

f. That it was resolved that the dispute between yourself and Violet had already been a subject of court proceedings and thus it need not be re-opened.

On 18th January 2016, we convened a meeting at the Commission's office-Mombasa where all the parties were present together with Mr. S. K. Chepoton on behalf of the Deputy County Commissioner, Changamwe Sub County. Each party gave their side of the dispute and the Commission also confirmed the steps taken by the Deputy County Commissioner as stated in their report.

Having carefully considered all the facts, the copious correspondence, the steps taken by the Commission and the Provincial Administration, we have come to the following conclusion;

a) That your complaint against the Chief of Chaani Location was mediated upon by the Commission whereby the Commission reconciled you and the Chief on 23rd July 2015.

b) That the Commission agrees with the recommendations made by the Deputy County Commissioner in its report dated 25th November 2015 addressed to the Commission, save for the demolition of Mwangangi Kanunia's wall which should be a resolve of the Department of Land Planning and Housing.

c) That the Department of Land, Planning and Housing to speed up the process of obtaining security of tenure to the squatters of Mbuyuni village.

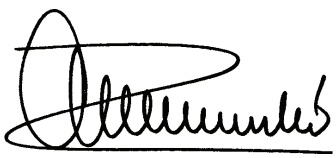
d) That any subsequent criminal acts by any person should be reported to the police for prosecution.

e) That all the pending court cases should proceed in court to their logical conclusion.

While we have reached the specific conclusions stated above, these are restricted to the instances examined, and should be happy to receive any complaint and investigate any other issue as may arise to your prejudice.

We assure you of our highest regards.

Yours sincerely,



DR. OTIENDE AMOLLO, EBS

CHAIR OF THE COMMISSION

CC:-

1. Area Chief

Chaani Location

P.O Box 92543

CHANGAMWE

2. Deputy County Commissioner

Changamwe Sub- County

P. O. Box 93444

CHANGAMWE

3. County Executive Member

Department of Land, Planning and Housing

P.O. Box 81599-80100

MOMBASA

4. County Commissioner

Mombasa County

P.O. Box 90424-80100

MOMBASA

REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)
INQUIRY FILE NO. CAJ/POL/015/1177/12

FELIX CHITOMA OPIYOW ……..COMPLAINANT

VERSUS

NATIONAL POLICE SERVICE……RESPONDENT

DETERMINATION

A. INTRODUCTION

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

B. COMPLAINT

3. The Commission received a complaint from Felix Chitoma Opiyow, the Complainant herein, vide a letter of 10th March 2012 alleging that he had been unlawfully arrested and detained without charges being preferred against him. The particulars of the allegations were as follows:

   a) That on or about the month of July 2003, he was arrested on suspicion of being a member of the illegal Al-Qaida group and taken to Port Victoria Police Station.

   b) That he was later transferred to D.C.I.O Busia Police Station where he was detained for a further four (4) days.

   c) That even after conducting the investigations, there was no evidence linking him to the Al-Qaida group and no charges were preferred against him.

   d) That he visited Port Victoria Police Station on 11th June 2013 requesting to be furnished with the Occurrence Book Number for the matter but his request was not honoured.

4. Based on the above, the complainant sought the intervention of the Commission to know why he was arrested and detained without charges, and the perpetrators brought to justice.

C. RESPONSE TO COMPLAINT

5. Upon receipt of the complaint, the Commission initiated an inquiry vide a letter of 3rd October 2013 to Officer Commanding station (OCS) Port Victoria Police Station who responded as follows:

   a) That the complainant visited his office on 11th June 2013 requesting for a copy of the Occurrence Book for the month of July 2003 in relation to his arrest and detention at the Station.

   b) That he promised to assist the complainant as soon as possible since the incident was recorded 10 years ago and the complainant did not have his Occurrence Book Number to assist in tracing the 2003 copy.

   c) That he managed to trace the Occurrence Book reflecting his arrest and copied the entries to his letter dated 13th January 2013.

D. REJOINDER

6. Upon receipt of the response from OCS Port Victoria Police Station, the complainant through his letter dated 16th March 2015 responded as follows:

   a) That OB 38/17/07/2013 at 1930hrs, OB 5/18/07/2013 at 0325 hrs and finally OB 4/19/07/2013 at 0630hrs are evidence that the police entered and searched his house without warrant.

   b) That he was detained at Port Victoria Police Station for 1 day and 4 days at DCIO Busia for interrogation without charges being preferred against him.

c) That his arrest and detention was a violation of his rights.

d) That his arrest and detention was actuated by malice since he was never charged in a court of law.

e) That as result of the arrest and detention he suffered damages to his reputation and shunned by right thinking members of the society.

E. ISSUES FOR DETERMINATION

7. Having examined the complaint, its circumstances and relevant documents, we have identified the following two issues for determination:

a) Whether the complainant was unfairly treated at Port Victoria Police Station by the police officers.

b) Whether the officers' conduct in handling the complainant at Port Victoria Police Station amounted to abuse of power.

F. ANALYSIS

a) Unfair Treatment

8. The Complainant alleged that the OCS, Port Victoria Police Station together Mabinju Assistant Chief, Regular Police and Administration Police Officers from Port Victoria Police Station and Maumau Police Station arrested him at midnight after they suspected that he was an Al-Qaeda. The complainant further alleged that he was detained for one (1) day and later taken to Busia for more questioning. It is the complainant's position that the arrest and detention were unlawful since he was not charged before any court of law.

9. In his response the OCS did not deny the allegation. In his letter dated 13th January 2013, he reproduced the OB extracts which were recorded by the officers who arrested the complainant. The extracts show that on 17th July 2003 at 1930 hours OCS, IP Omanya and SGT Misiko proceeded to Maumau area to conduct inquiries. OB 5/18/07/2003 reveals that at 0325 hours OCS, SGT Richard Misiko, PC Kosgei and PC D. Rotich returned from Maumau area, Mabinju Sub-Location and brought the complainant who was suspected to be the author of the anonymous leaflets found posted on the door to the Assistant Chiefs Office. OB 4/19/07/2003 also shows that the complainant was taken to DCIO Busia for interrogation.

10. We have analysed the two positions in this matter and agreed with the complainant that he was unfairly treated.

11. Section 72(3) of the former Constitution (now Article 49) which was in operation at the time when the complainant was detained provides that where a suspect has not been released, he should be brought before a court as soon as is reasonably practicable, and where he is not brought before a Court within twenty-four hours of his arrest or from the commencement of his detention, or within fourteen days of his arrest or detention where he is arrested or detained upon reasonable suspicion of his having committed or about to commit an offence punishable by death.

12. Article 49 (f) of Constitution provides that an arrested person has a right to be brought before a court as soon as possible but not later than twenty-four hours after being arrested and if twenty-four hours end outside ordinary court hours then the person should be presented to court the next court day.

13. The Commission did not find any evidence to the effect that the complainant was charged and arraigned in court as required by the law. It is, therefore, clear that the complainant was unfairly treated by the Police Officers.

14. Generally, unfairness may be in the form of non-observance of the rules of natural justice or to act without procedural fairness towards one to be affected by the decision. Police officers are tasked with the duty of carrying out investigations which investigations do invariably lead to criminal charges being preferred against persons who their investigations find culpable. They, therefore, ought to take their task seriously and ensure that the principles relating to fair administrative processes are adhered to.

15. The evidence rule that an administrative decision must be based upon logical proof or evidence material was also not adhered to in this case. Investigators and decision makers should not base their decisions on mere speculation or suspicion. The decision to detain the complainant for Four (4) days in the police custody ought to have been informed by material evidence. In this case, the complainant was suspected to be an Al-Qaeda and the author of the anonymous leaflets posted on the door to the Assistant Chiefs office. There was no evidence presented to the Commission by the OCS supporting their decision to arrest and detain the complainant for being a member of the Al-Qaeda or to have authored the anonymous leaflets.

16. The Commission holds that there was no reasonable ground to arrest and detain the complainant. The Commission therefore finds that there was no

evidence whatsoever showing that the complainant was a member of the Al-Qaeda.

17. Having found that the complainant was unfairly treated by being arrested and detained for four (4) days contrary to section 72 of the repealed Constitution, the Commission awards the complainant Kshs. 60,000. This position finds support in the case of Joshua Thairu Muthiga v Attorney General [2015] eKLR where the High Court awarded a petitioner Kshs.1, 350,000 who had been detained for 27 days before being arraigned in Court. Also in the Case of Anne Pacifica Achieng Osewe v Attorney General [2016] eKLR the High Court awarded Kshs. 3,000,000 as general damages to a petitioner who was kept in police custody for 43 days in violation of the right to liberty guaranteed under section 72**.**In the instant case the Commission adopts a conservative figure of Kshs. 15,000 for each day the Complainant was detained which will be surcharged from the earning of the four Officers, OCS Richard Omaya, Sgt Richard Misiko, PC Kosgei and PC D. Rotich for their wrong doings.

b) Abuse of Power

18. The complainant alleged that while in custody he was tortured and subjected to unnecessary suffering. He further alleged that the arrest was actuated by malice since to date he has not been charged in any court of law in relation to the suspicions. The allegations as put by the complainant amounts to abuse of power and unlawful/oppressive official conduct.

19. The OCS did not offer any response. The law is that in the ordinary way and particularly in this case, which affect life or liberty, an executive authority should give reasons and if he gives none, it is inferred that he had no good reasons or the decision was based an irrelevant consideration.

20. It is the Commission's position that the role of the police is to maintain law and order, prevent crime and investigate criminal acts so that offenders may be brought to justice. However, their powers and duties, and the rights and obligations of a citizen in relation to police action are carefully defined by law. The police must act only within the authority specifically granted by law.

21. It is our considered opinion that the four police officers abused their power by arresting the complainant, detained him for five (5) days without any charges being preferred against him.

G. CONCLUSION & DETERMINATION

22. Based on the foregoing, we hold and find as follows:

    i) The complainant was unfairly treated by the four Police Officers during his arrest and detention.

    ii) The relevant Police Officers, OCS Richard Omaya, Sgt Richard Misiko, PC Kosgei and PC D. Rotich abused their power by arresting and detaining the complainant for four (4) days without preferring any charges against him.

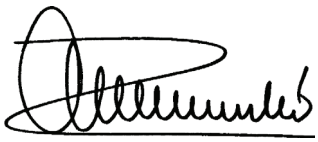
23. In light of the above, the Commission in exercise of its powers under Article 59(2)(j) of the Constitution and Sections 8(g) and 26(g) Act, **FINDS** that the National Police Service Should:

    i) Take appropriate disciplinary measures against OCS Richard Omaya, Sgt Richard Misiko, PC Kosgei and PC D. Rotich for abuse of power.

    ii) Compensate the complainant for the four (4) days detention at Kshs. 60,000.00.

    iii) Ensure strict compliance with the law and the rules of natural justice when arresting and detaining persons.

DATED this **22nd** Day of **March 2016**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

OUR REF: CAJ/MSA/M.WA/009/2/14-EM **8th February, 2016**
YOUR REF: NWCPC/HRA/SFIL/26/Vol. II/ (76)

Managing Director
National Water Conservation and
Pipeline Corporation
P.O Box 30173-00100
NAIROBI

Dear Sir,

RE: COMPLAINT BY MR. JULIUS GIKONYO- P/NO. 2732 REGARDING HIS SUSPENSION

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

The Commission makes reference to a complaint lodged by Mr. Julius Gikonyo Mwangi on 11th September 2014, against your office on the following allegations;

a) That he was an employee of National Water Conservation and Pipeline Corporation since the year 2001.

b) That vide a letter dated 29th November 2014, he was suspended from employment on allegations of grave breaches of the Code of Regulations.

c) That the allegations included soliciting and receipt of monies from various customers, giving wrong billings, failing to read meters and issuing illegal connections.

d) That since his suspension, the matter has never been heard and decided despite his response to the allegations against him.

e) That he made several follow ups regarding the issue and direction was subsequently given to your office on several occasions to expeditiously dispense with the issue but to date nothing has been done.

On 27th October 2014, the Commission wrote a letter of inquiry to your office raising the allegations and on 21st November 2014, your office responded as follows:

a) That indeed the Complainant was issued with a suspension letter on 29th November 2004.

b) Thereafter, the Water Sector reforms took place on 1st July 2005 and all staff, assets and liabilities of NWCPC's Coast region were transferred to Coast Water Services Board including the Complainant who was still on suspension.

c) That when the officer reported to your office, he was advised to seek redress at the Coast Water Services Board.

d) That you then wrote to the CWSB to resolve the case but received no response.

On 17th December 2014, the Commission received another response from the Principal Secretary, Ministry of Environment, Water and Natural Resources addressed to the Coast Water Services Board and copied to us. In the said letter, the Chief Executive Officer was asked to present their position over the matter.

On 22nd December 2014, the Coast Water Services Board wrote to us stating the following:

a) That the Complainant was under suspension by National Water Conservation Corporation and not Coast Water Services Board.

b) That the NWCPC being the organization that suspended him did not give them any documentation on the case implying that they would handle the case.

c) That the transfer plan did not include the name of the Complainant and that records show that the cases of other officers who had earlier been interdicted were dealt with by the staff welfare and establishment committee of NWCPC.

d) That the officers were reinstated and deployed to CWSB which accepted them.

e) That NWCPC should handle the disciplinary case and if cleared, reinstate the Complainant in their organization.

f) That the CWSB may not be in a position to accept additional staff because of budgetary constraints.

On 7th January 2015, the Commission wrote to the Principal Secretary to address the matter, since it appeared that both your office and the CWCB were disinclined to hear the Complainant's case. The Commission has since not received a response from the Principal Secretary over the matter.

Having carefully considered the various correspondences and all the facts of this case, we have come to the following conclusions:

a) While we agree that during the Water Sector Reforms in 2005, the transfer plan transferred all assets, liabilities and staff of the Corporation to the various service boards, the Corporation failed to submit the Complainant's case to the CWSB for resolution.

b) Therefore, during the transition, the Complainant's case was still pending with the NWCPC as the same was not brought to the attention of the CWSB.

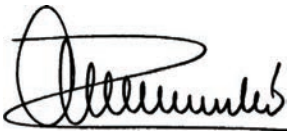
c) That it is thus the responsibility of the Corporation to hear the Complainant's suspension and make further directions on his subsequent deployment.

d) That the matter should be resolved **within sixty (60) days** from the date hereof noting that the same has been pending since 2004.

e) Failure by the Principal Secretary, Ministry of Environment, Water and Natural Resources to address the concerns raised by the Complainant amounts to Unresponsive Official Conduct.

We thank you for your continued co-operation and assure you of our highest regards.

Yours sincerely,



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC. **1. Principal Secretary**
Ministry of Environment, Water and Natural Resources
Human Resource Management Division
Maji House, Ngong Road
P.O Box 49720-00100
NAIROBI

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2. Chief Executive Officer
Coast Water Services Board
P.O Box 90417-80100
MOMBASA

3. Mr. Julius Gikonyo Mwangi
Tel: 0722213946
MOMBASA

REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)
INQUIRY FILE NO. CAJ/M.IGC/062/319/15-CAK

RESIDENTS OF GIUMPU SUB-LOCATION-
IMENTI SOUTH SUB-COUNTY ……..……COMPLAINANT

VERSUS

MINISTRY OF INTERIOR AND CO-ORDINATION
OF NATIONAL GOVERNMENT…….……RESPONDENT

DETERMINATION

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

B. SUMMARY OF THE COMPLAINT

3. The Commission received the complaint on the 13th day of May 2015 alleging as follows:

   i.) That vide their meeting of 10th June 2015 with the Chief of Kanyakine Location a proposal was made to create Yururu Location with two new sub-locations.

   ii.) That the residents welcomed the proposal but rejected the proposal to include Nchaure and Lower Giumpu in the yet to be created Yururu Sub-location since the residents of Giumpu sub-location through their community leaders would not wish to be divided.

   iii.) That the Giumpu residents believe that any attempt to divide them would be intended to scatter their potential and undermine their development.

   iv.) The Giumpu leaders have written to the Chief and the Deputy County Commissioner, Imenti South-Sub County seeking their intervention in this matter but have not received any response in regards to the same;

   v.) The Deputy County Commissioner has on several occasions derailed and/ or watered down their efforts to have the new boundary proposals implemented;

   vi.) The said Deputy County Commissioner has been compromised by local politicians to frustrate the locals as evidenced by the threats issued by him during a meeting held on 12th June, 2015 at Kanyakine Location.

Based on the foregoing, the complainant sought the following:

   (a) have the boundaries changes implemented as approved by earlier;

   (b) That the matter be investigated and action taken against the said Deputy County Commissioner.

C. THE ACTION, RESPONSE AND REJOINDER

4. Having received the complaint, the Commission commenced an inquiry into the matter by writing to the County Commissioner, Meru County on 29th September 2015. The Commission sought to have the matter investigated to get the official position on the same.

5. In responding to the allegations, the County Commissioner, Meru County vide the letter dated 27th November 2015 , stated that;

   a) The Giumpu is not a Location but a sub-location in Abogeta Location and falls administratively under Abogeta West Ward and Yururu Sub-Location is in Kanyakine Location of Abogeta East Ward;

   b) The dispute dates back to the year 2007 hen leaders wanted Giumpu Sub-Location

of Abogeta Location to be transferred to Kanyakine Location;

c) The matter of boundary came up when there was a proposal to upgrade Yururu Sub-Location which is in Kanyakine Location to a Location in the Location meeting held on12th January 2015. Yururu Sub-Location borders Giumpu Sub-Location which is in Abogeta Location, Abogeta West Ward;

d) During the said meeting, two groups emerged: one rejecting the proposal to include Nchaure and Lower Giumpu in the yet to be created Yururu Sub-Location while the other comprising of residents of Giumpu, rejected the transfer of the Sub-Location;

e) On 27th August 2015, the Deputy County Commissioner met the two groups with a view of have the standoff resolved;

f) It is during the said meeting that majority of elders from Giumpu Sub-Location and Kanyakine agreed to have the proposed upgrade effected;

g) Further, that the majority of the people from Giumpu Sub Location did not have a problem to belong to Abogeta West Ward;

h) There was no meeting held on 12th June 2015.

i) Further, the County Commissioner refuted the claim that the Deputy County Commissioner was transferring people from one ward to another.

6. The complainant lodged his rejoinder vide letter dated 14th January 2016 in which he refuted the foregoing responses stating that the respondent had not addressed the issue of abuse of office raised in his complaint. They stated that the County Commissioner failed to address the issue of implementation of the Civic and administrative boundaries in Giumpu Sub-Location and that the County administration has filed to adhere to the directives issued by the independent Electoral and Boundaries Commission in implementing the new boundaries.

D. ISSUE FOR DETERMINATION

7. The Commission has considered the complaint and the response together with the supporting documents and identified the following issue for determination in this matter:

i) Whether the Deputy County Commissioner overstepped his mandate in implementing the decision to create the new administrative locations.

E. RULES APPLICABLE

8. The rules applicable include the following;

i) Article 88 and 89 of Constitution of Kenya;

ii) Section 36 of the Independent Electoral and Boundaries Commission (IEBC) Act, 2011 and Paragraph 3(1) of the fifth Schedule of the Act.

F. ANALYSIS OF ISSUES AND EVIDENCE

9. The Constitution of Kenya at Article 88 establishes the Independent Electoral and Boundaries Commission (hereinafter called the IEBC) whose one of its key mandate is review the numbers, names and boundaries of constituencies as well as wards at intervals of not less than eight years, and not more than twelve years, but any review shall be completed at least twelve months before a general election of members of Parliament.

10. The IEBC executed the above mandate in accordance with the provisions of Article 89 of the Constitution and the then Section 36 of the Independent Electoral and Boundaries Commission (IEBC) Act, 2011 and Paragraph 3(1) of the fifth Schedule of the Act which required the IEBC to prepare and publish a preliminary report outlining—

a) the proposed delimitation of boundaries for constituencies and wards; and

b) the specific geographical and demographical details relating to such delimitation.

11. Further, Paragraph 3(2) of the Fifth Schedule of the IEBC Act stipulates that Commission shall ensure that the preliminary report is made available to the public

12. The IEBC published its first report on the first review relation to the delimitation of boundaries of constituencies and wards on 9th January 2012 and invited the public to present their views over the same.

13. Based on the foregoing, it is apparent that issues of delimitation of boundaries was done in accordance with the laid down procedure and the public was given ample time to present their views.

14. That vide the reply dated 27th November 2015, the County Commissioner stated *inter alia;*

a) That Yururu Sub-Location borders Giumpu Sub-Location which is in Abogeta Location, Abogeta West Ward;

b) That “the majority of the people from Giumpu Sub Location did not have a problem to belong to Abogeta West Ward.”

15. That it is apparent that the creation of the new administrative divisions by the Deputy Commission would result into the transfer of people from one Ward to the other which the residents are not comfortable with and are calling upon the said Officer to consider the already existing boundaries as established by the IEBC.

16. That it is worth noting that the IEBC is the only public institution with the mandate of delimitation of boundaries of constituencies and wards, and any attempt by another public office or officers purporting to do the same is illegal *ab initio*.

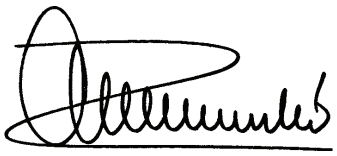
G. FINDINGS

17. In light of the above, the Commission in exercise of its powers under Article 59(2)(j) of the Constitution and Sections 8(g) and 26(g) of the Commission on Administrative Justice Act, **FINDS;**

    a) That the respondent is in violation of Articles 88 and 89 of the Constitution of Kenya;

    b) That any activity purporting to interfere with the already established boundaries must be done in consultation with the IEBC and in accordance with Article 89 of the Constitution.

DATED this 11th Day of April 2016



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)
INQUIRY FILE NO. CAJ/REA/021/176/15

DAUDI NKELE (ON BEHALF OF ORMANIE MASHUURU BOREHOLE COMMUNITY)……COMPLAINANT

VERSUS

RURAL ELECTRIFICATION AUTHORITY ……..RESPONDENT

DETERMINATION

A. MANDATE

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

B. COMPLAINT

3. The Commission received a complaint against the Rural Electrification Authority (REA) for unfairly and improperly changing the routing of the power connection from the initial Ole Maina Route to PEFA Route. The particulars of the allegations were as follows:

   a) That a Delegation from the Ormanie Mashuuru Borehole Community (hereinafter referred to as 'the Community') approached REA on 6th June 2014 for supply of power to the Ormanie Borehole and neighbouring homes.

   b) That on the advice of REA, they successfully applied for power connection whereupon a survey and routing of the power line was done by REA, and subsequently the contractor commenced work on 15th December 2014 and took the electricity poles and other materials to the site.

   c) That a further affirmation of the Project was made by REA when a Mr. Patrick Musembi visited the site on 19th December 2014 to determine its benefits to the Community. He confirmed that the Project would benefit the borehole, school and the surrounding community.

   d) That despite the foregoing and assurances from the meetings with REA, the Project was not completed due the re-routing of the power line and the subsequent withdrawal of services by the contractor on the instructions of REA.

   e) That REA failed to act independently and objectively in the matter since it allowed itself to be used by the area Member of Parliament, Hon. Peris Tobiko to cause the stoppage of the Project on four different occasions under the guise that the initial route was not viable

   f) That there was justification for the change since the PEFA route was longer than Ole Maina's and was therefore more expensive and unviable for the Project. Further, the Ole Maina's route would benefit five homesteads while the PEFA route would not benefit any homestead since the only two homesteads along the route could not be connected as one had already been connected while the other was out of transformer range.

   g) That there was no division among the community on the desirability of the Ole Maina's route or any aspect of the Project.

   h) That in any event, the Contractor had already completed 70% of the Project before the stoppage and holes had been dug and materials transported to the site. A redesign of the Project to PEFA route would therefore lead to waste of millions of shillings of public funds

   i) That the action by REA amounted to abuse of power and oppressive official conduct which impugned the Constitution since it amounted to serving partisan political interests to the detriment of the best interests of the community.

4. Based on the above, the complainant sought the intervention of the Commission for an explanation for the stoppage of the Project, and have it completed for the benefit of the Community.

C. RESPONSE

5. Upon receipt of the complaint, the Commission initiated an inquiry vide a letter of 10th July 2015 to REA who vide the letters of 17th July 2015, 12th August 2015 and 5th October 2015 acknowledged having an engagement with the Community for electrification of the community water borehole upon the request of the Community. Specifically, they responded as follows:

   a) That while it is true the Project started in December 2014, concerns were raised on its routing leading to its stoppage to allow for review of the routing. The proposed route meant that the power line would first go to a private residence then the borehole which gave the impression that priority was the private residence.

   b) That subsequent to a consultative meeting held at the Ministry of Energy and Petroleum where it was agreed that since the Project was funded by REA, it should first target the community borehole.

   c) That the Project was consequently redesigned such that the power line was to commence from Ole Maina's homestead to the community borehole before connecting any other customer. However, further concerns were raised on the new route and the Project had to be stopped again.

   d) That several meetings were held with stakeholders and site visits which revealed that the Community was divided on the routing; one group led by Hon. Judith Pareno preferred the Ole Maina route while the other group led by the areas Member of Parliament, Hon. Peris Tobiko, preferred the PEFA Church route. This made REA to review the design of the Project afresh.

   e) That the review, which was based on the availability of public road, distance of the proposed route and potential for future use of the proposed power line, established that the PEFA Church route was better than the Ole Maina Route due to its potential for future growth. REA, therefore, decided to supply electricity to the Borehole using the route from PEFA Church.

   f) That the variation was occasioned by unforeseen aspects following concerns by some stakeholders in the Community. The activity that had been undertaken was digging of 153 holes at a total cost of Kshs. 201,956. In any event, the cost of the variation would translate to Kshs. 301,956 translating to 5.3% of the original cost which is acceptable in project implementation.

   g) That in the circumstances, REA acted within the law and in accordance with the best interest of the community by seeking to connect electricity to the Borehole which was the target of the Project.

6. In analysing the response, the Commission noted REA's concern about the hostility encountered in the area in July 2015, and the subsequent request to the Commission to 'bring the parties together in order to complete the Project' vide the letter of 5th October 2015. Consequently, the Commission organized for a meeting with the public and other stakeholders at the Borehole on 19th November 2015. However, the meeting did not materialize due to the failure by REA to confirm their availability for the meeting, given their critical role in the Project. In light of this, the Commission, in line with its quasi-judicial mandate under Article 59(2)(j) of the Constitution as read with Section 8(g) and 26(g) of the Act, hereby gives a Determination in order to bring closure on the matter.

D. ANALYSIS OF THE ISSUES

7. As aforestated, the Commission made inquiries to REA upon receipt of the complaint and sought clarifications from both parties in the process. We noted the co-operation by the parties in this matter, especially in terms of responsiveness and availing the required information. Nevertheless, it is regrettable that the meeting that was scheduled for 19th November 2015 to bring the parties together did not materialize as earlier stated.

8. Having examined the complaint, its circumstances and relevant documents, we have identified the following issue for determination:

   a) Whether REA acted fairly in redesigning the routing for the Project from the initial Ole Maina Route to PEFA Church Route.

9. We wish to outline the relevant provisions of the law relating to fair administrative action which is the subject of the present matter. Article 47 of the Constitution creates an obligation by requiring such action to be expeditious, efficient, lawful, reasonable and procedurally fair. All public bodies are obligated to comply with this provision. Others relevant provisions are Article 59(2)(h-k) of the Constitution, the Commission on Administrative Justice Act,

2011, and the Fair Administrative Action Act, 2015. Administrative action in the context of the present matter would refer to 'any action relating to matters of administration and includes a decision made or an act carried out in the public service.'

10. First and foremost, we briefly lay out the uncontroverted facts of the matter. The parties have agreed that the Project was initiated by the Community who first sent a delegation to REA comprising the then Chairman of the Borehole, Mr. Shadrack Tetile and the Chairman of Ormanie School, Mr. Richard Sikona in June 2014 to request for power connection to the Borehole.

11. Pursuant to the advice of REA, the Community made an application for power connection whereafter REA surveyed and approved the Project as an extension of an existing Project in the area, Mashuuru Water Project, Rec. 3418514/15001. The power line of the Project was to follow the Ole Maina Route.

12. The Project commenced on 15th December 2014 with the digging of holes commencing and some materials taken to the site. However, the Project was stopped four times – 18th December 2014; resumed on 25th January 2015 and stopped on 28th January 2015; resumed on 12th April 2015 and withdrawn immediately after; and resumed on 3rd July 2015 and stopped on 4th July 2015.

13. Due to the delay in completing the Project occasioned by interruptions, some of the materials were stolen on 8th March 2015 which incident was reported to Mashuuru Police Station whereafter statements were recorded from the contractor and other people, and the poles were recovered and taken back to the site.

14. Several meetings were held between REA and the stakeholders to resolve the dispute, including the meeting held at the Ministry of Energy and Petroleum under the Chairmanship of the Cabinet Secretary where it was agreed that the line will commence from Ole Maina's homestead to the Borehole before connecting any other customer. Consequently, the Project commenced, but stopped immediately thereafter.

15. Due to further concerns, REA later reviewed the design of the Project from Ole Maina Route to PEFA Church Route based on three factors: availability of a public road, distance of the proposed route and potential for future use of the proposed power line.

16. As a result of the foregoing, the Project is yet to be completed since the contractor has faced hostility from the Community. Further, the variation of has led to a marginal increase in the cost of the Project by over Kshs. 300,000.

17. Having outlined the incontrovertible facts of the complaint, we now turn to the issues that have been contested by the parties that have led to the present matter. Specifically, we have noted that the primary issue in contention is the review of the power line from Ole Maina Route to PEFA Church Route and the stoppages of the Project four times which the complainant alleged amounted to unfair administrative action.

18. In the first place, as aforestated, the Project was initiated as an extension of another Project, Mashuuru Water Project, upon the request by the Community with the power line following Ole Maina Route. This Route was designed, surveyed and approved by REA in accordance with the applicable law thereby paving way of its commencement on 15th December 2014. Our analysis of the documents shows that there was no dispute on the routing of the Project at that time. However, the dispute on the routing arose after the commencement of the Project at the instance of a group of the Community led by the area Member of Parliament, Hon. Peris Tobiko. Our analysis of the circumstances of the stoppages show that REA failed to handle the dispute appropriately. In all the four instances, the contractor withdrew from the Project on the directives from REA. In particular, the statement of Mr. Paul Kipyegon Ngetich, a Director of Josharo Enterprises Limited that undertook the Project, to Mashuuru Police Station on 12th March 2015 suggests a dereliction of duty and partisanship by REA in handling the matter. Paul says in the Statement:

> *At the terminal we loaded 19 poles. When we were at Hon. Judy Pareno's compound, a man by the name Dickson came to me and told me that Hon. Peris Tobiko wanted to talk to me. This was around 11.30 a.m. I received Tobiko's call through Dickson's phone. She instructed me not to offload the poles or else she would instruct the youths to burn the poles. I told her that the only person who had authority to stop me from offloading the poles was the CEO REA or the supervisor REA…After twenty minutes I received a call from the CEO. The CEO told me to offload the remaining poles at one place and then asked me to release my staff afterwards…Then the CEO asked me asked me to cover the holes which had already been dug. After doing all that he gave me an appointment to see him on 19th December 2014. I went to his office at 6.00 a.m. on 19th December 2014…What the CEO told me is that there was politics in the Project. He asked me to go and see Mr. Kirui on 23rd December 2014 for other awards…On 22nd January 2015 I received a call from Patrick Musembi asking me to*

resume Mashuuru Project. I moved my employees on 23rd January 2015 to Mashuuru. They worked for two days and then on 25th January 2015 I received a call from Patrick asking me to call off the staff from the site (emphasis added).

19. It is not clear how Hon. Peris Tobiko was, although she is the area Member of Parliament, could direct the contractor engaged by REA on what to do. While we appreciate her role as a Member of Parliament, this does not entitle her to issue directions to independent public institutions such as REA in the present case. The subsequent action by REA, including quick interval of the call by the CEO to the contractor and the directive for release of staff and filling up of the holes that had already been dug, shows failure by REA to properly and impartially handle the matter. It is not clear why the CEO would order the filing up of the holes at the instance of one party before listening to both parties to the dispute or addressing the dispute.

20. Further, contrary to the position by REA, we have noted that the routing dispute was not raised by the Community, but by Hon. Tobiko as clearly articulated by the contractor in his statement referred to earlier and the correspondence in the matter. We did not find any evidence that the Community was against the Project or its initial Route. In our considered view, it would be ironical for the Community to approach REA for power supply which is subsequently approved, and later turn against Project once it begins.

21. We have also noted the efforts by various by the stakeholders to address the dispute. Notably, the meeting held at the Ministry of Energy and Petroleum following a complaint by Hon. Pareno made a breakthrough with the agreement on the way forward as outlined in the letter from REA to the Commission dated 17th July 2015 thus:

> Subsequently, a meeting was held in the Ministry of Energy and Petroleum under the chairmanship of the Cabinet Secretary of the Ministry and attended by the Principal Secretary in the Ministry, the Kajiado Governor, Hon. Peris Tobiko, the MP for Kajiado East and the REA CEO. *During the meeting it was agreed that since the project is being fully financed by REA, it should first target the community borehole. REA consequently redesigned the Project such that the line will commence from Ole Maina's homestead to the community borehole before connecting any other customer.* When work started on this route, it was again noted that there are still concerns being raised on the new route and the project had to be stopped once again *(emphasis added)*.

22. The foregoing clearly shows that outcome of the meeting at the Ministry was a breakthrough since it was attended by the main stakeholders, including Hon. Pareno and Hon. Tobiko who represented the disputing parties in the matter. The agreement resulted in two outcomes; that the Project would first target the Borehole, and that it would commence from Ole Maina's homestead to the Borehole. This paved way for resumption of work by the contractor.

23. Although we have noted the reasons advanced for the later stoppage and review of the Project, we are of the considered view that the review was unnecessary since the reasons lacked basis and soundness. In our view, the subsequent concerns lacked sincerity since the agreement was made by all stakeholders, including the main protagonists. It would be insincere for parties to a dispute such as the present one to strike an agreement only to raise other issues that undermine the very agreement that they entered into. Further, it is not clear why REA decided to review the design and routing of the Project when the stakeholders had voluntarily agreed to have the power line from Ole Maina's homestead. This action could be interpreted as usurpation of the powers of the stakeholders to determine the routing, which decision was made during the meeting at the Ministry. In our view, it was not fair and proper for REA to substitute the decision of the parties with a later review which changed the design to PEFA Church Route. They ought to have implemented the decision of the parties instead of pandering to the whims of one party who seemed to have later changed their position on the matter.

24. The viability of the Project was not contested by the parties which would explain the reason why it was approved and implementation commenced with the subsequent resumptions after stoppages on three different occasions. Our inquiry revealed that there was no communal dissatisfaction or interference with the Project as designed to follow the Ole Maina's homestead. They did not lead to the stoppage of the Project on the four occasions. The interruptions are not good for a Project such as the present one as they not only delay their completion, but may also increase the final cost thereby burdening the public.

25. We have noted that the cost of the Project would marginally increase as a result of the new design of the power line to follow the PEFA Church Route. While we have noted REA's explanation that the variation amounted to Kshs. 301,956 translating to 5.3% of the original cost which is acceptable in project management, we are of the considered view that the circumstances of this matter should not warrant any such increment in cost, irrespective of the percentage of variation. This is because

the redesign of the power line from the earlier agreed upon Ole Maina's homestead to PEFA Church Route was not necessary and fair. In any event, the Project was 20% complete at the time of the stoppage and it would be prudent avoid any variation unless under special and unavoidable circumstances. This would ensure fiscal prudence which is a pillar of our constitutional dispensation. In particular, it would conform to the provisions of Article 201(d) & (e) of the Constitution and Section 102(1)(a) & (b) of the Public Finance Management Act, 2012 that require 'public money to be used in a prudent and responsible manner.'

E. REMEDIAL ACTION

26. Based on the foregoing, we find and hold as follows:

    i) That it was not necessary to review the initial routing of the Project once the parties had collectively and consultatively agreed on the appropriate route.

    ii) That REA acted unfairly in redesigning the routing of the Project from the Ole Maina Route to PEFA Church Route since it amounted to substituting their decision with that of the stakeholders.'

    iii) That the action impugned Articles 47 and 59(2)(h-k) of the Constitution, Sections 2 and 8(a),(b)&(d) of the Commission on Administrative Justice Act, 2011 and Section 4 of the Fair Administrative Action Act, 2015.

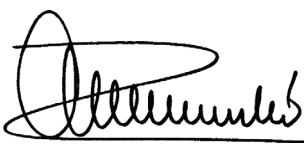
27. In light of the above, the Commission in exercise of its powers under Article 59(2)(j) of the Constitution and Sections 8(g) and 26(g) of the Commission on Administrative Justice Act, **HOLDS** that REA should:

    i.) Revert to the initial design of the Project to follow Ole Maina's homestead to the Community Borehole.

    ii.) Avoid stoppage of the Project to ensure that it is completed soonest.

    iii.) Avoid acting in a manner that may be interpreted as serving other interests or pandering to the directions or control of other quarters.

DATED this **14th** Day of **December 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)
INQUIRY FILE NO. PCSC/KNH/012/51B/09 – WT

BONIFACE WAWERU AND ANOTHER ……COMPLAINANTS
VERSUS
KENYATTA NATIONAL HOSPITAL.....……RESPONDENT

DETERMINATION

A. MANDATE

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

B. COMPLAINT

3. The Commission received a complaint from Mr. Boniface Waweru, P/No 111136 & Ronald Davis Chwala P/No 065180, the complainants herein alleging that they had been unfairly terminated from employment by the Kenyatta National Hospital. The particulars of the allegations were as follows:

   i) That they were employed at Kenyatta National Hospital from 1976 up to 16th September 2002 when they were sent on compulsory leave which lasted for six months without lawful justification.

   ii) That while on leave, they were served with retirement letters advising them that they had been retired under the 'Fifty year rule."

   iii) That according to the Terms and Conditions of Service of the Hospital, a person may be sent on compulsory leave to facilitate investigations on allegations made against that person, but there were no allegations made against them in this case.

   iv) That furthermore, the rules and procedures on compulsory leave were flouted by the Hospital administration.

   v) That they were also not paid their retirement benefits.

4. Based on the above, the complainants sought the intervention of the Commission to investigate the matter, declare their retirement unprocedural and unfair and direct that they be reinstated to employment and they be paid their pension.

C. RESPONSE

5. Upon receipt of the complaint, the Commission initiated an inquiry vide a letter of 21st August 2013 and the Hospital responded as follows:

   i) That the two officers, namely Mr. Boniface Waweru and Mr. Ronald Davis Chwala, were retired from the Hospital service under the "50 year rule", effective from 18th July 2003 and 15th August 2003 respectively after due consideration of their cases by the Management.

   ii) That the Management had embarked on conducting selective organizational changes in areas thought to have been performing dismally in the provision of quality healthcare and the Department of Laboratory Medicine was one of the departments that had been affected.

   iii) That as regards Mr. Chwala's case, the Hospital had received reports that being a senior member of the team charged with implementing positive changes in the Department of Clinical Medicine, the officer had exhibited gross incompetence in the core business of Clinical Chemistry and resisted any positive change.

   iv) That the two were senior members of staff in the Hospital since Mr. Waweru was the Section Head of Biochemistry while Mr. Chwala was the Deputy Medical Laboratory Technologist

and by virtue of the senior positions they held, they were expected to spearhead the changes initiated by the Management.

v) That the two officers were aware of the intended changes, but failed to embrace them and instead became stumbling blocks and hence their conduct was viewed **as gross misconduct** and their continued retention in service was not in the interest of the Hospital, thus the decision by the Board to retire them under the "50 year rule".

vi) That the Hospital's prevailing terms and conditions of service at the time allowed the Management where it considered the services of an officer not to be in the interest of the Hospital to either retire the officer in public interest or under the provisions of the Pensions Act without assigning any cause.

vii) That the appeals of the officers had been reviewed and the Boards decision to dismiss them under the 50 year rule upheld.

viii) That the Hospital Staff Superannuation Scheme's Trust Deed and Rules provided that an officer who retires from the service loses out a percentage of the benefits accruing to him or her for the years below fifty five. Accordingly, Mr. Waweru lost 2% of the total retirement benefits as he was fifty four while Mr. Chwala lost 10% of his total retirement benefits as he was fifty years then.

ix) That based on the above, the complainants were advised to collect their retirement benefits, but they protested and demanded for full payment of the same.

D. ANALYSIS OF ISSUES AND EVIDENCE

6. As aforestated, the Commission made inquiries to the Hospital upon receipt of the complaint and sought clarifications from both parties in the process. Having examined the complaint, its circumstances and relevant documents, we have identified the following three issues for determination:

    a) Whether the retirement of the complainants under the "50 year rule" was proper, procedural and fair;

    b) Whether it was justifiable and proper to send the complainants on compulsory leave; and

    c) Whether the complainants are entitled to be paid their retirement benefits in full.

7. First and foremost, we wish to outline the relevant provisions of the law relating to fair administrative action which is the subject of the present matter. Article 47 of the Constitution creates an obligation by requiring such action to be expeditious, efficient, lawful, reasonable and procedurally fair. All public bodies are obligated to comply with this provision. Others relevant provisions are Article 59(2)(h-k) of the Constitution; Sections 2 and 8 of the Commission on Administrative Justice Act, 2011; the Fair Administrative Justice Act, 2015 and the Employment Act, 2007.

8. Administrative action in the context of the present matter would refer to '***any action relating to matters of administration and includes a decision made or an act carried out in the public service.'*** Further, the Employment Act, Chapter 226 of the Laws of Kenya requires 'employers to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice' and outlaws direct or indirect discrimination in respect of recruitment, training, promotion, and terms and conditions of employment among others (Section 5(2 & 3).

a) Retirement under the ''50 Year Rule"

9. According to the Hospital, the complainants, namely Ronald Chwala and Boniface Waweru were retired under the "50 year rule" with effect from 18th July 2003and 15th August 2003 respectively. However, a close examination of the letters communicating the retirement reveal that they were both retired with effect from 1stApril 2003. This is as per the letter dated 20th March2003,REF.KNH/111136/005 as regards Boniface Waweru and the letter dated 20th March 2003,REF.KNH/065180/230 regarding Ronald Chwala. We have, nonetheless, chosen not to dwell on this discrepancy since we believe that the same could be a minor error.

10. The reasons given for the decision to retire the complainants under the "50 year rule" were that while the two officers were aware of the intended changes in their departments, they failed to embrace them and, instead, became stumbling blocks, hence their conduct was viewed as **gross misconduct** and their continued retention in service **was not in the interest** of the Hospital. Furthermore, the Hospital's prevailing Terms and Conditions of Service at the time allowed the Management, where it considered the service of an officer not to be in the interest of the Hospital to either retire the officer **in public interest or under the provisions of the Pension's Act without assigning any cause**.

11. From the above, it appears that the Hospital was not clear on the procedure to retire/terminate the officers. For instance, it made reference to retirement under the "50 year rule" and at the same time retirement

in public interest and attributed this decision to the conduct of the officers, which according to the Hospital, amounted to gross misconduct.

12. It behooves us to examine the relevant provisions of the Hospital's Terms and Conditions of Services applicable then, i.e. the Kenyatta National Hospital Terms and Conditions of Service, 1998. Section III, Sub-section12of the said Terms and Conditions of Service provided for the various ways in which the employment of an employee of the Hospital could be terminated. These are:

i) Termination by notice or resignation by an employee.

ii) Dismissal and/or an action that involves the application of disciplinary procedure as set out in the Code of Conduct.

iii) Normal retirement at 55years of age or voluntary retirement after 50 years or retirement due to ill-health. These were dealt with under the Staff Pension Scheme.

iv) Redundancy.

13. Furthermore, Section XV, Part XII of the Terms and Conditions of Service, i.e. the Code of Conduct provided for the forms of punishment to be meted out to an employee arising out of disciplinary proceedings. These are as follows:

a) Verbal caution or warning

b) Written caution, reprimand or warning

c) Stoppage or withholding of annual increments

d) Reduction in rank or designation

e) Surcharge

f) Termination of service with entitlement to salary and other benefits-where an employee has been subjected to disciplinary proceedings and found to be in breach of discipline amounting to gross misconduct not warranting dismissal.

g) Retirement in public interest

h) Summary dismissal with loss of benefits –where an employee has been found to be in breach of discipline amounting to gross misconduct.

i) Any other form of punishment approved by the Director.

14. Having examined the provisions, we have noted that compulsory retirement under the "50 year rule" is not mentioned in the Hospital's Terms and Conditions of Service and the only provision made is for voluntary retirement under the "50 year rule." Furthermore, retirement in public interest has only been provided for as a form of punishment to be meted out to an employee arising out of disciplinary proceedings.

15. At this point, it would be important to understand the above terminologies, i.e. retirement under the "50 year rule", retirement in public interest and what amounts to gross misconduct in employment.

16. Retirement under the"50 year rule" and retirement in public interest are some of the ways in which a public officer exits public service. As noted above, the Hospital's Terms and Conditions of Service were not exhaustive on the provisions on the above procedures for termination of employment. As a result, we will therefore, make reference to the Service Commission Code of Conduct, 1992, which was applicable then.

17. Section G.38 of the Service Commission Code of Regulations, 1992 provided as follows:

"(1) it is important that all officers should be aware of the clear distinction between:

a) Dismissal or compulsory retirement in the public interest

b) Termination of appointment a result of:

i.) An officer's resignation in accordance with the provisions of his agreement or letter of appointment or on attaining the normal retirement age of 55 years or by voluntary retirement under the "50 year" retirement rule; or

ii.) Termination by the Government in accordance with the provisions of an officer's agreement or letter of appointment or on attaining the normal retiring age of 55 or by compulsory retirement under "the 50 year" retirement rule by the decision of the Service Commission.

(2) Action under paragraph 1(a) above involves the adoption of the appropriate disciplinary procedure as set forth in the Service Commission's Regulations. Dismissal results in the forfeiture of all privileges and retiring benefits. The retiring benefits of an officer compulsorily retired in public interest are dealt with in accordance with Section 8 of the Pension's Act (Cap .189). Depending on the circumstances in which an officer has been required to retire in public interest, retiring benefits for which the officer would otherwise be eligible may be abated or altogether withheld.

(3) On the other hand, in the case of termination by the Government in accordance with the terms of an officer's agreement or letter of appointment or by compulsory or voluntary retirement on the

attainment of the qualifying age as stipulated in paragraph 1(b) above, an officer is eligible for full retiring benefits and other privileges…"

18. Section 8 of the Pension's Act states that: "where an officer's service is terminated on the ground that, having regard to the conditions of the public service, the usefulness of the officer thereto and all the other circumstances of the case, termination is desirable in the public interest, and a pension, gratuity or other allowance cannot otherwise be granted to him under this act, the President may grant a pension, gratuity or other allowance, not exceeding in amount that for which the officer would be eligible if he retired from the public service in the circumstances described in paragraph (e) of Section 6"

19. The procedure for retirement under the "50 year rule" is provided for under Section G.46 (1) of the Service Commission Code of Regulations, 1992 which states as follows:

    "An officer will normally be required to give six months' notice of his intention to retire under the "50year rule" and the Government will normally give a similar period of notice to any officer whom it is intended to apply this provision."

20. Section G.47 states that: "if a Permanent Secretary considers that a public officer should be called upon to retire on or after reaching the age of 50, he should advice the officer that his retirement is under consideration asking him whether he wishes to retire voluntarily or whether he wishes to make any representation of a personal nature of his compulsory retirement. The Permanent Secretary will forward such representations, if any, together with his own observations to the appropriate Service Commission (namely, the Public Service Commission of Kenya or the Judicial Service Commission) and the Commission will decide whether such officer should be called upon to retire. The Public Service Commission of Kenya has delegated its authority in certain cases to "authorized officers"

21. From the facts gathered in this case, the complainants were sent on compulsory leave on 16th September2002 and on 14thFebruary 2003, they wrote to the Hospital and requested to be allowed to resume their duties. On 17th March 2003, the Hospital wrote to them, communicating its decision to retire them under "50 year rule". Further on 19th March 2003, the Hospital communicated to them the decision to compulsorily retire them under "50 year rule" with effect from 1stApril 2003.

22. As noted above, retirement in public interest is a form of exiting service by a public officer as a result of disciplinary action. There is, however, no indication that the complainants had been subjected to or that they were facing disciplinary proceedings and this procedure could not apply.

23. On the other hand, retirement under the "50 year rule" can either be voluntary or compulsory and the procedure to be adopted in such an instance has been provided for. In this case, the complainants were sent on compulsory retirement under the "50 year rule", but the relevant procedure was flouted. For instance, the complainants were not given six months' notice of retirement as required, but were instead sent on compulsory leave for about six months.

24. Furthermore, they were neither notified of the intention to be retired under the "50 year rule", nor were they asked to give their representations against the intention to retire them as such.

25. It is imperative at this juncture to state that retirement under the "50 year rule" is not a form of disciplinary action to an employee and cannot arise out of disciplinary proceedings. This is as opposed to retirement in public interest which can be resorted to as a result of a disciplinary action.

26. It is, therefore, not surprising that the Hospital made reference to having retired the complainants in public interest since their conduct was considered gross misconduct while at the same time stating that they had been retired under the "50 year rule". It is important to distinguish the two and the Service Commission's Code of Conduct, 1992 reiterated this.

27. Gross misconduct is a ground for summary dismissal of an employee. There is, however, no single definition of the term and what constitutes gross misconduct was captured in the Hospital Terms and Conditions of Service of 1998 as well as Section 17 of the Employment Act, Cap 226, now repealed, which was applicable then. These include absence from work without leave or other lawful cause, being intoxicated during work, neglect to perform work, using abusive language, failure to obey lawful and proper command, criminal arrest and the commission of a criminal offence against the employer or employer's property amongst others. In all these cases, the law provides that due process must be followed in the summary dismissal of an employee.

28. The process that would have ideally followed when an employee was accused of gross misconduct would have been a disciplinary process. Thus, retirement under the "50 year rule" was, and is not a disciplinary process.

29. Accordingly, we find that the decision to retire the complainants under the "50 year rule" was unjustifiable and unfair. Furthermore, the procedure to effect the retirement was improper and un-procedural.

b) Compulsory leave

30. The Hospital had sent the complainants on compulsory leave and it would be important at this juncture to understand this procedure. Under the Kenyatta National Hospital Terms and Conditions of Service, 1998 which were applicable then, compulsory leave is provided for under section VIII sub-section 12 which states as follows:

> "The Director may order an employee to proceed on compulsory leave to facilitate investigations on any serious allegations made against the employee. Such leave will not exceed 30 days, shall be distinct and separate from annual leave and the employee shall be eligible for payment of full salary. In exceptional circumstances where investigations cannot be completed within 30 days, the Director may extend the period of compulsory leave by a further period not exceeding 30 days."

31. From the above, compulsory leave would be resorted to under the following conditions:

    i) Serious allegations have been made against an employee.

    ii) The period of compulsory leave should not exceed 30 days unless the same is extended by the Director, but not exceeding 30 days.

    iii) The employee is entitled to full salary during the period.

32. It is worth noting that the Service Commission Regulations did not have a provision for compulsory leave and we will, therefore, be guided by the Employment Act, Cap 226, now repealed which was applicable then. The other similar procedure to this is interdiction or suspension which is resorted to where investigations into the conduct of an employee have been commenced or where disciplinary proceedings have been commenced or in the case of suspension, where criminal proceedings have been instituted against the employee and it is considered proper that the officer should cease forthwith to exercise the powers and functions of his/her public office during the pendency of the proceedings.

33. The court in David *Wanjau Muhoro vs. Ol Pejeta Ranching Ltd* (2014) eKLR noted that compulsory leave is essentially a suspension of an employee from employment, pending investigation of an employment offence, and the outcome of the disciplinary process. Although the Hospital's Terms and Conditions of Service had provisions for interdiction and suspension where an employee had committed a serious offence or was in serious breach of discipline, we find it proper to conclude that the compulsory leave, in this instance, was a form of disciplinary process as defined above.

34. Having concluded as such, the next question would be whether the complainants were facing any disciplinary offence to be sent on compulsory leave? In its response, the Hospital stated that the complainants were retired from the Hospital's Service under the "50 year rule" after due consideration of their cases by the Management. It further stated that it had received reports that being senior members of the team charged with implementing positive changes in their departments, the officers had exhibited gross incompetence in the core business of Clinical Chemistry and resisted any positive change and their conduct was viewed as gross misconduct.

35. A close examination of the letters sending the complainants on compulsory leave reveal no allegations against them. It is also evident that no disciplinary proceedings were done and the Board of the Hospital may have sat and deliberated on the fate of the two employees in their absence. Accordingly, due process was not followed. Due process requires that the conduct of proceedings of such nature be done according to the established rules and principles for the protection of private rights including the requirement of notice and the right to a fair hearing before a body or a tribunal with the power to decide the case.

36. Furthermore, the procedure for compulsory leave as specified in the Terms and Condition of Service was flouted since the complainants were sent on compulsory leave from 16th September 2002 up to 17th March 2003 (a period of six months) and no extension was ever communicated. No disciplinary proceedings were instituted and the basis of sending the complainants on compulsory leave cannot be ascertained. This goes against the principles of fair administrative action.

c) Payment of retirement benefits

37. The complainants demanded for the payment of their pension in full while the Hospital stated that the demand was not within the regulations of the Hospital. The Hospital relied on the Staff Superannuation

Scheme's Trustee Deed and Rules which provided that an officer who retired from the Service loses a percentage of the benefits accruing to him or her for the years below fifty five. Accordingly, Mr. Waweru lost 2% of the total retirement benefits since he was fifty four at the time he was retired while Mr. Chwala lost 10% of his total retirement benefits as he was fifty years then.

38. As indicated above, an officer who is retired under the "50 year rule" is entitled to the payment of his pension in full while an officer who is retired in the public interest may or may not receive his pension depending on the circumstances of the case.

39. If the complainants had been lawfully retired under "the 50 year rule", then they would still be entitled to their pension in full, but we have already made a finding that the complainants were unfairly, improperly and un-procedurally retired from employment.

E. REMEDIAL ACTION

40. Based on the foregoing, we hold and find as follows:

    i) That the retirement of the complainants under "the 50 year rule" was arbitrary, unfair and un-procedural. However, due to the effluxion of time and the fact that the complainants are now passed the retirement age, we cannot direct the Hospital to reinstate them to employment.

    ii) That it was improper and un-procedural to send the complainants on compulsory leave without any allegations against them.

    iii) That the complainants would have ideally been entitled to the payment of their pension in full had they been procedurally retired under "the 50 year rule".

41. In light of the above, the Commission in exercise of its powers under Article 59 (2) (j) of the Constitution of Kenya, 2010 and Sections 8(g) and 26(g) of the Commission on Administrative Justice Act, 2011 **FINDS** that the Hospital should:

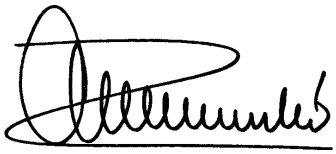
    i) Pay the complainants their pension in full. The same be computed based on their retirement dates had they attained the normal retirement age of 55 years.

    ii) Compensate the complainants for unfair termination of employment. The compensation should be computed based on the salary of each complainant payable as at 19th March 2003 for a period of one year from the date thereof.

    iii) Put in place measures to ensure strict adherence to the Constitutional principles, laws, regulations and other provisions applicable when undertaking administrative decisions.

    iv) Review its Terms and Conditions of Service to align them with the provisions of Article 47 of the Constitution and the attendant laws and regulations.

DATED this **8th** Day of **December 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)
INQUIRY FILE NO. CAJ/M.EDU/013/546/13-CAK

ANONYMOUS ……COMPLAINANT

VERSUS

MINISTRY OF EDUCATION, SCIENCE AND TECHNOLOGY……RESPONDENT

DETERMINATION

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

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B. SUMMARY OF THE COMPLAINT

3. The Commission received the anonymous complaint on the 13th day of September 2013 alleging as follows:

   a) That he is a parent at Kabaa High School, Machakos County;

   b) That the current principal informed the parents that the school had incurred a debt running into millions of shillings and that the debt had been incurred during the tenure of the former Principal;

   c) That they were never informed of the actual amount of debt that is purportedly in millions of shillings;

   d) That the current principal had had asked every parent to pay an extra Kshs. 1,000.00 annually in addition to the school fees until the debt is fully settled;

   e) That without any consultations, this amount was increased to Kshs. 5,000.00 per term which is burdensome to most parents;

   f) Further the Principal is forcing the parents to buy stationery for the school.

4. Based on the foregoing, the complainant sought to know how the debt was incurred, the amount, and also action be taken against the Principal for exploiting the parents.

C. THE ACTION AND RESPONSE

5. Having received the complaint, the Commission commenced an inquiry into the matter by writing to the Principal Secretary, State Department of Education on 19th November 2013. The Commission sought to have the matter investigated to get the official position of the Ministry.

6. In responding to the allegations, the State Department of Education vide a letter dated 16th April 2015 , stated that the Ministry conducted a financial audit assessment of the school in February 2015 and established that*:*

   a) The school was collecting Kshs. 3,000.00 per student per term for clearing the debt and not Kshs. 5,000.00 as alleged by the complainant;

   b) The Kshs. 3,000.00 was agreed upon during the extraordinary parents annual general meeting of 6th April 2013;

   c) Parents had been informed that the debt was Kshs. 31 Million;

   d) There was no evidence that the students were paying for stationery.

7. In the reply, the Ministry attached the following supporting documents;

   a) Financial Audit Assessment dated 16th February 2015;

   b) The Fees structure for the year 2014; and

   c) Minutes of the parents' meeting held on 6th April 2013 that passed the resolution requiring

all students to pay an additional sum of Kshs. 3,000 per term to clear the debt.

D. ANALYSIS OF ISSUES AND EVIDENCE

8. Having analysed the complaint the issues that came up were;

   i) whether the allegation that the School, Kabaa High School, had an outstanding debt was true.

   ii) whether the administration was involved in dubious activities that required parents to pay an additional sum of Kshs. 5,000.00 per term for an alleged debt that the school had incurred.

   iii) whether the students were forced to pay for stationery.

9. The complainant did not adduce any evidence to support his claim.

10. After an inquiry made to the Ministry of Education, Science & Technology, the circumstances under which the school incurred the debt was stated and the same proven to have been explained to the parents during an extraordinary meeting and a resolution for each student to pay Kshs. 3,000 and not Kshs. 5,000 passed. The copies of the fees structure for the year 2014 and the minutes for the extraordinary meeting were given as evidence to support the same. The Ministry mandated an audit to be carried out and a Financial Audit Assessment dated 16th February 2015 adduced as evidence to show how the finances of the school were managed. The report indicated that indeed the amount collected from the parents was used to pay the creditors.

E. CONCLUSION AND DETERMINATION

10. Based on the foregoing, we hold and find as follows:

   i) That the parents were asked to pay Kshs. 3,000 and not Kshs. 5,000 as had been alleged.

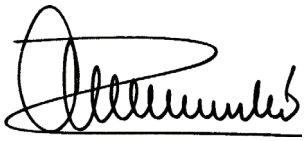
   ii) That the school had a debt of Kshs.31 million towards its creditors and the money paid by the parents was to pay the debt.

   iii) That the school administration did not misappropriate any funds and was not involved in any dubious activities to extort the parents of their monies.

   iv) That the students were not paying for stationery.

11. Due to lack of a rejoinder and further evidence to rebut the findings made from the response from the Ministry of Education, Science & Technology, we **FIND** that the allegations made by the complainant stand no ground and should therefore be dismissed. We recommend that the file be closed.

DATED this **25th** Day of **November 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)
INQUIRY FILE NO. CAJ/M.INF/023/54/2012 – WT

PROF. JAMES AMBANI KULUBI ……COMPLAINANT

VERSUS

MINISTRY OF INFORMATION, COMMUNICATION AND TECHNOLOGY .....……RESPONDENT

DETERMINATION

A. MANDATE

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

B. COMPLAINT

3. The Commission received a complaint from Prof. James Ambani Kulubi, the complainant herein, vide a letter of 27th October 2012 regarding the appointment of the Communications Secretary, National Communications Secretariat. The particulars of the allegations were as follows:

   a) That he had been invited for an interview on 20th and 21st September 2012, for the post of Communications Secretary at the National Communication Secretariat.

   b) That after the interview, he was informed that he had performed well, but the then Minister in the Ministry of Information and Communication declined to approve his appointment following an alleged adverse report from the Ethics and Anti-Corruption Commission.

   c) That he was required to provide clearance certificates from various agencies including the Ethics and Anti-Corruption Commission.

   d) That he was unfairly denied the appointment after obtaining the necessary clearances and instead, a person who had not been shortlisted for the interview was appointed to the position.

4. Based on the above, the complainant sought the intervention of the Commission in what he termed as unfair treatment in the recruitment process and to challenge the irregular appointment of one Mr. Charles Ngesa to the position of Communications Secretary.

C. RESPONSE

5. Upon receipt of the complaint, the Commission initiated an inquiry vide a letter of 16th December 2013 to the Ministry of Information, Communication and Technology (hereinafter referred to as the Ministry) who responded as follows:

   i) That the post of Communications Secretary in the National Communications Secretariat was advertised in the Daily Nation of Friday, the 22nd day of June 2012.

   ii) That fourteen (14) candidates applied for the post and seven candidates were shortlisted for interviews on 20th September 2012, but only six candidates appeared for the interviews.

   iii) That the complainant, Prof. James Ambani Kulubi emerged the best candidate, but had disclosed during the interview that he was under investigation by the Ethics and Anti-Corruption Commission (EACC) in respect of his former position as the Principal of Multi Media University. Although he had been cleared by EACC, there were other investigations that were yet to be concluded.

   iv) That following the above, the former Permanent Secretary wrote to EACC after the interviews and requested it to give clearance concerning

the investigations, but EACC did not respond

v) That on 10th January 2013, the Acting Communications Secretary then, Mr. Charles Ngesa wrote to the former Permanent Secretary requesting for confirmation to the post since he had acted in the position since 22nd May 2012.

vi) That on 18th April 2013, the then Permanent Secretary granted the request by the Acting Communications Secretary and appointed him as the Communications Secretary.

vii) That although the complainant emerged the best and was to be appointed to the post of Communications Secretary, other adverse factors came into play, i.e. the failure by EACC to respond to the letter and the time taken to respond was too long as per the appointment procedures, rules and regulations.

viii) That the above factors necessitated the former Permanent Secretary to appoint the Acting Communications Secretary to avoid any leadership/management crisis in the operations of the Secretariat.

D. ISSUES FOR DETERMINATION

6. Having examined the complaint, the response, its circumstances and relevant documents, we have identified the following two issues for determination:

a) Whether the complainant was treated unfairly by the Ministry in denying him an appointment as Communications Secretary following a competitive interview process.

b) Whether or not the Ministry acted improperly and irregularly in appointing Mr. Charles Ngesa to the position of Communications Secretary.

E. ANALYSIS OF ISSUES AND EVIDENCE

7. First and foremost, we wish to outline the relevant provisions of the law relating to the values and principles of public service which is the subject of the present matter. Article 232 of the Constitution creates an obligation by requiring fair competition and merit as the basis of appointments and promotions in public service.

8. Article 73 outlines the guiding principles of leadership and integrity to include selection on the basis of personal integrity, competence and suitability or election in free and fair elections. It also requires objectivity and impartiality in decision making, and in ensuring that decisions are not influenced by nepotism, favouritism, other improper motives or corrupt practices.

9. Further, the Employment Act, 2007 of the Laws of Kenya requires 'employers to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice' and outlaws direct or indirect discrimination in respect of recruitment, training, promotion, and terms and conditions of employment among others (Section 5(2 & 3).

a) Unfair treatment of the complainant in the recruitment process

10. According to the recommendations of the interviewing panel in the minutes of 20th September 2012, the complainant was endorsed for appointment subject to clearance by EACC. Vide a letter of the same date, the then Permanent Secretary wrote to EACC and requested for clearance regarding any investigations concerning the complainant before they could finalize the recruitment process. EACC responded on 26th September 2012 and stated that it had received two complaints against the complainant and it cleared him on the first complaint and left the second complaint to the Criminal Investigations Department (CID) since the Department had already commenced investigations into the allegations against him for alleged misappropriation of funds at Multi Media University.

11. It is worth noting that the response from EACC was received and date stamped by the Ministry on the same day – 26th September 2012. It is, therefore, not true that EACC did not respond to the letter from the Ministry.

12. Furthermore, the complainant made personal requests for clearance certificates to EACC and the Criminal Investigations Department. EACC wrote to him on 31st October 2012 confirming the position in their letter of 26th September 2012 which they had earlier addressed to the Ministry. The CID also wrote to him on 11th November 2012, stating that it had carried out investigations and forwarded his file to the Director of Public Prosecutions recommending closure of the file since they did not find evidence of misappropriation of funds at the University.

b) The appointment of Mr. Charles Ngesa, the then acting Communications Secretary

13. It is important to note that Mr. Charles Ngesa who was appointed to the position of Communications Secretary did not participate in the interview, but was acting in the position.

14. During the interview, the interviewing panel had given clear directions on what would happen should the best candidate not be cleared by EACC. In its minutes of 20th September 2012, the interviewing panel recommended for the appointment of the

complainant subject to clearance by EACC and, should he not be cleared, Mr. Peter Nickson Wanyonyi, the next best candidate be offered the position. Furthermore, should the position fall vacant within a period of six months, the next candidate should be offered the position without the necessity of a further interview. It is, therefore, questionable for the Ministry to wait until April 2013, only to appoint a person who did not participate in the interview.

15. The Ministry attributed their decision to appoint Mr. Charles Ngesa to two 'adverse factors'; namely failure by EACC to respond to their request for clearance of the complainant and a delay to respond. This is incorrect since as we have established above, EACC responded on 16th September 2012, six (6) days after the request was made by the Ministry. Furthermore, alleging delay in responding is unfounded since the response was issued.

16. Even if there was delay in getting clearances for the complainant, which was not the case, the interviewing panel was clear on what should happen in the event that the first best candidate was not cleared by EACC.

17. Even though the Acting Communications Secretary made a request for confirmation to the position, pursuant to the Public Service Commission Regulations, it was improper for the Ministry to delay the appointment for over six months so as to justify the appointment of a person who did not participate in the interview.

F. REMEDIAL ACTION

18. Based on the foregoing, we hold and find as follows:

    i) That the Ministry of Information Communication and Technology, under the stewardship of the former Permanent Secretary, Dr. Bitange Ndemo acted unfairly, improperly and irregularly in the conduct of and management of the recruitment process and the same violated Articles 10, 73 and 232 of the Constitution of Kenya, 2010.

    ii) That the Ministry acted unfairly, improperly and irregularly in denying the complainant the appointment whilst at the same time acting improperly by appointing Mr. Charles Ngesa to the position. However, due to the effluxion of time, we will not direct the Ministry to appoint the complainant to the position of Communications Secretary.

    iii) That the allegation that EACC did not respond to the Ministry's letter is misleading and meant to conceal the irregular appointment of an unqualified candidate as Communications Secretary by the Ministry. This is contrary to Section 52 (b) and (d) of the Commission on Administrative Justice Act, 2011 which makes it a criminal offence to give false or misleading information to the Commission.

19. In light of the above, the Commission in exercise of its powers under Article 59(2)(j) of the Constitution and Sections 8(g) and 26(c) of the Commission on Administrative Justice Act, **FINDS** that the Ministry should:

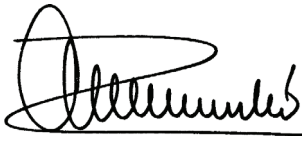
    i) Compensate the complainant for unfair treatment and loss of opportunity. The compensation should be computed by reference to the basic salary for the position of Communications Secretary for a period of six (6) months.

    ii) Ensure that future recruitment processes are conducted in a competitive, proper, fair and reasonable manner and in accordance with the values and principles of public service enshrined in Article 232 of the Constitution of Kenya, 2010.

20. The Commission will consider recommending to the Director of Public Prosecutions the prosecution of Mr. Wilfred F.O Amolo for submitting false and misleading information to the Commission vide the letter dated 30th June 2014, contrary to Section 52 (b) (d) of the Commission on Administrative Justice Act, 2011.

21. Pursuant to Section 43 (3) of the Commission on Administrative Justice Act, 2011, the Principal Secretary in the Ministry of Information, Communication and Technology is hereby required to implement the above findings relating and notify the Commission accordingly.

DATED this **10th** Day of **November 2015.**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)
INQUIRY FILE NO. CAJ/KNEC/013/549/13

GEORGE OTIENO ATUDO …….. COMPLAINANT

VERSUS

KENYA NATIONAL EXAMINATIONS COUNCIL …….. RESPONDENT

DETERMINATION

A. MANDATE

1. The Commission is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

B. COMPLAINT

3. The complainant lodged a complaint with us on 28th May 2013 alleging that he had been unfairly treated by the Kenya National Examinations Council (KNEC). The particulars of the allegations were as follows:

   i) That he sat for his EAACE at Homa Bay High School in 1975 and obtained '9' in General Paper, 'F' in Mathematics, F in Chemistry and 'E' in Biology.

   ii) That he was employed by the defunct Ministry of Local Government in 1979 as an Audit Clerk SS 13 and posted to the erstwhile Kisumu Municipal Council.

   iii) That he was dismissed from service on 28th June 2012 on account of the allegation that his 1975 East Africa Advanced Certificate of Education hereinafter referred to as EAACE number 7404501 was forged.

   iv) That when his former employer engaged Kenya National Examinations Council hereinafter referred to as KNEC for a clarification on the matter, KNEC wrongfully stated that the details of the complainant's certificate did not tally with the ones in their possession since his Biology results appeared to have been altered.

   v) That KNEC forwarded to the erstwhile Kisumu Municipal Council a Statement of Examination Results, which tallied with the results that the complainant had in his possession.

   vi) That the certificate in his possession was truly the one that was issued to him after his completion of East Africa Advanced Certificate of Education Examination in 1975.

   vii) That the results and grades in the certificate in his possession had been duly confirmed by Homa Bay High School, which was the institution where he had sat his examinations.

4. Based on the foregoing, the complainant sought the intervention of the Commission for his results and certificate to be declared authentic.

C. RESPONSE

5. Upon receipt of the complaint, the Commission initiated an inquiry vide a letter dated 4th September 2013 to KNEC. This elicited a response on 18th September 2013, which indicated that:

   i) There was a procedure that the Council followed in regards to the ascertainment or verification of results, which process was followed during the verification of the complainant's results.

   ii) All the details of the complainant's certificate tallied with the ones in the system except for his Biology results, which were indicated as Subsidiary '0' and not Principal 'E' that was reflected in his certificate.

   iii) Where a certificate is presented for confirmation varies from the records in the database, it is assumed that the results are altered or forged.

iv) The Council continuously put in place measures to safeguard the certification process to limit possibilities of forgeries.

D. HEARING OF THE MATTER

6. After an analysis of both the complaint and the response from KNEC, the Commission was of the opinion that the dispute between the complainant and the respondent may be conveniently and effectively resolved through a Panel Hearing. Consequently, the Commission issued and served the relevant notices upon both parties notifying them of the decision to conduct a formal hearing in accordance to Regulation 22(4)(a) of the Commission on Administrative Justice Regulations, 2013. The first hearing was conducted on 15th April 2015 and the second hearing on 6th May 2015, with both parties in attendance.

i) First Hearing

7. At the first hearing, KNEC was represented by Ms. Naomi Njenga, its Advocate from Kiarie, Kariuki & Advocates and Andrew Nyachio, its Senior Legal Officer. The complainant appeared in person after he waived his right to be represented by an Advocate and the panel was constituted of Dr. Otiende Amollo, Dr. Regina Mwatha and Cmmr. Saadia M. Mohamed.

8. The Chairperson noted that KNEC had served the Commission with a Replying Affidavit dated 14th April 2015. The same was served on 15th April 2015. A copy was served upon the complainant and he was given a chance to peruse the same. In addition, the complainant produced a letter from the previous year that had not been shared with KNEC, which was at that instance and was to be photocopied for them after the meeting. However, Ms. Njenga indicated that the presence of the letter did not affect KNEC's stand on the matter.

9. The Commission summarized the complaint for the parties as follows:

> Mr. Atudo was employed was employed by the defunct Ministry of Local Government in 1979 as an Audit Clerk SS 13 and dismissed from service on 28th June 2012 on account of the allegation that his 1972 East Africa Advanced Certificate of Education number 7404501 was forged. His former employer sought verifications of the same from KNEC. The response was that the details of the complainant's certificate did not tally with the ones in their possession since his Biology results appeared to have been altered from a Subsidiary 'O' to a Principal 'E'.

10. KNEC maintained its stance that the document was a forgery and that it had undertaken a proper verification of the results and found that there was an alteration.

11. The complainant indicated that the summary was not complete as it failed to indicate that he had had his results verified by his former school, Homa Bay High School. In addition, he had applied for a Statement of Results from KNEC, which was sent to the defunct Kisumu Municipal Council. Both of these results tallied with the Certificate that was in the complainant's possession. He further indicated that the original of the Statement of Results from KNEC was still in the possession of the Kisumu County Government, successor of the Kisumu Municipal Council.

12. The complainant further indicated that he had requested for a result slip from his former High School but the same could not be traced as he had only collected his Certificate and not a Results Slip. He went ahead to highlight discrepancies in the Results of other candidates in the results from Homa Bay High School and those that were in the custody of KNEC. Further, he asserted that there was a discrepancy in the aggregation of the marks.

13. The Chairperson sought to find out if the Principal of Homa Bay High School had provided the complainant with a copy of all the results for his year or just the page where his results were appended. The complainant responded that he had been given a copy of the entire results for the School. This was how he was able to spot the discrepancies in some of the candidate's performance and the final aggregate performance.

14. The Chairperson instructed that two officers (one from the Commission and one from KNEC) to peruse the results from Homa Bay High School and those from KNEC for the purpose of identifying any discrepancies in the two sets of the examination results. The verification revealed that results for four (4) individuals' results showed discrepancies between the ones from the School and the ones from KNEC. Dr. Regina sought to know how that was possible. Mr. Nyachio responded that he was not in a position to explain the discrepancy because he had not seen the original records from Homa Bay High School. He asserted that KNEC would call on an expert from the Archives to clarify on the same as well as the name of the examination.

15. KNEC representatives were requested to comment on the summary provided after the joint audit. Ms. Njenga requested that the response from KNEC be

summarized again, which was done. In response, Ms. Njenga indicated that KNEC had a mandate to verify Certificates that the institution had issued, and not the schools where a candidate undertook the examination. KNEC had no control over documents that had left it, therefore, school results could not be used for verification. She further indicated that the Statement of results in the possession of the Kisumu County Government was new information that KNEC needed to consider. To this end, she indicated that the original ought to be availed for any action to be taken by KNEC. However, KNEC did not admit that the alleged Statement of Results originated from KNEC.

16. Mr. Nyachio asserted that it was difficult to ascertain from the copy of delivery receipt in the complainant's possession what was actually delivered. He indicated that he would peruse KNEC's records to find out what was delivered.

17. The Chairperson also requested KNEC to check its records if the serial number indicated on the Statement of Results related to the same statement, which Mr. Nyachio indicated he would check and confirm. In addition, the Chairperson requested for a copy of the letter from the Public Service Commission (PSC) dated 11th October 2012 which sought the authentication of the results of the candidate as sent to the school and inquired if it was possible for a mistake to be made during the process of compiling the results. Mr. Nyachio responded that it was not possible for such discrepancies or mistakes as the complainant alleged to occur. However, a substantive investigation would be required to establish the same. Mr. Mwachio further asserted that the results in question that KNEC had in its archives were compiled and printed in 1990 even though the same were handed over to KNEC from EAACE in 1980.

18. Mr. Nyachio also indicated that KNEC had not investigated the issue of the results in the possession of Homa Bay High School and the Chairperson requested that he avail internal experts from KNEC to shed more light on the process of transcribing the results in order to rule out the possibility of a mistake being made.

19. The Chairperson brought to the attention of KNEC the fact that the results from its archives indicated that they were results for Kenya Advanced Certificate of Education (KACE) and not East Africa Advanced Certificate of Education (EAACE), which was the examination that the complainant had sat for. Mr. Nyachio promised that he would find out from the Archives Section how and when the name changed from EAACE to KACE.

20. Cmmr. Saadia sought to find out if KNEC's stand was that all the results in the possession of schools were not authentic; whether they were useless unless they were authenticated by KNEC. Mr. Nyachio responded that KNEC was the best authority to verify the authenticity of results since the institution had no control over the records once they are dispatched to schools.

21. Dr. Regina sought to find out how long it took for KNEC to forward a Statement of results to a candidate who had paid for the delivery of the same. Mr. Nyachio indicated that it took approximately one (1) week as envisioned by the institution's Service Charter.

22. The complainant relied on the following documents in support of his case:

    i. His original EAACE Certificate.

    ii. A copy of KNEC's Statement of Results dated 9th July 2012.

    iii. A copy of his EAACE Certificate duly certified by Homa Bay Secondary School.

    iv. A copy of his Application for Statement of Examination Results.

    v. An Air Waybill dated 29th June 2012 for the delivery of Statement of Examination Results.

23. To make a conclusive determination of the matter, the Chairperson requested KNEC to provide the Commission with:

    1. A copy of the letter from the Public Service Commission dated 11th October 2012.

    2. Documents from which the 1975 results were transcribed.

    3. A statement of what was delivered vide the waybill of 29th June 2012

    4. One of the transcribers from KNEC, if possible the one who transcribed the results that were in contention.

    5. An explanation on the change of name of the Examination to KACE from EAACE as indicated on the results from KNEC.

24. The Commission was also to engage the Kisumu County Government to obtain the original Statement of Results dated 9th July 2012 that was supposedly sent from KNEC. The Principal of Homa Bay High School would also be engaged to avail the original results of East African Advanced Certificate of Education in respect of Examination of November/ December 1975 kept by the School as well as the uncollected Certificates for the same examination.

ii) Second Hearing

25. At the second hearing, KNEC was represented by Ms. Naomi Njenga, its Advocate from Kiarie, Kariuki & Advocates, Andrew Nyachio, its Senior Legal Officer and Jane Nabiki Kashu, KNEC Principal Examination Secretary. The complainant appeared in person and the panel was constituted by the Chairperson and Commissioner Saadia. Mr. Andrew Odhiambo Buop the Principal, Homa Bay High School was also in attendance.

26. The Principal of Homa Bay High School handed in the original results of the 1975 EAACE to the Panel for examination. The print out was seen by the Chairperson and handed the same to the KNEC team.

27. The Principal also handed over 9 uncollected Certificates in respect of the 1975 EAACE. He was not the one who received the results from the examination body as the same had only been handed over to him seven (7) years earlier before when he took over as the Principal of Homa Bay High School.

28. KNEC and the complainant did not have any questions for the Principal nor did they challenge the results that he had produced. The Principal further asserted that the Result Slip in regard to the complainant's EAACE of 1975 was not in the custody of the school.

29. The Commission gave a report on its engagement with the County Government of Kisumu on the production of the Original Statement of Results it had received on 28th November 2012.

30. CAJ had issued a Notice to Produce Documents to the County but it availed a different document in the form of a Report. The County Attorney was called and informed that the document was irrelevant and he indicated that he would engage the County Secretary for the right document to be traced. On a follow-up telephone conversation with the Attorney, he informed CAJ that the said document could not be traced as there had been a disruption in the document stores during the transition of the Municipal Council to the County Government. Consequently, it was not possible to obtain the said Statement of Results.

31. KNEC produced the letter from the Public Service Commission dated 11th October 2012 requesting for the verification of some results, which included the complainant's results. It also provided a copy of a letter from the same institution dated 23rd April 2012.

32. Ms. Kashu explained the name change of the examinations evident in the print out results from KNEC by asserting that the last re-print of the examinations had been in 1990. Since 1980, the systems had been upgraded and the name had been changed to KACE. This meant that while printing, the machine picked everything at 'O' Level as KCE while anything above 'A' Level was picked as KACE. As such, the title EAACE had been rendered obsolete by the new machines. However, the students' results remained the same. The exams were stored in Reels, of which the data therein had been keyed in by employees for EAACE and not KNEC employees. Additionally, KNEC also received results in hard copy from EAACE in regards to all examinations before 1980. This hard copy was not available because it had become worn out due to the usage over the years.

33. According to her, the results from Homa Bay High School looked genuine, and she could not explain the discrepancy between the results and those printed out by KNEC. In addition, she asserted that KNEC did not rely on any other means to authenticate results apart from the records that were in their possession. Even though each student's results were represented by a Certificate and a Result Slip, the office relied solely on the computer records to authenticate the results.

34. She explained that no Statement of Results was sent to the defunct Kisumu Municipal Council because KNEC officers discovered that the complainant's results were tampered with and, therefore, they could not be sent. In regards to the serial number on the copy of Statement of Results in the complainant's possession, she could not comment on it as she did not have the Dispatch Register with her.

35. Ms. Kashu was not in a position to comment on which document had the serial number on the complainant's Statement of Results or the veracity of the signature therein. In addition, she explained that no criminal proceedings were instituted against the complainant for uttering a false document because the same had been presented to another party, and not KNEC. Further, KNEC lacked capacity to prosecute all the individuals who engaged in forging documents issued by it.

36. It was possible to access the Dispatch Register for the Statement of Results that had been printed for the date the complainant claims to have had his Statement printed. All the Statements that were printed during a particular period were recorded.

37. The Chairperson inquired from the KNEC Team that if they were asserting that the complainant's Certificate was a forgery, then it followed logically that the results from Homa Bay High School were also a forgery. Ms. Kashu reiterated that she could not comment on the validity of the results

from the school. She explained that KNEC had experienced situations whereby people claimed that the Certificates they had in their possession were genuine yet the same results had a variance with the ones in KNEC's records.

38. The hearing was concluded on an agreement that one officer from the Commission would:

    i. Check from KNEC if the serial number of the Statement of Results allegedly sent to Kisumu County Council was among the ones printed and recorded at KNEC.

    ii. Peruse the Register for Statements of Results issued in July 2012 to establish if the Statement in contention was printed at that time.

    iii. To collect from KNEC 10 samples of Statements of Examination results for Examinations undertaken before 1979.

    iv. To receive from KNEC result slips for the 3 students from Homa Bay High School whose 1975 EAACE results differed from the ones in KNEC's print out.

39. In fulfillment of the above, two officers from the Commission visited the Kenya National Examinations Archives at Extelcoms House on 7th May 2015.

40. The register in regards to Statements of Results was availed to them. It was in the form of a Counter Book and from the records therein, it was last used in November 2013. The reason given for its obsolesce was that KNEC started keeping digital records for any Statement of Examination Results that were printed thereafter.

41. Further perusal of the Counter Book revealed that the Certificates printed were not recorded individually, but in batches. For example, on 26th June 2012, the Statements indicated as printed were serial number 0154589 – 0154678. Mrs. Kachu, who was taking them through the exercise, indicated that on a daily basis KNEC printed out very many Statements and as such, it would have been difficult to record them individually.

42. The serial number for the Statement of Results allegedly sent to Kisumu Municipal Council (serial number 0155432) was among the ones printed on 9th July 2012. The Statements printed on that particular day fell within serial numbers 0155372 – 0155437. What this meant was that this particular Statement was printed on that day. However, it was difficult to ascertain in whose name the Statement was issued as well as to whom the same was addressed. In order to know the same, one had to peruse through the individual copies of Statements that were left with KNEC after the originals were dispatched. These copies were kept at KNEC's Archives at Industrial Area and Mrs. Kachu promised to send one of her Officers the next day to trace the same.

43. The Commission was also informed that there were some Statements that were printed but were not dispatched supposedly because they had errors or were spoilt. Such Statements even though recorded as printed were destroyed but there were no records to show that the same was destroyed. Therefore, according to KNEC, if a copy of the Statement of Results was not in its Archives, then it meant that it had been sent back to be destroyed because it had an error.

44. Mrs. Kashu provided the Commission with 10 original Statement of Examination Results in respect of Examinations undertaken before 1980. KNEC produced the original result slips for the 3 students from Homa Bay High School whose 1975 EAACE results differed from the ones in KNEC's print out. The students were John Ondieki, Ely Mwanza and Richard Ayoro.

45. By 14th May 2015, the exercise of tracing the copy of the Statement of Examination Results with serial number 0155432 by KNEC was over. Mrs. Kashu informed the Commission that the officers were unable to trace the said Certificate. According to her, the only explanation as to its absence was that the same had not been dispatched, but sent back to be destroyed. KNEC, therefore, concluded that the said Statement of Examination Results sent to the Clerk of the defunct Kisumu Municipal Council could not have been dispatched from its offices.

E. ANALYSIS OF ISSUES AND EVIDENCE

46. Having analysed the complaint, evidence adduced by both parties at the hearings and the documents pertaining the complaint, the issues that were evident were:

    i. Whether the Certificate in the complainant's possession was as issued by EAACE.

    ii. Whether the photocopy of the Statement of Results as forwarded to the erstwhile Kisumu Municipal Council was forged.

    iii. Whether the results reflected in the Certificate that the complainant had in his possession mirrored the ones that were in the possession of his former High School.

    iv. Whether the results presented by Homa Bay High School were authentic.

    v. Whether the results held by KNEC regarding the complainant's EAACE results tallied with the ones held by Homa Bay High School and

the complainant.

vi. Whether there was a possibility of a mistake or error in KNEC's results.

vii. Whether the complainant suffered dismissal as a result of (vi) in the event of the same.

47. The inquiries and hearing were designed to garner information from KNEC and the complainant, who were co-operative in terms of responsiveness, availing required information as well as their presence during the hearing.

a) Issue I:

48. At the hearing, the KNEC representatives had an opportunity to examine the original Certificate that was in the complainant's possession as well as the results that were in the custody of Homa Bay High School. At no point did they indicate that the Certificate was a forgery, In fact, there was a general agreement that the results from Homa Bay High School and the complainant's certificate looked genuine, and the discrepancy between the results and those printed out by KNEC could not be explained.

b) Issue II:

49. The explanation by KNEC regarding the non-dispatch of the Statement of Results to the Kisumu Municipal Council is not sufficient insofar as it fails to explain what the complainant paid for vide his bankslip of 29th June 2015 as well as what was delivered via the waybill of 29th June 2012. The only plausible explanation is that KNEC sent the Statement of Results to the Kisumu Municipal Council; a Statement that bears the same results as the Certificate in the possession of the complainant.

50. It is not sufficient that KNEC relied on the provisions of Kenya National Examinations Council Act to state that it was the only body that had the mandate to authenticate results that it had issued or for examination bodies whose results had been transferred to KNEC for storage. Even though it is the best authority to verify the authenticity of results, KNEC has to establish the integrity of results in their position and exclude the possibility of error. In this particular case, Homa Bay High School seemed to have the original results as issued by East Africa Examination Council in their original form, results of which KNEC seemed not to have as the results in its possession had been subjected to transcribing and reprinting. It would be manifestly unjust to fail to take cognizance that the High School also had results which on the face of it, appeared to be genuine.

c) Issue III – V

51. While recognizing that KNEC is the authenticating body in regards to results that it has issued, this role assumes that the results it holds are authentic. In this particular case, there might be a possibility of an error occurring when the results were received, when they were transcribed and subsequently stored. To this end, the authenticity of the results cannot be asserted in totality. It is our finding that KNEC's claim of forgery by the complainant cannot be based only on the fact that there is a discrepancy in the results held by the complainant and those that are held by KNEC. On the face of it, the Certificate in the complainant's possession seems original because:

i. It is similar to the certificates that the Principal produced during the Hearing, being the certificates in respect of the November/ December 1975 EACCE that remained uncollected at the School.

ii. The results reflected therein are similar to the ones in the original print out of results produced by the Principal in their original form during the Hearing.

iii. KNEC failed to indicate elements of the Certificate that supported their assertion that it was forgery, only asserting that it was a forgery because it did not tally with the results in its possession; results whose authenticity is not fool proof.

d) Issue VI:

52. The Commission sought to explain the discrepancies between the results held by KNEC and the ones held by the School, which included a variation on the name of the examination that the complainant had sat for. The explanation rendered by KNEC was that the last re-print of the examinations was done in 1990. Since 1980, the systems had been upgraded and the name changed to KACE. This meant that while printing, the machine picked everything at 'O' Level as KCE while anything above 'A' Level was picked as KACE. As such, the title EAACE had been rendered obsolete by the new machines. However, the students' results remained the same. The exams were stored in Reels, of which the data therein had been stored or entered by employees of EAACE and not KNEC employees.

53. From the explanation above, it is clear that the bulk of results, where the complainant's results were derived from have been subjected to a change from the old form of storage to a modern one. There is a possibility of human error during the transcribing of the results or during any of the other process which

the results were subjected to. It would, therefore, be against natural justice to punish the complainant where there is a likelihood of such an error occurring.

54. In addition, KNEC admitted that it had experienced situations whereby people claimed that the Certificates they had in their possession were original yet the same results had a variance with the ones in KNEC's records. However, they were ordinarily not as persistent as this particular complainant. In our opinion, this can be used to point to the fact that the complainant's tenacious pursuit of the rectification of his results, which are in the possession of KNEC is indicative of his belief that he is in possession of a genuine certificate.

55. From the above analysis, it is clear that the complainant suffered injury from KNEC's misstatements that his 1975 EAACE Certificate was a forgery and there is need to determine who should bear the responsibility of compensating him. The role of the Public Service Commission in the process was initiating the request for an audit of the complainant's Certificate as well as Certificates for other employees of the erstwhile Kisumu Municipal Council. Additionally, the Kisumu Municipal Council dismissed the complainant on the basis of the results rendered by KNEC that the complainant's Certificate was a forgery. According to Mrs. Kashu, KNEC is the only body that has the mandate to authenticate Certificates that were under its custody, a mandate conferred to it by virtue of Section 10 (1) (c) of the Kenya National Examinations Council Act 29 of 2012. As such, the Kisumu Municipal Council conducted its due diligence by referring the matter to KNEC and taking action based on the information that KNEC provided to PSC's inquiry. In this respect, neither the PSC, the Kisumu County Government, which took over from the erstwhile Kisumu Municipal Council can be take responsibility and the same lies squarely on KNEC.

F. REMEDIAL ACTION

56. Based on the foregoing, we hold and find as follows:

    i. That the Certificate that the complainant has in his possession is genuine.

    ii. That the assertion by KNEC that the document is a forgery based on the sole fact that the results therein do not tally with the ones in their records is unfair, unfounded and contrary to evidence and natural justice.

    iii. That KNEC has not demonstrated that the integrity of the results obtained from the defunct EAACE was fool proof and without the possibility of error.

    iv. That KNEC erred in determining that the complainant had forged a certificate resulting in his dismissal.

    v. That consequently, the complainant is entitled to all benefits by way of pension or otherwise as he would have been entitled to except for the dismissal.

57. In light of the above, the Commission in exercise of its power under Article 59 (2) (j) of the Constitution and Sections 8 (g) and 26 (g) of the Commission on Administrative Justice Act, 2011 **FINDS** that KNEC should:

    i. Rectify the complainant's results in its possession in regards to the November/ December 1975 EAACE results based on the above findings.

    ii. Review its policy regarding the authentication of results by institutions which have the mandate to offer examinations on its behalf.

    iii. Undertake a thorough exercise of authentication of all the results as furnished by EAACE.

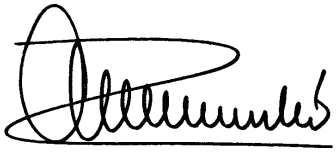
    iv. Compensate the complainant for the lost years, calculated up to the date of payment at the rate of 50% of what he would have been entitled to if he had not been dismissed from his post at the erstwhile Kisumu Municipal Council. At the time of his dismissal on 28th June 2012, the complainant's net salary was **Forty Thousand Kenya Shillings (Kshs. 40,000**).

    v. Arrange to make the payment within **one hundred and twenty (120) days, from the date hereof** or within such extended period as may be determined by the Commission upon request by KNEC, if made within forty five (45) days.

58. The complainant had also sought additional remedies of reinstatement to his former position. We have considered the circumstances of this matter and come to a conclusion that reinstatement would not be appropriate as the complainant was in any event bound to retire on or about 2nd December 2015.

59. The complainant's case be treated as a retirement.

DATED this **3rd** Day of **November 2015.**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

IN THE MATTER OF A COMPLAINT BY PAULPETER M. MAKOKHA AGAINST THE UNIVERSITY OF NAIROBI

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011.

2. The Commission has a mandate, *inter-alia,* to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

3. In the conduct of its functions the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

B. COMPLAINT BY PAULPETER M. MAKOKHA

4. The Commission received a complaint from Mr. Paulpeter M. Makokha, a postgraduate student at the Nairobi University, Department of Sociology and Social Work. The particulars of his allegations are as follows:

   a) That he enrolled for a two years Masters Programme in Rural Sociology and Community Development at the University of Nairobi in January 2010.

   b) That after successfully completing the course work he embarked on the project work in April 2011 after being assigned Dr. R.M. Ocharo as his project supervisor.

   c) That the complainant later left for Kakamega County to collect data for his proposal after the supervisor released him into the field on 27th July, 2012. During his time in the field he had to travel from Kakamega to Nairobi on several occasions to meet with his lecturer to discuss his project and hand in his work for review.

   d) That despite travelling to Nairobi severally he rarely met with his supervisor due to failure by his Supervisor to avail himself. That his effort to have his supervisor review and approve his project has been unsuccessfully and now a two-year programme has stretched into a five-year programme.

5. Based on the foregoing, the complainant sought the Commission to intervene and ensure that:

   i) The matter is mentioned to the Vice Chancellor and the DVC (Academic) so as to have his complaint addressed.

   ii) He is accorded fair treatment by the University of Nairobi

   iii) He graduates from University of Nairobi without further delays.

C. RESPONSE TO COMPLAINT

6. Having received the complaint, the Commission commenced an inquiry into the matter by writing to the Vice Chancellor, University of Nairobi on 28th October 2014 and copied it to the Director, Board of Postgraduate Studies and the complainant. We received an acknowledgement dated 10th November 2014 from the University of Nairobi and later a response from Dr. Robinson Mose Ocharo, the Chairman, Department of Sociology and Social Work dated 3rd December 2014.

7. In responding to the allegations, the Chairman, Department of Sociology and Social Work and the complainant supervisor stated the following:

   i.) That the complainant was indeed admitted to the Nairobi University M.A. program in the cluster of Rural Sociology and Community Development.

   ii.) That he was assigned to supervise the complainant's project work and that by August 2011 he was still working on his proposal. On 27thJuly 2012, the complainant had developed a proposal and was released to the field to collect data.

   iii.) That by March 2013, the complainant was still in the field and all the progress reports were submitted to the Board of Post-Graduate Studies.

   iv.) That in 2014, the supervisor reviewed 13 drafts report from the complainant and attached a Supervision Tracking Schedule. That the supervisor meets with all students under his supervision every Saturday from 11.00am to 1.00 pm for discussion.

   v.) That the complainant submitted his work on 19th September 2014 and the supervisor gave him his comments. However, the complainant

has not submitted a revised report since then.

vi.) The supervisor admits that he received short text messages on 24th September 2014 and on 25th September 2014 from phone no. 0700605350 but did not know the sender or the context in which it was written. On 9th October 2014, he received another short text message from phone no. 0700605350 and an email on the same day from the complainant but he did not reply to either.

D. THE REJOINDER

8. The complainant sent a rejoinder dated 16th February 2015 stating:

   a) That since he had relocated to Kakamega to make collection of data easier, he would travel to Nairobi on various occasions to submit his work or send his work directly to the supervisor.

   b) That the supervisor has been very slow in reviewing the complainant's research work. This he says is because the Supervisor has been reviewing Chapters 4 and 5 of his work since August 2013 to September 2014.

   c) That the dates mentioned by the supervisor are not the only times that he had sent short texts messages to the supervisor. The complainant alleges that he had sent several messages to his supervisor and signed off with his name.

   d) That the complainant lodged this complaint with the Commission after it become obvious to him that he will not be part of the group presenting their work by the end of the month of September and the programme would stretch to the 6th year.

   e) That the delay in review and approval of his research has caused him a lot of distress as he has missed out on many opportunities.

E. ISSUES FOR DETERMINATION

9. Having received the response from the University of Nairobi and a rejoinder from the complainant together with the supporting documents, the issues in contention are:

   i.) Whether the complainant has been subjected to unfair treatment by the University of Nairobi through Dr. Robinson Mose Ocharo, the Chairman, Department of Sociology and Social Work

   ii.) Whether the Five (5) year stretching of the complainant's Two (2) years Master's Programme is justifiable

F. ANALYSIS

10. Upon careful consideration and examination of the complaint, the response, rejoinder and the supporting documents supplied, together with the Board of Postgraduate Studies Regulations on the Process of Supervision of Postgraduate Students. The Commission finds that:

   i) The supervisor has only provided progress reports for 16th August 2011, 2nd March 2013 and a letter dated 27th July 2012 releasing the complainant to the field. This does not explain whether there was any contact between him and the complainant in the period not evidenced contrary to the regulations.

   ii) It now over 5 years since the complainant enrolled for his Postgraduate Degree and he is yet to complete his research work and the supervisor has not submitted any report to the Dean on the student's work.

   iii) Further, we note that that the complainant has not been given any written warning with regards to his work which the regulations provide where student's work is considered unsatisfactory as shown by either failure to consult the supervisor as required or receipt of an unsatisfactory report from the supervisor.

   iv) In our opinion based on the evidence provided, it is clear that the complainant was in constant communication with his supervisor over the years.

   v) The Board of Postgraduate Studies Service Charter of 2013 provides that the Postgraduate supervisors for masters or doctoral degrees are expected to promptly process examination of theses

11. It is on the above grounds that we find that Dr. Robinson Mose Ocharo, the Chairman, Department of Sociology and Social Work and the complainant's supervisor has not satisfactorily responded to this complaint and specifically on why the research review had stretched for 5 years. We therefore find that the complainant herein has been subjected to unfair treatment by the University of Nairobi.

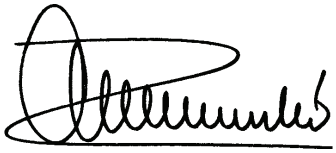
G) REMEDIAL ACTION

12. In light of the foregoing, the Commission in exercise of its power under Sections 8(g) of the Commission on Administrative Justice Act, finds that in the interest of justice and fairness the University of Nairobi through the Board of Postgraduate Studies should:

i.) Direct a review of the complainant's research by another supervisor

ii.) Ensure that the regulations and policies in place are strictly enforced and implemented to ensure that students are not prejudiced.

DATED this **5th** Day of **August 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)
(File Ref: CAJ/M.EDU/013/68(1)(2)(3)(4)/14)-FN

Jeremiah Nyaberi
Maurice Khayota
Isaac Chebon
Alfonso Munyali……Complainants

Versus

Kenya School of Government……Respondent

DETERMINATION

A. MANDATE OF THE COMMISSION

1. The Commission has a mandate, *inter-alia,* to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

B. SUMMARY OF THE COMPLAINTS AND RESPONSE

3. In April 2013, the first complainant, Jeremiah Nyaberi, was appointed as the Matuga Director of the Kenya School of Government, on a permanent and pensionable basis.

4. In October 2007, the second complainant, Maurice Khayota was appointed as the Director of the Embu Government Training Institute (GTI), as it then was, on a contractual basis. After the enactment of the Kenya School of Government Act of 2012, he held the position of Embu Campus Director, until his contract expired on 30th June 2014.

5. In May 2007, the third complainant, Isaac Chebon, was appointed as the Director of the Baringo Government Training Institute, as it then was, on a permanent and pensionable basis. After the enactment of the Kenya School of Government Act of 2012, he held the position of Embu Campus Director.

6. In July 2009, the fourth complainant, Alfonso Munyali, was appointed as the Director of the Mombasa Government Training Institute, as it then was, on a permanent and pensionable basis. After the enactment of the Kenya School of Government Act of 2012, he held the position of Mombasa Campus Director.

7. On 13th June 2014, there was an advertisement in a local newspaper for the positions of Campus Directors in the Kenya School of Government including the complainants' positions. On 27th June 2014, they lodged a complaint against the said School at the Commission.

8. The complainants alleged that the said advertisement was irregular and a breach of their terms and conditions since they still held their positions.

9. On 2nd July 2014, the Commission wrote a letter of inquiry to the Director General, Kenya School of Government and a reminder on 1st August 2014.

C. RESPONDENT'S RESPONSE TO THE COMPLAINT

10. The Kenya School of Government responded to the Commission vide their letter dated 13th August 2014. The School stated that the four officers were appointed by the Public Service Commission (PSC) as Directors in the then Ministry of State for Public Service (now Ministry of Devolution and Planning) highlighting that the letters of appointment were issued by PSC and did not make reference to the Government Training Institute or any specific office or station. The posting was part of the routine internal deployments or transfer of officers as provided for in the Civil Service Code Regulations.

11. The School stated that the complainants' employment status was that of civil servants in the rank of Director in the Ministry of Devolution and Planning and were NOT appointed as Directors of GTI. They were therefore, liable for deployment in any Department within the Ministry.

12. The School further stated that Section 21(3) and (4) of the Kenya School of Government Act did not bind the Council to reserve any position for any particular officer. The incumbents of these positions were, therefore, free to apply for consideration for the advertised positions.

D. ISSUES

13. I have analysed the complaint and identified the following issues for determination:

    i) Whether the advertisement and recruitment by the Kenya School of Government for the various positions of Directors for the campuses was lawful and fair.

    ii) Whether the said recruitment amounted to a breach of the terms and conditions of the complainants' employment terms.

E. ANALYSIS OF THE ISSUES

14. It has come to the attention of the Commission that the Employment and Labour Relations Court at Mombasa, Cause No. 399 of 2015 is seized of the same issues which are before the Commission, wherein Mr. Alfonso Munyali, the fourth complainant, is the claimant.

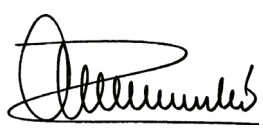
15. Similarly, the Employment and Labour Relations Court at Nairobi Petition No. 46 of 2014 also canvasses the same issues raised in the complaint. Brian Kevin Seda is the Petitioner in this matter acting as a concerned citizen on behalf of all the Directors of the Kenya School of Government campuses.

F. CONCLUSION

16. Section 30 of the Commission on Administrative Justice Act, 2011 limits the jurisdiction of the Commission. Sub Section (c) thereof provides that the Commission shall not investigate a matter pending before any Court or Judicial tribunal.

17. In light of the foregoing, the Commission is legally barred from making further inquiries into the complaint and the complainants should await the Court's determination of the matter.

DATED this **5th** Day of **August 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Our Ref: CAJ/M/LAN/022/1042/14-SK **9th July 2015**

Mr. Bartera Arap Moiyo

P.O Box 104190

NAIROBI

Dear Sir,

RE: YOUR COMPLAINT REGARDING BOUNDARY DISPUTE INVOLVING TITLE NOs. NANDI/KOYLAT 194 AND NANDI/KOYLAT 193

A. MANDATE OF THE COMMISSION

1. The Commission on Administrative Justice (Office of the Ombudsman) is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

2. The Commission has mandate, *inter alia*, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

3. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

B. SUMMARY OF THE COMPLAINT

4. In your complaint letter to the us dated 21st October 2014, you alleged that you are the registered proprietor of land Title No. Nandi/Kolat/194 in Nandi County, the subject matter of a boundary dispute with your neighbour, Christopher Kuto, the proprietor of the adjacent land Title No. Nandi/Koylat 193. You alleged that the District Land Registrar had failed to resolve the boundary dispute hence this complaint.

5. Further, you alleged that there was injustice in a court judgment delivered in Kapsabet PMCCC suit No. 32 of 1989 and RMCC Suit No. 32 of 1987 as you were not present during the court proceedings since you were not served to attend court. You further alleged that the court findings were not in line with the evidence on the ground and that the District Land Registrar was well aware of the disputed boundary and had even invited the affected parties vide a letter dated 5th August 2014 for resolution of the dispute.

C. ACTION TAKEN AND RESPONSE

6. Having received your complaint, the Commission initiated an inquiry vide our letter dated 8th December 2014 to the District Lands Registrar, Nandi Sub-County who in their response dated 30th December 2014 stated that :

   a) The matter was subject of court proceedings in Kapsabet RMCC suit No. 32 of 1987, and PMCC.No. 32 of 1989; *Christopher Kuto vs Yourself,* and that the judgment was entered in favour of the Plaintiff (Christopher Kuto) upon which a permanent injunction was issued restraining you from encroaching into his land.

   b) That the court order sought to resolve the dispute by using the Registry Index Map.

   c) That you sought to appeal against the decision of the High Court in Eldoret but the same was dismissed, and there has never been any order reversing that decision.

D. ANALYSIS AND DETERMINATION

7. We have examined the correspondence and supporting documents in this matter and established the following:

   a) That indeed there is a court judgment Kapsabet RMCC Suit No. 32 of 1987, and Kapsabet PMCC.No. 32 of 1989 regarding this matter and that the same was entered in favour of Christopher Kuto and a permanent injunction issued restraining you from encroaching on the disputed land.

   b) That the order in Suit No. 32 of 1987 declared that the Register be rectified to reflect 24.0 ha as the appropriate size of the land Parcel No. Nandi/Koylat/193 registered in the name of Christopher Kuto as the proprietor.

   c) That you made an application for appeal against the decision by the Resident Magistrate, in the High Court at Eldoret, Misc.

Civil Application No. 48 of 1993, but your application was declined on grounds that it was time barred and you had not explained the delay.

d) That there has never been any court order reversing the earlier decision of the Magistrate Court.

e) That the Ministry of Lands, Housing and Urban Development received money amounting to Kshs.20,000 from you for resolution of dispute despite having been aware of the proceedings in court.

8. In light of the foregoing, the Commission advises as follows:

a) That this matter has already been determined by a court of competent jurisdiction and the District Land Registrar has no mandate whatsoever to alter the Register or act in any way in contravention of the court orders.

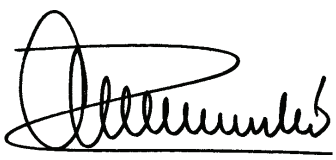
b) That the orders remain in force, up to and until you obtain another court order reversing it.

9. In conclusion, we have considered the facts of the matter and are satisfied with the explanation rendered. We also find that this matter has been adequately addressed and your allegations do not disclose any impropriety or malfeasance by the District Land Registrar. However, we note that it was improper for the District Lands Registrar to receive money amounting to Kshs.20,000 on 24th April 2014 for the dispute, having known that the matter had been settled by the decision of the court. Accordingly, we advise that the money be refunded to the complainant forthwith.

10. In the circumstances, and this matter having been subject of judicial proceedings the Commission cannot intervene or pursue any further. We are, therefore, proceeding to close this file. We, however, invite you to lodge any other complaint you may have now or in the future which is within our mandate as stated herein above.

We are happy to have been of service to you and assure you of our highest regards.

Yours sincerely,



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc. Ag. Chief Land Registrar
Ministry of Lands, Housing and Urban Development
Ardhi House, 1st Ngong Avenue
P.O Box 30450-00100
NAIROBI **{Your Ref: CLR/R/103 VOL.VIII(68)}**

Mr. E.O Odero
District Lands Registrar
Department of Lands
Nandi Sub-County
P.O Box 307
KAPSABET *(We acknowledge receipt of your letter dated 30th December 2014 contents whereof we have noted. We thank you for your continued cooperation and assure you of our highest regards.) (**Your Ref: NANDI/ KOYLAT/193 VS 194/9**)*

REPUBLIC OF KENYA
COMMISSION ON ADMINISTRATIVE JUSTICE
(OFFICE OF THE OMBUDSMAN)
INQUIRY FILE NO. CAJ/KNEC/013/422/13

ERIC ROWE KIEMA……COMPLAINANT

VERSUS

KENYA NATIONAL EXAMINATIONS COUNCIL ……RESPONDENT

DETERMINATION

A. MANDATE

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

B. COMPLAINT

3. The Commission received a complaint from Mr. Eric Rowe Kiema, the complainant herein, vide a letter of 10th April 2013 alleging that he had been unfairly treated by the Kenya National Examinations Council (KNEC). The particulars of the allegations were as follows:

   a) That he was employed by KNEC on 1st April 2009 through an advertisement that did not expressly state the Job Group for the position which led to his placement at Job Group KNEC EC 9 instead of EC 13 or 14 based on his qualifications and experience, and the fact that he had left the teaching job at Job Group M.

   b) That he had raised the issue with the Management of KNEC on many occasions without any success.

   c) That he also felt discriminated against by KNEC for failure to promote him to the right Job Group or shortlist him for other positions within KNEC for which he had applied and for which he was qualified.

   d) That part of the discrimination was evident from the fact that there were other officers who were elevated to higher Job Groups than in the advertisements and for which they had been interviewed. Further, some had been appointed to positions for which they were not qualified.

   e) That he had been reprimanded, intimidated and threatened by Senior Management of KNEC and further branded a trade unionist for seeking better job placement.

   f) That as a result, he had been affected since some individuals with less qualifications and experience, some of whom were his former students, were at the same Job Group with him or higher scales.

4. Based on the above, the complainant sought the intervention of the Commission for him to be awarded KNEC Scale EC 13 as stipulated in the KNEC Scheme of Service, and salary arrears be paid to him based on the new Scale.

C. RESPONSE

5. Upon receipt of the complaint, the Commission initiated an inquiry vide a letter of 4th June 2013 to KNEC who responded as follows:

   a) That Mr. Kiema was employed on 1st April 2009 as an Assistant Examinations Secretary III, Scale KNEC EC 9.

   b) That he was interviewed for the advertised position and was offered an appointment vide KNEC's letter of 16th February 2009 whereupon he wrote to KNEC on 24th February 2009 requesting to be considered for a position at either Scale EC 10 or 12 since he was already at Job Group M at the Teachers Service

Commission, and he had just been interviewed for promotion to Job Group N for which he was expecting to be successful.

c) That vide a letter of 9th March 2009, he was informed that the offer would remain as per the advertisement and was, therefore, asked to confirm his acceptance of the same.

d) That he subsequently accepted the offer vide the mail of 11th March 2009 and reported to duty on 1st April 2009. He, however, kept on writing to Management on the issue.

e) That following his appraisal in April 2012, his promotion was deferred for six months due to an unsatisfactory appraisal by his supervisors. This was further deferred on a number of occasions due to disciplinary issues.

f) That his request for promotion was not accepted for the position of Senior Examinations Secretary under Scale EC 12 of 9th January 2009 since he lacked the experience of three years at the Examinations Secretary level or the equivalent of Job Group N.

g) That KNEC had an elaborate system of recruitment, appointment and job placement based on the law. The Scales reflected qualifications, experience and seniority.

h) That Mr. Kiema was a disgruntled officer who constantly talked negatively about KNEC in a manner likely to cause disaffection among members of staff.

i) That in any event, his recent appraisal had indicated a positive trend in performance and his promotion to Examinations Secretary, KNEC Scale 10 was being processed to take effect from 1st July 2013.

D. ANALYSIS OF ISSUES AND EVIDENCE

6. As aforestated, the Commission made inquiries to KNEC upon receipt of the complaint and sought clarifications from both parties in the process. We noted the co-operation by both parties in this matter, especially in terms of responsiveness and availing the required information. Having examined the complaint, its circumstances and relevant documents, we have identified the following two issues for determination:

    a) Whether there was unfairness in the placement of Mr. Kiema to KNEC Scale EC 9 at the time of his appointment in 2009; and

    b) Whether KNEC has exhibited inconsistencies and unfair practices in the recruitment and promotions that evidence unfair treatment of Mr. Kiama.

7. First and foremost, we wish to outline the relevant provisions of the law relating to fair administrative action which is the subject of the present matter. Article 47 of the Constitution creates an obligation by requiring such action to be expeditious, efficient, lawful, reasonable and procedurally fair. All public bodies are obligated to comply with this provision. Others relevant provisions are Article 59(2)(h-k) of the Constitution, and Sections 2 and 8 of the Commission on Administrative Justice Act. Administrative action in the context of the present matter would refer to '***any action relating to matters of administration and includes a decision made or an act carried out in the public service.'*** Further, the Employment Act, Chapter 226 of the Laws of Kenya requires 'employers to promote equal opportunity in employment and strive to eliminate discrimination in any employment policy or practice' and outlaws direct or indirect discrimination in respect of recruitment, training, promotion, and terms and conditions of employment among others (Section 5(2 & 3).

i.) Unfairness in the Appointment Process in 2009

8. Mr. Kiema has alleged that he was shortchanged by KNEC by placing him on Scale EC 9 instead of Scales 13 or 14 for which he was qualified. According to him, this was unfair since his qualifications and experience should have enabled him to start at the higher Scales. He claimed that this was in line with the existing Scheme of Service relating to Examinations Administration and Test Development. Further, he alleged that the advertisement for his position was plain, in that it did not include the Scale which he later learnt as Scale EC 9. In response, KNEC stated that Mr. Kiema could only be appointed to the position for which he was interviewed, which information he was given before accepting the appointment to that position in 2009.

9. We have analysed the two positions in this matter and agreed with KNEC. In the first place, it was not contested that the position that was advertised by KNEC and for which Mr. Kiema was interviewed was different from Scale EC 9. We have noted that he was made aware of the position as evidenced by his letter of 24th February 2009 (whose subject line made reference to the appointment as EC 9) where he stated as follows:

> *I, the undersigned, do hereby thank the establishment for the appointment. However, allow me to register some complaint with you, Sir. I am currently in Job Group M as a TSC employee. I have subsequently appeared for Job Group N interview at the TSC headquarters and confident of romping home…Please, now that I have been interviewed for Job Group N and there is no doubt I will clinch it, I request you to consider me for EC 10-12, if possible.*

Upon receiving the letter, KNEC responded vide a letter of 9th March 2009 that:

> *We would like to inform you that the offer of appointment is on Scale EC 9 as advertised and hence cannot be reviewed. Please confirm your position on acceptance of the appointment as offered otherwise the Council will have no alternative but to rescind the appointment. Your response should be received by 20th March, 2009.*

10. On the basis of the above, Mr. Kiema accepted the offer vide his e-mail of 11th March 2009. We have noted that the above correspondence took place before Mr. Kiema accepted the offer. While not considering whether the advertised position ought to have been higher than Scale EC 9, we are of the considered view that Mr. Kiema, having known of the placement of the position, and subsequently accepting the offer despite being informed that the placement could not change, cannot thereafter blame KNEC for his predicament.

11. We note that he might not have known of the placement of the position earlier, but he got to know of it before accepting the offer. That is the reason why he wrote to KNEC on 24th February 2009 seeking to be considered for a higher position. He had the option of rejecting the offer and remaining with TSC and his acceptance of the offer, in our view, was voluntary. No evidence had been tendered to the contrary. In this regard, the argument by Mr. Kiema that the advertisement for his position was 'plain' on its placement also fails on this account. This would still so even if the subsequent advertisements provided for higher placements in which case the issue would be the fairness of the Scheme of Service to be considered separately. In light of the above, we do not find KNEC culpable of unfair treatment in the placement of Mr. Kiema at Scale EC 9 at the time of his appointment in 2009.

ii.) Unfair Practices in the Recruitment and Promotion

12. While advancing his complaint, Mr. Kiema alleged that he was a victim of unfair practices in the recruitment and promotion at KNEC. First and foremost, he alleged that he had been discriminated against since there were officers who had been elevated to higher positions than the advertised scales for which they were interviewed. This allegation was denied by KNEC.

13. We have examined the matter and extensively analysed the documents and noted that indeed there were instances where candidates on first appointments had been placed in higher scales than in the advertisements. Such instances were noted in the appointment of the following two officers:

    i) Mr. Richard Mwangagi, the Estates/ Properties Officer, whose scale was EC 9 in the advertisement of 14th July 2009 in the Standard Newspaper, but was placed on Job Group EC 11 on appointment, vide the letter of 15th December 2009.

    ii) Christopher Kiti, the Computer Programmer II/System Analyst II whose advertisement placement was EC 9, but was placed at EC 11 on appointment vide a letter of 15th March 2013.

14. We have not found any justification for the elevation of the above named officers to the higher positions than those in the advertisements and for which they were interviewed. We have noted the justification provided by KNEC vide the letter of 13th October 2014 for such action that 'the successful candidate was offered the post of Estates Manager EC 11 due to the responsibilities, qualifications and experience required for this role,' and that the ICT officer was offered Scale EC 11 to fill the existing vacant post as per the established posts. However, as stated above, the reasons are self-defeatist and inadequate. For instance, in both cases, the officers interviewed for Scale EC 9 as evidenced by the results of the interviews for the positions where they were the top candidates (evidenced by the Minutes of Staff Affairs Committee Meeting of 25th and 26th November 2009, and Minutes of the Full Council Meeting of 18th September 2013). At no time were they interviewed for the higher positions of Scale EC 11.

15. We have noted that both of these cases occurred after Mr. Kiema's appointment and it cannot, therefore, be argued that they were made earlier when there was a change of policy. Nothing would have been difficult for KNEC to advertise for the vacant positions, going by the response in the case of Mr. Kiema that he could only be placed on the job group for which he was interviewed. The foregoing, in our view, clearly proves the claim by Mr. Kiema that KNEC had unfair practices and inconsistencies in the appointment process.

16. Second, Mr. Kiema had alleged that unfairness in the manner in which KNEC had dealt with his applications for higher positions within the institution. He alleged that while some officers were promoted to higher positions by skipping some Job Groups, he had been denied such promotions on the basis of the fact that he could not be allowed to skip a Job Group. In response, KNEC stated that its promotion policy was guided by the Human Resource Promotion Policy and Scheme of Service. In relation to Mr. Kiema, we were informed vide a letter of 17th June 2013 that he 'had not been shortlisted for the position of Senior Examinations Secretary, EC 12 because he did not have the experience stipulated in the advertisement of 9th January 2009 which required an officer to have three years experience at the Examinations Secretary level or the equivalent of Job Group N. It is worth of note that Mr. Kiema had applied for a number of positions, including those under Scale EC 10, but was never shortlisted for any of them, perhaps based on the above ground.

17. Despite the position of KNEC above, we have noted they could have had other requirements. This can be illustrated by the memo to Mr. Kiema from the Deputy Secretary, Human Resource Manager of 3rd April 2012 under the subject line 'Application for the position of Senior Examinations Secretary, TD Scale 12 which stated as follows:

> *Following the internal advertisement for various vacant positions by the Council on 20th December 2011, the Council received applications and pre-shortlisted applications based on the criteria set out in the advertisement and the **additional criteria** set out below:*
>
> 1. ***The applicant must be serving on the Scale directly below the scale applied for e.g. an applicant for a position on EC 12 must be serving on Scale EC 11**;*
> 2. ***The applicant must have completed one year's service on the current scale in the Examinations Secretaries cadre;***
> 3. *The applicant must have a good record of performance on the current scale;*
> 4. *The applicant must be confirmed in appointment.*
>
> *The above criteria was intended to ensure transparent and equitable process where only the most suitable and qualified candidates would be given the opportunity to compete for a few selected positions.*
>
> *Subsequent to the above process, I regret to inform you that your application for the vacant position of Senior Examinations Secretary, TD Scale EC 12 was not successful since you are currently serving at Scale EC 9 and your common establishment promotion to Examinations Secretary II KNEC Scale EC 10 is due for consideration in April 2012 subject to favourable performance evaluation on your present Scale.*

18. We have noted that the above criteria were clearly additional requirements which had not been communicated to the applicants. We have failed to understand why such additional requirements were made without setting them out expressly in the advertisement. In our considered view, it would be unfair for a candidate to take his time to apply for a position with the belief that he or she meets the requirements for the advertised position only for KNEC to develop other requirements later. In our view, adding new and silent criteria as above amounts to changing the rules of the game and may introduce an element of unfairness. This only leads to the conclusion that the practice was unfair, and intended to lock out certain candidates from the advertised position.

19. We have conducted a holistic analysis of the records of KNEC in relation to the promotion of some officers identified by Mr. Kiema and noted that indeed there were officers who were promoted without observance of the requirement that they serve directly below the scale applied for and had completed one year's service on the current position. This is illustrated in the following instances:

    a) Richard Mwangangi, the current Deputy Chief Officer at KNEC 14 who skipped Scale EC 13. We have noted that he had been appointed to act as the Head of Section, Facilities Management on 5th May 2012, the same date he was promoted to Chief Officer, Facilities Management at Scale EC 12. It is clear that he did not serve under Scale EC 12 for one year as per the requirements since he was promoted to both EC 12 and EC 13 on the same day. Further, it is unclear whether the letter of 26th April 2012 appointing him to act as the Head of Section amounted to a promotion to Scale EC 13.

    b) Linet Makori, the Systems Analyst/Programmer, moved from Scale EC 4 (temporary) to Scale EC 9 vide the letter of 25th June 2012.

    c) Jeddy Waigwa, Personal Secretary I, moved from EC 5 to Scale EC 8 vide the letter of 7th August 2008.

    d) Philip Kakui, Senior Accountant, moved from EC 10 to EC 12 vide the letter of October 2011. Like Mr. Mwangangi above, he had served in

an acting capacity as Senior Management Accountant.

e) Nina Lugonzo, Senior Accountant (Payments), moved from EC 9 to EC 11 vide the letter of 15th February 2006.

f) Patrick Ochich, Deputy Secretary and Head of TD-BE Division, moved from Scale EC 12 to 14 vide the letter if 1st June 2009.

g) Ambia Noor, Senior Deputy Secretary, EA, moved from EC 11 to EC 13 vide the letter of 9th July 2009.

h) Tobias Mutuku, Senior Printing Technician, moved from EC 6 to EC 8 vide the letter of 16th February 2009.

We have not found any explanations by KNEC for acting as above. This leaves the inference of unfair practices in promotions at the institution.

E. REMEDIAL ACTION

20. Based on the foregoing, we hold and find as follows:

i) That KNEC did not shortchange Mr. Kiema by placing him at Scale EC 9 at the time of his appointment in 2009;

ii) That the practices at KNEC in relation to appointments and promotion are unfair and impugn Article 47 and 59(2)(h-k) of the Constitution, and Sections 2 and 8(a),(b)&(d) of the Commission on Administrative Justice Act.

21. In light of the above, the Commission in exercise of its powers under Article 59(2)(j) of the Constitution and Sections 8(g) and 26(g) of the Commission on Administrative Justice Act, **FINDS** that KNEC should:

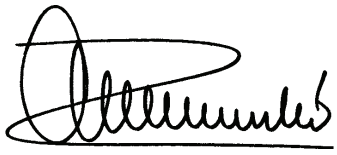
i) Consider the case of promotion of Mr. Kiema based on the above findings

ii) Review its Human Resource Policy and Practices and the Scheme of Service to align them with Article 47 of the Constitution.

iii) Harmonise the requirements for appointments to ensure fairness.

iv) Ensure strict compliance with the law, including its internal human resource documents on appointments and promotions.

DATED this **7th** Day of **July 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Our Ref: CAJ/JUD/001/1321/15

10th June 2015

Clara Amy Cox
Furncon Limited
P. O. Box 49643 – 00100
NAIROBI

Dear Madam,

RE: COMPLAINT REGARDING HANDLING OF SUCCESSION CAUSES AT THE FAMILY DIVISION OF THE HIGH COURT IN RESPECT OF THE ESTATE OF MARY HANNAH THOMPSON

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We make reference to the above captioned matter which you brought to our attention vide the letter of 18th April 2015 addressed to ourselves among other institutions. We have carefully examined the complaint and noted the following:

i) That you alleged that there were fraudulent activities relating to Succession Causes 2276/2006 involving some court officials in respect of the above captioned Estate. The fraud was detected by the court which directed that action be taken against the culprits who were subsequently charged and convicted by the court.

ii) That although the matter had been determined by the Court, the other parties filed further suits in court, Application Cause No. 2644 of 2008 and Succession Cause No. 2391 of 2011 among others.

iii) That the suits were premised on false and fraudulent documents that had previously been determined by the Court as such.

iv) That despite the foregoing, without merit and due regard to the previous decisions, the High Court (Hon. Justice William Musyoka) on 3rd February 2015 ordered that the files for all the matters relating to the Estate, including the previous cases, be put together for a further mention on 22nd April 2015 namely; Causes Nos. 2391 of 2011, 2644 of 2008, 2276 of 2006, 1788 of 2009 and 1965 of 2009.

v) That you were aggrieved by the decision of Hon. Justice Musyoka since some of the cases had been tainted with corruption and fraud. In any event, you alleged some of the Causes had been concluded by Justice Hon. Kimaru on 22nd November 2014.

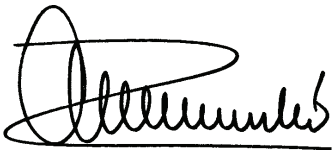
vi) That you sought the intervention of the Commission to ensure that action is taken against the culpable individuals.

We have considered **ALL** the facts of this case, the supporting documents and the circumstances and have come to the conclusion that we cannot be seized of the matter. This is in line with section 30(c) of the Commission on Administrative Justice Act, 2011 which prevents us from entertaining any matter pending before the Court. While we note that there may be issues of fraud in the matter, the same can be addressed in the matters currently pending before the Court. Kindly note that once in the judicial forum, the merits of the court decisions are remediable through the appellate process of the Judiciary.

In the circumstances, we wish to advise that we shall proceed to close our file on this matter, but are happy to look into any other complaint on any other issue which we may be competent to handle.

We thank you and assure you of our highest regards.

Yours sincerely,



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Our Ref: CAJ/POL/015/483/09- WT 23rd March 2015

Pius Wilson Siyah
P.O Box 4216 – 30200
KITALE

Dear Sir,

RE: YOUR COMPLAINT OF UNFAIR DISMISSAL FROM THE KENYA POLICE SERVICE

Kindly receive warmest compliments from the Commission on Administrative Justice.

We make reference to the above captioned matter resting with a letter from the National Police Service dated 9th February 2015. We have reviewed this file and noted the following:

a) That you filed a complaint with the defunct Public Complaints Standing Committee on 27th July 2009 alleging that you had been unfairly removed from the Kenya Police Service.

b) That PCSC wrote to the then Commissioner of Police on 27th November 2009 who responded stating that:

- You were removed from the Service on grounds of public interest.
- This followed a report aired on Citizen TV news at 7.00 pm on 18th February 2008 showing you and two other officers receiving illegal handouts from illegal fuel dealers at an illegal fuel depot at Industrial Area in Nairobi.

c) You gave your response on 5th April 2010 and denied the position given by the Police.

d) We wrote further letters to the Police on 5th October 2012, 13th July 2012 and 1st November 2012 requesting for further information and the outcome of the appeal.

e) After several correspondence with the National Police Service, they responded substantively on 9th February 2015, reiterating their earlier position.

We have carefully reviewed this file and the responses by the National Police Service and noted that:

i. On 22nd February 2008, you were served with a letter to show cause why you should not be removed from the Service.

ii. On 25th February 2008, you made your submissions against the intended removal from the Service.

iii. On 7th August 2008, you were removed from the Service after your above submissions were rejected.

iv. On 19th September 2008, you appealed against the removal from the Service to the then Commissioner of Police.

v. Your appeal was disallowed and this decision was communicated to you on 15th October 2009, 15th October 2010 and again on 20th March 2012.

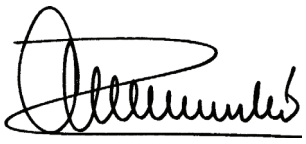
vi. That even though the reasons for disallowing the appeal had not initially been communicated to you, the same were done after we inquired into the dismissal.

We have also noted that the National Police Service have outlined the circumstances leading to your dismissal in their several responses. We, therefore, find that the then Kenya Police Force acted within the law in terminating your service. In the event that you are dissatisfied with this decision, we advise you to challenge the matter in a court of law. It may, therefore, be worthwhile to seek legal advice from a lawyer of your choice on the civil remedies that may be available to you.

In the circumstances, we shall proceed to close the inquiry on this particular file, but shall be happy to look into any other complaint you may have in future.

We thank you for your continued cooperation and assure you of our highest regards.

Yours sincerely,



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

OUR REF: CAJ/KAU/004/134/2013 – WT 16th March 2015

Amin Mohamed Khan
P.O Box 6060 - 00200
NAIROBI

Dear Sir,

RE: YOUR COMPLAINT AGAINST THE KENYA AIRPORTS AUTHORITY

Kindly receive warmest compliments from the Commission on Administrative Justice.

We make reference to the above captioned matter resting with your letter dated 13th January 2015. Vide our letter of 11th September 2014, we advised you that we would halt further inquiries into the matter as a result of stay orders issued by the Business Rent Tribunal on 31st July 2014. On 4th December 2014, you wrote to us and stated:

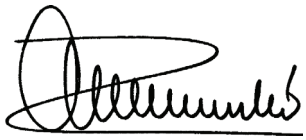
a) That the Kenya Airports Authority (KAA) withdrew the notice of termination of tenancy that had formed the basis of the proceedings before the Tribunal.
b) That the implication of the withdrawal was that the reference to the Tribunal abated and the tenancy between your company and KAA remained in force.
c) That earlier in August 2013 when fire gutted part of the terminal in Jomo Kenyatta International Airport, KAA relocated all tenants including your company to a make-shift space to carry on with their businesses.
d) That, however, when KAA relocated its tenants to the new terminal, they abandoned your company at the make-shift and your efforts to be allocated a space were unsuccessful.
e) That you felt aggrieved since KAA refused to allocate your company a space, yet the tenancy remained in force and all other tenants were allocated space.
f) You sought our intervention to compel KAA to allocate you a space at the new terminal.

We have carefully reviewed this matter and noted that the present issue regards enforcement of a tenancy agreement between your company and KAA and as such, involves enforcement of contract. Kindly note that such matters can only be enforced through the court process. It may be worthwhile to seek legal advice from a lawyer of your choice on the civil remedies that may be available to you.

In the circumstances, we are proceeding to close this file, but shall be happy to look into any other complaint you may have in future.

We thank you for your continued co-operation and assure you of our highest regards.

Yours sincerely,



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Our Ref: CAJ/EACC/026/105/14
Your Ref: CHAIR/CONF.1/(74)

12th February 2015

Commissioner Mumo Matemu, MBS
Chairperson
Ethics and Anti-Corruption Commission
Integrity Centre
Valley/Milimani Roads Junction
P. O. Box 61130 – 00200
NAIROBI

Dear Sir,

RE: COMPLAINT OF OPPRESSIVE CONDUCT BY JOSHUA MOMANYI (P/NO. 2001006813) AGAINST THE ETHICS AND ANTI-CORRUPTION COMMISSION

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We make reference to the above captioned matter in which we have been in correspondence with yourselves. We have carefully examined the correspondence and the supporting documents in the matter and noted the following:

i.) That we received a complaint from Joshua Momanyi Moranga in June 2014 alleging unfair treatment and oppressive conduct by the Ethics and Anti-Corruption Commission. In particular, he alleged that the termination of his employment contract was oppressive, unlawful, unfair and irregular since it did not follow the proper procedure in that the Administration Police Service lacked the power to deploy him while still in the service of the Ethics and Anti-Corruption Commission (EACC), without EACC initiating the recall. Further, he alleged that the action by EACC was part of the scheme to victimize him for having lawfully made a report to the National Assembly, the Commission on Administrative Justice and other oversight bodies regarding some alleged malpractices at the Commission. In any event, he stated, EACC did not terminate the contract of employment by giving the mandatory notice as required under Clause 2(c) of the Contract.

ii.) That we proceeded to make an inquiry into the matter in line with Article 59(2)(h-k) of the Constitution and the Commission on Administrative Justice by writing a letter to you on 11th June 2014.

iii.) That you responded vide a letter dated 23rd June 2014 wherein you stated that EACC acted procedurally based on a recall of the complainant by the National Police Service (NPS) vide deployment letters of 14th April 2014 and 10th May 2014. Further, you stated that the decision to relieve Mr. Moranga of the VIP escort duties was communicated to him vide the letter dated 11th March 2014, and that EACC had no control over his deployment and was obligated to abide by the decision of NPS to recall him. In any event, you stated that, the terms of his contract were explicit on termination, and that such termination could not be construed to amount to victimization since it conformed to the law.

Having outlined the inquiry process above, we have carefully analyzed the complaint, the correspondence, supporting documents and its circumstances, and have come to the following conclusions:

a) Termination of Contract of Employment

The complainant was an officer of the National Police Service seconded to EACC, and who had been issued with a contract of employment by EACC to run for three years, beginning 1st May 2013. As an officer on secondment, he was subject to the Rules and Regulations of NPS and EACC.

In relation to termination of contract, the complainant's Contract of Employment under Clause 2(c) stated as follows:

> *Upon confirmation in employment, termination of contract by **EITHER PARTY** shall be on giving a one (1) month's notice or equivalent salary in lieu of notice.*

It is not in contention that EACC could terminate the contract. What is contested is that EACC did not follow the due process in releasing the complainant back to the Service following his recall. Termination would have invoked Clause 2(c) of the Contract by giving one

month's notice or payment of salary in lieu of notice.

We have examined the documents availed to us and noted that there was no such notice either by the complainant or EACC. However, we have noted that vide a letter of 11th March 2014, EACC deployed the complainant from VIP Protection to Administration Department within EACC. This could not be construed to amount to the notice required under Clause 2(c). Further, in our view, the letters from EACC dated 16th May 2014 and 26th May 2014 to NPS and the complainant respectively were release letters and could not have amounted to the requisite notice. In any event, it would not have been legally possible for EACC to issue the notice after the deployment of the complainant since he had allegedly been deployed by NPS on 14th April 2014 and 26th May 2014.

b) Allegation of Victimisation

Having found as above, we have noted that the deployment of the complainant preceded the termination of a subsisting contract, and that there was no evidence of recall by NPS. Instead, we noted letters of deployment of 14th April 2014 and 10th May 2014 wherein the Service purported to invoke Clause 2(c) of the Contract for termination as evidenced by the statement from NPS vide their letter of 28th July 2014 that 'based on this Clause [2(c)], the Administration Police Service terminated the officer's employment…and subsequently redeployed them to various stations.' Further, we have noted the response from NPS vide their letter of 17th June 2014 that ***'the last redeployment came as a request from the Commission to redeploy APC Momanyi from VIP to general duties.'*** We also noted that the redeployment of the complainant to Kibish was done after he had petitioned the National Assembly to take action against a Member of the Commission for some alleged malpractices. The foregoing seems to suggest linkage between EACC and the action by NPS which might have been interpreted to amount to victimization of the complainant.

c) Fairness of the Action by EACC

Fair administrative action is a constitutional right which all entities are required to comply with. The action of EACC was an administrative action within the meaning of Articles 47 and 59(2)(h-k) of the Constitution, and Section 2 of the Commission on Administrative Justice Act. Administrative action in the context of the present matter has been defined under Section 2 of the Act as '***any action relating to matters of administration and includes a decision made or an act carried out in the public service.'*** Article 47 of the Constitution creates an obligation by requiring such action to be expeditious, efficient, lawful, reasonable and procedurally fair.

It is our view that the action by EACC did not meet the threshold of the above cited provisions of the law. While we appreciate the complainant was an employee of the National Police Service, EACC had a duty to act in a manner compliant with the law, including on termination of contract.

REMEDIAL ACTION

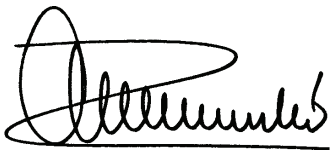
Based on the foregoing, we hold and find that the termination of the complainant's employment contract was unfair and unlawful, which action impugned Articles 47 and 59(2)(h-k) of the Constitution, and Sections 2 and 8(a),(b)&(d) of the Commission on Administrative Justice Act on fair administrative action.

In light of the above, the Commission in exercise of its powers under Article 59(2)(j) of the Constitution and Sections 8(g) and 26(g) of the Commission on Administrative Justice Act, **FINDS** that EACC should:

i.) Pay Mr. Moranga an equivalent of one month's salary in line with the termination clause 2(c) of his contract of employment.

ii.) Develop a policy for release of officers on secondment upon recall by the sending institution.

DATED this **12th** Day of **February 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc:

1. **Mr. Johnston Kavulundi, EBS, HSC**
   Chairperson
   National Police Service Commission
   5th Floor, Sky Park Plaza
   Westlands
   P. O. Box 47363 - 00100
   NAIROBI

2. **Joshua Momanyi Moranga**
   P. O. Box 20895
   KNH – NAIROBI

Our Ref: CAJ/POL/015/2014/14
Your Ref: PF/2001006813/15

12th February 2015

Mr. Samuel Arachi
Ag. Inspector General of Police
Jogoo House "A", Taifa Road
P. O. Box 30036 - 00100
NAIROBI

Dear Sir,

RE: COMPLAINT BY JOSHUA MOMANYI MORANGA (P/NO. 2001006813) OF UNFAIR TREATMENT AND ADMINISTRATIVE INJUSTICE

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We make reference to the above captioned matter in which we have been in correspondence with yourselves. We have carefully examined the correspondence and the supporting documents in the matter and noted the following:

i.) That we received a complaint from APC Joshua Momanyi Moranga, P/No. 2001006813 in May 2014 alleging unfair treatment, oppressive conduct and administrative injustice by the Administrative Police Service. In particular, he alleged that the Administrative Police Service had irregularly and unfairly deployed him when he was still on secondment at the Ethics and Anti-Corruption Commission (EACC) which had been issued with a three years' contract beginning 1st May 2013. He also alleged that he did not receive any letter terminating his contract or notice issued as required under Clause 2(c) of the Employment Contract. Accordingly, he stated that the action by the Administration Police Service was an act of victimization due to a report he had made to the National Assembly, the Commission on Administrative Justice and other oversight bodies regarding some alleged malpractices at the Commission.

ii.) That we proceeded to make an inquiry into the matter in line with Article 59(2)(h-k) of the Constitution and the Commission on Administrative Justice by writing a letter to you on 22nd May 2014 and sending a reminder on 11th June 2014. We thereafter received a response from you vide a letter dated 3rd June 2014. The Commission sought clarification from you vide the letters of 24th June 2014 and 18th July 2014 and received responses dated 17th June 2014 and 28th July 2014.

iii.) That in your response, you stated that Mr. Moranga's contract was terminated in line with Clause 2(c) of the Employment Contract and subsequently deployed vide the letters of 14th April 2014 and 10th May 2014. As such, he was duly deployed to Kibish Sub-County in Turkana County. Further, you stated that in any event, redeployment of police officers was a routine matter and it was necessary to change Mr. Moranga's working environment for him to be an all round security officer, given that he had served at EACC for the last nine (9) years, which was likely to compromise his performance as a security officer.

Having outlined the inquiry process above, we have carefully analyzed the complaint, the correspondence, the supporting documents and the circumstances of this complaint, and have come to the following conclusions:

a) Recall and Deployment

It is not in doubt that the complainant was an officer of the Administration Police Service seconded to EACC. The secondment had been crystallized by a Contract of Employment issued by EACC to run for three years beginning 1st May 2013. As an officer on secondment, he was subject to the Rules and Regulations of the Service as well as those of EACC.

While we acknowledge the right of the Service to recall the complainant, we wish to state that the same had to be done in accordance with the law. In this instance, there was an existing contract of employment between the complainant and EACC, which ought to have been taken into account. It is clear that the recall did not follow the due process. This is because the Service lacked the right to terminate the contract under Clause 2(c) since they were not privity to the Contract. They, therefore, could not invoke the said provision to terminate the

contract to facilitate the recall of the complainant. Doing so would offend the principle of privity of contract especially in employment contracts such as the present one. For the avoidance of doubt, Clause 2(c) of the Contract of Employment stated as follows:

> *Upon confirmation in employment, termination of contract by **EITHER PARTY** shall be on giving a one (1) month's notice or equivalent salary in lieu of notice.*

The terms of this provision were very clear. Only the parties, EACC or the Complainant could invoke this provision to terminate the complainant's employment. Further, the letter by EACC to the complainant dated 11th March 2014 was for internal deployment which had no bearing in this matter. In this regard, the alleged termination of contract by the Service was irregular.

b) Allegation of Victimisation

We have noted that the initial letter of deployment of the complainant was issued on 14th April 2014 wherein he was redeployed to Athi River Sub-County in Machakos County. The letter was not copied to EACC as would have been expected. The deployment was, however, revoked vide a letter dated 8th May 2014 and no reasons were given for the revocation. Despite the revocation, the complainant was redeployed on a **Saturday, Two Days** later vide a letter of 10th May 2014 to Kibish Sub-County in Turkana County. The letter was similarly not copied to EACC where he still had a valid contract. Throughout these proceedings, there was neither any communication from EACC relating to the complainant's contract of employment nor a request for recall made to EACC by the Service.

We have analysed the complaint and responses, supporting documents and the circumstances of the matter and wish to state that the action by the Service amounted to victimization of the complainant. First, the decision to deploy the complainant was not based on any official complaint or communication from EACC or recall based on termination of contract as required by the law. What we have noted is that the action was taken after he had lodged a Petition with the National Assembly and other Agencies regarding some alleged malpractices by a Member of EACC. We have also noted from the response by the Service vide its letter of 17th June 2014 that the redeployment was allegedly done at the request of EACC.

Secondly, we have taken note of the basis and frequency of the redeployment whereby he was initially deployed to Athi River on 14th April 2014, but this was revoked vide a letter of 8th May 2014 ostensibly on grounds that EACC had not communicated the decision to redeploy him from the VIP duties. The foregoing also raises the question of how and on what basis did the deployment take place? However, **TWO** days later, on 10th May 2014, the complainant was deployed to Kibish Sub-County. No evidence was provided to show that there was communication from EACC that had made the earlier deployment untenable. In the absence of good reasons for the decision and evidence of prior communication between EACC and the Service, the only inference to draw is that there was intention to first transfer the complainant out of Nairobi, whereafter it was found that Athi River was near Nairobi and, therefore, the second deployment to Kibish in Turkana County which is far from Nairobi to make it difficult for him to pursue his Petition in Nairobi. This would inevitably amount to victimization.

c) Fairness of the Action by the Police

Fair administrative action is a constitutional right which all entities are required to comply with. The action of the Service was an administrative action within the meaning of Articles 47 and 59(2)(h-k) of the Constitution, and Section 2 of the Commission on Administrative Justice Act. Administrative action in the context of the present matter has been defined under Section 2 of the Act as '***any action relating to matters of administration and includes a decision made or an act carried out in the public service.'*** Article 47 of the Constitution creates an obligation by requiring such action to be expeditious, efficient, lawful, reasonable and procedurally fair.

It is our view that the action by the Service did not meet the threshold of the above cited provisions of the law. The statement by the Service that the complainant had served EACC for nine (9) years which was a long period likely to compromise his performance does not have any basis since it was not for the Service to make a judgment on this matter when he was still under the service of EACC. Nothing would have been difficult for EACC to state as much and take appropriate action in consonance with the law and their internal performance mechanisms. We have perused the records and have not found anything to that effect or disciplinary proceedings against him by EACC.

In our view, there would be anarchy and lack of respect for the rule of law and de-motivation if Public Officers were to be allowed to make unfair decisions or take actions such as in the present case. This would not only offend the Constitution, but also stall the reforms in key public institutions such as the Service. This is what the Constitution, in particular Article 10, 47, 59, Chapter Six and 249(1) sought to remedy.

d) Conduct of the Complainant

We were informed that the complainant had failed to report to the new station of Kibish Sub-County in Turkana County where he had been deployed. Accordingly, we were informed that the Service was in the process of instituting necessary disciplinary action against him for

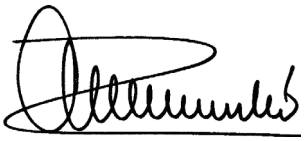
willful absenteeism from duty. The complainant did not provide any reasons for not reporting to the new station. While we have noted that the deployment was irregular and unlawful, we wish to state that it was incumbent upon the complainant to report to the new station, even as the issues were being addressed. In our view, such action is necessary for the maintenance of law and order upon which the Service is founded.

REMEDIAL ACTION

Based on the foregoing, we hold and find that the recall and deployment of the complainant was irregular, unlawful and unfair and amounted to victimization. We also find that the said action impugned Articles 47 and 59(2)(h-k) of the Constitution, and Sections 2 and 8(a),(b)&(d) of the Commission on Administrative Justice Act on fair administrative action. We also find that the failure by the complainant to report to the new station was improper.

While handling this matter, it has come to our notice that the complainant elected to go to court to seek the judicial remedies *[Nairobi Industrial Cause No. 2005 of 2014 – Joshua Momanyi Moranga versus the Ethics and Anti-Corruption Commission and the Attorney General].* In light of the above and in accordance with Section 30(c) of the Commission on Administrative Justice Act, we refrain from recommending any appropriate remedy and leave it to the court for determination.

DATED this **12th** Day of **February 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc:

1. **Mr. Johnston Kavulundi, EBS, HSC**
   Chairperson
   National Police Service Commission
   5th Floor, Sky Park Plaza ***[Your Ref: NPSC/1/29/4/VOL.III/ (10)]***
   Westlands
   P. O. Box 47363 - 00100
   NAIROBI

2. **Joshua Momanyi Moranga**
   P. O. Box 20895
   KNH – NAIROBI

OUR REF: CAJ/EACC/026/92/13/VOL.1– WT 6th February 2015

Robert Karani

Email: rkarani2013@gmail.com

Dear Sir,

RE: YOUR COMPLAINT AGAINST THE ETHICS AND ANTI-CORRUPTION COMMISSION

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We make reference to the above captioned matter. We have since received a response from the Ethics and Anti-Corruption Commission (EACC) who have further stated;

a) That you were seconded to EACC from 1st August 2005 and was redeployed to the National Police Service on 29th April 2013 and that your release was not discriminatory since the Commission continues to receive police officers on such terms depending on the assignment at hand.

b) That the date of joining the Commission indicated in your certificate of service was an inadvertent error and have taken the initiative to correct the same. Kindly therefore make arrangements to collect a new certificate.

c) That the word 'Police' in your certificate of service was added as an indication that you were on secondment from the National Police Service.

Having carefully reviewed all the correspondence and supporting documents regarding this matter, we have noted the following:

- That you were employed as Operations Assistant 1 at EACC vide a letter of employment dated 23rd June 2005, effective 1st August 2005 on a three year contract term, renewable by mutual consent and upon satisfactory performance of duties. The contract made a provision that you were not required to resign from the public office you were holding then, being the Kenya Police Force, as it then was.
- That on 11th September 2012, you were appointed by then defunct Ministry of Justice, National Cohesion and Constitutional Affairs and deployed to EACC as Operations Assistant 1 for a one year contract effective from 1st

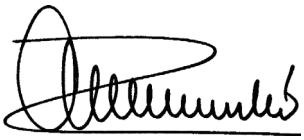
  August 2012 or until further decision by EACC, whichever is earlier.
- We, therefore, find that although your contract of employment did not expressly state that you were on secondment, it was apparent that you still retained your previous employment with the public office, i.e. the National Police Service, thus, your nature of engagement with EACC can be treated as on secondment and being on secondment, EACC had the power to redeploy you back to the National Police Service.
- Your engagement with EACC was on contract basis and since EACC complied with the terms of the contract on termination, we find that your employment was not unfairly terminated.
- That you had requested EACC to expunge the information incriminating you from your file. EACC responded and stated that the information was not used against you since you went through the vetting process and became successful. Furthermore, they further stated that there was no court order directing the Commission to expunge the records from the file. We, therefore, cannot direct EACC to expunge the same since they were not in any case adversely used against you during the vetting exercise.

From the foregoing, we do not find any fault in the actions of EACC since they acted within the law. We, however, remind you to collect your new certificate as advised.

In the circumstances, we are proceeding to close the inquiry on this particular file, but shall be happy to look into any other complaint you may have in future.

We assure you of our highest regards.

Yours Sincerely,



DR. OTIENDE AMOLLO, EBS

CHAIR OF THE COMMISSION

Cc. Chairperson
Ethics and Anti-Corruption Commission
Integrity Centre
Milimani/Valley Road Junction
P.O Box 61130 -00200
NAIROBI

Our Ref: CAJ/M.LAN/022/442/2012 -WT
YOUR REF: CLR/R/63/20/153 (18)

6th February 2015

Ms. Sarah Njuhi Mwenda

Chief Land Registrar
Ministry of Lands, Housing and Urban Development
Ardhi House,
1st Ngong Avenue, Off Ngong Road
P.O Box 30450
NAIROBI

Dear Madam,

RE: COMPLAINT REGARDING L.R 10394 (GRANT NO. I.R. 17434) BY TITUS BARMAZAI

Kindly receive warmest compliments from the Commission on Administrative Justice.

We make reference to the above captioned matter, wherein we had been in correspondence with former Chief Land Registrar and the Attorney General.

The background of this matter is a complaint lodged with us by Mr. Titus Barmazai, T/a Kaptoror Holdings Ltd in 2012 based on the following allegations:

a) That the then Land Registrar had failed to register a transfer document dated 2nd June 2001 in respect of L.R 10394, Grant Number I.R 17434 from Petrus Jacob De Jager to Kaptoror Holdings Ltd.

b) That this followed a ruling delivered on 30th July 2003 in Nairobi Misc. Application No. 1411 of 2001, directing the Registrar of Titles to register the above stated land document from Petrus Jacob De Jager to Kaptoror Holdings Ltd.

c) That his attempts to prevail on the Land Registrar to comply with the court order had been unsuccessful.

The Commission inquired into these allegations from the then Chief Land Registrar, vide our letter dated 7th March 2012 (copy enclosed), who responded stating:

i. That L.R No. 10394 was granted by the Colonial Government to Andries Petrus Jager for a leasehold term of 99 years with effect from 1st April 1953.

ii) That the family of Andries Petrus Jager abandoned the land after independence prompting the Government of Kenya to initiate measures to repossess the land in 1965.

iii) That the land was subsequently repossessed by the Government for resettlement of squatters together with Kondoo Haraka Settlement Scheme.

iv) That a subdivision was carried on the Settlement Scheme and 826 plots were created and out of these, 77 plots resulted from L.R No. 10394, all of which were registered under the Registered Land Act, Cap 300.

v) That meanwhile, the Government accepted registration of a transfer (Assent) on 10th May 1999 in favour of Petrus Jacobus De Jager under the provisions of Registration of Titles Act, Cap 281, resulting in double registration of L.R No. 10394.

vi) That this was an oversight on the part of Government because the repossession process of L.R No. 10394 to the Settlement Fund Trustees was not completed, creating a loophole for De Jager to cause the land to be transferred.

vii) That De Jager later sold and transferred L.R No. 10394 to Kaptoror Holdings Ltd, the complainant herein, who is now threatening about seventy seven (77) families settled by the Settlement Fund Trustees with eviction unless they purchase the land from it at market rates.

viii) That on the other hand, the seventy seven (77) families have been issued with title deeds after, clearing relevant payments to the Settlement Fund Trustees.

ix) That he had written to the Attorney General requesting for advice on the legal measures that the Government should take.

Based on this, we wrote to the Attorney General on 28th June 2013, who responded on 10th October 2014 and advised that this matter should be referred to the National Land Commission for investigations and appropriate action.

While we appreciate the response from the Attorney General, we are afraid that the concerned public offices are shifting this issue from one office to another and this is likely to prejudice the complainant. Our position is that

the complainant's case regards the enforcement of a court order which was issued on 31st July 2003 against the Registrar of Titles. The then Registrar of Titles and his/her successors did not challenge the order on review, appeal or otherwise.

It was, therefore, improper for the then Chief Land Registrar to seek the advice of the Attorney General regarding this matter, yet a valid court order existed. In any case, the Chief Land Registrar had the option to exercise his right of appeal and raise the grounds above, which he relinquished. We do not therefore support the Attorney General's advice that the matter be referred to the National Land Commission.

We hereby advise you to comply with the High Court in Nairobi, Misc. Civil Application No. 1411 of 2001, issued on 31st July 2003 without any further delay.

We thank you for your continued cooperation and assure you of our highest regards.

Yours sincerely,

DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc: 1. **Hon. Prof Githu Muigai**
Attorney General
Sheria House
Harambee Avenue
P O Box 40112 – 00100
NAIROBI (YOUR REF: AG/ CONF/4/70.VOL.II (55)

2. Mr. Titus K. Barmazai T/a Kaptoror Holdings Ltd
P.O Box 10524 – 00400
NAIROBI

Our Ref: CAJ/JKUAT/013/328/2012 - WT
Your Ref: JKU/1478-2(150)

6th February 2015

Prof. Mabel O. Imbuga, Ph.D, EBS
Vice Chancellor,
Jomo Kenyatta University of Science & Technology,
P.O Box 62000 – 00200,
NAIROBI

Dear Madam,

RE: COMPLAINT BY ROBI KOKI OCHIENG REGARDING UNPAID DUES FOR THE LATE ALBERT OCHIENG OKONGO

Kindly receive warmest compliments from the Commission on Administrative Justice.

We make reference to the above captioned matter resting with our letter of 8th December 2014. We have carefully reviewed this matter together with all the correspondence and the supporting documents and wish to address you on the following:

A. Complaint by Robi Koki

On 21st August 2012, the complainant lodged a complaint with us alleging:

a) That her late husband, Mr. Albert Ocheing Okongo died on 17th February 2012 and prior to his death, he was employed at the Jomo Kenyatta University of Science and Technology as an Assistant Registrar, PF 1478.

b) That upon his death, she requested to be paid his Group Life Insurance benefits and the University commenced the process of claiming the same from the Insurance Company, but no further communication was given to her on the status of her request despite several follow-ups.

B. Action and Response

We wrote to you on 23rd October 2012 regarding the above allegations and you responded on 30th July 2013 and stated that after the demise of Albert Ochieng Okong'o, the University wrote to the Insurance Company expressing its intention to make a claim under the University Group Life Scheme, but the Company responded and stated that the deceased was not eligible for any benefits under the University Group Life Assurance Scheme as he was not on payroll at the time of his demise.

Furthermore, you stated that the deceased was removed from the payroll on 6th May 2011 for non-remittance of Academic Progress Report, a requirement under the University Training Policy.

We have carefully reviewed this matter and noted the following:

a) That the deceased was employed by the University on 29th April 1993 as an Administrative Assistant in the Administration Division and at the time of his death on 17th February 2012, he was an Assistant Registrar, in the same Division. At no point did the University communicate its decision to terminate his contract of employment.

b) That the deceased was granted a study leave with effect from 10th January 2005 to pursue a Ph.D. Programme in Human Resource at the University of Nairobi, whose conditions were that he submits a Progress Report to the University. The study leave expired and was extended up to 9th January 2010, but still, he neither submitted the Progress Report nor did he report to work.

c) That on 6th May 2011, the University wrote to the deceased and communicated the decision to forward his case to the appropriate Committee of the Council for review, but the outcome of the review was not communicated. The University also resolved to stop payment of his salary vide the same letter.

d) On 15th July 2011 and 2nd August 2011, the deceased wrote to the University requesting to resume duty and he attributed his failure to submit a Progress Report to problems he faced with his supervision. He further stated that he had not sought for an extension of the study leave due to an oversight.

e) That the University wrote to him on 8th December 2011 requesting him to account with relevant documentation for the time he had been away on study leave. This was the last communication between the University and the deceased until his death.

f) That vide an internal memo dated 22nd February 2012, the University affirmed that the deceased was an employee of the University. The University went further and paid for his burial expenses basing the same on "the Collective Bargaining Agreement".

g) That upon his death in February 2012, the deceased's wife made a claim on the deceased's benefits, among them, the Group Life Benefits Scheme. The University Pension Scheme paid his pension which was calculated up to the date of his death. The University also commenced the process of claiming the Group Life Benefits Scheme from Pioneer Assurance Company. However, the University did not communicate to the complainant the outcome of the claim and it is only after we wrote to you on 23rd October 2012 that you responded on 30th July 2013.

h) That from your response, the reason why the deceased's Group Life benefits could not be paid is that he was not on the payroll at the time of his death.

i) That furthermore according to the University, once an employee is removed from payroll and continues to remain so for an inordinate period of time, then he/she is no longer considered to be an employee of the institution and by extension cannot draw any benefits from the University.

C. Analysis and Determination

From the above, we have noted the following issues for determination:

a) The effect of the removal of an employee from payroll and stoppage of salary

b) Whether the deceased was an employee of the University at the time of his death.

i.) Effect of removal from payroll / stoppage of salary

It is our considered opinion that the position taken by the University that one ceases to be an employee of the University once he/she is removed from the payroll and continues to remain so for an inordinate long time is erroneous and contrary to the Employment Act. The Act makes provisions regarding employment relationship between an employer and an employee and in particular, the requirement of a contract of employment.

A contract of employment can be brought to an end either upon summary dismissal of an employee by the employer or by termination of the same by either of the parties upon the issuance of sufficient notice. Summary dismissal comes about due to breach of a term of the contract of employment. On the other hand, a termination comes about where a party to a contract exercises a right under a contract to lawfully bring it to an end by notice even without a breach.

Sections 41 and 44 of the Employment Act are instructive on this. Section 41 of the Act states that:

"(1). Subject to section 42 (1), an employer shall, before terminating the employment of an employee, on the grounds of misconduct, poor performance or physical incapacity explain to the employee, in a language the employee understands, the reason for which the employer is considering termination and the employee shall be entitled to have another employee or a shop floor union representative of his choice present during this explanation.

(2) Notwithstanding any other provision of this Part, an employer shall, before terminating the employment of an employee or summarily dismissing an employee under section 44 (3) or (4) hear and consider any representations which the employee may on the grounds of misconduct or poor performance, and the person, if any, chosen by the employee within subsection (1) make."

Section 44 reads in part:

"(1)Summary dismissal shall take place when an employer terminates the employment of an employee without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(2) Subject to the provisions of this section, no employer has the right to terminate a contract of service without notice or with less notice than that to which the employee is entitled by any statutory provision or contractual term.

(3) Subject to the provisions of this Act, an employer may dismiss an employee summarily when the employee has by his conduct indicated that he has fundamentally breached his obligations arising under the contract of service.

(4) Any of the following matters may amount to gross misconduct so as to justify the summary dismissal of an employee for lawful cause, but the enumeration of such matters or the decision of an employer to dismiss an employee summarily under subsection (3) shall not preclude an employer or an employee from respectively alleging or disputing whether the facts giving rise to the same, or whether any other matters not mentioned in this section, constitute justifiable or lawful grounds for the dismissal if:-

a. without leave or other lawful cause, an employee absents himself from the place appointed for the performance of his work;

b. during working hours, by becoming or being intoxicated, an employee renders himself unwilling or incapable to perform his work properly;

c. an employee willfully neglects to perform any work which it was his duty to perform, or if he carelessly and improperly performs any work which from its nature it was his duty, under his contract, to have performed carefully and properly;…"

The University neither dismissed the deceased nor terminated his employment, yet it had the option to. Although the conduct of the deceased may have amounted to gross misconduct, which entitled the University to dismiss him, the University waived its right to dismiss him and retained him in employment.

If the University were to exercise the option of termination, it had an obligation to notify the deceased of the intended termination of employment, which was not done and further give him an opportunity to respond. The letters written by the University to the deceased regarding his study leave can in no way be construed to denote notification of termination of employment. Furthermore, there was no letter of termination that was issued by the University.

ii.) The employment relationship

It is clear that the deceased was an employee of the University at the time of his death since his contract of employment was never terminated. Consequently, he was entitled to the benefits as an employee of the University until his death. Had the University not removed him from payroll, he would have continued enjoying benefits that accrue to all employees, which included the benefits accruing from membership under the Group Life Scheme. In any event, the University Pension Scheme calculated the deceased's pension benefits up to the date of his death and paid the complainant.

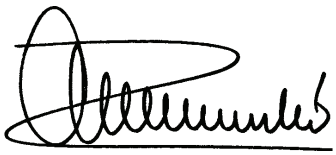
Furthermore, the University kept on advising the complainant that they were following up with the Insurance Company on the payment under the Group Life Scheme since 2012. It, however, did not communicate to her its position that the deceased was ineligible under the Scheme. This created some expectation on the part of the complainant that the same would be paid and it was only after our intervention that the University communicated the position not to pay.

D. Determination

Based on the foregoing, we hold and find that the action by the University was unfair, and impugned Articles 47 and 59 (2) (h-k) of the Constitution and Sections 2 and 8 (a) (b) and (d) of the Commission on Administrative Justice Act. In the circumstances, the Commission in exercise of powers under Article 59 (2) (j) of the Constitution and sections 8(g) and section 26 (g) of the Commission on Administrative Justice Act finds that:

1. The University should pay the equivalent of the Group Life Scheme the deceased would have been entitled had he not been removed from payroll.
2. The University should put in measures that are in accordance with the law in regard to administrative procedures at the institution.

DATED this **6th** Day of **February 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc: Mrs. Robi Koki Ochieng
P.O Box 235 – 00618
RUARAKA - NAIROBI

Our Ref: CAJ/AG/001/793/2013/RS

5th January 2014

Julian Evans Okiri Pacho
P.O. Box 53059-00200
NAIROBI

Dear Sir

IN THE MATTER OF A COMPLAINT BY JULIAN EVANS OKIRI PACHO AGAINST THE REGISTRAR OF COMPANIES WITH REGARD TO MAJESTIC PRINTING WORKS LIMITED

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We have now considered the full range of correspondence and documentation on this matter, and hereby render our determination.

A. MANDATE OF THE COMMISSION

The Commission on Administrative Justice (Office of the Ombudsman) is a Constitutional Commission established under article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.The Commission is mandated, among others, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

In the conduct of its functions the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

B. COMPLAINT BY JULIAN EVANS OKIRI PACHO

The Commission received a complaint from the complainant Mr. Julian Evans Okiri Pacho on the 29th November 2012 vide a letter dated 26th November 2012. The complaint raised a number of allegations against the Registrar of Companies and stated as such;

a) That Mr. Okiri Pacho was appointed a director and a shareholder of Majestic Printing Works Limited on the 17th November 1976, and was issued with a certificate of one thousand shares.

b) That he was mysteriously removed as one of the directors of Majestic Printing Works Limited without his knowledge.

c) That another company Majestic Holdings Limited was formed by the same directors of Majestic Printing Works Ltd.

d) Than within a period of three (3) years without his knowledge, a total of twelve million, seven hundred and sixty there thousand, nine hundred and eighty one (**Kshs. 12,763,981**) was transferred from Majestic Printing Works to Majestic Holdings Limited

e) That although the transfer of shares in essence made Majestic Printing Works limited a subsidiary of Majestic Holdings Limited, his shares were not registered in the new company.

Based on the foregoing, the complainant sought the Commission to intervene and ensure that:

i) The Registrar of Companies renders an explanation as to how he was removed as a director of Majestic Printing Works Limited

ii) The registrar of companies explains, how, over a number of years, shares of other directors have been increased and his stagnated.

iii) The registrar explains his exclusion from the new company, Majestic Holdings Limited, which he alleged was formed by all the directors of Majestic Printing Works Limited be explained.

C. THE ACTION AND RESPONSE

Having received the complaint, the Commission sought further and better particulars from the complainant vide a letter dated 7th May 2013 which were supplied on the 1st June 2013. The Commission commenced an inquiry into the matter by writing to the Registrar of Companies, on the 7th of August 2013 seeking to, *inter alia,* establish the facts of the complaint. The commission sent reminders on the 20th February 2014 and 9th June 2014which were never responded to. On the 6th of October 2014, the Commission sent a Notice to show cause to the current registrar of Companies Mrs. Bernice Wanjiku Gachegu which prompted aresponse dated 7th October 2014. The commission acknowledged the registrar's letter and forwarded his response to the complainant for his comments. On the 24th of October 2014, the Commission received a detailed rejoinder from the complainant upon which the commission closed the matter for analysis.

D. ANALYSIS AND RECOMMENDATIONS

Having received responses from both the complaint and the respondent, together with the supporting documents from both sides, the Commission proceeded to frame the issues in contestation for determination. The issues are:-

a) Whether the office of the registrar of companies had a role in the removal of Mr. Okiri Pacho as a director of Majestic Printing Works Limited

b) Whether the office of the registrar of companies had a role in the increase of shares of the other directors on majestic printings Works Limited.

c) Whether the office of the registrar of companies was involved in the exclusion of Mr. Okiri Pacho from Majestic Holdings Limited.

E. MYSTERIOUS REMOVAL OF MR. OKIRI PACHO AS A DIRECTOR OF MAJESTIC PRINTINGS WORKS LIMITED

The registrar general in answering to the allegation vide his letter of 7th October 2014, stated that Majestic Limited was registered on the 1st May 1948 under registration number C1604. Further it is noted:

i.) That Julian Evans Okiri Pacho was appointed as a director of the said company on 16th November 1976 by a notification of change of directors and secretaries filed the same year.

ii.) That on the 14th of June 1999 a notification of change of directors and secretaries was filed to the effect that Julian Evans Okiri Pacho had resigned as a director of the Company with effect from 6th November 1998.

iii.) That According to the returns filed between 1999 and 2011, Mr. Okiri Pacho remains a shareholder with 1000 shares as per the last return filed for the year 2011.

From the submissions made by the registrar of companies, it appears that Mr. Okiri Pacho resigned as a director. The registrar notes that the requisite statutory form was duly filed by the directors on 14th June 1999. Mr. Okiri Pacho in his letter dated 24th October 2014, states categorically that he did not resign as a director. It appears therefore that the only conclusion is that there was fraud on the part of the directors as they could have filled documents without Mr Okiri's knowledge or consent. In the event that fraud is involved, the matter would fall outside of the jurisdiction of the Ombudsman as it involves a private person challenging his fraudulent removal as a director from a private company. Having made such a finding it would be needless to belabour the detailed legal provisions governing company law. It is our opinion that the matter ought to be dealt with through the normal judicial process.

Further, the registrar notes that it is the sole prerogative of the individual company to determine its directors and that the directors have a statutory duty to notify the registrar of all the changes. The registrar cannot participate in the day to day affairs of a company, his or her role is to effect changes as and when presented, provided the company has complied with the statutory requirements. In this regard, we find the response of the registrar satisfactory.

F. THE COMPLAINT OF STAGNATED SHARES

In his second complaint, the complainant alleges that his shares have remained stagnant while shares of other directors have subsequently increased. He seeks the registrars explanation of the legality or otherwise of the increased share capital without his knowledge. The Commission notes the following facts from the complainant's submissions;

a) That since joining the company Mr. Okiri Pacho has not been allowed to participate in the day to day running of the business in Board meetings and the Annual General Meetings as statutorily required

b) That the original share capital of Kshs. 200,000/= divided into 10,000 shares was increased to 1,000,000/= (50,000 shares of Kshs. 20 each) through an ordinary resolution. This was done without Mr. Okiri's knowledge.

c) That the Articles of the company required that only the general meeting could authorise an increase of the shareholding. The complainant alleged that the action to increase shareholding through an extra-ordinary meeting was illegal.

d) That in 8th June 1981, shares were allotted to two outsiders, before he was considered thus lost shares amounting to Kshs. 80,000.

It is notable that the Registrar in his reply did not specifically respond to the above allegation. Nevertheless, we wish to ask ourselves as to whether the registrar failed in his duty to prevent the illegal increase of shares by the directors of Majestic Printing Works Limited. It is not in dispute that shareholding of the company and increase of share capital was done without the complainant's knowledge and or consent. The question at hand is whether the matter is one the Ombudsman can inquire into under the Commission on administrative Justice Act.

G. MAJESTIC HOLDING COMPANY LIMITED

In the final complaint, the complainant alleges that Majestic Holding Limited was registered on the 31st August 1990 with an authorised share capital of Kshs. 2,500,000 divided into 25,000 shares of Kshs. 100 each. Further the complainant alleges that the directors of Majestic Printing Works Limited and the same directors of Majestic Holding Limited. The complainant stated that Kshs. 1,996,267 was transferred from Majestic Printing Works Limited to Majestic Holdings Limited, making the later a subsidiary company of the former.

In his response to the above allegations the Registrar stated as below:

a) That Majestic Holdings Limited was registered on 31st October 1990 as registration C 43819 and that the complainant has never been a director or shareholder of this company.

b) That only two out of the nine shareholders of Majestic Printing Works Limited were involved in the formation of the Majestic Holdings Limited.

c) That Majestic Printing Works Limited has never been a shareholder of Majestic Holding Limited and that none is a subsidiary of the other.

d) That the similarity of the first name only is not prove enough to conclude that the directors of the two companies are similar. Further, there is no evidence of transfer of funds from one company to the other.

e) That owing to the above, it is not possible for the registrar to direct that Mr. Okiri Pacho be included as a director or shareholder of majestic Holding Limited.

The Commission notes that the Registrar has no jurisdiction in determining on who should be a director in a particular company. Moreover, he cannot purport to allocate shares to any person as the case may be. The Registrar's mandate under the Company Act is limited and cannot extend to intruding into the day to day running of a private company. Any allegations of fraud should be reported to the police and dealt with accordingly. We find the response of the registrar with regard to this complaint to be conclusive and satisfactory.

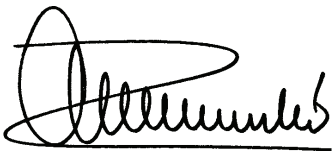
While the Registrar attempt to explain its internal procedure of complaint handling, the Commission notes that the registrar's office did not respond to the complainant's letter dated 26th November 2012 which prompted the complainant to pursue the matter with the Ombudsman office.

Further, the Commission notes that it took one year to get a response from the office of the Registrar of Companies. The initial letter from the Commission dated 7th August 2013 and it was only on the 7th October 2014 that the Commission received a response after several reminders including a notice to show cause.

H. REMEDIAL ACTION

The matter to be forwarded to the Criminal Investigations Departments for purposes of investigating the alleged fraud.

DATED this **16th** Day of **January 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC: **Mrs. Bernice Wanjiku Gacheru**
The Registrar General
State law office
Board of Directors
P.O. Box 40112-00100
NAIROBI

Our Ref: CAJ/AG/001/793/2013/RS

12th January 2015

Dr. John Omiti
Executive Director,
Kenya Institute for Public Policy Research and Analysis
2nd Floor, Bishop Gardens Towers
P.O. Box 56445-00100
NAIROBI

Dear Sir,

IN THE MATTER OF A COMPLAINT BY MICHAEL MBWAVI LUSINDE – FORMER KIPPRA EMPLOYEE, KENYA INSTITUTE FOR PUBLIC POLICY RESEARCH AND ANALYSIS.

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We have now considered the full range of correspondence and documentation on this matter, and hereby render our determination.

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.The Commission is mandated, among others, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

B. COMPLAINT BY MICHAEL MBWAVI LUSINDE

3. The Commission received a complaint from the complainant Mr. Michael Mbwavi Lusinde, a former employee of the Kenya Institute of Public policy Research and Analysis (hereinafter KIPPRA) on the 5th of September 2014 vide a letter dated on the same date. The complaint raised a number of allegations against the Institute and stated as such;

   i) That he was employed as an internal auditor at the Kenya Institute of Public Policy and Analysis on the 5th of December 2011 till 1st September 2014.

   ii) That during the financial years 2011/2012 and 2012/2013, bonus was paid to all the staff but he was not paid the same.

   iii) That since he had left the institute on the 1st September 2014, he had not yet received his gratuity.

   iv) That he attributed his frustration to the role he had played as an internal auditor and in particular pointing out misappropriation of funds at KIPPRA.

4. Based on the foregoing, the complainant sought the Commission to intervene and ensure that:

   i) The Institute pays out his gratuity as agreed between himself and KIPPRA in his contract of employment.

   ii) The Institute pays out his bonus as paid to all other staff.

   iii) The Commission investigates the maladministration at the institute.

C. THE ACTION AND RESPONSE

5. Having received the complaint, the Commission made an inquiry vide a letter dated 9th October 2014 seeking, *inter alia,* to establish the facts of the complaint. The commission received a response from the Executive Director of KIPPRA dated 15th October 2014. The Commission acknowledged the letter of KIPPRA vide its letter of 21st October 2014 and sought further clarifications on KIPPRA's letter of 15thOctober 2014 especially with regard to

the bonus payment policy. The Commission wrote a letter to KIPPRA dated 29th October 2014 and received a further response from KIPPRA dated 3rdNovember 2014. The Commission did another letter dated 24th November 2014 and proceeded to hold a meeting with a representative of KIPPRA at CAJ offices on the 11th of December 2014, in which KIPPRA wrote a letter of 11th December 2014, a letter which was received on the 16th December 2014.

D. ANALYSIS AND RECOMMENDATIONS

6. Having received responses from both the complaint and the respondent, together with a meeting that was held on the 11th of December 2014, between the Commission and a KIPPRA representative, the Commission proceeded to frame the issues in contestation for determination. The issues are:-

   i) Whether the complainant Mr. Lusinde was entitled to payment of his gratuity.

   ii) Whether the complainant, Mr. Lusinde was entitled to payment of bonus/ whether failure to pay his bonus amounted to discrimination.

E. PAYMENT OF GRATUITY TO MR MICHAEL LUSINDE MBWAVI

7. In his allegation, the complainant had alleged delay in payment of his gratuity. The respondent on the other hand alleged that the delay in payment had been caused by the complainant's delay in submitting his clearance. The respondent indicated that the complainant had not cleared with the staff welfare and the Human resource Department as required by the institute. The commission will not belabour the allegation of delay in payment of gratuity for the very reason that, upon inquiry, the same was paid vide cheque number **000421** for **Kshs. 219, 406,** dated 31st October 2014. The Commission finds that the delay was reasonable as the complainant was required to comply with the institutes clearing processes.

F. COMPLAINT WITH REGARD TO BONUS PAYMENT

8. In his second complaint, the complainant alleges that KIPPRA refused to pay bonus which was due to him. On inquiry into the allegation, KIPPRA indicated as such;

   a) That Mr. Lusinde Mbwavi was never paid bonus payment on allegation that he did not go through the individual staff performance appraisal scores.

   b) That KIPPRA pays bonus which is a 30% of the net savings realized from client work/ consultancies undertaken in every financial year.

   c) That staff on probation are not appraised and hence not eligible for bonus payment.

   d) That the institute does not have a specific instrument on bonus payment policy but relies on best practice as guided by the decisions of the Board as endorsed by the Parent Ministry through the Principal Secretary.

9. The Respondent indicated that Mr. Mbwavi joined the institute in December 2011 and was put on probation and was confirmed on the 5th of June 2012. This in essence meant that he was not eligible for bonus payment for the year 2011/2012 (July to June.

10. With regard to bonus payment for the year 2012/2013, the Institute admits that Mr. Lusinde Mbwavi was eligible for bonus payment. However, the Institute indicated that Mr. Mbwavi refused to go through the appraisal process. It is alleged that Mr. Mbwavi refused to be evaluated by the Executive Director and insisted that he could only be evaluated by the Board Audit Committee. The institute indicates that the while the term of the previous Board Audit Committee had expired, a new Board had not been constituted.

11. The Commission regrets the facts that Mr. Mbwavi was not appraised but finds that to deny him bonus payment would be unfair and discriminatory. It is noted that the relationship between Mr. Mbwavi and the Executive Director had grown sour and it's obvious that Mr. Mbwavi was apprehensive that he would not get an objective assessment. Moreover, international standards for professional practice of internal auditing dictates that to guarantee independence, the review of performance of internal audit managers should be done by the Audit Committee. The fact that there was no standing Audit Committee cannot be reason enough to deny Mr. Mbwavi his bonus.

12. From the foregoing, and to ensure fairness and equity, the Commission proposes that the Institute pays bonus to Mr. Mbwavi. The Commission proposes that an average between the highest and the lowest staff performance index used for the financial year 2012/2013 be used to calculate Mr. Mbwavi's bonus for the twelve (12) months that Mr. Mbwavi served for the financial year 2012/2013.

13. On a different note, the Commission notes that the Executive Director who is traditionally appraised by the Board was awarded bonus amounting to

Kshs 904, 189, for the year 2013, in the absence of the board appraisal. It is not clear as to how such amount was arrived at while there was no board to appraise him. The absence of a clear policy and procedure for appraisal and bonus payment has led to lack of fairness and transparency of bonus payment at the institute.

G. REMEDIAL ACTION

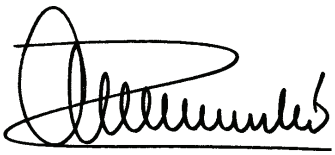
14. The above notwithstanding, the Commission having analysed the documents supplied by both parties makes the following findings and recommendations:-

    i) The Commission finds that the staff appraisal moderation criteria are inconsistent and unclear, most importantly is the role of the moderation committee, which in essence is composed of staff members who are interested parties in the bonus payment. It is recommended that a comprehensive bonus policy and procedure be put in place to ensure separation of duties among staff that prepare review and approve computation of the bonus payments.

    ii) That the Institute should review the bonus payment guidelines including bonus payment qualifications, staff appraisal and moderation criteria and the applicable bonus payment formulas.

    iii) The Commission recommends that Mr. Mbwavi be paid bonus based on paragraphs 11 & 12 above.

DATED this **14th** Day of **January 2015**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Copies to:

1. **Prof Mohammed Mudra's,**
Chairman, Board of Directors
Kenya Institute for Public policy Research and Analysis
Executive Director, KIPPRA
2nd Floor, Bishop Gardens Towers
P.O. Box 56445-00100
NAIROBI

2**. Mr. Lusinde Mbwavi Michael**
P.O. Box 17767-00100
NAIROBI

Our Ref: CAJ/RG/001/956/14 -NG **11th December 2014**

Mboi- Kamiti Farmers Company Limited
P.O Box 228-00900
KIAMBU

Dear Sirs,

RE: YOUR COMPLAINT AGAINST THE OFFICE OF THE REGISTRAR GENERAL

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We acknowledge with thanks receipt of your letter dated 30th September 2014 contents whereof we noted.

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.
2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

B. COMPLAINT

3. The Commission received a complaint regarding the above captioned matter on 21st March 2014 wherein you alleged that the Registrar General had been interfering with the activities of Mbo-I Kamiti Company from 2003 by, *inter alia,* ensuring that no proper Annual General Meeting was held, irregularly registered individuals who had not been properly elected by members of the Company as Directors and issuing unofficial certificates and had also abdicated in her duty by failing to certify the filing of annual returns of books of accounts, thereby necessitating and aiding the illegal disposal of the assets of the company.

C. ACTION TAKEN

4. We initiated an inquiry vide our letter dated 26th May 2014 addressing the Registrar General and copied the Attorney General

D. RESPONSE

5. In response to the allegations the Registrar General vide a letter dated 16thJune 2014stated as follows:
   - That the Company has had leadership wrangles since 1997 to the extent that the former Head of State his Excellency Daniel T. Arap Moi had to intervene.
   - That in 2005 Justice Ibrahim gave orders that an AGM be convened by end of January 2005, and electing new Directors was part of the agenda.
   - That following a Court Order that had been issued by Justice Wendo another AGM was held on 15th March 2010 and the office of the Registrar General was represented.
   - That some of the dissatisfied members went to Court challenging their election but there were no orders barring them from continuing to hold office.
   - That an exercise of verification of the shareholders was also done sometime in June 2010
   - That by virtue of a notice dated 22nd April 2014, the company called for an AGM on 15th May 2014.

E. REJOINDER

6. In your rejoinder, you reiterated your earlier position and also stated that:
   - The Registrar General has been holding and supervising Board Room AGMs without issuing statutory 21dsyas notice in form of electronic, postal and print media.
   - That the office has been economical with information relating to Court Orders that have been issued; as a result the members are not well informed on the Orders.

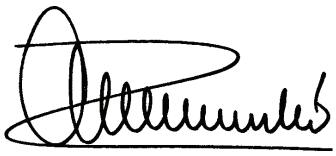
- That the Chairman of the company Thuo Mathenge's academic title of Dr. should be investigated.
- That the said AGM of 15th May 2014 was illegal and was held at unknown venue.

F. OUR ANALYSIS

7. Upon careful consideration and examination of the correspondence together with the supporting documents from both parties, we have come to the conclusion that:
   - That it is the responsibility of the Directors(those holding Office) to convene an AGM, but failure to do so, the shareholders have the power under Section 132 of the companies Act to convene an extra ordinary general meeting after giving a twenty (21) days' notice.
   - That it is also the responsibility of the Directors of the company when convening an AGM to adequately notify the shareholders in a manner that they think will be able to reach out to as many shareholders as possible including using electronic or print media as the case may be.
   - That as regards to notifying members on the Court Orders issued, it is not the mandate of the Registrar General to notify shareholders of Court Orders that have been issued regarding the Company unless specifically directed to do so by the Court. Otherwise it is a shared responsibility between the Directors, the suit parties and the shareholders to inform each other on the same, nonetheless, the responsibility still lies with the Directors to share such information with the shareholders at large.
   - As regards the credentials of the Chairman (Dr. Thuo Mathenge), we advise that you seek advice from a lawyer of choice and the remedies that may be available to you.
   - On the issue of the Registrar General being compromised, the allegations remain unfounded and any such evidence if available should be forwarded to the relevant authority; the Ethics and Anti-corruption Commission.
   - The Registrar's advise that the land buying company such as yours be given specific time frame to sub-divide land, issue titles and be wound up could be beneficial and your company can take the same into consideration if it will help the resolve the recurring wrangles.
8. We have considered the facts of the matter and are satisfied with the explanation rendered and if you proceed to take further action, you may need to seek advise from a lawyer of choice on the remedies that may be available to you.

In light of the foregoing, we are, therefore, unable to pursue the matter further and are proceeding to close this particular file. We, however, invite you to lodge any other complaint you may have now or in the future which is within our mandate as stated herein above.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC: **Hon. Prof. Githu Muigai, FCL, ARB, SC**
The Attorney General
State Law Office
Sheria House, Harambee Avenue
P.O Box 40112-00100
NAIROBI

Bernice Gachegu (Mrs.)
Registrar General
State Law Office
Sheria House
Harambee Avenue
P.O Box 40112-00100
NAIROBI

Our Ref: CAJ/PSC/016/59/13/VOL.1-NG **1st December 2014**

Mr. Richard Musyoka Mutisya

Dear Sir,

RE: YOUR COMPLAINT AGAINST THE PUBLIC SERVICE COMMISSION

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

B. COMPLAINT

3. The Commission received a complaint regarding the above captioned matter on 26th August 2013 wherein you alleged that you were an employee of the Ministry of Lands (as it then was) in the Survey Department and that you had been wrongfully dismissed from service. Further, you stated that you appealed against the decision, and the appeal was disallowed; you filed a second appeal sometime in July 2003 but you had not received any response from the Public Service Commission.

C. ACTION TAKEN

4. We initiated an inquiry vide our letter dated 19th November 2013 addressing the Public Service Commission and copied the Ministry of Lands, Housing and Urban Development.

D. RESPONSE

5. In response to the allegations the Principal Secretary, Ministry of Lands vide a letter dated 25th February 2014, and the Secretary to the Public Service Commission vide their letter dated 25th March 2014, stated as follows:

   - That you received a show cause letter on 8th September 1993.
   - That you were dismissed from service vide letter dated 25th August 1994.
   - That you appealed against the said decision vide a letter dated 19th September 1994 and the appeal was disallowed and the decision conveyed to you vide letter dated 16th October 1996.
   - That you appealed the second time but your appeal was disallowed on grounds that the appeal was time barred and the same communicated to you through the Ministry vide a letter dated 12th October 2004.

E. REJOINDER

6. In your rejoinder, you emphasized that the letter dated 16th October 1996 disallowing your appeal was received in February 2003 when you had visited the Ministry offices to make a follow up on your case. That you also filed the second appeal vide a letter dated 22nd May 2003 but you did not receive any response regarding the same.

F. OUR ANALYSIS

7. Upon careful consideration and examination of the correspondence together with the supporting documents from both parties, we have come to the conclusion that:

   - In a letter dated 16th October 1996 you were informed of your right to make a second appeal within one year from the date thereof, which you failed to do on grounds that you only received the letter in February 2003.
   - The decision disallowing your second appeal was also communicated to you vide letter

dated 12th October 2004 but you allege that you haven't received the same to date.

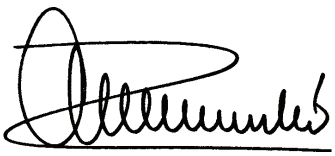
- On the issue of not receiving letters on time, we find it difficult to reach a conclusion as to whether the letters were sent to you or not. It is on that note we urge the Department to be more careful and proactive in ensuring that letters to their staff members and especially of such weighty issues are sent accurately and on time, including using registered mail as the case may be.
- As regards the determination of your appeal, it is clear from the documentation that indeed your appeal was determined and a decision reached, although you did not receive the letter on time.

8. We have considered the facts of the matter and are satisfied with the explanation rendered and are of the opinion that your dismissal from service followed due procedure and any other evidence that you believe was not factored in during your defence, the same can be raised in court if you proceed to take further action. You may also seek advise from a lawyer of choice on the remedies available to you.

   Kindly find attached the letter dated 14th August 2014 and the attached letters dated 12th October 2004 and 15th September 2004 communicating the decision of your second appeal addressed to you and to the Ministry respectively, for your attention and records.

9. In light of the foregoing, we are, therefore, unable to pursue the matter further and are proceeding to close this particular file. We, however, invite you to lodge any other complaint you may have now or in the future which is within our mandate as stated herein above.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc: Principal Secretary
Ministry of Lands Housing and
Urban Development
Ardhi House, 1st Ngong Avenue
Off Ngong Road
P.O Box 30450-00100,
NAIROBI

(**ATTN: RAPHAEL KALEVU.**
We acknowledge with thanks receipt of your letter dated 14th August 2014, contents whereof we have noted. We thank you for your continued cooperation and assure you of our highest regards. **Your Ref: C/84077788/15)**

Alice A. Otwala (Mrs), CBS
Secretary/CEO
Public Service Commission
Commission House, Harambee Avenue
P.O. Box 30095-00100
NAIROBI

(Kindly take note of the above. We thank you for your continued cooperation and assure you of our highest regards. **Your Ref: PSC. D/MU/983 (13)**

OUR REF: CAJ/M.EDU/13/643B/14 – WT
YOUR REF: KNEC/CONF/HA/HRM/101180

27th November 2014

Dr. Joseph Kivilu
Council Secretary / Chief Executive Officer
Kenya National Examinations Council
National Housing Corporation (NHC) House
Aga Khan Walk
P.O Box 73598 - 00200
NAIROBI

Dear Sir,

RE: COMPLAINT BY MERCY KARIMI KABURIA AGAINST THE KENYA NATIONAL EXAMINATIONS COUNCIL

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We make reference to the above captioned matter resting with your letter of 4th August 2014. We have further reviewed this complaint and noted that the main issue is whether an anomaly arose in 1998 in the job placement of the complainant during the general staff upgrading exercise.

A brief background of the issues reveal the following:

a) The complainant was employed by the Kenya National Examination Council (KNEC) as a Clerical Officer on temporary terms of service vide a letter of employment of 24th June 1992 and she was deployed to work as a Clerk/ Typist.

b) The appointment was confirmed to permanent and pensionable terms on 29th August 2005, thirteen years from the date of employment.

c) On 29th May 1998, she was promoted to the grade of Shorthand Typist II, Scale EC6 with effect from 1st November 1997. This was due to the general upgrading exercise done by KNEC.

d) According to the complainant, this is when the anomaly arose because she ought to have been promoted to the grade of Shorthand Typist II EC8. However, the letter of 29th May 1998 indicated that her advancement would be subject to satisfactory performance of duties for a period of one year from the date of the letter.

e) On 24th June 1999, she wrote to then Chief Executive Officer requesting to be promoted to the correct grade and the then Deputy Secretary confirmed that her performance was satisfactory, but she was not promoted.

f) On 29th January 2002, she was promoted to grade EC7 during the review and rationalization of salaries and allowances for staff and this was a general exercise. The letter effecting the promotion did not, however, disclose the job title to which she was promoted.

g) On 29th August 2005, while making reference to the complainant's appointment vide the letter of 15th June 1992, KNEC confirmed her appointment to permanent and pensionable terms, noting that her confirmation was inadvertently not effected.

h) On 5th June 2008, she wrote another letter to the Chief Executive Officer requesting for the anomaly to be rectified and the then Senior Deputy Secretary recommended that her case be resolved within the then existing scheme of service for secretaries.

All the correspondence from KNEC indicate that her grade was Shorthand Typist II. For instance:

- Vide a letter dated 27th September 2006, KNEC wrote to her regarding her application for the post of Personal Secretary II EC 9 and stated in part… "The KNEC top management gave you a chance to be interviewed for the post that it found appropriate and where you fully qualified for, but you declined and did not even bother to explain the reason for the decline. This would have addressed the anomaly in giving you the title of a Shorthand Typist II, Scale EC6 by placing you at the right grade had you been interviewed and succeeded".
- Further, vide a letter dated 8th November 2011, KNEC stated that… "it is acknowledged that you have attained qualifications that would qualify you to become a personal secretary. You have also served for many years as a shorthand typist II but on scale EC 6…."

- On 18th December 2012, KNEC wrote to the complainant regarding the change of her designation to Secretarial Assistant 1 and noted that her title was that of Shorthand Typist prior to her re-designation.
- When we sought clarification from you on 28th July 2014 regarding the use of grades of Shorthand Typist II EC6 and EC7 which were not existent in the career guidelines, you responded and stated that it was an anomaly.

Having outlined the above, we wish to point out as follows:

i) That it is clear that there was an anomaly in either the job title or job grade that was given to the complainant upon her promotion in 1998. All correspondence from KNEC indicate that she was promoted to the job title of Shorthand Typist II, Grade EC6 and later to EC 7 under the same job title. This was inconsistent to the career guidelines as the only job grades that were available for Shorthand Typists were Grades EC8 and EC 9.

ii) That despite the complainant raising the issue of the anomaly severally and requesting KNEC to correct it, KNEC did not endeavour to correct the anomaly, but insisted that the complainant applies for positions and attends interviews in order to be promoted.

iii) That it is only after we requested for a clarification that KNEC confirmed that there was indeed an anomaly in the complainant's job grade.

iv) That the complainant has insisted that it would only be fair if the anomaly is corrected and that she should not be subjected to an interview to correct an apparent anomaly, a position which we are in agreement with.

v) That the anomaly has inhibited the complainant's job progression and upward mobility.

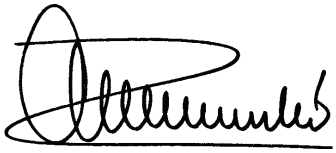
vi) That this has also affected the benefits she would have been entitled, had the anomaly been rectified.

In the circumstances, the Commission makes the following findings

1. KNEC should correct the anomaly and place the complainant in her right grade.
2. The same be backdated to the year 1997 when the upgrading was done and also the subsequent promotions.
3. KNEC should pay the complainant for the loss occasioned by the anomaly backdated to the year 1997.

We thank you for your continued cooperation and assure you of our highest regards.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc. **Mercy Karimi Kaburia**
P.O Box 59159 – 00200
NAIROBI

OUR REF: CAJ/KNEC/013/441/13/VOL. 1 - WT 24th November 2014

Dr. Belio Kipsang
Principal Secretary
State Department of Education
Ministry of Education, Science and Technology
Jogoo House "B", Harambee Avenue
P O Box 30040 – 00100
NAIROBI

Dear Sir,

RE: COMPLAINT BY MARGARET MUTHONI KYALO, INDEX NO. 401049021 REGARDING THE CANCELLATION OF HER KNEC RESULTS

Kindly receive warmest compliments from the Commission on Administrative Justice.

We make reference to the above captioned matter, wherein we have been in correspondence with the Kenya National Examinations Council, the Kenya Institute of Curriculum Development and the complainant. A brief summary of this matter is as follows:

A. Complaint by Margaret Muthoni Kyalo

On 22nd May 2013, the Commission received a complaint from Mrs. Margaret Muthoni Kyalo on the allegations:

a) That she registered with Kenya National Examination Council (KNEC) in January 2010 to sit for Business TEP Examinations for the award of Diploma in Human Resource Management at the Institute of Human Resource Management.

b) That she studied for a period of two years and sat for the examination in November 2011.

c) That KNEC released the results in February 2012, but cancelled hers for the reason that she failed to meet the minimum entry requirements for the course for which she was registered.

d) That on enquiring from KNEC, she was informed that holders of Division III at Kenya Certificate of Education (KCE) were no longer admitted for a Diploma Course and that it had decided to start "cleaning their house" with the complainant's group.

e) That KNEC has been issuing Diploma Certificates for Division III holders for the last fifteen years.

f) That she feels aggrieved since she submitted a request to KNEC to sit for the examination in this Course, which request was accepted when she was issued with an Admission Number, 401049021.

g) That KNEC accepted Kshs. 9,180 as examination registration fees and she also paid Kshs. 100,180 to the Institute of Human Resource Management as tuition fees.

h) That at no point did KNEC inform her that she did not qualify for admission to pursue the Diploma Course and that its decision to cancel her results after incurring costs and spending two years pursuing the course is unfair.

B. Action and Response

We wrote to KNEC on 25th June 2013 and requested them to respond to the allegations. On 9th July 2013, KNEC responded and stated as follows:

- That the complainant's results were cancelled because she did not meet the minimum entry requirements for the course.
- That the minimum entry requirements for Diploma in Personnel Management Course is either:
  - i) The candidate should have passed in the relevant craft course.
  - ii) A candidate should have K.C.S.E mean grade of C- (minus)
  - iii) A candidate should have attained equivalent qualifications to those stated in clause 2 above, for example KCE Division II.
- That the syllabus for Diploma in Personnel Management was developed by the Kenya Institute of Education (KIE), now Kenya Institute of Curriculum Development in December 1992 and the entry qualifications have never been lowered to KCE Division III since its inception.
- That admission to various courses is done by the respective institutions and the institutions are expected to ensure that the trainees meet

the entry requirements as per the syllabus before enrolling them.

- That the allocation ofKNEC index number and payment of examination fees is not a guarantee that a candidate qualifies to sit for an examination he/she is registered as the data has to be verified.
- That the complainant sat for Kenya Certificate of Education in 1984 and scored a grade of Division III which does not meet the requirement for the Diploma in Personnel Management Course.

We further wrote to the Kenya Institute of Curriculum Development (KICD) on 21st August 2013 and requested it to advise us on the body responsible for ensuring that institutions of learning implement training curriculum. On 31st January 2014, KICD responded and stated that its role is to develop curricula and the implementation of it is the prerogative of the training institutions. Further, they informed us that the assessment of learners and the certification is handled by the examining body, which in this case is KNEC.

We further wrote to KNEC on 30th July 2014 and requested for clarification on the following:

i) Whether the Council verified the qualifications of the complainant to register for examination for the Diploma in Personnel Management.

ii) Whether the Council accepted the complainant's O-level Certificate at the time of registration for exams in June 2010.

iii) The body which is responsible for assessing the qualifications of the complainant to register for examination for the Diploma Course in Personnel Management.

KNEC responded on 28th August 2014 and stated that:

- The institution enrolling students for a course has the primary role of ensuring that such students qualify based on entry requirements developed by the Kenya Institute of Curriculum Development and KNEC regulations.
- KNEC only validates the entry requirements from the list of students provided by the teaching institutions during the last year of their studies when such students are presented for registration to sit for KNEC exams.
- In 2010 when KNEC initiated the online mode of registration, the system could not verify details of candidates who sat for KCE and KACE and such details had to be verified manually.
- Furthermore, institutions delayed in submitting hard copies of candidates' documents and the validation process had to be extended making some unqualified candidates sit for the examinations.
- KNEC's responsibility is to verify the details given by the institution and the responsibility to ensure that qualified students enroll for courses rests with the institutions.

C. Analysis

We have reviewed this matter, together with the responses and the supporting documents provided by KNEC and the complainant and have noted the following:

- That the complainant applied to study a Diploma in Human Resource Management course at the Institute of Human Resource Management, and relied on the requirements provided by the Institute.
- That although the implementation of the set curriculum is a prerogative of the institutions themselves, the Ministry of Education has the mandate to ensure that all institutions implement the set curriculum.
- That KNEC had the responsibility to confirm that students meet the qualifications before the registration process is completed and candidates issued with examination registration numbers, but this was not done at the appropriate time, since it took approximately one year after the institution submitted the candidate's registration details for KNEC to respond that the complainant did not qualify to take the course.
- That in all our inquiries, we copied your Ministry, but no response was forthcoming.

D. Conclusion and Recommendations

Having outlined the above, we have come to the conclusion that:

i. The Institute of Human Resource Management failed to comply with the standards set by the Kenya Institute of Curriculum Development regarding the minimum entry requirements for the award of Diploma in Human Resource Management. However, since the Commission does not have jurisdiction over private entities as such, it will only make recommendations to the Ministry on the appropriate action to take against the Institution.

ii. The Ministry of Education failed in its responsibility to ensure that the Institute of Human Resource Management complied with the set curriculum.

iii. KNEC failed in their duty to ensure that the verification process is done in a prompt and timely manner. This has, however, been addressed to KNEC in a separate correspondence.

In the circumstances, the Commission makes the following recommendations:

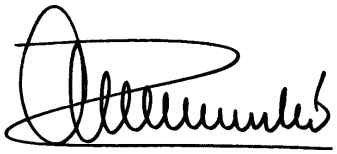
a. The Ministry of Education should compel the Institute of Human Resource Management to compensate the complainant for the years lost and to reimburse her the tuition fees paid.

b. The Ministry of Education should commence disciplinary measures against the Institute of Human Resource Management for failure to adhere to the standards set by the Kenya Institute of Curriculum Development.

c. The Ministry of Education should put in place measures and mechanisms to ensure that all institutions of learning adhere to the set standards when enrolling students to various courses.

We thank you for your continued cooperation and assure you of our highest regards.

Yours sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc:

1. **Dr. Joseph Kivilu**
Council Secretary / Chief Executive Officer
Kenya National Examinations Council
National Housing Corporation (NHC) House
Aga Khan Walk
P.O Box 73598 - 00200
NAIROBI (Your Ref: KNEC/GEN/R&AQA/ PSE/2014/022)

2. Margaret MuthoniKyalo
Email: kyerubbs@yahoo.com

OUR REF: CAJ/KNEC/013/441/13/VOL. 1 - WT
KNEC/GEN/R&AQA/PSE/2014/022

24th November 2014

Dr. Joseph Kivilu
Council Secretary / Chief Executive Officer
Kenya National Examinations Council
National Housing Corporation (NHC) House
Aga Khan Walk
P.O Box 73598 - 00200
NAIROBI

Dear Sir,

RE: COMPLAINT BY MARGARET MUTHONI KYALO, INDEX NO. 401049021 REGARDING THE CANCELLATION OF HER KNEC RESULTS

Kindly receive warmest compliments from the Commission on Administrative Justice.

We make reference to the above captioned matter resting with your letter of 28th August 2014. Having reviewed this matter together with the responses and supporting documents provided by yourselves and the complainant, we have come to the conclusion that:

i) *KNEC had the responsibility to verify and confirm that candidates meet the qualifications before the registration process is completed and registration numbers issued, but this was not done at the appropriate time, since it took approximately one year after the institution submitted the candidates' registration details for KNEC to respond that the complainant did not qualify to take the course. This position was further concretized by the response from the Kenya Institute of Curriculum Development vide a letter of 11th January 2014 that the assessment of such learners and certification is handled by the examining body, which in this case is KNEC. KNEC, therefore, failed in its duty to ensure that the verification process is done in a prompt and timely manner*

ii) *The Institute of Human Resource Management failed to comply with the standards set by the then Kenya Institute of Education (KIE), now Kenya Institute of Curriculum Development regarding the minimum entry requirements for the award of Diploma in Human Resource Management. However, since the Commission does not have jurisdiction over private entities as such, it will only make recommendations to the Ministry on the appropriate action to take against the institution. This matter has been addressed to the Ministry in a separate correspondence.*

iii) *The Ministry of Education failed in its responsibility to ensure that the Institute of Human Resource Management complied with the set curriculum.*

In the circumstances, the Commission makes the following recommendations in regard to acts and omissions on the part of KNEC:

i) *KNEC should refund the examination registration fees amounting to Kshs. 9,180 to the complainant.*

ii) *KNEC should put in place measures to ensure that the verification process is done in a prompt and timely manner and that candidates are cleared before they are issued with examination registration numbers and before examination registration fees is received.*

iii) *KNEC should put in place measures to ensure that system upgrades are done in a manner that may not cause delays and prejudice candidates.*

We thank you for your continued cooperation and assure you of our highest regards.

Yours sincerely,

CMMR. OTIENDE AMOLLO, EBS

CHAIR OF THE COMMISSION

Cc:

1. **Dr. Belio Kipsang**
   Principal Secretary
   State Department of Education
   Ministry of Education, Science and Technology
   Jogoo House "B", Harambee Avenue
   P O Box 30040 – 00100
   NAIROBI
2. Margaret Muthoni Kyalo,
   Email: kyerubbs@yahoo.com

OUR REF: CAJ/M.AGR/014/147/14 -NG **24th November 2014**
Your Ref: 12/14

Mr. William N. Onwonga

Bwonwonga & Company Advocates
Imani House, 1st Floor Room 10
P.O Box 894-10400
NANYUKI

Dear Sir,

RE: YOUR COMPLAINT ON BEHALF OF DAVID GITHINJI MATHU AGAINST THE KENYA AGRICULTURAL RESEARCH INSTITUTE (KARI)

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We acknowledge with thanks receipt of your letter dated 4th October 2014 contents whereof we noted.

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

B. COMPLAINT

3. The Commission received a complaint regarding the above captioned matter vide your letter dated 9th July 2014 wherein you informed us that you client was wrongfully and unfairly dismissed from employment and that KARI have failed to respond to your letters requiring them to furnish you with certified photocopies of the Board's proceedings that led to the dismissal of your client's appeal.

C. ACTION TAKEN

4. Having carefully reviewed the complaint together with supporting documents, the Commission wrote to you vide a letter dated 15th August 2014 wherein we advised that we were not able to pursue the complaint on dismissal since it was done procedurally. However, we commenced an inquiry into the issue of failure by KARI to respond to your request of availing certified copies of the Board's proceedings by writing to the Director of KALRO vide a letter dated 15th August 2014.

D. RESPONSE

5. The Director in responding to the allegations vide letter dated 25th August 2014 stated as follows;

   - That Mr. Mathu was employed with effect from 1st May 1987.
   - That he proceeded on leave and was scheduled to report back on duty on 30th September 1988, but he dint and consequently, his salary was stopped in February 1990.
   - That prior to desertion from duty Mr. Mathu had applied for admission at Meru Technical Training Institute to undertake an Artisan Course, but when a letter was addressed to him through the Principal of the institution, it was returned vide a letter dated 20th March 1991 indicating that Mr. Mathu was not known in the training Institute.
   - That Mr. Mathu continued to absent himself from duty and neither himself nor the family members informed KARI or the parent Ministry of his whereabouts.
   - That after 23 years of absence he wrote to the Director KARI vide letters dated 29th April 2011 and 16th May 2011, claiming that he had been sick and sought to know the status of his employment in KARI.

- That he received a notice to show cause letter dated 7th February 2012 informing him of the allegations against him and requiring him to make a statement in writing before any disciplinary action was taken, which he promptly did vide a letter dated 17th February 2012.
- That the KARI staff Advisory Committee considered his case and resolved that Mr. Mathu be dismissed from service, and he was informed of the outcome vide letter dated 20th November 2012.
- That he appealed against the decision vide a letter dated 14th December 2012, and was given an opportunity to appear before the Ad-Hoc Appeals Committee of the Board of Management on 14th May 2013. However, the appeal was disallowed and the decision to dismiss him upheld and communicated vide letter dated 8th August 2013.
- That your firm wrote to the Director on several occasions requesting for certified copies of the Board's proceedings that led to the dismissal of the appeal, but KARI rejected the request on grounds that releasing the minutes would breach the confidentiality of the appeals submitted by other staff members.

E. REJOINDER

6. In response to their letter you wrote to us vide a letter dated 4th October 2014 stating;
   - That Mr. Mathu (your client) was employed in 1986 and not 1987.
   - That he never received the letters that were allegedly addressed to him dated 3rd May 1991, 20th May 1991 and 20th February 1991.
   - That his salary was stopped in June 2006 and not in February 1990 as alleged by KARI.
   - That your client was not able to attend college due to the serious nature of his ailments and numerous attendances to hospital.
   - That he seeks to be paid his arrears and dues that had accumulated before he was dismissed.

F. OUR ANALYSIS

7. Upon careful consideration and examination of the documents and correspondence between the parties involved, we have reached the following conclusion:
   i. That it is clear from the documents adduced that Mr. Mathu was employed on 1st May 1987 (please refer to the NSSF statement of Account line 5) and the same was confirmed by the former employer.
   ii. We also note from the records, that his salary was stopped as per the pay change advice sheet dated 9th February 1990. The NSSF contributions which indicate that the employer made payments up to 2006 could be inaccurate, on grounds that it is not possible to have been employed in 1987 and the contributions made are as from 1986, a year before your client was employed.
   iii. That it is also clear that Mr. Mathu does not dispute to have been absent from work as from September 1988, when he is alleged to have deserted duty.
   iv. As regards Mr. Mathu not being able to attend college due to his ailment, we note that Meru Technical Institute in their letter dated 20th March 1991, clearly stated that he was not known in that Institution, meaning there was no record of him at all. Therefore, in our view it implies that he could not only have failed to secure an admission but also failed to apply to join the Institution in the first instance.
   v. We also note that Mr. Mathu or his family members never informed the employer of his illness and from the medical records it indicates that he started receiving medical attention in 1990, almost two years after deserting duty, and only resurfaced in 2011, 23 years later. Nevertheless, he was given a chance to defend himself, therefore, on the issue of dismissal we still reiterate our earlier position that the same was done in a procedural manner.
   vi. On the issue of arrears and dues, Mr. Mathu only worked for a period of about one and a half years (May1987- September 1988) before he allegedly deserted duty, and he continued to receive his salary up to January 1990, we are of the considered view that the amount he received for over one year after deserting duty, is more than enough for any salary arrears that could have been unpaid.
   vii. That he should refund the money he irregularly received from KARI for the period he was paid and did not work.
   viii. As regards certified copies of the Board's Proceedings, we are of the view that to the extent that other employees' issues or matters were discussed in the said minutes and that releasing the same would breach the confidentiality of the appeals submitted by the staff members, KARI are not duty bound

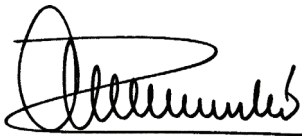
to release the said minutes. In any case, the reasons as to why the appeal was rejected are clearly stated in their letter dated 8th August 2013, and since you are in possession of all the correspondence regarding this matter, we believe it is sufficient for any further action you may need to take.

ix. We are also of the opinion that this case satisfies Article 47 of the Constitution, and on that note KARI cannot be compelled to release the said minutes.

8. In light of the foregoing, we are not able to pursue your complaint further and are proceeding to close this particular file. We, however, invite you to lodge any other complaint you may have now or in the future which is within our mandate.

We thank you for your correspondence and assure you of our highest regards.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC: **Prof. Onesmo K. Ole-Moiyoi**
Chairperson
Kenya Agricultural Research Institute Board
KARI Headquarters
Kaptagat Rd, Loresho
P.O Box 57811-00200
NAIROBI

Dr. Ephraim A. Mukisira PhD, MBS
Director
Kenya Agricultural Research Institute
KARI Headquarters
Kaptagat Rd, Loresho
P.O Box 57811-00200
NAIROBI

(We thank you for your continued cooperation and assure you of our highest regards. **Your Ref: KALRO/2/081/80**)

Our Ref: CAJ/NSSF/017/463/14-NG **10th November 2014**

Mr. Philip Kiboko Mavali

0705 833 415

(TO PICK FROM CAJ)

Dear Sir,

RE: YOUR COMPLAINT AGAINST THE NATIONAL SOCIAL SECURITY FUND

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

B. COMPLAINT

3. The Commission received your complaint regarding the above captioned matter on 10th April 2014, alleging that your were an employee of G4S Security Services Limited and retired in 1977 and that during your employment period you made contributions to your NSSF account, and you were entitled to a sum of Kshs. 30,022.40/=. Upon inquiring from the NSSF offices you were informed that the money had been paid to a person other than yourself and you suspected that the then NSSF officials could have defrauded you.

C. ACTION TAKEN

4. Having received your complaint, the Commission initiated an inquiry vide our letter dated 26th May 2014 addressing the Managing Trustee, National Social Security Fund.

D. RESPONSE

5. In responding to your allegations the Office of the Managing Trustee vide letter dated 5th June 2014(copy enclosed)stated as follows:

   i. That your assertions that the amount due to you was Kshs. 30.022.40 was misleading and inconceivable, and the total contribution as at the time you retired was Kshs. 4, 091.00 only.

   ii. That since 2004 this matter has been addressed severally through different institutions and lawyers that you had filed your complaint with, regarding the same issue.

   iii. That their Office has repeatedly advised you on your total contributions that is Kshs. 4,307.00 and the accumulated interest of Kshs. 3,552.25 that you were entitled to as at the time you retired, and the total amount due forwarded to you in 1978 and in 2004.

   iv. That you may visit their offices for a detailed explanation regarding their position in this matter.

E. OUR ANALYSIS

6. Upon careful consideration and examination of the correspondence together with the supporting documents from both parties, we have established the following:

   i. That you have indeed lodged several complaints with NSSF since 2004 regarding the same issue, through different legal entities and Government offices, information that you did not reveal when lodging a complaint with our office.

   ii. Nevertheless, NSSF have through several correspondence addressed your complaint giving you a detailed computation of your contributions.

   iii. That NSSF vide their letters dated 23rd November 2004 and 20th November 2009 invited you to attend their offices

accompanied by a witness, to have discussions on matter, to bring it to a logical conclusion.

iv. That NSSF reiterates its position that they do not owe you any further dues.

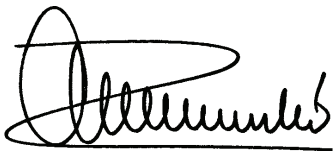
v. That NSSF have been more than willing to address this matter, but you still insist that they still owe you.

7. We have considered the facts of the matter and are satisfied with the explanation rendered and the steps taken in resolution of your complaint. We advise that, in case you are dissatisfied with their response, kindly visit their offices for clarification. Otherwise we are of the opinion that this matter has been adequately addressed and your allegations do not disclose any impropriety or malfeasance by the NSSF Officers.

8. In light of the foregoing, we advise that we are unable to pursue the matter further and are proceeding to close this particular file. We, however, invite you to lodge any other complaint you may have now or in the future which is within our mandate.

We are happy to have been of service to you and assure you of our highest regards.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc: Managing Trustee
National Social Security Fund
NSSF Building
P.O Box 30599 – 00100,
NAIROBI

(Attn: Nancy Mwangi. We acknowledge with thanks receipt of your letter dated 5th June 2014 and assure you of our highest regards. **Your Ref: SF/022 304 010/100)**

OUR REF: CAJ/P.ADM/015/1334/2012-NG **10th November 2014**

Mr. David Kisinga Musyoka

C/o Katoteni –Nzawa
P.O Box 574-90400
MWINGI

Dear Sir,

RE: YOURCOMPLAINT REGARDING THE APPOINTMENT OF THE ASSISTANT CHIEF NZAWA SUB-LOCATION, MIGWANI SUB-COUNTY IN KITUI COUNTY

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.
2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

B. COMPLAINT

3. The Commission received a complaint regarding the above captioned matter on 16th July 2012 wherein you alleged that you had applied for appointment as an Assistant Chief in Nzawa Sub- Location, and was among those shortlisted for an interview that was scheduled to take place on 4th July 2011. That upon conclusion of the said Interview, three individuals were shortlisted for appointment and your name was among them. Further, you alleged that the person who was appointed to occupy the said office, was never among the shortlisted candidates. You reported your concerns to the then District Commissioner (as it then was) but you never received a response.

C. ACTION TAKEN

4. Having received the complaint, the Commission initiated an inquiry vide our letter dated 4th October 2012 addressing the District Commissioner, Migwani District(as it then was).

D. RESPONSE

5. In response to the allegations the District Commissioner vide letter 16th October 2012 stated as follows:

   i.) That indeed you had applied for the position of Assistant Chief Nzawa Sub-Location.

   ii.) That you were among the eight shortlisted individuals who appeared before the selection panel.

   iii.) That upon conclusion of the Interview, three individuals were shortlisted but your name was not among them. Those shortlisted included; Daniel Ikui, Eunis Mutuo and Winfred Makaa, according to their performance.

   iv.) That the person appointed, Mr. Daniel Ikui was among the shortlisted candidates and the best overall performer.

   v.) That you had also not lodged a complaint with his office and if you had, you could provide copies of the said written complaint.

E. REJOINDER

6. In your rejoinder you reiterated your earlier position and also stated that, from what you had heard, you were the best overall performer and that your name was replaced with that of Mr. Daniel Ikui.

F. OUR ANALYSIS

7. Upon careful consideration and examination of the correspondences together with the supporting documents from both parties, we have made the following conclusion:

i.) That the Assistant Chief, Mr. Daniel Ikui was indeed among the eight shortlisted candidate for Nzawa Sub Location contrary to your allegations.

ii.) That from the records the Assistant Chief had the required minimum educational qualifications, a good social standing, had an income and no criminal record, which are among the factors that the interview panel took into consideration during the vetting process.

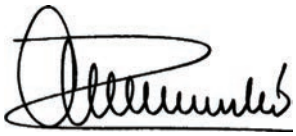
iii.) That your allegation that you were the overall best performer and your name was replaced with Mr. Daniel Ikui's name, continue to go unfounded.

iv.) That having keenly considered the evidence availed to us in regard to the interview process, the candidate who was given the position was the highest ranked.

8. In light of the foregoing, we are of the considered view that your allegations do not disclose any impropriety in regards to the manner in which the selection and appointment of the Assistant Chief Mr. Daniel Ikui was done.

9. We are, therefore, unable to pursue the matter further and are proceeding to close this particular file. We, however, invite you to lodge any other complaint you may have now or in the future which is within our mandate as stated herein above.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC: **Amb. Dr. Monica Juma**
Principal Secretary, Interior
Ministry of Interior and
Co-ordination of National Government
Harambee House, Harambee Avenue
P.O Box 30510-00100
NAIROBI

Mr. Were Simiyu
Deputy County Commissioner
Migwani Sub-County
P.O Box 1-90402
MIGWANI

(Kindly take note of the above. We thank you for your continued cooperation and assure you of our highest regards. **Your Ref: MIG/CON/S/4/3/97)**

Our Ref: CAJ/EACC/026/110/14

21st October 2014

Ernest C.O. Muga
P. O. Box 74656 – 00200
NAIROBI

Dear Sir,

RE: YOUR COMPLAINT AGAINST THE MINISTRY OF FOREIGN AFFAIRS AND FORMER SENIOR OFFICERS AT THE KENYAN HIGH COMMISSION IN NIGERIA

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We make reference to the above captioned matter that was referred to us by the Ethics and Anti-Corruption Commission vide a letter dated 15th August 2014 since it disclosed maladministration which are within the mandate of the Office of the Ombudsman.

We have examined the complaint together with the enclosures are noted that you alleged the following:

i) That you worked with the Ministry of Foreign Affairs as an Accountant and was posted to the Kenyan High Commission (Mission) in Nigeria as a Financial Attaché from July 1987 to December 1994 when your tour of duty ended.

ii) That the Ministry and the Mission failed to ship your two vehicles, Mercedes Benz 200E Registration Number 74CD16 and Peugeot 506 Station Wagon Registration Number 74CD 15, which had already been taken to the Shipping Agent, EKOBAS Enterprises, resulting in a court case in Nigeria for non-payment of demurrage charges.

iii) That the vehicles were released to the Mission in 2002 upon payment of the demurrage charges and instead of shipping them to Kenya, they were subsequently irregularly bought by Senior Officers of the Mission, Ambassador David Mutemi and Mr. A.K. Suge, without your consent or knowledge.

iv) That your efforts to get back the vehicle or compensation for the same have been unsuccessful since the Ministry has been unresponsive.

While considering the complaint, we have noted the following pertinent issues:

i) That the complaint was the subject of extensive consultations within the Ministry of Foreign Affairs and the Kenyan High Commission in Nigeria.

ii) That you had lodged the complaint with the erstwhile Public Complaints Standing Committee on 16th April 2008 **(File Ref. No. PCSC/M.FOR/011/2/08)** which wrote to the Ministry on 11th June 2008 and 9th September 2008, and the Ministry responded vide a letter dated 19th March 2009 informing PCSC that the matter was the subject of a case in the High Court, ***High Court Petition No. 1199 of 2007 – Ernest C.O. Muga vs The Attorney-General***.

iii) That PCSC thereafter wrote to the Ministry and you on 2nd April 2009 informing that they would not pursue the matter further since it was the subject of court proceedings. Accordingly, PCSC closed the file on 6th August 2011.

iv) That you had moved to Court vide a Petition dated 7th November 2011 wherein you sought compensation based on breach of your right to property under Section 75 of the repealed Constitution. In particular, you sought the following:

- A Declaration that you were unlawfully deprived of your property by the Government;
- An Order to the Government to restore your property by compensating you for the loss of the two vehicles and loss of user;
- An Order for payment of interest on the award of compensation at the prevailing commercial rates;
- Cost of the suit; and
- Any other relief that the Court deemed just and expedient.

v) That on 9th December 2011, the Court delivered Judgement in the matter by finding that the Petition did not disclose violation of your rights under Section 75 of the repealed Constitution. While noting that you had suffered a loss as a result of the manner in which the matter was handled, the remedy laid in a claim of damages against the Government under industrial action, and not a constitutional reference

of violation of fundamental rights under Section 75 of the repealed Constitution.

vi) That you were aggrieved by the decision of the High Court and filed a Notice of Appeal dated 9th December 2011 whose outcome is not clear.

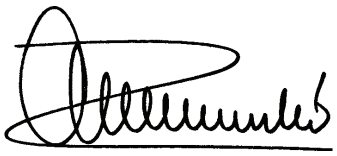
vii) That the matter was also the subject of Parliamentary Proceedings on 30th November 2004 where it was discussed on the floor of the National Assembly.

Having analysed the matter and its circumstances, we are of the considered view that while there might been acts of maladministration by the Ministry and officers at the Mission (delay, improper conduct, misbehaviour in public administration, abuse of power, inefficiency and unfair treatment) which are the province of the Commission, the matter is not appropriate and sustainable for consideration by the Commission by virtue of section 30(g) of the Commission on Administrative Justice Act. This is because once the complaint was taken to Court, it ceased being administrative in nature and became that of judicial intervention. As a matter of fact, the remedy of compensation which is at the heart of the complaint is the subject of the matter in court. As a result, your remedy lies in judicial sphere, where you have lodged an appeal.

In this regard, we wish to inform you that we cannot be seized of this matter and advise that you pursue compensation through the judicial process which you had embarked on earlier.

We thank you and assure you of our highest regard.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

OUR REF: CAJ/TSC/013/345/14/VOL.1 -NG **15th October 2014**

Mr. Philip Mutunga Mauta

c/o Head Teacher
Masaku Primary School
P.O Box 16
KINDARUMA

Dear Sir,

RE: YOUR COMPLAINT AGAINST THE TEACHERS SERVICE COMMISSION

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We refer to the above captioned matter and our inquiry letter of 13th February 2013 wherein you had alleged that you were an employee of the Teachers Service Commission working as a teacher in various primary schools for more than 15 years. You were interdicted and later dismissed from employment vide a letter dated 4th March 2004 for various allegations. Further, you stated that you appeared before the Commission for the hearing of your case, given an opportunity to defend yourself, but you felt that the hearing was unfair, and that your dismissal was equally unfair since TSC did not carry out independent investigations before reaching the verdict. You severally appealed against the decision but your appeals were dismissed; you again filed another appeal through KNUT but the decision to dismiss you was upheld. However, you alleged that you were never informed of the reasons as to why your appeal was rejected.

We have carefully reviewed your complaint together with the supporting documents and the response from TSC dated 11th September 2014(copy enclosed), and also previous correspondence and advise as follows:

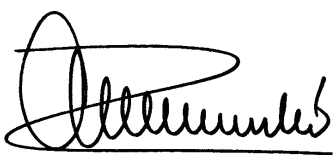
- That a hearing before any disciplinary panel is for the accused person to defend and/or prove himself/herself innocent against accusations levelled against him/her. Accordingly, if you fail to prove your case, then a decision reached will be in light of the evidence adduced.
- On the issue of failure by TSC agents to conduct proper and independent investigations, we advise that it is difficult to prove that the manner in which the investigations were carried out was not independent or proper, unless you have evidence to show otherwise, we can only treat the same as hearsay.
- As regards getting information on the reasons as to why your appeal with KNUT was dismissed, we concur that since KNUT had filed the case on your behalf and were part of the consultative meeting held by KNUT and TSC, and as the representatives of your interests in that meeting, theyought to give you the detailed report on the outcome of your case.
- Further, we also note that you failed to file an appeal with the Teachers Appeals Tribunal (now disbanded) which was the institution mandated to hear appeals from the Commission on dismissal and removal from the Teachers Register.
- As regards the salary arrears which you did not receive during the period of interdiction, we note that Section 68(a) of the TSC code of regulations for teachers, exempts teachers who have been accused of chronic abseentism from payment of their half salary.

In light of the foregoing, we are of the considered view that your allegations do not disclose any impropriety in regards to the manner in which you were interdicted and subsequently dismissed from employment. We find that TSC followed the laid down due procedure which was in accordance with the Code of Regulations and cannot be faulted for the same.

We are, therefore, unable to pursue the matter further and are proceeding to close this particular file. We, however, invite you to lodge any other complaint you may have now or in the future which is within our mandate.

We are happy to have been of service to you and assure you of our highest regards.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC: **Mr. Gabriel Lengoiboni**
Commission Secretary
Teachers Service Commission
Kilimanjaro Avenue, Upper Hill
P.O Box 371-30100
NAIROBI

(We acknowledge with thanks receipt of your letter dated 11th September 2014. We thank you for your continued cooperation and assure you of our highest regards. **Your Ref: TSC/ DDCC/VOL.II/29)**

OUR REF: PCSC/AG/001/102/09-NG **9th October 2014**

Mr. Sammy Kingoo Mutiso
P.O Box 10032
NAIROBI

Dear Sir,

RE: YOUR COMPLAINT AGAINST THE DIRECTORATE OF PUBLIC PROSECUTIONS

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We refer to the above captioned matter and the inquiry letter from the defunct PCSC dated 28th May 2009. The particulars of the complaint were as follows:

- That DPP had delayed and /or refused to take action on a report by the Kenya Anti- Corruption Commission (as it then was), regarding fraudulent transfer of Land Parcel No. Nzaui/ Kikumini/755 & 756 by a Mr. Philip Kivuva.

An Inquiry was initiated and PCSC wrote to the Kenya Anti-Corruption Commission vide a letter dated 28th May 2009 and received a response vide a letter dated 3rd September 2009 that stated:

- That KACC conducted investigations between 2004 and 2006 and upon conclusion of their investigations, a report was made to the Honourable Attorney General's Office on 23rd June 2006, recommending the prosecution of Mr. Philip Kivuva Nzioka for 15 counts of forgery and related offences.
- That KACC prepared a charge sheet and forwarded the same to the Attorney General's Office for consideration of the same.

A further inquiry was made vide a letter dated 18th December 2009 addressing the Attorney General's office to find out why the office had failed and/or delayed to prosecute the case. The Director of Public Prosecutions replied vide a letter dated 1st July 2010 stating:

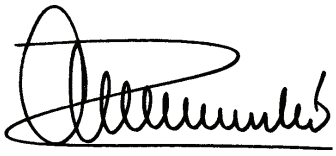
- That he had considered the circumstances surrounding the case in totality and decided not to have the matter prosecuted for the reasons:
  a) Firstly, that although there was no limitation of time in instituting criminal proceedings, the alleged criminal acts took place between 1965 and 1980, which is a long delay in invoking the criminal process, which would also raise critical constitutional issues of having a fair trial within a reasonable time.
  b) Secondly, the matter in question had been litigated in the Civil Courts, and you lost, that's why you sought to invoke the criminal process.
  c) Lastly, the alleged suspect was over 90 years of age at the time, and it indeed did not serve any public interest in prosecuting the suspect, when the evidence in support of the case could not sustain a trial.

Having carefully reviewed your complaint, together with the supporting documents and correspondence therein, we concur with the position taken by the Office of the Director of Public Prosecutions, that in pursuance of Justice we should also be keen not to infringe and violate the constitutional rights of others, and in the same breadth it should not be done without meaning or as a mere academic exercise.

f the foregoing, we are, therefore, unable to pursue the matter further and are proceeding to close this particular file. We, however, invite you to lodge any other complaint you may have now or in the future which is within our mandate.

We are happy to have been of service to you and assure you of our highest regards.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC: Director of Public Prosecutions
NSSF Building, Block 'A'19th Floor
Bishop Road
P.O Box 30701-00100
NAIROBI

(We thank you for your continued cooperation and assure you of our highest regards. **Your Ref: AG/ CR/505/6/435**)

OUR REF:PCSC/M.AGR/014/84/2009/YA 25th September 2014

Jefferson CM Kalendo
C/o Chome Primary School
P.O Box 1118
WUNDANYI

Dear Sir,

RE: YOUR COMPLAINT AGAINST THE MINISTRY OF AGRICULTURE, LIVESTOCK AND FISHERIES

Kindly receive warmest compliments from the Commission on Administrative Justice.

We make reference to the above matter and your various letters and reminders to the Commission which were not, regrettably, responded to. We have had some capacity challenges and a backlog of cases which necessitated the deployment of personnel on short term contracts with the consequence that your matter has been handled by three different officers over the past one and a half years. It is unfortunate that these officers left without taking concrete action on your matter.

Contrary to your belief and insinuations as contained in your letters and reminders, there was absolutely no malice, hidden agenda, bad faith, or ulterior motives for the delay in dealing with your matter. We do not operate on the basis of tribalism (or negative ethnicity) as alleged or at all. However, the lengthy delay is acknowledged and we apologize unreservedly for it.

A. BACKGROUND

It would appear that you were employed by the Government of Kenya in 1973 as a Subordinate Staff II (Job Group A) on temporary terms and that you stagnated in that position for many years. It would further appear that you spent many years pursuing your deployment within the supply chain management cadre as a Storeman III after successfully undertaking a government Occupational Test for that position in 1974. However, you did not succeed in your endeavours and it would appear that sometime in 1994 you were dismissed from service supposedly for gross misconduct.

B. COMPLAINT

You lodged your complaint with the defunct Public Complaints Standing Committee (PCSC) in 2009 concerning the alleged *wrongful dismissal* from service; the failure to promote or deploy you as *Storeman III* despite having undertaken and passed the relevant Occupational Test in 1974 ; and the failure by the Government to translate your terms from temporary to *permanent and pensionable*. You therefore, wanted to be:

(a) reinstated into service

(b) deployed as a Storeman III

(c) confirmed into permanent and pensionable terms.

An inquiry was, therefore, undertaken on your behalf with the then Ministry of Agriculture.

C. RESPONSES TO COMPLAINT

The inquiries were responded to by the Ministry as follows:

i) That on 8th March 1993, you were transferred to Ngereny Farmers Training Centre as a night watchman but you refused to take up the duties. As a result, a show cause letter dated 5th May 1994 was addressed to you but you responded after your case had been concluded by the Ministerial Advisory Committee meeting on 7th and 21st September 1994. Consequently, you were dismissed from service with effect from 8th March 1993 on account of *gross misconduct*. That you appealed the decision twice but both appeals were disallowed by the Public Service Commission.

ii) That you were hired as a Subordinate Staff II [Job Group A] in 1973 and you were later promoted to the position of Subordinate Staff I [Job Group C] in 1991. That although you passed the Occupational Test for Storeman III, it was not possible to deploy you as such principally because there were no available vacancies for such promotion or deployment. It was further stated that the position of Storeman III was abolished w.e.f 01/01/1978 with the consequence that you could not be deployed as such after the effective date.

iii) That even though it was possible for one to make a direct entry into the position of *Storeman II* under the new scheme of service which followed, you did not qualify for such entry because you did not meet the relevant professional requirements of the scheme. The new scheme required a pass in Proficiency Examination for Clerical Officers

and an Advanced Certificate in Storekeeping or Intermediate Certificate from a recognized Institute of Supplies Management.

iv) That your terms of employment could not be translated from temporary to permanent and pensionable because the position of *Subordinate Staff* in the Government is neither permanent nor pensionable.

D. ANALYSIS OF THE MATTER

It is clear from both your letters and your sworn affidavit on the one hand, and the Ministry's response on the other, that you were dismissed for alleged desertion from duty upon your transfer to Ngereny FTTC as a watchman. You have explained that you continued reporting to your former station after the transfer as a form of "protest." However, under both the Employment Act and the Code of Regulations for public servants, absence from your duty station without permission from your employer constitutes misconduct and such absence may attract disciplinary action. Under Section 44 of the Employment Act (Cap. 226) for instance, such absence may constitute gross misconduct for which an employee may be dismissed summarily from employment.

In our opinion, it was not legitimate for you to 'protest' by refusing to report to your new station unless such action was taken within the context of industrial action after your trade union has given the relevant statutory notice. The Ministry of Agriculture was, therefore, entitled to undertake disciplinary proceedings against you while, of course, following due process. We notice that a notice to show cause was issued and you responded to it even though it was reportedly received by the Ministerial Advisory Committee had concluded its sittings. It is also apparent that you appealed twice to the Public Service Commission against the dismissal on account of gross misconduct but the appeal was not successful. The PSC cannot be faulted for not finding merit in your appeal given the kind of explanation you offered for your absence from your new duty station.

We have carefully considered your submissions on the failure by the Ministry to deploy and/or designate you as Storeman III after having successfully passed the relevant Occupational Test in 1974 in spite of the existence of government Policy and Personnel Circular at the time. It would appear that the applicable Circular was Personnel Circular No. 20 of 17th August 1968 which was replaced w.e.f 1st January, 1978 by Personnel Circular No. 5 of 3rd May 1977. This is confirmed by a letter dated 10th August 1979 from the Permanent Ministry of Agriculture on the Scheme of Service for Supplies Cadre. We note from the said letter that all those who had passed the relevant Occupational Test were to be considered for promotion. It was not to be automatic.

In its response, the Ministry has conceded that you undertook and passed the relevant Test but could not deploy you, firstly, because you sat for the test before completion of two years in service and, secondly, because there were no available ***vacancies*** at the time. We note that the first reason is not good and reasonable enough because it is the same Government which allowed you to register and sit for the Test and could not turn back and deny the validity of the results. However, the unavailability of vacancies is a reasonable explanation for the failure to deploy you as a storeman before 1st January 1978. The Personnel Circulars are meant to provide guidance and cannot be used to overshoot the approved personnel establishment of the Ministry. The passing of a Test could not automatically translate into deployment as a Storeman. It had to be made subject to availability of vacancies unless the relevant Scheme of Service provided for automatic deployment. As indicated by your various letters and those of the Ministry, there were many other public servants who undertook similar occupational tests in Supplies but could not be promoted or deployed as Storemen due to unavailability of vacancies.

We have also noted your submission that Personnel Circular No. 5 of 3rd May 1977 provided for automatic absorption of serving officers covered by the Scheme. It is our understanding that you were not a serving officer within the Supplies Cadre and that is the reason why you were pursuing your deployment as such. We are of the considered opinion that serving officers within the meaning of the said Circular refers to the people then holding the various positions specified in the new Scheme of Service such as Storeman III, Storeman II, Storeman I, Supplies Assistants, Supplies Officer etc.

The reasons for the failure by the Ministry to deploy you as a Storeman III after 1st January 1978 are self-evident. The position of Storeman III became obsolete under Personnel Circular No. 5 of 3rd May 1977 and there were to be no more appointments to that position. However, under the new Scheme of Service, one could get appointed directly to the position of Storeman II or a higher position if one possessed the requisite professional qualifications for the position, with the exception of serving officers. The Ministry has explained that the option of such direct appointment could not work out in your case because you did not possess the requisite qualifications of a pass in Proficiency Examinations for Clerical Officers and an Advanced Certificate in Storekeeping or Intermediate Certificate from a recognized Institute of Supplies Management.

It is, therefore, our determination that the Ministry has given a reasonable and satisfactory account of the failure to appoint you to the position of Storeman III or any higher position. However, it was still possible for you to be promoted within the ranks of Subordinate Staff and

that it would appear that you were promoted from Job Group A to C during your tenure in the public service. We note that the Ministry erred in making reference to Job Group E as opposed to C in some of its letters. However, the Ministry's letter of 8th July 2005 makes reference to the correct Job Group.

On the issue of translation of your terms to permanent and pensionable, we are satisfied with the explanation offered by the respondent on why you could not be confirmed into permanent and pensionable terms. The position you were holding was not a pensionable one in the establishment of the Government of Kenya.

We also note that you left the public service about 20 years ago and virtually all the reliefs you were seeking such as reinstatement, promotion and translation of your terms into permanent and pensionable terms have been overtaken by events in view of the mandatory retirement age of 60 years.

E. CONCLUSION

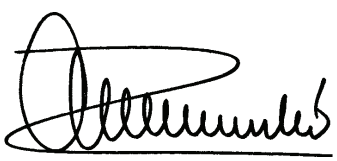
In conclusion, we are satisfied that the Ministry was justified in taking disciplinary action against you for failing to report to your new station. You could have reported to your new station without prejudice to your right to protest and pursue other lawful remedies for the transfer. We do not also find any fault on the part of the Public Service Commission in dismissing your appeals against dismissal by the Ministry. The explanation of "protest" you offered could not have been sufficient reason for the PSC to overrule the decision of the Ministerial Advisory Committee which recommended your dismissal from service.

The translation of your terms from temporary to permanent and pensionable has been adequately explained by the Ministry. It would also have been impractical and unlawful for the Public Service Commission to recommend such a remedy given the circumstances under which you left public service.

Consequently, we are proceeding to close our file but are happy to look into any other complaint on any other issue which we may be competent to handle.

We assure you of our highest consideration.

Yours sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc Principal Secretary, Agriculture
Ministry of Agriculture, Livestock and Fisheries
Kilimo House, Cathedral Road
P O Box 30028 -00100
NAIROBI
(Your Ref: MOA/HRM/4/16/1.VOL11/65)

OUR REF: CAJ/M.EDU/013/460/13/VOL.1 -NG **9th September 2014**
YOUR REF: TBA

Dr. Belio Kipsang
Principal Secretary
Ministry of Education, Science and Technology
Jogoo House "B"
Harambee Avenue
P.O Box 30040-00100
NAIROBI

Dear Sir,

RE: COMPLAINT BY CHARLES OLOO AGAINST KIMATHI ESTATE PRIMARY SCHOOL

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We make reference to the above captioned matter and your letter dated 16th July 2014. We have since received a response from the complainant, and having carefully examined the same we have established the following:

- That some Public Schools could be taking advantage of the fact that they can introduce programs as optional, which are not subject to approval by the Ministry to introduce extra charges, knowingly that the same will require financial support from the parents.
- That such monies are at times collected by the Heads of Schools without issuance of official receipts which undermines accountability.
- That this may have led to extortion of parents and improper use and/or mismanagement of such funds.

As you may recall the Commission was seized of a similar matter early this year concerning such levies in Kisumu County. Upon inquiries, the same was stopped and the Commission advised the Ministry to put appropriate measures, including issuing circulars, to stem the abuse of the same.

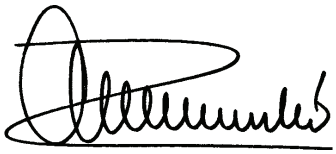
In light of the foregoing the Commission recommends as follows:

- The Ministry should in future put in place measures or mechanisms to ensure that the parents are not extorted by School Heads by ensuring that any extra charges introduced in the Public should be made known to the Ministry.
- That such charges should not be contrary to the Ministries Directives and Policies.
- The Ministry should be at liberty to inquire into the use of such funds and, if need be, require that the same is accounted for.
- That disciplinary action should be taken against any head teacher found to be extorting parents, and any such action should be documented.

In the circumstances we wish to advise that we shall proceed to close this particular file.

We thank you for your continued cooperation and assure you of our highest regards.

Yours sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC:

Charles Oloo
altenerkenya@yahoo.com (We are happy to have been of service to you and assure you of our highest regards)

Our Ref: CAJ/M.AGR/014/137/14/RS

13th August, 2014

Dr. Wilfred Tonui, PhD, RBP
Chief Executive Officer
National Biosafety Authority
Red Hill Road, off Limuru Road, Gigiri
P.O. Box 28251-00100
NAIROBI

Dear Sir,

IN THE MATTER OF ALLEGED MALADMINISTRATION AND ABUSE OF OFFICE AT THE NATIONAL BIOSAFETY AUTHORITY.

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman). We have now considered the full range of correspondence and documentation on this matter, and hereby render our determination.

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.The Commission is mandated, among others, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

B. ANONYMOUS COMPLAINT AGAINST THE AUTHORITY

3. The Commission received a complaint which was transmitted vide a letter dated 7th March 2014 from the Ethics and Anti-Corruption Commission (EACC). The complaint had four (4) allegations against the National Biosafety Authority and stated as follows;

    a) That the National Biosafety Authority has promoted staff without considering merit.

    b) That the beneficiary of the promotions were Esther Thuku, Hyrine Matheka, Mariam Ali, Adan Sugow and Doreen Gakii.

    c) That Doreen Gakii, one on the beneficiaries of the promotion is a relative to the Director, Finance and Administration.

    d) That the Authority' has never been audited by the Kenya National Audit office as required by law.

4. Based on the foregoing, the Commission intervened as required by law to establish the facts of those four (4) allegations.

C. THE ACTION AND RESPONSE

5. Having received the complaint, the Commission commenced an inquiry into the matter by writing to the Chief Executive Officer of the National Biosafety Authority, Dr. Wilfred Tonui on the 19th March, 2014 seeking to, *inter alia,* establish the facts of the complaint. The Commission received a response dated 25th March, 2014 together with a bundle of documents from Dr. Tonui. The Commission acknowledged receipt of the letter and the annexed documents vide a letter of 16th April 2014 and subsequently undertook to analyze the documents. The commission wrote a letter to both Dr. Julius Itunga and Dorren Muthiora inviting them to the Commission's offices to answer to their alleged relationship.

6. In responding to our inquiry, in his letter dated 25th March 2014, the Chief Executive Officer, Mr. Tonui stated as follows;-

    i) That the National Biosafety Board of Management during its 20th full Board Meeting held on the 3rd December, 2013considered and approved the recommendations of the

Finance and Administration Committee to promote the officers alleged to have been promoted.

ii) That the promotions were done in order to retain competent staff and to strengthen the National Biosafety programs.

iii) That the promotions were done procedurally and in accordance with the Authority's Human Resource Policy, Scheme of Service and against vacant position within the Establishment.

iv) That the management effected the Boards decisions in January 2014 while the directive from government dated 16th December 2013 was received on 20th January 2014, way later after the management had taken action and that the same was not ignored as alleged.

v) That upon receipt of the directive, subsequent external recruitments were put on hold pending authorization from the Office of the President.

vi) That the allegation that the Authority's accounts have never been audited were misleading and the CEO attached the audited reports for the 2011/2012 and 2012/2013 financial years.

vii) That there is no person in the institution called Doreen Gakii instead they have a person by the name Doreen Muthiora.

7. That on the 16thApril, 2014, the Commission wrote to the Authority seeking clarification on which Ministry the Authority administratively belonged to. Vide a letter dated 28th April 2014, the authority replied stating that the constitutive Act places them under the Ministry of Education Science and Technology, while the Executive Order No. 2 of 2013 place them under the Ministry of Agriculture, Livestock and Fisheries.

8. On the 23rd May 2014, the Commission wrote a letter inviting Doreen Muthiora and Dr. Julius Itunga who appeared at the Commission offices on diverse dates for questioning.

D. ANALYSIS AND RECOMMENDATIONS

9. Having received the responses from the Chief Executive Officer of the National Biosafety Authority and conducting the interviews with Ms. Doreen Muthiora and Dr. Julius Itunga, the Commission proceeded to frame the issues in contestation for determination. The issues are:-

i) Whether the National Biosafety Authority had promoted staff without considering merit and if at all the same was done in disregard of a government directive.

ii) Whether Doreen Muthiora, one on the beneficiaries of the promotion is related to the Director, Finance and Administration, Dr. Julius Itunga.

iii) Whether the National Biosafety Authority has been audited by the Kenya National Audit office as required by law.

E. PROMOTION OF STAFF

10. In the letter dated 25th March 2014, the Chief Executive Officer of the Authority gave a detailed response on all the issues raised. With regard to the promotions, the CEO indicated that;

i) That the National Biosafety Board of Management during its 20th full Board Meeting held on the 3rd December, 2013 considered and approved the recommendations of the Finance and Administration Committee to promote the officers alleged to have been promoted.

ii) That the promotions were done in order to retain competent staff and to strengthen the National Biosafety programs.

iii) That the promotions were done procedurally and in accordance with the Authority's Human Resource Policy, Scheme of Service and against vacant position within the Establishment.

iv) That the management effected the Boards decisions in January 2014 while the directive from government dated 16th December 2013 was received on 20th January 2014, way later after the management had taken action and that the same was not ignored as alleged.

v) That upon receipt of the directive, subsequent external recruitments were put on hold pending authorization from the Office of the President.

11. From the response of the Chief Executive officer, we noted that the promotions were done in good faith and were approved by the Board of Directors.

F. ALLEGED RELATIONSHIP BETWEEN THE FINANCE DIRECTOR AND ONE DOREEN GAKII

12. The Commission invited both the Director of Finance and Administration, Dr. Julius Itunga and Doreen Muthiora on diverse dates for questioning at the Commissions offices. The Commission was able to establish that the receptionist who had been promoted to the position of Communication Officer II is known by the name Doreen Muthoni Muthiora and not Doreen Gakii as earlier alleged. The two officers stated separately that they were not related to each

other in any way. From the statements taken by our investigative team, it was established as such;

a) That Dr. Julius Itunga is not related in any way to Ms. Doreen Muthiora as alleged by the anonymous complaint.

b) That the promotions were done on merit and that most of the positions had only one person and there was no need of conducting interviews for the promotions.

13. The warning according to the Managing Director, is solely based on the show cause memo sent by Mr. Mwangi to Mr. Munyao. Secondly, it could be presumed that the memo dated 6th March 2014 from Mr. James Mwangi to the Managing Director was meant to insubordinate the office of the Managing Director. Mr. James Mwangi indicated that as head of internal audit, he had a duty to professionally guide internal auditors in his department. He further stated that this was not meant to challenge the authority of the Managing Director but to add value to the organization. Having found that the memo was done in good faith as part of the day to day communication in an organisation the Commission finds that the letter cannot be deemed as insubordination on the part of Mr. James Mwangi. Having concluded as such, we find that the first warning was not well founded, and should not be considered a proper warning letter in any subsequent processes.

G. REMEDIAL ACTION

14. Based on the foregoing, we hold and find that the suspension of Mr. James Mwangi was unlawful, unprocedural and in violation of **A. 47** of the Constitution. The Commission welcomes the decision of the Board of Directors to reinstate Mr. James Mwangi.

15. In light of the above, the Commission in exercise of its power under Article **59(2) (j)** of the Constitution and Sections 8**(g)** and **26(g)** of the Commission on Administrative Justice Act, the Commission finds and recommends that the part of the letter dated 12th June 2014 that purports to constitute a first warning should be expunged therefrom and not be considered as such for purposes of any subsequent proceedings.

DATED this **13th** Day of **August 2014**

CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC:

1. **Dr. Ibrahim M. Mohammed**
Principal Secretary, Commerce & Tourism
Ministry of East African Affairs, Commerce & Tourism
Teleposta Towers, 18th Floor
NAIROBI

2. **Mr. Peter Kinya**
Chairman
Board of Directors
Kenya National Trading Corporation
P O Box 30587-00100
NAIROBI

3. **James Maringa Mwangi**
Internal Audit Manager
Kenya National Trading Corporation
2nd Floor, KNTC Complex
P.O. Box 30587-00100
NAIROBI

OUR REF: CAJ/M.WAT/009/97/13 -NG **11th August 2014**
YOUR REF: WRMA/P/NO.00151/47

Eng. Philip J. Olum, HSC
Chief Executive Officer
Water Resources and Management Authority
NHIF Building, 9th Floor, Wing B
P.O Box 45250-00100
NAIROBI

Dear Sir,

RE: COMPLAINT BY GEOFFREY MWORIA

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

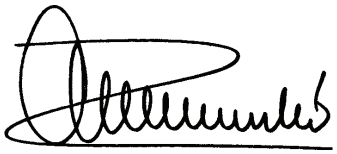
We refer to the above captioned matter and your letter of 23rd April 2014. We have since received the complainant's rejoinder and our response is as follows:

- That on the issue of the date when the show cause letter was issued and a meeting held to pass the resolution on the same, and Eng. Wilfred Matagaro exercising powers that were given to him, we are satisfied with the explanation rendered.
- On the issue of the disciplinary procedure and action taken, we note that the Staff Matters Committee's role as stated in the Human Resource Manual Section 10.13.1 is to **"determine whether an offence is minor, major or gross misconduct after undertaking due diligence of the matter"** which it lawfully categorized as gross misconduct.
- That since the offence was categorized as gross misconduct, it follows that the disciplinary action be taken against the complainant.
- That for such disciplinary action to be taken there has to be disciplinary proceedings which are to be undertaken by the disciplinary committee who then decide on the punishment to be meted out.
- However, Section 10.1.3 states that; **"the Chief Executive Officer will constitute a Disciplinary Committee which shall deliberate on disciplinary cases involving employees"**
- Further Section 10.2.4 states that; **"the Disciplinary Committee will deliberate on disciplinary cases involving employees in WRMA 6 to WRMA 10, Disciplinary cases involving employees in WRMA 5 to WRMA 1 will be deliberated by the Board.**
- The Complainant is an employee in Job Grade WRMA 4, meaning the Staff Matters Committee and the Disciplinary Committee have no power or mandate to determine the punishment or the decision regarding the disciplinary offence allegedly committed by the complainant.
- On the issue on who the complainant should have addressed his appeal to, it is clearly stated in Section 10.17.8 that; " **An employee to who any one or more of the punishments stated in Regulation 10.14 has been meted shall have the right of appeal to the Board through the Chief Executive Officer. Any such appeal shall be made in writing within six (6) weeks from the date of the letter conveying the disciplinary action."**
- That the complainant allegedly committed an offence under Section 10.13.1 subsection xii, and the disciplinary action taken against him is listed under Forms of Punishment in section 10.14 as severe reprimand, therefore the Complainant had every right to appeal to the Board against a decision unlawfully made by the Staff matters Committee as long as it was within the stipulated period.

In light of the foregoing, we are of the view that the Complainant is rightfully entitled to have his appeal heard by the Board to contest the disciplinary action taken against him. We, therefore, find and recommend that the Board hears and determines the Complainant's appeal within reasonable time.

We thank you for your continued co-operation and assure you of our highest regards

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc: **Mr. James Teko Lopoyetum, HSC**
Principal Secretary
Ministry of Environment, Water &
Natural Resources
Maji House
NAIROBI

Mr. Peter Kiilu
Board Chairman
Water Resources and Management Authority
NHIF Building, 9th Floor, Wing B
P.O Box 45250-00100
NAIROBI

Mr. Geoffrey Mworia
Surface Water- ENNCA
P.O Box 1331-10400
NANYUKI

Our Ref: CAJ/P.ADM/015/1275/2012-NG **6th August 2014**

Benson Ndambiri Njanjo
P.O Box 251
KIANYAGA

Dear Sir,

RE: YOUR COMPLAINT REGADING WRONGFUL DISMISSAL FROM PUBLIC SERVICE

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We make reference to the above captioned matter and our inquiry letter dated 10th August 2012 wherein you had alleged that your personal file was missing from the National, Provincial and District Headquarters, and any attempts to have the same retrieved had been futile. You were therefore seeking to have the same produced to enable you pursue payment of your benefits. Later on you also alleged that you had been wrongfully dismissed from Public Service and that your case had not been tried fairly by the trial judge Philip Tunoi and as such you were seeking review of your case and that the Public Service Commission reinstates you to service.

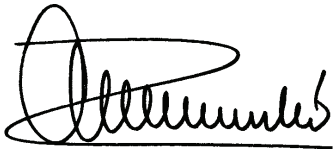
Having carefully reviewed the correspondence, we note the following:

- That the office of the Provincial commissioner (as it then was) wrote to our office vide a letter dated 31st August 2012 in response to our inquiry stating that the file was in their custody and arrangements were being made to forward the same to the Permanent Secretary, Provincial Administration and Internal security(as it then was).
- That a letter dated 15th February 2013 addressed to our office confirmed that the file had been forwarded to the Permanent Secretary's Office, therefore a follow up was to be made at their office.
- On the issue of retrial of your case, the matter was subject to a judicial determination and therefore, the Commission cannot intervene in any manner. You may seek legal advice from a lawyer of your choice on the remedies that may be available to you within the judicial process. Furthermore, you had already served the sentence and a retrial at this stage will only be an exercise in futility.
- As for reinstatement to Public Service, once you have been summarily dismissed from employment in the Public Service or have been found guilty of committing a crime by a Court of Law, then you are not eligible for employment in the Public Service and you lose out on all the benefits that you were entitled to before dismissal. However, if there are any unpaid dues in terms of salary arrears you may make a follow up on the same with the Ministry, failure to succeed you may lodge a complaint with our office.

In light of the foregoing, we are proceeding to close this particular file. We, however, invite you to lodge any other complaint you may have now or in the future which is within our mandate.

We are happy to have been of service to you and assure you of our highest regards.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Our Ref: CAJ/M.TRA/004/138/14/RS
Your Ref: MOT/S/ADM/54 VOL.XIII (35)

5th June, 2014

Mr. Stephen Mutoro
Secretary General
Consumer Federation of Kenya (COFEK)
Meky Place, Block F-45
Ngong Road/Ring Road Kilimani
P.O. Box 28053-00200
NAIROBI

Dear Sir,

IN THE MATTER OF A COMPLAINT BY CONSUMER FEDERATION OF KENYA (COFEK) ON THE RECRUITMENT PROCESS OF THE MANAGING DIRECTOR OF THE KENYA AIRPORTS AUTHORITY

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We acknowledge with thanks receipt of your letter of 15th April 2014 contents whereof we have noted. We have now considered the full range of correspondence and documentation on this matter, and hereby render our determination.

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under article 59(4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.The Commission is mandated, among others, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

B. COMPLAINT BY CONSUMER FEDERATION OF KENYA (COFEK)

3. The Commission received a complaint from the Consumer Federation of Kenya (COFEK) on the 21st of February 2014 vide their letter dated 19th February 2014.The complaint raised a number of allegations touching on the recruitment process of the Managing Director of the Kenya Airports Authority (KAA) and in particular;

That vide a reply to COFEK through the Principal Secretary, dated 5th February 2014 and referenced MOT/AT/28/238/VOL.IV (128), the Cabinet Secretary, Ministry of Transport and Infrastructure rendered an explanation, but failed to address the specific allegations raised by COFEK touching on the recruitment process of the Managing Director of the Kenya Airports Authority as had been stated in their letter.

a) That the Cabinet Secretary did not address himself to the specific allegations leveled against one Board Member from the Office of the President, Mr. J. Irungu.

b) That the whole recruitment process of the Managing Director of KAA was shrouded in mystery as the list of those who applied, those who were shortlisted and those who were interviewed was not made public. Further, it was alleged that the process failed the transparency and accountability test as enshrined in the Constitution. The same was stage managed in favour of a predetermined candidate.

c) That the anonymous score sheet in their possession raised integrity questions against Mr. Joseph Irungu. His award of marks was biased and raised serious integrity questions.

d) That the Cabinet Secretary received a letter from the Chairman of the Board of Directors of KAA recommending Mr. Hudson Aluvanze as the best candidate, a letter which the Cabinet Secretary disregarded.

e) That by failing to respond to the relevant issues raised by COFEK, the same amounted to unresponsive official conduct as provided for under the Commission on Administrative Justice Act, 2011.

4. Based on the foregoing, COFEK sought the Commission to intervene and ensure that:

i) The Cabinet Secretary responds to all the specific allegations raised in their letter dated 28th January 2014.

ii) The Commission inquired into the conduct of Mr. Joseph Irungu during the interviews of the Managing Director of the Kenya Airports Authority.

5. The Commission inquired into the fairness, accountability and transparency of the recruitment process of the Managing Director of the Kenya Airports Authority.

C. ACTION AND RESPONSE

6. Having received the complaint, the Commission commenced an inquiry into the matter by writing to the Cabinet Secretary, Ministry of Transport & and Infrastructure, Eng. Michael S. Kamau, on the 3rd March 2014 seeking to, *inter alia,* establish the facts of the complaint and received a response dated 13th March 2014 from the Principal Secretary, Mr. Nduva Muli. The Commission wrote a second letter dated 26th March, 2014 which elicited a response from the Ministry of Transport and Infrastructure dated 15th April 2014 upon which the Commission brought the correspondence to a close.

7. In responding to the allegations, Mr. Nduva Muli attached a confidential Report from Prof. Mutuma Mugambi, the Chairman of the Board of Directors of the Kenya Airports Authority detailing the recruitment process. In the Report there was a list of fifty three (53) applicants among which only seventeen (17) had met the mandatory requirements to the full Board for the final shortlisting. Out of the seventeen (17) only six (6) made it to final stage of the interview. There was also annexed a detailed report of those who were not shortlisted with reasons why each of them was not shortlisted.

8. In summary, it was stated that the interviewing Board was required to recommend three (3) possible candidates in which the Cabinet Secretary would appoint one (1) person as the Managing Director of the Kenya Airports Authority in exercise of powers conferred by Section 6 of the Kenya Airports Authority Act, Cap 395 of the Laws of Kenya. It was in this regard that the Cabinet Secretary appointed Ms. Lucy Mbugua who was among the three (3) candidates nominated by the Board.

D. ANALYSIS AND RECOMMENDATIONS

9. Having received two responses from the Ministry of Transport and Infrastructure dated 13th March 2014 and 15th April 2014,together with the supporting documents, the Commission proceeded to frame the issues in contestation for determination. The issues are:-

i) Whether the interview for the position of the Managing Director of the Kenya Airports Authority was conducted in a free and fair manner, was the interview shrouded in mystery.

ii) Whether the Cabinet Secretary received a letter recommending the appointment of Mr. Hudson Aluvanze for the position of Managing Director of the Kenya Airports Authority, whether he disregarded the same.

iii) Whether the award of marks by Mr. Joseph Irungu was biased and raised integrity questions.

E. RECRUITMENT PROCESS OF THE MANAGING DIRECTOR

10. The Consumer Federation of Kenya in their letter to the Cabinet Secretary, Ministry of Transport and Infrastructure had alleged that the recruitment process of the Managing Director of KAA was shrouded in mystery and could not be justified. In particular they stated that:-

i) The recruitment process violated Articles 10, 35 and 232 of the Constitution on transparency and accountability.

ii) The list of those who applied, those who were shortlisted for interview and those who were interviewed was not made public.

iii) The recruitment process was grossly irregular, not independent and in one way or the other, stage managed to favour a particular candidate

11. After analysing the two letters and the supporting documents supplied by the respondent, the Commission preliminary noted that the allegation that the entire process was shrouded in mystery was not well founded. The documents supplied to our office indicated that:

    a) The Board of Directors held interviews for the position of the Managing Director of the Kenya Airports Authority on the 29th November 2013.

    b) That a total of fifty three (53) applicants tendered their application for the position of the Managing Director of the Kenya Airports Authority.

    c) That **Appendix II** of the supporting documents contains a list of thirty six (36) individuals who applied, but were not shortlisted. The reasons as to why each of the thirty six (36) individuals was not shortlisted are well spelt out.

    d) That **appendix III** contains a list of seventeen (17) candidates who had met the mandatory requirement to the full Board for the first shortlisting. Reasons why the same were not invited for the final interview are also well spelt out.

    e) That out of the list of seventeen (17) only six (6) candidates qualified to be interviewed after the final shortlisting.

12. Having concluded that the process was not 'as mysterious' as alleged, we noted that the same information was not made public either in the Authority's website or in print media or even easily available to the public upon request.

F. LETTER RECOMMENDING THE APPOINTMENT OF HUDSON ALUVANZE

13. On the allegation that there was a letter from the Chairman of the Board of Kenya Airports Authority to the Cabinet Secretary, Ministry of Transport and Infrastructure recommending the appointment of Mr. Hudson Aluvanze for the position of the Managing Director, the Commission noted that the same was not supported. On the contrary, the documents provided by the Ministry shows that three names were forwarded to the Cabinet Secretary for the appointment of a suitable candidate for the position of the Managing Director. Neither the complainant nor the respondent produced such a letter recommending the appointment of Mr. Hudson Aluvanze to the position of the Managing Director of KAA. In the absence of such a letter, the Commission came to a conclusion that the allegation that the Cabinet Secretary received a letter recommending Mr. Hudson Aluvanze was unsubstantiated.

G. AWARD OF MARKS BY MR. J. IRUNGU

14. The Commission noted that the Ministry of Transport & Infrastructure in their letter dated 13th March 2014 did not respond specifically to the allegations raised against Mr. J. Irungu on the issue that he undeservedly advantaged Ms. Lucy Mbugua and the alleged relationship between Ms. Lucy Mbugua and a senior official at the Ministry. Our letter dated 26th March 2014 sought clarification on the issues. In their letter of 15th April 2014, the Ministry stated that 'under the tenets of good corporate governance Board of Directors are expected to give their views and opinions with independence.'

15. The Commission agrees with the observation by the Ministry that Board of Directors are expected to give their views and opinions with independence but seeks to answer whether in the circumstance, Mr. Joseph Irungu's conduct was within the tenets of good corporate governance required by Board of Directors.

16. In analysing this allegation, the Commission studied the authenticated score sheet availed by the Ministry which was similar to the anonymous score sheet obtained by the complainant. The Commission makes the following findings;

    a) The margin of award of marks by Mr. J. Irungu between his best candidate Ms. Lucy Mbugua (239) and his worst candidate Hudson Aluvanze (105) is the highest by one hundred and thirty four (134) marks, too big and suspicious.

    b) It is to be noted that Mr. J. Irungu awarded the least marks to all the four (4) out of the five (5) candidates that were interviewed.

    c) Further, it is noted that the four (4) candidates were awarded extremely low marks in an attempt to deliberately favour Ms. Lucy Mbugua.

    d) It is noted that if Mr. Joseph Irungu's computation was to be removed, Ms. Lucy Mbugua will move from 1st to 4th position, a clear indication of bias arising from Mr. Irungu's award of marks.

    e) By virtue of the above analysis, it is possible to draw inference that Mr. Joseph. Irungu was biased and indeed advantaged Ms. Lucy Mbugua.

H. REMEDIAL ACTION

17. Based on the foregoing, we hold and find that although the recruitment process of the Managing Director of the Kenya Airports Authority appeared to be free and fair on the face of it, a careful analysis reveals that the process violated the Constitutional principle enshrined in **A. 232 (1) g** on fair competition and merit as the basis of appointment in the public service. The Commission cannot however annul the process unless there is further evidence of conspiracy on the part Ms. Lucy Mbugua.

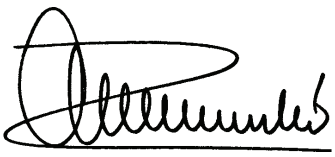
18. We hold and find that the conduct of Mr. Joseph Irungu, now serving in the Ministry of Interior and Co-ordination of National government and also a Board member of KAA was improper, and prejudicial for an officer in the public sector. His conduct in the circumstances impugned **A. 59 (2) h** of the Constitution, and Sections **2 and 8(a), (b) & (d)** of the Commission on Administrative Justice Act on fair administrative action. Having held that, we recommend that Mr. Joseph Irungu be reprimanded and be barred from conducting any other interview in the future. The Commission will also list Mr. Joseph Irungu in the register of improprieties.

19. In light of the above, the Commission in exercise of its power under Article 59(2)(j) of the Constitution and Sections 8(g) and 26(g) of the Commission on Administrative Justice Act, FINDS that the Ministry of Transport And Infrastructure:-

    i.) Should initiate measures to ensure that future interviews are conducted in a free, fair and transparent manner.

    ii.) Should initiate a process of removing Mr. Joseph Irungu from the Board of Directors of KAA.

DATED this **3rd** Day of **June 2014**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC:

1. **Prof. Mutuma Mugambi**
   Chairman
   Board of Directors
   Kenya Airports Authority
   P.O. Box 19001-00501
   NAIROBI

2. **Eng. Michael S. Kamau, CBS, HSC**
   Cabinet Secretary
   Ministry of Transport and Infrastructure
   Transcom House, Ngong Road
   P O Box 52692-00100
   NAIROBI

Our Ref: CAJ/KNTC/036/16/14/RS

24th June 2014

Mr. Mohammed Shaiya
Managing Director
Kenya National Trading Corporation
2nd Floor, KNTC Complex
P.O. Box 30587-00100
NAIROBI

Dear Sir,

IN THE MATTER OF A COMPLAINT BY JAMES MARINGA MWANGI AGAINST THE KENYA NATIONAL TRADING CORPORATION

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman). We have now considered the full range of correspondence and documentation on this matter, and hereby render our determination.

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.The Commission is mandated, among others, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

B. COMPLAINT BY JAMES MARINGA MWANGI

3. The Commission received a complaint from Mr. James Maringa Mwangi, an Audit Manager at the Kenya Trading Corporation, on the 28th of April 2014 alleging wrongful and unprocedural suspension from his employment. In particular, the complainant stated:-

   i) That on the 24th April 2014, he received a suspension letter from the Managing Director of the Kenya Trading Corporation with no reasons or justification for the suspension.

   ii) That prior to his suspension, he had received a letter dated 22nd April 2014, inviting him for a disciplinary hearing. The letter did not state the offence committed to warrant his suspension.

   iii) That he believed the reason for his suspension emanated from an advice he gave which contradicted the position of the Managing Director.

   iv) That on the 18th February 2014, the Managing Director wrote an email to Mr. Munyao and copied him in which he instructed Mr. Munyao to sign cheques. Mr Munyao had since been transferred from the Finance to the Audit department within the Corporation.

   v) That he was of the position and still holds that an internal auditor cannot sign a cheque and at the same time purport to audit his own action.

   vi) That auditing standards, best professional practices, good cooperate governance and the Public Finance Management Act, 2012 provides that internal auditors should not engage in activities that would be subject to review by an auditor.

   vii) That his advice was based on the above and was given in good faith in the cause of his duties and was not intended to insubordinate the Managing Director.

4. Based on the foregoing, Mr. James Mwangi sought the Commission's intervention to ensure that the suspension was lifted as it was unprocedural and lacked justification.

C. ACTION AND RESPONSE

5. Having received the complaint, the Commission commenced an inquiry into the matter by writing to the Managing Director of KNTC, Mr. Mohammed Shaiya on the 29th April, 2014 seeking to, *inter alia,* establish the facts of the complaint. The Commission received a response dated 14th May 2014 from the Managing Director, Kenya National Trading Corporation (KNTC). The Commission wrote a second letter dated 9th June 2014 acknowledging Mr. Shaiya's letter of 14th May 2014 on the9th of June 2014. On the 6th June 2014, the Commission received an email communication from Mr. James Mwangi indicating that he had been reinstated. Further, on the 12th June 2014, the Commission received a letter thanking the commission for intervening to ensure that he was reinstated but sought a withdrawal of the warning letter from KNTC. At this juncture, the Commission brought the correspondence to a close.

6. In responding to our inquiry, the Managing Director stated as follows;-

   i) That the complainant's case was being handled using the disciplinary process and that the same had been presented to the Finance and Administration Board Committee on the 24th April 2014 whereby Mr. James Mwangi had been invited and attended a hearing.

   ii) That based on the recommendations of the above Board Committee, James Mwangi was suspended from duty with effect from 24th April 2014.

   iii) That the matter was further presented before the Board Audit Committee on the 13th May 2014 and that James Mwangi was invited for another hearing.

   iv) That the Board Audit Committee recommended the matter to the full Board of Directors meeting scheduled for the 28th May 2014.

   v) That the Managing Director would keep the Commission posted once the Board of Directors determined the matter.

7. That on the 9th June 2014, the Commission acknowledged the Managing Directors letter dated 14th May 2014 and sought to be updated on the outcome of the meeting of the Board of Directors that was scheduled for the 28th of May 2014. The Managing Director did not communicate to the Commission on the outcome of the full Boards meeting as promised.

8. That on the 12th of June, 2014, the Commission received a response from Mr. James Mwangi indicating the following:-

   i) That he was reinstated back to the office and had reported back to work on the 9th June 2014.

   ii) That his reinstatement took the form of a first warning, in a letter dated 6th June, 2014

   iii) That the fact that the Managing Director issued a warning letter instead of the reinstatement was unjustified and an extension of an injustice.

D. ANALYSIS AND RECOMMENDATIONS

9. Having received the responses from the Managing Director and the communication from the complainant, Mr. James Mwangi, the Commission proceeded to frame the issues in contestation for determination. The issues are:-

   (i) Whether the suspension from employment of Mr. James Mwangi was unprocedural and wrongful?

   (ii) Whether the warning letter issued to Mr. James Mwangi upon reinstatement was justified?

E. SUSPENSION ON MR. JAMES MWANGI

10. Mr. James Mwangi indicated that on the 24th April 2014 he received a suspension letter from the Managing Director of KNTC which was a follow up of a disciplinary process held on the 22nd of April 2014. He noted that no reasons were given for his suspension. Upon analysis the commission noted the following:

    i) That no reasons were given for the suspension of the complainant, Mr. James Mwangi as per the letters of 22nd April 2014 and 24th April, 2014.

    ii) That Mr. James Mwangi was invited for a hearing before KNTC Board Audit Committee on 13th May 2014 and that the matter was recommended to the full Board meeting held on the 28th May 2014.

    iii) That from the letter dated 6th June, 2014 (Ref: KNTC/06/1/1558) it appears that the disciplinary process emanated from an internal memo from Mr. James Mwangi, the Audit Manager to the Internal Auditor 1, Mr. Munyao dated 4th March 2014.

    iv) That in the abovementioned memo titled 'signing of cheques', the Audit Manager, Mr. James Mwangi had sought an explanation

from Mr. Munyao on his signing of 9 cheques contrary to professional practice of internal auditors.

v) That the show cause memo was done by Mr. James Mwangi to Mr. Munyao knowing well that Mr. Munyao was under the instructions of the Managing Director to sign the cheques. This was termed as insubordination by the Managing Director.

vi) That it was explained by the Managing Director that since the process of enrolling new signatories had not been completed, he had instructed Mr. Munyao, the internal auditor to sign the cheques on a transitional basis.

vii) That the circumstances under which an auditor signs cheques and is later required to audit the same possess conflict of interest and is not intandem with professional practice for internal auditors. The same should not be allowed even on an interim basis.

viii) That the issuance of a memo directed to Mr. Munyao by Mr. James Mwangi was not in bad faith but was in line with best practice for him as a manager to give directives to an officer under him.

ix) That further, the issuance of the memo by the Internal Audit Manager to an Audit Officer could not pass as a disciplinary issues but merely an act of communicating from one office to another.

x) That continuous signing of cheques by Mr. Munyao who had moved from the Finance to the Audit Department went against best practice, the tenets of good corporate governance and the Public Finance Management Act, 2012 and it was incumbent upon Mr. James Mwangi to point it out.

11. Further, we note that persons transferred to, or temporarily engaged by the internal audit activity should not be assigned to audit those activities they previously performed or for which they had management responsibility until at least one year has lapsed. This is intended to ensure objectivity in the internal audit process. Similarly, we hold the view that Mr. Munyao's continued signing of cheques after his transfer from the Finance to the Internal Audit Department was improper. In our opinion, the Managing Director should have recalled Ms. Lucy Anangwe from leave to sign the cheques an exercise that would not have taken more than a day.

12. Having concluded that the memo was done in good faith by Mr. James Mwangi, we determine that the suspension was unprocedural and wrongful.

F. WARNING LETTER BY THE MANAGING DIRECTOR

13. The letter which reinstated Mr. James Mwangi was titled 'first warning' an issue that Mr. Mwangi now seeks the commission's intervention to ensure that the same is withdrawn. Was the warning justified in this particular circumstances?

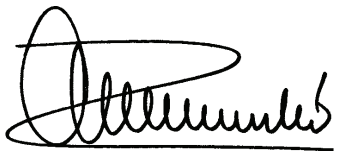
14. The warning according to the Managing Director, is solely based on the show cause memo sent by Mr. Mwangi to Mr. Munyao. Secondly, it could be presumed that the memo dated 6th March 2014 from Mr. James Mwangi to the Managing Director was meant to insubordinate the office of the Managing Director. Mr. James Mwangi indicated that as head of internal audit, he had a duty to professionally guide internal auditors in his department. He further stated that this was not meant to challenge the authority of the Managing Director but to add value to the organization. Having found that the memo was done in good faith as part of the day to day communication in an organisation the Commission finds that the letter cannot be deemed as insubordination on the part of Mr. James Mwangi. Having concluded as such, we find that the first warning was not well founded, and should not be considered a proper warning letter in any subsequent processes.

G. REMEDIAL ACTION

15. Based on the foregoing, we hold and find that the suspension of Mr. James Mwangi was unlawful, unprocedural and in violation of **A. 47** of the Constitution. The Commission welcomes the decision of the Board of Directors to reinstate Mr. James Mwangi.

16. In light of the above, the Commission in exercise of its power under Article **59(2)(j)** of the Constitution and Sections 8**(g)** and **26(g)** of the Commission on Administrative Justice Act, the Commission finds and recommends that the part of the letter dated 12th June 2014 that purports to constitute a first warning should be expunged therefrom and not be considered as such for purposes of any subsequent proceedings.

DATED this **24th** Day of **June 2014**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC:

1**. Dr. Ibrahim M. Mohammed**
Principal Secretary, Commerce & Tourism
Ministry of East African Affairs, Commerce & Tourism
Teleposta Towers, 18th Floor
NAIROBI

2**. Mr. Peter Kinya**
Chairman
Board of Directors
Kenya National Trading Corporation
P O Box 30587-00100
NAIROBI

3**. James Maringa Mwangi**
Internal Audit Manager
Kenya National Trading Corporation
2nd Floor, KNTC Complex
P.O. Box 30587-00100
NAIROBI

Our Ref: CAJ/OM/7/17/14/RS

17th June, 2014

Mr. Charles Tanui
The Managing Director
Kenya Pipeline Company Limited
P.O. Box 73442, 00200
NAIROBI

Dear Sir,

RE: IN THE MATTER OF ALLEGATIONS OF DISCRIMINATION AND NEPOTISM IN THE RECENT RECRUITMENT AT THE KENYA PIPELINE CORPORATION

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman). We acknowledge with thanks receipt of your letter of 27th May 2014 contents whereof we have noted. We have now considered our letter of inquiry and your response on this matter, and hereby render our determination.

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.The Commission is mandated, among others, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue Summons and require that statements be given under oath, adjudicate on matters relating to Administrative Justice, obtain relevant information from any person or Governmental authorities and to compel production of such information.

B. OWN MOTION INTERVENTION BY THE COMMISSION

3. Under **S. 29** of the Commission on Administrative Justice Act, 2011, the Commission has jurisdiction to investigate any complaint and may on its own initiative investigate any matter arising from the carrying out of an administrative action. Flowing from the above jurisdiction, the Commission took note of the above-captioned allegations appearing on Wednesday's 21st May, 2014, Star Newspaper which allegation stated:

   a) That the Kenya Pipeline Company had employed 13 people from one ethnic community (Kalenjin) Community out of the possible 33 staff positions.

   b) That this constitutes 40% of the staff hired and contrary to **S. 7 (2)** of the National Cohesion and Integration Act, 2008 which requires that no public establishment shall have more than one third of its staff from the same ethnic community

   c) That it appears that the recruitment process has been modeled with particular candidates in mind and fails the test of transparency and accountability as provided by the Constitution.

4. Based on the foregoing, the Commission sought from the Kenya Pipeline Corporation by way of indication the ethnic and County of origin of the corporations staff compliment including that of the alleged thirty three (33) new employees. Secondly, the Commission sought clarification of the process and the considerations used to arrive at the shortlisted candidates.

C. ACTION AND RESPONSES

5. The Commission made an inquiry to the Managing Director, Kenya Pipeline Company Limited, Mr. Charles Tanui vide a letter dated 23rd May 2014. The Commission sought among others to establish whether indeed 13 out of the new 33 employees were Kalenjins as alleged, an elaboration of the process and the staff compliment of KPC in general. The Commission received a reply on the 27th May 2014 with a number of annexures from the Managing Director, Mr. Charles Tanui.

6. In responding to the allegations, the Managing Director, KPC stated the following

   a) *That the article appearing on the Star Newspaper dated 21st May 2014 was unbalanced and unfortunate.*

   b) *That the institution had clarified issued in a subsequent article dated 22nd May 2014 appearing on the same newspaper (the same was annexed).*

   c) *That KPC was in the process of hiring 1,000 additional employees and the 33 were just the initial phase in which KPC sought to employ technicians.*

   d) *That the process was fair, advertised and attracted 2263 applicants who were shortlisted through a competitive process to 135 candidates.*

   e) *That following competitive interviews held on 15th to 18th October 2013, a total of 33 employees were hired. It was noted that the recruitment process is still ongoing.*

   f) *That the entire KPC establishment has a staff component of 1646, a list of composition by ethnicity was attached.*

   g) *That the overall picture on the recruitment process based on regional balance can only be ascertained after the recruitment process has been completed and the final numbers verified.*

   h) *That the organisation had not categorized staff alongside counties.*

D. ANALYSIS AND DETERMINATION

7. Having received the response form from the Kenya Pipeline Company Limited together with the supporting documents, the Commission proceeded to frame the issues for determination;

   (a) *Whether indeed KPC employed 13 Kalenjins out of the 33 possible vacancies in the initial phase of recruitment?*

   (b) *Whether in employing staff in phases requires compliance to the ethic balance requirement under the Constitution and the law?*

   (c) *Whether KPC is guilty of nepotism and discrimination in the recruitment of staff?*

E. EMPLOYMENT OF THE THIRTEEN (13) OUT O THIRTY THREE (33)

8. Nowhere in his response did the Managing Director dispute that 13 out of the 33 employees in the initial phase were from the Kalenjin Community**.** In his response, Mr. Tanui indicated that the 33 were recruited based on 4 broad categories. 15 staff were recruited purely on merit, 5 on account of gender balance and 13 on account of regional balance. Even so, it is unlikely that the category would result to such an inequality of picking 13 out 33 from one ethic community comprising almost 40% of the total recruitment process at that particular stage. The Commission notes that Mr. Tanui did not avail as requested a tabulation of the 33 newly recruited employees, their ethnicity as well as their county of origin. In this regard and absence of any contradiction, we find that KPC employed 13 Kalenjins out of the 33 possible vacant positions in the initial phase of recruitment.

F. EMPOYING STAFF IN PHASES AND THE CONSTITUTIONAL REQUIREMENT

9. It appears from the response of the Managing Director, Mr. Tanui that it doesn't matter how the recruitment process is conducted as long as the final results reflect regional and ethnic balance. This would be unfair since it usually take years from one recruitment process to another and this was not the intention of the Constitution. It is only fair and a true interpretation of the Constitution that the recruitment process reflect regional and ethnic balance at all the stages of the recruitment process. **A. 232 (h)** of the constitution of Kenya provides for the values and principles of public service among others that the recruitment process ensure inclusivity and representation of Kenya's diverse communities. Further, inclusivity is one of the national values and principles of governance that is supposed to bind all state organs in which KPC is not exempted. In our opinion we find that the recruitment process ought to and must adhere to the principle of inclusivity at any stage of the recruitment process.

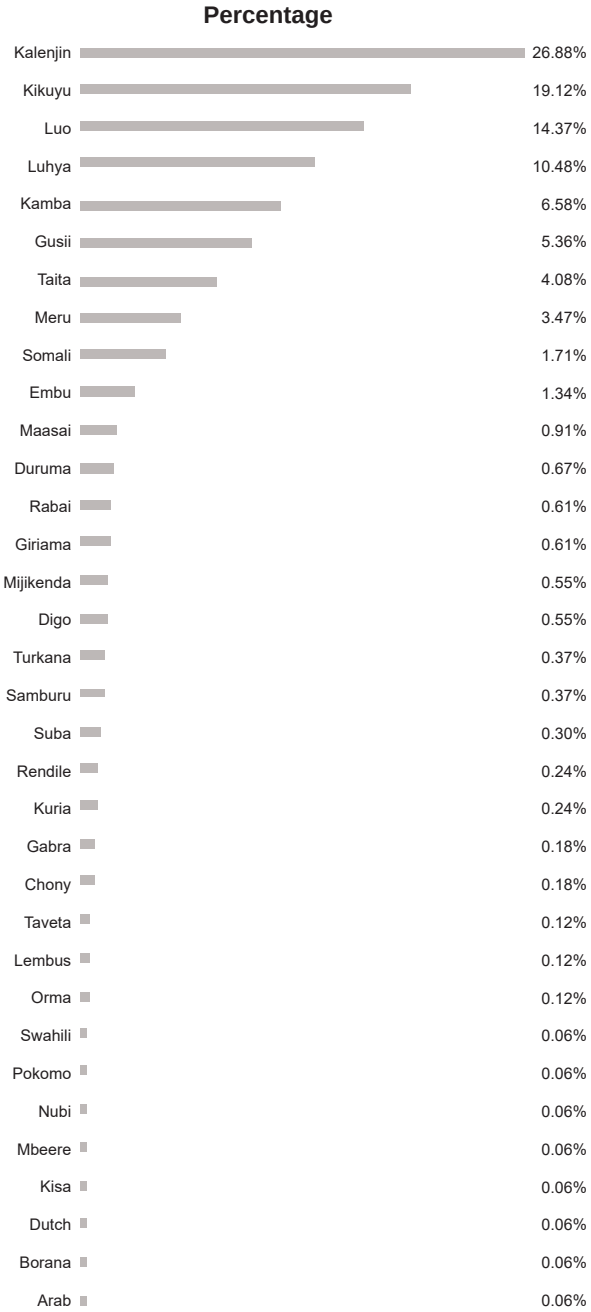
G. NEPOTISM AND DISCRIMINATION AT KPC

10. Having received a summary of staff detailing their ethnicity, the Commission undertook an analysis to determine whether indeed the allegations of tribalism and nepotism were founded. We noted as such;

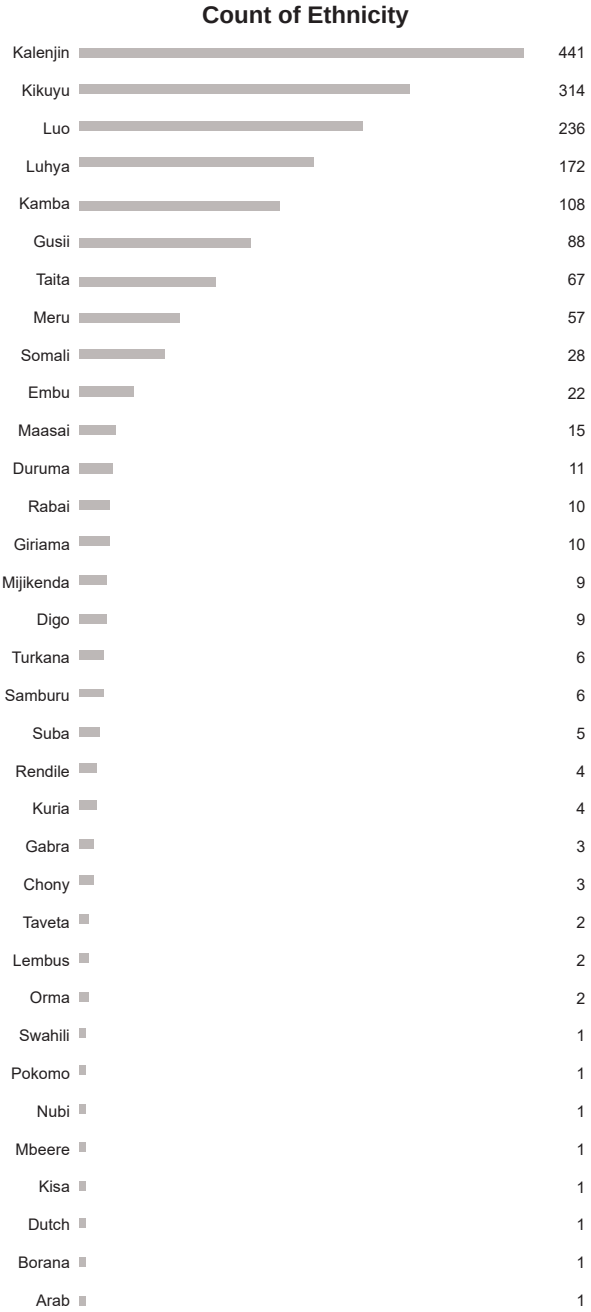
    i) That the Kalenjin community, where the Managing Director originates comprises the largest staff component at KPC.

No.	Ethnicity	Count of Ethnicity	Percentage
1.	Elgeyo	**114**	**6.93%**
2.	Kipsigis	**81**	**4.92%**
3.	Marakwet	**12**	**0.73%**
4.	Nandi	**107**	**6.50%**
5.	Pokot	**3**	**0.18%**
6.	Sabaot	**10**	**0.61%**
7.	Tugen	**114**	**6.93%**
TOTAL		**441**	**26.86%**

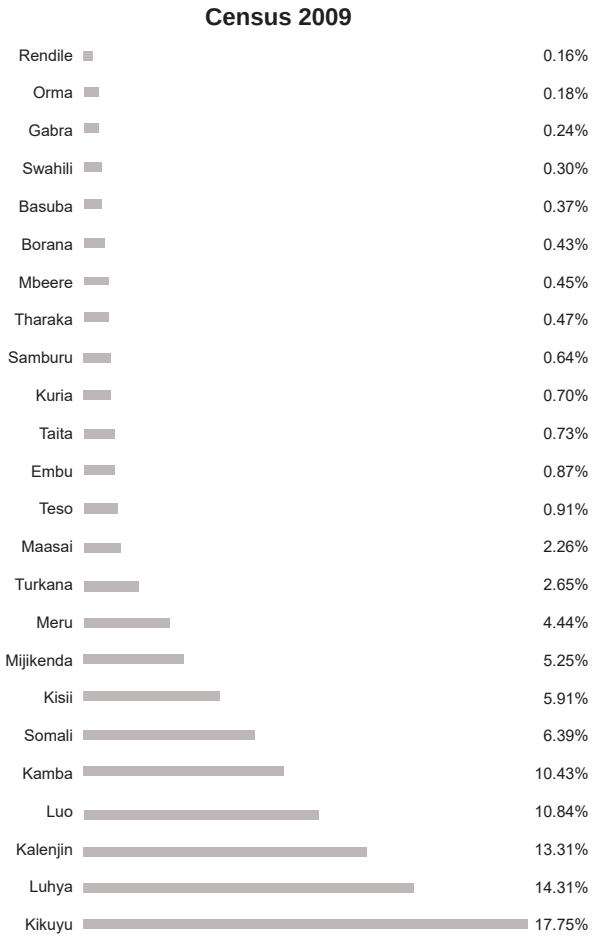
ii) That the numbers are skewed in favour of the Kalenjin Community if one was to make a comparison with the latest census report. The Kalenjin community comprise 13.31% of the total population in Kenya while the same occupy 26.86 of the current job opportunities at the Kenya Pipeline Company Limited.



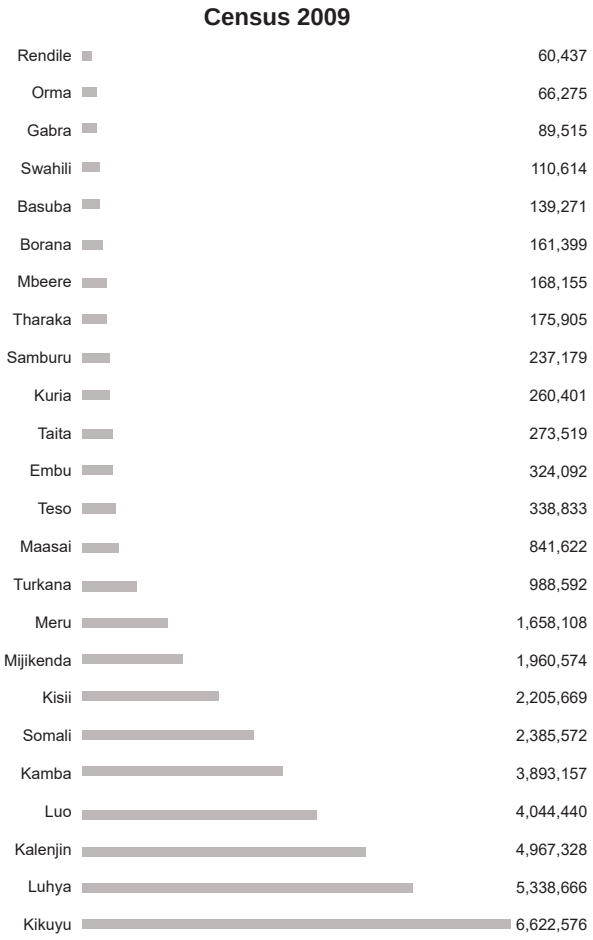
Percentages in terms of ethnic composition at the KPC



Count of Ethnicity at the KPC



National Census 2009



National Census - Population by numbers

iii) That your analysis is not proper as it clusters the Luhyia differently from other Luhyia sub-tribes e.g. the Banyore, Bukusu, Bakhayo, Batsoso, Marachi, Maragoli and others.

iv) That looking at the Census report vis-à-vis the ethnic composition of KPC, certain communities have been disadvantaged if weighed against their total population.

v) The Commission notes that although the composition of the Kalenjin (26.86) falls below the 30% stipulated in the National Cohesion and Integration Commission, it would be absurd to employee a single community to take up such a large percentage of jobs in the public sector. It means therefore that only 4 or 5 communities can serve in such one government entity. It should be noted that the Constitution overrides the NCIC Act and sets a higher requirement for inclusivity under **A. 232 (1) (h**) and **A.10** of the Constitution.

H. REMEDIAL ACTION

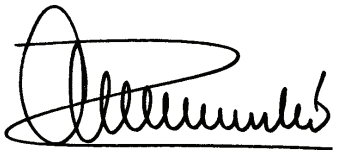
11. Based on the foregoing, we hold and find that the Kenya Pipeline Company breached the Constitution of Kenya A. 232 (1) h by employing 13 Kalenjins out of the 33 available opportunities.

12. In light of the above, the Commission in exercise of its power under Article 59(2)(j) of the Constitution and Sections 8(g) and 26(g) of the Commission on Administrative Justice Act, FINDS that KPC:-

i) Remedy the situation through affirmative action in the subsequent employment to ensure fair distribution of all the ethnic communities of Kenya.

ii) That the distribution of jobs to mirror the latest population census as may be practical as the circumstances allow.

DATED this **17th** Day of **June 2014**



DR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC: 1. **Eng. Joseph K. Njoroge, MBS**
Principal Secretary
Ministry of Energy and Petroleum
Nyayo House, Kenyatta Avenue
P O Box 30582 -00100
NAIROBI

2. **Daniel Wamahiu Kiongo**
Chairman
Board of Directors
Kenya Pipeline Company Limited
P.O. Box 73442, 00200
NAIROBI

Our Ref: CAJ/M.AGR/014/126/13-NG **4th June 2014**

Retired Sgt. Godfrey Kariuki Gathingi
P.O Box 1261
NAIVASHA

Dear Sir,

RE: YOUR COMPLAINT AGAINST KENYA FOREST SERVICE

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We make reference your complaint lodged with us on 8th October 2013 alleging that the Forest Guards were being oppressed and treated unfairly since their terms and conditions of service were poor, and the same needed to be reviewed. In addition, you sought that the retired officers be compensated for the positions they served during the time they worked for the Forest Department.

The Commission commenced an inquiry vide a letter dated 3rd February 2014 setting out the particulars of the allegations. We received a detailed response from the Kenya Forest Service dated 20th February 2014 (a copy of which we forwarded to you) addressing the issues raised in your complaint. We have also noted the contents of your letter of 25th March 2014 on the issue.

We have carefully analyzed your complaint and the response(s) together with the supporting documents and we have established the following:

a) That you served in the former Forest Department for 34 years until retirement in 2007, 21years of which you served as a Sergeant.

b) That following the enactment of the Forest Act 2005, the Kenya Forest Service was established in 2007 to succeed the former Forest Department. Therefore, the Kenya Forest Service came into force when you were already eligible for retirement.

c) That the Forest Act provided for the grading structures and career progression of the Forest Guards, introduced new policies and procedures which were and are still being implemented progressively, and it is evident from the supporting documents that there has been progressive improvement on the terms and conditions of current serving Forest Guards.

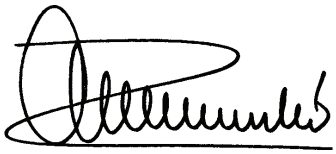
d) That during your service under the former Forest Department, you were assigned different responsibilities. For instance, you were the in-charge of Emburu Forest Station and also a parade commander, but you were not paid the responsibility allowances for the positions. We note that such responsibility allowance that you claim was not provided for, and the same was well communicated to you in the letter of appreciation dated 14th July 2009.

In view of the foregoing, the Commission finds that since you retired before the new benefits and grading structures came into force, you are therefore not entitled to compensation. On the issue of the terms and conditions of the serving Forest Guards the Commission is satisfied with the explanation rendered and the progress made so far.

In the circumstances, we advise that we are unable to pursue the matter further and are proceeding to close this particular file. We, however, invite you to lodge any other complaint you may have now or in the future which is within our mandate.

We are happy to have been of service to you and assure you of our highest regards.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC: Director
Kenya Forest Service
Karura, Off Kiambu Road
P.O Box 30513-00100
NAIROBI

(**ATTN: Col (Rtd) J.N. Kimani.** We thank you for your continued cooperation and assure you of our highest regards. **Your Ref: CONF/ CMP/1/KFS (77))**

Our Ref: CAJ/M.EDU/013/330/2012-SC

21st May 2014

Mr. Evans Ombogi
P. O. Box 63091 - 00200
NAIROBI

Dear Sir,

RE: YOUR COMPLAINT AGAINST TSC FOR FAILURE TO PAY YOUR SALARY FROM 1998 TO 2003

Kindly receive warmest compliments from the Commission on Administrative Justice.

We make reference to the above captioned matter resting with your letter of 6th February 2014. As you may be aware, you lodged this complaint with us on 24th August 2012 alleging the following:

- That the Teachers Service Commission (TSC) had unlawfully and unfairly terminated your services in 1998 on grounds that you had not successfully completed your BED Course.
- That the termination was unfair since TSC failed to appreciate that the delay in submitting the details was not your mistake, but was caused by Egerton University, which in their communication to TSC vide the letters of 14th July 1998 and 5th November 1999, admitted the delay.
- That you continued to teach at Magena Secondary School in Gucha District during the material time on the advice and under the supervision of the School Principal, an agent of TSC.
- That although you were eventually reinstated by TSC in 2003, TSC failed to pay you for the period between May 1998 to April 2003 when you continued to teach at the School.
- That you challenged the decision of TSC by instituting proceedings in Court, which you subsequently withdrew on the request and promise by TSC to have you compensated for the duration between May 1998 and April 2003.
- That the failure to pay you amounted to unfair administrative action and had affected you a lot.

Having received the complaint, the Commission wrote to TSC vide a letter dated 6th November 2012 and received a response on 26th November 2012 which was subsequently forwarded to you for your rejoinder. Upon receiving the rejoinder, the Commission sought further clarification from TSC vide a letter of 3rd October 2013, and received a response on 22nd November 2013. In essence, TSC stated the following:

1. That you were employed on permanent terms in 1996 subject to submission of your degree certificate upon graduation since you were posted before graduation.
2. That TSC made it clear to you that your services would be terminated if you did not pass your exams.
3. That you failed to forward your degree certificate until 28th June 1999, one year after the termination of your services on 26th May 1998.
4. That you were re-employed on permanent terms with effect from 2nd May 2003.
5. That upon re-employment, you sued TSC claiming the salary from the date of termination of your services in May 1998 to the time of your employment in May 2003.
6. That you failed to follow the procedure of suing the employer in that you did not seek the approval of the Office of the Attorney General and breached Regulation 69 of the Code of Regulations for teachers, which subsequently made you to withdraw the suit.
7. That in the circumstances, the termination remained and you could not, therefore, be paid for the period claimed.

We have carefully examined the matter, the supporting documents and its circumstances and made the following conclusions:

a) That TSC acted within the law in declining to pay you the salary for the period between May 1998 when your services were terminated to April 2003 when you were re-employed. We have noted that the offer of employment dated 12th April 1996 had a condition requiring you to pass your final examination, failure of which would warrant its termination. Furthermore, we have noted that the said contract had placed you on probation for two years from 12th April 1996. As such, when you failed to furnish TSC

with the requisite information, it was open to them to terminate the contract, which they eventually did upon the expiry of the two years' period on 1st June 1998. Although there was communication from Egerton University on 14th July 1998 and 5th November 1999, it was done after the two years' duration contained in the contract of employment. Accordingly, the termination by TSC, painful as it might have been, was in line with the terms of your employment, and in our considered view, cannot be said to have been unlawful.

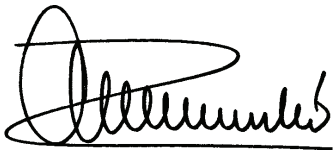
b) Having found the termination of employment to have been lawful, it is our considered view that it was not open to you to continue working at Magena Secondary School unless an employment by the Board of Governors for which they alone would be responsible. The termination of employment ended the relationship between you and TSC. The School Principal could not and had no powers to reverse the decision of TSC unless he received written authorization from them. No such authorization was provided to the Principal. In this regard, your continued teaching at the School with the full knowledge of the termination lacked the blessing of TSC and they cannot, therefore, be held liable for payment of salary for the said duration. On the basis of the foregoing, the claim is not sustainable.

c) In relation to the court matter, *Kisii CMCC No. 443 of 2004, Evans M. Ombogi vs TSC,* we noted that there was scanty information relating to it. Although we do not agree with the position of TSC that the consent of the Office of the Attorney-General is needed to institute a suit of that sort, we have nonetheless found the Court matter to be of no assistance in this matter. We also noted the contents of the letter from TSC of 1st September 2004 to your Advocates asking them to make suggestions for the way forward and proposal for initiation of the intended settlement. However, it is not clear who made the proposal for settlement out of court or the conclusion of the matter. In our view, such agreement ought to have been registered in court. In this regard, we have failed to find any grounding for the alleged promise by TSC for partial compensation or payment of salary and cannot, therefore, be acted upon.

Based on the foregoing, we find that TSC is not liable for payment of your salary for the material period, and the claim is unsustainable. In the circumstances, we believe that the matter has come to a close and are proceeding to close our inquiry on this particular file.

We assure you of our highest regards.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc:

Mr. Gabriel K. Lengoiboni
(Your Ref: TSC/DDCC/VOL. III/90)
Commission Secretary
Teachers Service Commission
TSC Building, Upper Hill, Kilimanjaro Road
Private Bag
NAIROBI

Our Ref: CAJ/P.ADM/015/1906/13-NG **21st May 2014**

John Nyamu Githinji
P.O Box 43
KUTUS

Dear Sir,

RE: YOUR COMPLAINT AGAINST THE CHIEF NYANGATI LOCATION IN KIRINYAGA COUNTY

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We make reference to the above captioned matter and our inquiry letter of 12th February 2014 wherein you had alleged that there was a disabled person known as Nduto Kiundu aged 21years (now deceased), who lived in Nyangati Location Rurii Village in Kirinyanga County. You also alleged that during his initiation, he was taken to a traditional nurse, who is the brother to the Location Chief, one Mrs. Margaret Wanjiru, and that the said Chief refused that he be taken to Hospital until the situation worsened when he was taken to Kenyatta National Hospital for further treatment. He later passed on, and the Chief organized for the burial to take place at night.

We have carefully reviewed the response from the Deputy County Commissioner vide a letter dated 26th February 2014(copy enclosed) and facts by the Catholic Priest vide our tele-conversation on 13th May 2014 and have established the following:-

a) That the late is popularly known as Michael Kariuki and he was aged between 15 and 18 years, and only the parents can confirm with certainty when he was born.

b) That since Michael was born he has been epileptic and was also partially retarded, a fact that was confirmed by the Priest.

c) That his initiation took place at Kimbimbi Hospital a Government Hospital, and not by a traditional nurse as you had earlier indicated.

d) That the late Michael became epileptic and was ill when he was rushed to Kimbimbi Hospital and later transferred to Kerugoya Hospital and when the situation worsened he was taken to Kenyatta National Hospital where he passed on. Further it was the brother to the Chief (Mr. Simon Njoka), who was also neighbour to the deceased that assisted to rush him to Hospital.

e) That on the day of the burial, the body was collected from Nairobi but due to mechanical problems the family encountered on the way to the village, they arrived at about 5pm.

f) That in Kikuyu customs and /or practices once a body is taken from the morgue, it ought to be buried the same day, a fact that is well within your knowledge.

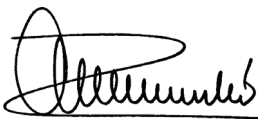
g) That since it was getting late the Catholic Priest hurriedly conducted the burial ceremony with the family's consent, and the same was concluded by 6pm.

Having considered the facts we are of the view that it is **not** true that the late was buried late in the day because he was a disabled person, it was occasioned by the circumstances of that day. In that regard, we find that there was no malice by the Chief to allow the same (if at all she did), because it was the family's wish that he be laid to rest on that particular day.

In light of the foregoing, we are unable to pursue the matter further and are proceeding to close this particular file. We, however, invite you to lodge any other complaint you may have now or in the future which is within our mandate.

We are happy to have been of service to you and assure you of our highest regards.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC: Deputy County Commissioner
Mwea East Sub-County
P.O Box 1
KERUGOYA

(We acknowledge with thanks receipt of your letter dated 22nd January 2014 and assure you of our highest regards. **Your Ref:DF/86974/(25)**

OUR REF: CAJ/M.IGC/062/2/2013 -SC **21st May 2014**

Anthony M. Wambugu
P.O. Box 1553-00100
NAIROBI

Dear Sir,

RE: YOUR COMPLAINTON BEHALF OF KABENDERA RESIDENTS AGAINST THE RECENT APPOINTMENT OF THE ASSISTANT CHIEF KABENDERA SUB-LOCATION GATARGWA LOCATION, KIENI-WEST DISTRICT OF NYERI COUNTY

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman). The Commission makes reference to your complaint where you allege that the residents are dissatisfied with the recent appointment of the Area Sub Chief for the following reasons:

1. That he does not domicile in Kabendera Sub Location, but is a resident of Kimunyuru Sub Location.
2. That he is not familiar with the residents hence difficult for him to relate with them or mediate in resolution of disputes among them.
3. That the manner in which the recruitment was conducted was unfair since it appeared that there was a candidate who had been endorsed by the former Chief and the Area District Commissioner.
4. That the residents raised their concerns with the former Provincial Commissioner Central and the former District Commissioner Kieni District vide a letter dated 25th February 2013, but no response has been forthcoming to date.
5. That they proceeded to report their concerns to the Interior and Internal Security Secretariat, but they have never received a response to date.

Having received the complaint, the Commission wrote to the Ministry of Interior and Coordination of National Government vide our letter dated 9th September 2013. In their substantive response dated 4th November 2013, the Ministry addressed your concerns as follows:

- That the Assistant Chief was born in Kimunyuru Sub-Location, and later purchased two pieces of land in Kabendera in 2009 and subsequently settled in the location.
- That the Assistant Chief also possessed the necessary superior educational qualifications.
- That the interviews were conducted with impartiality, integrity and competence, where the current Assistant Chief emerged as the best suited for the position.
- That the Ministry does nonetheless note that some residents were unhappy with the appointment, but that they are nonetheless satisfied with the appointment.

We have since received your rejoinder which we have analyzed together with the comments from the Ministry and we have made the following conclusions:

i) That the Assistant Chief did indeed possess the requisite educational qualifications that set him above the other short listed candidates.

ii) That your allegation that the Assistant Chief only bought the land in 2011 continues to go unfounded as you are yet to produce any evidence to support your position. Moreover, the requirement that an applicant hail from the specific area is an added benefit, but as you noted from the response of the Ministry, the candidates were vetted on educational qualifications and past work experience.

iii) Lastly, you verbally informed our legal officers that you no longer wished to pursue this case when you visited our offices on the 12th May 2014.

In light of the above, we proceeding to mark this file as closed and invite you to lodge any other complaint you may have now or in the future which is within our mandate.

We assure you of our highest regards.

Yours sincerely,

CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

CC:

1. Principal Secretary
   Ministry of Interior and Coordination of National Government
   Harambee House
   Harambee Avenue
   P.O. Box 30510-00100
   NAIROBI. (**ATTN: J.N. KINAMA- YOUR REF:OP/ PA.17.70/2A-** Kindly take note of the above)

OUR REF: CAJ/CG/KAKAMEGA/053/2/13-VOL.1-NG **21st May 2014**

Mr. Benedict Sabala Tendwa
P.O Box 12336-00100
NAIROBI

Dear Sir,

RE: YOUR COMPLAINT REGARDING THE APPOINTMENT OF THE COUNTY EXECUTIVE COMMITTEE IN KAKAMEGA COUNTY

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We make reference to the above captioned matter lodged with us on 21st June 2013 alleging that the Governor of Kakamega County, Hon. Wycliffe Oparanya Ambetsa had failed to follow the laid down procedures in the appointment of the County Executive Committee. In particular you alleged as follows: -

- That there was no short listing of the County Executive Committee nominees to public participation in the appointment of the same.
- That there was no interview process carried out to ensure compliance with Chapter 6 of the Constitution and Section 35 (3) of the County Governments Act.
- That the members were not approved by the relevant Committee of the County Assembly by dint of Article 179 (2) (b) of the Constitution.
- That the appointments failed to take into account the provision of Article 197 (2) (a) of the Constitution to ensure that community and cultural diversity of the County is reflected in the appointments.
- That most of the appointments of the county level had been awarded to the relatives of the Governor.

Having received the complaint, the Commission commenced an inquiry into the matter wherein we wrote to the Governor vide a letter dated 22nd August 2013.

We received a response vide a letter dated 6th September 2013 and subsequently forwarded the same to you vide a letter of 31st October 2013for your comments. We thereafter received a rejoinder from you vide a letter of 18th November 2014, wherein you sought clarification from the Governor, who responded vide letter dated 13th March 2014(copy enclosed). We were also furnished with copies of relevant documents, specifically the advertisement for the positions of County Executive Committees, list of those who applied and shortlisted candidates and their profiles, and the report of the selection panel.

Having examined the documents, the correspondences and considered the circumstances of this matter, we have made the following conclusions:

A. DUE PROCESS

We have established that the due process was followed in the appointment of members of the County Executive Committee based on the following:

a) That the positions of the County Executive Committee as well as the County Public Service Board were advertised in two widely distributed local daily newspapers, the Standard and the Daily Nation of the 4th and 5th April 2013 respectively. The adverts set out the requirements for these positions and invited all qualified and interested candidates to apply for the positions.

b) That the County received 289 applications, being 238 were male and 51 females, out of which 54 applicants were shortlisted, based on an objective criterion.

c) That the Governor constituted an independent panel comprising of 5 members to scrutinize, shortlist, interview and rank the applicants. The Panel conducted the exercise and presented names of the successful applicants to the Governor for appointment.

d) The Governor subsequently nominated the successful candidates presented by the Panel and forwarded their names to the County Assembly Kakamega for approval as required by the law.

e) That the County Assembly through the Committee on appointments published the list in the Newspaper (Sunday Standard of 2nd June 2013) and invited the members of the public to give views concerning the nominees.

f) The County Assembly conducted the public vetting between 6th June 2013 and 8th June 2013, and subsequently forwarded their report to the County Assembly for adoption. During the vetting process, only Mr. Luke Wasike Khaemba, was rejected based on the adverse

report by the public on his suitability and integrity.

g) The names of the approved nominees were then forwarded to the Governor vide a letter dated 10th June 2013, who subsequently made the appointments.

B. PUBLIC PARTICIPATION

It is clear from the foregoing that there was public participation at all stages of the appointment process of the County Executive Committee as required by the Constitution, the County Governments Act, 2012 and the Public Appointments Act, 2011. This was mainly achieved through the Newspaper announcement seeking views of the public during the vetting process. Indeed it was through this very process that one of the nominees was rejected by the County Assembly.

C. INTEGRITY OF THE NOMINEES

We examined the documents provided, but we did not find any issue of integrity against the nominees, save for Mr. Luke Wasike, who was, as earlier stated, rejected by the County Assembly on the basis of an adverse report by the public against him. Further, we noted that the complaint only made a general statement without providing any grounds that touched on the integrity of any of the nominees. In this regard, we are unable to find theta the process failed to consider the integrity or suitability of the nominees, and as such, the allegation fails.

D. APPOINTMENTS BASED ON NEPOTISM AND PARTY AFILIATION

The Governor in his response dated 13th March 2014 averred that the named nominees are not related to him in any way, and upon scrutiny of the documents presented to the Commission we have found no evidence to show that some of the nominees were his relatives and/or such appointments were made based on nepotism and party affiliation as alleged in the complaint. As outlined above, the due process was followed, and qualified and suitable candidates applied and were shortlisted and interviewed by an independent panel. The nominees were further subjected to an approval process by the County Assembly. In any event, the positions were open to all qualified and interested individuals unless disqualified by the law. None of the nominees was disqualified by the law or such disqualification, if any, brought to the attention of the County Assembly or the Commission.

E. SPECIAL CONSIDERATIONS

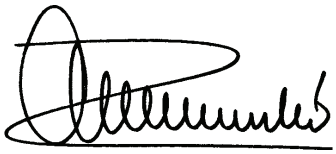
In relation to the allegations that the appointments did not satisfy the diversity in the County, gender and regional consideration, we are satisfied that the process met the legal threshold. This is evidenced by the report of the selection panel and the actual appointments, where four(4) out of ten (10) nominees were females while six(6) were males, which met the a third gender principle. In terms of regional balance, the constituencies in the County were well represented in the County Executive Committee, taking into consideration that some constituencies had fewer applicants.

In view of the foregoing, the Commission finds that your allegations of failure by the Governor of Kakamega County to follow the laid down procedures in the appointment of the County Executive Committee cannot be sustained.

In the circumstances, we find the explanation rendered by the Hon. Governor is reasonable and are proceeding to close this file.

We thank you for your correspondence and assure you of our highest regards.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc: **Hon. Wycliffe Oparanya Ambetsa**
Governor
Kakamega County Government
P. O. Box 176 – 50100
KAKAMEGA

(We acknowledge with thanks receipt of your letter dated 13th March 2014. **YOUR REF: OG/CGK/COMP/40/1(5)**

Our Ref: CAJ/ERC/021/98/13/VOL.1
Your Ref: ERC/CP/CAJ/1/2

17th April 2014

Eng. Emma Kiilu
Chairperson
Energy Regulatory Commission
Eagle Africa Centre
Longonot Road, Upper Hill
P. O. Box 42681 - 00100
NAIROBI

Dear Madam,

RE: COMPLAINT OF ABUSE OF OFFICE AND PREJUDICIAL CONDUCT IN THE APPOINTMENT OF DIRECTOR GENERAL

Kindly receive warmest compliments from the Commission on Administrative Justice.

We make reference to the above captioned matter and the correspondence therein. We have carefully examined the correspondence and the supporting documents in the matter and noted the following:

i.) That we received an anonymous complaint dated 11th July 2013 alleging abuse of power and prejudicial conduct in the recruitment process of the Director General of the Energy Regulatory Commission (ERC). In particular, it was alleged that, as the Chairperson of ERC, you acted in contravention of the law by presiding over the recruitment process for the above position for which you had tendered your application. Further, it was alleged that you failed to declare the existence of any conflict of interest and also had the contract with PriceWaterhouseCoopers (PwC) for the recruitment of the said position terminated without any justification.

ii.) That we proceeded to make an inquiry in line with Article 59(2)(h-k) of the Constitution and the Commission on Administrative Justice by writing a letter to you on 22nd July 2013.

iii.) That you responded vide the letters dated 24th July 2013 and 30th July 2013 wherein you stated that you had not tendered any application for the said position. You duly furnished us with a copy of the list of applications for the position as received by ERC. On the basis of your response, you requested the Commission to exercise its discretion by dismissing the compliant as per Section 34 of the Commission on Administrative Justice Act since, in your view, it was frivolous, vexatious, unfounded and an abuse of the due process.

iv.) That you raised concerns relating to the manner in which the Commission had handled the matter. In particular, you stated that the Commission had not accorded you a fair hearing by condemning you unheard and overly relying on the defamatory and actionable allegations. You also requested and obtained a copy of the complaint that was lodged with the Commission.

v.) That the Commission further received an anonymous letter that sought to clarify issues relating to the complaint. In particular, the letter alleged that the contract for the recruitment of the Director General had been awarded by the Tender Committee to PwC in June 2013, and that your application for the position was part of the applications that were opened on 5th July 2013, but the application was later mysteriously withdrawn from the others.

vi.) That the Commission responded vide our letters of 1st August 2013 and 6th August 2013 wherein we addressed your concerns and sought clarification on whether the Tender Committee had resolved to engage the services of PWC in the recruitment process, and whether you had indeed overruled the Tender Committee on the issue.

vii.) That you substantively responded vide a letter dated 4th September 2013 wherein you stated that there was no contract between PwC and ERC concerning the recruitment process and that the Board acted in line with Section 12 of the Energy Act in conducting the recruitment process.

viii.) That the Commission responded vide a letter of 2nd October 2013 wherein we reiterated our earlier assurance that we were merely undertaking an inquiry, and that nobody had been presumed guilty.

ix.) That the Commission wrote a letter to you on 7th November 2013 seeking a clarification on whether the process of procuring a consultant for the recruitment of the Director General had been sanctioned by ERC, and the circumstances under which the process was terminated. We subsequently received a response from you vide a letter dated 5th December 2013 informing us that ERC had sanctioned the procurement of a consultant for the recruitment of the Director General, but the process was terminated since the quotation from PwC exceeded the Kshs. 500,000 limit set by the Office of the President for procurement during the transition period.

x.) That the Commission further sought and obtained information from PwC on whether there was a valid contract on the consultancy services between themselves and ERC for the recruitment of the Director-General.

Having outlined the inquiry process above, we have carefully analyzed the complaint, the correspondence, the supporting documents and the circumstances of this complaint, and have come to the following conclusions:

i.) *Application for the position of Director General*: Our inquiry did not establish that you had applied for the position of Director General. Indeed, there was neither any evidence of such application from our inquiry nor from the list of applicants availed us by the Chairperson of ERC.

ii.) *Failure to disclose conflict of interest*: This allegation could not be sustained since there was no finding that you had applied for the position of the Director General. Further, no direct or indirect conflict of interest was established by the inquiry.

iii.) *Engagement with PwC in the recruitment of the Director General:* While it was established that ERC had commenced discussions with PwC to assist in the recruitment of the Director General, the process was never finalized. Consequently, PwC was not formally engaged to undertake the process. In other words, there was no valid contract between PwC and ERC for the recruitment of the Director General.

We wish to point out that while the ERC Board is empowered under Section 12 of the Energy Act to recruit the Director-General of ERC, this does not preclude the Board from engaging a consultant to assist them in the process. Indeed, the Board could have been informed by this fact when they sanctioned the procurement of a consultant (PwC) to assist in the recruitment process. It is the considered view of the Commission that the engagement of a consultant in the process of recruiting the Director-General would not have negated the role of the Board in the recruitment process. On the contrary, such an engagement, if properly and lawfully done, would enhance the transparency and credibility in the recruitment process.

Further, it was established that ERC had entered into a contract with PwC on 23rd June 2012 to facilitate the recruitment of 10 positions at ERC in the 2012/2013 Financial Year. However, the position of Director-General was not included in the list of the 10 positions. While we have noted the reasons for not engaging PwC or any consultant to assist in the recruitment of the Director-General, we believe that given the nature of the position and in keeping with the Constitutional requirement of transparency in the appointment in the public sector, it would have been more appropriate to seek the services of a consultant to assist in the recruitment process.

Indeed, while we appreciate that the decision of the Board was informed by the Circular from the then Head of the Civil Service and Secretary to the Cabinet which froze the award of contracts above Kshs. 500,000 until further directions from the Office, we are of the considered view that ERC could have sought such approval from the Head of Civil Service to award a contract in excess of the stated amount, given the importance of the position. To this end, we have found it paradoxical that ERC would engage a consultant for the recruitment of positions which are below that of the Director-General, but leave out the position of the Director-General, which in our view, would have required the highest standard of transparency.

Despite the foregoing, we have found that the process of procuring PwC to conduct the recruitment process had not been finalized in the present case and the action taken in that regard cannot, therefore, be used as the sole ground of finding malfeasance by the Board.

iv.) *Fairness of the inquiry:* The Commission conducted the inquiry fairly in line with the Constitution, the Commission on Administrative Justice Act and other relevant laws. As earlier stated, the Act and the attendant Regulations (Regulation 4 of the Commission on Administrative Justice Regulations, 2013) provide for lodging of complaints to the Commission, including anonymous complaints. Although the Commission is cognizant of the attendant risks of anonymous complaints, it cannot fail to act on such complaints merely because they may be established later to be unfounded or false. Such complaints may be critical in dealing with maladministration in the public sector, which would explain why the law allows for such complaints to be made to the Commission.

In the present matter, the Commission availed a copy of the complaint as requested by you which showed good faith and fairness of the process. Further, the Commission did not presume guilt on the part of the Chairperson of ERC based on the allegations, but undertook an inquiry to ascertain the truth. To this end, the Commission exhausted a number of correspondence with you and sought clarifications where appropriate. This was a normal process and was not in any way intended to forestall the recruitment process of the Director General or tarnish the names of ERC or its Commissioners. Indeed, the inquiry should be seen as part of the transformative process in the public sector governance which seeks to ensure transparency, fairness, lawfulness and objectivity of actions by public institutions and public officers. Further, we wish to point out that where the information is found to be false, misleading or malicious, then action could be taken against any person giving such information in line with Section 52 of the Commission on Administrative Justice Act.

Based on the foregoing, we wish to inform you that no finding of malfeasance has been made against you in this instance and are, therefore, proceeding to close our inquiry on this particular file.

We thank you for your continued co-operation and assure you of our highest regards.

Yours Sincerely,

CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Copies to:

1. **Dr. Fredrick Nyang**
   Ag. Director General
   Energy Regulatory Commission
   Eagle Africa Centre
   Longonot Road, Upper Hill
   P. O. Box 42681 - 00100
   NAIROBI

2. **Mr. Davis Chirchir**
   Cabinet Secretary
   Ministry of Energy and Petroleum
   Nyayo House, Kenyatta Avenue
   P. O. Box 30582
   NAIROBI

3. **Prof. Margaret Kobia, PhD, CBS**
   Chairperson
   Public Service Commission
   Commission House, Harambee Avenue
   P. O. Box 300595
   NAIROBI

OUR REF: CAJ/TSC/013/622/14- AOL 15th April 2014

Agnes Njoki Kago
P. O. Box 33878 - 00600
NAIROBI

Dear Madam,

RE: YOUR COMPLAINT AGAINST TEACHERS SERVICE COMMISSION

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

We make reference to the above captioned matter which you brought to our attention on 27th January 2014. We have reviewed the file and noted the following:

1. That your complaint is about the period that you were interdicted by Teachers Service Commission, which was one year.
2. That you allege that you were not given a fair hearing and the investigation report was biased.
3. That you pleaded to be brought back to Nairobi on medical grounds, but the same was not effected.
4. That you were not paid half salary as per the norm of officers who have been interdicted.

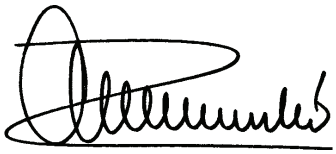
After a thorough perusal of the documents accompanying your complaint, we are of the opinion that:

1. That Teachers Service Commission Code of Regulations for Teachers provides that interdiction shall be for the period that TSC conducts investigations.
2. That the failure by TSC to pay half of your salary during interdiction was premised on **Section 68 (d)** of the TSC Code of Regulations for Teachers which exempts teachers who have been accused of misappropriating or mismanaging public funds from the payment of their half salary.
3. That you were invited for a hearing at TSC House on 4th June 2010 which you requested to be postponed to enable you prepare a defence.
4. That the hearing was postponed to 6th June 2011 whereby TSC requested you to avail yourself for the same and adduce any documents for your defence.
5. That you were subsequently found guilty of misappropriation of school funds and you were subjected to a one-month suspension as well as a transfer to Gitothua Primary School.
6. That your letter requesting to be posted to schools within Kasarani, Starehe or Kamukunji Districts did not disclose the need for consideration due to any medical condition as alleged in your complaint form

In light of the above, we are of the opinion that your allegations do not disclose any impropriety in regards to the manner in which TSC handled your interdiction, subsequent suspension and transfer. The institution adhered to the legally set Regulations. We are, therefore, unable to commence an inquiry into the matter and are proceeding to close our file on the same. We, however, invite you to lodge any other complaint you may have now or in the future regarding any Public Office or Officers.

We assure you of our highest regards.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

IN THE MATTER OF A COMPLAINT BY AFFECTED STUDENTS AGAINST THE KENYA SCHOOL OF LAW

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

B. THE COMPLAINT

3. The Commission received a complaint from the affected students on 9th January 2014 (see appended list) against the Kenya School of Law alleging unfair treatment by the refusal of the School to admit them to the Kenya School of Law Advocates Training Programme for the 2014-2015 Academic year. In particular, they alleged as follows:

   i.) That they applied in the year 2012 to join the Kenya School of Law for the Advocates Training Programme in the 2013/2014 Academic Year and the School rejected their applications stating that they had not attained the minimum requirements for admission to the School since they had not done all the sixteen (16) core subjects as required by the Legal Education Act 2012.

   ii.) That they were advised to take the missing courses in any accredited University for teaching the legal education within the Country, and not necessarily where they had attained their Law degree, consequently, the students successfully undertook the missing subjects in different accredited Universities majority of whom who registered at the Catholic University of Eastern Africa and made fresh applications for admission in the 2014/2015 academic year.

   iii.) That sometime in December 2013, they were listed as unsuccessful applicants, and the reason stated for their non-admission was that the courses they undertook were done in remedial centers that were not approved by the school.

   iv.) That they requested for the official communication on the same but were informed that the letters were not ready for collection.

   v.) That they had not been informed that not all accredited Universities were approved remedial centers prior to taking the required courses.

   vi.) That there were other applicants who were admitted by the school, yet they undertook the remedial courses in the same accredited Universities, which are not listed as approved remedial centers.

   vii.) That the applicants were later informed that the only approved centers for teaching remedial courses were Riara and Strathmore Universities, which are considered the most recently approved Institutions to teach the legal education, and are yet to release their first group of graduates in the faculty of law.

4. Based on the foregoing, the affected students sought the Commission to intervene and ensure that:

   a) The School sets aside its decision and admits them to the Kenya School of Law Advocates Training Programme for the academic year 2014/2015.

C. THE ACTION AND RESPONSE

5. Having received the complaint, the Commission commenced an inquiry into the matter by writing to the Director Kenya School of Law on 10thJanuary 2014. The Commission also sought, vide letters dated 29th January 2014 and 14th February 2014 to be furnished with information and /or evidence to show that the students were notified to undertake the remedial courses at the approved centers and the rationale for selecting the approved centers. The Commission received feedbacks from Director /Chief Executive of the Council of Legal Education and the Director /Chief Executive of the Kenya School of Law Board vide letters of 13th January 2014, 6thFebruary 2014, 12th February 2014 and 20th February 2014.

6. In responding to the allegations, the Director/ Chief Executive of the Council of Legal Education stated the following:

   i) That following the enactment and implementation of the Legal Education Act 2012 several students who had failed to meet the criteria (examined and passed the 16 core units) were to be shut out completely from joining the Kenya School of Law, this led to the Council's decision to introduce what became to be known as the Remedial Programme.

   ii) That the Council agreed that the Remedial Programme be offered by institutions that were fully accredited as legal training institutions under the law. Consequently, the Council wrote to all institutions that were fully accredited vide letters dated 11th March 2013 and requested them to develop a programme to address this training opportunity.

   iii) That Riara University responded promptly to the request and their training programme was approved by the Council and as such it was the only approved center to mount the programme for the year 2013. Other Universities invited to provide the training (including Kenyatta, Kisii and Strathmore Universities) had submitted their proposals which are yet to be evaluated and approved.

   iv) That Catholic University and all the other Universities vide a letter dated 2ndMay 2013 were advised to refrain from offering make up classes since they were not fully accredited and the programme had to be evaluated and approved by the Council.

   v) That the Catholic University Dean of Faculty appealed to the Council on behalf of the students who had undertaken the remedial courses at the institution to be admitted, on the ground that they did not have full information on the CLE policy at the time the students applied. The Council vide a letter dated 2nd November 2013 rejected the appeal.

   vi) That the Council will evaluate and approve the Programmes of both Public and Private Universities if and when they develop a competent modular Remedial Programmes.

   vii) That the Board had no other correspondence on the matter including the issuance of a notice.

D. THE REJOINDER

7. The Complainants in response to the Kenya School of Law stated that they were not notified by the Catholic University or the Kenya School of Law that the courses had to be done under an approved remedial programme and in approved remedial centers.

E. ISSUES ARISING

8. Having received the response from the Kenya School of Law Board and the Council of Legal education together with the supporting documents, the Commission proceeded to frame the issues in contestation for determination, namely:

   a) Whether the School notified the students and the general public in advance, that Riara University was the only approved Remedial Center.

   b) Whether the affected students are entitled to admission to the academic year 2014/2015.

F. OUR ANALYSIS

9. Upon careful consideration and examination of the documents and correspondence between the parties involved, we find that the affected Students and the general public were not given notice by the Kenya School of Law and/or Council of legal Education before or at the material time they were seeking to undertake the remedial courses, that Riara University was the only approved center to offer what was termed as the Remedial Programme.

10. We are also of the opinion that as a Public Institution it is of utmost importance to notify members of the public of any changes that are made to the School's Policies and Programmes among other things, which are likely to directly and/or indirectly affect the target population.

11. That the affected students attended classes, did the coursework and were examined like other regular LL.B students and attained the same level of proficiency in the courses they undertook and the fact that no other information has been given to state otherwise, it is in all fairness that their case be re considered.

G. REMEDIAL ACTION

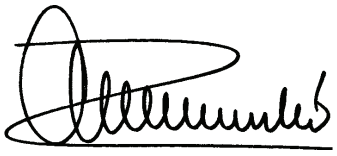
12. In light of the foregoing, the Commission in exercise of its power under Sections 8(g) of the Commission on Administrative Justice Act, finds that in the interest of justice and fairness the Kenya School of Law should:

    i) Admit the affected students to the Advocates Training Programme for the academic year 2014/2015.

    ii) Issue a notice to the public listing and/ or identifying the remedial approved centers for all future applicants.

    iii) Inform and/or issue notice to all the Universities that offer legal training (both public and private) advising them **NOT** to admit students who wish to undertake the remedial programme unless they have been fully accredited and the programme has been approved by the Kenya School of Law Board.

DATED this **5th** Day of **March 2014**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

OUR REF: CAJ/PEN/000/506/2013 -SAK **20th March 2014**

Ms. Mary Wanjiru

Dear Madam,

RE: YOURCOMPLAINT REGARDING NON-PAYMENT OF PENSION TO THE BENEFICIARIES OF THE ESTATE OF PETER NJERU NJUE (DECEASED)

Kindly receive warmest compliments from the Commission on Administrative Justice.

The Commission makes reference to your complaint regarding the above captioned matter where you alleged the following:

- *That upon the death of your father, your mother Esther Waitherero Njeru, as a beneficiary, was entitled to receive her father's monthly pension.*
- *That when her mother died in early 2009, the monthly pension payment continued to be remitted to your mother's Post Bank Account No. KEMUBSG 0008925 until October 2010.*
- *That upon noticing the same, Post Bank, on 23rd October 2012, refunded the monies amounting to Kshs 124, 200 to the Pensions Department vide a cheque number 024502 on account of Esther Waitherero Njeru Pension Number WDG96/9453A.*
- *That upon making an inquiry you were instructed to open an account in your name to have the monies deposited therein.*
- *That since you opened the account the monies have not been remitted to your account.*

We inquired into the same vide a letter of 13thSeptember 2013 to the Pensions Department who responded vide a letter of4th December 2013 stating the following:

- *Indeed they were in receipt of returned pensions amounting to Kshs 124,200 from Postbank for remittances from January 2009 to October 2012.*
- *That following the death of your Mother, there was no child eligible for children pension owing to the fact that the children to whom you are claiming were born AFTER the death of your father.*

In light of the response from the Pensions Department, we have made the following conclusions:

1. That in the case of Faith Rwamba and Patience Waitherero, the following legal provisions apply:
   a. *That in line with the Widows and Children's Pension Act of 1965, a child MUST be the child of the deceased in order to receive the dependent's pension*
   b. *That according to Section 11 (3) (a), a child conceived after the death of the pensioner shall not benefit from the children's pension.*

   Therefore, the two children are not eligible to receive your father's [ension.
2. In your case as the only statutorily accepted child of Peter Njue, we have noted the following:
   a. *That for a child to continue to receive the dependents pension after the death of the widow section 17 (2) (b) (i) of the Pension Act states that the child MUST be under the age of twenty one (21) years, which you have since attained.*

In light of the above, we are proceeding to mark this inquiry as closed, as the explanation rendered by the Pensions Department is satisfactory. We, however, invite you to lodge any other complaint that you may deem appropriate.

We assure you of our highest considerations.

Sincerely,

CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc:

Pensions Secretary/Director of Pensions
The Pensions Department
The Treasury
Harambee Avenue
P.O. Box 20191
NAIROBI

(YOUR REF: D P N / D G 9 6 / 9 4 5 3 - A T T N : MICHAEL OBONYO- your letter of 4th December 2013 refers**)**

OUR REF: CAJ/M.AGR/014/108/13-SC **4th February 2014**

Ms. Bilha Mudi
P.O. Box 7857-00100
NAIROBI

RE: COMPLAINT REGARDING TAX EXEMPTION APPEAL ON TERMINAL BENEFITS

Kindly receive warmest compliments from the Commission on Administrative Justice (Office of the Ombudsman).

The Commission makes reference to your complaint of 21st August 2012. We wrote to The National Treasury on 7th November 2012 and did a subsequent reminder on 17th June 2013.

We received a response on 22nd July 2013 and forwarded the same for your comments vide a letter of 24th July 2013 to which to date we are yet to receive your response. The position maintained by the Principal Secretary is that the group for 2011 cannot be exempted from paying tax on their benefits. We have analyzed the response and the find the explanation given satisfactory. In this regard, we have made the following conclusions:

i) The then Minister of Finance granted tax exemption to the first batch of retrenches of Telkom Kenya vide Legal Notice No. 73 of 2010 and rejected a similar request for the second batch in 2011 because by this time, Telkom Kenya had become a private company. Therefore, the Government no longer had any control over the management of Telkom Kenya as it was no longer a State Corporation.

ii) The retrenchment package of the 2008 employees was part of a negotiated package between Telkom Orange and the Government of Kenya. The Government policy is that all tax payers should pay taxes without exemptions so as to promote fairness and equity as is enshrined in Article 201 of the Constitution which provides that the public finance system shall promote an equitable society, and in particular ensure that the burden of taxation shall be shared fairly.

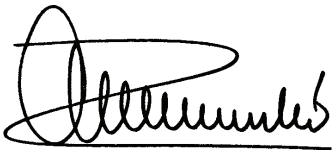
iii) The Government has rejected many applications from private companies even those that are co owned by government have been denied tax remissions in the past e.g. Kenya Airways had applied for exemption but was denied. Therefore, the reasons given of fairness and equity are reasonable.

iv) Pursuant to section 13 of the Income Tax Act, the power to grant tax exemption is the prerogative of the Cabinet Secretary. Therefore, the exemption given to the retrenches of 2008 was a privilege granted by the then Minister and not a right assertable in law to be granted to all retrenches.

Therefore the explanation given by The National Treasury appears reasonable. We have also noted that Kenya Revenue Authority had advised the National Treasury that future exemptions should not be granted because it would set a bad precedent. Selective tax exemptions may generate complications if similar requests are made by other taxpayers in future. Such exemptions may also run counter to the letter and spirit of the Constitution meant to promote the principles of fairness and equity.

In light of the above, please be advised that we shall proceed to close the file and we hope to have been of service to you and feel free to lodge any complaint that may fall within our mandate in future.

Yours Sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc: **Dr. Kamau Thugge, EBS**
Principal Secretary
National Treasury
P.O. Box 30007
NAIROBI. **(Your Ref: ZZ 28/012)**

Our Ref: PCSC/KCAA/004/25/08 VOL. I 11th November, 2013

Hesbon Yotoh
P. O. Box 4040-00200
NAIROBI

Dear Sir,

RE: YOUR COMPLAINT AGAINST THE KENYA CIVIL AVIATION AUTHORITY

We make reference to the above subject and various correspondence both from yourself and the Kenya Civil Aviation Authority (hereinafter 'KCAA') together with the documentary evidence availed by the parties.

It is evident that the principal complaint against KCAA concerns your summary dismissal from service with loss of benefits. Consequently, you wanted the Commission to inquire into reasons for your dismissal and loss of benefits. Some of specific allegations you made against KCAA included, *inter alia*,

i) **That** you were irregularly dismissed on *malicious allegations* of loss of US $ 5,100 when there was no documentary evidence to prove such loss.

ii) **That** the particulars of *gross misconduct* were not disclosed to you by KCAA hence you did not know the exact nature of the case against you.

iii) **That** the dismissal was undertaken without due regard to rules of procedure applicable to *disciplinary proceedings*.

iv) **That** the matter was not investigated by *independent agencies* such as the Auditor General and Police Service and relevant reports thereon given.

v) **That** the audited accounts of KCAA to the National Assembly did not disclose the loss of US $ 5,100.

vi) **That** your appeal against dismissal was unfairly dismissed without adequate reasons.

You therefore, sought to have KCAA compelled to; provide documentary *proof* of the loss of US $ 5,100; withdraw the Audited Final Accounts from the Parliamentary Accounts Committee (PAC); *disclose* the basis/grounds of gross misconduct; undertake a fresh and comprehensive investigation on the matter; explain why you should lose 17 years of pensionable service; and payment for 70 days accumulated leave among other demands.

We note that the Finance Manager of KCAA wrote a letter dated 30/08/2006 to you seeking a written explanation on why disciplinary action should not be taken against you for failure to bank the money and failure to report the loss for about 4 months. It would appear that you responded to a notice to *show cause* vide a two page letter dated 4/09/2006 admitting loss of the money supposedly from your drawer. In the said response, you admitted the failure to report the loss but sought the understanding of the Authority on the matter. You also thanked KCAA for giving you an opportunity to explain the issue.

By its letter dated 7/09/2006, KCAA responded by dismissing the explanation offered as unacceptable and unsatisfactory. It considered your conduct as constituting *gross misconduct* and consequently proceeded to *summarily* dismiss you from employment with immediate effect. KCAA offered to pay you outstanding leave days upon submission of a duly completed clearance certificate. You appealed the said decision on summary dismissal but the appeal was not successful.

When an inquiry was made by the predecessor to this Commission, KCAA responded through various letters and asserted that you were dismissed for *gross misconduct* in that you received the said revenue of **US $ 5,100** which you failed to bank as per Government Financial Regulations or account for the same. It was also stated that you had failed to report the alleged loss to your superiors for over 4 months from the date of receipt of the money.

Upon a review of the responses from KCAA and rejoinders from you we have noted that;

i) On 25/04/2006 while performing cashiering duties at KCAA you received a sum of **US $5,100** from the East African School of Aviation on behalf of your former employer.

ii) The said money was not banked or locked away in a safe but was kept in your office drawer for banking the following day.

iii) When you discovered the money had gone missing you did not report the loss to KCAA or police authorities for investigation.

iv) The loss of the said money was discovered by the employer in August 2006 upon a belated reconciliation being conducted by KCAA.

Our analysis of the specific substantive issues is against KCAA are as follows

A. Wrongful dismissal on malicious allegations

Although you claim that you were irregularly dismissed on *malicious* allegations of loss of US $ 5,100 when there was *no documentary* evidence to prove such loss, the evidence before us shows the contrary. In your two page letter dated 4/09/2006 in response to a notice to show cause you admitted *loss* of the money allegedly from your drawer. In those circumstances, there was no need for additional documentary evidence of loss to be availed by KCAA other than the written statement. In those circumstances we found no evidence or indication of *malice* on the part of KCAA since the loss of the funds appears to be factual.

B. Particulars of gross misconduct

To be fair to KCAA, the particulars of the case against you were sufficiently clear to enable you respond to them. Indeed, you were able to respond to the notice to show cause in two pages as evidenced in your letter of 4/09/2006.

However, if you wanted to know what *constituted* gross misconduct in the circumstances, you may refer to the provisions of the Employment Act, 2007. Section 44(4) of the Employment Act enumerates some of the matters which may constitute gross misconduct such wilful neglect to perform ones duties or careless and improper performance of any work which from the nature of the duty should be performed carefully and properly; or where an employee is reasonably suspected to have committed a criminal offence against his employer or employer's property.

According to Halsbury's Laws of England Vol. 16 (4th Ed), gross misconduct is defined as "*conduct so undermining the trust and confidence inherent in the particular contract of employment that the employer should no longer be required to retain the employee*."

It is evident from the letter of dismissal and responses from KCAA that they considered your conduct to constitute gross misconduct within the meaning of the law.

C. Procedural propriety of disciplinary proceedings

You complain that you were not accorded a full disciplinary hearing as provided for under the Authority's Human Resource Manual and the Civil Service Code of Regulations (COR). You were also expecting some prior warnings and a Disciplinary Committee to accord you a full hearing.

There is a distinction between dismissal on account of misconduct and *summary dismissal* on account of *gross misconduct*. As a general rule, where an employer proposes to dismiss an employee on account of misconduct, then the full disciplinary process in the applicable Manual, Rules or Regulations should be followed including the rules of natural justice. However, summary dismissal for gross misconduct is such a serious matter that a shortened or abridged disciplinary process is permitted by the law.

The requirement for the giving of notice or prior warning is usually dispensed with but elementary procedural safeguards such as the rules of natural justice would apply. As long as the employer carries necessary inquiries (or investigation), issues a notice to show cause and considers the employee's response, then a summary dismissal may be lawful. In fact, the abridged termination procedure is what distinguishes a summary from a normal dismissal. Depending on the gravity of the gross misconduct an employer may be entitled to dismiss the employee instantly.

In the instant case, you were notified of the allegations in writing and accorded an opportunity to explain the loss of the money and the failure to report the loss. Your response was a two page letter which KCAA considered did not give a satisfactory explanation.

We have noted from our file that our predecessors had written a letter dated 9th September, 2010 to KCCA asserting that the dismissal was wrongful because you had not been '*subjected to a conclusive disciplinary process*.' It is our considered view that the said statement was premature and made in error. It was premature because it was made in the initial stages before conclusion of the inquiry and erroneous because the nature of summary dismissal as a result of gross misconduct in law was not taken into account

D. Appeal against dismissal

Although you complain that your appeal against dismissal was unfairly dismissed by the Board without adequate reasons, there is no evidence to support such a conclusion. The main issue here is who really bears the burden of proof in the first instance in respect of administrative appeals. Is it the appellant's responsibility to convince the appellate body that his appeal is meritorious or is it the responsibility of the appellate body to show why the appeal should not be allowed? At the very least, the appellant must lay a good basis for his appeal in order to create an obligation on the appellate body to give reasons for discounting his grounds of appeal.

The Board of the Authority considered your appeal in 2010 and disallowed it for lack of merit in that they did not find any reasons for overturning the summary dismissal decision of management. Minutes of the Human Resource Committee of the Board on the matter were availed to us to confirm that your appeal was

considered and dismissed. In those circumstances, it cannot be said that the Board misdirected itself while considering the appeal when no persuasive case had been placed before them.

E. Investigation by independent agencies

It is your contention that the matter ought to have been investigated by independent agencies such as the Auditor General and Police Service and necessary reports obtained before any disciplinary action could be taken.

There is no legal, policy or administrative requirement in Kenya that every alleged misconduct or gross misconduct in the course of employment ought to be investigated by law enforcement agencies or other independent agencies before any disciplinary action is contemplated by an employer. If there were such a requirement then it would be unduly burdensome since criminal investigations may stall or take unduly long periods to be concluded. There are also those employers who may wish to pursue civil and administrative measures instead of pressing for criminal charges.

It should also be borne in mind that the inability by police investigators to find evidence of criminal liability or an *acquittal* of a suspect by a court of law in criminal proceedings may not necessarily affect the legality of disciplinary action which may have been taken. It may be possible for an employer to take disciplinary action if satisfied (on a balance of probabilities) that there was misconduct on the part of an employee even where criminal proceedings against the same person may have failed. See *Republic v Public Service Commission ex parte James Nene Gachoka Misc. Application No. 516 of 2005 [2013]eKLR* (unreported).

F. Audited Accounts of KCAA to the National Assembly

The complaint that the audited accounts/reports to the National Assembly did not disclose the loss of US $ 5,100 may not help in the resolution of the substantive complaint of wrongful dismissal. The declaration of a loss in the audited accounts may constitute some evidence of loss but it is not the only way of proving a loss. If there was any contravention of Government Financial Regulations and Procedures by the Authority then that should form the subject of a separate inquiry by the Auditor General and not part of your wrongful dismissal complaint.

G. Loss of 17 years of pensionable service

It is well established that if a person is dismissed from public service in Kenya, such dismissal is with loss of all benefits. A summary dismissal inevitably results into loss of benefits under the public service Code of Regulations (COR).

H. Payment for outstanding leave days

We are satisfied that you are entitled to be paid for outstanding leave days (70) which you had earned prior to the summary dismissal upon clearance with the Authority. It would be unjust and unlawful for KCAA to insist that you should discharge them from all legal liability before the leave days could be commuted to cash.

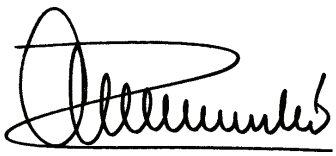
In view of the foregoing, and a thorough review of the matter it is our considered view that in all the circumstances of the case, KCAA cannot be faulted for the disciplinary action taken against you. The Authority has given a reasonable explanation for the action taken against you which is well supported by the Employment Act (Cap. 226) and case law.

It is, therefore, recommended that we pursue the issue of payment for the outstanding leave days which is the only legitimate claim you appear to have against KCAA.

In the circumstances, we shall pursue the issue of payment for the outstanding seventy (70) leave days and advise you appropriately.

We assure you of our highest regards.

Yours sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc: Director General
Kenya Civil Aviation Authority
KAA Complex
JKIA
P. O. Box 30163-00100
NAIROBI

Our Ref: PCSC/M. FOR/011/17/2012/YA 31st October 2013

Ambassador Daniel M. Koikai

Office of the President
Presidency and Cabinet Affairs Office
Kenya Southern Sudan Liaison Office
P. O. Box 9251-00200
NAIROBI

Dear Sir,

RE: YOUR COMPLAINT AGAINST THE FORMER PERMANENT SECRETARY MINISTRY OF FOREIGN AFFAIRS MR. THUITA MWANGI

We make reference to the above subject and various correspondence both from yourself and the former PS Ministry of Foreign Affairs together with the documentary evidence availed by the parties.

It is evident that the primary complaint against the former PS, Ministry of Foreign Affairs, concerned his alleged failure or refusal to deploy you upon completion of your tour of foreign diplomatic service in Nigeria in 2011. Consequently, you wanted the Commission to inquire into the reasons for your non- deployment and alleged abuse of office by the PS for failing to deploy you. You also wanted to the PS to be compelled to deploy you to enable him continue working. By a letter dated 14 Jan 2013, the Commission inquired from the former PS on the complaint. The PS did not respond within the stipulated period and we did a follow up letter in which we raised additional issues of alleged unfair treatment and discrimination.

The PS ultimately responded to our letters and offered reasons for the delay in undertaking the deployment. The gist of the explanation was that he had initially deployed you to the National Defence College (NDC) as *Senior Directing Staff* in April 2012 but this did not materialize since you were not accepted by the Ministry of Defence. The PS then had to seek the assistance of the Central Human Resource Management Committee (CHRMC) for a suitable deployment. We were furnished with a letter from the Ministry of State of Defence requesting for a replacement.

Upon a thorough review of the matter and consideration of witness accounts from officials within the Ministry and the Public Service Commission, we have come to the following conclusions;

i.) *There is documentary evidence to show that the CHRMC actually undertook deployment of various public officers in November 2012 even though it is not clear when the request for your deployment was made by the former PS. We noted that there were actually two officers from the Ministry of Foreign Affairs who were deployed outside the Ministry. We were, therefore, unable to find evidence of unfair treatment or discrimination.*

ii.) *In spite of your assertion that the then acting PS, Amb. Wamoto, had prepared an internal deployment order which was stopped or revoked by Mr. Mwangi, we did not find any evidence to support this allegation. On the contrary, Amb. Wamoto completely denied the existence of such an internal posting order in writing.*

iii.) *Although you asserted that your abortive deployment to NDC was irregular and contrary to existing policy and regulations, we were unable find evidence that such policy existed and no regulation was found in the course of the inquiry to support such a position. In any event, this is a moot point since your deployment to NDC did not materialize.*

iv.) *In our view, the former PS offered a reasonable explanation for the delay in your deployment. But most importantly, we think this substantive complaint was effectively resolved by your deployment to Kenya Southern Sudan Liaison Office (KESSULO).*

v.) *The allegations touching on the conduct of the former PS regarding his dealings with the procurement of property for the Kenyan Embassy in Japan are subject to judicial proceedings and therefore outside our mandate. However, any fresh or additional particulars of corrupt conduct in relation to any other matter may still be reported to the Ethics and Anti-Corruption Commission for possible investigation*

In the circumstances, we shall proceed to close this file, but should be happy to attend to any other complaint as you may lodge which may be suitable for administrative remedy.

We assure you of our highest regards.

Yours sincerely,

CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

IN THE MATTER OF A COMPLAINT BY ENG. JUDAH ABEKAH AGAINST THE VISION 2030 DELIVERY SECRETARIAT

A. MANDATE OF THE COMMISSION

1. The Commission is a Constitutional Commission established under Article 59(4) and Chapter Fifteen of the Constitution, and the Commission of Administrative Justice Act, 2011. The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

2. In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information from any person or Governmental authorities and to compel the production of such information.

B. COMPLAINT BY ENG. JUDAH ABEKAH

3. The Commission received a complaint from Eng. Judah Abekah on 21st August 2012 against the Vision 2030 Delivery Secretariat alleging unfair treatment in the appraisal of performance and renewal of his contract of employment. In particular, he alleged the following:

   i.) That he joined the Vision 2030 Delivery Secretariat (VDS) on a three years' contract commencing on the 16th of March 2009. The contract was due to expire on 15th March 2012. In accordance with the terms of his employment, he applied for renewal of contract on 14th September 2011.

   ii.) That his appraisal upon which the decision to renew his contract was based was unprocedural, irregular and subjective, and in violation of Article 47 of the Constitution on fair administrative action. This was based on the following grounds

      a) On 1st February 2012, he was invited to a meeting that was titled ad-hoc Committee Meeting and was not provided with the agenda of the Meeting or informed of the Meeting in advance.

      b) When he went to the Meeting, he found three members of the Board and the Director-General who proceeded with what turned out to be a performance appraisal for him, which in fact were accusations leveled against him by the Director-General.

      c) He was not accorded an opportunity to prepare his defence since he was informed of the Meeting in advance or told the accusations against him in advance.

      d) The appraisal did not conform to both the terms of his employment contract and the laid down performance appraisal process in the Civil Service, which was evidenced by the fact that the Committee lacked information from the previous two years since he had never been appraised for the three years of his employment at VDS.

      e) The composition of the appraisal panel lacked diversity and further did not include the Permanent Secretary for Planning, National Development and Vision 2030 as required by his contract of employment.

      f) The Board relied on indicators and targets that were not set and agreed upon hence the subjective and prejudicial appraisal process, based on personal opinion of the Director-General that could not be verified. Further, the Board failed to appreciate that he had never received any warning from the Director-General for underperformance for the three years that he worked at VDS.

      g) At the end of the purported appraisal, there was no agreed score signed by both parties contrary to the provisions that guide performance appraisal in the Civil Service.

      h) He was not granted an opportunity to register his comments in writing on the final appraisal contrary to the requirements and practice of appraisal process in the Civil Service.

   iii.) That following the said appraisal, he appealed to the Minister for Planning, National Development and Vision 2030, as he then was, as the appointing authority, stating the irregular nature of the performance appraisal.

   iv.) That the Minister considered the appeal and renewed his contract by one year. The new contract was subsequently forwarded to him through the Director-General, as is the practice

is the Civil Service, but the Director-General refused to forward it to him, and insisted that he had to handover and exit VDS. To this end, the Director-General locked his office with his personal effects, including important documents.

4. Based on the foregoing, Eng. Abekah sought the Commission to intervene and unsure that:

   a) His salary arrears and allowances be paid promptly;

   b) His renewed contract be forwarded to him by the Director-General;

   c) His office be opened to enable him access his personal effects; and

   d) He should be furnished with copies of his appraisal reports for the 1st, 2nd and 3rd years at VDS.

C. ACTION AND RESPONSE

5. Having received the complaint, the Commission commenced an inquiry into the matter by writing to the Director General on 12th September 2012, 30th October 2012, 7th December 2012, 14th January 2013, 26th February 2013 and 25th March 2013 seeking to, *inter alia,* establish the facts of the complaint. The Commission also sought to be furnished with a copy of the Appraisal Report for Eng. Abekah. Further, the Commission wrote to the Chairman of the VDS Board on 5th June 2013 on the matter and sought to be furnished with a copy of the Appraisal Report. The Commission received feedbacks from VDS vide the letters of 26th October 2012, 19th December 2012, 30th January 2013, 4th April 2013 and 13th August 2013.

6. In responding to the allegations, VDS stated the following:

   i.) That performance appraisal is a normal practice by all public institutions more so for contract employees, and a tool for gauging their performance before renewal of contract.

   ii.) That the appraisal of Eng. Abekah' performance was undertaken by an ad-hoc Committee of the Board in its 7th Meeting on 1st February 2012.

   iii.) That before the appraisal, the Committee satisfied itself that:

      a) The Evaluation Forms and criteria were consistent with the mandate of VDS and the job description of the position for which Eng. Abekah was seeking renewal.

      b) The process by which the evaluation matrices were developed was described to the Committee and found to be satisfactory. The VDS Directors, including Eng. Abekah, had largely developed the matrix with professional input from the Human Resources Department.

      c) The process being undertaken to evaluate the performance of the Directors was the normal one typically applied by other state corporations and Semi-Autonomous Government Agencies.

   iv.) After the appraisal, his performance was found to be unsatisfactory, and the Committee resolved not to renew his contract. The same was presented to the full Board Meeting in its 14th Meeting held on 3rd February 2013, which after deliberation resolved to adopt the recommendations of the Committee not to renew his contract. The Board resolution was immediately communicated to the Minister for Planning, National Development and Vision 2030 by the Board Chairman.

   v.) The Minister, however, renewed Eng. Abekah's contract for one year. After consultation between the Minister and the Board Chairman, the Minister wrote another letter to the Chairman superseding the previous contract renewal letter to Eng. Abekah. In the letter, the Minister informed the Chairman that while respecting the Board's decision not to renew Eng. Abekah's contract, he viewed it as too harsh and was of the view that a one year contract with close supervision would be more appropriate. The Minister concurred with the Chairman that since the matter had been decided by the Board, it would be referred to them for final decision, taking into account the Minister's suggestions

   vi.) The Eng. Abekah was at liberty to collect his personal effects that he allegedly left in the office at the expiry of his contract

7. The Commission further held a meeting with the Director General in April 2013 where he stated the following:

   i.) That the renewal of Eng. Abekah's contract was primarily the responsibility of the Board and the Minister for Planning, National Development and Vision 2030 with the Director General playing a minor role.

   ii.) That the process of renewal of Eng. Abekah's contract was transparent and objective and consultative based on performance.

iii.) That he was accorded an opportunity to appear before two separate sub-committees of the Board and allowed to raise issues.

iv.) That Eng. Abekah was not the only Director at the Secretariat who appeared before the Board Sub-Committee for appraisal.

v.) That the alleged renewal of Eng. Abekah's contract by the Permanent Secretary for Ministry of Planning was irregular and unprocedural since the procedure was for the Board to recommend to the Minister for consideration. In case the Minister was of a different opinion, the proper procedure would have been for him to refer the matter back to the Board for consideration.

vi.) That the Commission ought to find that the action by the Board and the Director-General was proper since it was in line with the law.

D. THE REJOINDER

8. The Commission duly forwarded the responses to Eng. Abekah, who replied by his letters of 22nd October 2012, 3rd December 2012, 23rd April 2013, 22nd July 2013 and 10th September 2013. In his reply, he stated that:

i.) That he indeed appeared before two Board Sub-Committees on 1st February 2012 and 12th December 2012. However, he maintained that the appraisal process by the First Sub-Committee was unprocedural and failed to conform to the performance evaluation in the Civil Service.

ii.) That the Second Board Sub-Committee did not undertake an evaluation of his performance, but considered whether the First Sub-Committee had followed procedure in the appraisal process.

iii.) That the Appraisal Report upon which the decision to renew his contract was based, was full of inexactitudes, subjective, not transparent, lacked a pass mark and was not signed by both parties contrary to the performance appraisal in the Civil Service.

E. ANALYSIS AND DETERMINATION

9. Having received the response from the Vision 2030 Delivery Secretariat and the rejoinder from Eng. Abekah together with the supporting documents, the Commission proceeded to frame the issues in contestation for determination:

i.) Whether the appraisal of performance and the subsequent renewal process of Eng. Abekah's contract was lawful, procedural and regular.

ii.) Whether the Director General acted lawfully, ethically and appropriately by withholding Eng. Abekah's renewed contract.

iii.) Whether Eng. Abekah is entitled to the remedies sought.

F. PERFORMANCE APPRAISAL AND RENEWAL OF CONTRACT

10. The Commission notes that performance appraisal is an important feature in all public institutions that is used to gauge the performance of employees, and usually forms the basis of renewal of contracts of employment for employees on contract. The case of Eng. Abekah was not different. Indeed, this was expressly provided for in his employment contact under Clause 4 that his performance would be 'reviewed and appraised regularly and documented in meetings with the Board and the Permanent Secretary for the Ministry of Planning, National Development and Vision 2030.' This process was to be undertaken in line with the Guide to Performance Appraisal System in the Civil Service and Local Authorities, 2008 (2008 Guide) while taking cognizance of the Constitutional principle of fair administrative action.

11. It is not contested that the appraisal process and the renewal of Eng. Abekah's contract was the primary responsibility of the Board, the Ministry and the Director General. Similarly, it is not contested that Eng. Abekah appeared before two Sub-Committees of the Board for purposes of the renewal of his contract of employment. However, what is contested is the manner in which the two processes were undertaken. The Commission was furnished with two separate appraisal reports, one by the Board and the other by Eng. Abekah, with different contents and scores. The Commission examined both reports and noted some inconsistencies and deficiencies which could have affected their authenticity. For instance, the Reports were undated and unsigned by the Supervisor and Appraisee as required by the 2008 Guide. The need for the above stated requirements, in our view, is to ensure the credibility of the appraisal process by removing any real or perceived bias, subjectivity or personal whims.

12. In relation to the regularity of the appraisal process, we have noted the absence of quarterly or annual appraisal reports for the First and Second years of his

employment contrary to the 2008 Guide the contract of employment. No explanation was provided for the absence of the Reports or an indication of whether the appraisals were ever undertaken. Given the absence of the Reports for the previous years, it was incumbent upon the Director General and the Board to conduct an appraisal process that would not only be seen to be fair, but also be manifestly fair. In addition, such process had to be comprehensive to meet the standards set out in the Guide and Article 47 of the Constitution. On the basis of the foregoing, we find that the process did not meet the standards set out in the Guide and the Constitution.

G. THE CONDUCT OF THE DIRECTOR GENERAL

13. On 19th March 2013, the Minister for Planning, National Development and Vision 2030, as the appointing authority, considered the recommendations of the Board and an appeal by Eng. Abekah, and proceeded to renew his contract by one year, effective from 17th March 2012. The Minister stated that the decision for the one year extension was arrived at by the Executive Management of the Ministry based on advice of the Directorate of Human Resource Management upon taking the concerns of the Board on his performance. The relevant part of the letter stated as follows 'following the expiry of your contract for the position of Director, Enablers and Macro with effect from 16th March 2012, and arising from strong reservations raised by the Board on your performance in your previous three (3) year contract, it has been decided that your contract be renewed for one (1) year only with effect from 17th March 2012. Further consideration for renewal shall be subject to satisfactory performance as assessed by the Board through the Director General.'

14. The letter was subsequently delivered to the Office of the Director General on 30th March 2012 for forwarding to Eng. Abekah, but he failed to release the letter and instead instructed him to hand over and vacate the office immediately. Having failed to get the letter from the Director General upon getting to know of its existence, Eng. Abekah proceeded to accept the offer through a memo to the Permanent Secretary on 3rd April 2012, and relied on it as the basis of his continued stay at VDS. While we agree with VDS that the Minister ought to have referred the matter back to the Board with the recommendation of the one year extension, we hold that the withholding of the letter by the Director General was inappropriate and improper, especially after informing Eng. Abekah through an e-mail on 27th March 2012 that 'his renewal was in the hands of the Minister' and that he would be 'advised as soon as we hear from the Minister.'

15. It would be unfortunate and inappropriate if supervisors, especially the Chief Executive Officers of Public Institutions, were to be allowed to withhold appointment letters or any communication channeled through them to other officers working under them in situations where they do not accept or agree with the contents of such communication. This would be a recipe for disaster which would inevitably undermine good public administration.

16. Given the circumstances of this matter, it would have been appropriate for the Director General to forward the letter to Eng. Abekah even as he sought the intervention of the Board. Indeed, this was the practical action to take since at the time that the Minister issued the letter of renewal to Eng. Abekah on 19th March 2012, the term of the Board had expired on 13th March 2012. This situation remained so until 18th July 2012 when a new Board was gazetted in the Kenya Gazette Notice No. 10218 and later inaugurated on 4th October 2012, which undoubtedly affected the resolution of the matter for almost one year. This responsibility was not vitiated by the second letter from the Minister that referred the matter to the Board for re-consideration at a time that the term of the Board had expired.

17. Further, the Director General failed to furnish the Commission with a copy of the original Performance Evaluation Report for Eng. Abekah that was forwarded to the Minister for action. This was so despite several requests made to him vide the letters of 12th September 2012, 7th December 2012, 14th January 2013, 26th February 2013 and 25th March 2013. This undoubtedly affected the expeditious resolution of the matter and amounts to malfeasance in public administration.

18. In the circumstances, we find that the conduct of the Director General was improper and prejudicial and expressly amounted to abuse of power, misbehaviour in public administration, unlawful official conduct and unfair treatment in breach of Article 59(2)(h) & (i) of the Constitution and Section 8 (a) (b) & (d) of the Commission on Administrative Justice Act, 2011.

H. DURATION OF RESOLUTION OF THE MATTER

19. The duration taken to finalize the matter of almost one year, from March 2012 to 19th February 2013, was inordinately long, and amounted to unfair administrative action within the meaning of Articles 47, 59 and Sections 2 and 8 of the Commission on Administrative Justice Act, 2011. We have noted that this was almost the same period of the one year

extension of Eng. Abekah's contract by the Minister. In so finding, we have taken cognizance of the absence of the Board from 13th March 2012 to 4th October 2012 when a new Board was inaugurated, but are not convinced that the delayed inauguration of the new Board was a good ground for such inordinate delay. Indeed, Eng. Abekah stated that he could not seek another employment during the period that the matter was still being considered by the Board since that would have meant that he was no longer interested in the renewal of his contract.

20. It would be inexcusable and inappropriate to allow such kind of delay into matters of enormous ramifications on the lives of public officers, and which have the effect of keeping them under suspense for an indefinite period. Indeed, even if the Board had recommended a renewal of contract for one year as earlier suggested by the Minister, it would have been nugatory given the fact that the one year renewal period envisaged by the Minister would have expired on 16th March 2013, just a month after the final decision was communicated to Eng. Abekah.

21. Once Eng. Abekah got to know that his contract had been extended by one year, he was entitled to rely on this appointment. In our view, this created a legitimate expectation for Eng. Abekah that he would continue with his work at the Vision 2030 Delivery Secretariat for another one year. Accordingly, he adjusted his affairs believing that his contract had been renewed by one year.

I. REMEDIAL ACTION

22. Based on the foregoing, we hold and find that the action by the Director General impugned Articles 47 and 59 of the Constitution, and Sections 2 and 8(a),(b)&(d) of the Commission on Administrative Justice Act on fair administrative action.

23. In light of the above, the Commission in exercise of its power under Article 59(2)(j) of the Constitution and Sections 8(g) and 26(g) of the Commission on Administrative Justice Act, **FINDS** that the Vision 2030 Delivery Secretariat should:

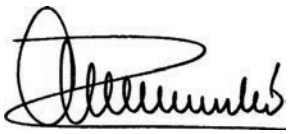
    i.) Pay Eng. Abekah an equivalent of twelve months' salary and allowances in compensation for the one year period of the renewed contract.

    ii.) Facilitate Eng. Abekah to access his personal effects from his former office.

    iii.) Offer an unconditional apology to Eng. Abekah for the treatment meted out to him

24. Eng. Abekah had also sought additional remedies of reinstatement to his former position, and also an apology by the Vision 2030 Delivery Secretariat for unfair treatment. We have considered the circumstances of this matter and come to a conclusion that reinstatement would not be appropriate.

DATED this **10th** Day of **October 2013**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Our Ref: CAJ/PCK/023/71/13/VOL.1-EO

1st October 2013

Mr. Fredrick Ondeng Okello
P. O. Box 468 – 40601
BONDO

Dear Sir,

RE: COMPLAINT AGAINST POSTAL CORPORATION OF KENYA FOR FAILURE TO COMPLY WITH COURT ORDER IN HCCC NO. 688 OF 2007

Kindly receive warmest compliments from the Commission on Administrative Justice.

We make reference to the complaint that you lodged with us on 25th July 2013 alleging manifest injustice by Postal Corporation of Kenya. We have carefully considered the matter and noted the following:

i.) That you lodged a complaint with us on 25th July 2013 whereby you alleged that the Postal Corporation of Kenya had failed to comply with a Court Order in HCCC No. 688 of 2007, *Ainea Likumba Asienja & 11 Others vs. The Postal Corporation of Kenya & Another*.

ii.) That, specifically, the complaint related to the execution of an award of Kshs. 36,560,752.75 issued by the Court on 28th June 2012.

iii.) That subsequent to the Ruling, the Corporation successfully applied for an order of stay of execution, which subsists to date.

iv.) That in the meantime, your advocates on record, Ms S. Musalia Mwenesi Advocates, have been engaging with the advocates on record for the Defendants, Ms Muthoga Gaturu & Company Advocates, with a view to having the matter settled.

v.) That despite the foregoing, you are not impressed with the manner in which your advocates have handled the matter.

vi.) That in the circumstance you have sought the Commission to intervene in the matter by ensuring the execution of the Court Order.

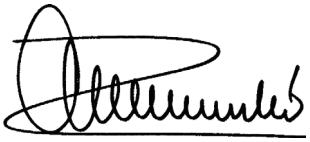
While we have noted the issues raised in the complaint, we wish to inform you that the Commission cannot be seized of the matter based on the fact that it still pending before the Court since the Order for Stay of Execution has not been lifted to enable you realise the award of the Court. In this regard, the matter is still of a judicial intervention and not of administrative justice for which the Commission would assume jurisdiction. Please be informed that the Commission lacks jurisdiction to intervene in this matter by virtue of Section 30(c) of the Commission on Administrative Justice Act. In the circumstances, we wish to inform you that we cannot be seized of the matter, but advise that you pursue it through the judicial process.

Kindly further note that should your disaffection against the Advocates subsist, you may refer the matter to the Advocates Complaints Commission whose address is as follows:

The Secretary
Advocates Complaints Commission
Sheria House, 5th Floor, Harambee Avenue
P. O. Box 48048 – 00100
NAIROBI

We assure you of our highest regards.

Yours sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Our Ref: CAJ/KNH/012/125/2012/YA

27th June 2013

Audrey Ithibu Mbugua
P. O. Box 52418 - 00200
NAIROBI

Dear Mbugua,

RE: YOUR COMPLAINT AGAINST KENYATTA NATIONAL HOSPITAL FOR DENIAL OF MEDICAL SERVICES FOR SEX CHANGE

Kindly receive warmest compliments from the Commission on Administrative Justice.

We make reference to the correspondence in the above captioned matter wherein you raised a number of issues against Kenyatta National Hospital. We have carefully considered this matter and noted the following:

i.) That you lodged a complaint with us on 26th June 2012 wherein you alleged that Kenyatta National Hospital had cancelled your surgical procedure which was scheduled for 17th March 2009 without consulting you and/or giving reasons for the same.

ii.) That you also alleged that the Hospital had inordinately delayed in informing you about the status of your surgery despite several follow-ups that you made to their offices.

iii.) That you sought the Commission's assistance to ensure formal explanation of why the procedure was cancelled and ensure its rescheduling to another date.

iv.) That upon receipt of the complaint the Commission contacted Kenyatta National Hospital on 3rd July 2012 to inquire into the matter and was informed that the Hospital had sought for a legal opinion of the Attorney General who advised them that it was the Hospital's discretion to undertake an operation on you. We were further informed that you were being handled at the Patient Support Centre for medical purposes at the time of our intervention.

v.) That we contacted the Hospital again on 14th July 2012, 21st July 2012 and 27th November 2012 on the matter and further sought relevant documents for our consideration.

vi.) That the Hospital responded on 27th November 2012 and provided the history of the matter. They stated that you were referred to them in 2008 from Mathari Hospital for assessment by a multidisciplinary panel. The Hospital further informed us that when you sought a sex change operation at the Facility in November 2011, they in turn sought the legal opinion of the Attorney General on the legality of undertaking such an operation, and also requested you to identify a close family member to accompany you for an interview before a medical panel. This decision was allegedly informed by the Report of the Assessment done on 21st May 2009 by the multidisciplinary panel of doctors at the Hospital.

vii.) That the Hospital further informed us that you failed to meet the requirements to enable them determine the course of action. They also informed us that they received the opinion of the Attorney General on the matter who indicated that there was no legal obligation or public duty imposed on the Hospital and medical practitioners to perform sex change operation as requested by you, and that the non-performance of the said operation would not violate any of the fundamental rights and freedoms. In addition, we were informed that the Attorney General was not categorical on the legality of such an operation in Kenya.

viii.) That the Commission examined the complaint together with the extant correspondence and identified three key issues for consideration: (a) the legality of the requested sex change operation; (b) whether Kenyatta National Hospital could be compelled to undertake the operation; and (c) the delay by the Hospital to inform you of the status of the operation or provide reasons for their action/inaction.

ix.) That we undertook an extensive research on the matter to determine the way forward. The research considered the relevant constitutional provisions as well as international law on the subject. We further examined the legal position of the subject from other jurisdictions, specifically from the United States, Canada,

Japan, South Korea, Malta, Switzerland, France Spain, Portugal, Republic of Moldova, Turkey, Finland and South Africa.

x.) That the Commission subsequently made an inquiry into the matter vide its letter of 20th March 2013 to the Hospital and a reminder on 23rd April 2013 requesting them to provide their position on the matter, including the inordinate delay and failure to communicate to you for over three years, both letters were copied to you.

xi.) That we received a response from Kenyatta National Hospital vide a letter dated 29th May 2013 wherein they stated that they got seized of your matter through a referral from Mathari Hospital, and subsequently undertook an assessment by a multidisciplinary medical panel in the year 2009, which recommended that you identify a close relative to accompany you for review, but you failed to do so. Further, the Hospital stated that you were never scheduled to undergo the sex-change operation at the Hospital.

xii.) That the Hospital further stated that they sought and obtained the advice of the Attorney General on the matter, and were advised that there was no legal obligation or public duty imposed on the Hospital and medical practitioners to perform such operation, and could therefore not be compelled to do so. Accordingly, the Hospital stated that it had no obligation to perform the said operation and advised that you could seek the said services elsewhere.

xiii.) That in the meantime, we learnt that you moved to court (Milimani Law Courts in Nairobi) seeking to compel the Kenya National Examinations Council to change your name in the KCSE Certificate to reflect your new gender.

xiv.) That the case is still pending before the Court for determination wherein a number of issues have been raised including sex change which were part of the basis of your complaint to the Commission.

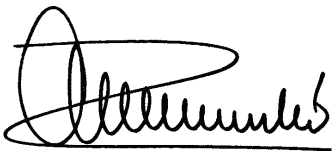
While the Commission has proceeded as aforestated, we have noted that your case before the Court is closely related to, and indeed dependent on, the legality or otherwise of your sex change. Accordingly, the Court will have to determine the question of sex change in order to make a determination on whether to compel KNEC to change your name in the KCSE Certificate as requested by you in the suit.

In the circumstances, we wish to inform you that the Commission is unable to continue pursuing the complaint due to your decision to seek judicial redress thereon. This is because our jurisdiction is ousted by virtue of Section 30(c) of the Commission on Administrative Act which limits our jurisdiction regarding matters that are pending before any court or judicial tribunal. Please be informed that once you instituted the matter in Court, it ceased being of administrative justice and became one of a judicial intervention. Once in that forum, the merits of the matter would be considered by the Court.

In this regard, we are proceeding to close the file on this particular complaint, but are happy to look into any other complaint on any other issue which we may be competent to handle.

We thank you for showing confidence in the Commission and assure you of our highest regards.

Yours sincerely,



CMMR. OTIENDE AMOLLO, EBS

CHAIR OF THE COMMISSION

Cc: Chief Executive Officer
Kenyatta National Hospital
P. O. Box 20723 – 00202
NAIROBI

Our Ref: CAJ/P.ADM/015/1498

21st May 2013

Ms. Susan Mungai
Tel: 0710751134
NAIROBI

Dear Madam,

RE: YOUR COMPLAINT AGAINST THE MINISTRY OF FOREIGN AFFAIRS

Kindly receive warmest compliments from the Commission on Administrative Justice.

I make reference to the above mentioned matter and the meetings held with you at our offices on the same. I have carefully examined the matter together with the availed documents and noted the following:

i.) That the Commission received a referral letter dated 13th June 2012 from the Office of the President which referred the matter to us for appropriate action.

ii.) That upon receipt of the said letter, the Commission requested you to avail yourself for a meeting at our offices with supporting documents to enable us determine appropriate action to take.

iii.) That you came to the Commission Offices on 20th March 2013 where you held a lengthy discussion with us on the issue and stated that your complaint stemmed from a letter that was faxed by the Ministry of Foreign Affairs to the Kenya School of Law concerning your law degree which led to your inability to secure admission at the Kenya School of Law.

iv.) That you also had issues with the University of Greenwich and the University of Guildhall for allegedly providing information which you stated was inaccurate and prejudicial to your application for admission at the Kenya School of Law.

v.) That you informed the Commission that you did not wish the Commission to inquire into the basis of the refusal by the Kenya School of Law to admit you in to the Advocates Training Programme

vi.) That we subsequently communicated our position on the matter to you vide our letter of 22nd March 2013 wherein we informed that we could not inquire into the matter for reasons that the Universities complained against were outside Kenya and, therefore, did not fall within the mandate of the Commission. In addition, the said universities were not public institutions within the meaning of the Constitution and the Commission on Administrative Justice Act.

vii.) That you were dissatisfied with the decision of the Commission and appealed to me vide a letter of 25th April 2013 for a review of the decision.

viii.) That I considered your request and vide a letter dated 26th April 2013, granted you a chance for a further discussion on the matter on 29th April 2013.

ix.) That during the Meeting, you reiterated that you did not wish the Commission to inquire into the reasons why the Kenya School of Law failed to admit you into the Advocates Training Programme.

x.) That with regard to the other complaints, you were requested to obtain evidence that the Ministry of Foreign Affairs had faxed the documents to the Kenya School of Law and a copy of the letter you had written to the Ministry of Foreign Affairs requesting assistance in your quest for admission to the School. In addition, you undertook to avail a copy of the letter from the then area Member of Parliament confirming admission by officers who sent the documents from the Ministry of Foreign Affairs to the Kenya School of Law.

I have considered **ALL** the facts of this complaint, the deliberations of our several meetings with you together with the available documents and the circumstances of this matter and have come to the conclusion that the complaint is not sustainable and falls for closure based on the following grounds:

i.) ***Non-admission by the Kenya School of Law:*** You had requested the Commission not to make inquiries into the failure by the Kenya School of Law to admit you into the Advocates Training Programme. However, we noted that although you did not wish the Commission to deal with this matter, it nonetheless formed the crux of your complaint.

ii.) ***CAJ Jurisdiction over the Universities of Greenwich and Guildhall:*** These universities are situated in the United Kingdom where you undertook your university education and by virtue of the Commission on Administrative Justice Act, the Commission lacks jurisdiction over them. In addition, the said universities do not fall within the scope of state or public offices within the meaning of Article 260 of the Constitution and Section 2 of the Commission on Administrative Justice Act. We further undertook an Internet search to establish the alleged affiliation to the Multi-Media University in Kenya, but did not find anything as to show a nexus to make them a "public institution" within the law in Kenya. In any event, these are separate and distinct institutions with legal personalities in their respective legal systems. In the circumstances, we find that the said universities are not amenable to the jurisdiction of the Commission.

iii.) ***Transmittal of Letter by the Ministry of Foreign Affairs to the Kenya School of Law:*** The Commission examined all the documents availed by you, but did not find evidence that the Ministry wrote a letter to the Kenya School of Law stating the alleged facts. On the contrary, vide a letter dated 11th October 2007, the Ministry acknowledged faxing the information that they received from the Kenyan High Commission in London. In addition, there is no evidence that the documents were faxed by Mr. Allan Mburu as alleged, on instructions of the Ministry. In any event, you appear not to have any problem with the sending of the documents, but instead were unhappy with the contents of the documents which you stated were false. This is clear from the fact that you have not raised issue with yet another letter from the Ministry of 11th October 2007, which unlike the first, was now favourable to you. We hold the view that, your wish for the Commission not to inquire into the veracity of the said documents precludes us from holding the Ministry to have acted improperly.

Second, you failed to avail a copy of the letter you wrote to the Ministry of Foreign Affairs in 2006 seeking their assistance in getting information from the universities in the United Kingdom. This letter is central to this complaint in that it would have enabled us to determine the scope of your request to the Ministry and whether they went outside the authority given to them. In this regard, it was unclear the exact wording of your request, thus the Commission could not determine the impropriety of the Ministry's action in this matter.

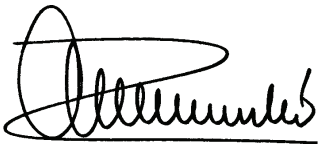
Third, the letter from the area Member of Parliament to the then Minister for Justice, National Cohesion and Constitutional Affairs, the late Hon. Mutula Kilonzo, had requested for investigations into the complaint to determine whether the cancellation of your documents for admission to the Kenya School of Law was proper. The letter did not indicate or allege any malfeasance or involvement of anybody at the Ministry as alleged.

While the Commission has taken note of your predicament, we are of the considered opinion that it is not possible to find any malfeasance against the Ministry of Foreign Affairs in the absence of the requested documents. Accordingly, the Commission is unable to find any act of impropriety or malfeasance on their part. In any event, we have noted that the Ministry's action was geared towards assisting you to gain admission at the Kenya School of Law. Further, we wish to inform you that we do not have jurisdiction over the universities in the United Kingdom, and therefore not amenable to our mandate under the Constitution and the Commission on Administrative Justice Act. However, we wish to advice that you seek advice from a lawyer on the civil remedies which may be available to you in this matter.

In the circumstances, we wish to advice that we shall proceed to close the inquiry on this particular file, but are happy to look into any other complaint on any other issue which we may be competent to handle.

We assure you of our highest regards.

Yours sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc:

Mr. Mutea Iringo, EBS
Permanent Secretary
Ministry of State for Provincial Administration and Internal Security
Harambee House, Harambee Avenue
P. O. Box 30510 - 00100
NAIROBI

Our Ref: CAJ/M.TRA/004/68/010-FL

22nd March 2013

Joseph Ndungu Mathenge
P. O. Box 66851 – 00800
NAIROBI

Dear Sir,

RE: COMPLAINT AGAINST THE KENYA CIVIL AVIATION AUTHORITY

Kindly receive warmest compliments from the Commission on Administrative Justice.

The Commission notes with concern the messages that you have posted on our Social Media Platform between the diverse dates of 4th to 6th March 2013 in which you showed your displeasure with the Commission in relation to how your complaint had been handled. In particular, your messages on the Platform together with your past correspondences to the Commission have demonstrated discourtesy and intimidation towards the Commission.

In this regard, we wish to state as follows:

1. That you lodged a complaint with our predecessor, the Public Complaints Standing Committee (PCSC), on 18th March 2010 alleging unfair interdiction and failure to pay half your salary and full allowances in line with Section 62 of the Anti-Corruption and Economic Crimes Act, 2003;

2. That on 10th August 2010, PCSC made an inquiry to the Kenya Civil Aviation Authority (KCAA) seeking information on the issue and its urgent resolution. The Kenya Civil Aviation Authority responded vide a letter of 30th August 2010 by stating that you had not been dismissed, but was on suspension after being charged in Court by the Kenya Anti-Corruption Commission (now Ethics and Anti-Corruption Commission);

3. That your conduct in the whole matter has been improper and that you have kept on sending mixed signals in the resolution of this matter. This is illustrated by your various correspondences to PCSC and the Commission indicating that you '***were no longer interested in pursuing the matter through them and that you had full confidence in the competence of the Anti-Corruption Court to dispense with this matter expeditiously, impartially and professionally and very soon I will be able to have these issues addressed by a competent civil court within the framework of the new Constitution***' (copy of letter of 5th May 2010 enclosed);

4. That Section 62 (1)&(2) of the Anti-Corruption and Economic Crimes Act, 2003 provides for half pay of basic salary and full amount of allowances for any public officer on suspension following arraignment in Court on charges of corruption or economic crime. However, Section 62(4) of the Anti-Corruption and Economic Crimes Act qualifies the extent and scope of the foregoing sub-sections by providing that '***this section does not derogate from any power or requirement under any law under which the public officer may be suspended without pay or dismissed***.' In effect, the provisions of Section 62 must be read together in order to arrive at the correct interpretation. Through the various correspondences with KCAA, it was found that they relied on their Manual for Human Resource Administration whose Section 8H(c) provided that 'an officer put on suspension shall not be entitled to any salary.' Accordingly, this meant that you were not entitled to any payment while on suspension. However, this position was not final and could be legally challenged in light of the new Constitution and other relevant laws.

5. That upon receiving correspondences from you, the Commission invited you to a meeting, which was subsequently held on 6th March 2013 at the Commission's Offices. During the meeting, you were requested to avail a copy of the Judgment you referred to in your earlier letter to the Commission on the same subject matter which had just been determined by the Industrial Court to enable the Commission to proceed with your matter. This was so because you had told the Commission that you could get the Judgment since the successful litigant was your friend who had a similar matter against the National Social Security Fund.

   However, three days later, on 9th February 2013, the Commission received a letter from you stating a number of issues key among them that ***'you had forwarded copies of all documents relating to the matter to an advocate, Mr. Muthui Kimani, to study and file an application at the Industrial***

Court, and advise whether your constitutional right to administrative justice had been breached by KCAA and the Commission and suggest an appropriate remedy in case of breach.' The Commission subsequently wrote to you on 22nd February 2013 requesting you to furnish us with the aforestated Judgment and further to confirm whether you had filed the matter at the Industrial Court as stated in your earlier letter. However, regrettably, you have not furnished us with the said Judgment or responded to our letter. As you may be aware, the said Judgment would have strengthened the earlier position of the Commission in relation to your matter, which would inevitably require an analysis of the Judgment.

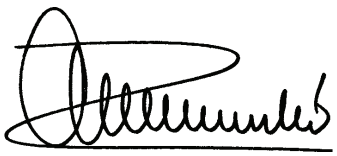
To our surprise, you visited our Social Media Platform and posted messages that disparaged the Commission even after you had been requested by our officer to visit our Website or call the Commission for any updates of your complaint. You went further to state that you had sworn an affidavit and that 'you will make the Commission to account for the mandate Kenyans gave them.'

Whereas the Commission appreciates your right to comment on our performance, your approach has been wanting and discourteous to say the least. We have also noted your lack of co-operation in providing the requested Court Decision as this would provide a strong ground for the Commission's efforts to resolve your complaint.

Kindly note that while we have provided a Social Platform for engagement generally with the Commission, abuse of the Platform negates its very purpose and continuance thereof can be actionable. On the substantive matter, having failed to avail documents sought and having opted for judicial intervention, our jurisdiction is thus ousted by Section 30 of the Commission on Administrative Justice Act. As such, we shall treat this matter as referred to the judicial sphere and close our file.

Kindly take note accordingly.

Yours sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Cc:

Colonel (Rtd) Hillary K. Kioko, MBS, OGW
Director General
Kenya Civil Aviation Authority
KAA Complex, JKIA
P. O. Box 30163 – 00100
NAIROBI

Our Ref: CAJ/PPOA/000/459/2013

17th January 2013

Shailesh Patel

Africa Infrastructure Development Company

NAIROBI

Dear Sir,

RE: COMPLAINT ABOUT DIRECT PROCUREMENT BY THE INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION

Kindly receive warmest compliments from the Commission on Administrative Justice and acknowledgement of your complaint of 15th January 2013 on the above mentioned subject. The Commission is a Constitutional Commission established under Article 59(4) of the Constitution and the Commission on Administrative Justice Act, 2011.

The Commission is empowered to, among other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. Further, the Commission has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

In the conduct of its functions, the Commission has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, issue summons and require that statements be given under oath, adjudicate on matters relating to administration of justice, obtain relevant information from any person or Governmental authority and to compel the production of such information.

We have carefully perused this Complaint and noted the following:

1. That you formally lodged a complaint with us on 15th January 2013;
2. That the complaint was against the Independent Electoral and Boundaries Commission (IEBC) for directly procuring the printing of ballot papers by M/s Smith and Oozman Company of the United Kingdom for the March 4th 2013 General Elections, and the Public Procurement Oversight Authority (PPOA) for failing to take action against IEBC for the direct procurement;
3. That you lodged a complaint with IEBC and PPOA seeking to reverse the decision of IEBC on direct procurement;
4. That part of your complaint relates to a South African Company, PAARL MEDIA, which you have stated has capacity and is willing to print and supply the ballot papers to IEBC for the March 4th General Elections;
5. That by the time of lodging the complaint, two cases had been filed in the High Court, by M/s Kalamazoo Secure Solutions Limited, Ren-Form CC Company and Aerovote Limited, seeking to achieve a similar objective, that is, reverse IEBC's decision on direct procurement; and
6. That on 11th January 2013, Hon. Justice David Majanja of the High Court gave directions on the matter in preparation for its full hearing and determination.

We have considered **ALL** the facts of this case and its circumstances and have come to the conclusion that the Commission cannot be seized of the matter. The reasons are as follows:

1. The matter, being a procurement issue, falls within the mandate of the Public Procurement Oversight Authority as per Section 9 of the Procurement and Disposal Act. The Section requires PPOA to, among other things, ensure compliance with the Act and Regulations. Part of this mandate would include undertaking investigations as per Section 102 of the Act. In addition, candidates to a procurement process are entitled under Section 93 of the Act to seek review of the procurement by a procuring entity, in this case IEBC, by lodging a complaint for review with the Public Procurement Administrative Review Board. According to Section 93(2)(a) of the Act, the request for administrative review may relate to the choice of a procurement procedure by a procuring entity. The Commission has noted from the Complaint that the matter was reported to PPOA which undertook to investigate and take appropriate action.

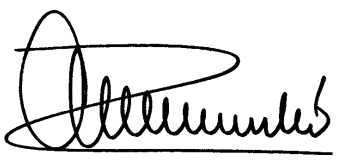
2. Once the matter was instituted in Court, the issue ceased being of **"Administrative Justice"** and became one of **Judicial intervention**. In line with Section 30(c) of the Commission on Administrative Justice Act, 2011, the jurisdiction of the Commission is ousted, if the matter was referred to Court there before.

3. The request to the Commission to assist you in getting specifications of the ballot papers required and complete documentation of the process may not be sustainable in the face of the Constitution. While the Commission appreciates the right of access to information under Article 35 of the Constitution, this right only obtains to Kenyan citizens. Indeed, this was aptly captured by the High Court in ***Famy Care Limited vs Public Procurement Administrative Review Board and Kenya Medical Supplies Agency, Nairobi Petition No. 43 of 2012***, that the right is only available to Kenyan citizens. It is clear from the Complaint that the main gist is to have a South African Company, PAARL MEDIA, to print and supply the ballot papers to IEBC for the March 4th General Elections. This Company is certainly not a Kenyan citizen within the meaning of Article 35 of the Constitution of Kenya, and cannot, therefore, invoke this provision for information to be availed to it.

4. In as much as the matter is administrative in nature, the request by yourselves and the circumstances of the case is such as to further the commercial interest of a party or potential party to a procurement process. Based on this, the Commission may not act is such a way as to further or be perceived to further the commercial interest of any party, but would only be concerned with substantive and procedural administrative fairness.

In the circumstances, we wish to advise that we are unable to be seized of the matter, but have duly referred the same to PPOA for necessary action and update.

Yours sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Our Ref: CAJ/POL/015/22/08-FL

4th September 2012

Beatrice Wandia Njoroge,
P.O Box 70791,
NAIROBI.

Dear Madam,

RE: YOUR COMPLAINT AGAINST THE ONGATA RONGAI POLICE STATION

Kindly receive warmest compliments from the Commission on Administrative Justice (CAJ).

Upon review of your file, we note that you had reported the same matter to several institutions including: the Kenya Anti corruption Commission as it then was, the Coalition on Violence Against Women (COVAW-K), the Commissioner of Police and the Prosecutor Kibera Law Courts.

We nonetheless took it upon ourselves to take action on your matter as hereunder;

i.) You first lodged your complaint with PCSC as it then was on the 7th August, 2008 against the Ongata Rongai Police Station and one Mr. Makamara.

ii.) On 24th September, 2008 and 15th April, 2009 respectively, the said Committee brought the matter to the attention of the Commissioner of Police.

iii.) From our records, we note that on the 24th March 2010 you were charged with the offence of creating disturbance in a police building, contrary to section 60(1) of the Police Act to which you were arraigned in Court-Criminal case no 1536/2010.

iv.) Thereafter, you lodged your complaint a second time with the Commission vide your Complaint Form dated14th March 2012.

v.) The matter was brought to the attention of the Director of Police Complaints vide our letter dated 26th March 2012 which was also copied to you.

vi.) The Police vide a letter dated 11th April 2012 whose contents were concisely explained to you rebutted your allegations and stated that investigations with regards to your complaint were undertaken and concluded.

vii.) You rebutted the contents of the Police letter to which the Commission carried out an inquiry on the matter by visiting your residence at Ongata Rongai, interviewing various people, and also held a meeting with you in full plenary.

viii.) A Report on the findings of the aforesaid inquiry was submitted to the Commission and its contents noted.

ix.) That the Commission took note of your unbecoming conduct on the 20th June, 2012 at the Commission Offices where you expressed yourself in a manner that was discourteous and lacking in respect to which you thereafter apologized.

x.) That on 21st June, 2012, the Commission invited you for a meeting with the Chair and later with its Commissioners. After a lengthy discussion, you were able to convey your complaints to which you were advised that the Commission will revert to you on the same.

xi.) That on 16th July, 2012, the Vice Chair of the Commission undertook further investigations into the matter by interrogating other persons, including some of your relatives and friends.

Having carefully considered the various copious correspondence, the various reports and the facts of the matter, we have come to the following conclusions:

a) You have made various reports against the Police and other private individuals, some of whom have also made reports against you.

b) You specifically complained of inaction by the Police and conspiracy in abetting the murder of your husband and several attacks.

c) You alleged that the attacks were aimed at disinheriting you and your family of land and developments on the land.

d) We have found no evidence of conspiracy or inaction on the part of the Police. We urge you to forward your statement on your last attack, and follow-up the P3 Form to enable the Police undertake necessary prosecution. If, after providing these, the Police decline to prosecute, we shall be happy to intervene.

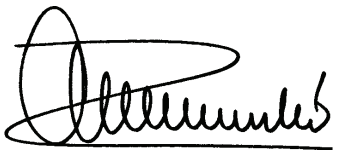
e) Similarly, we have found no evidence of conspiracy to disinherit you and your family. We have not established any land dispute and note that your position is safe and secured by the Succession Act and the reformed Land Legislation. Further, we have found no connection to the death of your late husband in respect of whom all indications are that he died of natural causes based on the autopsy report.

f) While it is not for us to delve into questions not framed for our attention, we wish to observe that it might serve you well to call close family members for deliberations and emotional/ psycho-social support. In the event, and noting the many squabbles you appear to have had with various neighbours, it may serve you well to secure alternative accommodation while leaving the place in question for rental purposes.

While we have reached the specific conclusions stated above, these are restricted to the instances examined, and should be happy to receive any complaint and investigate **any other** issue as may arise to your prejudice.

We assure you of our highest regards.

Yours sincerely,



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

Copy to: Mr. Mathew Iteere
Commissioner of Police
Vigilance House, Harambee Avenue
NAIROBI

IN THE MATTER OF COMPLAINT BY MS NANCY KHISA AGAINST THE KENYA COPYRIGHT BOARD

A. THE ALLEGATIONS

The Complainant, Nancy Khisa, lodged a complaint to the Commission on 3rd April 2012. She alleged that she was appointed as a Senior Public Communications Officer by the Kenya Copyright Board on 6th February 2012. She narrated that she resigned from her previous employment, and accepted the offer and reported to her new work station. Thereafter she was informed that her appointment had been cancelled on the grounds that the appointment letter was mistakenly sent to her due to a technical error. She concluded her allegations by remarking that her employment was terminated for no justifiable reason and that the same was done contrary to laid down procedures.

B. THE ACTION AND RESPONSE

Having received the complaint, the Commission forwarded to the Executive Director Kenya Copyright Board a letter detailing those allegations of the Complainant on 22nd June 2012. The Commission sought that the Board reverts to it, clearly indicating its position on the same.

The crux of the Respondent's response was that there was a technical error in the Human Resource Department which was undergoing a transition, and that a Letter of Offer was sent to the Complainant in error. The Board further informed the Commission that it only realized the error in March 2012, and that the Complainant was duly notified of the same, and her appointment revoked. The Board further alleged that it did not cause the resignation of the Complainant from her previous employment since she was unemployed at the time.

C. THE REJOINDER

The Commission duly forwarded the response to the Complainant, who replied by her letter of 19th July 2012. In her reply, the Complainant maintained that:

i.) She was interviewed on 19th December 2011, notified of success in the interview on 6th February 2012, and instructed to report, which she did, as of 1st March 2012.

ii.) She was, in the course of this time, nominated as an ISO champion for the Department.

iii.) She had been issued with a letter of appointment effective 13th February 2012, duly adjusted her affairs and settled for work, only to be called and advised her appointment was in error, on 8th March 2012. However, due to intervening circumstances, as she was expectant, she was only finally, asked to hand over on 2nd April 2012.

iv.) She bears no responsibility for the alleged error, and believes she was rightly competitively recruited. In any event, the contract was sealed upon execution of the Letter of Offer.

v.) She had been working for a funded NGO before, whose funding was temporarily suspended, but that all her manager colleagues were thereafter recalled once funding resumed. She could not then be recalled, having started working for the Kenya Copyright Board.

D. FINDINGS

The Commission has analyzed the facts of this matter which largely uncontested. What is in contest action is the effect of the action taken against the Complainant namely, revocation of her appointment on the ground of a mistake or error.

The Commission makes the following findings:

a) That much as it may be probable that an error may have occurred, it is inconceivable that such a mistake should take months to discover, after the complainant had reported and even worked for several weeks.

b) That in any event, the responsibility for such mistake falls on the Board, and the consequences thereof cannot be visited upon the Complainant.

c) Pursuant to the issuance of a letter of appointment to the Complainant and her acceptance of the appointment, a contract of employment had been lawfully created by the two parties. For such a contract to be revoked then there had to be in existence justifiable grounds that are either envisaged in the law or in the Code of Conduct of the organization. Certainly, a purported mistake on the part of the employer to have notified and employed the wrong candidate is not one such ground and cannot form the basis of revocation of contract. Such revocation is in violation of Article 47 of the Constitution that grants each and every citizen a right to fair administrative action.

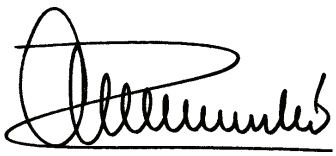
We hold and find that the administrative action of the Board impugned Article 47 of the Constitution and was unjust and unfair.

In light of the above, and considering that the Complainant was on a six (6) months probation period, and had been paid one month's Salary in Lieu of Notice, the Commission, in exercise of its power under Article 59(2)(j) of the Constitution, and Section 8 (g)

of the Commission on Administrative Justice Act, 2011 FINDS that the Kenya Copyright Board should pay to the Complainant an equivalent of Two Months' Salary in compensation for loss she has suffered as a result of the action of the Board.

The said sums are to be remitted to the Complainant immediately, with an apology over the mix-up. In turn, the Complainant will pursue no further action or issue relating to the short stint of employment with the Kenya Copyright board.

DATED this **13th** Day of **August 2012**



CMMR. OTIENDE AMOLLO, EBS
CHAIR OF THE COMMISSION

JUDICIAL DECISIONS

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REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO 408 OF 2013

BETWEEN

COMMISSION ON ADMINISTRATIVE JUSTICE…..…….PETITIONER

AND

JOHN NDIRANGU KARIUKI..……1ST RESPONDENT

INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION…..…….2ND RESPONDENT

JUDGMENT

Introduction

1. This is the curious case of John Ndirangu Kariuki. He is an elected member of parliament. He was elected in 2013. He ought to be a venerable gentleman. The Petitioner is however convinced, very convinced, that John Ndirangu Kariuki ought not have been on the ballot as he had been convicted of a disqualifying offence in 2004.

2. The Petition raises a critical question of the role of the Independent Electoral and Boundaries Commission's role in the registration of candidates for election to elective or public bodies.

The Parties

3. The Petitioner is a constitutional commission established by the Commission on Administrative Justice Act (Cap 102A) of the Laws of Kenya pursuant to Article 59(4) of the Constitution.

4. The 1st Respondent is the Member of Parliament for Embakasi Central Constituency. He was elected to the National Assembly during the general elections conducted in the year 2013.

5. The 2nd Respondent on the other hand is also a commission. It is created under Article 88 of the Constitution. It is charged with the mandate of overseeing elections to elective bodies and offices established by the Constitution.

6. The Petitioner ,in its petition , seeks the following final orders:

(i) Declaration that the 1st Respondent was not qualified to vie for the position of Member of Parliament for Embakasi Central constituency under the constitution and Elections Act, 2011.

(ii) **[For]** ***a declaration that the 2nd Respondent in failing to find that the 1st Respondent was qualified acted in dereliction of its constitutional and statutory duty***

(iii) For a declaration that the office of member of parliament for Embakasi Central Constituency has become vacant by virtue of Article 103(1) (g) of the Constitution

(iv) That Costs of this petition be met by the Respondents

(v)Any other relief that this court deems fit to grant.

7. The Petition is supported by the affidavit of Leonard Ngaluma together with the written submissions filed on 5 November 2015.

The Petitioner's case

8. The Petitioner states that it is empowered under Article 249(1) and 59 of the Constitution and Section 8 of the of the Commission on Administrative Justice Act to investigate any conduct in state affairs, complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unresponsive official conduct and misbehaviour in public administration. Further the Petitioner states that it promotes constitutionalism in addition to addressing improper conduct.

9. It is the Petitioner's case that the 1st Respondent was unlawfully cleared by the 2nd Respondent to contest for the seat of Member of Parliament for Embakasi Central Constituency. The Petitioner avers that the 2nd Respondent unlawfully cleared the 1st Respondent to vie for the position, and subsequently gazetted him as the duly elected member of the National Assembly for Embakasi Central Constituency notwithstanding the

express provisions of Article 99(2)(h) of the Constitution and section 24(2) of the Elections Act ,2011.

10. Additionally, it is the Petitioner's case that Article 99(2)(h), whose provisions have been replicated in section 24(2)(9)(h) of the Elections Act, sets out the qualifications and disqualifications for elections as Member of Parliament. Further, Article 99(1)(b) of the Constitution outlines the qualifications for election as a member of parliament and states that a person is eligible for election as a Member of Parliament if the person, inter alia, satisfies any educational and ethical requirements prescribed by the Constitution or by an Act of Parliament.

11. The Petitioner avers that under Article 99(2) of the Constitution, a person is disqualified from being elected as a member of parliament if the person is found in accordance with any law to have misused or abused a state office or public office or in any way to have contravened Chapter six of the Constitution.

12. The Petitioner contends that the 1st Respondent did not meet the requirements as set out in law and was therefore not qualified for election as a member of parliament, as he had been convicted of two counts of abuse of office on the 14th January 2004 by the Anti-Corruption Court in Nairobi in ***Anti Corruption Court Criminal Case No 25 of 2002; In re Republic versus John Ndirangu Kariuki & another*** and subsequently sentenced to a fine of Kshs 100,000 on each count. In default, the 1st Respondent was to serve a jail term of one year on each count.

13. The Petitioner avers that it informed the 2nd Respondent on 14th December 2012 about the status of the 1st Respondent in relation to his [dis]qualification under Article 99 of the Constitution and Section 24 of the Elections Act. The 1st Respondent had honoured the sentence without preferring any appeal. In addition, the Petitioner states that it furnished the 2nd Respondent with all the relevant documents confirming the conviction.

14. It is the Petitioner's case that having been charged and convicted of abuse of office for which no appeal had been preferred, the 1st Respondent's character and personality neither bring honour to the nation and the dignity to the office he holds nor promotes public confidence in the integrity of a public office required by the Constitution.

15. The Petitioner averred that the Election Petition filed by a third party against the 1st and 2nd Respondent seeking to challenge the nomination and subsequent election of the 1st Respondent as a Member of parliament in view of his conviction was dismissed on 24th May 2013 on the basis that the petitioner therein was not a competent legal person known to law and therefore incapable of bringing the petition in its own name.

16. It is the Petitioner's case that the 2nd Respondent acted in blatant abuse of the Constitution, the Elections Act, the Commission on Administrative Justice Act, breach of trust and abused power by clearing the 1st Respondent to contest for elections as Member of Parliament and subsequently gazetting him as having been duly elected.

17. According to the Petitioner the 1st Respondent is not fit to assume and or hold any public office within the Republic of Kenya and his holding of office as a Member of Parliament is in contravention of the Constitution and he ought to vacate office in accordance with Article 103(1)(g) of the Constitution. Article 103(1)(g) provides that the office of a Member of Parliament becomes vacant if the member becomes disqualified for election to parliament under Article 99(2)(d) to (h) of the Constitution.

18. In these respects, the Petitioner contends case that the 2nd Respondent abdicated its obligation and fraudulently and unlawfully cleared the 1st Respondent to contest for election. According to the Petitioner the 2nd Respondent was fully aware that the 1st Respondent was a disqualified person.

19. The Petitioner avers that the 1st Respondent could not therefore lawfully assume and or hold the office of Member of Parliament since his election as the Member of Parliament for Embakasi Constituency was null and void. The assumption of office and the continued holding of office by the 1st Respondent as Member of Parliament for Embakasi Central Constituency, accordingly contravenes Article 73(1) of the Constitution. The Petitioner contends that even though the 1st Respondent filed judicial review proceedings against the 2nd Respondent being Judicial Review Application No 452 of 2012, the same was dismissed on the 28th January 2013.

The 1st Respondent's case

20. The 1st Respondent opposed the petition by way of a Replying Affidavit sworn on the 9th November 2015.

21. He contends that the Petition challenges his eligibility and consequential membership to the National Assembly by reference to Articles 99(1)(b) and 99(2)(h) of the Constitution and Sections 24(1) (b) and 24(2)(h) of the Elections Act which provisions of the law are on eligibility for one to contest for a seat in parliament. According to the 1st Respondent, the appropriate forum for such challenge is through an election petition filed before an election court.

22. The 1st Respondent also contends that the petition is an abuse of the court process, only intended to harass and distract him from discharging his functions as the Member of Parliament for Embakasi Central Constituency.

23. It is also the 1st Respondent's case that the provisions of Article 99(2)h of the Constitution cannot be applied retrospectively and that the petition seeks to do exactly the opposite.

24. The 1st Respondent also contends that he had been cleared to contest for the elective public position by yet another independent commission in the Ethics and Anti-Corruption Commission prior to being cleared by the 2nd Respondent. The clearance by both Commissions, states the 1st Respondent, was after a full disclosure of all relevant facts. The 1st Respondent denies any fraud.

25. In these respects, the 1st Respondent asserts that having been cleared by the Ethics and Anti-Corruption Commission, which decision was never challenged in court, it is not open for the Petitioner to question his eligibility, to contest and hold the seat of Member of Parliament for Embakasi Central Constituency, on ethical grounds and the petition should be dismissed.

26. Finally, it is the 1st Respondent's case that Article 99(3) of the Constitution provides that a person is not disqualified under clause 2 unless all possibility of appeal or review of the relevant sentence or decision has been exhausted. The 1st Respondent contends that he has a pending application for leave to institute appeal out of time and therefore the issue of him not being eligible to contest or hold office does not arise, as such the 1st Respondent states that he is yet to exhaust his appeal avenues.

The 2nd Respondents case

27. The 2nd Respondent also opposed the Petition through the replying affidavits of Moses Kipkogei.

28. The 2nd Respondent contends that it is an independent commission under Article 88 of the Constitution with the exclusive mandate of registering candidates for elections and not subject to the direction and control of any person or body.

29. It is the 2nd Respondent's case that the petition impugns the validity of the election of the 1st Respondent as the Member of Parliament for Embakasi Central Constituency and the orders being sought are governed by Article 105 of the Constitution as operationalised by section 80 of the Elections Act 2011. The orders can only be determined by way of an election petition.

30. The 2nd Respondent asserts that Article 105 gives the High court exclusive jurisdiction to hear and determine election matters. As such the timelines set for the determination of election related matters is strict mandating that the same be heard and determined within a period of six months. The petition is therefore brought in breach of the rules and the set timelines, so contends the 2nd Respondent.

31. The 2nd Respondent refutes having unlawfully cleared the 1st Respondent to vie for the seat of Member of Parliament for Embakasi Central constituency. The 2nd Respondent contends that the 1st Respondent fully disclosed in his nomination papers that he had been convicted offences under the Penal Code, but had sought to appeal against the conviction in High Court Misc. Criminal Application No.614 of 2012(Nrb).

32. The 2nd Respondent asserted that while Article 99(2)(h) of the constitution provides that a person is disqualified from being elected as a member of parliament if the person is found in accordance with any law to have misused or abused a state office or public office or in any way contravened Chapter six of the Constitution, the provision is qualified by Article 99(3) which provides that a person is not disqualified to vie for the position of member of the National Assembly unless all possibility of appeal or decision has been exhausted.

33. The 2nd Respondent asserts that having been shown the letter by the 1st Respondent showing that an appeal was being preferred , the 2nd Respondent was constitutionally duty bound to allow the 1st Respondent to contest the elective position.

34. It is further the 2nd Respondent's case that the decision to clear the 1st Respondent to contest the elective post was not appealed against before the 2nd Respondent's dispute resolution committee. Provision for appeal is given under Article 88(4)(e) as read with section 74 of the Elections Act and section 4 of the Independent and Electoral and Boundaries Commission Act together with all the rules of procedure.

35. Urging that the 2nd Respondent had no duty to investigate the matter further, the 2nd Respondent contends that the only investigative function vested in the commission is as provided under section 4(1) of the Independent Electoral and boundaries Commission Act to investigate and prosecute electoral offences by candidates, political parties or their agents pursuant to article 157(12) of the Constitution.

36. The 2nd Respondent further states that for the purposes of clearing any candidate the commission relies on the self-declaration, statutory declaration as well any report of the Ethics and Anti-Corruption Commission which is mandated with enforcement of Chapter six of the Constitution on leadership and integrity. In this case, the 2nd Respondent asserts, no report impugning the eligibility of the 1st Respondent to vie for membership of parliament was received from the Ethics and Anti-Corruption Commission and as such the 1st Respondent had to be cleared him.

37. According to the 2nd Respondent, Article 99(2) of the Constitution and Section 24(2) of the Elections Act 2011

are qualified and have to be read together with Article 99(3) of the constitution and section 24(3) of the of the Elections Act 2011 which allow for rights of appeal or review to be first exhausted.

38. The 2nd Respondent denies in any way having fraudulently, unlawfully or negligently abdicated its obligation.

39. In closing, the 2nd Respondent urges that the court should take into consideration the effect that the orders sought would have on the constituents of the affected electoral area and the special nature of elections in the country and interpret the law strictly.

ARGUMENTS IN COURT

40. The petition was urged by way of written submission filed in court and highlighted by Mr Yuvinalis Angima for the Petitioner and Mr Elisha Ongoya for the 1st Respondent. Ms. Sarah Okimaru advocated for the 2nd Respondent.

Petitioner's submissions

41. During its submissions in court, the Petitioner restated its case that the 2nd Respondent knew that the 1st Respondent was not qualified to run for election but none the less cleared him to contest as he is a convict. Counsel submitted that this amounted to dereliction of the 2nd Respondent's constitutional duty. Counsel further submitted that no evidence of appeal had been submitted. Likewise, counsel submitted that there was no evidence that the application for leave to file an appeal had ever been allowed.

42. Counsel further submitted that the court had jurisdiction to entertain the matter as the core issue before the court was not an election petition but only a question as to whether the relevant provisions of the Constitution had been observed.

43. The Petitioner further submitted that even though the issues raised in the current petition are similar to those which had been raised in Election Petition No 8 of 2013, the Petitioner was not a party to the latter petition and in any event the latter petition was never determined on its merits. Then relying on the case of **Dr Thuo Mathenge & Another v Nderitu Gachagua & 2 others [2013]** eKLR, counsel submitted that the court had jurisdiction to determine issues of nomination. Counsel in concluding urged the court to avoid any technicalities and allow the Petition instead.

1st Respondent's submissions

44. In his submissions, Mr Ongoya for 1st Respondent contended that the issues related to Article 99 and Chapter 6 of the Constitution and therefore the values established thereunder were never intended to apply retrospectively.

45. Counsel submitted that the 1st Respondent had demonstrated that even though he had been convicted he had not yet exhausted all mechanisms of appeal and that in any event the burden lay on the Petitioner to show that the appeal or review avenues had been exhausted.

46. Finally, it was counsel's submission that the Petitioner has raised a question of validity of the election of the 1st Respondent which could only be presented within 28 days after the elections. He reiterated that the orders sought are drastic and should be only granted in the clearest of cases.

2nd Respondent's submissions

47. Ms. Okimaru associated herself with the submissions of the 1stRespondent.

48. She reiterated that one should only move the court by way of election petition where a sitting member of parliament's suitability is challenged. She restated that the duty of the 2nd Respondent is to clear candidates and that all was required was full disclosure by the candidates as required by the ethics and integrity statutes. And this had been done. Counsel submitted that the 2nd Respondent could not go beyond Article 99(2)(h) and 99(3) of the Constitution.

DISCUSSION AND DETERMINATION

Issues

49. Five main issues may be reserved here. They are:

a. Whether the court has jurisdiction to determine this petition?

b. Whether there was a violation of Article 99 of the Constitution when the 1st Respondent was allowed to vie and be elected into office?

c. Whether the Articles 3, 10,73 99 and 103 are retrospective in application?

d. Whether the 2ndRespondent abdicated its function and duty under the constitution?

e. Whether the Petitioner is entitled to the orders sought?

50. Before addressing the issues, it would be important to state that the facts are basically not in dispute.

51. There is no controversy that on 14 January 2004 the 1st Respondent was convicted for abuse of office in *Nairobi Chief Magistrate's Anti Corruption Case No 25 of 2002 (Republic v John Ndirangu Kariuki & Another)*. The 1st Respondent was duly sentenced after trial. It is not in dispute the 1st Respondent settled for the option of a fine and paid the fine of Kenya Shillings 100,000/= on each count. It is further not in dispute that the Petitioner protested at the 1st Respondent's nomination. The protest was made to the 2nd Respondent. The 2nd Respondent

however still cleared the 1st Respondent to contest in the general elections of the year 2013. The 1st Respondent won the Embakasi Central Constituency seat and was declared the duly elected Member of Parliament. An election petition was filed by the Kituo Cha Sheria, a nongovernmental organization. The election petition which challenged the 1st Respondent's election was however dismissed for want of standing and or capacity by the petitioner. It was not dismissed on merits.

A question of jurisdiction

52. It is contended by the Respondents that the Petition is an abuse of the process and indeed not a Constitutional Petition but an election Petition in disguise. The Respondents contend that the 1st Respondent can only be removed as a Member of Parliament through an election Petition filed pursuant to and in full compliance with the provisions of the Elections Act (Cap 7). The Respondents add that indeed an election Petition had been filed but the same was dismissed. In consequence, the Respondents state that the court has no jurisdiction to entertain the current Petition or issue the reliefs prayed for.

53. The Respondents placed reliance on the cases of the **Speaker of the National Assembly -v- Hon. Njenga Karume [2008] 1KLR 425** and **The National Alliance Party & Another -v- The Independent Electoral and Boundaries Commission [2013]eKLR,** both for the preposition that where a procedure for the redress of any particular grievance, is laid out and prescribed by the Constitution or an Act of Parliament, that procedure right to be strictly followed. Accordingly, the Respondents stated that the Election Act 2011 which promotes Article 105 of the Constitution clearly outlines the procedure to be followed when the question to be determined by the High Court is whether a person has been validly elected as a member of Parliament or whether the seat has become vacant.

54. The Petitioner's position is that the court has jurisdiction under Article 165(3) of the Constitution as the question before the court is one of Constitutional interpretation and in particular one of the 1st Respondent's constitutional disqualification to run for election to an elective office.

55. The Petitioner further contends that the reliefs sought are merely declaratory which may or may not be granted by the court. The Petitioner additionally points out that the other question is whether a Constitutional Commission in the 2nd Respondent has performed or acted in accordance with the Constitution or abdicated its Constitutional duty.

56. I must point out as has been done on several occasions that a question of jurisdiction ought always to be determined at first instance and on the earliest opportunity. Once the court ascertains that there is want of jurisdiction then it must down its tools and proceed no further with the matter as any decision made in the absence of jurisdiction is of no use and is void: see **Owners of Motor Vessel 'Lillian S' –v- Caltex Oil (K) Limited [1989] 1 KLR 1.**

57. In the instant Petition, the question of jurisdiction had been earlier raised by the 2nd Respondent through a formal application dated 29th September 2013. The 2nd Respondent sought to have the Petition struck out for want of jurisdiction. The application was heard by Justice Mumbi Ngugi on 3rd March 2014. In a reserved ruling delivered on 6th June 2014, Justice Mumbi Ngugi dismissed the application. Effectively, the question of jurisdiction was resolved by the court on 6th June 2014.

58. In dismissing the application challenging the court's jurisdiction, the court further observed as follows:

> ***"[29] In my view, the question that arises is whether the present petition challenges 'the electoral process,' in which case the matter should have been brought within the timelines set out in the Elections Act, being 28 days after the declaration of the results for Embakasi Central Constituency.***
>
> ***[30] As I understand it, the petitioner does not in any way impugn the electoral process resulting in the election of the 1st respondent. Rather, the question is whether he was constitutionally and statutorily eligible to vie for elections, and if he was not, whether the 2nd respondent abdicated its duty by allowing his participation in the elections."***(emphasis mine)

59. The record reveals that the 2nd Respondent thereafter preferred an appeal against Justice Mumbi Ngugi's decision. The appeal is Court of Appeal Civil Appeal No. 257 of 2014. It is still apparently pending. Despite a stay of proceedings herein for 90 days to enable the 2nd Respondent pursue its appeal or obtain a formal stay of proceedings, the appeal has never been prosecuted. There is also no stay of proceedings.

60. I am of the view that with the pendency of the Appeal No. 257 of 2014, it would be inappropriate if not superfluous for me to revisit the issue of jurisdiction and make a further determination thereon.

61. Secondly, there is the fact of specific collateral estoppel or issue preclusion, in other words. This court (Mumbi Ngugi J) has already made a finding that the court has jurisdiction to determine the Petition. It put to rest and entombed that issue at least at the High Court level. I should not and indeed I am precluded through the doctrine of issue preclusion from revisiting the decision on an issue already pronounced on merits by this court

and which the parties are pursuing an appeal.

62. Suffice to point out only that having read the decision by Justice Mumbi Ngugi of 6th June 2014, I state that I entirely agree with the same with the only addition being that this court's jurisdiction *in re* constitutional petitions is founded on Article 165 (3) which reads as follows:

> ***(3) Subject to clause (5), the High Court shall have-***
>
> ***(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;***
>
> ***(c) …***
>
> ***(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of-***
>
> ***(i) the question whether any law is inconsistent with or in contravention of this constitution.***
>
> ***(ii)the question whether anything said to be done under the authority of this Constitution or of any law is inconsiatent with or in contravention of , this Constitution****.(emphasis added)*

63. The questions identified by Justice Mumbi Ngugi as raised by the Petition and also earlier reserved by myself in paragraph [49]above, appear to fall squarely within the provisions of Article 165(3).

64. The Respondents also pointed out that the reliefs sought are of a nature that only an Election Petition court may grant under the Elections Act (Cap 7). I must quickly point out that the reliefs a court considering allegations of violations of the Constitution may grant are not limited or straight jacketed in any way. The court besides making appropriate declarations must also be innovative to fashion such relief as is appropriate for the circumstances of each case and which may be necessary to protect and enforce the Constitution: see **Mary Makokha Baraza -v- Judicial Service Commission & 9 Others [2012]eKLR** and **Fose -v- Minister of Safety and Security [1997] ZACC 6.**

65. I return the verdict that this court has the requisite remit to hear and decide the instant Petition.

Whether there was a violation of Article 99 of the Constitution

66. Put in another way, the issue is whether the Respondents violated Article 99 of the Constitution when the 1st Respondent was cleared to contest for the Embakasi Central Constituency seat during the general elections of 2013.

67. The Petitioner's case in this regard is straight forward.

68. According to the Petitioner the 1st Respondent is a convict. He was convicted in 2004. The conviction entailed two counts of abuse of office. That was in the case of **Nairobi Chief Magistrates Anti-Corruption Case no. 25 of 2002 Republic –v- John Ndirangu & another.** The 1st Respondent was fined Kshs 100,000/= on each count. In default he was to serve one year in jail. That was the sentence. He honoured the non-custodial sentence and paid the fine. He never appealed against either the conviction or the sentence within the prescribed period under the Criminal Procedure Code (Cap 75). Then he went mute. Ten years later, the 1st Respondent filed an application for leave to appeal out of time. The application is yet to be heard.

69. The Petitioner states that it informed the 2nd Respondent of all these facts. Attempts by the 1st Respondent through the judicial process to restrain the 2nd Respondent from acting on the Petitioner's information were also rejected by the court in **Nairobi Judicial Review Application No. 452 of 2012 Republic -v- Commission on Administrative Justice & Another *Ex p* John Ndirangu Kariuki**. The court declined to prohibit the 2nd Respondent from acting on or considering the information availed by the Petitioner on the 1st Respondents alleged disqualification.

70. The Petitioner states that armed with all these facts the 2nd Respondent should not have cleared the 1st Petitioner to contest in the general elections of 2013.

71. In response, the 1st Respondent as well as the 2nd Respondent contend that the issue of the 1st Respondent's competence was already considered by a court of competent jurisdiction and rejected in favour of the Respondents when this court (Kimondo J) dismissed an election Petition filed against the Respondents. The petition raised the same issue.

72. The petition in question was Nairobi Election Petition No. 8 of 2013. It was filed by Kituo Cha Sheria, a non-governmental organization. It was dismissed on 24th May 2013.

73. The 2nd Respondent also states that it never violated the Constitution as the Petitioner had been cleared by the Ethics and Anti-Corruption Commission, which is the constitutional body enjoined to deal with ethical and corruption related issues.

74. Finally, the 1st Respondent also states that he could not be banned from contesting as he was/is yet to exhaust all the possibilities of appealing against the conviction and sentence or of having the same reviewed.

75. The central question in this Petition revolves around Article 88 of the Constitution as well Article 99 of the Constitution.

76. Article 88 deals essentially with the 2nd Respondent's establishment and mandate. In so far as the same is relevant, under Article 88(4)(e) of the Constitution, the 2nd Respondent is under a constitutional compulsion to settle electoral disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to or arising after the declaration of results.

77. The question brought forth by the Petitioner regards the nomination of the 1st Respondent. The Petitioner had prompted the 2nd Respondent to consider the 1st Respondent's qualifications. The 1st Respondent then dragged both the Petitioner and the 2nd Respondent to court over the same. There was definitely, in my view, a dispute over the nomination of the 1st Respondent which the 2nd Respondent was duty bound to resolve absent any resolution by the court.

78. Coupled with various provisions of the law especially section 24 of the Elections Act 2011 as well as Article 99 of the Constitution, the phrase "*disputes relating to or arising from nominations*" under Article 88 must be read and understood liberally to mean such disputes or questions as may arise prior to the nominee being cleared or at the time of clearance or after clearance by the 2nd Respondent. The phrase cannot be limited to challenges raised after a person has been duly cleared by the 2nd Respondent. I have no doubt that in addressing issues regarding the nomination of the 1st Respondent, the 2nd Respondent was duty bound to consider all relevant statutory and constitutional provisions including Article 99 of the Constitution.

79. Article 99 of the Constitution provides that unless disqualified by the Constitution a person is eligible for election as a Member of Parliament if he is a registered voter and is nominated by a political party. If he is not an independent candidate he must be supported by at least one thousand registered voters in the constituency he seeks to represent or, in the case of an election to the Senate, two thousand voters registered in the county. Thirdly, the person must also satisfy any educational, moral and ethical requirements prescribed by Parliament or the Constitution.

80. Article 99(2) of the Constitution states the constitutional grounds for disqualification. The Article reads, in so far as is relevant, that

> ***2. A person is disqualified from being elected a Member of Parliament if the person***
>
> ***a- f ...***
>
> ***g. Is subject to a sentence of imprisonment of at least six months, as at the date of registration as a candidate, or at the date of election; or***
>
> ***h. Is found, in accordance with any law, to have misused or abused a state office or public office or in any way to have contravened Chapter six [of the Constitution].***
>
> ***3. A person is not disqualified under clause (2) unless all possibility of appeal or review of the relevant sentence or decision has been exhausted.*** (emphasis)

81. The Petitioner has invited the court to consider the constitutionality of the 2nd Respondent's actions in not disapproving of the 1st Respondents nomination and in allowing the 1st Respondent to be on the ballot in 2013. The question is whether there was a violation of Article 99 of the Constitution by the Respondents

82. There is need to interrogate the relevant constitutional provisions. A brief reflection and interpretation of the relevant Constitutional provisions is further made necessary when the Respondents contend that the Article 99 was never intended to operate retrospectively.

83. A short rehash of the guidelines on constitutional interpretation may be necessary.

84. Firstly, the Constitution has itself set out a clear parameter for its interpretation. Under Article 259, the Constitution is to be construed in a manner that promotes its purposes, values and principles, advances the rule of law, human rights as well as fundamental freedoms and rights. It must also be construed in a manner that not only permits the development of the law but also contributes to good governance.

85. Secondly, the Constitution ought to be construed in a holistic manner with all the provisions sustaining and supporting each other rather than destroying the other: see **Olum -v- AG [2002] 2 EA 508**

86. Thirdly, while where there is no ambiguity attempts to depart from the straight texts of the Constitutional provisions should be avoided (see **Joseph Mbalu Mutava -v- AG & Another [2014]eKLR**), the widest possible interpretation in its context should always be accorded: see **Advocates Coalition for Development and Environment & Others -v- Attorney General & Anor [2014]3 E A 9.**

87. Fourthly, constitutional provisions containing fundamental rights ought to be given dynamic progressive purposive liberal and flexible interpretation with a view to preserving and expanding the right. Any law, and by extension constitutional provision, which limits fundamental rights or freedoms ought however to be strictly construed to protect the right: see ***Re* The Matter of the Interim Independent Electoral Commission SCK Constitutional Appl No. 2 of 2011 [2011]eKLR at para 51**.

88. It is not in dispute that in contesting for the Embakasi Central Constituency seat the 1st Respondent was exercising his undoubted political right under Article 38(3) (c) of the Constitution. That right is however subject to express constitutional claw-backs indexed under Article 99(2). It is also ought not be in a controversy that by virtue of Article 88 of the Constitution, as promoted by both the Independent Electoral and Boundaries Commission Act (Cap 7A) and the Elections Act (Cap 7), the 2nd Respondent is enjoined not only to participate and regulate processes by which political parties nominate candidates but also to register the nominated candidates. The 2nd Respondent is also under a constitutional command to resolve any disputes arising from nominations.

89. The 2nd Respondent is under a constitutional and statutory duty to receive and register the candidates nominated by various political parties. That is certainly clear from Section 28 of the Election Act (Cap 7) and Article 88(4)(f) of the Constitution. Clearly as well, Article 99(2) of the Constitution and Section 24(2) Elections Act which are distinctively similar word for word, do not anticipate the nomination and consequent registration of a candidate disqualified under both the Article 99(2), and Section 24(2) of the Elections Act.

90. A holistic and purposeful reading of Article 99 of the Constitution would certainly lead to the more plausible conclusion that the 2nd Respondent must not register any candidate who is disqualified by the provisions of Article 99(2) of the Constitution and Section 24(2) of the Elections Act 2011. This is more so where the 2nd Respondent's attention is drawn to the disqualification index whether informally or formally through a challenge to the nomination. It is no doubt the duty of the 2nd Respondent to ensure that unqualified persons are not allowed to register and contest in an election. It would certainly be in line to so hold considering that the Constitution under Chapter 6 cherishes places a very high premium on integrity to hold public office.

91. In the instant case the Petitioner accused the Respondents of violating Article 99(2) of the Constitution, in particular clause 2(h). It is stated that the 1st Respondent was disqualified as he had been convicted of offence which fetched an aggregate fine of Kshs. 200,000/= upon sentencing. The offence entailed two counts of abuse of office. The conviction was in the year 2004.

92. A cursory reading of Article 99(2) (h) of the Constitution would lead to the rather obvious inference that the 1st Respondent fell in the category of those disqualified from contesting for a Parliamentary. The same inference can be made if one reads Section 24(2) (h) of the Elections Act, where abuse of office is also indexed as a disqualification factor. In the instant case the 1st Respondent was found, in accordance with the law to have abused a public office. The finding had been made by a competent court duly seized with jurisdiction after a trial and not through mere public opinion.

93. The 1st Respondent however states and rightly so that Article 99(2) (h) is not absolute but is subject to the provisions of Article 99(3). The latter Article states that the disqualification factors indexed under Article 99(2) do not apply unless "*all possibility of appeal or review of the relevant sentence or decision has been exhausted*".

94. In **Esposito Franco –v- Independent Electoral and Boundaries Commission [2013]eKLR** the court reviewed Article 99(3) and held that the said Article 99(3) applied in relation to Articles 99(2)(g) and (h) of the Constitution.

95. I would certainly agree with that proposition save to add that Article 99(3) applies in respect of the disqualifying factor under Article 99(2) (f) as well. A decision as to a person's bankruptcy may be made by the court or the Registrar General as the case may be pursuant to proceedings commenced under the relevant insolvency laws. Such a decision may be the subject of an appeal or review. Effectively, that would fall under Article 99(3). Article 99(3) applies to the disqualifications indexed under Article 99(2)(f), 99(2)(g) and 99(2)(h). So long as an appeal or review application against a bankruptcy order, a sentence of imprisonment of at least six months or a decision of conviction for abuse or misuse of office is still pending, then a person will not be deemed disqualified. It is a constitutional claw-back which appears to take away the intended gains of Chapter six as well as Article 99(c) of the Constitution but which seeks to promote the rule of law in so far as it recognizes the right to appeal. It must be respected.

96. In the instant case, the 1st Respondent has argued that the protection of Article 99(3) was and is still available to him. The 2nd Respondent supports the same position. Both Respondents contend that the 1st Respondent has not exhausted all possibility of appeal against the sentence and conviction. The basis of the Respondents' argument is an application filed in court seeking to appeal against the conviction and sentence. The application is registered as High Court Misc. Criminal Application No. 614 of 2012.

97. It is to be noted that the application was just that. It was not an appeal as contemplated by Section 350(1) of the Criminal Procedure Code (Cap 75). Instead, the application seeks the permission of the court to appeal out of time. The question is whether such an application would operate as an appropriate bar to any of the disqualification indices under Article 99(2)(f)(g) or (h).

98. It is long settled in law that parties do not have inherent rights of appeal. Appeals are creatures of statute, even

in criminal cases: see for example **Attorney General -v- Shah No. 4 [1971] EA 50.** Appellate jurisdictions spring only from statute and where statute provides for the mode and medium of how that right is to be exercised and it is not taken, the right of appeal is lost.

99. In the criminal justice system, the Criminal Procedure Code (Cap 75) provides for the right of Appeal. Sections 349 and 350 provide for the mode and medium of appeal as well. The Appeal ought to be filed within 14 days from the date the order or sentence appealed from has been made. The appeal is to be made by way of a Petition and a copy of the judgment or order appealed against attached. Where the appeal is not made within the prescribed time then that right will be lost unless the appellate court in exercise of its hermetical jurisdiction extends the time for appeal. The proviso to Section 349 provides as much when it states that:

> ***"provided that the court to which the appeal is made may for good cause admit an appeal after the period of fourteen days has lapsed"***.

Effectively, there will be no appeal unless with the court's permission on the peculiar and particular facts of each intended appeal is granted.

100. Effectively as well, it is clear that an appeal may be filed out of time. The possibility of appeal is in existence even after the time limit for appealing has expired. The judicial discretion whether or not to allow an appeal is strictly with the appellate court and no other person.

101. Article 99(3) is explicit that "*unless all possibility of*" appeal or review of the relevant sentence or decision has been exhausted the disqualification indices will not apply. In my view, it is necessary to give Article 99(3) and in particular the appellation "*unless all possibility of*", a more liberal interpretation.

102. Article 99 provides generally for both qualifications and disqualification of candidates seeking the elective position of Member of Parliament. Oxymoronically, the Article promotes and limits an individual's political rights under Article 38(3). Every adult citizen has a right to be a candidate for public office without unreasonable restrictions. There are constitutional and statutory restrictions but they must not be construed in an unreasonable manner. The limitations must be strictly construed. Article 99(3) is itself not a limitation of any right. Instead, it seeks to enhance rights; the political rights.

103. In my view consequently, the right to apply for leave to appeal out of time is covered and contemplated by Article 99(3) when it refers to possibility of appeal. As the application for leave to appeal can be lodged at any time after the expiry of the statutory fourteen (14) days, it cannot be said that all possibility of appeal or review has been exhausted immediately time expires.

104. It is for the court seized with the application for leave to consider the circumstances, including any delay in filing the application and make a determination whether or not to grant permission for the appeal to be lodged out of time. It could grant permission. It could deny permission. The odds however exist until a determination is made by the court.

105. In consequence, where a party has an application pending before the appellate court seeking permission to appeal out of time such a party cannot be said to be a disqualified candidate until the application for leave has been heard and determined.

106. In the instant case the position duly obtains. There is admittedly an application for leave to appeal out of time. It was filed, perhaps so late in time. This court however lacks the jurisdiction to interrogate the merits of the application. Likewise the 2nd Respondent cannot determine the success or failure of such an application.

107. The 1st Respondent had not exhausted all the possibility of appeal against the sentence and conviction levied on him in 2004 to lead to his automatic disqualification from contesting the seat of member of parliament in 2013.

108. In so concluding, I have had to weigh the weight the Constitution has placed on the need for integrity in leadership for good governance against a similarly weighty premium the same Constitution has placed on the protection and advancement of fundamental freedoms and rights, in this case political rights. The need to promote fundamental rights and see to the realization of the potential of all human beings would tilt towards ensuring that even a convict must have his days in court, including the very last day. That appears to the spirit of Article 99(3) when it talks of all possibility of appeal being exhausted.

Retrospectivity

109. I was urged by the Respondents' counsel to also find that the Constitution does not operate retrospectively. While relying on the case of **Orengo –v- Moi and 12 Others (No. 3) [2008] 1 KLR (EP) 715**, Mr. Ongoya asserted that the Constitution like statutes must be interpreted to operate prospectively. Counsel pointed to Articles 3, 73, 99 and 103 of the Constitution.

110. It is a clear and acceptable legal principle that laws shape to future matters and are not applied to acts of the past unless express provision is made for past time or matters pending. Law in other words ought not be retrospective. The treatise **Maxwell on Interpretation of Statutes 12th Ed 1969 pp 215-224** gives the exposition

that law is deemed to be retrospective when it creates a new obligation or imposes a new duty or attaches a new disability in respect to transactions or considerations already past. **Maxwell** further suggests that law is however not properly called retrospective because a part of the requisites for its action is drawn from a time antecedent.

111. The rationale of the rule must be that law ordinarily is intended to "give fair warning of their effect and permit individuals to rely on their meanings from date of enactment" per Mokgoro J in **Veldman v Director of Public Prosecutions, Witwatersrand Local Division[2005]ZACC 22 (CC)** at **para 26.**

112. The rule against retrospection is however only a presumption. It could be permeated and overcome either by express words in the law itself showing that the provision is intended to be retrospective or by indispensible and discrete implication showing such intention.

113. In **Samuel Kamau Macharia & Another -v- Kenya Commercial Bank Limited & 2 Others [2012]eKLR** , the Supreme Court appreciated that constitutional provisions may act retrospectively.The presumptive effect of the rule against retrospectivity was dealt with when the Court stated as follows:

> ***"At the outset, it is important to note that a Constitution is not necessarily subject to the same principles against retroactivity as ordinary legislation. A Constitution looks forward and backward, vertically and horizontally, as it seeks to re-engineer the social order, in quest of its legitimate object of rendering political goods. In this way, a Constitution may and does embody retrospective provisions, or provisions with retrospective ingredients. However, in interpreting the Constitution to determine whether it permits retrospective application of any of its provisions, a Court of law must pay due regard to the language of the Constitution. If the words used in a particular provision are forward-looking, and do not contain even a whiff of retrospectivity, the Court ought not to import it into the language of the Constitution. Such caution is still more necessary if the importation of retrospectivity would have the effect of divesting an individual of their rights legitimately occurred before the commencement of the Constitution."*** *(Emphasis added).*

114. It ought therefore be relatively clear that the Constitution does not interfere with rights which vested before it came into force. The converse also subsists that laws which are inconsistent with the Constitution even though they were previously purely valid laws also acquire a status of Constitutional invalidity, unless there is an express provision to the contrary or the implication to the contrary is purely overwhelming on a holistic reading of the Constitution.

115. The relevance of Chapter six and alongside it Article 99 is found in the high importance and huge premium the Kenyan people placed through the Constitution in the values of accountability, transparency, integrity and good governance. Those are deemed as national values under Article 10. They thread through the Constitution. I have little doubts that Kenyan people clamoured for these values.

116. I also have little doubts that while it was not the wish of Kenyans that the Constitution opens wounds, the Constitution stands as a stack reminder that only persons of integrity ought to assume positions of leadership with a view to attaining good governance. The Constitution could not certainly have been intended to cleanse persons with criminal records.

117. With regard to candidates for election to Parliament, the wordings of Article 99(2) are relatively clear. The applicable and relevant time is date of registration as a candidate. It matters, in my view, very little when one became of unsound mind or was declared a bankrupt or was sentenced to imprisonment for more than six months. If on the day of registration the event was still intact then he was disqualified. Thus if one was of unsound mind at time of registration as a candidate he was disqualified. Likewise if he was still an undischarged bankrupt, he was also disqualified. The use of the words "is" and "at time of" in all the sub-clauses of Article 99(2) is telling.

118. Clearly, the additional provision at Article 99(3) would imply that the Constitution draftsmen appreciated that most of the liabilities could be rectified and detached either before or even after the promulgation of the Constitution. An adverse finding could be reviewed or appealed against. A conviction or sentence could also be reviewed or appealed against. The cleansing process was to be in accordance with the law. Truly, if dishonesty in the running and management of public affairs had been proven in court of law even prior to the promulgation of the Constitution one could not be expected to argue that subjectively his integrity had been revived, the moment the new Constitution was promulgated.

119. In my view, it makes better sense to hold that the provisions of Article 99 apply and were intended to so apply. Constitutional value would be better promoted and upheld.

In neglect of duty

120. I come to the final question of whether the 2nd Respondent was derelict in the exercise of its duties or abdicated its duties.

121. The 2nd Respondent as I have established was under a constitutional compulsion to register candidates for elections: see Article 88(4)(f). The duty under Article 88(4)(f) is not to be exercised whimsically. It has to be exercised pursuant to constitutional and statutory provisions. The 2nd Respondent does not just register any person as a candidate. Besides being nominated by a political party, a candidate must also meet the constitutional threshold. He must not be disqualified by virtue of any disqualification index under Article 99(2).

122. Like all independent commissions guided by Chapter 15 of the Constitution, the 2nd Respondent is also under a duty to promote Constitutionalism whilst also securing the observance of democratic values and principles. In the execution of its constitutional and statutory mandate, the 2nd Respondent is however independent. It is not subject to the direction and control of any body or person. It is only guided by the Constitution and the law. Where therefore the Constitution says that one is disqualified from contesting an election and a nominated person's eligibility is questioned, it is incumbent upon the 2nd Respondent before registering such a person as a candidate to confirm that the disqualification is indeed applicable.

123. The 2nd Respondent has through its Replying Affidavit in this matter indeed established that it has an elaborate process of clearing candidates before registering them to contest elections. The candidates as well as their respective political parties are expected to fill in an array of forms. They are also expected to execute statutory declarations and confirm that they are qualified and not disqualified, by law for election. The 2nd Respondent also takes the candidates through a questionnaire answered by the candidates under oath. Moral and ethical questions are posed. Candidates are asked whether they have been convicted of offences and sentenced to six months in prison or more. Candidates are asked if they have been subjected to disciplinary or criminal proceedings for breach of the Public Officer Ethics Act or code prescribed there under.

124. In the instant case, the parties are at a consensus that the Petitioner drew the 2nd Respondent's attention to the fact that the 1st Respondent had been nominated by a political party but was disqualified under the Constitution. The 1st Respondent indeed even prompted the 2nd Respondent through court in **NBI JR Appl. No. 452 of 2012Republic –v- Commission of Administrative Justice & The IEBC *Ex p* John Ndirangu Kariuki.** The said suit was dismissed by the court on 28th January 2013. The judgment it stated partly as follows:

> ***"[13]...<u>However at the time these proceedings were instituted there is no evidence that the 2nd respondent had commenced the process of determining the eligibility of the applicant to hold public office</u> and that there was imminent danger that the ex parte applicant was going to be denied the opportunity of being heard before a determination was made. Courts do not issue orders at large in judicial review applications. Whereas such orders may be granted in declaratory suits, the Court is not expected to go to a fishing expedition in an application for judicial review unless it is shown that the applicant's rights and fair hearing have been or are in imminent danger of being contravened"*** (emphasis mine)

125. Evidently, the 2nd Respondent was aware that there was a complaint regarding the 1st Respondent's suitability to contest for an election. Evidently, there existed a complaint that even the 1st Respondent was aware of. The 2nd Respondent as founded by the court did not however act on the complaint.

126. Before me it was contended and submitted that the 1st Respondent having been cleared by the Ethics and Anti-Corruption Commission, another Chapter 15 commission, the 2nd Respondent could do no more than simply register the 1st Respondent as a candidate. There was no evidence placed before me of any attempt after 28th January 2013 [date of decision in Judicial Review] that the 2nd Respondent vetted the 1st Respondent's representations including the alleged existence of an appeal.

127. Truly, the 2nd Respondent is a state organ. It is duty bound "to respect uphold and defend" the Constitution under Article 3 of the Constitution. Secondly, the 2nd Respondent under Article 252(1) has a duty to conduct investigations on its own initiative or on a complaint besides performing its duties independently. It should not be the subject of any control or direction by a third party. Reports by third parties should supplement its work but not direct its work. Such reports should not be the sole and binding basis of its decisions.

128. I have not seen and neither have I read anything

to suggest that the 2nd Respondent indeed performed its duty by investigating the complaint by the Petitioner herein as to the qualification of the 1st Respondent to contest the election of 2013. The totality of my findings would reveal that the 2nd Respondent in simply relying on the report by another party neglected its duties. No wonder there is no status report on the application for leave to appeal which application was filed over ten years after the appeal doors had been shut and which application the 2nd Respondent amazingly and flimsily construed as an appeal.

129. The 2nd Respondent must be faulted.

CONCLUSION

Summary of findings

130. I have arrived at the destinations with regard to the issues reserved for determination.

131. On the issue of jurisdiction, this court had the necessary remit to consider and decide the Petition by as this issue had already been determined by this court (Mumbi Ngugi J) on 6 June 2014. I am obliged to observe the dogma of issue preclusion in the circumstances of this case, considering further that an appeal is currently pending on the same issue before the Court of Appeal.

132. Secondly, I arrive at the conclusion that there was no violation of Article 99 of the Constitution when the 2nd Respondent registered the 1st Respondent as a candidate and allowed him to vie in the 2013 general elections. The 1st Respondent has till date not exhausted all the possibilities of appeal against conviction and sentence. Article 99(3) applies not only to clause 99(2)(g) and (h) but also to clause 99(2)(f). Additionally, Article 99(3) must be construed in a manner that is least restrictive to the constitutional right to make political choices including to be a candidate for a public office.

133. Thirdly, Article 99 of the Constitution applies retrospectively. The relevant time for consideration is the time for registration of a person as a candidate under Article 88(4)(f) of the Constitution and whether the factor of disqualification exists at that point of time. It matters not when the factor came into being. The principles of good governance, integrity, transparency and accountability dictate that the Constitution ought not to be used to cleanse criminals or those whose integrity have been found to be wanting and are unlikely to promote or protect the said ideals and values. Persons with criminal records relating to abuse or misuse of office are barred from contesting to be elected to the elective bodies or public office.

134. Fourthly, I find that the 2nd Respondent abdicated its duties and functions under the Constitution. As a constitutional commission it could not and cannot wholly rely on the Ethics and Anti-Corruption Commission's or any other person's direction and control in the execution of its constitutional mandate. Neither could the 2nd Respondent take and accept without any further interrogation a letter written by the candidate that an appeal was pending. The 2nd Respondent can and must conduct its own investigations once a person's qualification is brought to question. It failed or neglected to do so in respect of the 1st Respondent whose qualification had been rightly questioned.

Reliefs and Disposition

135. What remains for consideration is now what reliefs, if any, should be fixed by the Court.

136. Appropriate reliefs are not necessarily those sought or proposed by a party, even if he is successful. The court must be cognisance of the fact that reliefs fixed by the court in constitutional petitions may have an impact on others and not only the parties to the petition. The Constitution is relatively flexible on the remedies available. Consequently, appropriate relief depends on the circumstances of each case: see **Bidco Oil Refineries Limited v Attorney General & 3 Others NBI HCCP No 177 of 2012 [2012]eKLR** . As was stated in the case of **Nancy Makhoha Baraza v Judicial Service Commission & 9 Others [2012]eKLR**:

> " ***The new Constitution gives the court wide and unrestricted powers which are rather exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises***."

137. Here the Petitioner sought various declaratory orders.

138. I have returned the verdict that while the 2nd Respondent was derelict in the discharge of its duties, it cannot be said that the 1st Respondent was not qualified to vie for the position of Member of Parliament for Embakasi Central Constituency. I consequently cannot make an order declaring the office of Member of Parliament for Embakasi Central Constituency vacant.

139. I cannot however ignore the clear intendment of the Article 99 generally. The purpose was to promote good governance by ensuring that only ethically upright persons of integrity are nominated registered and ultimately elected to Parliament. The question marks on the 1st Respondent's candidature are yet to be erased. The tag of a criminal conviction hangs over him. The pending application for leave to appeal out of time will lead to either the question marks being entrenched or

erased. If the 1st Respondent's character and personality neither brings honour and dignity to the nation and to the office of Member of Parliament nor promotes public confidence in the integrity of the office he holds then it would be appropriate that he vacates office.

140. The application for leave to appeal must and ought to be determined soonest. It beats reason why it is yet to be heard nearly four years on. The 1st Respondent may be accused of lacking the necessary alacrity but the judicial system also must take the flak. It may be necessary to prompt an intervention if only to ensure an expeditious disposal of justice and to promote good governance by ensuring that the question marks dotting an honourable member of parliament are finally interrogated.

141. On the issue of costs, the petition was a largely in my view a public interest litigation. Both parties have shared success and there would be no need to condemn either to costs.

142. In light of the above, the Petition partially succeeds and I make the following orders.

> **(a)*There shall issue a declaration that the 2nd Respondent acted in dereliction of its constitutional and statutory duty in failing to investigate whether the 1st Respondent was qualified as a candidate to contest for a public office.***
>
> ***(b) The Petitioner and the 2nd Respondent are ordered to jointly liaise with the Registrar of the High Court and ascertain why the application by 1st Respondent for leave to appeal out of time being High Court Misc. Criminal Application No. 614 of 2012 is yet to be disposed of more than three years since it was filed in court. The Petitioner as well as the 2nd Respondent may prompt the hearing of the application if the 1st Respondent is not doing so.***
>
> ***(c) Each party shall bear its own costs of the petition.***

Dated, signed and delivered at Nairobi this 29th day April, 2016

J.L.ONGUTO
JUDGE

Commission On Administrative Justice v John Ndirangu Kariuki & Another [2014] eKLR

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO 408 OF 2013

COMMISSION ON ADMINISTRATIVE JUSTICE ….....….....PETITIONER

VERSUS

JOHN NDIRANGU KARIUKI…..…….1ST RESPONDENT

INDEPENDENT ELECTORAL & BOUNDARIES

COMMISSION ……..…….2ND RESPONDENT

RULING

1. In the petition dated 5th August 2013, the petitioner seeks various orders pertaining to the eligibility of the 1st respondent to vie as a candidate for the seat of Member of Parliament for Embakasi Central Constituency in the elections held on 4th March 2013. It prays for, among others, an order that the 1st respondent was not qualified to vie for elections; that the 2nd respondent, the Independent Electoral and Boundaries Commission (IEBC), in failing to find that the 1st respondent was disqualified from vying, was in dereliction of its constitutional and statutory duty; and finally, for a declaration that the seat of Member of Parliament for Embakasi Central Constituency has become vacant by virtue of Article 103(1) (g) of the Constitution.

2. The respondents oppose the petition and by an application brought by way of **Notice of Motion dated 29th August 2013**, the 2nd respondent pray that the petition be struck out on the basis that it is an abuse of process as any orders for removal of a Member of Parliament ought to be brought by way of an election petition.

3. The position taken by the 2nd respondent through its Counsel, Ms. Ndegwa, is that the proper process for challenging the election of a candidate for elective office is through an election petition; that there is a clear process defined by law in Article 87 of the Constitution, sections 76 and 105 of the Elections Act, as well as the Elections Rules 2013 made under the provisions of the Elections Act. Counsel contended that the election of the 2nd respondent was challenged in an election petition and determined by Kimondo J in **High Court Petition No 8 of 2013 Kituo Cha Sheria vs IEBC & Others.**

4. Counsel relied also on the decision of the Supreme Court in **Advisory Opinion No 2 of 2012 – In the Matter of Gender Representation in the National Assembly and Senate[2012] eKLR** in which the Supreme Court held that the elections process is not an event but a continuum, and that all disputes should be determined under the legally established mechanism.

5. Counsel also relied on the case of **The National Alliance & Another vs IEBC Petition No. 175 of 2013(2013)eKLR** where the Court held that a party cannot rely on Article 165(3) to bring an election petition as a constitutional petition. It was the 2nd respondent's case that the present petition is an abuse of the Court process as it is an attempt to avoid the strict timelines set by the Constitution and it also seeks to re-introduce **Petition No 8 of 2013**, which is contrary to the rules of natural justice. It was Counsel's submission that this Court should consider the precedent likely to be set by a matter such as this as an unsuccessful party can re-introduce an election petition through a proxy as a constitutional petition which would be contrary to the public interest. The 2nd respondent therefore prayed that the petition be struck out with costs.

6. Mr Wambola for the 1st respondent supported the 2nd respondent's application. According to the 1st respondent, the petition may be disguised as a constitutional petition but it seeks remedies that can only be sought by way of an election petition. Counsel observed that prayer No 3 of the petition was seeking the nullification of the election of the 1st respondent as the Member of Parliament for Embakasi Central and for the seat to be declared vacant. It was his contention

that the appropriate procedure would have been for the petitioner to approach the Court by way of an election petition, not a constitutional reference.

7. Mr. Wambola submitted further that under the Elections Act, No 24 of 2011 and the Rules made thereunder, prayers of the nature sought in the petition could only be sought within 28 days of the declaration of the disputed results while the present petition was filed 5 months after the declaration of the results.

8. While conceding that the High Court has unlimited original jurisdiction in all civil and criminal matters, Counsel contended that the argument could not be stretched to accommodate a matter that has been presented before Court in a manner that is contrary to the clearly set out statutory and constitutional procedures. He agreed with the 2nd respondent that the petition should be struck out with costs.

9. In response, Mr. Angima for the petitioner contended that the present petition is not a typical election petition, nor was it intended to be; that the petitioner was challenging neither the electoral process or the validity of the 1st respondent's election, nor was it alleging that there was fraud in his election.

10. According to Mr. Angima, the only issue that the petitioner was raising was the eligibility of the 1st respondent to contest the Parliamentary seat because of a constitutional disqualification contained in Article 99(2)(h) of the Constitution. It was the petitioner's contention that at the time of the elections, the 1st respondent was ineligible for having a subsisting criminal conviction for abuse of office.

11. Counsel submitted that under Article 99, there are several disqualifications provided, some of which may arise before or after an election, one of the disqualifications being violation of Chapter 6. It was the petitioner's case that it can bring a constitutional petition at any time and does not need to come to Court within 28 days of the elections.

12. It was the petitioner's case that it was seeking declarations consequential to interpretation of Article 103 of the Constitution; and that Article 103(g) gives rise to a consequential declaration of disqualification under Article 99.

13. The petitioner conceded that a party with an election dispute may go to Court after 28 days but submitted that it did not have an election dispute with the 1st respondent. What it was seeking was a constitutional interpretation under Article 258 of the Constitution, in good faith, and to bring before the Court what the petitioner considered to be a breach of the Constitution. It contended that it had not come to Court as a proxy for another party, nor did it have any personal interest in the matter.

14. With regard to Election Petition No 8 of 2013 and the contention that it was a bar to any further adjudication of the eligibility of the 1st respondent, it was the petitioner's submission that the petition was struck out without being heard on its merits as the petitioner had no legal capacity. Mr. Angima submitted, however, that the Court, while striking out the petition, recognised that there were serious issues to be resolved with regard to the eligibility of the 1st respondent. Counsel submitted further that the petitioner was not a party to Petition No 8 of 2013 nor did it apply to been joined.

15. According to Mr. Angima, should the Court find that any of the prayers sought are inappropriate, it can decline to issue the said orders but should not strike out the petition.

16. Mr. Angima relied on the decision of the Court of Appeal in **Thuo Mathenge vs Nderitu Gachagua & 2 Others (2013)eKLR** for the holding that the jurisdiction of the High Court was wide enough to inquire into issues of eligibility even though the IEBC is vested with jurisdiction to inquire into such issues.

17. Finally, it was the petitioner's submission, in reliance on **D.T Dobie vs Muchina (1982) KLR1** and **Steven Kariuki vs George Mike Wanjohi and 2 others Nairobi, High Court Petition No 2 of 2013** that the Court should be hesitant to strike out pleadings without hearing parties except in the clearest of cases.

Determination

18. I have considered the respective pleadings of the parties in this matter, particularly the affidavits sworn in support and in opposition to the application dated 29th August 2013 by Mr. Kipkogei and Mr. Ngalema for the 2nd respondent and the petitioner respectively. I have also read the affidavit sworn in support of the petition by Mr. Ngaluma, the Chief Executive Officer of the Commission.

19. In the said affidavit, Mr. Ngaluma sets out the functions of the petitioner, a Constitutional Commission established under Article 59(4) of the Constitution and Section 3 of the Commission on Administrative Act 2011. He states that the Commission is charged with the mandate to protect the sovereignty of the people, secure the observance of democratic values and principles by all state organs, and to promote constitutionalism in Kenya. He states further that the Commission is particularly empowered by Articles 59(2)(h-k) and 249 of the Constitution and Section 8 of the Commission on Administrative Justice Act to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government that is alleged or suspected to be prejudicial or improper or to result in impropriety or prejudice, and to take appropriate remedial action.

20. According to the petitioner, on 20th September 2012, it wrote to the Ethics and Anti-corruption Commission and the Director of Public Prosecutions requesting to be furnished with a list of individuals who had been convicted of abuse of office to enable it compile a register of such convicted individuals for purposes of the Constitution. By the letter of 12th October 2012, the Ethics and anti-corruption Commission and the Director of Public Prosecutions sent separate lists of individuals who had been convicted of abuse of office, corruption, economic, and other related crimes to the petitioner.

21. The 1st respondent was mentioned in both lists as having been convicted of two counts of abuse of office in the Chief Magistrate's Anti-Corruption Court ACC Number 25 of 2002**, Republic versus John Ndirangu Kariuki & Another** on 14thJanuary 2004 and subsequently sentenced to pay a fine of Ksh100,000 on each count or in default to serve a jail term of one year for each count.

22. The petitioner avers that it confirmed from the judiciary vide a letter dated 20th December 2012 that the 1st respondent had not appealed against his conviction and sentence. It then wrote to the 2nd respondent vide a letter dated 14 December 2012 recommending that the persons in the list including the 1st respondent had failed the integrity test and therefore ought to be disqualified from running for public office in the General Elections of 4th March 2013 for the reason that they did not meet the threshold set forth in the Constitution and the Elections Act.

23. It states that it further furnished the 2nd respondent with relevant documents evidencing the conviction of the 1st respondent. It states that the status of his case expressly barred him from election as Member of Parliament by virtue of Article 99(2)(h) of the Constitution and Section 24(2)(h) of the Elections Act. The 1st respondent then filed judicial review proceedings against the petitioner in **Nairobi High Court Judicial Review Application No 452 of 2012; Republic vs Independent Electoral and Boundaries Commission Ex –parte John Ndirangu Kariuki**, which application was dismissed on 28th January 2013.

24. The petitioner states that despite this, the 2nd respondent, in blatant disregard of the Constitution, the Elections Act and the recommendation of the petitioner, unlawfully cleared the 1st respondent to vie for elections during the 4th March 2013 General Elections. It subsequently gazetted him as being the duly elected Member for Embakasi Central.

25. The petitioner contends that Article 99(2)(h) of the Constitution and section 24(1)(b) of the Elections Act expressly disqualify any person found to have misused or abused a public office or in any way to have contravened Chapter Six of the Constitution from being elected as a Member of Parliament, It contends further that the said Article and section outline the qualifications for election as a Member of Parliament. It is its contention that the 1st respondent was expressly barred by these provisions from running or assuming public office. I have not heard any of the respondents to dispute the above matters.

26. It is undisputed that the 1st respondent was elected Member of Parliament for Embakasi Central Constituency in the elections of March 4 2013. It is also not in dispute that his election was challenged in Election Petition No.8 of 2013, and that the said petition was struck out as the Court found that the petitioner had no capacity to file the petition, that there was no petitioner in Court, and therefore no valid petition before the Court.

27. The petitioner's contention is that it is not challenging the electoral process leading to the election of the 1st respondent. Its contention is that there has been a violation of the Constitution in the failure by the 2nd respondent to find that the 1st respondent was disqualified by reason of having been convicted of the offence of abuse of office, a conviction that he never appealed against.

28. The position taken by the 1st and 2nd respondent is that this petition is disguised as a constitutional petition while it is in reality an election petition; and that a prayer to remove a sitting member of the National Assembly by impugning any aspect of **the electoral process** can only be sought by way of an election Petition. They argue further that the issues that the petitioner now raises should have been the subject of **High Court Petition No. 8 of 2013 - Kituo Cha Sheria vs John Ndirangu & Another** which was struck out on 24th May 2013.

29. In my view, the question that arises is whether the present petition challenges 'the electoral process,' in which case the matter should have been brought within the timelines set out in the Elections Act, being 28 days after the declaration of the results for Embakasi Central Constituency.

30. As I understand it, the petitioner does not in any way impugn the electoral process resulting in the election of the 1st respondent. Rather, the question is whether he was constitutionally and statutorily eligible to vie for elections, and if he was not, whether the 2nd respondent abdicated its duty by allowing his participation in the elections.

31. It appears to me that these are very distinct questions which ought to be considered on their merits, and that this petition should not be struck out at this preliminary stage. It would also not, in my view, meet the ends of justice or advance the principles in the Constitution relating to integrity in public office were the Court to strike out the petition without a hearing on the merits. While it is indeed correct, as submitted

by the respondents, that the elections process is a continuum and should be dealt with in accordance with the provisions of the electoral laws, the question may arise as to what the position should be where it is alleged that there has been a disregard of the Constitution by the 2nd respondent. Would this be a question concerning the electoral process, which would then fall for determination under the laws governing election petitions?

32. It may be that an unqualified person is allowed to vie by the 2nd respondent, and is then elected. Would this imply that the question of his or her eligibility cannot thereafter be raised? The effect of such a finding may well render the provisions of the Constitution and the Elections Act with regard to eligibility and of suitability to hold public office under Chapter 6 of the Constitution of no effect whatsoever. Anyone raising the question of an elected member's eligibility would be confronted with the response that the issue can only be determined as an election question.

33. I also note the sentiments of the Court in High Court Petition No. 8 of 2013 at paragraphs 33-36 where the Learned Judge states as follows:

> ***34. "That is not to say that the High Court is divested of jurisdiction in all matters relating to nomination. If for example, by negligence or otherwise, a non-citizen was nominated for election and elected, it would be perfectly in order for the Court to right the wrong. In Luka Lubwayo and Another vs Gerald Otieno Kajwang and Another Nairobi Petition 120 of 2013 [2013]eKLR the Court found that where IEBC had failed to exercise its mandate under statute, the High Court could intervene. Article 105 1 (a) seems to widen the scope of the court in a petition to determine whether a person has been validly elected as a member of parliament. The question of validity may encompass the clearance to run."***

34. Without making any findings one way or the other on the eligibility or otherwise of the 1st respondent, I believe the interests of justice demand that the issues that this petition raises be canvassed and heard on their merits.

35. In the circumstances, the application dated 29th August 2013 is hereby dismissed. The costs thereof shall be in the cause.

Dated and signed at Nairobi this 6th day of June 2014

MUMBI NGUGI

JUDGE

Mr. Angima instructed by the firm of Yuvinalis Angima for the Petitioner

Mr. Wambola instructed by the firm of Ongoya & Wambola & Co. Advocates for the 1st respondent

Ms. Ndegwa instructed by the firm of Sisule Munyi Kilonzo & Associates Advocates for the 2nd respondent

Kizito M. Lubano v Kemri Board of Management & 8 others [2015] eKLR

REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 47 OF 2015

KIZITO M. LUBANO ……..……..……..…….. PETITIONER

VERSUS

KEMRI BOARD OF MANAGEMENT ……..…….. 1ST RESPONDENT

DIRECTOR KEMRI…….. 2ND RESPONDENT

MINISTER OF HEALTH…….....……..…….. 3RD RESPONDENT

PRINCIPAL SECRETARY, HEALTH…….....……..…….. 4TH RESPONDENT

ETHICS AND ANTI- CORRUPTION COMMISSION…..…….. 5TH RESPONDENT

ELIZABETH BUKUSU……..…….. 6TH RESPONDENT

ANNE WANG'OMBE……..…….. 7TH RESPONDENT

ATTORNEY GENERAL……..…….. 8TH RESPONDENT

COMMISSION ON ADMINISTRATIVE JUSTICE ……..... 9TH RESPONDENT

JUDGEMENT

1. The petitioner, Kizito Lubano filed his Petition on 9th June 2015 challenging his dismissal from KEMRI and the violation of his constitutional rights under articles 10, 20, 27, 28, 24, 25, 29, 32, 33, 35, 36(1), 37, 40(3) (b), 41, 43, 47, 48, 50, 59, 73, 75, 76, 77, 79, 201, 232, 236, 249, and 252 of the constitution. In reply the 1st and 2nd respondents filed a Replying Affidavit on 24th June 2015 sworn by Margaret Rigoro the legal officer. The 7th Respondent also filed a Replying Affidavit on 1st July 2015. The 3rd, 4th and 8th respondents filed their Grounds of opposition on 6th July 2015. The 9th Respondent also entered appearance herein and has filed their responses.

2.The background to the Petition is that the Petitioner was employed by KEMRI as the Principal Research Officer and Head of Planning, Monitoring and Evaluation Department. The 1st Respondent is sued as the manager of KEMRI, a state corporation and the 2nd Respondent is the Chief Officer and director of KEMRI while the 3rd Respondent is the parent ministry and the 4th Respondent the responsible officer at the 4th respondent. The 5th Respondent is joined in their capacity as a constitutional commission responsible for ensuring compliance with and enforcement of the provisions of chapter 6 of the constitution. The 6th Respondent was the supervisor of the petitioner; the 7th Respondent is the head of human resource at KEMRI; the 8th Respondent is the legal government advisor; and the 9th Respondent is an independent commission on administration of justice.

The petition

3. The Petitioner is seeking the following orders;

a. *A declaration that within the intendment of Article 10 of the Constitution and resonating the intention of Article 201(a) of the Constitution the 1st, 2nd, 3rd, 4th, 6th and 7th respondents are bound to discharge their public duties in an open and transparent manner;*

b. *A declaration that within the intendment of Article 47(1) and 50 of the Constitution the 1st, 2nd, 3rd, 4th, 6th and 7th respondents cannot remove the Petitioner from his position as the head of the monitoring and evaluation department without giving him an adequate opportunity to defend himself from the allegations in accordance with the rules of natural justice;*

c. *A declaration that within the intendment of Article 28, 41(1) and (2)(a), 47 of the Constitution the 1st, 2nd, 3rd, 4th, 6th and 7th respondents cannot unilaterally freeze the petitioners' salary without communication and due administrative process;*

d. *A declaration that within the intendment of Article 28, 41(1) and (2)(a), 47(1) of the Constitution the 1st, 2nd, 3rd, 4th, 6th and 7th respondents cannot arbitrarily remove the Petitioner from the position of the head of planning, monitoring and evaluation for which he had been competitively recruited following a newspaper advertisement without a hearing;*

e. *A declaration that within the intendment of Article 47(2) of the Constitution the 1st, 2nd, 3rd, 4th, 6th and 7th respondents cannot take administrative actions without giving valid reasons for the same;*

f. *A declaration that within the intendment of Article 236 of the Constitution the 1st, 2nd, 3rd, 4th, 6th and 7th respondents cannot victimise the Petitioner for having discharged his public duties;*

g. *A declaration that within the intendment of Article 59(4), 79, 248, 252 of the Constitution the 5th and 9th respondents are bound to carry out their constitutional mandate and obligation to any member of the public notified of improprieties within government bodies;*

h. *A declaration that within the intendment of Article 73(1)(a) of the Constitution the respondents are bound to exercise their powers as a public trust consistent with the purposes and objects of this Constitution demonstrates respect for the people brings honour to the nation and dignity to the office and promotes public confidence and the integrity of the office;*

i. *A declaration that within the intendment of Article 73(2)(b) of the Constitution the respondents are bound to be objective and impartial in decision making and to ensure that decisions are not influenced by favouritism, other improper motives or corrupt practices;*

j. *A declaration that within the intendment of articles 73(2)(c), 75, 76 and 77 the 1st, 2nd, 3rd, 4th, 6th and 7th respondents are bound to declare their personal financial and other conflicts of interest with their public duty;*

k. *A declaration that the recommendation for the dismissal of the Petitioner is in contravention of articles 25, 50, and 47 of the Constitution and does not meet the threshold set in section 44(4) of the Employment Act, 2007 and Regulations 14.5 and 13.25 of the KEMRI staff regulation and KEMRI Human Resource policy and Procedures Manual;*

l. *And order of judicial review in the nature of certiorari due to issue to bring into the Court for purposes for quashing the decision of the 1st Respondent dismissing the Petitioner for being illegal and unconstitutional;*

m. *And order of judicial review in the nature of mandamus does issue compelling the 1st Respondent to reinstate the Petitioner to his former position as Principal Research Officer and Head of KEMRI Planning, Monitoring and Evaluation Department;*

n. *And order for compensation for general and exemplary damages to compensate the Petitioner for the harassment, financial constraints, intimidation, defamation and mental torture he has suffered resulting from the unfair and unconstitutional dismissal;*

o. *A permanent injunction against the respondents stopping them from undertaking any disciplinary process against commencing any further disciplinary action against the Petitioner based on the same faulty allegation relied upon in the impugned process; and*

p. *The costs of the Petition be borne by the respondent.*

The Petition

4. The background to the Petition is that the Petition was formerly employed by KEMRI as the Principal Research Officer and head of the Department of Planning, Monitoring and Evaluation where he performed his duties diligently and as part of his work since 2008 he was involved in continuous surveillance, collection and analysis of information necessary for effective stewardship of KEMRI.

5. The Petition is therefore that the Petitioner was then dismissed from his position on false allegations and on a faulty administrative process. That the KEMRI board used the disciplinary process to coerce the Petitioner to change the shareholding in KEMRES Ltd, registered as a private company limited by shares contrary to the Companies Act and members of the 1st Respondent became the directors. Other allegations made against the Petitioner which he has challenged are that he did not disregard any official communication to him and the disciplinary committee relied on matters that are in Court in case No.493 of 2013 instituted by the 6th respondent, Elizabeth Bukusi. that the Petitioner asked for better particulars of allegations against him but was not provided with such; the allegation that he was absent from work without permission was not correct as such absence was explained; he was present at the Performance Contracting meeting but obtained permission to be absent; the Petitioner was unfairly accused of providing information to the offices of the Ombudsperson and the 5th respondent; and that the composition of the disciplinary committee hearing his case constituted the 6th Respondent who had already filed a case against the Petitioner and was pending in court. Other parties in the committee had vested interests in the disciplinary process, the 6th Respondent had colluded with the 7th Respondent to write adverse letters against the Petitioner and illegally stopping his salary. The Petition is also that the Petitioner was unfairly treated when the disciplinary committee held that he had the burden to proof that the allegations against him and in making conclusion that he should be retired on public interest without disclosing such matters in the allegations or proceedings was therefore wrong.

6. Before his dismissal, the Petitioner had brought to light abuses of power and maladministration at KEMRI leading to his being obstructed from performing his

duties. Since his employment, the Petitioner has been the subject of provocation, bias, discrimination, jealousy and resentment and the 6th Respondent had been insensitive to his department activities and therefore did undermine, micromanage, and bypass the department despite the critical role it does play for KEMRI. From 2011, the 6th Respondent had been indifferent to the Petitioner and his work; in May 2013 the 6th Respondent held a retreat for staff for review of the organisational chat and performance appraisal but left out the petitioner's department; the Petitioner wrote to the 1st Respondent but was ignored; on 5th august 2015 the 6th Respondent excluded the Petitioner from a strategic planning meeting; and later the Petitioner led a team to develop the strategic document focusing on devolution and was adopted with approval by KEMRI.

7. The petitioner, in the course of his work at KEMRI learnt that the 6th Respondent was running an NGO with a project RCTP-FACES and was a co-director contrary to government regulations. This NGO was awarded$7 million (Ksh.560 million) in 2010. This can explain why the Petitioner was removed from the planning meetings and why he received a letter on 11th September 2013 for gross misconduct following an Article in the newspapers which he had not authored and another letter dated 16th September 2013 after raising concerns with regard to the strategic planning. These were efforts to remove the Petitioner from KEMRI. In January 2014 the Petitioner received a letter that he had been removed as head of his department which was taken over by the 6th respondent; there was a disciplinary hearing on 29th March 2014 and 4th April 2014; there is a pending defamation suit filed by the 6th Respondent against the petitioner; and these facts notwithstanding the disciplinary case was determined with the dismissal of the Petitioner on 17th December r2014 by retirement on public interest.

8. To help resolve the matter, the Petitioner held a meeting with the 4th Respondent on 5th January, 9th February and 23rd February 2015 was adviced that he would be reinstated but further attempts to engage have been unsuccessful. Internal mechanisms thus exhausted, the Petitioner has moved the court.

The 1st and 2nd respondent's case

9. The 1st and 2nd respondents case is set out in the Replying Affidavit by Margaret Rigoro filed on 24th June 2015 presented their case as the Legal Officer of KEMRI. The Petitioner was employed by KEMRI which is a state corporation established under the Science, Technology and Innovations Act and KEMRI as a body corporate with perpetual succession, has power to sue and be sued in its own name. The Petitioner was retired on 17th November 2014 following an employment dispute of which the 3rd and 9th respondents were not parties and hence not proper parties in this matter and herein wrongly enjoined. The Petitioner was an interested party in Petition No.33 of 2014 and a ruling was delivered on 30th July 2014; there is an appeal application filed in Civil Application No. 26 of 2015 before the Court of Appeal and due for hearing on the grounds of stay pending appeal; and that these matters address issues similar as herein. There is also an appeal that has since been filed which has a nexus with the proceedings herein where the Petitioner is a party supporting the appeal. The proceedings herein should be stayed pending the hearing and determination of the Appeal now pending before the Court of Appeal to avoid conflicting decisions on the same subject matter.

10. The case is also that on diverse dates KEMRI received a number allegations and complaints against the petitioner, he was given warning letters and thereafter the 1st Respondent commenced disciplinary action in strict compliance with the procedures. The disciplinary committee summoned the Petitioner to respond to the allegations and complaints against him; the committee deliberated over the matter and on 28th April 2014 a recommendation was made to retire the Petitioner on public interest. The 1st Respondent also met to deliberate over the disciplinary committee recommendation on the petitioner, it adopted the committee recommendation that led to the retirement of the Petitioner on 17th November 2014.

11. The case is further that upon the retirement of the Petitioner all tasks he previously had were taken up by other officers working within KEMRI. There are regulations with elaborate clearance process relating to benefits after termination or retirement after employment. the current Petition has been made in bad faith as there is a pending matter before the Court of Appeal over the same issues as herein; the termination of the petitioner's employment was done in accordance with his employment contract; unnecessary parties have been enjoined; and the Petitioner has come to Court with unclean hands.

3rd, 4th& 8threspondents Case

12. The above respondents filed grounds of opposition to the Petition on 6th July 2015. The Petition is opposed on the grounds that there is a misjoinder of the respondents herein in that the 3rd, 4th and 8th respondents are not privy to the employment contract and should be removed from the Petition and no cause of action exists against them. KEMRI is a body corporate that can be sued in its own name and the petitioner's termination of employment was

in accordance with his contract of employment and in this regard there is no case disclosed against the 3rd, 4th and 8th respondents. These respondents hold constitutional offices with definite mandate and duties and without any cause of action against them being disclosed there is misjoinder of the Respondent herein and thus bear no liability and the Petition should be dismissed.

The 7th respondent's case

13. The 7th Respondent filed a Replying Affidavit as a party herein and the Assistant Director, Human Resource at KEMRI. The case is that the Petitioner was employed by KEMRI a body corporate with capacity to be sued and the dispute herein relate to the termination of the employment contract between the Petitioner and his employer, KEMRI. The joinder of the 7th Respondent herein is erroneous and incompetent as well as the other respondents and they are not parties to the employment contract between the employer, KEMRI and the petitioner.

14. The case is also that the 7th Respondent is aware that KEMRI has a code of conduct and Ethics and a Human Resource Policy and Procedures manual which is circulated to all staff and requires high standards of conduct and performance of all staff members. KEMRI received allegations and complaints against the Petitioner which led to the Petitioner being issued with warning letter and led to disciplinary proceedings against him. Such proceedings were in accordance with the procedures set out by KEMRI and the 7th Respondent was in attendance at the committee meetings. The Petitioner was invited to the committee hearings and adviced of his right to be accompanied by a person of his choice where he was able to respond to all allegations and complaints against him. The disciplinary committee discussed the issues before it well before forwarding its recommendations to the 1st Respondent and subsequent Petition No. 33 of 2014 was filed and the Petitioner was a party as the Interested Party. This suit was dismissed by the Court on 30th July 2014 and thereafter an appeal was filed to the Court of Appeal wherein the Petitioner is a party.

15. The case is also that the 1st Respondent passed a resolution for the incorporation of a company known as KEMRI Enterprises & Services Limited (KEMRES) which was to be wholly owned by KEMRI so as promote its commercialization of research work. In KEMRES, KEMRI held 51% shares, Dr Solomon Mpoke as chief executive officer held 15% share and the Petitioner held 10% share. The 1st Respondent later made a resolution to change the shareholding and Dr Mpoke agreed to sign for this change but the Petitioner refused despite repeated requests.

16. The case is also that KEMRI constituted a disciplinary committee charred by Dr Kihumbu Thairu where the issue of KEMRES was deliberated on 4th April 2014, the Petitioner was present with his representative. The 7th Respondent was present at this meeting for human resource and as a staff member of KEMRI and all issues before the committee was fairly considered. There was no discussion of the personal differences between the Petitioner and any other party of matters subject in Civil Case No. 493 of 2013.

17. The disciplinary committee held another meeting on 28th April 2014 chaired by Dr Kahumbu Thairu and its recommendations were adopted by KEMRI. The allegations that the 7th Respondent had vested interests in the matters under deliberation were found to be malicious and incorrect as she had no interest in the position the Petitioner held at KEMRI or the issues being addressed by the disciplinary committee.

18. The 7th respondent's case is that, as the head of human resource at KEMRI, human resource department is the custodian of performance data and records for all staff and allegations by the Petitioner that on 6th May 2013 a meeting was held in Naivasha to discuss performance appraisals is misleading.

19. In this case the disciplinary committee was very objective in its deliberations and the personal differences and matters in Civil Case pending between the 7th Respondent and the Petitioner were not in issue in the petitioner's disciplinary case. matters outlined by the Petitioner are malicious and in bad faith and the suit is vexatious as the disciplinary committee was properly constituted to inquire into the allegations and complaints against the Petitioner and another employee and had a right to appeal but failed to do so; the reliefs sought are not supported in law; there is no particular claim against the 7th Respondent as she only acted in her capacity as human resource at KEMRI and canto be held liable as she acted in good faith for her office; and the Petitioner has come to Court in bad faith as he has another matter before the Court of Appeal and in addition the Petitioner has always acted in defiance of the 1st Respondent and chief executive officer. There is no breach of the petitioner's constitutional rights. The Petition should be dismissed.

Submissions

20. The parties opted to file their written submissions herein.

21. The Petitioner submitted that he was NOT subjected to a disciplinary process that was expeditious, reasonable, lawful and procedural as under the provisions of Article 47 and 50 of the constitution. The Petitioner as the Principal research officer and head of department of planning monitoring and evaluation was involved

in continuous surveillance, collection and analysis of information necessary for effective stewardship of KEMRI. The Petitioner was dismissed based on false allegations following a disciplinary process to coerce him to change the shareholding in KEMRES Ltd registered as a private company. During the disciplinary hearing the committee considered allegations that are subject of Civil Suit No.493 of 2013 filed by the 6th respondent. At the disciplinary hearing the Petitioner requested for further details but was not provided with the same, he did not disrupt the hearing, and there was no show cause letter issued with regard to his disruption of a board meeting.

22. The Petitioner also submitted that he was never absent from work without permission; he did not abscond duty or fail to attend the performance contracting exercise for 2012/2013; there was no misrepresentation of the respondents before the office of the ombudsperson; and the disciplinary committee comprised the 6th Respondent who had instituted a civil suit against the Petitioner and hence had a vested interest while the 7th Respondent had colluded with the 6th Respondent to write adverse letters against the petitioner. At the hearing, the Petitioner was allowed very little room to Respondent to allegations against him.

23. This disciplinary hearing did not meet the principles of Article 47 and 50 of the constitution.

24. The Petitioner also submitted that he was victimised for performing his public duty contrary to Article 236 of the constitution. Before dismissal, the Petitioner had brought to light abuses of power, unfair treatment and maladministration at KEMRI that had le to him being obstructed from performing his oversight duties as head of monitoring and evaluation; he was frustrated and discriminated; the 6th Respondent was opposed to the activities of the department of planning monitoring and evaluation where the Petitioner was head; he was not invited to a retreat held in May 2013 by the 6th Respondent on organisational chart where performance appraisal was discussed; and when the Petitioner briefed members of KEMRI board, he was ignored.

25. The Petitioner also submitted that while performing his duties in planning and monitoring he learnt of a project RCTP-FACES which the 6th Respondent is a co-director and has an NGO under the same name with its address being the Centre of Microbiology Research at KEMRI which is a gross violation of government regulations and unethical this being conflict of interest on the part of the 6th respondent. By excluding the Petitioner in KEMRI strategic planning, he was being prevented from monitoring procurements and expenditures in the RCTP-FACES project. This also was as a result of an internal audit report which uncovered questionable expenditure of comingling of funds and assets. Instead of addressing the misappropriation of funds, the Petitioner was issued with warning letter for gross misconduct by the 2nd respondent.

26. That the Petitioner was dismissed for undertaking his public duty and his rights under Article 236 of the Constitution were violated. He was not accorded due process as held in the case of **Richard Bwogo Birir versus Narok County Government & 2 others [2014] eklr.**

27. The Petitioner also submitted that a public officer cannot be retired on public interest on a non-existent ground. In the case of the disciplinary hearing of the petitioner, the committee concluded that he should be retired from service on public interest without disclosing any such allegations in its proceedings. That the Respondent relied on this ground upon realisation that there was no ground to warrant the summary dismissal. There was a duty to state the public policy objective in making such a decision as held in the case of **D K Njagi Marete versus Teachers Service Commission [2013] eklr.** There was also no evidence as to the process employed by the respondents to arrive at this public interest reason for the termination of the Petitioner as was held in **Mary Chemweno Kiptui versus Kenya Pipeline Company Limited [2014] elk.** And to arrive at such a reason was too harsh in the circumstances as there was no justification for it.

28.The Petitioner also submitted there was no alternative dispute resolution mechanism at his disposal to exhaust as the 1st Respondent refused to consider his appeal.

29. On the joinder of the parties herein, the Petitioner submitted that the 1st and 2nd respondents are parties herein for their role in KEMRI and were part of the breach of his constitutional rights. The 3rd, 4th and 8th respondents are enjoined herein as the parent ministry and where the Petitioner sought assistance and as such and the 8th Respondent being legal advisor to government this is a Petition and the privitiy of contract does not arise. The 5th Respondent as an independent constitutional commission is responsible integrity matters a subject of this petition. The 6th Respondent acted irregularly in breach of duty and her actions led to the unfair administrative process under Article 47 and the victimisation of the Petitioner contrary to Article 236 of the constitution. The 7th Respondent is a party being the direct participant in the intimidation and eventual unfair dismissal of the petitioner, she ignored the human resource practices by writing letters and taking action without due process, at the disciplinary hearing there was no fairness accorded to the petitioner.

30. The Petitioner is seeking for orders that he was taken through a flawed disciplinary process; was unfairly retired on public interest; international dispute mechanisms had been exhausted and was victimised for doing his public duty.

31. The Petitioner has also relied on the following cases – **James mwaniki Thathi S/ACP versus inspector General & 4 others [2014] eklr;** and **Abraham Gumba versus Kenya Medical Supplies Authority [2014] eklr.**

The 1st, 2nd, 6th and 7th respondents' submissions

32. The respondents submitted that the Petitioner was employed by KEMRI who is not a party herein. KEMRI has its Staff Regulations issued to all staff and has a provision of a Disciplinary Committee to investigate allegations and complaints against any staff. In this case the Petitioner was heard by the disciplinary committee which made recommendations to the 1st Respondent which retired the Petitioner on public interest on 17th November 2014. There has been a previous suit Petition No.33 of 2014 on this matter and the Petitioner was a party. From this petition, there is an appeal pending before the Court of Appeal.

33. The respondents submitted that the Petitioner as an employee of KEMRI he should have sued thus instead of its employees or the board under the provisions of section 19 of the Science, Technology and Innovations Act that establish KEMRI. There is no cause of action against the respondents as they were not his employers as defined under the section 2 of the Industrial Court Act [Employment and Labour Relations Court Act]. Any claims against the 6th and 7th respondents are made in their capacity as staff of KEMRI and cannot be held liable in their personal capacity. This is a case on non-joinder of the employer and the misjoinder of the 6th and 7th respondents. There is no case against the respondents.

34. The respondents also submitted that the Petition is incompetent as there is a previous suit Petition No.33 of 2014 that was filed and the Petitioner was an active participant and which suit was dismissed. There is an appeal before the Court of Appeal. The reliefs sought in this Petition are similar to what the Petitioner asked in the previous petition. For the court5 herein to make a decision while there is a pending appeal over the previous suit would lead to conflicting decisions over the same matter.

35. The respondents also submitted that the Petitioner was dismissed fairly as under the provisions of section 43(1) of the Employment Act. The employer in this case had valid reasons for termination and there was proof. The resulting termination by retirement on public interest is a form of termination of employment as held in **D.K. Njagi Marete Case** as cited above. The employer has the duty to prove that the termination was fair and in this case KEMRI bears such responsibility and has not been enjoined herein so as to contest the case by the petitioner. In this case KEMRI applied its regulations to hear allegations and complaints against the Petitioner and the 1st Respondent constituted a committee to hear the case, the Petitioner was accorded his rights as under section 41 of the Employment Act, he was accompanied by Dr Juma and actively participated in the proceedings. The committee recommendations were then adopted by the Board and KEMRI terminated the petitioner. The reasons then leading to the petitioner's termination met the threshold set out under section 44(4) of the Employment Act.

36. The claim for compensation was not pleaded and the Petitioner cannot be awarded what was not claimed in his petition. Other remedies are general not capable of being awarded. Orders of mandamus and certiorari are not available to the Petitioner as there is no public right revolving around his employment. The claim for an injunction against the respondents to stop the disciplinary action is discretionary and he has not come to Court in clean hands. The rights stated to have been infringed have not been demonstrated to warrant the constitutional remedies sought and should be dismissed.

37. The respondents have relied on the following cases **- Mwatata Juma Mwangala versus Ms Anne Waiguru & others, ELRC Petition 37 of 2013; Ronald Kimatu Ngati versus Ukulima Sacco Society Ltd, Civil Appeal No.277 of 2009; joseph Mbuta Nziu versus Kenya Orient Insurance Company Ltd, Civil Suit No.156 of 2006 (Mombasa); Prisca Kemboi & Others versus Kenya Post Office Savings Bank, Petition No.38 of 2013.**

3rd, 4th and 8th respondents

38. The respondents submitted that this is a case between an employer and employee but the employer, KEMRI is not a party to this suit. Section 16 of the Science, Technology and Innovation Act has been ignored. Termination of the petitioner's employment was lawful under his contract of employment and thus the respondents bear no duty herein. There is no privity of contract between the respondents and Petitioner so as to confer rights or impose obligations. The parties sued herein are not sued in their capacity as the employer as the 1st and 2nd respondents are just offices or officers undertaking their roles but not as employers. The orders sought canto be issued against the respondents.

39. The respondents also submit that the Petitioner does not disclose any constitutional violations against him to warrant the remedies sought. The myriad of constitutional provisions cited are not supported by any evidence and even where such provisions are noted, none relate to the functions of the respondents. There is no breach of such rights that have been alleged as committed by the respondents.

40. The Petitioner is not entitled to the reliefs sought against the respondents. The employment contract alleged to have been violated was between the Petitioner and KEMRI which is not a party herein so as

for the Petitioner to seek the remedies outlined. To seek remedies based on constitutional violations, such a party must set out with a reasonable degree of precision the complaints, the provisions said to have been violated and thus commensurate with the remedy sought. The orders sought by the Petitioner are against public interest and should not be granted and Petition dismissed.

41. The respondents have relied on the following cases – **Aineah Liluyani Njirah versus Agha Khan Health Services [2013] eklr; Dunlop Tyre Co versus Selfridge [1915] AC 846; Tweddle versus Atkinson [1861] 1 B&S 393; and Anarita karimi Njeru versus Republic [1976-1980] KLR.**

The 9th respondent

42. The Respondent submitted that although the Petitioner has made submissions with regard to his early retirement from employment by KEMRI, he has not pleaded or particularised the manner in which the Respondent has violated any of the cited provisions of the Constitution or law. There is no pleading on any wrongdoing, default, malfeasance or misfeasance on the part of the Respondent has been cited.

43. The Respondent received a complaint from the Petitioner and made an enquiry with regard to matters set out by the Petitioner but became aware that there was Petition No.33 of 2014 where the Petitioner was the first interested party and thus terminated further action in the matter as required by law. Section 30 (c) of the Commission of Administrative justice Act preclude the Respondent from investigation any matter which is pending in court. The Petitioner was notified of the discontinuation of the inquiry in writing, he protested this decision but has not challenged these facts.

45. The Respondent also submitted that in the entire petition, there are no adverse facts against the Respondent alleging any wrongdoing so as to seek the remedies outlined against them. Under the law, the Respondent acted as required and where the matter remained pending in court, no further action was required by them. The Respondent is therefore wrongly joined in these proceedings; there is no demonstration of any reasonable cause of action or that the Respondent is a necessary party herein.

46. The Respondent also submitted that the remedies sought against them that they did not act independently is incorrect as there was no default since the Petitioner with the knowledge of Petition No.33 of 2014 participated as an interested party. With that knowledge, the Respondent had to stop any further inquiry into his complaints. The alleged violation by the Respondent of the provisions of Article 73 of the Constitution have not been set out; such allegations are general and not capable of proof any action or omission to warrant the remedies sought. The Respondent was always impartial in its inquiry into the matter until the matter was seized by the court. The case against the Respondent should be dismissed and costs to follow the cause.

Determination

Several issues arise from the Petition that require determination. I have outlined them as follows;

Whether Petition 33 of 2014 and Appeal 24 of 2015 before the Court of Appeal relate to the same issues as herein;

Whether the pending appeal in Civil Appeal No.24 of 2015 will lead to the Court rendering conflicting decisions;

Whether the non-joinder of KEMRI is fatal to the suit;

Whether the is misjoinder and non-joinder of parties;

Whether the disciplinary proceedings against the Petitioner met the required threshold; and

Whether the remedies sought are due.

47. The first challenge to the Petition was that there exists Petition No. 33 of 2014 that substantively addressed matter similar to the Petition herein. That the Petitioner was an active party in Petition No.33 of 2014, there is an Appeal to the Court of Appeal and to move the Court as herein would be to invite the Court to give conflicting decisions. I have taken time to read Petition No.33 of 2014, the Grounds of Appeal in civil Appeal No.24 of 2015 and make the following emerge;

a. That Petition no.33 of 2014 is filed by Okiya Omtata Okoiti and Nyakina Wycliffe Gisebe as the Petitioner against KEMRI Board of Management & 2 Others and Kizito Lubano & 4 Others as Interested Parties. The Petitioner herein, Kizito Lubano is sued as an Interested Party.

b. That the current Petition is by Kizito Lubano against KEMRI Board of Management & 7 Others.

c. That Civil Appeal No.24 of 2015 is filed by Okiya Omtata Okoiti and Nyakina Wycliffe Gisebe as the Petitioner against KEMRI Board of Management & 2 Others and Kizito Lubano & 4 Others as Interested Parties.

d. That In Petition No.33 of 2014, the 1st interested party being the current Petitioner herein is described as follows;

The 1st interested party – Kizito Lubano – is a Principal Research Officer and a former Head of Planning, Monitoring and Evaluation Department at KEMRI. The 1st and 2nd respondents [KEMRI Board of Management and Director, KEMRI] have threatened to retire him in the public interest as disciplinary action contrary to Article 236 of the constitution. …

e. That In the current petition, the Petitioner at paragraph 26 of the Petition states;

The Petitioner has been dismissed rom service based on false allegations and a faulty administrative process

f. That The two suits thus outlined, one is filed by parties other than the current Petitioner while the Petition herein is sorely by Kizito Lubano; one is based on threatened retirement of Kizito Lubano by KEMRI Board of management and others while the Petition herein is based on the dismissal of the Petitioner by KEMRI Board of Management and others; the declaratory orders sought in Petition No. 33 of 2015 and the prayers sought herein are fundamentally different noting the nature of parties who have sued in each case.

g. That Civil Appeal no. 24 of 2014 is specifically drawn from the Ruling of the Court in Petition No.33 of 2014. Such an Appeal has nothing to do with the current petition.

48. It cannot therefore be correct that both petitions in No.33 of 2014 and No.46 of 2015 are similar. The parties and prayers sought in both Petitioner are different. Even where Petition No.33 of 2014 were to be allowed, which is not the case here, the nature of prayers sought against the respondents are different as herein as the Petitioner in this case is seeking for orders on the basis that he has been dismissed from his employment. In my reading of Petition No.33 of 2014, the petitioners were suing in the interests of the public thus;

> *The 1st and 2nd petitioners who are residents of Nairobi City County, are law abiding citizens of Kenya, public spirited individuals, human rights defenders, and strong believers in the rule of law and constitutionalism. They are members of Kenyans for Justice and Development Trust, which is a legal trust, incorporated in Kenya and founded on republican principles as set up with the purpose of promoting democratic governance, economic development and prosperity. …*

49. I therefore find the current Petition is not a replica of Petition No.33 of 2014. There are fundamental differences to both suits. The prayers/orders sought are separate and distinct from each other and the Petitioner is properly before this court.

50. The other question is whether there is the non-joinder of KEMRI as a crucial party herein. That KEMRI was the employer of the Petitioner but has not been joined herein as a party and thus fatal to the suit. All the Respondent strongly made submissions in this regard noting the constitutive Act for KEMRI, the Science and Technology Act, that KEMRI being a body corporate with perpetual succession has power to sue and be sued in its name. In this regard the Employment and Labour Relations Court (Procedure) Rules (the Rules) define who a *Party* to any proceedings is;

> *"Party" means a person, a trade union, an employer, employer's organization or any corporate body directly involved or affected by an appeal, or claim to which the Court has taken cognizance or who is a party to a collective agreement referred to Court for registration.*

51. I am keen on the part that such a *party* includes that person or entity *directly involved or affected by an appeal, or a claim to which the Court has taken cognizance.* Such a *party* therefore has to be assessed as one to be included in proceedings before this Court to ensure the ends of justice are achieved. The nature of proceedings before this Court are that in labour relations, the Court should not overly rely on technicalities at the expense of substantive justice. Where the Petitioner has sought for orders against the parties before court, such prayers shall be analysed on their merit and where a party that is crucial to the claim but has not been joined herein, no orders can be made against such an entity as they are not a party to the suit in the first instance. However, where the Court finds it necessary and just to direct the enforcement of orders of the Court and that such an enforcement would only be possible where a particular party named or not named as a Respondent is necessary, nothing stops the course of justice to so direct.

52. The above finding is not a departure from the position long held in the Case of **Werrot and Company Ltd & others versus Andrew Douglas Gregory & Others, HCCC No. 2363 of 1998, LLR 2828;**

> *For determining the question of who is a necessary party there are two tests; (i) there must be a right to some relief against such a party in respect of the matter involved in the proceeding in question and (ii) it should not be possible to pass an effective decree in the absence of such a party.*

53. The question should then be whether the current respondents are properly joined herein and if so whether such presence is necessary in order to enable the Court effectually and completely adjudicate upon and settle all the questions involved in the suit. There must be a demonstration by the Petitioner that there is a direct and real interest in the reliefs sought against the listed respondents and thus necessary parties herein. See **Benjamin Kipketer Tai versus Kenya Commercial Bank, HCCC No.87 of 2003 (Kisumu) [2003] LLR 8071.** In this regard therefore I wish to refer to **Amon –**

vs- Raphael Tuck and Sons Ltd [1956] 1 ALL E.R. AT Page 273 it was held *inter alia* that;

> *… A party may be joined in a suit, not because there is a cause of action against it, but because that party's presence is necessary in order to enable the Court effectually and competently adjudicate upon and settle all the questions involved in the cause or matter.*

54. In this case therefore, and noting the decision in **Benjamin Kipketer Tai Case** and in **Amon case,** the non-joinder of KEMRI is not fatal to the suit. The Petitioner has set out the orders sought against each Respondent and granted the history of the matter, he has laid a background relating to each Respondent with regard to the Petition herein. The 1st Respondent manages KEMRI which is a state corporation and issued the letter of dismissal; the 2nd Respondent is the chief officer of KEMRI and acted for and on behalf of such body; 3rd Respondent is the parent ministry with regard to KEMRI while the 4th Respondent is the chief officer in charge of the 3rd respondent; the 5th Respondent is a constitutional commission with the mandate of ensuring compliance with chapter six of the Constitution with regard to leadership and integrity; the 6th Respondent supervised the petitioner; the 7th Respondent is head of KEMRI human resource function while the 8th Respondent is the legal advisor of the national government; and the 9th Respondent as an independent commission on administration of justice addressed this matter before it was filed in court. Each party herein is clearly assigned a role with regard to the background of the Petition even where there may be no specific payer against such a party. Where KEMRI is not joined and the Court establishes that there is a good case against such a body, there is discretion to order as appropriate. See **Marekere University versus St. Mark Education Institute Ltd & Others, Kampala High Court Civil Suit No.378 of 1993 [1994] KALR 26.**

> *The fact that the plaintiff chose to file a suit against the two defendants only, implicitly meant that it did not sue anyone else … it is clear that it has not indicated that it wishes to sue any other party.*

55. I hasten to add, where a suit is suitable before court, non-joinder of a party cannot remove responsibility from other parties sued as respondents. An omission of any party as Respondent cannot be a justification by other parties that the suit should not move simply because such other party is not joined. See **Busienei versus Transnational Bank (K) Ltd [2002] 1 KLR 784.** Where the Court is satisfied that there is a case against the respondents before court, such a case must be addressed on its merits. This Court recognises that employment and labour relations operate in an intricate manner and in a majority of cases, an employee will know who their supervisor is and might never know how the entity under which they work under is legally registered, even where the case was the converse and such an employee has all the requisite details, fair labour relations dictates that the Court operate without undue regard to technicalities and ensure substantive justice. That is my reading of the provisions of Article 41 and 159 of the Constitution read together with section 20(1) of the Employment and Labour Relations Court Act. To allow the respondents escape responsibility where such exists, would be tantamount to rendering fair labour practice and fair industrial relations ineffective.

56. I therefore find the joinder of the respondents herein is necessary as this will enable the Court to effectually and completely adjudicate upon and settle all questions involved in the petition. Where there is an omission to join KEMRI as a right party, such non-joinder does not remove responsibility from the other respondents. Such non-joinder does not render the Petition fatal.

57. On the substantive issues raised in the petition, the Petitioner submitted that his rights under the Constitution were violated. I single out the violations set out under articles 41, 47, 73, 75, 232 and 259 which relates to fair labour practices, fair administrative action, the exercise by state officer of their authority in fairness and with integrity, state officers to avoid conflict of interest in the performance of their duties, accountability for administrative acts, and the requirement on all to promote the values and principles in the constitution. The Petition is based on the facts that the Petitioner was employed by KEMRI as the Principal Research and Head of the Department of Planning, Monitoring and Evaluation until his dismissal on 17th December 2014 on the grounds of retirement on public interest. The Petitioner has challenged the reasons for his dismissal from employment; the process and reasons of and for his disciplinary hearing; the persons presiding over the disciplinary hearing; and that his appeal against his retirement on public interest was never considered.

58. In the ordinary exercise of its powers, the Court appreciates that parties in an employment relationship should be left to address disciplinary matters by the use of internal mechanisms. Such internal procedures must be guided by the operative law and Constitution but of fundamental importance is to ensure that an employee is heard at the shop floor as the best forum where basic facts in employment are to be found. The Court acknowledges that interference in such matters will remove the necessary parties from establishing and utilising available policy and regulation mechanisms established for that purpose. The Court will however intervene in exceptional cases where it is apparent that the proceedings so taken to address any disciplinary case is based on an illegality or the continued administrative

action is an injustice *ab initio* and the continuation of such action will result in an inherent injustice. These were matters that the Court addressed at length in **Petition No.33 of 2014** as cited above. Similar findings were made in the case of **Joseph Mutuura Mberia & Another versus The Council Jomo Kenyatta university of Agriculture and Technology (JKUAT) Cause No.1587 of 2013;**

> *… an employer is at liberty to commence disciplinary proceedings against the employee and it is the duty of the employee to justify in the administrative disciplinary process the continuation of his employment. However where the Court establishes that such administrative disciplinary proceedings are commenced with ulterior motive or as a process shrouded with illegalities, then the Court must intervene and stop such an illegality.*

59. In this case, the Petitioner has challenged the process undertaken in his disciplinary hearing, the reasons for such action and the resultant outcome of such a process. the respondents have justified such action noting that the process undertaken in the hearing of the petitioner's gross indiscipline was in accordance with the policy regulations adopted by the 1st Respondent for KEMRI for its employees and that there existed valid reasons for the disciplinary action against the Petitioner and the decision to retire him on public interest was approved by the 1st Respondent for KEMRI. In this regard, where such a process, reasons and resultant outcome is thus challenged, the Court must go into the same and ensure there was due process, there was no illegality and the administrative action taken against the Petitioner was fair or unfair in the circumstances. Such an assessment by the Court does not go contrary to the Respondent disciplinary procedures as the issue in question is the legality, the fairness and compliance to due process.

60. In a similar scenario in the case **of Nomgcobo Jiba v Minister of Justice & Constitutional Development & 16 Others, Case No J167/09 Labour Court Johannesburg** held;

> *[On the question as to whether] the Labour Court has jurisdiction to interdict any unfair conduct including disciplinary action. However such an intervention should be exercised in exceptional cases. It is not appropriate to set out the test. It should be left to the discretion of the Labour Court to exercise such powers having regard to the facts of each case. Among the factors to be considered would in my view be whether failure to intervene would lead to grave injustice or whether justice might be attained by other means. The list is not exhaustive.*

61. However, the statutory mandate of the 9th Respondent is clear. Such mandate was put into motion by the Petitioner before filing this petition. The 9th Respondent is bound to perform its mandate within its constitutive statute which I find was properly undertaken with regard to matters outlined in this petition. To enjoin the 9th Respondent in these proceeding was unnecessary.

62. Starting from the end, on **17th December 2014** the Petitioner was issued with a dismissal letter dated 17th November 2014. The letter stated that the Petitioner was dismissed for three (3) reasons/grounds out of the listed 6 issues before the disciplinary committee against him. The 1st Respondent noted;

> *The Board noted that allegations 2, 3, and 6 are currently a subject under consideration by the Court and were not therefore discussed. After listening to your responses, the board has found your responses in respect to allegations 1, 4 and 5 above to be unsatisfactory, and consequently holds you guilty of the offences.*

63. Of the six (6) allegations made against the Petitioner, three (3) were not in issue at the hearing as noted in the letter of dismissal. Such were matters subject of determination. What was considered were allegations 1, 4 and 5 that;

1. *Allegations that you disobeyed lawful instructions to you from the board of management, vide the board's letter dated 29th june 2011, and director, KEMRI, vide his letter dated 30th November, 2011 by refusing to facilitate amendment of KEMRES Memorandum and Articles of Association as resolved by the Institute's board in breach of the KEMRI Staff Service Regulations*

> *4. Allegations that you were absent from duty without permission from 16th January – 23rd January 2014, and failed to provide satisfactory explanation on the same in contravention of the KEMRI staff Service Regulations.*
>
> *5. allegations that you abandoned without formal approval, the Institute's PC evaluation exercise for the year 2012/2013 conducted in October 2013 at Utalii College, an exercise which is a culmination of PC activities coordinated throughout the year by the M&E department, and where you, as the Head of the Department, was therefore expected to provide guidance and leadership throughout the process.*

64. These were thus the allegations against the Petitioner to which he was supposed to give a satisfactory response. These were allegations the Petitioner was summoned to address vide letter dated 19th March 2014. On 28th March 2014 the Petitioner gave his detailed responses to all the

issues against him but the Court concern is with regard to the 3 issues above, 1, 4, and 5.

65. On issue one and **allegation Number (1)** the Petitioner noted that KEMRES is a limited entity governed by the Companies Act and the procedure for the amendment of the Memorandum and Article of Association is prescribed in law. In the Replying Affidavit of the 7th Respondent filed on 1st July 2015 at paragraph 15 she avers that

> *I am aware that the Institute's board of Management passed a resolution for the incorporation of a company to be known as KEMRI Enterprises & Services Limited (KEMRES) which was to be wholly owned by the Institute, and whose objective was to promote the commercialisation of research work.*

66. This registration of KEMRES is confirmed by annexure at page 532 of the petitioner's bundle. A certificate of incorporations thus;

> *No. CPR/2011/43112*
>
> *CERTIFICATE OF INCORPORATION*
>
> *I hereby certify that –*
>
> *KEMRI ENTERPRISES & SERVICES LIMITED*
>
> *Is this day incorporated under the Companies Act (Cap.486) and that the Company is LIMITED.*
>
> *GIVEN under my hand at Nairobi this 14th day of March Two Thousand and Eleven [2011].*
>
> *[Signed]*
>
> *Registrar of Companies.*

67. A registered company under the Companies Act, is regulated under the same Act. Any changes to the Company must conform to its constitutive Act. In this regard the 7th Respondent in her affidavit filed on 1st July 2015 at paragraph 17 affirms;

> *I am aware that the institute's board of Management subsequently made a resolution for the institute's interest to change the shareholding in the said Company {KEMRES} and upon communication to the said resolution the institute's Chief Executive Officer, Dr Solomon Mpoke, agreed to sign the documents for transfer of shares but the Petitioner herein refused to comply with the Board's request despite repeated requests an reminders as borne out in the annexed copies marked "AW-3".*

68. Annexure "AW-3" is a letter by the chairman of the 1st Respondent dated 29th June 2011 directed at Dr Solomon Mpoke and the Petitioner on the amendment to KEMRES Memorandum and Articles of Association. This letter is issued after the registration of the KEMRES Company on 14th March 2011. Upon such registration, the affairs of such Company could only be regulated under the Companies Act and by its Directors. Where KEMRI had shareholding therein in the Company and wished to make changes to such shareholding, as such a party to the company they had the freedom to make such changes but such changes were not to affect the shareholding of the other directors. Upon registration of the KEMRES Company, the directors therein had the freedom to act in accordance with the Company Memorandum and Articles of Association. In this case, the Petitioner effectively became a director of KEMRES with the sanction of his employer but to KEMRI he remained the bound by his terms and condition of employment as the Principal Research Officer and head of Department of Planning, Monitoring and Evaluation. To thus require him to make changes under KEMRES using the KEMRI disciplinary mechanisms over a limited Company is a procedure that is clothed with illegality, coercive and contrary to fair labour practices under the provisions of Article 41 of the constitution. For the 1st, 2nd, 6th and 7th respondents to move the process of the disciplinary process on a matter such as this set out under allegation 1 in the summon issued to the Petitioner is an unfair administrative action contrary to the provisions of Article 47 of the constitution.

69. I therefore find no good basis upon which the 1st respondent, relying on a matter set out under allegation 1 reached their finding that resulted in the dismissal of the petitioner. Such a reason lack justification as it was not a valid issue against the Petitioner in the course of his employment contract.

70. With regard to **allegation four (4),** the Petitioner explained his absence from duty on 16th to 23rd January 2014 in that;

> On 8th and 16th January 2014 he was at an interview at NACC;
>
> On 17th January 2015 he was Aga Khan and Nairobi Hospital attending to a painful back; and
>
> 17th to 24th he was on a doctor's bed rest.

71. During the disciplinary hearing meeting held on 4th April 2014, during deliberations on allegation number 4 it was noted as follows;

That Dr Kizito alleged to have been present in the Institute on the 20th and 21st January 2014 despite having been allowed off-duty by a medical practitioner for the period of 17th to 24th January 2014.

…

That management should produce evidence (delivery book) showing attempts to reach Dr Kizito.

Agreed:

That Dr Kizito was guilty on this count since he did not inform his supervisor of his sickness neither did he submit his medical certificate to the Staff Clinic as was required of him …

72. Page 10 of 15 to these minutes is not attached. I have gone through the entire record of the Petition and replies thereto, this page is missing. That notwithstanding, though the Petitioner was found guilty of this offence, his salary for the days said he was absent was not paid. He notes this much in his reply filed in response to the allegations against him. He also records that the non-payment of such salary in this regard was causing his family great hardship. I take it then, for the days the Petitioner was absent from duty, even before he was heard and though the record in this regard is incomplete, he was punished for it as his salary was stopped. The 1st, 2nd, 6th and 7th respondents do not clarify as to whether such salary has since been paid and even if it was paid, which is not stated, the withholding of such salary for the duration it was, I find to be undue punishment for the allegation made against the Petitioner and before he was heard as to his reasons of such absence. To then use the same reason for a dismissal is double punishment. This is not a fair labour practice and contrary to good practice in an open and democratic society such as ours and as a requirement under Article 41 and Article 20(4)(a);

(a) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom;

73. To use the same reason of the petitioner's absence from duty to retire him on public interest noting that he had already been penalised is to deny him fairness and contrary to human dignity, equality of terms and contrary to fair labour practice. It goes contrary to the tenets of due process. It is contrary to what is fair, just and reasonable. In any event, under the KEMRI Staff Service Regulations at clause 14.11 it states;

Absence from duty without leave

Where an employee is absent from duty without leave or reasonable cause for a period exceeding forty-either hours and the employee cannot be traced within a period of twenty-one working days from the commencement of such absence, or if traced no reply to a charge of absence without leave is received from him within twenty-one working days after the dispatch of the charge to him, the Director/ CEO may summarily dismiss him on grounds of desertion.

74. Where the above provisions were to be strictly followed, the Petitioner is said to have been absent from 16th to 23rd January 2014. Therein are six (6) working days. On 23rd January 2014 a notice of absence was issued to the Petitioner by the 7th Respondent and he was required or Respondent within 7 days. The Petitioner replied on 11th February 2014 but on 25th February 2014 the 7th Respondent replied noting that the explanations given were not satisfactory and directed him to submit the original medical receipts with regard to the medical expenses at the Aga Khan and Nairobi hospitals.

75. I therefore find, as noted above, the petitioner's salary was already stopped.in submissions, the respondents do not make any reference to this facts as to whether such salary was paid or the sanction lifted, what is clear is that these allegations formed part of the 6 issues that formed the basis of the disciplinary hearing leading to the dismissal of the Petitioner by retirement on public interest. I find such a sanction in the circumstances of the case to be excessive as this was double punishment. To use one complaint against an employee for double punishment is too harsh a practice that has no justification in fair labour relations.

76. With regard to allegation **Number five (5),** the Petitioner is said to have abandoned the PC evaluation exercise taking place at Utalii College and an exercise that fell under his department. To this allegations the Petitioner submitted that he was at the meeting in Utalii College but it took long than expected and he had to urgently travel to Mombasa to attend to his child school, he alerted the Director before his exit from the meeting, he also informed his colleague and the evaluators present for the exercise and the Director did grant such permission.

77. In the disciplinary committee hearing, these minutes are missing page 10 of 15. Allegation 5 start from such page. The Court record has page 11 of 15 which must be a continuation of the previous missing page. In the minutes it is noted that;

Agreed:

That Dr Kizito was found guilty on this count as charged since he did not receive explicit permission neither from his immediate supervisor nor from the Director, KEMRI to excuse himself from this important institute and National exercise.

78. The allegation against the Petitioner here was that he *abandoned without formal approval the PC evaluation exercise for the year 2012/2013.* The Petitioner has submitted that indeed he was at this meeting but had to leave early to attend to an urgent meeting in Mombasa with regard to his child at school and that before he left the meeting, he informed the KEMRI Director. The contest here is that the KEMRI Director did not give *explicit permission.* What then is *explicit permission?*

79. The **Concise Oxford English Dictionary** defines the word *explicit* as follows:

Stated clearly and precisely.

80. Permission on the other hand is defined as;

> *A licence or liberty to do something; authorisation. Authorisation that is clearly and unmistakably granted by action or words, oral or written.*

81. This is the nature of permission that the Petitioner is challenged to have failed to have at the time he exited the meeting held on October 2013. In response, the Petitioner states that before he left the meeting he informed his immediate supervisor and the CEO as well as the person facilitating the meeting. The CEO being the officer responsible for daily running of KEMRI was thus informed and did let the Petitioner leave. Save for what is stated in the 5th charge against the petitioner, I find no other complaint against him by his immediate supervisor, the CEO or any other officer of the Respondent to suggest, imply or require that the Petitioner should have had *explicit permission* granted to him before exiting the meeting.

82. Under the Science, Technology and Innovation Act, section 30 provides for the role of the Director of KEMRI with the functions of;

> *(2) The Director of the Agency shall be the chief executive officer of the Agency and responsible to the Board of the Agency for the day –to-day running of the affairs of the Agency.*

83. Under such provisions therefore, where the Director as the CEO ought to have issued such *explicit permission* such requirements should have been made before the director allowed the Petitioner to exit the meeting. Where such exit was obtained irregularly, the KEMRI human resource policy was adequate to address this before the matter could arise on 4th April 2014 requiring the Petitioner to respond together with other myriad of allegations. Where it was necessary for the Petitioner to respond immediately about his sudden exit from the meeting in October 2013, a notice to that effect should have been issued immediately.

84. The question then with regard to the nature of *permission* granted to the Petitioner becomes quite subjective. It is the word of the disciplinary committee members against the Petitioner and in the absence of the person who gave him such *permission* to be away from the meeting, it cannot be an issue of the Petitioner *abandoning without formal approval.* Permission was granted by none other than the Director and Chief Officer of KEMRI for the Petitioner to leave the meeting early. Where the Petitioner acted inappropriately, this was against the Director as against any other officer present at the meeting. Where the director thus felt slighted for not being made aware of the early exit of the petitioner, then the director became a key witness of what exactly transpired between him and the petitioner. Such matter should have been procedurally addressed before the show cause and disciplinary hearing on 4th April 2014 as it concerned a meeting held in October 2013. To raise it in April 2014 without first taking the matter through the processes necessary is to render the Petitioner response ineffective under the circumstances of all the allegations he was faced with and required to prepare adequately. The complainant here should have been the KEMRI Director who is said to have given permission that is said was not *explicit.* Is there such a complaint? See **Jenny Luesby versus Standard Group Limited, Cause No.137 of 2014** at paragraph 62;

> *… The claimant in this case is accused of insubordination of the CEO and that there was a complaint by KUJ about her conduct. What then can the claimant be said to have done that was contrary to the law? Was this a case for summary dismissal as under section 44 of the Employment Act?*
>
> *… The respondent's evidence is that the claimant breached the terms of her contract… that her conduct of walking into the editors meeting was insubordination of the CEO and the evidence that while at the editors meeting the claimant was disruptive and where she walked out of the meeting, that this was an act of insubordination. This conduct undermined the authority of the CEO hence the summary dismissal. … the CEO was however never called to give evidence on the alleged facts of insubordination. Such act were said to be against him and not to any other officer.*

85. In this case therefore, where there is a contest such as this one, over a matter serious as to cause the dismissal of the Petitioner by retirement on public interest, great caution and consideration should have been given to each and every allegations made against him. It is obvious from the proceedings herein, the submissions by the Petitioner and matter deponed by the 7th Respondent in the Replying Affidavit filed on 1st August 2015 that the respondents went at great length to have the Petitioner make changes to the KEMRES affairs. Such efforts led to what the 7th Respondent states

at paragraph 18 and Annexure "AW-4" the minutes of 4the April 2014 that;

> *Because of lack of cooperation from Dr Kizito, the institute is now pursuing registration of another company to replace KEMRES. That Dr Kizito disobeyed lawful instructions from the Board and from the Director, KEMRI.*

86. Such averments are indicative of frustrations from the 1st, 2nd and 7th respondents against the petitioner. He had become a stumbling block to the required changes to the directorship of KEMRES. This was a Company with the purpose of *commercialisation of research* and as such, the proposed changes by the KEMRI Board that were intended to remove the Petitioner only and retain the two other directors, Dr Solomon and Boit and add others was being 'frustrated' by the petitioner. There was therefore sufficient motive to have him removed from his employment to pave way for staff who would comply to directions as required. This is not the purpose of public service. KEMRI and the 1st Respondent Board carry a public function. Equally, the 2nd and 7th respondents are not ordinary persons when undertaking their roles within the public entity, KEMRI. They act for the public good as public officers. Their service is to the public and not for themselves. To therefore frustrate the employment of another public officer undertaking his duties simply because he had refused the coercion of relinquishing his interests in a limited Company is to act contrary to the provisions of Article 10, 20,41, 47, 73,75, 232, 236, and 259 of the constitution. These are fundamental rights and where violated the Petitioner has a remedy from this court.

87. Based on the above analysis, I find merit in the challenges made by the Petitioner against his dismissal and retirement on public interest. Had such matters been considered in an appeal using the internal mechanism, such loopholes as noted above should have been adequately addressed.

88. Where internal procedure allow for an appeal, this should be exhausted. Where an employee files such an appeal, dues process demands that such an appeal be heard on its merit. Where there is evidence that an appeal is allowed by the policy and internal procedures of an employer and such an appeal is not heard on its merit, good reason then exists for the Court to intervene and hear a claimant as had such an appeal been heard and its merit considered, there may have had a different decision. In the case of **Fredrick Owegi versus CFC Life Assurance, Cause No.1001 of 2012** the Court held;

> *…where there is procedural unfairness the substantive issue faced by the employee is muzzled in the process. Where there was an opportunity to address the core concerns that an employee may have, once due process is not applied the possible outcome is already eschewed against such an employee. The emphasis here is on process, and not result. That being the case, it serves no purpose for the Court to consider and analyse every issue raised by the Respondent in the show cause letter issued to the claimant as the failure by the Respondent to consider all or some of the issues albeit material as rendering the claimant's responses unsatisfactory should have been given further thoughts through a hearing where the claimant should have been heard in the presence of a fellow employee of his own choice. Once that was done the internal procedures of the Respondent allowed for time for appeal, which should have been notified to the claimant at the time of termination. [Emphasis added].*

89. However where it is apparent that such an appeal has already been compromised by the actions of the employer and its officer, the employee need not apply it as this would be an act in futility. In this case, the Petitioner filed his appeal, this is on record and the 1st and 2nd respondents have not shown anything with regard to what they did in addressing such an appeal. Had the appeal been given due consideration, noting the obvious challenge to the subjective nature of matters before the disciplinary committee, a different outcome of the appeal was reasonably possible.

90. I therefore find the disciplinary proceedings against the Petitioner were already eschewed and the resulting decision clothed with illegalities. Whatever outcome arose out of proceedings that were shrouded with such illegalities as set to above, the appeal not having been considered, such result became a nullity. It is of no legal effect. This shall be quashed.

91. There are serious issues with regard to leadership and integrity that the Petitioner has set out. I find he has undertaken his public duty that far and despite the non-appearance of the 5th respondent herein, the 3rd, 4th and 8th respondent have the power and mandate to set in motion a process to address any malpractices within KEMRI and its management. I will only say that much.

92. That set out, it is important to revisit the decision of the 1st Respondent to dismiss the Petitioner by retirement on public interest. What led to such a sanction is crucial to interrogate. The Petitioner held a public office for a public body, KEMRI. The officers working at KEMRI are therefore public officers undertaking their public duty for the public good. Disciplinary proceedings for KEMRI employees are governed by the human resource policy. Such a policy is to guide KEMRI in addressing disciplinary cases and where there is a finding of

misconduct, address the same in accordance with the set policy, written law such as the Employment Act or the Constitution as under Article 41. To go outside what is provided for under the KEMRI policy and act for the public good, great caution must be taken and where taken, reason, justification and reasonable sanction must be gone into. To thus arrive at a dismissal and a retirement in the public interest, the 1st Respondent must show as to how such a sanction was arrived at and its rationale.

93. This Court has set some principles in this regard. As submitted by the Petitioner in the case of **DK Njagi Marete versus the TSC**, the Court held that;

> *… The Respondent [the employer] had the onus to show objective and demonstrable grounds warranting the retirement of the claimant. When a public employer justified the premature termination of a contract of employment, on the grounds of public interest, such an employer had* ***to show its decision was driven by public policy objective, and that the decision taken was legitimate and justifiable****. It was not enough to merely write a letter to the employee and inform him that a decision to retire him on public interest had been made. There had to be shown valid reasons amounting to public interest, to justify termination. [Emphasis added].*

94. Such a reason cannot be bare. It must have its basis and or a foundational basis. The reason must find validity in a policy, law or public complaint against the subject employee. In this regard, section 43 of the Employment Act is important to restate here thus;

> ***43.*** *(1) In any claim arising out of termination of a contract, the employer shall be required to prove the reason or reasons for the termination, and where the employer fails to do so, the termination shall be deemed to have been unfair within the meaning of section 45.*
>
> *(2) The reason or reasons for termination of a contract are the matters that the employer at the time of termination of the contract genuinely believed to exist, and which caused the employer to terminate the services of the employee.*

95. The clarity of section 43 of the Employment Act in this case is that, whether an employee is in the public or private employment, these provisions are mandatory. The termination of any contract of employment must meet a set threshold. There must be genuine reasons to terminate a contract of employment; such a reason or reasons must be proved; and where there are no reasons or the reasons are found not to be genuine, any resulting termination of an employment contract is unfair. The duty is vested upon an employer to prove the reasons for termination of an employment contract. In the **DK Njagi Marete Case** the Court went further and stated that the employer must show objective and demonstrable grounds warranting termination of an employment contract. In this case, the employer who relied on the reason of a public interest had to go a step further and show that such a reason was driven by public policy objective. Therefore without such ingredients, to pick a reason such as the one given to the Petitioner without setting out the principles outlined above rendered the same void. It had no legitimacy as it lacked justification.

96. In a different case that related to an officer employed in the disciplined forces, the Court set out the procedures applicable to all public officers without the exclusion of the disciplined forces. In the case of **John Benson Githinji versus the Attorney General & Others, cause No.2020 of 2011,** the Court held that;

> *Retirement in the interest of the public is provided for under Regulation 25[2] and 36 of the Public Service Commission Regulations. It is a form of retirement that is resorted to, where termination cannot be effectuated suitably under other Regulations. It also has its procedural protections. The Authorized Officer must have considered every report in his possession made with regard to the Public Officer. The Authorized Officer must hold the view that it is desirable to retire the Public Officer in the public interest. The Public Officer shall be notified of the intention to retire him in this manner, and availed specified complaints and substance of any report or part thereof which is detrimental to the Officer. He must be given the opportunity to show cause why he should not be retired in the public interest. His representations and the observations of the Authorized Officer shall after this be forwarded by the Authorized Officer to the Public Service Commission, who determines whether the Public Officer shall be retired in the public interest. [emphasis added].*

97. to therefore retire an employee in the public interest would therefore appear to require a higher standard of prove with a different set of requirements than in ordinary procedures for termination of employment. upon an employer taking the decision to terminate an employee through any other process and it emerges that the only reason for such termination is the *public interest,* then the procedures and principles set out in the **DK Njagi Marete case** and in the **John Benson Githinji case** would have to be put into motion so as to justify such a reason. Due process is paramount. Before a temination of an employment contract, whatever the public interest

that may exist to suggest that such an officer should be retired and their contract terminated, due process must be given a chance. Such an officer must be given notice and a chance to be heard in his defence. In the proceeding against the Petitioner held on 4th April 2014 or any other day, none relate to any notice of retirement in the public interest. To therefore apply the same in his dismissal was arbitrary, unilateral and or influenced by extraordinary motives not disclosed to the Petitioner or to the court.

98. I therefore find the dismissal and retirement of the Petitioner in the public interest lacked justification, it was arbitrary and influenced by malice and ill-motive. This is contrary to the provisions of Article 47 and 50 of the constitution. There was a violation of the petitioner's constitutional rights in this regard.

Remedies

99. In view of the finings made in the judgement, the Court finds that the Petitioner is entitled to the remedies prayed for save that the prayers for compensation for general and exemplary damages for harassment, financial loss, intimidation, defamation and mental torture sets in motion a different set of assessments for the Court consideration. This shall not be gone into factoring that these are not the only remedies that the Petitioner is seeking. However such will be put into account in the final orders of the court.

100. The Petitioner has also set out various declarations with regard to the violation of his rights. He is seeking for the quashing of the decision taken by the 1st Respondent and orders of mandamus compelling the 1st Respondent to reinstate him to his former position as principal Research officer and Head of Planning, Monitoring and Evaluation department. The Petitioner relied on the case of **Mary Chemweno Kiptui** as set out above where there was a reinstatement. The 1st, 2nd, 6th and 7thRespondent submitted that the Petitioner is not entitled to the remedies sought as they are not pleaded. That retirement in the public interest is a form of termination of employment and in this case the respondents were justified in recommending such termination and the fact that the 1st Respondent for KEMRI adopted the same gave it the necessary legal sanction. The respondents cited the case of **Mwatata Juma Mwangala** extensively but I find the same not relevant herein as it related to a different set of facts and the outcome decision cannot in any way be related herein.

101. On the Court finding that there was fundamental failures in the disciplinary procedures taken against the petitioner, the allegations made had no justification and ended in an illegality the Court has given due considerations to all the submissions herein. Such submissions are put into account herein particular averments by Mary Rigoro in her affidavit filed on 24th June 2015 where she states that upon the retirement of the Petitioner his duties were taken over by officers working within KEMRI. I take it then there is no new recruitment with regard to the position the Petitioner held as at 17th November 2014. There is no substantive appointment in this regard and such duties and tasks performed by the Petitioner still exist though currently held by different officers within the respondent.

102. The Petitioner is specific in the nature of orders sought. He is seeking orders of judicial review for the quashing of the decision of the 1st Respondent to dismiss him in the public interest. He is seeking for compensation for general damages and a permanent injunction against the Respondent with regard to their undertaking similar disciplinary proceedings. Such remedies will be put into account in the final orders of the court.

103. I have taken due assessment of all the issues herein and the factors necessary for application with regard to the provisions of section 49 of the Employment Act with regard to the order for reinstatement. The nature and seriousness of the employment violations herein are serious and only an order for reinstatement can sufficiently address the same. The nature of the illegalities committed shall well be redressed with an order for specific performance. The Petitioner moved the Court immediately and it has been less than one (1) year since his dismissal.

In conclusion therefore, I enter judgement for the Petitioner against the Respondent for:

a. **The decision to dismiss and retire the Petitioner in the public interest is hereby quashed; *It is declared the Petitioner's dismissal and retirement in the public interest was arbitrarily, unfair and unlawfully applied to him;***

b. **A declaration that under Article 236 of the constitution, the Petitioner remains the lawful holder of the position of Principal Research Officer and Head of Planning, Monitoring and Evaluation of KEMRI and shall continue to hold such officer with full benefits until otherwise terminated for another other lawful reason or reasons other than the reasons subject of this petition;**

c. **The Petitioner is hereby reinstated to his position with KEMRI with all his back salary, allowances, benefits and any other legal dues he was entitled to by virtue of his employment with KEMRI;**

d. **The Petitioner shall report on duty on 2nd November 2015 at 0830 hours and the respondents to jointly and severally permit the Petitioner to resume his official duties with effect as herein;**

e. **The 1st Respondent is hereby restrained from undertaking disciplinary action against the**

Petitioner with regard to matters relating and subject of proceedings held on 4th April 2014;

f. **The joinder of the 9th Respondent was not necessary in this petition. The 9th Respondent perform a public duty. No costs are due.**

g. **The 1st Respondent shall meet the costs of the Petitioner while the 2nd, 3rd, 4th, 5th, 6th, 7th and 8th respondents shall meet their own costs.**

It is so ordered.

Delivered in open court at Nairobi and dated this 30th day of October 2015.

M. Mbaru

JUDGE

In the presence of:

Lillian Njenga: Court Assistant

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAKURU

PETITION NO.53 OF 2014

MICHAEL K. MAINA……..……..PETITIONER

VERSUS

COMMISSIONER OF ADMINISTRATIVE JUSTICE ……..……..1ST RESPONDENT

DIRECTOR OF PUBLIC PROSECUTIONS……2ND RESPONDENT

INSPECTOR GENERAL OF POLICE……..3RD RESPONDENT

CHIEF MAGISTRATE, NAKURU LAW COURTS……..4TH RESPONDENT

THE ATTORNEY GENERAL……5TH RESPONDENT

JUDGEMENT

1. The petitioner who acts in person has filed the petition dated 1st August ,2014 alleging that his rights under Articles 19,46 and 47 of the Constitution have been infringed. He seeks the following orders;

   a) A declaration that the failure by the Chairperson, Commission on Administrative Justice to respond or acknowledge receipt of a complaint under registered post amounts to a failure of a duty which the commission is constitutionally mandated to perform

   b) A declaration that procrastinating to investigate/ make a decision on this psychologically tortious issue by the Commission of Administrative Justice contravenes the provisions of Articles 46 and 47 and Chapters 6 and 12 of the Constitution;

   c) A declaration that ignoring the Petitioner's complaint infringes on his right under Article 19(1) (2) of the Constitution which mandates the Commission to observe,respect,protect,promote and fulfill the rights and fundamentals freedoms;

   d) If all or some of the prayers in paragraphs 1,2 and 3 are in the affirmative this honorable court to issue orders to writ of mandamus to compel the Chairperson, Commission on Administrative of Justice to investigate and issue a determination in the complaint/petition which was submitted to him on 6th December 2013;

   e) Such orders as the Honorable court may deem fit; and

   f) Costs of this petition

THE PETITIONER'S CASE

2. On 13th and 14th July 2006, the petitioner was attacked at his home in Mchanganyiko Area in Nakuru County by robbers. With the help of his son, he was able to apprehend one of the robbers, David Kamau Shivendi, BUT THE REST MANAGED TOI ESCAPE. The suspect was later charged in the Chief Magistrate's Court at Nakuru in CR. Case No.1694 of 2006 with the offence of robbery with violence contrary to Section 296(2) of the Penal Code. He was acquitted of this Offence under Section 210 of the Criminal Procedure Code because of non-availability of witnesses.

3. The Petitioner alleges that because of the acts and omissions of the 2nd, 3rd and 4th Respondents officers, the persons responsible for the attack were not brought to Justice .He accuses the police of failing to conduct sufficient investigations into the matter and as a result the other robbers were not apprehend. He alleged that the trial Court deliberately subverted justice by acquitting they arrested suspect under Section 210 of the Criminal Procedure Code notwithstanding that on the date when the accused was acquitted due to unavailability of prosecution witnesses, he was in court ready to give his testimony. The Senior State Counsel under the then PCIO Rift Valley, who was acting under the instructions of the 2nd Respondent, was accused of colluding with the trial magistrate to acquit the accused person. The prosecutor also failed to appeal against the erroneous decision of the trial magistrate despite giving an undertaking that he would do so.

4. The Petitioner filed complaints with the Hon. Attorney General, the Chief Justice, Kenya Anti-Corruption Commission, the PPO Rift Valley, the PCIO Rift Valley and the 2nd Respondent who did not notify him if they had addressed his complaint or their findings.

5. As a matter of last resort, he submitted his grievances to the 1st Respondent by way of the letter dated 6th December, 2013. He asked the chairperson to the 1st Respondent to inform him whether an appeal was filed against the decision of the trial magistrate in the criminal case where the suspect was discharged and its current position and whether any action was taken against the trial magistrate who acquitted the accused; the court prosecutor who conspired with the trial magistrate and the police officer from the DCIO Nakuru who impersonated the DCIO. He also sought to be informed whether the exhibits which are held in police custody could be released to him.

6. The Petitioner's case is that this complaint has not been addressed to date. His claim was that by failing to act, the 1st Respondent infringed on his rights under Articles 46 and 47 of the Constitution. He also alleged that this inaction was contrary to Chapter 6 and Article 19(1) of the Constitution. He therefore asked this court to issue a writ of mandamus compelling the 1st Respondent to investigate and issue a determination on his complaint.

THE 1ST REPONDENT'S CASE

7. The 1st Respondent filed a Replying Affidavit sworn by its Chief Executive Officer on 26th September, 2013. It acknowledged that the Petitioner filed a complaint, which was filed under Reference No.CAJ/POL/015/1919/13 VOL 1. However investigations into this complaint were commenced in March 2013 due to backlog.

8. The 1st Respondent maintained that it did not refuse or ignore the Petitioner's complaint. It exhibited various letters to the 2nd Respondent requesting assistance in investigating the issue (see exhibits " LN2, LN3 and LN5").The 2nd Respondent acknowledge that it was aware of the Petitioner's case as he had also complained to it, and would revert with further directions once the file was submitted by its Branch in Nakuru. (See Exhibits "LN4 and LN6").

9. In view of this explanation, the 1st Respondent was of the view that the Petitioner's complaint was unmerited and should be dismissed.

THE 3RD, 4TH AND 5TH RESPONDENTS' CASE

10. The Hon. Attorney General entered appearance on 2nd August, 2014 for the 3rd, 4th and 5th Respondents. By the Grounds of Opposition dated 24th March, 2015, they objected to the Petition on the grounds that it is bad in law, lacks merit and is an abuse of the court process, that the Petitioner has not demonstrated how his right have been violated and has not exhausted the available administrative remedies.

11. The 2nd Respondent did not enter appearance or file any document to oppose the Petition.

SUBMISSIONS

12. In his submissions, the Petitioner relied on a sworn affidavit filed on 8TH April 2015 wherein he stated his case which I need not reiterate.

13. Counsel for the 1st Respondent submitted that the 1st Respondent had discharged its mandate under the Commission of Administration of Justice Act, 2011 and the Rules made thereunder in that it received the Petitioner's complaint and has commenced an inquiry into it. Counsel referred to the various correspondences between the 1st and the 2nd Respondents wherein the 1st Respondent requested an investigation into the criminal case in which the accused was acquitted. Counsel acknowledged that the case in which the accused was acquitted. Counsel acknowledged that the case cited therein was erroneous, but nonetheless, the 2nd Respondent understood that it referred to the Petitioner and also indicated that it had also received complaints from the Petitioner.

14. Referring to the submissions of the Petitioner, counsel was of the view that the Petitioner was aggrieved by two issues, the alleged collision between the Prosecutor and the trial magistrate and the failure of the 2nd Respondent to appeal against the trial court's decision to acquit the accused. Counsel submitted that the 1st Respondent is not able to offer the remedies which the Petitioner seeks. The 1st Respondent is an independent body and cannot be directed by any person or body to undertake any prosecutions. The Petitioner has enjoined it in this Petition but has not sought any substantive orders against it.

15. Secondly the corruption allegations made against the magistrate who was handling the criminal case were determined by the Judicial Committee on Ethics and Governance in the year 2007 and it was found that there was no reason to take step against the trial magistrate. Therefore the commission was only required to look into the complaint against the 2nd Respondent.

16. That the 1st Respondent can only issue administrative remedies, whereas the remedies sought by the Petitioner are more of a judicial nature. The 1st Respondent discharged its mandate by admitting the Petitioner's complaint and making an inquiry. He asked that the Petition be dismissed with costs.

17. Counsel for the 3rd, 4th and 5th Respondents adopted these submissions in their entirety.

18. In rejoinder, the Petitioner submitted that the letters cited by the Respondent's counsel refer to another case, Cr. Case No. 1694 of 2006 which was the subject of the Petitioner's case.

19. The 1st Respondent's duty is to investigate acts done by public administrators that it was only right that he first reports to the 1st Respondent before approaching the court. It was his submission that he did not wish to re-arrest the accused, but an appeal to the 1st Respondent for the Report on the decision of the Judicial Committee. He had asked for a copy of the Report from the Committee but he was told that they could not give it to him as it was in-house. He also wants a response from the 1st Respondent on the results of the inquiry.

ANALYSIS

20. The Petitioner's claim is that by the acts or omission of the 2nd, 3rd and 4th Respondent, the persons who violently attacked him on the night of 13th and 14th July, 2006 were not brought to justice.

21. In this Petition, his complaint is directed only at the 1st Respondent against whom he seeks the orders in the Petition. Therefore, as no substantive prayers were sought against the 2nd,3rd and 4th Respondents ,this court will confine itself to the claim against the 1st Respondent.

22. Although filed as a constitutional reference, this case is one for judicial review and invokes this court's supervisory jurisdiction under Article 165 of the Constitution. The facts do not support the contention that the Petitioner's rights under the Articles 46 and 47 or under any other Article in Chapter 4 of the Constitution were infringed. The Petitioner has sought to enforce the duty of the 1st Respondent to investigate its complaint against the 2nd Respondent.

23. His contention is that the 1st Respondent failed to carry out its constitutional and statutory mandate to investigate his complaint against the 2nd Respondent's decision not to appeal against the trial court's decision to acquit one of the suspects who had been charged with the attack.

24. The Petitioner stated before this court that he did not desire to re-open the case against the acquitted accused. He only wished to enforce the 1st Respondent mandate to look into the complaint against the 2nd Respondent and ensure that it is brought to answer for its inaction. He only desired that a report be issued to him of the results of its findings. His primary prayer was one for an order for mandamus directed against the 1st Respondent compelling it to investigate his complaint and issue him with the report of its findings.

25. The application should have been filed in accordance with Order 53 of the Civil Procedure Rules, which provides for the procedure of seeking judicial review orders. However there was no prejudice that was suffered by any of the parties and in particular the 1st Respondent against whom the orders were sought. The 1st Respondent understood the complaint against it and the nature of the orders sought. It was able to respond comprehensively to the averments against it. Therefore, in the interest of justice, I will proceed to determine the main issue raised in this case as to whether the 1st Respondent has a mandate to investigate the Petitioner's complaint against the 2nd Respondent and whether it has failed to discharge it.

26. The scope of the order of mandamus was defined by the Court of Appeal in Kenya National Examination Council V Republic Ex-Parte Geoffrey Gathenji Njoroge and 9 others, [1997] eKLR,as follows:

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

detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by a statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is the wrong remedy to apply for because, like an order of prohibition,an order of mandamus cannot quash what has already been done"

27. The 1st Respondent is a body established under Section 3 of the Commission of Administrative Justice Act, 2011 (No. 23 of 2011). Its functions under Section include;

(a) Investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;

(b) Investigate complaints of abuse of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;

(c) Report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b) , and the remedial action taken thereon;

(d) Inquire into allegations of mal-administration, delay, administrative injustice discourtesy,incompetence,misbehavior,ineffiency or ineptitude within the public service;

28. By the letter dated 6th December, 2013, the petitioner asked the 1st Respondent to investigate into the criminal case and inform him whether an appeal was filed against the decision of the trial magistrate in Criminal Case No 1694 of 2006 and its position ,whether any action was taken against the trial magistrate who acquitted the accused, the court prosecutor who conspired with the trial magistrate and the police officer from the DCIO Nakuru who impersonated the DCIO.He also sought to be informed whether the exhibits which are held in police custody could be released to him.

29. The Petitioner's requests related to investigations being conducted on the improprieties of the various public officers and actions taken against them. They were therefore within the mandate of the 1st Respondent.

30. The 1st Respondent has demonstrated, contrary to the averments of the Petitioner that it had not neglected to act on his complaint, that it had commenced an inquiry into the Petitioner that it had not neglected to act on his complaint, that it had commenced an inquiry into the Petitioner 's complaint which is yet to be determined. An order of mandamus is issued where the body has refused and/or failed to act. In this case, the same is yet to be completed. In particular it has already requested for information and the assistance of the 2nd Respondent who is yet to revert back.

FINDINGS

31. In light of this evidence, I find that the Petitioner's contention that the 1st Respondent had abdicated in performing its statutory duty to be without merit.

DETERMINATION:

32. Accordingly, the Petition herein is hereby dismissed. There shall be no order as to costs.

Dated and Signed at Nyeri this…....day of …….2015

A.MSHILA

JUDGE

Dated, Signed and Delivered at Nakuru this…….day of ……..,2015 by HON.JUSTICE A. K. NDUNGU

JUDGE

Paul Musili Wambua v Attorney General & 2 others [2015] eKLR

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NO. 542 OF 2013

IN THE MATTER OF ARTICLES 22,23,165(3) (B) AND (D), 258, OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF CONTRAVENTION OF ARTICLES 10(2),24, 27 AND 28 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF INTERPRETATION OF ARTICLES 77,259 AND 260 OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATER OF THE BETTING CONTROL AND GAMING ACT, CHAPTER 131 OF THE LAWS OF KENYA

BETWEEN

PROF. PAUL MUSILI WAMBUA.....PETITIONER

AND

ATTORNEY GENERAL.....RESPONDENT

AND

ASSOCIATION OF HUMAN RESOURCE

PRACTITIONERS OF KENYA.....1ST INTERESTED PARTY

COMMISSION ON ADMINISTRATIVE

JUSTICE……2ND INTERESTED PARTY

JUDGEMENT

1. By an amended petition dated 6th February, 2014, the Petitioner herein, **Prof. Paul Musili Wambua,** seeks the following orders:

> **(a) A declaration that lecturers in public universities are not state officers and as such are not precluded from participating in any other gainful employment as envisaged by Article 77 of the Constitution.**
>
> **(b) A declaration that Section 3(1)(a) of the Betting Lotteries and Gaming Act is inconsistent with the Constitution in as far as it limits the fundamental freedom from discrimination of the Petitioner by virtue of being a lecturer in a public university contrary to the extent permissible by Article 24(1) of the Constitution.**
>
> **(c) An injunction do issue forthwith against the Interested Party from continuing with its apparent witch-hunt in a bid to malign the Petitioner on the basis of its erroneous interpretation of the constitution.**
>
> **(d) A declaration that the Section 3(1)(a) of the Betting Lotteries and Gaming Act ought to be construed *mutatis mutandis* with the provisions of the constitution to ensure that it does not offend Articles 24 and 27 of the Constitution, 2010.**
>
> **(e) A declaration that the Petitioner is not in breach of the Constitution or any other written law by holding the position of Chairman of the Betting Control and Licensing Board.**
>
> **(f) Costs of the Petition.**

2. According to the petitioner, he is a distinguished Association Professor of Law at the University of Nairobi School of Law, an advocate of the High Court of Kenya and the Chairman of the Betting Control and Licensing Board (hereinafter referred to as the BCLB) and that he commences these proceedings on his own behalf and on behalf of all part time permanent and/or full time Lecturers and Professors in Public Universities in Kenya under the provisions of Article 22(2) of the Constitution of Kenya, 2010.

3. The Respondent is the principal legal adviser to the Government of the Republic of Kenya mandated to represent the national government in court under the provisions of Article 156 (4).

4. The Interested Party is the registered association for the Human Resource Practitioners of Kenya.

The Petitioner's Case

5. According to the Petitioner, he was retained as a Pert time Lecturer of Law at the University of Nairobi, in February 2000 and was transferred to the Permanent list pensionable members of staff in March 2004 under payroll number MC10/184950. On or about 3rd January 2013 he was appointed the Chairman of BCLB vide Gazette Notice No. 203 of 11th January 2013 which appointment was largely due to the Petitioner's distinguished experience as Associate Professor of Law, his vast experience in matters of Public Governance and Public Service and more so as a Lecturer of law of long standing.

6. Prior to the appointment as the Chairman of BCLB, he had been appointed as Associate Dean in Charge of Kisumu Campus on 29th March 2011 for a period of three years ending on 28th March 2014 which appointment was made when he was on sabbatical leave from the university and during which time he also served as a visiting professor of Law at the National University of Rwanda and as Dean of Kabarak University School of Law.

7. According to the petitioner, he has at all times strived to uphold the national values and principles of governance in line with the provisions of Article 10 of the Constitution of Kenya, 2010 and in particular that of sustainable development recognizing the role of education on promoting social/socio-political and cultural arms of sustainable development.

8. However, on or about 11th October 2013 the Interested Party herein, through its Advocates; ***M/s Ngonyo Munyua & Company Advocates***, wrote to the Petitioner on the matter of his appointment as Chairman of BCLB aforesaid which letter made inter alia various allegations, claims and demands as follows:

(a) That the Petitioner was appointed Chairman of BCLB aforesaid while serving as a public officer at the University of Nairobi, Parklands Law School holding the title of Associate Dean.

(b) That the said appointment was in disregard of the provisions of Section 3(1)(a) of the Act (Betting Lotteries and Gaming Act, Chapter 131 of the Laws of Kenya) which excludes public officers from appointment.

(c) That the appointment aforesaid was the product of collusion between the Petitioner and the then Vice President and Minister for Home Affairs, the latter supposedly being and continuing to be a partner in the law firm of Musyoka Wambua and Katiku Advocates.

(d) That the Petitioner immediately vacates the office of Chairman of the BCLB despite rightly noting, that it is within the province of the Petitioner to choose either to retain the Chairmanship of BCLB or resign as Associate Dean aforesaid.

9. The Petitioner subsequently responded, through his advocates on record, to the Interested Party's material mischaracterization, misrepresentation of facts, innuendos and insinuations contained in its said letter and stated *inter alia* as follows:

(a) The Petitioner was duly appointed as Chairman of BCLB as at the time of the said appointment the Petitioner was not occupying the position of Associate Dean as alleged and he was on sabbatical leave from the University of Nairobi.

(b) The then Vice President and Minister for Home Affairs ceased being a partner in the firm of **M/s Musyoka Wambua and Katiku Advocates** in 1993 upon his appointment to the Cabinet

(c) The Petitioner was appointed Chairman of BCLB on merit more so being a distinguished Professor of Law of many years standing, well experienced in matters of public governance and whose track record in public service is beyond reproach.

(d) The foregoing notwithstanding, the Petitioner resolved to relinquish the position of Associate Dean forthwith as he wishes to concentrate on and is determined to continue with overseeing and concluding the far reaching reform process initiated at the BCLB.

10. Subsequently, the Interested Party herein changed tack and now demands that pursuant the Petitioner's continued employment as a lecturer at the University of Nairobi, School of Law whilst being the Chairman of BCLB, the Petitioner takes steps to account for loss of

public funds in terms of double payments presumably in reference to the modest honorarium due to the Chairman of BCLB.

11. The Petitioner contended that he had not received his due honorarium payment in full as the Chairman of BCLB as he was only paid for the months of January and February 2013 since his appointment aforesaid largely due to the fact that he viewed his appointment as an opportunity for Public Service and in a bid to espouse the national values and principles of good governance prescribed by the Constitution.

12. According to him, Article 260 of the Constitution distinguishes between a State Officer to the extent that whereas a State Officer is a person holding any of the prescribed State Offices, a Public Officer is either a State Officer or any person other than a State Officer who holds a public office. He contended that Article 77 of the Constitution limits full-time State Officers only from participating in any other gainful employment. In other words not only does the said Article relate to full-time State Officers only as opposed to part-time State Officers as well, the said Article does not apply to Public Officers who are not State Officers.

13. It was pleaded that the Petitioner is Public Officer by virtue of the definition prescribed under Section 2 of the ***Public Officer Ethics Act***, Chapter 183 of the Laws of Kenya in respect to his employment as a lecturer at a public university. To him, the constitution guarantees every person freedom from discrimination by any person whether directly or indirectly on any ground whatsoever. Further, the Constitution under the provisions of Article 24 therein envisages a situation where a right or fundamental freedom in the Bill of Rights may be limited by law only. However, the said Article goes further and qualifies this exception and states *inter alia* that the said limitation is only to the extent that it is reasonable and justifiable in an open and democratic society taking into account all relevant factors including *inter alia* the importance of the purpose of the limitation and the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

14. It was his view that the provisions of Section 3(1)(a) of the ***Betting Lotteries and Gaming Act*** (hereinafter referred to as the Act) aforesaid is discriminatory to the extent that it precludes a public officer from appointment as Chairman of BCLB, and in particular it may be construed that the Petitioner by virtue of being a lecturer employed by a public university is thus not eligible for appointment as Chairman aforesaid. It was his contention that a Lecturer at any institution of higher learning particularly at a public university holds a significant and pivotal role in the society and as such his position is instrumental towards the promotion of sustainable development. Indeed the economic impact of public universities is undeniable. He averred that in recognition of the situation noted in the foregoing paragraph, the Commission for University Education (CUE) commissioned a team of education professionals to conduct capacity audits on public universities which made up the Institutional Audit Reports, 2013 received on 8th February 2013 which report revealed shocking details to the extent that Kenya's public university education is being undermined by a glaring lack of adequate academic staff with doctorate degrees with the number being at an all-time low which state of affairs particularly applies to the University of Nairobi, the foremost public university in Kenya.

15. The Petitioner avers that Section 3(1)(a) of ***Betting Lotteries and Gaming Act*** aforesaid is unconstitutional in as much as it seeks to limit the fundamental freedom from discrimination by precluding all public officers, in this particular case lecturers, from appointment as Chairman of BCLB. In his view, the said limitation is not reasonable, justifiable and fails to take into account all relevant factors to the extent that despite distinguished lecturers such as the Petitioner being public officers their involvement in various other public service duties ought to be encouraged for purposes of tapping into their special skills rather than requiring them to relinquish their teaching positions at the university despite the glaring shortfall of qualified lecturers aforesaid. He opined that precluding and/or limiting certain public officers such as lecturers aforesaid from appointment as Chairman of BCLB vide a blanket provision without taking into account all relevant factors including the relation between the limitation and its purpose and more so whether there are less restrictive means to achieve the purpose is manifestly unconstitutional.

16. It was contended that the constitution does not include Public Officers under the ambit of the Article 77 of the Constitution but rather it restricts the activities of full-time State Officers only, perhaps in recognition of the significant mandate borne by the holders of the respective State Offices only rather than all public officers. He asserted that Article 77 of the Constitution does not apply in any way whatsoever to public officers who are not state officers and in any case, the appointment of the Petitioner as Chairman of BLCB and continued holding of the said position cannot be construed to amount to gainful employment in reference to the provisions of Article 77 of the Constitution.

17. He explained that the ***Leadership and Integrity Act***, 2012, an Act of parliament enacted to give effect to Chapter Six of the Constitution, at Section 26 thereof clearly defines the term "gainful employment" to mean *inter alia* work that a person can pursue and perform for money or other form of compensation or remuneration which is inherently incompatible with the responsibilities

of the state office or which results in the impairment of the judgment of the state officer in the execution of the functions of the state office or results in a conflict of interest. It was therefore the Petitioner's position that from the definition of 'gainful employment' aforesaid it is clear that *inter alia* first and foremost the person must be a holder of a state office and the work pursued for money form of compensation must be inherently incompatible with the lecturer in a public university from the application of Article 77 of the constitution in as far as he neither holds a state office nor is the work of a lecturer inherently incompatible with the responsibilities of the supposed state office.

18. It was contended that the ***Betting Lotteries and Gaming Act*** preceded the promulgation of the Constitution, 2010 and as such there is need to ensure that it is amended accordingly so that its provisions and in particular Section 3(1)(a) thereof does not offend Articles 24 and 27 of the Constitution.

19. In support of the averments in the petition the Petition swore a supporting affidavit on 11th November, 2013 in which the averments in the petition were repeated.

Respondent's Case

20. In reply to the application the respondent filed the following grounds of opposition:

> **1. That the Petitioner has not explored the alternative legal administrative avenues available to him to do reparation of his claims if at all;**
>
> **2. That the constitutional principle/right of access to justice before constitutional commissions and the court is a fundamental right which does not necessarily amount to a witch-hunt.**
>
> **3. That the averments as contained in the Petition are selective both in facts and the constitutional and legal principles applicable to the trite jurisprudence on the harmonized and purposive interpretation of the constitution; and**
>
> **4. That this honourable court is enjoined by dint of Article 23(3) of the Constitution to issue appropriate reliefs taking into consideration the totality of the factual circumstances and all the applicable and relevant laws as read in conformity with the Constitution of Kenya 2010.**

21. It was submitted on behalf of Respondent that the allegations made in the petition were not precise hence no cause of action was disclosed. In support of this position the Respondent relied on **Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** and **Paul Kiplagat Birgen and 2 Others vs. IEBC and 2 Others [2011] eKLR**.

22. It was further submitted that letters having been addressed and copied to competent constitutional and statutory bodies to deal with the issues raised therein, in the absence of an averment on ostensible lack of mandate, the issues should be conclusively determined by the respective institutions and only if aggrieved with their findings should the jurisdiction of the Court be invoked otherwise it would amount to usurpation of the powers of the said institutions. In support of this submission the Respondent relied on **Michael Wachira Nderitu and Others vs. Mary Wambui Munene and Others Constitutional Petition No. 549 of 2012**.

23. It was submitted that one such institutions is the Ethics and Anti-Corruption Commission established pursuant to Article 79 of the Constitution as an independent Commission not subject to direction or control by any [person or authority. It was further submitted that pursuant to Article 80 of the Constitution which mandates Parliament to enact legislation to operationalised the leadership and integrity chapter in the Constitution, Parliament enacted the ***Leadership and Integrity Act*** with clear substantive and procedural mechanisms for dispute resolutions. Based on the authority of **Ndyanabo vs. Attorney General [2001] 2 EA 485**, it was submitted that the presumption of the constitutionality of section 3(1)(a) of the ***Betting Lotteries and Gaming Act*** has not been discharged. In support of this submission reliance was placed on **National Conservative Forum vs. Attorney General High Court Petition No. 438 of 2013**.

24. It was therefore submitted by the Respondent that the Petitioner having held more than two public office posts, by dint of section 3 of the said Act, his appointment to the Chairmanship of the BCLB was null and void.

2nd Interested Party's Submissions

25. On the part of the 2nd interested party, the Commission on Administrative Justice, also known as the Ombudsperson, it was submitted that, the mandate of the 2nd interested party pursuant to Article 59 of the Constitution is to investigate any conduct in state affairs in both the national and county government.

26. According to the 2nd interested party, the court should address itself on whether the Petitioner was pursuant to the definition of a "public officer" in the Constitution and the ***Public Officer Act***, Cap 183 of 2003 a public officer at the time of his appointment to the position of the Chairman of the BCLB. It was submitted that at the time of his appointment to the Board, the petitioner served as an Associate Dean of the University of Nairobi, a public office and subsequently n his appointment to the BCLB, held two public offices. Based on Busia Election Petition No. 3 of 2013 – **John Okelo Nagafwa vs.**

IEBC & 2 Others [2013] eKLR it was submitted that the Chairman's engagement with the BCLB amounts to gainful employment as anticipated under section 26(1) of the ***Leadership and Integrity Act***. In further support of this position, the 2nd interested party relied on the African Charter on Values and Principles of Public Service and Administration. It was therefore submitted that a public officer cannot be employed to serve in another public office whose functions do not correlate to is duties and that the only instance when a public officer can serve in another public office is when such officer is required by law and by virtue of his/her office to serve in two or more public offices subject to the condition that the officer will not draw additional salary or allowances.

27. It was submitted that a public officer who by virtue of his/her office is required by law or any other regulation to sit in the Board or otherwise serve in another public institution should not be paid any salary or allowance. Such service should be construed as public service and services rendered being within the normal course of the duties of the public office.

Determinations

28. I have considered the Petition herein, the affidavits filed and the submissions.

29. What triggered this petition was a letter dated 11th October, 2013 addressed by the firm of **Ngonyo Munyua & Company Advocates** to the Petitioner on behalf of their clients, the 1st interested party herein in which it was alleged that the petitioner's holding of two positions of Associate Dean at the University of Nairobi and the Chairmanship of the BCLB was an affront to the Constitution. The said interested party therefore put the Petitioner on notice that it was intending to move Court for appropriate orders.

30. It is on the basis of the said notice that he Petitioner has now moved this Court seeking the orders sought in the plaint. One does not need to be a magician to see that the petition was meant to pre-empt the action which the 1st interested party had threatened to take.

31. In the letter dated 11th October, 2013, the 1st interested party requested the 2nd interested party and the Ethics and Anti-corruption Commission to commence investigations as to the constitutionality and legality of the Petitioner's holding of two public offices. Including determination of abuse of office and non-prudent use of public funds. It has not been contended that the said institutions which are Constitutional Commissions had no such mandate.

32. According to **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475**:

> **"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."**

33. I am also mindful of the decision of this Court in **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo vs. IEBC and 2 Others** in which it was held that:

> "**We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."**

34. Whereas every person is pursuant to the provisions of Article 3 and 22 under an obligation to respect, uphold and defend the Constitution and a right to right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened, it is my view that those provisions ought not to be abused. As was held in **Kenya Bus Services Ltd & Others vs. Attorney General and Others [2005] 1 EA 111; [2005] 1 KLR 743; [2005] 1 KLR 787**:

> **"Whereas ordinary jurisdiction stems from the Act of Parliament or statutes, the inherent powers stem from the character or the nature of the court itself – it is regarded as sufficiently empowered to do justice in all situations. The jurisdiction to exercise these powers was derived, not from statute or rule of law, but from the very nature of the court as a superior court of law, and for this reason such jurisdiction has been called "inherent". For the essential character of a superior court of law necessarily involves that it should be invested with a power to maintain its authority and to prevent the process being**

obstructed and abused. Such a power is intrinsic in a superior court, its very lifeblood, its very essence, its immanent attribute. Without such a power, the court would have form but would lack substance. The jurisdiction, which is inherent in a superior court of law, is that which enables it to fulfil itself as a court of law. The judicial basis of this jurisdiction is therefore the authority of the Judiciary to uphold, to protect and to fulfil the judicial function of administering justice according to law in a regular, orderly and effective manner…The need to administer justice in accordance with the Constitution occupies an even higher level due to the supremacy of the constitution and the need to prevent the abuse of the Constitutional provisions and procedure does occupy the apex of the judicial hierarchy of values. Therefore the Court does have the inherent powers to prevent abuse of its process in declaring, securing and enforcing Constitutional rights and freedoms. It has the same power to set aside *ex parte* orders, which by their very nature are provisional."

35. As was held in **Karuri & Others vs. Dawa Pharmaceuticals Company Limited and Others [2007] 2 EA 235:**

Nothing can take the courts inherent power to prevent the abuse of its process by striking out pleadings or striking out a frivolous and vexatious application. Baptising such matters constitutional cannot make them so if they are in fact plainly an abuse of the court process…A Constitutional Court must guard its jurisdiction among other things to ensure that it sticks to its constitutional mandate and that it is not abused or trivialised. There is no absolute right for it to hear everything and it must at the outset reject anything that undermines or trivialises or abuses its jurisdiction or plainly lacks a cause of action… The notion that wherever there is a failure by an organ of the Government or a public authority or public office to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals is fallacious. The Right to apply to the High Court under the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened is an important safeguard of those rights and freedoms but its value will be diminished if it is allowed to be misused as a general substitute for the normal proceedings for invoking judicial control of administrative action. In an originating application to the High Court, the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying the normal way for the appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedoms.

36. Therefore it is my view and I so hold that to institute a Constitutional Petition with a view to circumventing a process by which institutions established by the Constitution are to exercise their jurisdiction is an abuse of the Court process. To allow entertain such a course would lead to the Courts crippling such institutions rather than nurturing them to grow and develop.

37. Accordingly I find that in so far as prayers a), c) and e) of the petition are concerned this Court ought not to entertain the same at this stage.

38. With respect to prayer b) in the petition, I associate myself with the holding of **Mumbi Ngugi, J** in **National Conservative Forum vs. Attorney General [2013] eKLR** where the learned Judge expressed herself as follows:

"…if I may borrow the words of the dissenting opinion in the United States Supreme Court case of U.S. v. Butler 297 U.S. 1 (1936):

'Courts are concerned only with the power to enact statutes, not with their wisdom….For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government'.

Should a need to reconsider the presence of the International Crimes Act in our statute books arise, assuming that the good and cogent reasons that one hopes informed its enactment no longer exist, that is something that lies within the power and mandate of the legislature which, at the time of its enactment, thought it a wise and necessary legislation to enact. One may have serious reservations about the wisdom of enacting or removing legislation from the statute books to suit the exigencies of the moment, but our democratic processes, as enshrined in the Constitution, have vested in the legislature the power to do that should it be so minded."

39. The reason advanced by the Petitioner for seeking to declare section 3(1)(a) of the Act as unconstitutional is that the said section is discriminatory to the extent that it precludes a public officer from appointment as Chairman of the BCLB. According to the Petitioner a

lecturer at any institution of higher learning particularly at a public university holds a significant and pivotal role in the society and as such his position is instrumental towards the promotion of sustainable development. According to the petitioner, distinguished lecturers such as the Petitioner being public officers their involvement in various other public service duties ought to be encouraged for purposes of tapping into their special skills rather than requiring them to relinquish their teaching positions at the University despite glaring shortfall of qualified lecturers.

40. Whereas this Court may well agree with the position taken by the Petitioner on the role of lecturers in the development agenda of the nation, as clearly stated hereinabove, Courts are concerned only with the power to enact statutes, not with their wisdom. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government. Accordingly this Court is not entitled to find that section 3(1)(a) of the Act as unconstitutional is unconstitutional simply because it precludes the Petitioner from being the chair of the BCLB.

41. It must always be noted that discrimination *per se* is not unconstitutional. In **Nyarangi & 3 Others vs. Attorney General [2008] KLR 688**, it was held:

> **"The *Blacks Law Dictionary* defines discrimination as follows: "The effect of a law or established practice that confers privileges on a certain class or that denies privileges to a certain class because of race, age, sex nationality, religion or handicap or differential treatment especially a failure to treat all persons equally when no reasonable distinction can be found between those favoured and those not favoured." *Wikipedia, the free encyclopedia* defines discrimination as prejudicial treatment of a person or a group of people based on certain characteristics. *The Bill of Rights Handbook, Fourth Edition 2001*, defines discrimination as follows:- "A particular form of differentiation on illegitimate ground."… The law does not prohibit discrimination but rather unfair discrimination. The said *Handbook* defines unfair discrimination as treating people differently in a way which impairs their fundamental dignity as human beings, who are inherently equal in dignity. Unlawful or unfair discrimination may be direct or subtle. Direct discrimination involves treating someone less favourably because of their possession of an attribute such as race, sex or religion compared with someone without that attribute in the same circumstances. Indirect or subtle discrimination involves setting a condition or requirement which is a smaller proportion of those with the attribute are able to comply with, without reasonable justification. The US case of *Griggs vs. Duke Power Company* 1971 401 US 424 91 is a good example of indirect discrimination, where an aptitude test used in job applications was found "to disqualify Negroes at a substantially higher rate than white applicants".**

42. I further associate myself with the decision in **John Kabui Mwai & 3 Others vs. Kenya National Examination Council & 2 Others [2011] eKLR** where it was held that:

> **"we need to develop a concept of unfair discrimination which recognises that although a society which affords each human being equal treatment on the basis of equal worth and freedom is our goal, we cannot achieve that goal by insisting upon identical treatment in all circumstances before the goal is achieved. Each case will therefore require will require a careful and thorough understanding of the impact of the discriminatory action upon the particular people concerned to determine whether its overall impact is one which furthers the constitutional goal of equality or not. A classification which is unfair in one contest may not necessarily be unfair in different context. At the heart of this case, therefore, is the recognition that not all distinctions resulting in differential treatment can properly be said to violate equality rights as envisaged under the Constitution. The appropriate perspective from which to analyse a claim of discrimination has both a subjective and an objective component...In determining whether there is discrimination on grounds relating to the personal characteristics of the individual or group, it is important to look not only at the impugned legislation which has created a distinction that violates the right to equality but also to the larger social, political and legal context...It is only by examining the larger context that a court can determine whether differential treatment results in equality."**

43. I also agree with the decision in **Maharashtra State Board of Secondary and Higher Secondary Education and Another vs. Kumarstheth [1985] LRC** in which was held:

> **"so long as the body entrusted with the task of framing the rules or regulations acts within the scope of the authority conferred on it in the sense that the rules and regulations made by it have a rational nexus with the object and purpose of the statute, the court should not concern itself with the wisdom of the efficaciousness of such rules and regulations. It is exclusively within the province of the Legislature and its delegate**

> **to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures substantive as well as procedural would have to be incorporated in the rules and regulations for the efficacious achievement of the object and purposes of the Act. It is not for the Court to examine the merits and demerits of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulation falls within the scope of the regulation-making power conferred on the delegate by the statute. The responsible representative entrusted to make bylaws must ordinarily be presumed to know what is necessary, reasonable, just and fair."**

44. I have considered the grounds upon which the Petition relied and I am not satisfied that the Petitioner's case rebuts the presumption of Constitutionality of section 3(1)(a) of the Act as espoused in **Ndyanabo vs. Attorney General** (supra).

45. With respect to the prayer for a declaration that section 3(1)(a) of the Act ought to be construed *mutatis mutandi* with the Constitution to ensure that it does no offend Articles 24 and 27 of the Constitution, 2010, section 7 of the Sixth Schedule to the Constitution provides:

> ***All law in force immediately before the effective date continues in force and shall be construed with the alterations, adaptations, qualifications and exceptions necessary to bring it into conformity with this Constitution.***

46. Accordingly nothing turns on that prayer since it is just a declaration of the provision in the Constitution.

47. As properly appreciated by the 2nd interested party, some of the issues dealt with in its submissions were properly not issues in this petition. Accordingly I do not feel called upon to pronounce myself thereon.

Order

48. In the circumstances, the inescapable conclusion I come to is that this petition is unmerited. It is accordingly dismissed with costs.

G V ODUNGA

JUDGE

Dated at Nairobi this 23rd day of January 2015

E OGOLA

JUDGE

Delivered in the presence of:

Mr. Kamau for the Respondent

Cc Teresia

Severine Luyali v Ministry of Foreign Affairs & International Trade & 3 others [2014] eKLR

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA AT NAIROBI

PETITION NO. 23 OF 2014

SEVERINE LUYALI …… PETITIONER

VERSUS

THE MINISTRY OF FOREIGN AFFAIRS

AND INTERNATIONAL TRADE ……..1ST RESPONDENT

THE PRINCIPAL SECRETARY,

MINISTRY OF FOREIGN AFFAIRS

AND INTERNATIONAL TRADE ……..2ND RESPONDENT

THE HON. ATTORNEY GENERAL ……..3RD RESPONDENT

THE COMMISION ON THE ADMINISTRATIVE

JUSTICE, "OFFICE OF THE OMBUDSMAN" ……..INTERESTED PARTY

JUDGEMENT

Introduction

1. This matter concerns the rights of the Petitioner Severine Luyali relating to her employment as the first Counsellor at the Kenya High Commission in South Africa and the same consists of two distinct claims. The first one concerns the Petitioner's employment at the Kenya High Commission in South Africa (SA). The second one, relate to the violation of the Petitioner's constitutional rights by the failure of the respondent in following fair administrative procedure in recalling the Petitioner back to head office without due regard to her extension of duty in SA.

2. The Petitioner is the employee of the 1st respondent, Ministry of Foreign Affairs and International Trade (Ministry) who was recalled back to the Head office of the Ministry by the 2nd respondent as the Cabinet Secretary in the Ministry while the 3rd respondent is the principal government legal advisor. The Interested Party is an independent commission pursuant to Article 59(4) of the Constitution and with the mandate to investigate any conduct in state affairs or any acts or omission in public administration in any sphere of government and complaints of abuse of power, unfair treatment, and manifest injustice, unlawful, oppressive and unresponsive official conduct.

Case against Respondents

3. By an application dated the 2th April 2014, the petitioner moved the court for the following orders:

i. *That this application be certified as extremely urgent and herd ex parte in the first instance*

ii. *That pending the heading of this instant application inter parties, this court do issue a conservatory order restraining and/or preventing the 1st and 2nd respondents either by themselves or through their agents and/or servants from recalling/redeploying / releasing the Petitioner/Applicant from the Kenya High Commission to the Headquarters of the Ministry of Foreign Affairs and International Trade or any other state department thereto*

iii. *That pending the hearing of this instant application inter partes this court do issue a conservatory order restraining and/or preventing the 1st and 2nd respondents either by themselves or through their agents and/or servants from withholding any payments and/or expenditure allocations properly due and owing and/or to be incurred by the Petitioner and her family during the course and in relation to the petitioner's tour of service in the High Commission in South Africa.*

iv. *That pending the hearing and determination of the Constitutional Petition filed herein this court do issue conservatory order restraining and/or preventing the 1st and 2nd respondents either by themselves or through their agents and/or servants from recalling/ redeploying/releasing the petitioner/Applicant from the Kenya High Commission to the Headquarters of the Ministry of Foreign Affairs and international Trade or any other state department thereto.*

v. *That pidgin the hearing and determination of the Constitutional Petition filed herein this court do issue a conservatory order restraining and/preventing the 1st and 2nd respondents either by themselves or through their agents and/or servants from withholding any payments and/or expenditure allocations properly due and owing and/or to be incurred by the Petitioner and her family during the course and in relation to the petitioner's tour of service in the High Commission in South Africa.*

4.The application was supported by the affidavit of the Petitioner, in which she deposed that she was assigned duties at the Kenya High Commission in SA on 5th October 2009 as second Secretary for a term of 4 years and the tour of duty was to end on 5th October 2013 but before this end of tour, in march 2013, the petitioner requested for an extension through the then Permanent Secretary with the 1st respondent. The request was that the tour of duty be extended to December 2014 and thereafter further consideration to December 2015 and on 22nd march 2013, the 1st respondent wrote to the Petitioner with reference to her request of 18th March 2013 and approved an extension to October 2014.

The petitioner relied on the approval given by the 1st respondent to reorganise here affairs while in SA especially keeping her child in school there to avoid disruptions. Despite the approval of extension being given until October 2014, the 1st and 2nd respondents on 4th December 2013 unilaterally and without notice or giving reasons dispatched their letter to the Petitioner dated 3rd December 2013 notifying her that she had been recalled and to report back to the 1st respondent in Nairobi on or before 12th December 2013.

This directive was in conflict with the approval and extension granted on 22nd march 2013 and the same done in violation of the law as this cancelled the tour of duty by one year and the same done with notice of eight (8) days only. On 4th December 2013 the petitioner wrote to the respondents with reference to the extension of duty already granted and on 4th December 2013, the respondents accorded the petitioner three (3) months' notice as from 6th December 2013 within which time to depart from the High Commission. Subsequent to this response, the Petitioner on 17th December 2013 did request the respondent's to abide by their letter of extension of 22nd march 2013 so as to end her tour of duty in October 2014 noting that from the extension, she had reorganised her life while in SA. On 14th March 2014, the Petitioner returned to her office after return from Kenya where she had travelled to bury her mother and received communication from the 2nd respondent informing her that she had been redeployed to the 1st respondent's headquarters in Nairobi and was to report immediately. On 2nd April 2014 the Petitioner was asked to report back to head office on 16th April 2014 and noting the injustice being committed the Petitioner wrote to the IP on 10th April 2014 and noting the issues and complaint the IP on 16th April wrote to the respondent's and sought to have parties maintain the status quo as the matter was under their investigations. This was ignored by the respondents who gave the petitioner an ultimatum to report back by 1st May 2014 prompting her to seek court orders as herein on 30th April 2014. That unless the orders sought are not granted the Petition will be frustrated as there are arguable issues to be addressed while the status quo is maintained.

5. It is the petitioners' case that the respondent is in violation of both her constitutional and legal rights and will be prejudiced by the decision of the 1st and 2nd respondent in recalling her back to the head office, redeployment or in any other manner if released from her tour of duty in SA.

The Respondent's Reply

6. Through the Replying Affidavit of the 2nd respondent dated 12th may 2014 and reply that the 1st respondent is the body mandated by the executive to manage foreign policy, bilateral and multinational relations through the missions and embassies abroad while the Public Service Commission (PSC) has the mandate of establishing and abolishing offices in the public service, appointing persons and developing the human resources in the public service. A public officer can be posted to work in any station at any time with no exception when need arises and hence there is no permanent deployment to a specific station or department. For the 1st respondent to ensure effective services, different officers are sent to the foreign missions and embassies including the petitioner and by the Kenya Foreign Service Regulations 2000, the respondents have regulations provide that any officer can be posted to serve any mission outside the country as the service is required and such an officer can be given 3 to 9 months to prepare oneself for a transfer. The petitioner was employed by PSC in 1996 as an Executive Officer II and deployed to the 1st respondent and thus subject to the rules and regulations thereto. In 2001 to 2005 the petitioner was sent to the Kenya Mission in Sweden and was recalled back to Kenya until 2009 when she was posted to the current duty station in South Africa and the terms of the posting were set out for the officer per the Kenya Foreign Service Regulations 2000. The posting had a time limit but could still be varied based on work performance exigencies of duty or other reasons of indisposition. The petitioner was thus aware that the posting was for 48 months and could be varied any time. The tour of duty ended on 4th October 2013, the petitioner requested for extension for reasons of pregnancy and child education which was given consideration and the same extended to October 2014 after which the petitioner was to report back to the headquarters. This extension was not a guarantee that

where there was a legitimate expectation the petitioner could remain at the posting until October 2014 as she was still accountable to the respondents.

7. Due to exigencies of duty the respondents recalled the petitioner in December 2013 to report back by 12thdecember 2013 and upon her protest on the short notice, the respondent granted a 3 months extension to report back by 6th march 2014. All relocation arrangements were done and funds made available to the Petitioner. Upon the demise of the petitioner's mother, she was granted 10 days compassionate leave to attend to the burial rites and her stay extended by 10 days to facilitate smooth return back to the headquarters and she accepted her allowances thereto. On 16th April 2014, the IP wrote to the respondents on a complaint lodged by the petitioner to which extensive responses were given but the petitioner never reported back as directed by the respondent's. The respondents wrote to the petitioner directing her to report back by 1st May 2014 to avoid misapplication of public funds and further ensure the respondents do not incur unwarranted public expenditure which would raise audit queries as there was and still is no reason to incur public expenditure on behalf of the petitioner as she is supposed to be working at the ministry headquarters in Nairobi.

The petitioner hence on 25th April 2014 accepted the payment of the transfer and shipment allowance that was condition precedent to the petitioner's smooth departure from the foreign mission. The contention by the petitioner that her child education in South Africa will be disrupted is not a good reason to seek extension of posting as there are similar schools in Kenya that can offer similar education system where the child can smoothly transit with no disruptions. The respondents have acted in good faith, offered the required assistance as a good employer and all allowances paid to the petitioner to enable her move back to headquarters for duty. The rushing to court by the petitioner on 30th April 2014 was done long after the respondents had finalised with all payments for relocation. On 9th May 2014, the petitioner refunded back the relocation allowance, the orders sought herein were actuated by malice, in bad faith and through misrepresentation to the court and meant to stifle the smooth running and exercise of administrative functions of the respondents despite the petitioner having been dully informed of the decision to have her relocate to the headquarters. The petitioner has not demonstrated what prejudice or inconvenience that will be caused to her if the conservatories orders are not granted as the reason given are immaterial and inapplicable in the circumstances and the court cannot intervene as this is an administrative matter best handled by the PSC as the employer. There is not particular grievances articulated in the petition, she has come to court without clean hands and in the interests of justice, the orders sought in the petition should be declined.

Hearing

8. When the matter came up for mention and directions on 29th May 2014, all the parties agreed to proceed with the hearing of the main petition as the issues outlined in the Notice of Motion and the grounds of the same form part and grounds of the Petition. Court allowed the hearing of the petition so that the matter could be dealt with substantively at the hearing. All the parties were allowed to file their written submission with regard to the Petition.

9. The petition was heard on the 5th June 2014. Each party made their extensive submissions in this regard. The petitioner through Ogeto Advocate relied on the written submission dated 27th May 2014, the List of Authorities filed on 19th May 2014. The respondent relied on their written submissions dated 3rd June 2014, Further Affidavit filed on 27th May 2014 and the IP relied on their written submissions dated 3rd June 2014.

The Petition

10. Apart from the orders sought by the petitioner in the Notice of Motion, the petitioner further seeks the following reliefs in the main Petition dated 29th April 2014;

a. *Pending the hearing and determination of this petition conservatory orders be issued in terms of the Notice of Motion application filed herewith.*

b. *That the perpetual mandatory injunction and/or the prerogative of prohibition do issue restraining the 1st and 2nd respondent's either by themselves or through their agents and/or servants from recalling/redeploying/ releasing the Petitioner from the Kenya High Commission to the Headquarters of the Ministry of Foreign Affairs and International Trade or any other department thereto before October 2014.06.12*

c. *That a perpetual mandatory injunction and/or the prerogative order of prohibition do issue restraining and/or prohibiting the 1st and 2nd respondent's either by themselves or through their agents and/or servants from withholding any payments and/or expenditure allocations properly due and owing and/ or to be incurred by the petitioner and her family during the course and in relation to the petitioner's tour of service in the High Commission in South Africa.*

d. *That the decision of the 1st and 2nd respondents to recall/ redeploy/release the petitioner from the Kenya High Commission to the Headquarters of the Ministry of Foreign Affairs and International Trade be quashed by an order of certiorari;*

e. *A declaration that the Petitioner's tour of duty or periodic of service ion the Kenya High Commission in South Africa runs up and until 31st October 2014;*

f. *That the respondent be condemned to pay the costs of this petition; and*

g. *Any other order and or directions that this court may deem fit to grant.*

Petitioners' Case

11. The petitioner submitted that she was assigned the duty of First Counsellor in the Kenya High Commission in South Africa for four years from 5th October 2009 and was extended to end in October 2014. She reorganised her life and family affairs but on 3rd December, the 1st and 2rd respondents revoked the extension without any justifiable cause or reason. The respondent's in the exercise of their powers in deploying the petitioner and decisions can be questioned as the court has supervisory powers over administrative actions by public officers where there are allegations of unfairness, unreasonableness and breach of due process. Article 23(3) of the Constitution provides that in any proceedings brought for the enforcement of the bill of rights, a court may grant appropriate relief including a declaration of rights, an injunction and conservatory orders and relied on the case of ***Diana Kethi Kilonzo versus Independent Electoral and Boundaries Commission and 10 Others [2013] eKLR*** where the court held that where a party is aggrieved the court may will step in and provide appropriate relief as required by Article 23(3) of the Constitution. The court is therefore properly seized of the matter to safeguard constitutional rights of the petitioner.

12. The respondents have violated constitutional rights of the petitioner being **Article 50(1**) as there deployment steps taken before this action were unlawful and in total disregard of natural justice, no fairness was applied by the 2nd respondent toward the petitioner or due process and the rule of law. Upon receipt of the Court order dated 30th April 2014, the respondent wrote to the petitioner on 6th may 2014 threatening disciplinary action. **Article 41** of the Constitution was violated where the respondent failed to give the petitioner reasons of the decisions affecting her employment which was in breach of fair labour practice. The petitioner had a valid reason to seek extension of duty in South Africa as her son is in a school system that varies with the system of schooling in Kenya. The petitioner referred to the case of ***Peter Kariuki and 16 others versus Kenya Agricultural research Institute [2013] eKLR*** where the court held that fair labour practices include provisions for basic fair treatment of employees, procedures for collective representation as work and policies that enhance family life.

13. The respondent violated Article 47 of the Constitution as in the exercise of their administrative powers, the 1st and 2nd respondents failed to give reasons for their decision. The respondents have the power to transfer the petitioner but the same must be exercised in a lawful manner and not be arbitrary. The petitioner's tour of duty had been granted and when this was varied, no reasons were given even when she expressed her reasons for seeking for such extension. In this case, the 1st and 2nd respondent's decision to redeploy the petitioner was contrary to Article 232 and 236 as they were not transparent in their administrative action and did not follow the tenets of due process as held in ***Marbury versus Madison 5 U.S 137 [1803]*** that when legislation impose on an officer a duty, the officer cannot at his discretion sport away the vested rights of others.

14. The petitioner applied for extension of duty which was granted and the same was revoked without reason. The extension created a legitimate expectation upon the petitioner that her tour of duty would last until October 2014 and based on this expectation she reorganised her life and family around this date. The petition's expectation was within the extension period her son's education would be minimally disrupted and relied on the case of ***A. M. Msagha versus Chief Justice of Kenya and 7 others [2006] eKLR*** the could held legitimate expectation is but one variant aspect of the duty to act fairly and natural justice is but a manifestation of a broader concept of fairness. The respondents were therefore expected to act within this legitimate expectation enforceable in law.

15. The respondent was in breach of natural justice as they denied the petitioner the right to be heard before making a decision that was detrimental to her legitimate expectation that the tour of duty would be as was already granted. The decision was unilateral and arbitrary and in beach of the constitutional duty bestrode upon the respondents. There was a binding undertaking that the extension of duty to the petitioner had been granted and could not be revoked without proper basis. This was as held in the case of ***Githunguri versus Republic [1986] eKLR*** that official undertakings given officially must be honoured and members of the society are entitled to an orderly and tranquil life and not be subjected to vicissitudes of law especially when there have been no subsequent fresh events to justify it.

Respondent's case

16. The respondents submitted from the outlined facts of the case, the petitioner have no justiciable labour dispute for the determination of the court. The terms of engagement in the public service are that a public officer can be posted to work in any station at any time with no exception when need arises and hence there is no permanent deployment to a specific station or department. The 2nd respondent in exercise od delegated power by the PSC deployed the petitioner to South Africa for 4 years with set terms in line with Kenya Foreign Service Regulations 2000 that such service was temporary assignment with specific terms

and responsibilities and duties and therefore the tour of duty could be varied depending on circumstances. The posting was not absolute and the petitioner was aware that she could be recalled any time or be redeployed in another station before the end of the 4 years on 4th October 2013. Before this end date the petitioner sought for an extension which was granted but later varied based on the discretion of the respondents noting that period of service and tour of duty was temporary and thus recalled the petitioner on the grounds that there are regulations which provide that a serving officer irrespective of marriage can be deployed to any mission subject to exigencies of the service on good notice normally 3 months and not more than 9 months. There is therefore no dispute between the respondents and the petitioner for determination of the court. There is no constitutional issue for determination as the Employment Act read with the Constitution sets out the rights of an employee which rights if violated are capable of adversely affecting the petitioner and causing a permanent departure in her life such as dismissal, termination or retirement.

17. The petitioner was posted to the South Africa foreign mission on an assignment and not on contract. In assignments there is no conditions subject of breach unlike in a contract and there is no threat to the petitioner's rights as hers was a deployment a normal practice in public service. There is no loss of a benefit or privilege threatened as the contract of employment with the respondents is still in place. Had the extension not been granted, there would have been no duties for the petitioner to undertake in the mission of duty and to allow the petitioner to remain in her station of choice will set a bad precedent to other officers bound to be deployed any time when need arises. In the case of **John Harum Mwau versus Attorney General Misc 890 of 2001** the court held that a court cannot be subjected to proceedings where the questions for determination are abstract and hypothetical in the absence of real dispute between the parties before it as the court would be engaging in an academic exercise.

18. That the petitioner is guilty of material non-disclosure and is seeking justice with unclean hands in that since December 2013 she was aware of the recall order by the 2nd respondent, head of mission commenced relocation preparations and when the petitioner resumed duty after her compassionate leave, more days were added factoring the period away and was at all material times that there were such processes for the relocation and despite the good faith on the part of the respondents the petitioner acted in bad faith when she failed to disclose to the Court on 30th April that all allowances had been paid for her relocation. The petitioner failed to report back to headquarters on 16th April 2014 without giving any reasons, despite her release and payments, nothing was stated and this was meant to defeat the course of justice and on this basis the conservatory orders should be declined. In the case of **Bahadurali Ebrahim Shamji versus Al Noor Jamal and 2 others, Civil Appeal 2010 of 1997** where the Court of Appeal held that;

19. Article 47 of the Constitution on fair administrative action is that such action must be with exercised within reasonable advance notice, reasonable opportunity and the subject party being given a chance to be heard. In this case, the respondents did not violate this right, the deployment of the petitioner was within the scope of duty and no benefit or right that she will lose by being reassigned duties. There was good notice of the recall and a reasonable period was given to prepare for relocation.

20. Double expectation is double-edged to serve both ways where the responsibility of posting and management of staff in the 1st respondent lies with the 2nd respondent in accordance with powers conferred by PSC to the 1st and 2nd respondents. The petitioner had been to other foreign missions in Sweden and was recalled when her duty term ended and posted to the current duty station. There was no legitimate expectation created by the respondents that the petitioner was to remain in her station of choice even where there was sufficient notice revoking the extension given. The assertion by the petitioner that her son should be allowed to remain in school in South Africa is not a legitimate reason to seek to extend duty as there are similar schools in Kenya.

21. That the orders sought are not efficacious in the circumstances as the petitioner being an employee of the government, it would be in the interests of justice that orders sought not be granted in order to save on the employer/employee relationship. The court should strike a balance in enhancing the co-existence of the two parties as if the orders are granted, they will cripple the operations of the respondents. The matters are administrative suitably handled through internal mechanisms and in the interests of justice that the internal procedures of intervention and appeal to the PSC be given an opportunity to process the same for good relations of the parties.

22. That the court should exercise its discretion in the matter judiciously noting the petitioner has failed to disclose material facts when she initially came to court seeking conservatory orders. The orders should be declined in the public interest, performance of duty and enhancing good administration that overweighs the personal interest of the Petitioner to remain in South Africa.

The Interested Parties' case

23. The IP on the part submitted on two issues being that there was a legitimate expectation on the petitioner when extension of tour of duty by the respondent was granted and that the administration action of the respondent to recall the petitioner was not fair as it amounted to administrative injustice. In this regard the IP relied on the case of **CCU versus the Minister for Civil Service [HL 1984] 1985 1 AC 375** and **Republic versus City Council of Nairobi exparte Kenya Taxi Cabs Association [2010] eKLR.**

24. A legitimate expectation arise where a decision made affect the other person by depriving her of some benefit or advantage which has in the past been permitted and legitimately expected to be permitted and to continue unless there is communication of a rational ground for withdrawal and that there is assurance from the decision maker that the decision will not be withdrawn without advance reasons for the withdrawal. A legitimate expectation arises from a promise or representation given on behalf of a public body. In this case the 1st respondent informed the petitioner on 22nd March 2013 that the tour of duty had been extended for one year to October 2014, this decision was rescinded on 3rd December 2013 and no reasons were given for the same. When communication was received by the petitioner on 22nd March 2013, a legitimate expectation arose that she would enjoy the benefits and advantages of such position until October 2014. The respondent may have had reasonable and valid reasons to retract from their position but to do so they ought to have communicated to the petitioner some rational grounds for withdrawing the earlier decision of extension of tour of duty and then given the petitioner a chance to comment of the withdrawal of the extension. Even though transfers, relocation and recall area allowed, the same must be exercised within a context that is valid and reasonable based on the legitimate expectation of the officer subject to such measures.

25. Decisions made or an act carried out in the public service is now regulated by Article 47 of the Constitution, meant to promote and protect administrative justice in regard to administrative action that affects individuals. Article 47 of the Constitution has various ingredients that need to be observed any time a public body or public/state officer takes an administrative action which are that administrative action ought to be delivered expeditiously, efficiently, lawfully, reasonably and following fair procedure. Where a fundamental right is likely to be adversely affected by an administrative action, that person has a right to be given reasons for the action. In this case the administrative action of the respondent fell short of the fair administrative action as envisaged and expressly provided for by Article 47 of the constitution. This action is subject to oversight by the Court where there is deprivation of some benefit unlike in a case where it is an administrative and staff matter where the Court cannot intervene. The court can intervene where an administrative decision is made either illegally, irrationally or fraught with procedural impropriety, unfair, unconstitutional or for any other justifiable reason that has been embraced in the rapidly developing administrative law.

26. The Industrial Court has jurisdiction over matters outlined under section 12 of the Industrial Court Act relating to employment and labour relations and can made appropriate orders as sought by the petitioner.

Analysis and Determination

I have framed key issues for determination as follows;

a. Whether the recall of the petitioner by the 1st and 2nd respondent from her tour of duty is in breach of petitioner's rights under the Constitution or other relevant laws

b. The extent of the right of fair labour practice under **Article 41** of the Constitution

c. Whether the order sought should be granted**.**

27. I have considered the pleadings, depositions and submissions made for and on behalf of the parties. Several issues were canvassed in both the pleadings and oral submissions. I will first deal with the preliminary issue raised by the respondents that there is no justiciable labour dispute and or issue herein for the Court to determine, that the petitioner as a public officer can be posted to work in any station at any time with no exception and when need arises can be deployed as there is no permanent deployment.

28. I will go beyond the question raised by the respondent on the lack of a justiciable labour dispute and relook at the same together with the jurisdiction of the industrial court. Both parties admit that the petitioner is a public servant under the PSC and serving at the 1st respondent and currently on tour of duty at the Kenya High Commission in South Africa. Within this context, the petitioner was granted an extension of her tour of duty which extension has been revoked and has been recalled back by the 2nd respondent as the accounting officer for the 1st respondent. There thus exists an employer and employee relationship between the parties herein and the questions that arise as to whether this recall should be effected or not forms the substantive question to be addressed herein. Whether there is a justiciable claim or not also go to the question as to what extent a right sought can be enforced by a Court or not and the idea behind a justiciable right as under the Bill of Rights is that decisions affecting basic rights and liberties should be reviewed by an institution standing outside the policies sphere, namely the judiciary. Therefore where a party claim that a right as under the Bill of Rights and in this

case a right anchored under Article 41 of the constitution has been violated or is under threat of violation, the Industrial Court must conform to the provisions of Article 23(1) and (3) of the Constitution;

23. (1) The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

…

(3) In any proceedings brought under Article 22, a court may grant appropriate relief, including––

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

29. Courts enforcing the Bill of Rights may on occasion impose positive duties on the state of public official as all rights have a cost. These are rights as under Article 41 and where the industrial Court finds and violation of an employee or employer rights can order in damages or compensation as the case may be to address the unfair labour practice. This just reconfirms that indeed, claims under Article 41 of the Constitution are justiciable, capable of being enforced as under Article 23 of the Constitution or under the various employment law and within the jurisdiction of the Industrial Court.

30. The question of justiciability also go to the core of the jurisdiction of this court as this is an employment matter that falls within the jurisdiction of the Industrial Court. The Industrial Court as constituted under the ***Industrial Court Act, 2011*** is competent to interpret the Constitution and enforce fundamental rights and freedoms in matters arising from disputes falling within the provisions of **Section 12** of the ***Industrial Court Act, 2011***. (*See* ***United States International University (USIU) v Attorney General*** **Nairobi Petition 170 of 2012,** ***George Onyango v Board of Directors of Numerical Machining Complex Ltd & 2 others*****, Petition No. 417 of 2012).**

Whether there was a violation of the Petitioner's rights

30. Unlike the former Constitution which did not recognize and protect the rights of employee, the Constitution now has explicit provisions which provide a foundation for the rights of workers/employees. The preamble and the provisions on national values and principles contained in **Article 19** lays emphasis on dignity, human rights and social justice for all persons. In giving effect to the provisions of the Constitution and the Bill of Rights, the place of employees must be articulated as required by **Articles 41** that Every person has the right to fair labour practices and reasonable working conditions that must be seen in the context of Article 2(2) where No person may claim or exercise State authority except as authorised under this Constitution. In the context that the petitioner is a public officer working In a public body, any action taken by the petitioner in her service or any decision taken by the respondent as the employer with regard to the employment of the petitioner, such action must conform to both constitutional provisions as well as the legal requirements there. How the petitioner is to act and is treated by the employer must be assessed with the yardstick of the constitution and the employment law

31. The Constitution also provides a window for enforcement and enrichment of the rights and freedoms of employees through the application of international law principles, treaties and conventions Kenya has ratified. This is through the provisions of **Article 2(5)** and **(6)**. The International Labour Organization (ILO) Conventions applicable to Kenya and the UN Global Compact where fair procedure, reasonableness and consultation are made the core principles to the employer/employee relationship.

32. The petitioner moved the court seeking for conservatory orders upon the respondent's decision to revoke her tour of duty that had been granted on 22nd October 2013. This tour of duty was to end in October 2014 but before this could take effect to the full, on 3rd December 2013 the petitioner was recalled back to the Ministry headquarters and stated;

...

RECALL TO REPORT BACK TO THE MINISTRY HEADQUATERS

…

Further to out letter Ref. No.96026167/(115) of 22nd march 2013, this is to convey the decision of the Authorised officer to calling you back to the ministry headquarters immediately ad in any case not later than by 12th December, 2013. Accordingly you are hereby required to hand over all government/ Mission assets which may be in your possession before you leave the Mission for further instructions.

…

33. To this communication, the petitioner made a reply on 4th December 2013, noting her circumstances and further that she had re-organised her life based on the extension given by the respondents and that;

The time given for me to report back to Headquarters is unfeasible because I have a family and cannot prepare to depart in less than a week. Besides, the Foreign Service Regulations; B""(3) provides: "subject to exigencies of the service, an officer shall normally be given three-month's notice prior to the end of the tour of duty to prepare himself for transfer".

7. I therefore wish to request that you reconsider this matter with a view to allowing me complete my one-year extension period.

34. on 6th December 2013, the respondent in what seem to be a reply to what the petitioner stated in her letter of 4th December 2013 state;

…

In view of the concerns raised, I am pleased to inform you that the Authorised officer has considered and your request and therefore granted you three (3) months from the date of this letter to allow you to prepare to report back to the headquarters by 6th March 2014.

35. This communication by the respondents and extension of time by 3 months can find basis in the letter of the High Commissioner, Amb. Patrick Wamoto, who on 4th December 2013 noted that the mission has a financial shortfall and could not afford to facilitate the relocation of the petitioner, Further on 24th December 2013, the High Commissioner outlined to the respondents that there were three other officers that were due for relocation after their recall inclusive of the petitioner and he was thus requesting for a budgetary advance to facilitate this process. There is no reply to this communication by the high Commissioner but On 11th March 2014, the High Commissioner does write to the respondents seeking o know if there will be replacement of the officers to be relocated inclusive of the petitioner as there was a house and lease that required to be confirmed or released and the respondent only replied to this communication on 9th April 2014 that the issues raised by the High Commissioner would be addressed at an appropriate time. As this was happening the petitioner requested for compassionate leave that was granted for 10 days and on 28th April 2014 the High Commissioner wrote to the 2nd respondent with regard to the Petitioner;

I am pleased to release the above named officer on 31st March 2014 to report back to headquarters on completion of her tour of duty but she seems not to have completed her packing and freighting of her personal effects due to the disruption in her departure arrangements, occasioned by the sudden death of her mother and travel home on 10 emergency days leave from 4th March 2014.

This is to therefore seek authority for her to be in station for an extra 10 days to enable her finalize her departure arrangements and leave on 16th April 2014.

36. The 10 days requested for by the High Commissioner for the benefit of the petitioner were approved by the respondents vide letter dated 2nd April 2014. The petitioner was to relocate by 16th April 2014. However on 16th April 2014, the IP lodged a complaint for the petitioner to the respondents based on ground similar to what the petitioner had raised in her letter to the respondents dated 4th December 2013. The IP raised their concerns with the respondents that the petitioner had been granted an extension of tour of duty, this was revoked without giving reasons and without due consideration tot e fact that the petitioner had a child in school, the notice given by the respondents on 3rd December 2013 was too short contrary to the 3 months basic minimum for such recall and that the decision to revoke the extension fell short of the fair administrative action guaranteed to the petitioner under the Constitution. The IP sought a review of the respondent's decision to enable the petitioner serve under her station until October 2014action guaranteed to the petitioner under the Constitution. The IP sought a review of the respondent's decision to enable the petitioner serve under her station until October 2014. On 22nd April 2014, the 2nd respondent replied to the IP noting that the recall of the petitioner was an administrative action done in accordance with the Foreign Service Regulations as and the Code of Regulations and the petitioner was expected to report back as directed. On 30th April 3014, the respondents wrote to the IP noting that the petitioner was to report back to headquarters on 1st May 2014.

37. This then formed the summary background to the court orders granted on 30th April 2014 giving conservatory orders to the petitioner.

38. There is now a fundamental shift in the labour relations environment in Kenya with the enactment of the Employment Act, 2007 and the Constitution, 2010. Employees, without distinction as to whether they are in the public or private sector now enjoy a protective labour environment that was no always the norm before. Employers both in the public and the private sphere enjoy rights now regulated under the law and the Constitutions. But things were not always like this. There is therefore the major change. Where employers had developed regulations, policies and guidelines before 2007 and 2010 with regard to the new labour laws and the Constitution, there is now an urgent call to go back and realign these regulations, policies and guidelines so as not to be left behind by the fast growing labour sector that will seriously be undermined by employers who fail to adjust or make appropriate changes to reflect the changed circumstances for the employee.

39. The fundamental shift now incorporate what the Industrial Court has interpreted to be before an employer can take any action, positive or negative on an employee, there is need for Fair procedure, reasonableness and consultation. Even where there is a benefit given to an employee, fair procedure entail that that employee be reasonably to made aware that such a benefit has been conferred and the reasons for such a benefit. On the other hand where an adverse decision is made by the employer, a similar requirement is expected to follow as a matter of law. This mode of things finds good justification even in a case like this one where the employer is a state department and the employee is a public officer. Actually, the measure for ensuring fair procedure and consultation is higher for such bodies and officer based on Article 10 of the Constitution that outline the same as;

> *Article 10(2) provides that the national values and principles of governance include—*
>
> *(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people; (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised; good governance, integrity, transparency and accountability; and sustainable development.*

40. The Constitution does not end at Article 10, it goes further to state how state officer to apply fair administrative action and the ambit within which their decisions are to be applied. Article 47(1) provides that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair and under sub-article (2) it is provided that if a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action. Sub-article (3) provides that Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall (a) provide for the **review of administrative action by a court** or, if appropriate, an independent and impartial tribunal; and (b) promote efficient administration.

41. Article 73 (1) provides that authority assigned to a State officer (a) is **a public trust** to be exercised in a manner that (i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people; (iii) brings honour to the nation and dignity to the office; and (iv) promotes public confidence in the integrity of the office; and (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

42. As a final point in this regard, Article 232 (1) stipulates that; the values and principles of public service include (a) high standards of professional ethics; (b) efficient, effective and economic use of resources; (c) responsive, prompt, effective, impartial and equitable provision of services; (d) involvement of the people in the process of policy making; (e) accountability for administrative acts; (f) transparency and provision to the public of timely, accurate information; (g) subject to paragraphs (h) and (i), fair competition and merit as the basis of appointments and promotions; (h) representation of Kenya's diverse communities; and (i) affording adequate and equal opportunities for appointment, training and advancement, at all levels of the public service, of (i) men and women; (ii) the members of all ethnic groups; and (iii) persons with disabilities.

43. Sub-article (2) provides that the values and principles of public service apply to public service in (a) all State organs in both levels of government; and (b) all State corporations.

44. With regard to labour relations and employment matters, there is now a legal duty on an employer to give an employee reasons or reason for any action taken being matters the employer genuinely believed to exist and which caused the employer to take such action. It does not end there as the employer, even where there is a genuine reason or reasons to give to the employee with regard to any action taken the same must be assessed as to its validity, fairness and reasonableness. It goes even further as where an employee who feels aggrieved by such action and there is a reason or reasons given which the employee believes to be genuine, such complaint must be lodged with the industrial Court and what is crucial to assess if the procedure applied by the employer while arriving at the subject action or decision.

45. The respondents submitted that what they did with regard to the petitioner was an administrative action that was not subject to legal action as under the PSC regulations, they could recall the petitioner to serve in any department. There was no permanent deployment. However the Constitution now creates a mechanism where administrative power can be reviewed through a judicial review, while providing individuals with justiciable rights to claim relief from the effects of unfair administrative action. The Constitution requires the administration, public officer and state officials to act in accordance with fundamental principles of justice and rationality and prohibits the legislature from allowing any departure from these principles. Administrative action is therefore part of the wider exercise of public power that when analysed or reviewed must find reasoning to any challenge of invalidity of administrative action and find basis in lawfulness, fair procedure and reasonableness.

46. As late as at the time the parties herein came for the hearing of the petition and submissions closed, the respondents failed to outline as to the reason or reasons for which the administrative decision to revoke the

extension of the petitioner tour of duty was made. In the affidavit of the 2nd respondent dated 12th May 2014 at paragraph 14;

> *That further to the foregoing, the said order clearly set out terms in line with the Kenya Foregoing Service Regulations 2000 that; foreign service was a temporary assignment with specific time bound responsibilities and duties and therefore the tour of duty could be varied depending on various issues including performance, exigencies of duty, indiscipline or otherwise reasons of indisposition.*

47. The 2nd respondent despite going that far fails to state what the reason or reasons as to why the petitioner's extension of tour of duty was revoked. Was it due to her performance, exigencies of duty, indiscipline or other reasons of indisposition? These, the petitioner was denied and even the court, was equally denied.

The right of fair labour practice

48. The Constitutional provisions outlined above and the cited extracts are made in an effort to reproduce the forgoing articles of the Constitution in order to be able to place them in the context of the petitioner's contention that they have been violated with reference to her and in order to understand in what way and to what extent. In other words this Court is called upon at this point to interpret the Constitution in favour of the petitioner and if persuaded come to the conclusion that the rights have been violated to such an extent that it warrants grant of conservatory orders sought.

49. With regard to fair labour practice this court in ***Elizabeth Washeke and 62 Others versus Airtel Networks and Another, Cause No. 1972 of 2012*** that As far as the issue of fairness of a labour practice, regard must be had to the Employment Act, 2007. For the vast majority of employees, whether in the public of private sectors, the provisions of this legislation, rather than the Bill of Rights, provides the principle guarantees of fair labour practices. It is only for those persons not covered by the respective employment legislations (members of the disciplined forces) that afford a degree of protection that would otherwise be denied.

> *Whether conduct is fair or not necessarily involves a degree of subjective judgement. However, this is not to suggest that the assessment of fairness is unfettered or a matter of whim. Rather, regard must be had to the residual unfair labour practice; the employment relationship would still exist. But due to the unfair labour practice the employee is left unprotected. The unfair conduct of the employer relating to a particular employee or employees can then be termed as unfair labour practice. Thus, any understanding of fairness must involve weighing up the respective interests of the parties – as well as the interests of the public.*

50. In this case, despite the respondents not giving the petitioner reasons for the revocation of the extension of duty, with the intervention of the High Commissioner, there were extension as noted above, on 28th April 2014 the High Commissioner wrote to the 2nd respondent with regard to the Petitioner;

> *I am pleased to release the above named officer on 31st March 2014 to report back to headquarters on completion of her tour of duty but she seems not to have completed her packing and freighting of her personal effects due to the disruption in her departure arrangements, occasioned by the sudden death of her mother and travel home on 10 emergency days leave from 4th March 2014.*
>
> *This is to therefore seek authority for her to be in station for an extra 10 days to enable her finalize her departure arrangements and leave on 16th April 2014.*

51. The Petitioner does not contest these presentations by the High Commission in her pleadings or submission. As much as the respondents are applying rules and regulations that date back to 2000 in a changed environment with regard to the applicable laws and the Constitution, as the employer, the respondents still retain the rights to give an employee lawful and proper command which is within the scope of duty to obey, as issued by the employer or a person placed in authority over the employee. Where the petitioner was ready to move and relocate as indicated and not contradicted or contested as of 16th April 2014, the petitioner did not relocate and opted to refund back the relocation funds advanced to her. The essence of public service and the tenets bestowed upon the respondents to ensure do not end with them only, these constitutional expectations outlined under Articles 10, 73 and 232 and more fundamentally Article 41 with regard to fair labour practices to all officers in public service. The petitioner is therefore equally bound as a public servant to act in good faith, ensure good industrial/work relations with the employer and obey lawful orders as issued by the employer even in a case where the employer is a public body. Even in a case where the petitioner had a valid expectation to the nature that the tour of duty would not end until October 2014, when the employer reviewed the letter of protest and concerns as noted in the letter dated 4th December 2013, there was an extension of duty by 3 months which was a reasonable period where the petitioner as a diligent employee was expected to re-organise her life and family so as to attend to her allocated duties. It does not only require an employer to act in good faith, the employee is equally bound by the same rule, to act with outmost due diligence and in good faith toward the directives issued by the employer.

Whether the order sought should be granted

52. During the subsistence of this matter in Court, the Petitioner had enjoyed interim orders date 30th April 2014 to date, a period of over 8 weeks. With the granting of the interim conservatory orders, noting substantive remains for the court to address apart from the subsistence of the petitioner while on tour of duty.

Conclusion

In view of the foregoing and the powers conferred on the Court and set out under Section 12 of the Industrial Court as read together with Article 162(2) and 165 of the Constitution; and in the interests of justice to ensure fair labour relations between the parties herein I make the following orders:

i. **The Court varies the 1st and 2nd Respondents recall/redeployment/release of the petitioner from the Kenya High Commission in South Africa to the Headquarters of the Ministry of Foreign Affairs and International Trade or any other state department thereto;**

ii. **The Notice period for the recall/redeployment/ release of the petitioner from her tour of duty from the Kenya High Commission in South Africa is extended by four (4) weeks from the date hereof;**

iii. **During the four (4) weeks extension period the respondents will make any payments and/or expenditure allocations properly due and owing and/or to be incurred by the Petitioner and her family during the course and in relation to the extension of petitioner's tour of service in the Kenya High Commission in South Africa.**

iv. **The petitioner is awarded 50% costs herein.**

Delivered in open Court at Nairobi and dated this 18th Day of June 2014

Mbaru

JUDGE

In the presence of

Court Assistant: Lilian Njenga

……..

……..

[1] See Johan De Waal, Iain Currie, G. Erasmus *the Bill of Rights Handbook* (4th ed. 2001) Juta, 391.

Republic v Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 304 OF 2014

REPUBLIC ……..APPLICANT

VERSUS

COMMISSION ON ADMINISTRATIVE JUSTICE…….RESPONDENT

Ex-parte

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES

JUDGEMENT

1. Through the Notice of motion application dated 5th August, 2014 the ex-parte Applicant, the National Social Security Fund (NSSF) Board of Trustees prays for orders that:

> **"1. An Order of Certiorari do issue to remove into the High Court and quash the whole Investigations Report by the Ombudsman-Kenya on Abuse of Power and Disregard of Procurement Procedures by the Ag, CEO and the Management of NSSF in the awarding of Tassia II Infrastructure Development Project (April, 2014).**
>
> **2. THAT the Court be at liberty to make such further and/or alternative orders as it deems appropriate.**
>
> **3. THAT Costs of this application be provided for."**

2. The application is supported by the grounds set out in the Statutory Statement dated 4th August, 2014 and the facts contained in the Verifying Affidavit of the Applicant sworn on 4th August, 2014 by Richard Langat.

3. The Respondent, the Commission on Administrative Justice is a constitutional commission established under Article 59 of the Constitution of the Republic of Kenya.

4. According to the papers filed in Court, the Applicant's case is that by a letter dated 17th January, 2014, the Chairperson of the Respondent requested the Managing Trustee of the Applicant to respond to allegations enumerated in the letter of Francis Atwoli in regard to Tassia II Regularisation Scheme Infrastructure Development (the Project). A copy of the complaint was attached to the Respondent's letter.

5. The Applicant responded through a letter dated 22nd February, 2014, forwarding a detailed report on the issues raised. It is the Applicant's case that as at the time the Respondent wrote the said letter, the Applicant's management had been invited to appear before the Public Investments Committee (PIC) of the National Assembly and the Ethics and Anti-Corruption Commission (EACC) to answer allegations regarding the Project. Further, that on 30th January, 2014, the Applicant's Managing Trustee and other managers had appeared before PIC where they were grilled about the Project.

6. On 29th January, 2014, the Respondent wrote to the Applicant indicating that it had decided to conduct investigations into the Project focusing on two issues namely; the approval of the contract by the Board of the Applicant and the administrative management of the process leading to the award of the contract.

7. On receiving this letter, the Applicant wrote to the Respondent on 3rd February, 2014, alerting it of the fact that the Project was under the investigation of EACC, PIC and the Labour and Social Welfare Committee of the National Assembly. The Applicant urged the Respondent to postpone the scheduled interview in light of those investigations and the fact that Section 30(h) of the Commission on Administrative Justice Act, 2011 (CAJA) barred the Respondent from investigating matters under investigation by other commissions.

8. The Respondent wrote back to the Applicant on 6th February, 2014, contending that its powers emanate from the Article 59(2) (h), (i) and (j) of the Constitution and therefore any legislation that would seem to curtail its functions would "not pass muster." The Respondent

also stated that at the time of the commencement of the enquiry no other entity was seized of investigations in respect of the matters raised. The Respondent contended that its role was focused on administrative law while that of EACC was targeted at criminality and consequently the focus and resultant actions are distinct.

9. On 17th February, 2014, the Applicant wrote to the Secretary/ Chief Executive Officer of EACC seeking guidance as to whether it was proper for the Respondent to proceed with investigations over a matter that it was investigating. The EACC wrote back on 21st February, 2014 and copied the letter to the Respondent confirming that they were indeed investigating the matter and they were not privy to the issues being investigated by the Respondent.

10. The Applicant denies the Respondent's contention that it was the first body to commence investigations into the Project. It is the Applicant's case that the Respondent's decision to proceed with the investigation was in breach of Section 30(h) of the CAJA. Further, that on 23rd April, 2014, PIC made its findings on the matter.

11. According to the Applicant, the Respondent has published a draft Investigations Report (the Report) on the Project and its findings and recommendations conflicted with those of PIC and the rationale of Section 30(h) of the CAJA was therefore apparent. The Applicant has therefore urged this Court to issue an order removing the Respondent's Report into this Court and having it quashed.

12. As per the Statutory Statement dated 4th August, 2014, the Applicant consequently seeks relief on the grounds that:

> **"1) The Respondent acted in breach of the express language of Section 30(h) of the Commission on Administrative Justice Act which provide that the Commission shall not investigate any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.**
>
> **2) The Applicant does not fall within the ambit of public service as contemplated by Article 260 of the Constitution and not within the ambit of section 29(1) of the Commission on Administrative Justice Act.**
>
> **3) The investigation report is a nullity in law for want of jurisdiction.**
>
> **4) It is desirable that the court do declare the report a nullity to avoid substantial prejudice and inconvenience that may ensue from acting on the recommendations."**

13. The Respondent opposed the application through a Replying Affidavit sworn on 6th October, 2014 by its Chairperson. The Respondent's case is that it is a constitutional commission established following the restructuring of the Kenya National Human Rights and Equality Commission pursuant to Article 59(4) of the Constitution. That pursuant to Article 59(5) of the Constitution as read together with Section 4 of the CAJA, the Respondent has the status and powers of a commission within the meaning of Chapter 15 of the Constitution of Kenya.

14. Further, that the Respondent has been given a wide mandate under Articles 59(2)(h)–(k), 249 and 252 of the Constitution as read with sections 8, 26, 27, 28 and 29 of the CAJA. Such mandate amongst other things includes; to investigate any conduct in state affairs or any act or omission in public administration in any sphere of government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct and further to deal with maladministration through conciliation, mediation and negotiation where appropriate.

15. The Respondent contends that in the conduct of its functions, Article 252 of the Constitution and sections 8, 26, 27, 28 and 29 of the CAJA grants it powers to conduct investigations on its own initiative or on a complaint made by a member of the public, to issue summons as it deems necessary for the fulfilment of its mandate and require that statements be given under oath, to adjudicate on matters relating to administrative justice, obtain any information it considers relevant from any person or governmental authorities including requisition of reports, records and documents and to compel the production of such information, to interview any persons, and to recommend compensation or other appropriate remedies against persons or bodies to which the CAJA applies.

16. It is the Respondent's case that pursuant to Article 252(2) of the Constitution, a complaint may be made to it by any person entitled to institute court proceedings under Article 22(1) and (2) of the Constitution. Further, that under Section 31 of the CAJA, the Respondent may investigate an administrative action despite a provision in any written law to the effect that the action taken is final or cannot be appealed, challenged, reviewed, questioned or called in question.

17. The Respondent states that after undertaking its investigations, it is required under Section 42 of the CAJA to prepare a report for the state organ, public office or organization to which the investigation relates, and the report shall include the findings of the investigation, the action it considers should be taken, reasons for the decision and the recommendations deemed appropriate.

18. Further, that upon an inquiry into a complaint, the Respondent may undertake such other action as it may deem fit against a concerned person or persons where the inquiry discloses a criminal offence as provided for under Section 41 of CAJA. That under Article 59 (2)(j) of the Constitution and Section 8(g) of the CAJA, the Respondent is empowered to report on complaints investigated under paragraphs (h) and (i) and take remedial action.

19. According to the Respondent, on 14th January, 2014, Mr Francis Atwoli, the Secretary General of the Central Organization of Trade Unions who is also a member of the Applicant's Board of Trustees wrote a letter to it complaining of irregular approval of the Kshs. 5.053 billion for the Project by Applicant's Board Chairman and the Acting Managing Trustee/Chief Executive. He also complained of the improper and unprocedural awarding of the tender for the Project.

20. Pursuant to the its investigative powers, the Respondent undertook investigations into the allegations whilst focusing on the administrative management of the process leading to the award of the contract and the approval of the contract by the Board with a view to establishing the veracity of the allegations and contested matters of fact.

21. After exchange of correspondence with the Applicant's Chief Executive Officer, the Respondent invited the Applicant for hearing but the Applicant did not honour the invitations. On 6th March, 2014 the Respondent informed the Applicant in writing that it had nevertheless proceeded with investigations notwithstanding refusal to honour the invitations and advised the Applicant of its preliminary findings, and at the same time called upon the Applicant to make any further comments in rejoinder to the preliminary findings.

22. Subsequently, the Respondent held interviews and recorded statements from the Applicant's legal officer Mr Austin Ouko and other persons and documents relevant to the investigations were also recovered. Upon conclusion of its investigations, the Respondent compiled the Investigations Report titled "Abuse of Power and Disregard of Procurement Procedures by the Acting CEO and the Management of NSSF in the awarding of the Tassia II Infrastructure Development Project." The Investigations Report shall hereinafter be simply referred to as the Report. Further, that in line with Section 42(3) of the CAJA, the Respondent forwarded the Report together with the recommendations to the Applicant for appropriate action but the Applicant failed to implement the recommendations in breach of the said provision.

23. In response to the allegation by the Applicant that the Respondent acted in breach of Section 30(h) of the CAJA and that the Report was a nullity for want of jurisdiction, the Respondent asserts that it has a constitutional and statutory mandate under Articles 59(2)(h), (i) and (j) and 252 of the Constitution and Section 8 of the CAJA; to investigate any act or omission in any sphere of government suspected to be prejudicial, improper or to constitute abuse of power, and to take appropriate remedial action.

24. The Respondent postulates that any legislation or policy that seeks to constrict or hinder exercise of its jurisdiction is in breach of the express provisions of the Constitution. Further, that Section 31 of the CAJA expressly provides that the powers of the Respondent whilst investigating an administrative action shall not be limited by any provision in any written law.

25. It is the Respondent's case that in any event, Section 30(h) of the CAJA suggests forbearance where there is an ongoing investigation at the time it commences an inquiry. In this particular instance, no other entity was seized of investigations in respect of the matters raised by the Respondent as at the time of the commencement of the inquiry. Further, that PIC and EACC commenced their investigations after the Respondent had initiated its inquiry as is evidenced by correspondence and minutes exhibited through the Applicant's verifying affidavit.

26. In addition, it is the Respondent's argument that its investigations focused solely on administrative law through investigation on maladministration (abuse of power, impropriety or prejudice) pursuant to its distinct mandate in the Constitution, quite apart from the investigations of any other body, a fact that was confirmed by EACC in the letter dated 21st February, 2014. Also that the resultant actions on the Respondent's investigations are distinct from that of any other investigations and there is indeed no conflicting recommendation between its recommendations and those of PIC.

27. On the Applicant's assertion that it does not fall under the jurisdiction of the Respondent, the Respondent contends that the Applicant is a statutory body corporate operating under the regulatory framework of the National Social Security Act, 2013, the State Corporations Act, Cap 446 and the Public Officer Ethics Act, 2003 and is therefore a public office which falls within the ambit of Section 29(1) of the CAJA.

28. The Respondent asserts that the application is in any event an abuse of process and bad in law and ought to be dismissed. The Respondent contends that the Applicant has come to court with unclean hands because it failed to comply with the recommendations of the Respondent's Report and/or to communicate with the Respondent on the same in blatant breach of section 42(3) of CAJA; the application offends the provisions of Order 53 of the Civil Procedure Rule; there is no occasion and/or basis for grant of the prayers sought; there is no decision and/or proceedings capable of being quashed by way of orders

of certiorari; and that the application is accordingly premature and ought to be dismissed with costs.

29. It is the Respondent's view that this matter is of great significance to the public by virtue of the fact that the circumstances revolving around it touches on its core constitutional mandate, and therefore the determination in this matter will have a great impact on the course and practice of administrative law on ombudsmanship in Kenya as founded in both the Constitution and the CAJA.

30. Further, that this matter is also of great public importance as it involves the integrity of the Constitution and interplay between state organs/agencies being the Applicant and the Respondent herein and commitment to inter agency harmony or co-operation. The Respondent therefore urges this Court to act in accordance with the observation of the Supreme Court in **the matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR,** and as the custodian of the integrity of the Constitution interpret it holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights are enabled to discharge their obligations as a basis of sustaining the design and purpose of the Constitution.

31. The Respondent also asks the Court in considering this case to have in mind the advice of the Supreme Court in the Advisory Opinion in **Speaker of the Senate & another v Hon. Attorney General & others [2013] Eklr,** that lawful public agency conduct under the Constitution requires every state organ to grapple, in good faith, with assigned obligations, and with a clear commitment to inter agency harmony and cooperation and that no state agency, especially where it is represented by one person, should overlook the historical trajectory of the Constitution which is clearly marked by transition from narrow platforms of idiosyncrasy or sheer might to a scheme of progressive, accountable institutional interplays.

32. The Respondent also holds the view that as was observed in **Re the Matter of the Interim Independent Electoral Commission [2011] eKLR,** it was established alongside the judicial branch and is entrusted with special governance mandates of critical importance in the new constitutional dispensation, and that it is the custodian of the fundamental ingredients of democracy such as rule of law, integrity, transparency, and human rights, and that the exercise of its probity in the exercise of its constitutional mandate ought to be upheld.

33. In view of the contents of the application before this Court, it is clear that the Applicant's case is premised on the assertion that the Respondent had no jurisdiction to inquire into the complaint that led to the preparation of the Report in question. The Applicant's approach on the question of jurisdiction in this matter is twofold. In the first place its case is that the Respondent acted in breach of Section 30(h) of the CAJA as it delved into the matter when the same was already under the investigation of EACC and two committees of the National Assembly. Secondly, it is the Applicant's argument that it does not fall within the ambit of public service as contemplated by Article 260 of the Constitution and neither does it fall within the ambit of Section 29(1) of the CAJA. Consequently, the Applicant contends that the Respondent has no jurisdiction over it.

34. For completion of record, I must state that there was a third argument introduced through submissions by the Applicant to the effect that the Kenya Human Rights and Equality Commission Bill, which had been published in 2011 for purposes of Article 59(4) & (5) of the Constitution was never passed or operationalized through statute. As such, there was no statute passed to restructure or proclaim the bifurcation of the Kenya Human Rights and Equality Commission into two or more commissions as envisaged under Articles 59(4) or indeed assigning each function of the Kenya Human Rights and Equality Commission to one or the other of the successor commissions. The Applicant contends that what was envisaged and expressly provided for under Article 59(4) & (5) of the Constitution is that there was to be a single Act of Parliament, perhaps the Kenya Human Rights and Equality Commission Restructuring Act, legally and constitutionally restructuring the Commission and expressly delegating the functions in the manner provided under Article 59(5) of the Constitution.

35. The Applicant goes ahead to submit that if anything, a cursory consideration of Article 59(2) of the Constitution shows that only two commissions were envisaged and those are the Kenya National Commission on Human Rights established by the Kenya National Commission on Human Rights Act, 2011 to deal with all the human rights aspects under Article 59(2) of the Constitution and the National Gender and Equality Commission created by the National Gender and Equality Commission Act, 2011 to monitor, facilitate, promote and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions, and take remedial action on abuses in this context under Article 59(2) of the Constitution as read together with Article 27 of the Constitution.

36. The Applicant is therefore advancing the view that the Respondent's existence is not founded on any known constitutional provision. The Respondent's apt response to this question is that the same was raised through submissions and the Court cannot address the

same. The Respondent's counsel nevertheless went ahead to point out that the Respondent's existence is rooted in the Constitution.

37. I agree with the Respondent that this issue was only raised by the Applicant in the submissions stage. The question of the legal foundation of the Respondent is not one to be raised casually through submissions. As was stated by the Court of Appeal in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR:**

> **''Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing submissions but based only on evidence presented''**

38. I will therefore not consider this issue which has been raised through submissions and to which the Respondent was never given prior notice to respond to by way of evidence. Having said so, I find it important to point to the fact that Article 59(4) gave room to Parliament to split the Kenya National Human Rights and Equality Commission **"into two or more separate commissions."** The claim that Article 59 only envisaged two entities is therefore not correct.

39. Turning back to the question of jurisdiction, I propose to start with the question as to whether the Applicant is not amenable to the jurisdiction of the Respondent. I did not find any argument in the Applicant's written submissions to support its assertion that it does not fall within the ambit of public service as contemplated by Article 260 of the Constitution and Section 29(1) of the CAJA.

40. In opposition to the Applicant's contention, the Respondent referred this Court to the decision of Lenaola, J, in the case of **Kenya Union of Domestic, Hotels, Education and Allied Workers Union v The Salaries and Remuneration Commission and another, Nairobi High Court Petition No. 294 of 2013.** In that case, one of the issues for determination by the Court was whether state corporations are public offices within the meaning of Article 260 of the Constitution. After considering the relevant provisions of the law the learned Judge opined that:

> **''Although these institutions do not receive monies from the Consolidated Fund, they are empowered by Parliament through legislation to raise income through levies and other commercial ventures. Further, state corporations receive funds from Parliament through their respective Ministries and fit the description in Article 260 regarding funds from Parliament.**
>
> **Further 'Public fund' has the meaning assigned to it by the Exchequer and Audit Act (Cap 412 Laws of Kenya). Public money is said therefore to include; revenue, any trust or other moneys held, whether temporarily or otherwise by an officer in his official capacity, either alone or jointly with any other person, whether an officer or not. Given that definition of public funds and given that the Petitioner's members work for institutions, parastatals or corporations that provide a public function, then to my mind they are properly within the public service category and therefore state corporations and their employees fall within the meaning of public office and public officers, and I so find."**

41. I find nothing to make me hold a different view from the decision of Lenaola, J. I do not think the Applicant holds the view that it is not a state corporation or an agency of the state. I therefore hold that the Applicant falls under the jurisdiction of the Respondent.

42. As for the constitutional and statutory jurisdiction conferred upon the Respondent, the Applicant argues that the functions of the Respondent as provided under Article 59(2) of the Constitution were not to be performed in abstract but strictly in the context of human rights and equality as envisaged by Article 27 of the Constitution. The Applicant submits that it is important to appreciate that for purposes of fair administrative action, Article 47(3) of the Constitution only envisaged a statutory legislation to promote and give effect to the requirements of efficient and fair administrative action, and if necessary, the statute was required to provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal/body.

43. Further, that the Constitution did put in place a specialized commission namely EACC established under Article 79 of the Constitution to deal with leadership and integrity issues, including those set out under Article 73(2) of the Constitution, effectively dealing with investigations on any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice, investigation of complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct, outside the context of human rights and equality.

44. According to the Applicant, taking into account the nature and purpose of the provisions of Articles 47(3), 59(2) & 79 of the Constitution with regard to the jurisdiction of the Respondent, it is clear that Parliament

could not and did not delegate the functions under Article 59(2) of the Constitution outside the context of human rights and equality. Furthermore, Parliament did not have constitutional authority and therefore could not have created a commission that would usurp the functions and duties exclusively vested in EACC as established under Article 79 of the Constitution. The Applicant therefore asserts that there is no jurisdictional justification as alleged by the Respondent to enable it cross into the arena of EACC.

45. The Applicant proceeds to postulate that the tribunal or body envisaged under Article 47(3) of the Constitution is a statutory body, not a commission, and accordingly, this is where the Respondent ought to have derived its statutory authority, as clearly supported by the Fair Administrative Action Bill, 2014. The Applicant urges this Court to find that it is in this narrow context under which the Respondent is to operate.

46. The Respondent's view is different from that of the Applicant. According to the Respondent, the Applicant's interpretation of Articles 47, 59(2) and 79 of the Constitution is restrictive and does not promote the purposes, values and principles of the Constitution and this goes against the provisions of Article 259(1) of the Constitution. It is the Respondent's case that both EACC and the Respondent have distinct constitutional mandates and roles to play in promoting good governance. Further, that whereas Article 79 of the Constitution tasks EACC with ensuring enforcement of Chapter Six of the Constitution (Leadership and Integrity), Articles 59(2)(h)-(k), 149(1) and 252 of the Constitution and the CAJA grants the Respondent the power to handle matters involving maladministration.

47. In my view, the starting point is to appreciate the reasons behind the establishment of the constitutional commissions and independent offices. In this regard the decision of the Supreme Court in **Re the Matter of the Interim Independent Electoral Commission [2011] eKLR** provides good guidance. In that case the Court stated:

> "**It is a matter of which we take judicial notice that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause".**

48. The Court did not stop there but proceeded to caution at Paragraph 60 that:

> "**While bearing in mind that the various Commissions and independent offices are required to function free of subjection to *"direction or control by any person or authority",* we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the "independence clause" does not accord them *carte blanche* to act or conduct themselves on whim; their independence is, by design, configured to the *execution of their mandate,* and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices**

are not to plead "independence" as an end in itself; for public-governance tasks are apt to be severely strained by possible "clashes of independences"."

49. A commission like the Respondent is expected to operate within its constitutional and statutory mandate and cooperate with other state organs, public agencies and commissions. The aim is to ensure smooth operations that will deliver maximum benefits for the people of Kenya in whose interest the Constitution was promulgated. An expansionist commission will end up causing disharmony and thereby stalling delivery of services.

50. The question that follows is whether the Respondent crossed its boundaries in this matter. According to the Respondent, its mandate is provided under Articles 59(2)(h)-(k) of the Constitution as follows:

"The functions of the Commission are—

(*a*)…….

(*b*)…….

(*c*) …….

(*d*) …….

(*e*) …….

(*f*) ……..

(*g*) ……..

(*h*) To investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;

(*i*) To investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;

(*j*) To report on complaints investigated under paragraphs (*h*) and (*i*) and take remedial action; and

(*k*) To perform any other functions prescribed by legislation."

51. Those functions are replicated under the CAJA. Section 2 of the CAJA defines administrative action as follows:

"Administrative action" means any action relating to matters of administration and includes—

(a) A decision made or an act carried out in the public service;

(b) A failure to act in discharge of a public duty required of an officer in public service;

(c) The making of a recommendation to a Cabinet Secretary; or

(d) An action taken pursuant to a recommendation made to a Cabinet Secretary;

52. Looking at the constitutional and statutory functions of the Respondent, it is difficult to entertain the Applicant's attempt to shrink the mandate of the Respondent. The roles of the Respondent and EACC run into each other and it is not easy to separate complaints of maladministration from those of corruption for the two evils are more often intertwined. A simple example will do. An officer of a public body who demands a bribe before giving service is likely to delay delivery of service to a member of the public. In such a situation you will find both a case of lack of integrity which falls under the jurisdiction of EACC and a case of maladministration which is in the province of the Respondent. The commissions should therefore be able to coordinate their operations in a manner that maximises returns on the public funds allocated to them. Where the commissions are not willing to harmoniously give way to each other, Section 30 of the CAJA becomes useful.

53. The Respondent's assertion that its jurisdiction should not be viewed from a narrow context is indeed correct. It is true that the Respondent is among the commissions whose existence is rooted in the promotion of respect for human rights and development of a culture of human rights in Kenya. What the Applicant does not seem to appreciate is that human rights pervades all the activities of human species. The need to respect human rights is very important in the governance of this country and where there is an allegation of maladministration the Respondent is under a duty to enquire into the complaint and act in accordance with the powers bestowed on it by the Constitution and legislation. In the circumstances of this case, I will therefore agree with the Respondent that it had jurisdiction to investigate this matter although the nature of the complaints may have been better dealt with by EACC.

54. The remaining issue is whether the Respondent breached Section 30(h) of the CAJA. According to the Applicant, the letter from EACC clearly shows that it was investigating the matter by the time the Respondent commenced its investigations. As such the Respondent by virtue of Section 30(h) had no jurisdiction over the matter.

55. It is the Applicant's case that a well established principle in administrative law is that a public body must understand the scope and limits of its powers and must operate within those limits. The Applicant's counsel supported this argument with the decision in **Anisminic Ltd v Foreign Compensation Commission [1969] 2 A.C. 147 (HL)** where Lord Reid stated that:

> **"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *Reg.* v. *Governor of Brixton Prison, Ex parte Armah* [1968] A.C. 192, 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law."**

56. It is the Applicant's position that if an act is void, then it is in law a nullity. This argument was buttressed by the statement in **Macfoy v United Africa Co. Ltd [1961] 3 All E.R. 1169** where it was stated that:

> **"If an act is *void*, then it is in law a *nullity*. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."**

The Applicant therefore urges this Court to find that the Respondent had no jurisdiction to enquire into the matter.

57. In response to the Applicant's contention that its jurisdiction was ousted by Section 30(h) of the CAJA, the Respondent asserted that it has the constitutional mandate of addressing maladministration and the role of EACC is ensuring compliance with Chapter Six of the Constitution. The Respondent argues its functions and those of EACC do not conflict but are complimentary in the broader scheme of good governance.

58. It is therefore the Respondent's case that the limitation under Section 30(h) of the CAJA should not arise for various reasons. Firstly, there were no investigations being done by EACC as at the time the Respondent commenced its inquiry through its letter dated 17th January, 2014. Secondly, there is no evidence placed before this Court to show the issues that were allegedly investigated by EACC. The Respondent submits that all that exists is the letter dated 21st February, 2014 from EACC to the Applicant, which letter does not disclose the issues being investigated by EACC. It is the Applicant's case that it is important to note that the letter in question appreciated the distinct constitutional mandates of both EACC and the Respondent and calls upon the Applicant to co-operate with the Respondent.

59. The Respondent urged this Court to be guided by the Advisory Opinion of the Supreme Court in **Speaker of the Senate & another v Hon. Attorney General & another and 3 others [2013] eKLR,** where the Court opined that lawful public agency conduct under the Constitution requires every state organ to grapple, in good faith, with assigned obligations, and with a clear commitment to inter agency harmony and co-operation and that no state agency, especially where it is represented by one person, should overlook the historical trajectory of the Constitution which is clearly marked by transition from narrow platforms of idiosyncrasy or sheer might to a scheme of progressive, accountable institutional interplays.

60. In resolving this question, the starting point is Section 30 of the CAJA. The Section states:

> **"Limitation of jurisdiction**
>
> **The Commission shall not investigate—**
>
> **(a) Proceedings or a decision of the Cabinet or a committee of the Cabinet;**
>
> **(b) A criminal offence;**
>
> **(c)A matter pending before any court or judicial tribunal;**
>
> **(d) The commencement or conduct of criminal or civil proceedings before a court or other body carrying out judicial functions;**
>
> **(e) The grant of Honours or Awards by the President;**
>
> **(f) A matter relating to the relations between the State and any foreign State or international organization recognized as such under international law;**
>
> **(g) Anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to; or**
>
> **(h) Any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law**."

61. When one reads the said Section, it clearly becomes apparent that Parliament intentionally limited the jurisdiction of the Respondent in the identified circumstances. The reason for this limitation is that there was need to avoid conflicts between the Respondent and other state agencies. The limitation is therefore reasonable considering that the Respondent is not a super commission capable of investigating all the things done by state organs. Where therefore another commission or any other person established by the Constitution or any other written law is dealing with a particular issue, the Respondent has no jurisdiction to venture into that matter.

62. The Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] Eklr,** underlined the importance of courts and tribunals to operate within their jurisdictional fields as follows:

> "**A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."**

63. I have no doubt that the same principle is applicable to the jurisdiction of all state corporations, government agencies and commissions. None of them has unlimited mandates and they can only do that which they were established to do. The Respondent's jurisdiction is not limitless. It can only do that which the Constitution and the law allow it to do and nothing more.

64. In order to determine whether the Respondent had jurisdiction in this case, the Court has to look at the evidence presented by the parties. Two letters written by EACC both dated 21st February, 2014 are relevant to this matter. One letter is addressed to the Acting CEO of the Applicant and in that letter, EACC confirms that it was investigating the Project but was not privy to the Respondent's investigation but **"tend to believe that the Commission on Administrative Justice (CAJ) may not be investigating the same matters this Commission is, as the two Commissions have distinctive mandates in the Constitution."** The Applicant is advised to **"cooperate with any investigative agency that may have lawful reasons to inquire into the matter."**

65. The other letter is addressed to the Respondent by EACC. In that letter, EACC discloses that it is actively investigating the Project and asks the Respondent to **"urgently let us have your comments more particularly in the areas you are investigating to avoid duplication and apparent inconvenience."**

66. These two letters clearly show that EACC acted in the manner expected of any good public organisation. It is not clear whether EACC received any reply from the Respondent. The key reason why no more than one public agency should be engaged in investigation of the same matter is that it is a waste of public resources.

67. The EACC's letters do not, however, reveal when it started its investigations into the Project. The jurisdiction of the Respondent is only taken away by Section 30(h) of the CAJA where the matter is **"for the time being under the investigation of any other person or Commission….."** The matter under investigation by another body should be the same with the matter under investigation by the Respondent.

68. In this case, the Applicant has not demonstrated that the issues under investigation by EACC were the same with those under the investigation of the Respondent. It is also not clear whether by the time the Respondent commenced its investigations, EACC had already started its investigations. The same position applies to the investigations by the two parliamentary committees.

69. The danger, where there is no sufficient evidence, in acceding to an application like the one of the Applicant is that matters touching on public interest may be swept under the carpet. The risk of misuse of public finances through a multiplicity of investigations is a lesser evil compared to the failure to unearth malpractices in the public service. In the circumstances of this case this application fails and the same is dismissed.

70. On the issue of costs, I find that the Applicant's case was not frivolous and it should not be saddled with costs for testing certain legal provisions. The appropriate order is therefore to ask each party to meet own costs and I so do.

Dated, signed and delivered at Nairobi this 10th day of July , 2015

W. KORIR,

JUDGE OF THE HIGH COURT

Republic v Commission on Administrative Justice & another Ex Parte Samson Kegengo Ongeri [2015] eKLR

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

JUDICIAL REVIEW DIVISION

MILIMANI LAW COURTS

JUDICIAL REVIEW APPLICATION NO. 429 OF 2014

IN THE MATTER OF APPLICATION BY PROF. SAMSON KEGENGO ONGERI ORDERS OF CERTIORARI AND PROHIBITION

AND

IN THE MATTER OF ARTICLE 22, 47, 59 & 75 (3) OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF SECTIONS 36, 37 & 39 OF THE COMMISSION ON ADMINISTRATIVE JUSTICE ACT 2011

AND

IN THE MATTER OF: SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26

BETWEEN

REPUBLIC

VERSUS

COMMISSION ON

ADMINISTRATIVE JUSTICE .....1ST RESPONDENT

NATIONAL LAND COMMISSION..... 2ND RESPONDENT

EX PARTE

PROF. SAMSON KEGENGO ONGERI.....APPLICANT

JUDGEMENT

1. By a Notice of Motion filed 24th November, 2014, the *ex parte* applicant herein, **Prof. Samson Kegengo Ongeri**, seeks the following orders:

1. **An order of certiorari do issue to bring into the High Court and to quash the Report of the 1st Respondent (the Commission of Administrative Justice) released in October 2014 entitled "A MARKET UNDER SIEGE: AN INVESTIGATIONS REPORT BY THE OMBUDSMAN-KENYA ON ALLEGED IRREGULAR AND ILLEGAL ACQUISITION OF KISII MUNICIPAL MARKET LAND BY PRIVATE DEVELOPERS".**

2. **An order of Prohibition do issue to the 1st Respondent and 2nd Respondent from illegally dealing in any manner whatsoever or taking any unfair administrative action in regard to plot number Kisii Municipal/Block 111/258.**

3. **The costs of this application and of the entire suit be awarded to the *Ex parte* Applicant.**

***Ex Parte* Applicant's Case**

2. The application was supported by a supporting affidavit sworn on 24th November, 2014 by the Applicant.

3. According to the applicant, 1st Respondent herein (the Commission on Administrative Justice also known as Ombudsman) released in October 2014 a report entitled "A MARKET UNDER SIEGE: AN INVESTIGATIONS REPORT BY THE OMBUDSMAN-KENYA ON ALLEGED IRREGULAR AND ILLEGAL ACQUISITION OF KISII MUNICIPAL MARKET LAND BY PRIVATE DEVELOPERS" which report the applicant was illegal since it was published in defiance of the rule in *res sub judice* since the contents thereof form the subject matter of Kisii H.C.C.C. No. 133 of 2010. It was averred that the said report was accompanied by a press statement that was gravely misleading as regards the case in Kisii HCCC No. 133 of 2010 since the same came up for ruling sometimes last year on 7th November, 2013 contrary to

the assertions in the reckless press statement that the case was due for mention on 13th March, 2008.

4. It was the applicant's view that the orders of prohibition against the Respondents were therefore necessary since there was a real likelihood that they will in future take extra judicial actions especially as relates to the repossession of Land Reference No. Kisii/Municipality/ Block III/258 unless this honourable court injuncts them.

5. According to the applicant, he was never afforded an opportunity to be heard by the Commission on Administrative Justice before publishing the report contrary to the procedural safeguards in Sections 36, 37 and 39 of the ***Commission on Administrate Justice Act,2011*** (hereinafter referred to as "the Act") and Article 47 of the Constitution. It was further contended that the applicant neither given any written reasons for the administrative action of publishing the adverse report nor indeed was he served with the report itself before and after publication as required under Article 47(2) of the Constitution of Kenya 2010. He only got wind of the report through the media.

6. According to the applicant, on the 23rd October, 2014, he instructed his advocates to write a letter to the Ombudsman demanding an explanation for the aforementioned unprocedural failures but never received a reply or explanation from the Ombudsman. To the applicant was yet another unfair administrative action by the 1st Respondent even after all the unfairness in their report and the unprocedural process leading to its publication.

7. He therefore deposed that his appointment on 15th August, 2014 as Ambassador of Kenya to United Nations Settlements Programme (U.N-HABITAT) stood to be challenged in court or otherwise jeopardized by the adverse contents in the aforementioned report which was compiled and published unlawfully and without due process of law. Moreover, the adverse findings on his alleged abuse of office captured in the ombudsman Report aforementioned were likely to impair his legitimate expectations of any future appointment(s) to public office bestowed upon him due to the provisions of Article 75(3) of the Constitution of Kenya unless the report is quashed by an order of the High Court.

8. According to the applicant, the recommendation of the 1st Respondent's report to the 2nd Respondent to investigate and repossess Land Reference No. Kisii Municipal/Block 111/258 while the same is the subject of court proceedings in Kisii H.C. No. 133 of 2010 which is yet to be determined, was a threatened invasion of his rights to access to justice and equal protection before the law. He lamented that as a matter of fact, the executive branch had previously given extra-judicial orders and taken unfair administrative action against him in relation to the land known as Kisii Municipal/Block 111/258 by revoking his title and registration when the same issue is still pending in court in Kisii High Court Case No. 133 of 21.

9. The applicant was therefore equally apprehensive that the 2nd Respondent might in similar vein as the 1st Respondent and the Kisii Land Registrar take unfair administrative action against him and his proprietary interests due to their obvious lack of adherence to the rule in *res sub judice*.

10. He reiterated that in all circumstances of the case, his rights to fair administrative action and access to justice had been infringed, were still being infringed and were likely to continue being infringed unless the court granted him the orders sought. Besides the infringement of his right to fair administrative action in the facts of this case, the applicant asserted that his own reputation as a person and a public figure had suffered greatly and continued to suffer due to the accusations of abuse of office that he was not given a chance to rebut.

11. It was submitted on behalf of the applicant that the investigations and the report related to a matter that was before the Court of law hence the same was illegal as it was based on *sub judice* issues and as such prohibited by section 30(c) of the Act.

12. It was submitted that the applicant was never afforded an opportunity of being heard before the report was published; that the entire process constituted an unfair administrative action; that the conclusions in the said report that the applicant abused power were unreasonable as the applicant was in the government in 1982 when the report was bought in 1982; and that the applicant's legitimate expectations under the Constitution to appointment in public service are threatened by the contents of the report. A perusal of the plaint in Kisii HCCC No. 133 of 2010, it was submitted, clearly shows that the matters in issue in the said suit and in the report the subject of these proceedings were similar, hence the application of *sub judice* rule. Accordingly, the Court was urged to quash the whole report and not just limit the relief to the applicant since it is trite law that an administrative action done in abuse of power is not severable in cases of quashing the said action. In support of this submission, the applicant relied on ***R vs. City Council of Nairobi exp Callfast Services Limited & 32 Others Misc. Appl. No. 276 of 2010 and Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] KLR 240.***

13. According to the applicant it did not matter whether or not the Respondent had notice of the pendency of the said civil proceedings. It was however submitted that the Respondent visited the Kisii High Court and ought to have discovered the existence of the said suit. Apart from that the Respondent, from the supporting affidavit was clearly aware of the existence of the said suit.

14. It was submitted that even if section 31 of the Act relied upon by the Respondent was to be construed as bestowing unlimited power on the Respondent, the Court will still have power to issue judicial review orders to stop abuse of power.

15. It was submitted that the principle of a fair hearing is embodied in the Act itself in section 36 to the effect that a person against whom an adverse finding or recommendation is made is required to be given an opportunity of making representations thereon before the Commission includes the finding in its report. Similarly section 39 of the Act enjoins the Respondent to afford a person whose reputation is likely to be prejudiced by an inquiry an opportunity to give evidence and it was submitted that the applicant fell in that category of persons.

16. On the issue of service by postage, it was submitted that based on section 112 of the ***Evidence Act***, the burden was on the Respondent to prove that such service was effected and that the applicant proved that the address to which the letter was addressed belonged to the University of Nairobi where he was a don decades before. Even if service on the applicant was in the Respondent's opinion satisfactory, it was submitted that the fact that the other three letters were returned and yet the Respondent still proceeded to publish the report was an indication of the height of abuse of power and hence an indication of a political vendetta coming at a time when the applicant was being vetted for the position of an Ambassador to UN HABITAT.

17. Section 43 of the Act as read with Article 47(2) of the Constitution, it was submitted enjoined the Respondent to serve the Respondent's report on the applicant. The Applicant however came to know of the report through the media.

18. According to the applicant every citizen has a legitimate expectation to offer himself for consideration in the service of his country. However as a result of the impugned report the applicant's appointment to the said UN HABITAT is in danger of being vacated for breach of the integrity clauses in the Constitution pursuant to Article 75(3) of the Constitution.

19. On the allegation by the Respondent that the report was a mere recommendation, it was submitted that a reading of section 42 of the Act reveals that the recommendations of the Respondent are worth their weight in gold since the same are capable of being implemented by the National Assembly. It was submitted that where a Commission arrives at a recommendation after an inquiry has been made in which the recommendation is final in nature that would amount to a determination for the purposes of judicial review and support for this submission was sought in ***Republic vs. Attorney General ex parte Biwott [2002] 1 KLR 668 and Republic vs. Judicial Commission of Inquiry into Goldenberg Affair, ex parte George Saitoti [2007] 2 EA 392; [2006] 2 KLR 400.*** In this case it was submitted that the Respondent has finally determined the culpability of the applicant and sees no cause for further investigations or court determinations.

20. According to the applicant with the passing of the current Constitution the issue of justiciability nolonger arises and the Court was based on ***Republic vs. Attorney General & 2 Others ex parte Shem Odongo Ochuodho Misc. Appl. 416 of 2005*** urged to seek to protect the right to fair administrative action and reputation of the applicant.

Respondent's Case

21. In response to the application, the Respondent filed a replying affidavit sworn by **Dr. Otiende Amollo**, the Chairperson of the Commission on Administrative Justice, also known as the "Office of the Ombudsman" the 1st Respondent herein (also referred to as "the Commission").

22. According to the deponent, the 1stRespondent is a Constitutional Commission established pursuant to the restructuring of the Kenya National Human Rights and Equality Commission to create the Respondent pursuant to Article 59(4) of the Constitution of Kenya and Part II of the Act.

23. It was deposed that pursuant to Article 59(5) of the Constitution as read together with section 4 of the Act, the 1st Respondent has the status and powers of a Commission within the meaning of Chapter 15 of the Constitution of Kenya. The deponent deposed that the 1st Respondent has been given a wide mandate under Article 59(2)(h) - (k) and Articles 249 and 252 of the Constitution as read with sections 8, 26, 27, 28 and 29 of the Act, including the mandate to, amongst other things, investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct and further to deal with maladministration through conciliation, mediation and negotiation where appropriate. In the conduct of its functions, Article 252 of the Constitution and Sections 8, 26, 27, 28 and 29 of the Act grants the 1st Respondent the powers to conduct investigations on its own initiative or on a complaint made by a member of the public, to issue summons as it deems necessary for the fulfillment of its mandate and require that statements be given under oath, to adjudicate on matters relating to administrative justice, obtain any information it considers relevant from any person or Governmental authorities including requisition of reports, records and documents and to compel the production of such information, to interview any persons, and to recommend compensation

or other appropriate remedies against persons or bodies to which the Act applies.

24. It was disclosed that pursuant to Article 252(2) of the Constitution, a complaint to the 1st Respondent may be made by any person entitled to institute court proceedings under Article 22(1) and (2) of the Constitution and under Section 31 of the Act, the 1stRespondent may investigate an administrative action despite a provision in any written law to the effect that the action taken is final or cannot be appealed, challenged, reviewed, questioned or called in question. After undertaking its investigations, the 1st Respondent is required under Section 42 of the Act to prepare a report to the state organ, public office or organization to which the investigation relates, and the report shall include the findings of the investigation, action the 1st Respondent considers to be taken, reasons whereof and recommendations the Respondent deems appropriate.

25. It was further disclosed that the 1stRespondent may upon an inquiry into a complaint, undertake such other action as it may deem fit against a concerned person or persons where the inquiry discloses a criminal offence as provided for under Section 41 of the Act and that further Article 59(2)(j) of the Constitution and Section 8(g) of the Act empower the 1st Respondent to report on complaints investigated under paragraph (h) and (i) and take remedial action.

26. According to the deponent, the 1st Respondent received complaints from members of the public while on a county visit to Kisii County that Kisii Municipal Market Land was irregularly acquired by private individuals. Pursuant thereto and in exercise of the investigative powers of the 1st Respondent as set out above under Articles 59 and 252(1)(a) of the Constitution and Sections 8, 26, 27, 28 and 29 of the Act, the 1st Respondent decided to undertake investigations into the subject complaints whose summary were the alleged maladministration through irregular allotment of Kisii Municipal Market Land to private individuals and alleged abuse of power by public officers. It was disclosed that as detailed in the 1st Respondent's Report titled "A Market Under Siege, An Investigations Report by the Ombudsman-Kenya on Alleged Irregular and Illegal Acquisition of Kisii Municipal Market Land by Private Developers, October 2014", the 1st Respondent's investigative process entailed the following:-

i. That in consonance with the provisions of Section 37 of the Act, the 1st Respondent first notified the Governor, Kisii County, vide a letter Ref: CAJ/IE/6/21 Vol. 1 dated 14th February 2014 of its decision to undertake investigations regarding alleged irregular allotment of Kisii Municipal market land to private individuals.

ii. The 1st Respondent thereafter visited various offices for investigations including the Kisii County Governor's Office, the Land Executive Office, Land Registry, County Surveyor's Office, Town Engineer's Office, Town Administrator's Office, Physical Planning Office and the Kisii High Court.

iii. The 1st Respondent interviewed the Deputy Governor, Kisii County, Kisii County Executive Officer for Lands, the Land Registrar, the County Surveyor, Kisii Town Administrator, The County Planning Officer, The Kisii Municipal Surveyor and members of the Public.

iv. The 1st Respondent recovered various documents in respect of matters in issue including documents relating to Plot Number Kisii Mun/Block III/258, Kisii Mun/Block III/259, Kisii Mun/Block III/260, Kisii Mun/Block III/418, Kisii Mun/Block III/334, Kisii Mun/Block III/261.

v. The 1st Respondent further recorded statements by County Planning Officer, Statement by **Benjamin Onkoba**, **Jared Osano Atancha**, **Robert Ombasa**, **Steven Rioba Kambaga** and **Tom Nyagami Gai**.

27. It was deposed that the 1st Respondent thereafter analyzed all the statements/information and documentation retrieved during the investigations and came up with, *inter alia*, the following conclusions:-

i. Copies of Approved Plan Number N/37/71/1 of 1971 showed that there is land that had been reserved for Kisii Municipal Market.

ii. The subject piece of land set aside for Kisii Municipal Market was subdivided into eight plots and according to the Register Index Map for Kisii Municipality, the Kisii Municipal Market occupies one of the plots while the other seven plots were acquired by named individuals including the ex-parte Applicant herein who it was found acquired Plot Number Kisii Mun/Block III/258.

iii. Official searches as well as the Register Index Map confirm that the seven plots inclusive of Plot Number Kisii Mun/Block III/258 acquired by the ex-parte Applicant were hived from the Kisii Municipal Market Land

iv. Documents availed confirmed that the land in question is public land set aside for the Kisii Municipal Market and that it was irregular for the subject land to have been acquired by private individuals.

28. Based on the above conclusions, it was averred, the 1st Respondent came up with, *inter alia*, the following preliminary recommendations as guided by relevant legislative framework on public land including Article 61(1)(2), 62(1)(d), 62(2)(a)(b) and the Fourth Schedule (Article 185(2), 186(1) and 187(2) of the Constitution;

Sections 8(a)(b) and 12((2)(f) of the Land Act No. 6 of 2012; Sections 5(1)(a)(c)(e)(h), 5(2)(b)(c)(d)(e), 6(1)(2)(a)-(c), 6(3)(a) of the ***National Land Commission Act***, 2012; Sections 5(1)(2)(c) of the ***County Governments Act*** No. 17 of 2012 and Sections 16(1), 21(2) of the ***Physical Planning Act*** Revised Edition 2012:-

i. That the National Land Commission should investigate the illegal acquisition of the seven plots of land with a view to repossessing the same

ii. The County Government of Kisii should survey and register the market land as per the Approved Master Plan of 1971.

iii. The County Government of Kisii should ensure that public land within the County is surveyed and registered with the Ministry of Lands, Housing and Urban Development

iv. Similarly, other County Governments should survey and register all the public land within their jurisdictions with the Ministry of Lands, Housing and Urban Development and acquire Title Documents

v. The Principal Secretary Lands, Housing and Urban Development should seek to establish those public officers who facilitated the illegal acquisition of the seven plots and take appropriate punitive action as provided for by law

vi. That the named individuals including the ex-parte Applicant herein should willingly and unconditionally surrender the irregularly acquired plots.

29. The deponent added that after making the above conclusions and recommendations and bearing in mind that the same adversely mentioned various individuals including the *ex-parte* Applicant herein, the 1st Respondent, in consonance with the provisions of Section 36 and 39(1)(b) of the Act, notified all the named individuals (the *ex-parte* Applicant inclusive) of the adverse findings and recommendations and called on them to make presentations thereon before compiling and publishing the Report. With respect to the *ex parte* applicant, he was notified and called to comment and make presentations thereon vide its letter dated 4th September 2014 sent to the ex-parte Applicant by registered mail on 5th September 2014. In sending the notice, the 1st Respondent used the *ex-parte* Applicant's postal address obtained from the Kisii Lands Registry in respect of Kisii Mun/Block III/258 which had been allocated to the ex-parte Applicant. However, unlike in the case of some individuals whose letters were unclaimed and thereby Returned to Sender (RTS) by Postal Corporation of Kenya as evidenced by copies of such notification by Postal Corporation of Kenya, the *ex-parte* Applicant claimed his letter dated 4th September 2014 and the same was not returned. The deponent therefore believed that the ex-parte Applicant received the notice through the letter of 4th September 2014 but chose not to give any presentations in respect of the subject parcel.

30. He averred that upon conclusion of its investigations and in the absence of the *ex-parte* Applicant's response after the lapse of over one month from the date of calling upon the *ex-parte* Applicant to respond, the 1st Respondent proceeded and compiled the Report subject of the instant judicial review proceedings in October 2014. However, in his view, the said report is not justiciable because whereas it contains Recommendations impacting on the rights of the ex-parte Applicant, the same are not Decisions and the Report is therefore not amenable to judicial review.

31. The deponent further deposed that:

i. The subject of the 1st Respondent's investigations herein was not Kisii HCCC No. 133 of 2010 but the alleged maladministration by various public officers in the irregular and illegal alienation of public land reserved for the Kisii Municipal Market and that in those circumstances, it would be inevitable for the investigations to uncover the beneficiaries of such illegal allocation.

ii. The Report did not in any way prejudge the merits of the pending suit against the ex-parte Applicant. It is upon the ex-parte Applicant to progress the pending suit expeditiously in whatever manner he deems appropriate.

iii. The documentation exhibited by the ex-parte Applicant reveal that his title over the suit property was revoked vide The Kenya Gazette Notice Vol. CXII-No. 124 dated 26th November 2010.

iv. With respect to the alleged apprehension by the ex-parte Applicant, there is no evidence that the 2nd Respondent has started acting on the 1st Respondent's recommendations without giving the *ex-parte* Applicant an opportunity of being heard and bearing in mind that this is a judicial review application, the Honorable Court ought not to issue orders at large.

v. The powers of the 1st Respondent under Section 31 of the Act are not limited by any other provisions of law.

32. It was further averred that:

i. The *ex-parte* Applicant was given an opportunity to be heard vide the letter dated 4th September 2014 but he declined to embrace the opportunity.

ii. In the letter under reference, the Findings and Recommendations were detailed to the *ex-parte* Applicant who was thereby called upon to respond to the subject Findings and Recommendations in vain.

iii. It is therefore not true that the 1st Respondent failed to comply with the provisions of sections 36 and 39(1)(b) of the Act as alleged.

iv. Article 47(2) of the Constitution was adhered to by the 1st Respondent to the extent that as soon as the 1st Respondent realized in its conclusions and recommendations (prior to compiling and publishing the Report) that the ex-parte Applicant had been adversely mentioned, a notification calling upon the *ex-parte* Applicant to respond thereto was sent to the *ex-parte* Applicant.

33. It was submitted that the Court ought to determine whether the doctrine of sub judice can be invoked in the investigative proceedings conducted by the 1st Respondent. It was submitted based on ***Nyanza Garage vs. Attorney General Kampala HCCS No. 450 of 1993 cited in Republic vs. National Environment Tribunal ex parte Orbit Chemicals Industries Limited & Another*** that whilst undertaking investigations the 1st Respondent did not constitute itself as a Court of law or judicial tribunal as the investigations by the 1st Respondent were neither a court process nor a suit. It was further submitted that neither the parties in the two matters were the same nor were the issues similar. It was therefore contended that *sub judice* was inapplicable.

34. It was submitted that consequent upon the investigations carried out by the Respondent, save for the sole remedial action taken against the beneficiaries of the plots calling upon them to surrender the plots, the rest of the recommendations required various public officers/offices to undertake specified their mandates with a view to providing remedial action to the public.

35. It was submitted that prior to uncovering the beneficiaries of the allocations, the 1st Respondent would not have known of the *ex parte* applicant's interest in the allocations and the existence of the court cases hence the allegations of breach of section 30(c) does not arise. It was submitted that the said section is merely a procedural provision which bar the 1st Respondent from proceeding with a matter pending before a Court but does not bar administrative investigation. In this case the report did not prejudice the merits of the suit pending in Court.

36. According to the 1st Respondent, having sent to the applicant a letter by way of certificate of posting to the applicant's last known address calling for the applicant's representations and having not received any such representations, the 1st Respondent complied with sections 36 and 39(1)(b) of the Act as well as Article 47(2). In support of its submissions the 1st Respondent relied on ***Republic vs. Advocates Complaints Commission & Another [2013] KLR.***

37. With respect to Article 47(2) of the Constitution it was submitted that section 43 of the Act only requires that the complainant be informed of the result of the investigation and that the applicant in this case was not the complainant.

38. Since the recommendations were not final in nature and have not been acted upon by the 2nd Respondent, it was submitted that the applicant's legitimate expectations had not been violated.

39. The orders being sought being discretionary, it was submitted that in the circumstances of this case, they ought not to be granted.

Determination

40. I have considered the application, the affidavits in support of and in opposition to the application the submissions as well as the authorities relied upon and this is the view I form of the matter.

41. ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 539 at para 639 states:

"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge."

42. In this case, it was contended that the impugned findings being recommendations rather than a decision, they cannot be the subject of judicial review remedy of certiorari. It is therefore important to determine the nature of the said findings and whether the same can be subjected to an order of certiorari.

43. The general position on this matter is stated in ***Halsbury's Laws of England*** (supra) as follows:

"The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary

decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded."

44. This position found favour in our local jurisprudence in ***Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354*** in which the Court stated:

"The notice that is under challenge in these proceedings gave the applicants 14 days to vacate the disputed land. The letter (Notice) was written based on the findings of the Ndungu Report on land whose recommendations have not acquired any statutory form. They are mere recommendations and have no force of law and it is doubtful whether the said Report can be a basis for issuance of such notice as the one under attack in this application."

45. However, in ***Re Pergamon Press Ltd [1971] Ch. 388,*** the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of Law. That issue was answered as follows:

"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay's submission. *It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him.* **They need not quote chapter and verse. An outline of the charge will usually suffice...That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind."** [Emphasis mine].

46. ***Halsbury's Laws of England*** (supra) puts it thus:

"However, the nature of the inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; ad it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice."

47. It is therefore clear that the need to act fairly depends on the nature of the report and the recommendations to be made. The circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their interests or legitimate expectations. Where the report and recommendations may have far reaching implications such as the ruining of careers and reputation as well as being the basis of judicial proceedings, the authority concerned has a duty to act fairly. It is for this reason that I believe the provisions of sections 36 and 39 of the Act are relevant. The two provisions provide:

36. The Commission shall give any person, State organ, public office or organisation against whom an adverse finding or recommendation is made, an opportunity to make representations concerning the finding or recommendation before the Commission includes the findings in its report.

39(1) Subject to subsection (2), if at any stage of an inquiry, the Commission-

a. ***considers it necessary to inquire into the conduct of any person; or***

b. ***is of the opinion that the reputation of any person is likely to be prejudice by the inquiry, it shall give that person an opportunity to appear before the Commission by himself or by an advocate to give evidence in his own defence.***

48. Therefore even without the benefit of case law, the Act itself imports the elements of a hearing before the Commission's findings are included in the report. On this issue ***Halsbury's Laws of England***, (supra) states:

"Where however a general duty to act judicially is cast on the competent authority, only clear language will be interpreted as conferring a power to exclude the operation of the rule, and even in the absence of express procedural requirements fairness may still dictate that prior notice and an opportunity to be heard be afforded."

49. In this case the Commission recommended that the National Land Commission does investigate the illegal acquisition of the seven plots of land with a view to repossessing them. The consequences of the failure to act by a body to whom the Commission has directed its recommendations are specified in section 42(4) of the Act as follows:

3. ***If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure or refusal to implement its recommendations and the National Assembly shall take appropriate action.***

50. Therefore as opposed to a situation where a body is merely tasked with investigations and preparation of a report and what follows thereafter is solely left to the institutions to which a report is made, the Commission's duty does not end at the point where the report is made. The Commission has the mandate to follow up and see that its recommendations are implemented. In my view the Commission's recommendations are the kind of recommendations which were contemplated in ***Re Pergamon Press Ltd*** (supra). I therefore find that the Commission was under a duty to act fairly and before condemning the ex parte applicant or criticising him, had to afford the applicant a fair opportunity for correcting or contradicting what was said against him.

51. The minimum ingredients of fair hearing are provided in Article 47 of the Constitution. I say the minimum because under Article 20 of the Constitution every person is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom and in applying a provision of the Bill of Rights, a court is enjoined *inter alia* develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. It was accordingly held by **Rawal, J** (as she then was) in ***Charles Lukeyen Nabori & 9 Others vs. The Hon. Attorney General & 3 Others Nairobi HCCP No. 466 of 2006 [2007] 2 KLR 331*** that:

"Whereas the court is mindful of the principle that the Legislature has the power to legislate and Judges shall give due deference to those words by keeping the balances and proportionality in the context of fast progressing issues of human rights which have given birth to the enshrinement of fundamental rights in the Constitution, the Constitution should not represent a mere body or skeleton without a soul or spirit of its own. The Constitution being a living tree with roots, whose branches are expanding in natural surroundings, must have natural and robust roots to ensure the growth of its branches, stems, flowers and fruits."

52. In ***Chege Kimotho & Others vs. Vesters & Another [1988] KLR 48; Vol. 1 KAR 1192; [1986-1989] EA 57*** the Court of Appeal expressed itself as follows:

"The law is a living thing: it adopts and develops to fulfil the needs of living people whom it both governs and serves. Like clothes it should be made to fit people. It must never be strangled by the dead hands of long discarded custom, belief, doctrine or principle."

See ***Midland Bank Trust Co. vs. Green [1982] 2 WLR 130.***

53. That the law must of necessity, adapt itself to the changing social conditions and not lay still was similarly appreciated in ***Kimani vs. Attorney General [1969] EA 29.***

54. Article 47 of the Constitution provides:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

55. The Respondents have sought to avoid this Constitutional provision by contending that under section 43 of the Act it is only the complainant who is required to be informed of the result of the investigation and that the applicant in this case was not the complainant. If that interpretation was to be adopted it would mean that section 43 of the Act limits the rights granted to a person adversely affected by an administrative action under Article 47. For that position to be valid, the legislation purporting to limit the right must conform to Article 24(2) of the Constitution which provides that a provision in the

legislation limiting a right or fundamental freedom-

(a) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom, and the nature and extent of the limitation;

(b) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(c) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

56. Pursuant to Article 24(3) of the Constitution it is the obligation of the State or a person seeking to justify a particular limitation to demonstrate to the court, tribunal or other authority that the requirements of the foregoing Article have been satisfied.

57. In this case I do not find that section 43 of the Act limits the rights in Article 47 of the Constitution. It follows that the Commission was under the constitutional obligation to ensure that its decision met the requirement of fairness. In ***R vs. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, 560-G,*** **Lord Mustill** held:

"Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both."

58. Similarly, in ***Hoffmann-La Roche (F) & Co. AG vs. Secretary of State for Trade and Industry [1975] AC 295, 368D-E*** it was held that the commissioners;

"…must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely."

59. The 1st Respondent has excused its action by contending that prior to uncovering the beneficiaries of the allocations, the 1st Respondent would not have known of the *ex parte* applicant's interest in the allocations and the existence of the court cases. It is however my view that as soon as the 1st Respondent came to realise that arising from its investigations there were persons whose interests were likely to be affected by its decision, it ought to have afforded them an opportunity of being heard before releasing the report. Even assuming that by the time of releasing the report, it was not aware that the report adversely affected the interests of any person, it had an obligation to furnish its decision and reasons therefor to any person affected thereby in order to afford the person an opportunity of correcting the impression created in the report and if necessary modify the same.

60. In this case however, the 1st Respondent has contended that by its letter dated 4th September, 2014, it afforded the applicant an opportunity of being heard which the applicant did not utilise. It is true that where a person is offered an opportunity of being heard and fails to utilise the same he cannot be heard to complain that he was never heard. As was held in ***Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998:***

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

61. However in this case, in the same letter the 1st Respondent indicated that one of its findings arising from the investigations was that the applicant "irregularly acquired plot number Kisii Municipality/Block III/258". The 1st Respondent then outlined its recommendations including investigations of the said action. The applicant was then given a notice purportedly under section 36 of the Act to comment on what the 1st Respondent termed "adverse findings". It is patently clear that though the 1st Respondent purported to act pursuant to section 36 of the Act, nothing could be far from the truth. As indicated above, section 36 is clear that the notice thereunder must be given before the Commission includes the findings in its report. From the contents of the letter it is clear that by the time the 1st Respondent wrote the letter it had to all intents and purposes not only made findings but even arrived at its recommendations. In my view a process by which an administrative body makes findings and proceeds to make recommendations before affording persons affected thereby cannot by any stretch of imagination be termed as fair in order to meet the provisions of Article 50 of the Constitution. For a hearing to be said to be fair not only should the case that the

respondent is called upon to be meet be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it but also the authority concerned ought to approach the issue with an unbiased disposition. In other words the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria. The fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

"The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice…Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter."

62. It is therefore clear that even if it is true that the *ex parte* applicant was duly notified of the findings by the 1st Respondent such notification was unprocedural and did not lend itself to a fair hearing.

63. The applicant however contended that he never received the notification. He said that the address to which the letter was purportedly dispatched belonged to the University where he used to work but had since left. He in fact adduced evidence to support that fact. That the applicant is a public figure is not in doubt. The Act is however silent on the mode of service or notification. Section 3(5) of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya provides:

Where any written law authorizes or requires a document to be served by post, whether the expression "serve" or "give" or "send" or any other expression is used, then, unless a contrary intention appears, the service shall be deemed to be effected by properly addressing to the last known postal address of the person to be served, prepaying and posting, by registered post, a letter containing the document, and, unless the contrary is proved, to have been effected at the time at which the letter would be delivered in the ordinary course of the post.

64. It is clear that the foregoing section deals with situations where the law authorizes or requires a document to be served by post. It is my view that personal service remains the best mode of service and unless it is shown that such service was not possible or for some reason not convenient, where the action intended to be taken has the potential of giving rise to abridgement of a persons' rights, public bodies ought to endeavour to personally serve notices where the law requires that notification be given. In this case, I am unable to see why it was so difficult to effect personal service on the applicant. Having found that the purported notification was unprocedural nothing however turns on this issue.

65. It was further contended by the applicant that since there were pending proceedings before a Court of law in respect of the same matter, the 1st Respondent was barred from conducting investigations in respect of the same issues. Section 30(c) of the Act bars the Commission from investigating a matter pending before any Court or judicial tribunal. The 1st respondent has attempted to argue that the said provision does not bar investigation but only bars the taking of an action. In my view that position is incorrect. What that provisions bars in express terms is investigation. It has further been contended that since the 1st Respondent was unaware of the existing court proceedings, section 30(c) is inapplicable. With due respect the 1st Respondent is attempting to read into legislation what does not exist. The general rule is that a statute should not, in absence of express provision, be construed so that it deprives people of their accrued rights. See ***Panafrica Builders and Contractors Limited vs. Singh [1984] KLR 121; Zainal Bin Hashim vs. Malaysia Government [1980] 2 WLR 136, 140;Craies on Statute Law*, 7th Edn. [1971] 389.**

66. It must always be remembered that one of the canons of statutory construction is that words of a statute should never, in interpretation be added to or subtracted from without almost a necessity and that it is the duty of the court to construe a statute according to the ordinary meaning of the words used. See **Purshottam N Kotak vs. A Ali Abdullah [1957] EA 321.**

67. I therefore do not see the reason why the word "investigate" used in section 30 of the Act ought to be substituted with the word "act". The 1st Respondent is barred from investigating matters pending in Court

knowledge or otherwise of such proceedings immaterial. Want of jurisdiction, it has been held may arise under two or more circumstances. **Madan, J** (as he then was) in ***Choitram and Others vs. Mystery Model Hair Saloon Nairobi HCCC NO. 1546 of 1971 (HCK) [1972] EA 525*** expressed himself on this issue as hereunder:

"Lack of jurisdiction may arise in various ways. There may be an absence of these formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from the rules of natural justice thereby it would step outside its jurisdiction."

68. Similarly, in ***Owners of the Motor Vessel "Lilian S" vs. Caltex Oil (Kenya) Limited [1989] KLR 1*** it was held that a limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognisance, or as to the area over which the jurisdiction shall extend, or it may partake both of these characteristics.

69. Therefore even if the Commission had powers to investigate the nature of the complaints in issue but the Legislation under which it operates restricts its powers as was the case, in the instant case, the Commission would not have jurisdiction to embark on the said voyage unless the statutory bottlenecks had been removed or settled. A tribunal which has no jurisdiction to entertain a matter, it has been held, cannot purport to accord the respondent a fair hearing.

70. The 1st Respondent has however attempted to distinguish the matters it was investigating from the matters which were the subject of the said proceedings. In E & L Case No. 133 of 2010 it is clear that what was being sought was a declaration that the applicant's title was null and void and for cancellation of his registration as the proprietor thereof. The basis for seeking the said order was that the land was part of the land reserved for a municipal market within Kisii Town and that the same was fraudulently leased. In its report, the 1st Respondent found that the applicant acquired the same plot despite the fact that it was part of the land set aside for the Kisii Municipal Market. It was held in ***Thika Min Hydro Co. Ltd vs. Josphat Karu Ndwiga (2013) eKLR*** that:

"It is not the form in which the suit is framed that determines whether it is *sub judice*. Rather it is the substance of the suit and looking at the pleading in both cases."

71. Having looked at the pleadings in the ELC and the subject matter which the 1st Respondent set out to investigate or which it did actually investigate and made findings on, I have no doubt that the subject matter was the same and the issues were also the same. It is not in doubt that the applicant was a party to those same proceedings. In my view the reason for barring the 1st Respondent from investigating matters which are the subject of Court proceedings is to avoid possibility of the 1st Respondent's findings running contrary to court decisions. I am therefore satisfied that the 1st Respondent ought not to have investigated the matter the subject of these proceedings. If it did unknowingly as it alleges, that does not render its findings valid.

72. It was contended that the applicant's legitimate expectation of an appointment to public service was threatened by the 1st Respondent's action. In **De Smith, Woolf & Jowell,*"Judicial Review of Administrative Action"*** 6th Edn. Sweet & Maxwell page 609 it is stated that:

"A legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit of advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted. The protection of legitimate expectations is at the root of the constitutional principle of the rule of law, which requires predictability and certainty in government's dealings with the public."

73. However it was held in ***South Bucks District Council vs. Flanagan [2002] EWCA Civ. 690 [2002] WLR 2601 at [18]*** that:

"Legitimate expectation involves notions of fairness and unless the person making the representation has actual or ostensible authority to speak on behalf of the public body, there is no reason why the recipient of the representation should be allowed to hold the public body to the terms of the representation. He might subjectively have acquired the expectation, but it would not be a legitimate one, that is to say it would not be one to which he was entitled."

See also ***Rowland vs. Environment Agency [2002] EWHC 2785 (Ch); [2003] ch 581 at [68]; CA [2003] EWCA Civ 1885; [2005] Ch 1 at [67].***

74. In this case I am not satisfied that the applicant has proved that he had a legitimate expectation that he would be appointed to serve as he has alleged. Whereas he may have had legitimate expectation that his appointment in the ambassadorial position would not be withdrawn, his expectation cannot be transferred to the 1st Respondent as the 1st Respondent was not the appointing authority. In my view there cannot be a general or amorphous legitimate expectation in the manner asserted by the *ex parte* applicant.

75. It was submitted based on ***Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others*** (supra) that once this Court finds that the process was unprocedural the entire report of the 1st Respondent ought to be quashed. In my view, and it has been stated before, judicial review proceedings are special proceedings and whereas the Court may quash a report or decision, the order ought not to be crafted in such a manner that even those who have not contested the decision would be entitled to benefit otherwise that would defeat the limitation provided under the ***Law Reform Act*** as read with Order 53 of the ***Civil Procedure Rules***. I therefore associate myself with the decision in ***Commercial Bank of Africa Ltd. vs. Isaac Kamau Ndirangu Civil Appeal No. 157 of 1995 [1990-1994] EA 69***that a party cannot expect to reap any benefit from court proceedings to which he is not a party. In any event based on the material before me I am unable to find that the circumstances of the persons who were subject of the impugned report were similar to that of the ex parte applicant. In arriving at this finding I am reinforced by the holding in ***Republic vs. Judicial Commission of Inquiry into the Goldenberg Affair, Honourable Mr. Justice of Appeal Bosire and Another ex Parte Honourable Professor Saitoti [2007] 2 EA 392; [2006] 2 KLR 400*** a decision made by bench presided by **Nyamu, J** (as he then was) who also made the decision in ***Keroche Case***. In the ***Goldenberg Case*** the Court expressed itself as follows:

"Like so much straw into a burning fire let this order of certiorari consume all offending references. Like fire which converts, everything to itself let this order of certiorari remove and convert the dark spots. Like guided missiles hit only the target, let this order have the same effect by hitting only the targeted paragraphs which are in relation to the applicant only. In the result, we forthwith order the removal into this Court of the Goldenberg report and immediately quash the following paragraphs to the extent that they refer adversely to the applicant only."

76. In the result I find that the manner in which the proceedings leading to the findings in the impugned report was conducted was tainted with procedural impropriety. I further find that the decision of the 1st Respondent was similarly tainted with illegality as the 1st Respondent was barred by the legal instrument from which it derived its authority to make the questioned decision from acting in the manner it did.

Order

77. In the result, I hereby grant an order of certiorari bringing into this Court for the purposes of being quashed the Report of the 1st Respondent (the Commission of Administrative Justice) released in October 2014 entitled "***A Market Under Siege: An Investigations Report By The Ombudsman-Kenya On Alleged Irregular And Illegal Acquisition Of Kisii Municipal Market Land By Private Developers"*** and the same is quashed to the extent that it makes adverse findings against the *ex parte* applicant herein.

78. In the circumstances I do not find it necessary to grant the order of prohibition as sought in the Motion since the quashing of the report necessarily implies that the same can nolonger be implemented.

79. I award the costs of this application to the Applicant to be borne by the 1st Respondent.

80. It is so ordered.

Dated at Nairobi this 20th July, 2015.

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Kalii for the Applicant

Mr Wachira for Miss Nungo for the 1st Interested Party

Cc Muruiki

Republic v Kenya Vision 2030 Delivery Board & another Ex-parte Eng Judah Abekah [2015] eKLR

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 223 OF 2014

REPUBLIC .....APPLICANT

VERSUS

KENYA VISION 2030 DELIVERY BOARD.....1st RESPONDENT

ATTORNEY GENERAL .....2ND RESPONDENT

THE COMMISSION ON

ADMINISTRATIVE JUSTICE.....INTERESTED PARTY

Ex-parte

ENG. JUDAH ABEKAH

JUDGEMENT

Upon obtaining the leave of the Court, the ex-parte Applicant, Eng. Judah Abekah, filed the notice of motion dated 6th June, 2014 in which he seeks an order of mandamus to compel the 1st Respondent, the Kenya Vision 2030 Delivery Board ("Board"), to comply with the recommendations of the Interested Party, the Commission on Administrative Justice ("Commission"). The Applicant had complained to the Commission against the Board's refusal to renew his employment contract. The Applicant also prays for an order of compensation and assessment of damages. Finally, the Applicant asks to be awarded the costs of these proceedings.

From the papers filed in Court, the facts giving rise to this application are not disputed. The Applicant was on 16th March, 2009 appointed as a Director (Enablers and Macro) for three years at the Vision 2030 Delivery Secretariat under the Ministry for Planning and National Development and Vision 2030. As stipulated, six months prior to the conclusion of the contract he wrote to the Board asking for renewal of his contract. His request was rejected on the grounds that his performance was below par and the contract was subsequently terminated through a decision dated 23rd March, 2012.

The Applicant was aggrieved by the decision of the Board and he appealed to the Minister for Planning and National Development and Vision 2030 ("Minister"). The Minister renewed the Applicant's contract for a period of one year but the Board did not allow him to go back to work. As a result, the Applicant sought the intervention of the Commission. After investigating the matter, the Commission in a report dated 10th October, 2013 concluded, *inter alia*, that the Board had **"impugned Articles 47 and 59 of the constitution and Sections 2 and 8(a),(b) and (d) of the Commission of Administrative Justice Act on fair administrative action."**

The Commission thereafter made recommendations to the 1st Respondent as follows:

> **"i) Pay Eng. Abekah an equivalent of twelve months salary and allowances in compensation for the one year period of the reviewed contract.**
>
> **ii) Facilitate Eng. Abekah to access his personal effects from his former office.**
>
> **iii) Offer an unconditional apology to Eng Abekah for the treatment meted out to him."**

The findings were forwarded to the 1st Respondent for implementation but the 1st Respondent failed or refused to implement the same. That is why the Applicant has approached this Court for an order of mandamus to compel the 1st Respondent to implement the recommendations of the Commission.

The Attorney General of the Republic of Kenya who was named as the 2nd Respondent did not participate in these proceedings.

Upon the perusal of the statutory statement dated 6th June, 2014 and the verifying affidavit sworn by the Applicant on the same date, it is apparent that the Applicant bases his application on a single ground namely that the **"1st Respondent's decisions or actions herein are made in excess of its jurisdiction and are *ultra vires* as it is purporting to exercise**

powers or authority not conferred on it by the Constitution and the Commission on Administrative Justice Act, 2011 or indeed any other provision of the law whatsoever."

On its part, the Commission supported the application through a replying affidavit sworn by its Chairperson Mr. Otiende Amollo. I will revert back to the contents of his affidavit in due course.

The 1st Respondent opposed the application by way of a replying affidavit sworn by its Acting Director General, Gituro Wainaina. It is the 1st Respondent's case that after the Applicant applied for renewal of his contract, the Director General and later an Ad hoc Committee appraised him and concluded that his contract should not be renewed. The decision of the 1st Respondent was communicated to the Minister who nevertheless went ahead and renewed the Applicant's contract for one year by a letter dated 9th March, 2012. The Board, however, never enforced the renewed contract as it deemed it irregular.

It is the 1st Respondent's case that the Applicant eventually complained to the Interested Party. The 1st Respondent replied to the Interested Party's inquires and went ahead to form a new committee to check and review the process relating to the renewal of the Applicant's contract. The new committee upheld the decision of the Ad hoc Committee. The Board also discussed the matter afresh and upheld its earlier decision not to renew the Applicant's contract. The decision was communicated to the Minister and the Applicant. The Minister also communicated the decision of the Board to the Applicant.

It is the 1st Respondent's case that it was responsible for the renewal of the Applicant's contract after assessing his performance and this responsibility was discharged fairly and impartially. The 1st Respondent contends that the dispute between the Applicant and the 1st Respondent relates to the renewal of the Applicant's contract of employment and the dispute ought to have been referred to the Industrial Court (now the Employment and Labour Relations Court) for determination as per **Section 87 (b)** of the **Employment Act, 2007** and **Section 12(1) (a)** of the **Industrial Court Act, 2011**. Consequently, the Respondent asserts that the Interested Party's findings and recommendations were made *ultra vires* its mandate and the same cannot be enforced by way of an order of mandamus.

In the alternative, the Respondent submits that even if the Interested Party had the authority to make the findings and recommendations, the Court has no jurisdiction to grant the orders sought as the Interested Party has mechanisms for enforcing its orders.

On the Applicant's prayer for compensation, the Respondent contends that this Court has no jurisdiction to award compensation in an application for judicial review.

I will now turn back to the detailed affidavit of the Chairperson of the Interested Party. Through the said affidavit, the mandate of the Interested Party is disclosed. The deponent also discloses the background of the matter and why the same was considered to have fallen within the jurisdiction of the Interested Party. The process the Interested Party used to arrive at its findings and recommendations is explained.

The Interested Party asserted that the 1st Respondent has neglected, failed, ignored and/or refused to implement the findings. It is the Interested Party's case that if the Applicant was aggrieved by the recommendations, then it ought to have moved the Court by way of judicial review to impeach those recommendations instead of refusing to implement them.

The Interested Party submitted that it has jurisdiction to handle the matter as it was not among those limited under **Section 30** of the **Commission ofAdministrative Justice Act, 2011("CAJA").** The Interested Party contended that in the ordinary practice of administrative law as buttressed by **Articles 59(h)** and **(i)** and **252** of the **Constitution of Kenya** as read together with **sections 2(1), 3, 4, 8, 26, 27, 28, 29, 30** and **31** of **CAJA,** the 1st Respondent is bound to implement the findings of the Commission unless it successfully moves the High Court in judicial review proceedings for orders against the findings.

The Interested Party argued that the spirit of **Section 8(f)** of **CAJA** behoves the Court to appreciate the adjudication of the case herein by the Interested Party through its specialized administrative justice system as an alternative mode of resolution of complaints relating to public administration and that the same ought to be enforced unless challenged by way of judicial review. It was the Interested Party's case that issuance of an order of mandamus would set a precedent on the Court's appreciation of the alternative mode of dispute resolution by way of the administrative system of justice as practiced by the Interested Party, which administrative system of justice is anchored in both the **Constitution** and **CAJA**. The Interested Party asserted that this matter is of great public importance as it touches on the Interested Party's core constitutional mandate to render administrative justice and also involves interplay between state organs being the respondents and Interested Party.

Citing the decision of the Supreme Court in **THE MATTER OF THE PRINCIPLE OF GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND THE SENATE [2012] eKLR,** the Interested Party urged this Court as

the custodian of the Constitution to interpret it holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights are enabled to discharge their obligations as a basis for sustaining the design and purpose of the Constitution.

The advocates for the parties also filed submissions. Upon perusal of the submissions and the pleadings filed in this matter, I have identified the following issues for determination:

1. Did the Interested Party have jurisdiction to determine the matter which has given rise to these proceedings?

2. Can the decisions of the Interested Party be enforced by issuance of an order of mandamus?

3. Who should bear the costs of these proceedings?

The Applicant and the Interested Party hold the view that the Applicant was an employee of the Ministry of State for Planning, National Development and Vision 2030 and not the 1st Respondent. The Applicant exhibited the letter dated 3rd March, 2009 appointing him as the Director, Enablers and Macro, to show that the contract was between him and the Ministry. The 1st Respondent on the other hand was adamant that it was the employer of the Applicant and that is why it was tasked with the onus of recommending the renewal of the Applicant's contract. I do not think that much will turn on this argument. In my view, this case is more about the powers of the Interested Party and the enforcement of its recommendations, findings, reports or decisions. Whether the Applicant was an employee of the Ministry or the 1st Respondent will not have a significant impact on the outcome of this case.

The question that really needs to be answered is whether the Interested Party had jurisdiction to investigate the Applicant's complaint. The functions of the Commission are set out in **Section 8** of the **CAJA**. The **Section** states:

"8. Functions of the Commission

The functions of the Commission shall be to—

(a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;

(b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;

(c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;

(d) inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service;

(e) facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;

(f) work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;

(g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;

(h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;

(i) publish periodic reports on the status of administrative justice in Kenya;

(j) promote public awareness of policies and administrative procedures on matters relating to administrative justice;

(k) take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;

(l) work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and

(m) perform such other functions as may be prescribed by the Constitution and any other written law."

Those functions are far-reaching and include investigation of complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector. Whichever way one looks at the Applicant's complaint, it can be easily concluded that the same fell within the functions of the Commission.

Section 29 of **CAJA** gives investigative powers to the Commission over any complaint arising from the carrying out of an administrative action of a public office, a state corporation or any other body or agency of the State. When one considers the said provision, together with the functions of the Interested Party, it becomes clear that the Commission had jurisdiction to carry out investigations in respect to the Applicant's complaint. Whether the Applicant was an employee of the Ministry or the Board is immaterial as both the Ministry and the Board are state organs and they all fell under the jurisdiction of the Interested Party's investigative powers. Although the parties urged this Court to determine whether the Applicant was an employee of the Ministry or an employee of the Respondent, I do not see the need for making such a determination.

An administrative action is defined by **Section 2** of **CAJA** **"as any action relating to matters of administration and includes-**

a. **a decision or an action carried out in the public service;**

b. **a failure to act in discharge of a public duty required of an officer in public service;**

c. **The making of a recommendation to a Cabinet Secretary; or**

d. **an action taken pursuant to a recommendation made to a Cabinet Secretary;"**

Looking at the **CAJA** in its entirety, I think it would be limiting the jurisdiction of the Commission if this Court is to hold that it did not have jurisdiction to investigate the Applicant's complaint. It is immaterial that the dispute may have fallen into the jurisdiction of the Court. So long as maladministration was alleged, the Applicant could look into the complaint. However, there is no doubt that the Applicant had other viable options for redressing his complaint. Whether it was prudent for the Commission to take up such a complaint is another thing altogether.

In my view, the core question in this matter is whether a public body can be compelled by way of an order of mandamus to implement the recommendations, findings or reports of the Commission. The Court of Appeal in the case of **KENYA NATIONAL EXAMINATION COUNCIL v REPUBLIC, EXPARTE GEOFFREY GATHENJI & 9 OTHERS, Nairobi Civil Appeal No. 266 of 1996** aptly summarized the purpose and reach of an order of mandamus as follows:

> **"The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS? Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-**
>
> **"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."**
>
> **At paragraph 90 headed "the mandate" it is stated:**
>
> **"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."**
>
> **What do these principles mean? They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed."**

In **REPUBLIC v THE COMMISSIONER OF LANDS AND ANOTHER EX-PARTE KITHINJI MURUGU M'AGERE, Nairobi High Court Misc. Application No. 395 of 2012,** G.V. Odunga, J explored the circumstances under which an order of mandamus can issue. I beg to quote him at length as follows:

> **"11. The first issue is when can a Court grant an order of *mandamus* and what is an order of *mandamus*? In Shah vs. Attorney General (No. 3) Kampala HCMC No. 31 of 1969 [1970] EA 543, it was held that:**
>
> ***"Mandamus* is essentially English in its origin and development and it is therefore logical that the court should look for an English definition. *Mandamus* is a prerogative order issued in certain cases to compel the performance of a duty. It issues from the**

> **Queen's Bench Division of the English High Court where the injured party has a right to have anything done, and has no other specific means of compelling its performance, especially when the obligation arises out of the official status of the respondent. Thus it is used to compel public officers to perform duties imposed upon them by common law or by statute and is also applicable in certain cases when a duty is imposed by Act of Parliament for the benefit of an individual. *Mandamus* is neither a writ of course nor of right, but it will be granted if the duty is in the nature of a public duty and especially affects the rights of an individual, provided there is no more appropriate remedy. The person or authority to whom it is issued must be either under a statutory or legal duty to do or not to do something; the duty itself being of an imperative nature."**

12. **It is an order sought under sections and 9 of the *Law Reform Act*, Cap 26 Laws of Kenya as read with Order 53 of the Civil Procedure Rules by person or body from the High Court of Kenya requiring any act to be done. In other words, *Mandamus* would issue from the alternative remedy, requesting that a statutory body etc. be compelled to fulfil its statutory obligation. So *Mandamus* order can issue from the High Court commanding a body or person to do that which it is its or his duty to do. It lies to secure that performance of a public duty, in the performance of which the applicant has a sufficient legal interest. The issue of *Mandamus* is discretionary and will only issue provided there is no other remedy available. See Tom Byakatonda on Behalf of Rushwa Growers Coop Society vs. The Board of Directors Banyankole Kweterana Coop Union Mbarara HCMA No. 29 of 1995 and Wade & Philips 9th Ed 607; Cephas Male vs. KCC [1992] KALR 159.**

13. **It is important to note, however, that an order of *mandamus* is not an order of specific performance, like in a contract situation. A party in a judicial review seeking an order of *mandamus* must show the existence of a statutory duty conferred or invested by statute upon some person, body of persons or tribunal which such person, body of persons or tribunal has failed to perform. See Republic vs. Registrar of Societies & 5 Others ex parte Kenyatta & 6 Others Nairobi HCMCA No. 747 of 2006 [2008] 3 KLR (EP) 521.**

14. **Therefore, *mandamus* is a peremptory order requiring the Respondent to perform a specified public duty. It does not lie for breach of a private obligation even if such obligation is owed with other public law duties to an applicant but whether a duty is to be enforced by *mandamus* depends on whether the duty as expressed or implied gives the applicant the right to complain. Its purpose is to compel the performance of a public duty or any act contrary to or evasive of the law. It does not lie against a public officer as a matter of course. There are bars and limitations. Courts are reluctant to direct a writ of *mandamus* against the executive officers of a Government unless some specific act or thing, which the law requires to be done, has been omitted. Courts proceed with extreme caution for the granting of the writ, which would result in interference by the judicial department with the management of the executive department of the Government. The conditions for its grant are that it must be shown that the public officer has failed to perform his duty; that the court would not grant *mandamus* where there is an alternative remedy available to the applicant; and that it may be refused if the enforcement of the order will present problems like lack of adequate supervision. See Evanson Jidiraph Kamau & Another vs. The Attorney General Mombasa H.C. Misc. Application No. 40 of 2000.**

15. **It has further been held that *Mandamus* is first, employed to enforce the performance of a public duty, which is imperative, not optional, or discretionary, with the authority concerned. Secondly, it is used to enforce the performance of public duties, by public authority, and not when it is under no duty under the law. However, it would seem that *mandamus* may be issued to enforce mandatory duty which may not necessarily be a statutory duty, but which has "a public element" which may take any forms, and fall under the classic formula of "any body of persons having legal authority to determine questions affecting the rights of subjects" like non-statutory self-regulating bodies. Thirdly, *mandamus* may issue directing the concerned authority to act according to law. Fourthly, there must be a legal right, or substantial interest of the petitioner, the petitioner must satisfy the Court that he has a legal right, the performance of which must be done by the public authority. It must, however, be noted that by no means closing avenues for the issue of *mandamus* against an authority, the affected person, or persons, must have demanded justice, which must be refused. See the Tanzania Court of Appeal decision in Ngurangwa and Others vs. Registrar of The Industrial Court of Tanzania and Others [1999] 2 EA 245.**

16. **It is now trite that the order of *mandamus* is of a most extensive remedial nature, and is, in form, of justice, directed to any person, corporation or inferior tribunal requiring him or them to do some particular thing thereon specified which appertains**

to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right and it may issue in cases, where although there is an alternative legal remedy yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way. See Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443; Halsburys Laws of England 4th Edition Vol 1 at 111 Paras 80, 90."

From the cited decisions, it is apparent that an order of mandamus will issue to compel the performance of a statutory duty owed to an applicant. Therefore, the fulcrum of an order of mandamus is that a statutory duty must be owed to an applicant and the public officer or public body, after being asked to perform the duty, has refused or failed to discharge that duty and there is no other adequate remedy. In matters involving exercise of judgement and discretion the public officer or public agency can only be directed to take action; it cannot directed in the manner or the particular way the discretion is to be exercised.

The question that follows therefore is whether the Board was obliged to implement the Commission's recommendations. The Applicant and Interested Party powerfully submitted that an order of mandamus can issue to compel a public body to implement the Interested Party's recommendations.

In order to stress the important role of the Commission in the current constitutional dispensation, Mr. Otiende Amollo referred this Court to the decision of the Supreme Court in **RE THE MATTER OF THE INTERIM INDEPENDENT ELECTORAL COMMISSION [2011] eKLR** where it was observed at paragraphs 59 and 60 that:

> **"[59] It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause".**
>
> **[60] While bearing in mind that the various Commissions and independent offices are required to function free of subjection to *"direction or control by any person or authority",* we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the "independence clause" does not accord them *carte blanche* to act or conduct themselves on whim; their independence is, by design, configured to the *execution of their mandate,* and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the**

> **Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead "independence" as an end in itself; for public-governance tasks are apt to be severely strained by possible "clashes of independences"."**

It is clear from the decision that the Supreme Court did indeed emphasise that commissions and independent offices, and the Interested Party is one of them, should be given the leeway to discharge their mandates. The Supreme Court, however, cautioned that commissions and independent offices could only operate within terms of the Constitution and the law. I will add that they cannot exercise powers they do not have and their decisions cannot be conferred the status not bestowed on them by the Constitution or statute.

This calls for the interrogation of the **Constitution** and the **CAJA** in order to understand the Interested Party's mandate and the weight to be given to its findings and recommendations. The Commission is an off-shot of **Article 59** of the **Constitution** which provides:

> **"59. (1) There is established the Kenya National Human Rights and Equality Commission.**
>
> **(2) The functions of the Commission are—**
>
> **(*a*) to promote respect for human rights and develop a culture of human rights in the Republic;**
>
> **(*b*) to promote gender equality and equity generally and to coordinate and facilitate gender mainstreaming in national development;**
>
> **(*c*) to promote the protection, and observance ofhuman rights in public and private institutions;**
>
> **(*d*) to monitor, investigate and report on the observance of human rights in all spheres of life in the Republic, including observance by the national security organs;**
>
> **(*e*) to receive and investigate complaints about alleged abuses of human rights and take steps to secure appropriate redress where human rights have been violated;**
>
> **(*f*) on its own initiative or on the basis of complaints, to investigate or research a matter in respect of human rights, and make recommendations to improve the functioning of State organs;**
>
> **(*g*) to act as the principal organ of the State in ensuring compliance with obligations under treaties and conventions relating to human rights;**
>
> **(*h*) to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;**
>
> **(*i*) to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;**
>
> **(*j*) to report on complaints investigated under paragraphs (*h*) and (*i*) and take remedial action; and**
>
> **(*k*) to perform any other functions prescribed by legislation.**
>
> **(3) Every person has the right to complain to the Commission, alleging that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.**
>
> **(4) Parliament shall enact legislation to give full effect to this Part, and any such legislation may restructure the Commission into two or more separate commissions.**
>
> **(5) If Parliament enacts legislation restructuring the Commission under clause (4)—**
>
> **(*a*) that legislation shall assign each function of the Commission specified in this Article to one or the other of the successor commissions;**
>
> **(*b*) each of the successor commissions shall have powers equivalent to the powers of the Commission under this Article; and**
>
> **(*c*) each successor commission shall be a commission within the meaning of Chapter Fifteen, and shall have the status and powers of a commission under that Chapter."**

By virtue of **Article 59(5)(c),** the Interested Party is a commission within the meaning of **Chapter Fifteen** of the **Constitution**, and shall have the status and powers of a commission under that **Chapter**. The objects and powers of commissions and independent offices are found in **Articles 249, 252** and **254** of the **Constitution.**

The objects of the commissions and independent offices as found in **Article 249(1)** of the **Constitution** are:

> **"(*a*) protect the sovereignty of the people;**
>
> **(*b*) secure the observance by all State organs of democratic values and principles; and**
>
> **(*c*) promote constitutionalism."**

The investigatory powers of commissions and independent offices are found in **Article 252** which states:

> **"252. (1) Each commission, and each holder of an independent office—**
>
> **(*a*) may conduct investigations on its own initiative or on a complaint made by a member of the public;**
>
> **(*b*) has the powers necessary for conciliation, mediation and negotiation;**
>
> **(*c*) shall recruit its own staff; and**
>
> **(*d*) may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution.**
>
> **(2) A complaint to a commission or the holder of an independent office may be made by any person entitled to institute court proceedings under Article 22 (1) and (2).**
>
> **(3) The following commissions and independent offices have the power to issue a summons to a witness to assist for the purposes of its investigations—**
>
> **(*a*) the Kenya National Human Rights and Equality Commission;**
>
> **(*b*) the Judicial Service Commission;**
>
> **(*c*) the National Land Commission; and**
>
> **(*d*) the Auditor-General."**

Under **Article 254** the Interested Party, like the other commissions and independent offices, is required to submit a report each financial year to the President and to Parliament.

Pursuant to **Article 59** of the **Constitution,** Parliament enacted the **CAJA** which gave the Commission the functions found in **Section 8**. In addition to **Section 8**, **Section 26** gives general powers to the Commission as follows:

> **"26. General powers of Commission**
>
> **In addition to the powers conferred in Article 252 of the Constitution, the Commission shall have power to—**
>
> **(a) issue summons as it deems necessary for the fulfilment of its mandate;**
>
> **(b) require that statements be given under oath or affirmation and to administer such oath or affirmation;**
>
> **(c) adjudicate on matters relating to administrative justice;**
>
> **(d) obtain, by any lawful means, any information it considers relevant, including requisition of reports, records, documents and any information from any person, including governmental authorities, and to compel the production of such information for the proper discharge of its functions;**
>
> **(e) by order of the court, enter upon any establishment or premises, and to enter upon any land or premises for any purpose material to the fulfilment of the mandate of the Commission and in particular, for the purpose of obtaining information, inspecting any property or taking copies of any documents, and for safeguarding any such property or document;**
>
> **(f) interview any person or group of persons;**
>
> **(g) subject to adequate provision being made to meet his expenses for the purpose, call upon any person to meet with the Commission or its staff, or to attend a session or hearing of the Commission, and to compel the attendance of any person who fails to respond to a request of the Commission to appear and to answer questions relevant to the subject matter of the session or hearing."**

After investigation, the Commission can act as per **Section 41** of the **CAJA**. **Section 41** states:

> **"41. Action after inquiry**
>
> **The Commission may, upon inquiry into a complaint under this Act take any of the following steps—**
>
> **(a) where the inquiry discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;**
>
> **(b) recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution;**
>
> **(c) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation, other appropriate methods of settling the complaint or to obtain relief;**

(d) provide a copy of the inquiry report to all interested parties; and

(e) submit summonses as it deems necessary in fulfilment of its mandate."

After completion of investigations, the Commission will make a report to the organization concerned. In this respect **Section 42** of the **CAJA** states:

"42 (1) After concluding an investigation or an inquiry under this Act, the Commission shall make a report to the State organ, public office or organization to which the investigation relates.

(2) The report shall include—

(a) the findings of the investigation and any recommendations made by the Commission;

(b) the action the Commission considers should be taken and the reasons for the action; and

(c) any recommendation the Commission considers appropriate.

(3) The Commission may require the State organ, public office or organization that was the subject of the investigation to submit a report to the Commission within a specified period on the steps, if any, taken to implement the recommendations of the Commission.

(4) If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure or refusal to implement its recommendations and the National Assembly shall take appropriate action."

Looking at the provisions of the **Act** I am of the opinion that the Commission is not given coercive powers over the organizations it investigates. Where an organization refuses to implement the recommendations of the Commission, the only action the Commission can take is to make a report to the National Assembly detailing the failure. Thereafter the National Assembly shall take appropriate action–see **Section 44(4)** of the **CAJA**.

Can the Court issue mandamus in view of the constitutional and statutory provisions? S**ection 42** of the **CAJA** clearly provides that where a state organ, public office or organization fails or refuse to implement the recommendations of the Commission, the Commission shall report the matter to National Assembly for action. Had Parliament desired that the courts should enforce the recommendations of the Commission, it would have clearly stated so. One of the constitutional mandates of the is conciliation, mediation and negotiation-see **Article 252(1)(b)** of the **Constitution.** Force cannot be used to achieve such a function and I do not think that Parliament wanted the Commission's findings and recommendations to have the force of court judgements. I doubt whether the Commission having been given investigative powers could also be given powers akin to those of the Judiciary. Elevating the Commission's reports to the level of court judgments would mean that the Commission would act as a prosecutor, a judge and executor at the same time. It would end up steamrolling over state organs, public offices and organizations. My finding tallies with the practice in other jurisdictions. In Australia for example, the Commonwealth Ombudsman cannot override the decisions of state agencies, or compel those agencies to comply with his or her recommendations–see **www ombudsman.gov.au.**

As the Commission cannot compel a state agency to implement its recommendations, it follows that the Court cannot compel a government agency to implement such recommendations. Government agencies have no statutory duty to implement the recommendations of the Commission. They cannot therefore be compelled by way of mandamus to implement those recommendations. I therefore find that an order of mandamus cannot issue as prayed for by the Applicant.

Assuming that an order of mandamus can issue to compel a public body to implement the recommendations of the Commission, can such an order issue in the circumstances of this case? As already stated, a public agency may or may not act on the findings and recommendations of the Commission. A public agency can therefore exercise discretion when it comes to the implementation of the reports of the Commission.

As already pointed out, in matters of discretion mandamus can only compel the performance of a duty but it cannot direct the manner in which the mandate is to be executed. However, there is an exception to this rule as was pointed out by Panganiban, J in the Philippines case of **FIRST PHILLIPPINE HOLDINGS CORPORATION V SANDIGANBAYAN, 253 SCRA 30, February 1, 1996** that:

"Ordinarily, mandamus will not prosper to compel a discretionary act. But where there is 'gross abuse of discretion, manifest injustice or palpable excess of authority' equivalent to a denial of a settled right which petitioner is entitled, and there is no other plain, speedy and adequate remedy, the writ shall issue."

In the case before this Court, the Applicant has not demonstrated that the exception should be activated in his case. It is also noted that the Board has already exercised its discretion by deciding not to act on the Commission's recommendations. There is therefore no basis whatsoever for the issuance of an order of mandamus.

The importance of complying with the findings and recommendations of the Commission cannot be over emphasised. If the role the Commission plays was not necessary, then the people of Kenya could not have given it constitutional existence. Whereas it is important for public organizations to implement the recommendations of the 1st Interested Party they cannot be forced by the courts to do so. In the circumstances the Applicant's application fails in its entirety and the same is dismissed.

Although the Applicant's application has failed, I am of the view that the application was not frivolous. In the circumstances I will order each party to meet own costs of these proceedings and it is so ordered.

Dated, signed and delivered at Nairobi this 26th day of February, 2015

W. KORIR,

JUDGE OF THE HIGH COURT

Justice Philip K. Tunoi & another v Judicial Service Commission & 2 others [2014] eKLR

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 244 OF 2014

IN THE MATTER OF ARTICLE 22(1) OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND OR FUNDAMENTAL FREEDOMS UNDER THE CONSTITUTION OF KENYA INCLUDING ARTICLE 20, 21 (1), 22, 10, 27 (1), 27(2) 28, 40, 47, 57

BETWEEN

JUSTICE PHILIP K. TUNOI……..……..1ST PETITIONER

JUSTICE DAVID A. ONYANCHA.....2ND PETITIONER

-VERSUS-

JUDICIAL SERVICE COMMISSION….....1ST RESPONDENT

THE JUDICIARY.....2ND RESPONDENT

AND

COMMISSION OF ADMINISTRATIVE

JUSTICE.....INTENDED AMICUS CURIAE/APPLICANT

RULING

Introduction

1. The Petitioners in this petition are judges of the Superior Courts of Kenya. The first Petitioner is a Judge of the Supreme Court of Kenya while the 2nd Petitioner is a Judge of the High Court of Kenya.

2. These proceedings were triggered by letters dated 28th April, 2014 addressed to the Petitioners by the Chief Registrar of the Judiciary in which it was stated that the 1st Respondent had resolved that all Judges retire at the age of seventy years.

3. This ruling however is in respect of a Notice of Motion dated 3rd July, 2014 brought by the **Commission of Administrative Justice** (hereinafter referred to as the CAJ), also known as the Office of the Ombudsman, in which the CAJ seeks the following orders:

1. **That this application be certified as urgent and heard *Ex parte* in the first instance.**
2. **That this Honourable Court be pleased to grant the Applicant leave to be joined in the Petition as *Amicus Curiae* or friend of the Court.**
3. **That upon the granting of prayer No. 2 above the Honourable Court do give directions on how the intended *amicus curiae* shall participate in further proceedings herein on such other or further directions as the court may deem fit to give.**
4. **That the costs of and incidental to this application be provided for.**

CAJ's Case

4. The application was supported by an affidavit sworn by **Otiende Amollo,** the Chairperson of the CAJ on 3rd July, 2014.

5. According to the deponent, the CAJ is a Constitutional Commission established under Article 59(4) of the Constitution of Kenya and Section 3 of the ***Commission of Administrative Justice Act*** of 2011, (hereinafter referred to as the Act) charged, *inter alia*, with the mandate of protecting the sovereignty of the people, securing the observance of the democratic values and principles by all state organs and promoting *constitutionalism* in Kenya and as bears a constitutional

responsibility to ensure compliance with the Constitution including assisting this honourable court to arrive at fair, comprehensive and expeditious decisions.

6. It was contended that in its capacity as the Ombudsman, the CAJ is charged with ensuring proper public administration and that the National, County governments and state organs promote the rule of law while adhering to the fundamental principles of good governance and Constitutionalism. Further, the CAJ is also concerned that should any disputes or disagreements arise between the two levels of government or among state organs, the same should be resolved amicably through alternative dispute resolution mechanisms in the spirit of Articles 189 and 242(1) (b) of the Constitution, and Section 8(f) and (h) of the Act.

7. In the deponent's view, the issues for consideration in the Petition herein are matters that are essentially of administrative justice arising from the alleged premature retirement of judicial officers which matters the Commission deals with in its ordinary course of business hence the CAJ would be most obliged to participate in and assist in the amicable resolution of the existing dispute of alleged administrative injustice and discrimination through alternative dispute resolution mechanisms.

8. The deponent deposed that he had previously served as a member of the Committee of Experts which spearheaded the drafting of the Constitution of Kenya 2010 and therefore had considerable experience in both constitutional and administrative law and possess firsthand knowledge of the mind of the drafters of the Constitution which may assist towards resolution of the existing dispute hence the presence of the CAJ in the proceedings will therefore serve the purpose of prompting administration of justice and development of the law since the CAJ intends to render its expertise in an important and non-partisan manner.

9. In his submissions in support of the application, **Mr Chahale**, learned counsel for the CAJ while reiterating the foregoing submitted that since the decision by the Respondents is challenged on the ground of impropriety and unlawfulness, the CAJ's participation herein would be beneficial to the Court as the issue for determination would be whether the Respondent's decision accords with democratic values and principles in discharge of its constitutional obligations.

10. It was further submitted that the parties herein are of a unique nature since the petitioners are senior members of the bench while the 1st Respondent is the Judicial Service Commission and the 2nd Respondent is the judiciary. The Chief Justice, on the other hand is the Chair of the 1st Respondent and the head of the 2nd Respondent by dint of his position as the head of the Supreme Court, the senior most court while the other two Superior Courts are represented in the 1st Respondent. In his view, the uniqueness may cause questions of incompatibility to so easily arise hence it would be helpful to the proceedings and the Court if an independent party with no direct interest is allowed to join the proceedings as a friend of the court and the CAJ would be that perfect party since the CAJ has statutory jurisdiction to deal with complaints arising out of administrative actions.

11. It was therefore submitted that the CAJ would provide assistance and expertise to the Court if allowed to join in these proceedings. According to learned counsel the CAJ has participated in several matters involving administration of justice, equality of treatment and fair administrative action in which the CAJ has presented its opinion in a neutral and balanced manner and it does not intend to deviate therefrom hence the application ought to be allowed.

The Petitioners' Case

12. The application was opposed by way of a replying affidavit sworn by the 1st Petitioner herein on 2nd October, 2014.

13. According to him, the adversarial proceedings filed herein raise constitutional issues which the Petitioners and the Respondents shall adequately argue during the hearing of the Petition.

14. To him, the rival positions taken by the parties are quite clear and do not require any additional input from the CAJ whose functions are set out in Section 8 of the Act hence the CAJ cannot claim to have legal expertise regarding the issues raised in the Petition.

15. He deposed that it is worrisome that the Chairman of the CAJ claims to know the "mind of the drafters of the Constitution" a claim which is not capable of verification and the contention is intended to alter the level field that the parties now have.

16. In his view, the Chairman shall advance his partisan position regarding the pending issues on the pretext that the view are what was in the mind of the drafters of the Constitution hence the Petitioners shall be placed at a great disadvantage which will be to the benefit of the Respondents.

17. On behalf of the 1st Petitioner, **Mr Ngatia**, SC submitted that the matter before the Court is an adversarial matter with clear pleadings by the parties unlike some of the opinions sought at the Supreme Court in which the CAJ participated. The test in adversarial proceedings, it was submitted is different. In this case, defences had been filed before the intervention by the CAJ whose intervention takes a very strange angle since in paragraph 9 of the supporting affidavit the deponent claimed that he knew the minds of the drafters of the Constitution. Consequently, it was submitted that if allowed to participate it would be at a

platform of articulating the minds of the drafters of the Constitution and that would be the end of the matter. It was submitted that that position would put the petitioners at a disadvantage as it would tilt the level playing ground.

18. It was further submitted that before this Court is a similar petition filed by **Hon. Lady Justice Khaminwa**and **Hon. Mr Justice Njagi** yet the CAJ has not made a similar application in the said matters.

19. It was submitted that for one to be an *amicus* the first test is the ability to have expert knowledge of the issues in controversy and ordinarily a party ought to file an *amicus* brief to demonstrate the expertise to be presented to the Court by showing for example the studies undertaken yet that has not been presented before this Court. What is before the Court is that the CAJ occasionally investigates allegations of malpractices and occasionally metes alternative dispute resolution mechanisms in those complaints. In learned Senior Counsel's view, none of the said activities equates even remotely to being scholarly briefs expected of *amicuscuriae* hence there is no foundation for the application. What was expected of the CAJ, it was submitted was to show its understanding of the law in other jurisdictions which have dealt with the same issue of retirement of Judges without which there is want of expertise in that branch of the law rather than reliance on the minds of drafters which cannot be independently verified.

20. In support of his submissions **Mr Ngatia** relied on **Raila Odinga and Others vs. Independent Electoral and Boundaries Commission and 3 Others, Petition No. 5 of 2013**, **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others, Petition No. 12 of 2013** and **Judicial Service Commission vs. The Speaker of the National Assembly & Another Petition No. 518 of 2013.**

21. It was further submitted that an *amicus* does not descend to the facts which are left to the litigants. However here the CAJ claims to know the mind of the drafters of the Constitution hence puts him in a position adverse to one of the parties.

22. It was submitted that the emotive terms employed with respect to the petitioners' positions are irrelevant since the petitioners are entitled to approach this Court to adjudicate in accordance with the law.

23. On his part, **Mr Nowrojee, SC** who appeared with **Mr Ngatia**, added that the CAJ has not given any specific reason to intervene or identified a specified expertise not available to the Court which will justify intervention. It is not enough to make general observations on their powers. According to **Mr Nowrojee**, this is a matter which requires a decision on the Constitution and the Court is adequately able to discharge and which it has discharged in the past hence there is no compelling reason shown. According to him the best exemplification of lack of a compelling reason is the conduct of the CAJ by not explaining why it chose to intervene in this matter as opposed to similar petitions which are in the public domain with similar issues.

24. It was submitted that the allegation of the CAJ's role is not the criterion for joinder as an *amicus*. Having not given any advisory opinion to the **Hon. Chief Justice** which would have assisted the 1st Respondent, it was submitted that they ought not to claim that they have a role of giving advisory opinion for better administration of justice.

25. It was therefore submitted that since there is an ambiguity in the application, the same ought to be disallowed with costs.

Respondents' Case

26. On his part **Mr Issa**, learned counsel for the Respondents was of the view that the uniqueness of the parties is not new to the 1st Respondent which is an independent commission not influenced by the fact that some of the parties are judges or magistrates. Therefore the issue of incompatibility does not arise as the fact that the parties are Judges will not influence the position of the 1st Respondent which has been involve in proceedings some of which it has lost an indication that the Judges have been impartial and fair determination given hence the concerns do not arise.

27. The Petitioners therefore objected to the admission of the CAJ is these proceedings as *Amicus Curiae*.

CAJ's Rejoinder

28. In a rejoinder, **Mr Chahale** reiterated that if the CAJ is joined to these proceedings its opinion will only be that of an opinion which will not be binding and the Court will still render its decision. Secondly, the CAJ chose only to join one of the matters before the Court because its opinion would not be any different even if it joined all the matters. Thirdly, the CAJ cited its jurisdiction and its expertise in dealing with administrative justice rather than a display of powers. Fourthly, with respect to incompatibility, he clarified that it did not mean that the Court cannot arrive at a just determination but he meant that the uniqueness makes the case for joinder of an independent party since the CAJ is an independent body created by the Constitution and an Act of Parliament hence obligated to operate within the Constitution and the Act.

29. **Mr Chahale** was of the view that in our jurisdiction the procedure is first to seek leave before an *amicus* brief while with respect to the advisory opinion, he was of the view that the same could not have been given during the pendency of these proceedings.

Determinations

30. It is unfortunate that in this country, unlike in other jurisdictions with an advanced Constitution as ours, we do not have in place comprehensive rules which govern the admission of persons as *amici* in legal proceedings. May be it is time the Hon. The Chief Justice deemed it fit to put into motion a machinery through which the issue of the promulgation of such rules may be undertaken so as to give guidelines to the manner in which *amicus curiae* can be admitted to legal proceedings and the scope of their participation thereat.

31. Accordingly, it is my view that procedures adopted in other jurisdictions may only be a guide, but do not necessarily bind the Courts in determining whether or not a person or entity ought to be admitted into legal proceedings as such *amicus curiae*.

32. I have considered the application, the affidavits in support of and in opposition to the application as well as the submissions made and authorities relied upon.

33. In **Raila Odinga and Others vs. Independent Electoral and Boundaries Commission and 3 Others** (supra), the Supreme Court expressed itself as follows:

> **"We are of the opinion that where in adversarial proceedings, parties allege a proposed applicant for amicus curiae is biased or hostile to one or more of the parties or where the applicant through previous conduct appears to be partisan on an issue before the Court, then we must consider such an objection seriously…Having listened to all arguments from counsel and studied the documentation submitted to the Court with regard to this Application, and even though we are unable to ascertain the veracity of every claim, the Court is convinced of the perception of bias and partisanship with regard to the applicant exists."**

34. The same Court in **Trusted Society of Human Rights Alliance vs. Mumo Matemo & 5 Others** (supra) pronounced:

> **"On the other hand, an amicus is only interested in the Court making a decision of professional integrity. An amicus has no interest in the decision being made either way, but seeks that it be legal, well informed, and in the interest of justice and the public expectation. As a friend of the Court, his cause is to ensure that a legal and legitimate decision is achieved."**

35. As this Court held in **Judicial Service Commission vs. The Speaker of the National Assembly & Another** (supra):

> ***"The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2012*, defines an interested party as "a person or entity that has an identifiable stake or legal interest in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation". From the foregoing it is clear that an interested party as opposed to an amicus curiae or a friend of the court may not be wholly indifferent to the outcome of the proceedings in question. He is a person with an identifiable stake or legal interest in the proceedings hence may not be said to be wholly non-partisan as he is likely to urge the Court to make a determination favourable to his stake in the proceedings. *Amicus curiae* on the other hand is defined as a "an expert on an issue which is the subject matter of proceedings but is not party to the case and serves to benefit the court with their expertise." *Amicus curiae* is therefore a person who shows that he is possessed of some expertise relevant to the matters for determination before the Court. Such a person as is expected of experts is required to be non-partisan and his role is meant to enable the Court get a clear picture of the issues in dispute in order for the Court to arrive at an informed and just decision. Therefore the mere fact that the applicant herein may be partisan does not necessarily render him unsuitable to be joined in these proceedings as an interested party."**

36. In **Re: Certain Amicus Curiae Applications; Minister of Health and Others vs. Treatment Action Campaign and Others (CCT8/02) [2002] ZACC 13 (5 July 2002)** the South African Constitutional Court expressed itself as follows:

> **"In the exercise of that discretion the Court will consider whether the submissions sought to be advanced by the amicus will give the Court assistance it would not otherwise enjoy. The requirements for admission as an amicus are set out in Rule 9 and, as this Court pointed out in *Fose v Minister of Safety and Security*:**
>
> > **"It is clear from the provisions of Rule 9 that the underlying principles governing the admission of an *amicus* in any given case, apart from the fact that it must have an interest in the proceedings, are whether the submissions to be advanced by the *amicus* are relevant to the proceedings and raise new contentions which may**

be useful to the Court. The fact that a person or body has, pursuant to Rule 9(1), obtained the written consent of all parties does not detract from these principles; nor does it diminish the Court's control over the participation of the *amicus* in the proceedings, because in terms of subrule (3) the terms, conditions, rights and privileges agreed upon between the parties and the person seeking *amicus* status are subject to amendment by the [Chief Justice]."

To this we would add that the application for amicus status must be made timeously and, failing that, condonation must be sought without delay… The role of an amicus is to draw the attention of the court to relevant matters of law and fact to which attention would not otherwise be drawn. In return for the privilege of participating in the proceedings without having to qualify as a party, an amicus has a special duty to the court. That duty is to provide cogent and helpful submissions that assist the court. The amicus must not repeat arguments already made but must raise new contentions; and generally these new contentions must be raised on the data already before the court. Ordinarily it is inappropriate for an amicus to try to introduce new contentions based on fresh evidence."

37. Similarly, the same Court in **Institute for Security Studies In Re S vs. Basson (CCT30/03B) [2005] ZACC 4; 2006 (6) SA 195 (CC)** expressed itself as follows:

"In the exercise of its discretion whether or not to admit a person as an amicus this Court will have regard to the principles that govern the admission of an amicus. These principles are whether the submissions sought to be advanced are relevant to the issues before the court, will be useful to the court and are different from those of the other parties…the submission should raise new contentions and should "not repeat any matter set forth in the argument of the other parties." It is the duty of this Court, in the exercise of its discretion to ensure that these principles are satisfied before a person can be admitted as an amicus. Where these principles are not satisfied, a person cannot be admitted as an amicus."

38. From the forgoing this Court can glean the following principles for consideration in an application for admission or joinder of an *amicus*:

1. **The application must be made timeously.**

2. **The applicant ought not to raise any perception of bias or partisanship either from the documents filed, his submissions or conduct prior to the making of the application.**

3. **The applicant ought to be neutral in the dispute where the dispute is adversarial in nature.**

4. **The applicant ought to show that the submissions it intends to advance will give such assistance to the Court as would otherwise not have been enjoyed by the Court. He ought to draw attention of the Court to relevant matters of law or fact which would otherwise have not been drawn. Therefore the applicant ought to show that he does not intend to repeat the arguments already made by the parties but that he intends to raise new contentions. The new contentions however must be based on the data already before the Court and not on fresh evidence.**

5. **The applicant ought to show that he has expertise in the field relevant to the matter in dispute. Therefore general expertise in law does not suffice.**

6. **Whereas consent of the parties is a factor to be taken into consideration, it is not the determinant factor.**

39. In this case the CAJ contends that it is a Constitutional Commission established under Article 59(4) of the Constitution of Kenya and Section 3 of the Act charged, *inter alia*, with the mandate of protecting the sovereignty of the people, securing the observance of the democratic values and principles by all state organs and promoting constitutionalism in Kenya and as bears a constitutional responsibility to ensure compliance with the Constitution including assisting this honourable court to arrive at fair, comprehensive and expeditious decision. In my view this allegation does not evince any specific expertise by the CAJ in the matter in dispute in this petition. Rather it generally provides the Constitutional and Legislative mandate of the CAJ as opposed to specific expertise on the subject of this litigation. If that was the criteria to be applied then the CAJ would automatically be joined as *amicus* in all petitions where allegations of administrative fairness is made.

40. The deponent to the supporting affidavit has also deposed that having been a member of the Committee of experts, he is in a position to submit on the intention of the drafters of the Constitution. First and foremost, it ought to be remembered that the CAJ as an entity was not a member of the Committee of Experts. Rather it is its chair who was a member. Therefore to admit the CAJ to these proceedings would mean that in the event that for any reason its Chairperson is unable to give his input in the petition, the role of the CAJ in these proceedings would nolonger be useful. Even if the Court was of the view that it required the assistance of the members of

the Committee of Experts, it would have sought the same from them either collectively as the Committee of Experts or from individual Committee members. In other words I am not satisfied that the CAJ as an entity has any expertise to offer in these proceedings which the Court cannot enjoy from the submissions from the parties herein.

41. The other issue is the submissions which are intended to be made by the CAJ. From the supporting affidavit, it would seem that the CAJ intends to urge the Court to consider the intention of the drafters of the Constitution. The perceived intention of the drafters clearly is a matter which would involve consideration of what took place in the Committee and may well be subjective. Accordingly, as was held in **Raila Odinga and Others vs. Independent Electoral and Boundaries Commission and 3 Others** Case (supra), the CAJ's position is likely to be biased or hostile to one or more of the parties herein. The question is not whether its position will affect the decision of the Court but whether the perception of bias and partisanship with regard to the parties exist and that cannot be ruled out.

42. Apart from that the CAJ intends to bring to the attention of the Court the intention of the drafters of the Constitution. Whether or not such intention can be shown without adducing evidence of deliberations which took place before the Committee is another matter. If such deliberations are necessary then it would mean that the submissions of the CAJ will nolonger be based on the data before the Court but on fresh data adduced by itself and that as the authorities show is unacceptable.

43. With respect to the consideration of the intention of the drafters of legislation in interpretation of legislation, modern scholars are not agreeable on the weight to be attached to that principle since in most cases, it is not very easy to determine with precision what the drafters actually meant by enactment of certain legislation. The more appealable option is the "mischief rule". The Mischief Rule is a rule of interpretation of statutes, or put differently, an aid to interpretation. It lays down the proposition that before arriving at any particular interpretation of the statute, the Court will consider and be aided by establishing what the law was before the statute was enacted or amended, the injustice or mischief which existed before the enactment of the statute, and would the interpretation of the statute in the matter before Court perpetuate that injustice or mischief which existed before the enactment of the law? These propositions, though they have an archaic savour are still constantly recognised by the Courts as rules of practical importance, and these considerations will often be decisive in interpreting the effect of a statute. See **C K Allen, *Law in the Making*** 7th Edition Page 495; **In Re Mayfair Properties & Co [1898] 2 Ch. 28, 35; Hickman vs. Pracey [1945] AC 305, 315.**

44. This is not to sound a death knell to the consideration of the legislative intent which is still relevant but just to say that legislative intent is in certain cases a very amorphous consideration.

45. Whereas it is true that an *amicus* brief is not necessarily a requirement in an application for joinder as an *amicus*, it is my view that it is important that the intended *amicus* show briefly the nature of the case he intends to submit on and the scope of the participation to enable the Court determine whether such person is really an *amicus* and whether his participation in the relevant proceedings is necessary.

46. Having considered the case as presented by the CAJ in these proceedings as well as the other parties' respective positions and the principles guiding the joinder of a person in legal proceedings as an *amicus*, I am not satisfied that the test for the joinder of the CAJ herein as *amicus* has been met.

Order

47. Consequently, the Notice of Motion dated 3rd July, 2014 fails and is dismissed but taking into account the nature of these proceedings and the role the CAJ intended to play herein, there will be no order as to costs.

Dated at Nairobi this 3rd day of November, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nowrojee, SC and Mr Ngatia, SC for the Petitioners

Miss Mugo for Mr Issa for the Respondents

Miss Cherogony for Mr Otiende Amollo for the Ombudsman

Cc Patricia

Martin Nyaga Wambora v County Assembly of Embu & 6 others [2015] eKLR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, MWERA & G.B.M. KARIUKI JJ.A.)

CIVIL APPLICATION NO. NAI. 46 OF 2015 (UR 40 OF 2015)

BETWEEN

MARTIN NYAGA WAMBORA……..……APPLICANT

AND

THE COUNTY ASSEMBLY OF EMBU……..…..1ST RESPONDENT

THE SPEAKER OF THE COUNTY ASSEMBLY……2ND RESPONDENT

THE SPEAKER OF THE SENATE……..……3RD RESPONDENT

THE SENATE……..……4TH RESPONDENT

PARLIAMENTARY SERVICE COMMISSSION……..5TH RESPONDENT

COMMISSION ON ADMINISTRATIVE JUSTICE…..……6TH RESPONDENT

ANDREW IRERI NJERU & 31 OTHERS……..……7TH RESPONDENT

(Being an application for stay and injunction pending the hearing and determination of the intended appeal from the High Court of Kenya at Nairobi, (Mwongo, Korir & Odunga, JJ.) dated 12th February, 2015 in Petition Nos. 7 & 8 of 2014) (Consolidated)

****

RULING OF THE COURT

1. The applicant, ***Martin Nyaga Wambora***, has applied to this Court under Rule 5(2)(b) of the Rules of this Court for orders to restrain any person from being sworn in to occupy the office of Governor of Embu County, during the pendency of the applicant's appeal to this Court. The appeal arises from a ruling delivered by a three judge Bench of the High Court (***Mwongo, Korir***&***Odunga***, ***JJ.***) on 12th February 2015, dismissing Embu Constitutional Petitions No. 7 and 8 of 2014 (Consolidated).

A. Background

2. In the ruling, the High Court held *inter alia* that the petition was not incompetent; that the proceedings to impeach the Governor of Embu County ***Hon.Martin Nyaga Wambora*** were not *sub judice*; that ***section 33*** of the ***County Governments Act, 2012,*** is not unconstitutional; that the due process for the removal of a governor was followed in the removal of ***Hon. Martin NyagaWambora*** as Governor of Embu County; and that the removal process of the Governor requires that an opportunity be afforded to the public to participate therein which opportunity was afforded in the instant case.

3. The petitioners in the consolidated petition included: the applicant as 1st petitioner and 32 others who described themselves in the petition as "Citizens of Kenya, who reside, vote and work for gain within the Embu County, who are vested with a constitutional duty to respect, uphold and defend the Constitution of Kenya as enacted".

4. In the petition, the applicant and his co-petitioners had sought prayers as follows:

> ***"(a) A declaration that the petitioners and members of the public are entitled the right to participate in the process of removing the Governor of Embu County from office and the same has been violated.***
>
> *b.* ***That the court be pleased to establish the required threshold of the members of public***

who should participate under Article 118(1) (b), Article 174(a) & (c) and Article 196 (1)(b).

c. ***That the Honourable Court do make a declaration that public participation is a pre-condition to proceedings for removal of a governor under Article 181 of the Constitution.***

d. ***A declaration that the Act of removing a County Governor is not an exclusive affair of the County Assembly and the Senate.***

e. ***Declaration that the resolution passed by the County Assembly on 29th April, 2014 is null and void for having been passed by the County Assembly in contravention of County Assembly Standing Order No. 86 and the Senate into contravention of Standing Order No. 92 of the Senate Standing Orders.***

f. ***Declaration that the impeachment passed by the Senate pursuant to a resolution passed by the County Assembly of Embu on 29th April, 2014, is null and void.***

g. ***Declaration that Section 33 of the County Government Act is unconstitutional for being in conflict with and flying over the face of Article 1, Article 2(1) & (2), Article 10, Article 118(1)(b), Article 174 (a) & (c) and Article 196(1) (b) for failing to allow public participation and involvement in the removal of a County Governor.***

h. ***That the Honourable Court be pleased to issue an order of certiorari to remove to the High Court and quash the resolution passed by the County Assembly of Embu dated 29th April, 2014 and the Senate on the 13th May, 2014 to remove 1st respondent as the Governor of Embu County.***

i. ***That the Honourable Court be pleased to issue an order of certiorari to remove to the High Court and quash the resolution passed by the Senate dated 13th May, 2014 to impeach the Governor of Embu County.***

j. ***A declaration that the threshold of the impeachment of a Governor as convisaged (sic) under Article 181 of the Constitution were read together with other provisions.***

k. ***A declaration that the petitioners herein are entitled to the full protection of their right to information and the same right has been violated.***

l. ***Costs of the suit."***

B. The Notice of Motion

5. Following the dismissal of the consolidated petition, the applicant moved to this Court by way of a notice of motion brought under ***Section 3A***&***3B*** of the ***Appellate Jurisdiction Act***; and ***Rules 5(2)(b)*** of the ***Court of Appeal Rules,*** seeking orders to preserve the subject matter of the appeal he intends to file against the ruling. In particular, the applicant seeks an injunction or conservatory orders restraining any person or authority from swearing in the Deputy County Governor of Embu County as County Governor or in any way interfering with the applicant's tenure as the Governor of Embu County, pending the hearing and determination of the intended appeal. The applicant also seeks an order restraining the Deputy Governor, Embu from assuming office as Governor or in any way interfering with the mandate of the applicant as the duly elected Governor of Embu County. During the hearing of the motion, the applicant was represented by Senior Counsel, ***Mr. Paul Muite***, and ***Mr. Wilfred Nyamu***.

6. The respondents in the motion before us are the County Assembly of Embu and the Speaker of the County Assembly of Embu (1st and 2nd respondents), who were represented by ***Mr. Njenga*** of Muchoki, Kangata, Njenga & Company Advocates; the Senate of Kenya and the Speaker of the Senate of Kenya (3rd and 4th respondents), did not respond to the application nor were they represented at the hearing; the Parliamentary Service Commission (5th respondent), was represented by ***Mrs. Thanji***, instructed by Advocate Anthony T. Njoroge; the Commission on Administrative Justice (6th respondent), was discharged from the proceedings by this Court, following a letter indicating their wish not to appear in the appeal; and ***Andrew Ireri Njeru***& 31 others (hereinafter referred to as 7th respondent), who were co-petitioners with the applicant in the consolidated petition were represented by Messrs Ndegwa & Ndegwa Advocates in this motion.

7. Following directions given by this Court (in consultation with the parties' advocates) for the hearing of the appeal, written submissions were duly filed and exchanged between the applicant, the 1st and 2nd respondents, and the 5th respondent. These parties' counsel also appeared before us on 18th May 2015, and orally highlighted the rival submissions.

C. The Applicant's Submissions

8. In the oral and written submissions, learned counsel for the applicant referred to the 25 grounds raised in the draft memorandum of appeal that the applicant intends to file, and submitted that the applicant's intended appeal is arguable and will, *inter alia,* raise the following fundamental issues:

i. The rule of law and the principle of *stare decisis, vis-a-vis* decision of the Court of Appeal over the High Court.

ii. Proof of the constitutional threshold for removal of the applicant as governor and the nexus between the allegations in the motion tabled in the County Assembly and the applicant.

iii. Public participation in the removal process of a duly elected governor and the rights protected under ***Article 38(2)*** of the ***Constitution***.

iv. The vexed question of separation of powers and role of the courts in determining the constitutionality of removal or impeachment process.

9. Counsel argued that the High Court made several errors in its judgment, and failed to address and determine crucial issues, such as, the involvement of the applicant in the allegations of violations of the Constitution; the nexus and threshold regarding his removal as governor; and whether the removal of the applicant as Governor of Embu county was in conformity with the Constitution. Further, that the High Court adopted a narrow and restrictive interpretation of its role in the review of the removal process, and the interpretation of the doctrine of separation of powers.

10. Learned counsel argued that it was in the public's interest that the impugned judgment and the decree of the High Court be stayed pending the hearing and determination of the intended appeal, as the process of impeachment and removal of a governor have significant political and administrative implications that in effect reverses the decision of the polarity of voters in a county.

11. In this regard, reliance was placed on ***Kenya Hotel Properties Limitedvs Willisden Investment Limited & 6 Others [2013] eKLR***, in which this Court quoted the following passage from ***East African Cables Limited vs Public Procurement Complaints Review and Appeals Board & Another, [2007] eKLR,*** on situations where public interest should take precedence:

> ***"We think in the particular circumstances of this case, if we allowed the application, the consequences of our orders would harm the greatest number of people. In this instance, we would recall that advocates of Utilitarianism, like the famous philosopher John Stuart Mill, contend that in evaluating the rightness or wrongness of an action, we should be primarily concerned with the consequences of our action and if we are comparing the ethical quality of two ways of acting, then we should choose the alternative which tends to produce the greatest happiness for the greatest number of people and produces the most good. Though we are not dealing with ethical issues, this doctrine in our view is aptly applicable"***.
>
> *[Emphasis supplied].*

12. Also relied on is ***Gitarau Peter Munya vs Dickson Mwenda Kithinji 2 Others, [2014] eKLR*** where this Court stated:

> ***"Bearing in mind the nature of the competing claims, against the background of the public cause, we have focused our perception on the public interest, and the concept of good governance, that runs in tandem with the conscientious deployment of the scarce resources drawn from the public. Proper husbandry over public monetary and other resources, we take judicial notice, is a major challenge to all active institutions and processes of governance; and the courts by their established attributes of line drawing, must ever have an interest in contributing to the safeguard to such resources. These principles dictate that our conscientious sense of proportion stands not in favour of fresh elections for Meru County gubernatorial office, during the pendency of an appeal. By our sense of responsibility, the courts contribution to good governance in that context, takes the form of an expedited hearing of the appeal"***.

13. In this case, the applicant is apprehensive that the dismissal of the petition means that unless conservatory orders are granted, his removal from the position of Governor of Embu County will take effect, and ***Article 182(2)*** of the ***Constitution*** that brings into office the Deputy County Governor for the remainder of the term of the County Governor will be enforced. The applicant maintains that such an eventuality will render his appeal nugatory, as there is no constitutional provision for the reversal of the position once the Deputy county governor assumes office and is sworn-in.

D. 7th Respondent's Reply to the Motion

14. Although the 7th respondent did not file any submissions nor appear for the hearing of the motion, a replying affidavit sworn by ***Mr. Aloice VictorNjagi*** (***Njagi***), who was the 4th petitioner in Embu Constitutional Consolidated Petition No. 7 & 8 of 2014, was filed in response to the motion. In the replying affidavit, ***Njagi*** basically supported the applicant's motion. Annexed to the replying affidavit is a notice of appeal dated 16th February 2015, indicating the 7th respondent's intention to appeal against the ruling of the High Court in the

consolidated petition delivered on 12th February 2015. Also annexed is a draft memorandum of appeal that contains some 25 grounds which 7th respondent intends to canvass.

15. ***Njagi***, deponed that the intended appeal by the applicant is arguable as it raises *inter alia* constitutional grounds regarding the impeachment of the applicant and adherence to the law, rules of natural justice and participation of the public in the process; that it is important that conservatory orders be granted as the 7th respondent's rights of participation in the impeachment of the applicant will otherwise be prejudiced; that without the conservatory orders, the application of Article 182(2) of the Constitution will result in conflict with the outcome of the applicant's appeal that has high chances of success; that it is in the interest of justice that an injunction be issued under Rule 5(2)(b) of the Court Rules to preserve the *status quo* and the applicant's appeal.

E. 1st and 2nd Respondents' Reply and Submissions

16. The 1st and 2nd respondents opposed the applicant's motion through a replying affidavit sworn by Justus Kariuki Mate (Mate), who is the 2nd respondent being the current Speaker of 1st respondent, the County Assembly of Embu. In a nutshell, Mate deponed that the 1st and 2nd respondents have a constitutional mandate in carrying out oversight authority over the Embu County Executive with a view to ensuring accountability and transparency in the functions of the County Executive, and the application of the resources of the County Government; that the removal of the applicant as Governor of Embu County was initiated and carried out in accordance with the above constitutional mandate; that the removal of the applicant as Governor of Embu County was endorsed by the Senate; and that following the dismissal of the applicant's petition against his removal, it is in the interest of the people of Embu and the principle of good governance that the applicant be removed immediately; that there will be no vacuum as the Constitution provides that the Deputy county governor shall exercise the functions of the office of governor for the reminder of the term; and that this position would simply be reversed should the applicant succeed in its appeal.

17. Learned counsel for the 1st and 2nd respondents made oral and written submissions arguing that the orders sought by the applicant under ***Rule 5(2)(b)*** of the ***Court Rules***, should not to be granted as the applicant is seeking an injunction restraining the Deputy county governor from exercising a right in law that has crystalized in her favour under ***Article 182(2)*** of the ***Constitution;*** that such an order cannot be issued against the Deputy county governor as she is not party to the proceedings and has not had the opportunity of being heard; that the Court cannot exercise its discretion to defeat or limit an expressed right in law that has accrued in favour of the Deputy county governor under ***Article 182(2)*** of the ***Constitution***.

18. Counsel further submitted that the intended appeal by the applicant is not arguable as the issues identified as pertinent, are issues which were determined by the High Court based on settled law and the evidence available on record; that the burden of proof remained entirely on the applicant and he cannot use any deficiency in the evidence to constitute an arguable ground of appeal; that it was clear that sufficient public participation was undertaken and no arguable issue can arise in that regard; and that the issue of separation of powers was properly addressed in accordance with settled law.

19. In support of these submissions, learned counsel relied on ***Stanley Kang'ethe Kinyanjui vs Tony Keter& 5 Others [2003] eKLR***, in which it was stated that:

> ***"The term 'nugatory' has to be given its full meaning.***
>
> ***It does not only mean worthless, futile or invalid. It also means trifling. Reliance Bank vs NorlakeInvestment [2002] 1 EA 227.***
>
> ***Whether or not an appeal will be rendered nugatory, depends on whether or not what is sought to be stayed if allowed to happen is reversible; or if it is not reversible whether damages will reasonably compensate the party aggrieved".***

20. Counsel for the 1st and 2ndrespondents maintained that the intended appeal would not be rendered nugatory if the Deputy county governor assumes office under ***Article 181(2),*** as the applicant would be restored to office by the operation of law if his appeal is successful; and that the applicant's fear was merely loss of political clout and capital that would attend his removal from office.

F. The 5th Respondent's Reply and Submissions

21. The 5th respondent also opposed the motion relying on a replying affidavit sworn by ***Jeremiah Nyegenye*** (***Nyegenye***), who is the Secretary to the Parliamentary Service Commission. ***Nyegenye*** deponed *inter alia* that the impeachment proceedings against the applicant as Governor of Embu County, were initiated and done in the County Assembly of Embu, and the Senate in accordance with ***Article 181*** of the ***Constitution*** as read with ***Section 33*** of the ***County Government's Act***; that the proceedings culminated in a resolution passed by the Senate upholding a report of the special committee of the Senate, proposing the impeachment of the applicant; that the special committee of the Senate conducted its investigations against the applicant without bias and

in accordance with the Constitution and the County Government's Act; that the rules of natural justice were observed as the applicant was given an opportunity to appear before the special committee but declined to do so.

22. ***Nyegenye*** further deponed that the removal of a governor from office is a process arising from the need to ensure accountability and good governance and that a time limit is necessary for the expeditious resolution of such a process; that the impeachment process is a purely political process provided under ***Article181*** of the ***Constitution*** and ***Section 33*** of the ***Government's Act*** as a power to be exercised by the people's representative; and that the motion seeking the removal of the Governor of Embu County was published in the Kenya Gazette and the proceedings made open to the public as envisaged under ***Article 196*** of the ***Constitution***.

23. In the written and oral submissions, learned counsel for the 5th respondent argued that the issues raised by the applicant as possible issues in the appeal such as public participation, threshold, nexus, principle of bias, and principle of natural justice, are not arguable issues as they are issues that have already been addressed between the parties in various High Court decisions and in this Court. Relying on ***Nguruman Limited vs Jan Bonde Nielsen & 2 Others***, ***[2014] eKLR*** counsel submitted that mere existence of an arguable appeal does not warrant the grant of conservatory orders but that the applicant must demonstrate that he will suffer irreparable injury which cannot be compensated by an award of damages, and that the balance of convenience tilts in his favour. Counsel maintained that in this case if the applicant were to succeed in its intended appeal, the Court could easily reinstate the applicant into office as governor of Embu and nullify the swearing in of the Deputy county governor.

24. On the issue of balance of convenience, counsel argued that an order made by the court under ***Rule 5(2)(b)*** of the ***Court Rules*** would disrupt the smooth operations of the functions of the County Government of Embu to the detriment of the residents of Embu; that although the Court should balance the public interest against the applicant's individual rights, the public interest of the people of Embu outweigh the individual interest of the applicant; that public interest lies in upholding the findings of the County Assembly of Embu and the Senate which findings were based on thorough investigations; that it is in the public interest that the applicant ceases to exercise the functions of governor for the County of Embu to function smoothly. In this regard, the case of ***Gitarau Peter Munya vs DicksonMwenda Kithinji & 2 Others, (supra)*** was cited.

25. In regard to the doctrine of separation of powers, counsel cited the following cases: ***Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 Others [2013 eKLR; Okiya Omtata Okoiti v TheAttorney General & 5 Others [2014] eKLR; Republic v Registrar of Societies &5 Others exparte Kenyatta & 6 Others [2007] eKLR; &Mumo Matemu v TrustedSociety of Human Rights Alliance & 5 Others, Civil Appeal No. 290 of 2012***; to buttress the proposition that the powers of impeachment as provided by law lie solely with the County Assembly and the Senate; that the role of the Court is to discover whether the proper procedure provided in the law has been followed; that the Court cannot usurp the role of the County Assembly of Embu and the Senate by carrying out a merit review of the resolution of the County Assembly and the Senate; and that the orders sought by the applicant seek to have the Court interfere with legislative functions, as they seek to restrain the Senate and the County Assembly from undertaking their constitutional and statutory functions.

26. Finally, learned counsel for the 5th respondent submitted that the applicant has not shown that he will suffer any prejudice if the orders sought in the application are not granted as this Court will simply reinstate him into office if his appeal is successful. Thus, the Court is urged to dismiss the applicant's motion as the applicant has not met the conditions for the grant of an injunction or conservatory orders under ***Rule 5(2)(b)*** of the ***Court Rules.***

G. The Applicable Law

27. The motion before us is one for injunctive orders under ***Rule 5(2)(b)*** of the ***Court of Appeal Rules***. The guiding principles in invoking this Court's jurisdiction under that rule, is as restated in ***Kenya Hotel Properties Limited v Willsden Investment Limited & 6 Others, (supra)*** as follows***:***

> ***"First, the intended appeal should not be frivolous or as otherwise put, the applicant must show that it has an arguable appeal, and secondly, this Court should ensure that an appeal if successful should not be rendered nugatory".***

28. As regards the nugatory aspect the following statement made by this Court in ***Reliance Bank Limited v Norlake Investments Limited(supra)***, is instructive:

> ***"What may render the success of an appeal nugatory must be considered within the circumstances of each particular case. The term 'nugatory' has to be given its full meaning".***

29. The principles that govern an application for injunction under ***Rule5(2)(b)*** of the ***Court Rules***, are not the same as the principles that govern an application for interlocutory injunction under ***Order 40*** of the ***Civil ProcedureRules 2010*** (formally Order 39 of the repealed Civil Procedure Rules). In the latter, the principles were well settled in the celebrated case of ***Giella vs Cassman Brown& Co Ltd***. ***[1973] EA 358,*** that:

> ***"First, an applicant must show a prima facie case with a probability of success. Secondly, an injunction will not normally be granted unless the applicant might otherwise suffer irreparable injury, which would not be compensated by an award of damages. Thirdly if the court is in doubt, it will decide an application on the balance of convenience."***

30. These were the principles that were applied in ***Nguruman Limited vJan Bonde Nielsen 2 Others, (supra)***. A careful examination of these principles reveals that unlike ***Rule 5(2)(b),*** where the establishment of an arguable appeal that is not frivolous is sufficient, (an arguable appeal not necessarily meaning one which must succeed), an application under ***Order 40*** requires that a *prima facie* case with a probability of success must be established and as stated in ***Mrao Ltd. v First American Bank of Kenya Ltd. & 2 Others, [2003] KLR 125***:

> ***"In civil cases, a prima facie case is a case in which on the material presented to the court, a tribunal properly directing itself will conclude that there exists a right which has apparently been infringed by the opposite party to call for an explanation or rebuttal from the latter. A prima facie case is more than an arguablecase. It is not sufficient to raise issues but the evidence must show an infringement of a right, and the probability of success of the applicant's case upon trial.***
>
> ***That is clearly a standard, which is higher than an arguable case".*** Emphasis added.

31. Thus the principles for granting an interlocutory injunction under ***Order 40*** of the ***Civil Procedure Rules*** provides a bar which is a notch higher than that required for granting an injunction under ***Rule 5(2)(b)*** of this ***Court's Rule***. In our view, the case of ***Nguruman Limited v Jan Bonde Nielsen 2 Others, (supra),*** that was cited to us by the 5th respondent is not applicable in this motion as it was an appeal against a refusal to grant an injunction under ***Order 39*** of the now repealed ***Civil Procedure Rules,*** and not an application for injunction under ***Rule5(2)(b)*** of the rules of this Court. We reiterate what was observed by this Court in ***Reliance Bank Limited v Norlake Investments Limited, (supra)*** that a balance of convenience is not a pre-condition for granting an application under ***Rule5(2)(b)*** but is merely a factor which depending on the circumstances of the particular case, may be taken into account in establishing the nugatory aspect of the intended appeal.

H. **Analysis & Determination**

32. It is not in dispute that the appeal before us has its genesis in the impeachment resolution that was passed against the applicant in the County Assembly of Embu, on 29th April 2014 and confirmed by a resolution of the Senate. The subject matter of the intended appeal is the removal of the applicant from the gubernatorial position in Embu County. The issue that arises for determination in the motion before us is whether the applicant has satisfied this Court that his intended appeal against the ruling of the High Court is not frivolous but raises arguable issues; and secondly, whether if the orders sought by the applicant in the motion are not granted, his appeal if successful, will be rendered nugatory.

33. With regard to the arguability of the appeal, the applicant and the 7th respondent have both filed draft memoranda of appeal raising several issues. A number of these issues are anchored on the interpretation of the Constitution and statutory provisions. For instance, the interpretation of Articles 181 and 182 of the Constitution that provide for removal of a county governor, and vacancy in the office of a county governor, are pertinent issues. The respondents maintain that the issues raised by the applicant are not arguable because they are based on settled law and the evidence. In effect, that is a conclusion that this Court can only arrive at upon hearing the appeal and analyzing the evidence and the law. For the purposes of the motion before us, it is enough that these issues will require interrogation in the intended appeal. The fact that the interrogation concerns interpretation of constitutional provisions cannot be taken lightly. Demonstration of a single arguable issue is all that is necessary in establishing the arguability of an appeal. We have no hesitation in finding that the appeal does raise several arguable issues.

34. As regards the nugatory aspect, since the passing of the resolution by the Embu County Assembly for the applicant's impeachment on 29th April 2014 and the confirmation of that resolution by the Senate, the applicant has remained in office pursuant to orders issued by the High Court. These were a conservatory order issued by the High Court on 15th May, 2014 pending the hearing of the consolidated petition; and an order issued by the High Court on the 12th February, 2015 after the dismissal of the consolidated petition for maintenance of the *statusquo,* for a period of 14 days to enable the applicant move to this Court. Thus, the applicant has remained in office for a period of over one year from the time the impeachment resolution was passed against him.

35. The applicant is apprehensive that unless conservatory orders are granted for him to remain in office, Article 182 of the Constitution may come into play and his appeal that seeks to protect his position as Governor of Embu County will be rendered a mere academic exercise. The relevant part of ***Article 182(1)*** and

(2) of the Constitution states as follows:

> ***"182. (1) The office of the county governor shall become vacant if the holder of the office –***
>
> *a.* ***……***
>
> *b.* ***……..***
>
> *c.* ***……..***
>
> *d.* ***……..***
>
> *e.* ***is removed from office under this Constitution.***
>
> *2.* ***If a vacancy occurs in the office of county governor, the deputy county governor shall assume office as county governor for the remainder of the term of the county governor".***

36. It was submitted that it would not be possible to remove the deputy county governor from office once he assumes the position of county governor under ***Article 182(2) of the Constitution***. Our reading of this Article is that the Constitution envisages the deputy county governor occupying the county governor's position for the remainder of the term that is, until the next elections. However, the key word in ***Article 182(2)*** is 'if a vacancy occurs'. It is this event that brings ***Article 182(2)*** into operation. In this case, the issue of the removal of the governor under ***Article 182(1)(e) of the Constitution*** is still a contested issue as the applicant has filed a notice of appeal against the ruling of the High Court. This means that the matter is yet to be conclusively determined. The deputy county governor's right under ***Article 182(2)*** has, therefore not crystalized, as the process of removal has not been determined and the 'vacancy' has not been confirmed.

37. The deputy county governor must await the finalization of the process and is not entitled under ***Article 182(2)*** to assume office of the county governor. Indeed, the applicant's right of appeal should not be rendered futile by the application of ***Article 182(2)*** before the appeal is heard and determined. Like the High Court, this Court has no mandate to inquire into the merit of the allegations made against the applicant, as separation of powers must be maintained. The mandate of this Court in the appeal will be limited to review of the High Court's consideration of the process and the reasonableness of the action taken against the applicant.

38. Further, there are special circumstances in this matter that must be taken into account. The office of a county governor is a public office, to which, voters pursuant to ***Article 181 of the Constitution*** elect the holder. Indeed, the applicant was so elected by the voters in Embu County. Thus, the issue of public interest in this matter is a relevant consideration in determining the nugatory aspect as the interest of the voters has to be taken into account. On the flip side is the fact that serious allegations have been made against the applicant, and that these allegations have been found justified by the people's representative in the Embu County Assembly and the Senate.

39. In considering the balance of convenience we bear in mind that the position of Governor of Embu is not just about the individual rights of the applicant, but is also about the people of Embu and balancing their franchise with good governance. It must not be forgotten that while the Constitution gives every citizen including the county governor the right to access justice, it also enjoins the court to observe the national values and principles of governance when interpreting and applying the Constitution or any law. Thus, courts must not only uphold the rule of law, equity and democracy, but must also promote the values that underlie an open and democratic society based on human dignity, equity and freedom.

40. Where as in this situation a county governor challenges his ouster from officer, it is the duty of the court to ensure that his/her success does not become Pyrrhic victory. This principle holds true not only in civil and commercial law litigation, but also what may be termed political cases. For at the end of the day, the quest in all these cases is justice, and it is the duty of the court to guard against the dispensation of justice becoming Pyrrhic and scandalous.

41. The applicant was elected Governor of Embu County for a five year term, effective from March, 2013 which means almost half the term is gone. We take judicial notice of the fact that litigation in courts can drag on for a long time and a situation may arise where the court process may be manipulated or abused, so that the appeal remains pending until after the applicant's term in office expires. Such an eventuality would neither be in the interest of justice nor good governance.

I. Conclusion

42. For the afore stated reasons, we allow the applicant's motion to the extent of issuing a conservatory order for him to remain in office and continue to exercise his powers as Governor of Embu County for a limited period of four months effective from the date hereof. The applicant shall take appropriate action to file and serve the memorandum of appeal and the record of appeal within the next thirty (30) days, and the President of the

Court of Appeal shall make arrangements for the appeal to be fast tracked and heard within the four months period that the conservatory orders will remain in force.

43. We realize that this time frame is rather stringent but this has been necessitated by the public interest involved in this matter and the need for expeditious disposal of the dispute. A copy of this order shall be served on the Registrar of the High Court to ensure that the proceedings of the High Court and judgment are availed to the applicant to enable him comply with this order.

Costs of this motion shall be costs in the appeal. Those shall be the orders of this Court.

Dated and Delivered at Nairobi this 10th day of July, 2015.

H. M. OKWENGU

…….

JUDGE OF APPEAL

J. MWERA

…….

JUDGE OF APPEAL

G. B. M. KARIUKI

…….

JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR

Martin Nyaga Wambora & 30 others v County Assembly of Embu & 4 others [2015] eKLR

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CORAM: MWONGO, PJ; KORIR, J; AND ODUNGA, J.)

EMBU CONSTITUTIONAL PETITION NOS. 7 & 8 OF 2014 (CONSOLIDATED)

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA ART. 1, 2(1), (2) and (5), ART. 3 (1) and (2), ART. 4(2), ART. 10, ART. 19, ART.20, ART.21, ART.22(1) and (2) (b) and (c), ART. 23(1), ART.24 (1), ART.33(1)(a), ART.35, ART 38(1), ART. 47(1) and (2), ART. 48, ART.52, ART. 93 (1), ART. 96, ART.165 (3)(b) and (d) (ii), ART. 73 (1) and ART.75 (1) (c), ART. 174 (a) and (c), ART. 175. ART.181, ART. 118 (1) (b), ART. 196(1) (b), ART. 200, ART.258, ART.259 and ART.260.

AND

IN THE MATTER OF ART.1, ART.3 AND ART. 25(a) OF THE INTERNATIONAL CONVENTION ON CIVIL AND POLITICAL RIGHTS OF 1996.

AND

IN THE MATTER OF ART.20 OF THE AFRICAN [BANJUL] CHARTER ON HUMAN AND PEOPLES' RIGHTS, ADOPTED JUNE 27, 1981.

AND

IN THE MATTER OF SECTION 2(1) (b) AND SECTION 148 OF THE PUBLIC FINANCE MANAGEMENT ACT CAP.412

IN THE MATTER OF SECTION 2(a), 3(b) AND (f) SECTION 14(1) (a) SECTION 87 OF THE COUNTY GOVERNMENT ACT CAP.17

AND

IN THE MATTER OF THE REMOVAL OF THE GOVERNOR OF EMBU COUNTY

AND

IN THE MATTER OF VIOLATION OF FUNDAMENTAL RIGHTS AND FREEDOM

BETWEEN

MARTIN NYAGA WAMBORA……..……..1ST PETITIONER

ANDREW IRERI NJERU…….……..……2ND PETITIONER

BEN KANYENJI……..……..……3RD PETITIONER

ALOISE VICTOR NJAGI……..……..4TH PETITIONER

GERALD KINYUA MBOGO……..……..……5TH PETITIONER

SIRIAKA MURINGO NJUKI..……..……..6TH PETITIONER

LYDIA MBAKA NJERU ……. …7TH PETITIONER

FELIX NJIRU…….…….. ….8TH PETITIONER

SICILI TIRA NGOCI.....……..……..……9TH PETITIONER

NAMU NDEREVA…….…….. ……10TH PETITIONER

JAMES KARIUKI NYAGA……11TH PETITIONER

JACINTA IGOKI NYAGA…… ….12TH PETITIONER

FLORA MBURA……13TH PETITIONER

FRIDA WANJIRA……14TH PETITIONER

VERONICA KIOKO……15TH PETITIONER

ROSE MUTURI……16TH PETITIONER

MONICAH MUTURI……17TH PETITIONER

ALBINA WEVETI……18TH PETITIONER

PETER NYAGA……19TH PETITIONER

GRACE WANGUI KARANJA……20TH PETITIONER

NANCY NDEGI……21ST PETITIONER

JOSPINE WAMBUGI……22ND PETITIONER

DOMINIC NJERU……23RD PETITIONER

ROSEMARY MUNYAGA……24TH PETITIONER

JOHN NAMU……25TH PETITIONER

JAMES NYAGA……26TH PETITIONER

AGABIO NJIRU……27TH PETITIONER

ERICK KINYUA……28TH PETITIONER

MUTHONI MUNENE……29TH PETITIONER

ALFRED NJERU……30TH PETITIONER

IRENE MUTHONI……31ST PETITIONER

SIMON NAMU……32ND PETITIONER

JOHN NAMU……33RD PETITIONER

VERSUS

COUNTY ASSEMBLY OF EMBU……1ST RESPONDENT

SPEAKER OF THE COUNTY ASSEMBLY……2ND RESPONDENT

THE SPEAKER OF THE SENATE……3RD RESPONDENT

THE SENATE……4TH RESPONDENT

PARLIAMENTARY SERVICE COMMISSION……INTERESTED PARTY

COMMISSION ON ADMINISTRATIVE JUSTICE……MICUS CURIAE

JUDGMENT

INTRODUCTION

1. The historic impeachment of the Embu County Governor, Hon. Martin Nyaga Wambora ("**The Governor**"), has been fraught with litigation at every turn. The first impeachment proceedings against the Governor occurred pursuant to a resolution for his removal in the Embu County Assembly passed on 29th January, 2014. This was swiftly followed by proceedings in the Senate, resulting in a resolution of impeachment published in *Gazette Notice number 1052* of 17th February, 2014.

2. By a judgment dated 16th April, 2014, in **Consolidated Petition No 3 of 2014 (formerly Embu Petition No 1 of 2014), Petition No 4 of 2014 (formerly Pet No 51 of 2014 (Nairobi), Judicial Review No 6 of 2014 (formerly Nairobi JR Misc. Applic No. 17 of 2014) and Misc. Applic No 4 of 2014,** this Court (Ong'udi, Githua and Olao, JJs.) invalidated, in entirety, the first impeachment proceedings against the Governor. He was consequently restored to office as Governor. Immediately following the judgment of the Court, a second impeachment motion against the Governor, was commenced in the County Assembly of Embu on 16th April, 2014. This was followed by a confirmatory resolution in the Senate.

3. The consolidated petitions herein were instituted in reaction to the second impeachment motion against **the Governor**. Both Petition Nos. 7 and 8 of 2014, herein, were filed together with notices of motion on 30th April 2014, at Embu under certificate of urgency. At the hearing of the certificates, Ong'udi J, recused herself and forwarded both matters to the Principal Judge. Following interlocutory hearings of the motions, Mwongo, PJ, declined to issue any orders in Petition No 7, but issued a conservatory order in Petition No 8. It is by virtue of that order that Hon. Martin Nyaga Wambora, the 1st Petitioner herein, still holds office as the Governor of Embu today. Subsequently, the two petitions were consolidated and the Chief Justice empanelled this bench to hear them on merit. It is these consolidated petitions that are for determination by this Court.

4. The basis of the impeachment presently complained about, is a replication of the first impeachment process. The substance of the facts giving rise to the complaints allegedly occurred in 2013. The County Government of Embu had advertised tenders for the supply of maize, and had procured services to face-lift Embu stadium. According to the complaint in the County Assembly, the maize was allegedly below quality and did not germinate. Where it did grow, such growth did not exceed more than 20 percent. As for Embu Stadium, it was alleged that the amount spent on it far exceeded what had been budgeted for, and the refurbishment was unsatisfactory. The Members of the County Assembly found this inexplicable as the project had been taken over from the Ministry of Works which had done some of the works.

5. The County Assembly had on the 3rdJanuary 2014, summoned the County Secretary to appear on 6th, January 2014, before the joint committees on Agriculture, Livestock, Fisheries and Co-operatives; Infrastructure; and Youth and Sports. She was to answer queries over seeds supplied to farmers, together with clarifying issues concerning the stadium renovations. Thereafter, the County Assembly recommended her suspension to the Governor pending investigations by the Ethics and Anti-Corruption Commission. The Governor declined to act as recommended.

6. Triggered, inter alia, by the Governor's refusal to act on the County Assembly recommendation, an impeachment motion was tabled in the County Assembly on 16th January, 2014. It was premised on the grounds that the Governor's conduct amounted to gross violation of the Constitution and an abuse of office. This started off the first impeachment process, which was concluded by the Kerugoya High Court's decision, mentioned above, invalidating the impeachment, and reinstating the Governor into office.

7. Hot on the heels of the delivery of the said judgment at Kerugoya, a Notice of Motion dated 16th April, 2014 – the same date the judgment was delivered – was filed in the County Assembly of Embu. The motion was for the removal of the Governor, and was approved by the Speaker on the same day. A notice thereof was given on 22nd April 2014. The Governor was served with a notice requiring him to attend the Assembly on 29th April, 2014, to defend himself. He, however, failed to appear when the motion was due to be discussed in the County Assembly. On 29th April, 2014, an impeachment resolution was passed by the County Assembly. Communication thereof was forwarded the next day to the Senate, which went ahead with the next phase of the impeachment proceedings under its own procedures.

8. In the meantime, the Petitioners filed **Petition Nos. 5 and 6 of 2014** in the Embu High Court, seeking to stop discussion of the motion. They withdrew these soon after the County Assembly passed the resolution to impeach the Governor in the second impeachment proceedings. The details of these petitions have not been indicated.

9. After grant of leave to amend the petition, and allowing for responses, it was mutually agreed that all parties do file written submissions together with lists and copies of authorities. The oral hearing was held on 6th November, 2014.

THE PARTIES

10. The 1st Petitioner is the Governor of Embu elected pursuant to **Article 180** of the **Constitution**. He will hereinafter be referred to variously as the "**1st Petitioner"** or "**Mr Wambora**" or "**the Governor**". The 2nd-33rd Petitioners are male and female citizens, registered as voters in Embu County. They will hereinafter be referred to as "**the Petitioners**". The petitioners were represented by Mr. Paul Muite, Senior Counsel, Mr. Nyamu, Mr Ndegwa and Mr. Njoroge advocates.

11. The 1st Respondent is the County Assembly of Embu established pursuant to **Article 176(1)** of the **Constitution** and is referred to herein as '**the County Assembly'.**

12. The 2nd Respondent is the Speaker of the County Assembly of Embu ("**the Speaker"**) established pursuant to **Article 178** of the **Constitution**. The 1st and 2nd Respondents were represented by Prof. T Ojienda, Senior Counsel, Mr. Njenga and Ms. Jane Mugambi, advocates.

13. The 3rd and 4th Respondents are the Speaker of the Senate and the Senate, established under **Article 93(1)** and **Article 98(1)(e)** of the **Constitution** respectively. They neither filed any pleadings nor did they appear in these proceedings at any stage. They were unrepresented.

14. The Parliamentary Service Commission (hereinafter the '**PSC'**) was admitted as an Interested Party. It is established pursuant to **Article 127** of the **Constitution**. It was represented by Mr. Njoroge and Ms. Thanji, advocates.

15. The Commission on Administrative Justice was admitted as a friend of the Court and shall hereafter be referred to as the **'Amicus**'. It is established under **Article 59(4)** of the **Constitution** and the **Commission on Administrative Justice Act, 2011**. Its counsel on record was Mr. Chahale, advocate, who did not appear at the oral hearing.

THE AMENDED PETITION

16. In the amended petition dated 23rd May, 2014 and supported by the affidavit of **Aloise Victor Njagi** sworn on the same date, the petitioners sought the following reliefs from this Court:

"a) A declaration that the Petitioners and Members of the Public are entitled the right to participate in the process of removing the Governor of Embu County from office and the same has been violated.

b) That the court be pleased to establish the required threshold of the members of public who should participate under Article 118(1) (b), Article 174(a) and (c) and Article 196 (1)(b).

c) That the honorable court do make a declaration that Public Participation is a Pre-condition to proceedings for removal of a governor under article 181 of the Constitution.

d) A declaration that the act of removing a County Governor is not an exclusive affair of the county assembly and the Senate.

e) Declaration that the resolution passed by the County Assembly on 29th April, 2014 is null and void for having been passed by the County Assembly in contravention of County Assembly of Embu Standing Order No. 86 and the Senate in toto contravention of Standing Order No. 92 of the Senate Standing orders.

f) Declaration that the impeachment passed by the Senate pursuant to a resolution passed by the County assembly of Embu on 29th April, 2014 is null and void.

g) Declaration that Section 33 of the County Government Act is unconstitutional for being in conflict with and flying over the face of Article 1, Article 2(1) and (2), Article 10, Article 118 (1) (b), Article 174 (a) and (c) and Article 196 (1) (b) for failing to allow public participation and involvement in the removal of a county Governor.

h) That the Honorable Court be pleased to issue an order of certiorari to remove to the High Court and quash the resolution passed by the County Assembly of Embu dated 29th April, 2014 and the Senate on the 13th May 2014 to remove (the) 1st Respondent (sic) as the Governor of Embu County.

i) That the Honorable Court be pleased to issue an order of certiorari to remove to the High Court and quash the resolution passed by the Senate dated 13th May, 2014 to impeach the Governor of Embu County.

j) A declaration that the threshold of the impeachment of a Governor as convisaged (sic) under Article 181 of the Constitution were read together with other provisions (sic).

k) A declaration that the Petitioners herein are entitled to the full protection of their right to information and the same right has been violated.

l) Costs of the suit."

17. To assist the Court, the petitioners set out at Paragraph 92 of the Amended Petition, what they styled as the **"Questions for interpretation"** to be answered by the Court as the main, or part of the key issues for determination. These were set out in the Amended Petition as follows:

"92. The Petitioners proposes for a (sic) Constitutional interpretation of the following questions.

a. ***Whether the action of removing and impeaching the Embu County Governor without involving the Petitioners violates the Petitioners' rights? If so what is the expected threshold of the number of members of public who should participate in the removal process and what criteria would be applied in facilitating the public participation?***

b. ***Whether the action of removing and impeaching the Embu County Governor without involving the members of the public and the petitioners violated their sovereign power to directly participate in the removal and impeachment process?***

c. ***Whether the act of removing a County Governor ought to be an exclusive affair of the county assembly and the Senate?***

d. ***Whether the resolution passed by the County assembly on 29th April, 2014 in toto disregard of the Embu County Assembly Standing Order No. 86 Order and Senate Standing Order No. 92 is valid and capable of initiating the removal of the Governor?***

e. ***Whether if the answer to the question (d) above is in affirmative, whether the said motion can form the subject of debate in the Senate and its committee under section 33 (3) of the County Government Act No. 17 of 2012?***

f. ***Whether section 33 of the County Government Act is unconstitutional for being in conflict with and flying over the face of Article 1, Article 2 (1), (2), Article 10, Article 118 (1) (b), Article 174 (a) and (c) and Article 196 (1) (b) for failing to allow public participation and involvement in the removal of a County Governor?***

g. ***Whether the petitioners' right to information under Article 35 has been violated?***

h. ***Whether principles of natural justice have been violated by both the County Assembly and the Senate? "***

THE PETITIONERS' CASE

18. It was the Petitioners' case that the removal and impeachment of Mr. Wambora by the Respondents is inconsistent with the provisions of **Articles 1, 2(1), (2)** and **(5), 3(1), (2), 4(2), 10, 118(1)(b), 174(a)** and **(c)** and **196(1)(b)** of the **Constitution** and those rights as enshrined under the Bill of Rights; in particular **Articles 38(1)** and **35**.

19. In opening their submissions, the Petitioners questioned the propriety of the appearance of the PSC in the suit as it had not been sued. They argued that in the circumstances, there were limits to its participation in the proceedings.

20. The Petitioners' opposition to the inclusion of the PSC in these proceedings was also based on the fact that the Senate had not entered appearance in the proceedings. It was their submission that the Constitution establishes the PSC with responsibility for matters under**Article 127(6)** of the **Constitution**. As such, the actual legislative functions of the Senate are not part of the work of the PSC. Thus, the Senate should have been the proper party appearing and not the PSC.

21. The Petitioners also argued that the petition was necessitated by the injustices meted on the Governor. Counsel stated that the impeachment proceeded despite there being no nexus between the alleged violations complained of and the Governor's specific actions or conduct. It was the Petitioners' submission that the Governor is not the accounting officer for the County under either **Article 226** of the **Constitution** or **Section 149** of the **Public Finance and Management Act, 2012** or the **Public Procurement and Disposal Act, 2005.**

22. Counsel pointed out that the High Court in **Martin Nyaga Wambora & 4 Others v Speaker of the Senate & 6 others, [2014] eKLR (Kerugoya, Petition No. 3 of 2014)(**hereinafter **"Wambora 1"),** made a finding that in order to remove the Governor from office, there has to be a nexus between the Governor and the conduct complained of. The Petitioners noted that the Court also found that there has to be gross violation of the Constitution or other written law by the Governor. It was their submission that the Court held that it was for this Court to make the decision on whether the alleged conduct was a gross violation of the Constitution.

23. The Petitioners submitted that the basis for the charges against the Governor was tenders issued by officers of the County; that the Governor had no role in procurement and tendering issues; that there were specific officers of the County who are vested with the responsibility and legal obligation to handle procurement and related matters as accounting officers; that there was no basis in law for his removal since in any event investigations into the procurements had not found him liable; and consequently, that the threshold required for his impeachment had not been achieved.

24. With regard to the criteria and threshold for removal of the Governor, the Petitoners invited the Court to consider the Court of Appeal decision in **Martin Nyaga Wambora & 3 Others v Speaker of the Senate & 6 Others [2014] eKLR (Nyeri, Civil Appeal No. 21 of 2014) (**hereinafter **the "Wambora 1 Appeal")**. The Court there held, Counsel submitted, that there must be proof of personal wrong-doing by the Governor. It was counsel's further submission that the seriousness with which impeachment is treated in law is exemplified by

the fact that grounds for removal of a Governor under **Article 181** of the **Constitution** is in *pari materia* with the criteria for the removal by impeachment of the President under **Article 145** of the **Constitution**. The allegations with which the Governor was charged were not serious in those terms.

25. It was submitted for the Petitioners that what is *'gross violation'* amounts to a serious crime against the law, and is an issue of law for determination by the Court. Such serious crime must be clearly demonstrated. It was counsel's submission that the Court of Appeal in the ***Wambora 1 Appeal*** defined '*gross violation*' to include proof of the personal involvement of the Governor in the subject matter of the charge.

26. Counsel faulted the High Court in ***Wambora 1*** for not making a determination on the question whether there was a nexus in the acts alleged to have been committed and the involvement of the Governor. The 1st Petitioner's case was that he was not involved in the tendering and procurement process, as there are specific officers who deal with such aspects as provided under **section 149** of the **Public Finance and Management Act.** It was contended that the person who should have been summoned and charged was the accounting officer or the County Secretary, who are the responsible officers. The Court was also told that investigations pertaining to the issue of the seedlings and the stadium were carried out, and he was not found culpable.

27. The Petitioners asserted the High Court's jurisdiction to interfere with the actions of the County Assembly and Senate. They submitted that although the Court of Appeal in ***Wambora 1 Appeal*** held, under the core function test, that no organ should interfere with the functions of the other, the High Court as regards supervisory jurisdiction, derives its mandate from **Article 165 (3)** and **Article 165(6)**. Thus, it was submitted that the removal of a Governor is a political as well as a quasi-judicial process. Accordingly, the petitioners argued, where the High Court exercises its supervisory jurisdiction, it cannot be said to be interfering with other organs under the separation of powers prism. It was contended that supervisory jurisdiction is exclusive to the High Court and when exercised, it does not amount to interference with other state organs.

28. On public participation, it was the Petitioners' contention that they were entitled to fully participate in the removal and subsequent impeachment of the Governor by virtue of **Articles 1(2)** and **10** of the **Constitution**. In particular, it was contended that the removal and impeachment of the Governor amounts to "any other business" of the county assembly as envisaged under Article **196(1)(b)** of the **Constitution**. Further, that under **Article 174(a)** and **(c),** of the **Constitution**, in terms of the promotion of the objects of devolution, accountable exercise of power and enhancing self-governance and participation of the people in the exercise of state power, the Petitioners were entitled to directly participate in the respondents' business, whatever the nature of such business.

29. It was submitted that the right to public participation consists of at least two elements: First, a general right to participate in public affairs, including engaging in public debates and dialogue with elected representatives at public hearings, which necessarily demands that citizens have the essential information and effective opportunity to exercise the right to public participation. Secondly, it involves the more specific right to vote or to be elected.

30. It was argued that the level of public participation expected is that set out in the case of **Robert N. Gakuru & Others v The Governor Kiambu County Petition No. 532 of 2013.** In that case, Odunga, J. stated that county assemblies are obliged in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively, and ought to take all reasonable measures to ensure that as many of their constituents are aware of the intention to pass legislation.

31. It was also submitted that the evidence submitted by the 1st Respondent showing that a committee had previously gone round talking to farmers, amounted to no more than a mere investigation. At that point, the impeachment process had not commenced, and the committee's actions did not amount to public participation in the impeachment process itself.

32. The Petitioners submitted that as no affidavit had been filed to show that there was public participation of the people of Embu County, the exercise fell afoul of the principles of good governance. Counsel cited the case of **Doctors for Life International v The Speaker of the National Assembly & Others (CCT 12/05) [2006] ZACC 11; 2006 (12) BCLR 1399(CC); 2006 (6) SA 416(CC) (17 August 2006)** in support of the necessity of public participation.

33. It was also averred that lack of public participation infringed the Petitioners' civil and political rights under **Articles 1, 3** and **25 (a)** of the **International Convention on Civil and Political Rights** and **Article 20** of the **African [Banjul] Charter on Human and Peoples' Rights.**

34. Additionally, the Petitioners submitted that **section 33** of the **County Governments Acts**, **2012,** (hereinafter referred to as the Act) which sets out the procedure for the removal of a governor by the Senate and County Assembly, was unconstitutional. It was argued that the provision is in conflict with **Article 1, Article 2 (1), (2), Article 10, Article 118 (1) (b), Article 174 (a)** and **(c)** and **Article 196 (1) (b)** of the **Constitution.**

35. The Petitioners asserted that **Section 33 of the Act**:

> ***"…lacks an integral part of the letter and spirit of the Constitution";***
>
> and that the cited Articles of the Constitution create:
>
> ***"…an obligation and duty on the part of the senate and the county assembly to facilitate public participation and involvement in the legislative and other business that fundamentally affect their socio, economic or political affairs".***

36. It was the petitioners' case the said **Section 33**, as enacted, denies them the right to participate in matters pertaining to the removal of the Governor. As such the Petitioners' sought a declaration that **section 33** of the Act is unconstitutional.

37. On the right to information, it was the petitioners' case that according to **Article 35** of the **Constitution**, they are entitled to access information relating to the running of the affairs of the 1st Respondent and held by the state regarding the impeachment, which information should have been widely published. This right was violated by the County Assembly, which did not avail such access. It was counsel's submission that the state must publish and publicize any information affecting the nation. This, it was submitted, must be done through a recognized instrument such as the Kenya Gazette. The Petitioners' contention was that the mere fixing of notices on the notice board was insufficient and did not amount to publication.

38. The Petitioners contended that during the second impeachment process, there was bias. This was argued to be based on two facts: The first was that the Speaker of the County Assembly was facing contempt proceedings at the time of approving the motion for removal of the Governor and was thus biased. The second was that during that impeachment process before the Senate, the Special Committee constituted comprised of the same members as had sat in the first impeachment process. This, it was argued, was unfair and unreasonable since those very members had in the earlier impeachment proceedings found the Governor liable. It was urged that this contravened **Article 47** of the **Constitution**. Further, that the principle of *nemo judex in causa sua* is applicable where there is a real likelihood of bias. The Petitioners contended that, bias was clearly manifested in the Senate report which was not distinct from the one made in the earlier impeachment proceedings. Counsel cited **Halsbury's laws of England 4th Edition pages 86 to 90** on the issue of bias.

39. For all these reasons the Court was urged to nullify all the proceedings for removal of Mr. Wambora from office as Governor of Embu County.

40. It was contended that the proceedings before the County Assembly were conducted in contravention of the*sub judice* rule since there were court proceedings relating to the issue before the said Assembly

THE RESPONDENTS' CASE

41. Counsel, for the 1st and 2nd Respondents, relied on the affidavit of Hon. Justus Kariuki Mate, the Speaker of the County Assembly of Embu, who is also the 2nd Respondent herein. Deposed on 3rd June, 2014, on his own behalf and on behalf of the 1st Respondent, the affidavit outlined the constitutional and statutory foundation of the County Assembly of Embu, and how its membership is constituted. He pointed out that the Speaker is an *ex officio* member of the County Assembly.

42. The deponent further averred that the role of the County Assembly included exercising an oversight role over the County Executive and any other County executive organs. The object was to ensure there was accountability and transparency in the execution of the functions of the County executive and in the application of the resources of the County Government. He outlined the functions of the Speaker of the County Assembly under **Article 178 of the Constitution** as essentially to preside over the sitting of the County Assembly and to facilitate the orderly and effective sitting of the County Assembly of Embu.

43. The Respondents noted that the roles of the members of a County Assembly are set out under the provisions of the **Act**, which include the following:-

> ***"a) Maintain close contact with the electorate and consult them on issues before or under discussion in the County Assembly.***
>
> ***b) Present views, opinions and proposals of the electorate to the County Assembly.***
>
> ***c) Provide a linkage between the County Assembly and the electorate on public service delivery."***

44. The Speaker highlighted provisions that enjoin the County Assembly to consider matters of accountability and transparency of the County Government; the proper application of County resources for the better welfare and provision of the electorate at the grass roots level; and to take appropriate action to ensure that the resources available to the people were applied optimally and transparently. In realising these provisions, he stated, the County Assembly is provided with various powers in law through which it exercises its oversight authority over the County executive and the various organs and offices in the County Government structure which included:-

> ***"i. Approval of nominees for appointment to County public offices as may be provided in the County Government Act.***

ii. Approval of the budget and the expenditure of the County Government as provided under the provisions of section 8(c) of the County Government Act.

iii. Approval of borrowing by the County Government as provided under section 8 (d) of the County Government Act.

iv. Approval of County development planning

v. Approve the establishment or abolition of the offices in the County public services as provided under section 62 (2) of the Act

vi. Approving County Executive members."

45. In his affidavit, the Speaker averred that the County Assembly, in its oversight role, is given power in law to remove various officers within the County government structure. These included powers for:

"a) Removal of speaker under section 11 of the County Government Act

b) Removal of members of the executive committee under section 40 of the Act

c) Removal of the governor and Deputy Governor under Article 181 of the Constitution as read together with section 33 of the Act."

46. According to him, the County Assembly is mandated in law to establish committees for such general or special purposes as it considers fit and necessary for the efficient execution of its constitutional mandate. In so doing, the County Assembly of Embu has constituted, among others, a Committee for Agriculture, Fisheries, Livestock and Co-operatives as provided for under **Standing Order 191(5) of the Embu County Assembly** for the following purposes:-

"a) To investigate, inquire into and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the departments.

b). To study and review all the County legislations referred to it.

c). To study the program and policy objectives of the departments and the effectiveness of the implementation.

d). To investigate and inquire into all matters relating to the departments as it may deem necessary and may be referred to them by the County Assembly

e). To vet and report on all the appointments where the Constitution or any law requires the County Assembly to approve.

f). To make reports and recommendations to the County Assembly as often as possible including the recommendation of proposed legislation."

47. The Speaker averred that a first motion of impeachment was filed on 16th January, 2014, which process had proceeded through the Senate, and an impeachment decision was passed. However, the impeachment had subsequently been nullified by the High Court.

48. Consequently, the process of removal of the Governor was again commenced on 16th April 2014, when he received a new Notice of Motion for the removal of the Governor from office. After confirming that there was no pending suit on the matter and that there was no order issued by the Court restraining the County Assembly from being seized of the motion, he approved the motion. Notice of the Motion, he said, was presented to the Assembly by the mover, **Hon. Ibrahim Swaleh,** on the 22nd April 2014.

49. He averred that, applying the guidance of this Court in its judgment in ***Wambora 1****(supra),* he directed that a notice of the motion be served on the Governor for his attendance on the 29th April, 2014, when the motion was to be moved. However, when the motion was served on him, the Governor made efforts to have the matter amicably settled, and there was extensive discussion of it in public fora and the media. Despite the 1st Petitioner's efforts to settle the impeachment amicably, the motion was moved on 29th April 2014 before the Assembly where the 1st petitioner was called upon to respond to the allegations levelled against him.

50. According to the deposition, the Governor failed to appear before the Assembly and instead filed Embu High Court **Petition No. 5 of 2014 Hon. Martin Nyaga Wambora v The County Assembly of Embu and Others** seeking interim orders to stop the County Assembly from deliberating on the Motion. This time the Court did not grant any conservatory orders and consequently, the suit together with Embu High Court **Petition No. 6 of 2014** which had been filed by the 2nd Petitioner and others, were withdrawn.

51. The deponent further asserted that **Petitions Nos. 5** and **6** were filed with the sole intention of pre-empting and frustrating the debate on the removal motion before the County Assembly, and that when they did not yield any conservatory orders as intended, the petitioners withdrew the petitions. The Motion at the County Assembly was passed and the decision communicated to the Senate. Subsequently, the Senate constituted a special committee to hear the charges against the 1st Petitioner; that a hearing was conducted on 11th May

2014; that parties appeared in the company of their advocates; and that after the hearing, the Senate found that three of the charges against the 1st Petitioner had been substantiated and on 13th May 2014, by a near unanimous vote, the Senate proceeded to remove him from office by way of impeachment.

52. With regard to the complaint that the Governor was not procedurally removed, the Respondents contended that this petition should be dismissed as unmeritorious for the reason that the petitioners failed to demonstrate that there was any breach of the procedure in respect of the removal of the Governor by way of impeachment. The petition, they argued, had been brought by way of collateral attack to the findings against the Senate. They asserted that the Governor was twice afforded the opportunity to raise issues in his defence against the charges at the County Assembly of Embu on 29th April 2014, and before the select committee of the Senate on 11th May, 2014. On both occasions, however, he failed to appear either by himself or to lead witnesses to refute the allegations made against him. The County Assembly of Embu and the Senate were both guided by the decision of this Court in ***Wambora 1*** with regard to the applicable procedure and the role of the Assembly and the Senate in their mandates.

53. The Respondents asserted that this petition was effectively an appeal from the decision of the County Assembly of Embu and the Senate, which this Court had no jurisdiction to determine. He added that the threshold required for removal of a Governor was expressed by the number of votes required to pass such a resolution, which included a two-thirds majority at the Assembly and a majority at the Senate.

54. The Respondents submitted that the threshold required in the removal of the Governor under **Article 181** of the **Constitution** was realised since the charges were based on well documented evidence that was availed to both to the County Assembly and the Senate; that the Governor's written responses to the charges were found to be inadequate; and that there was no jurisdiction for appeal to this Court against a finding of the County Assembly and Senate under the doctrine of separation of powers; that the findings of the County Assembly and Senate were final and binding upon all parties herein; and that there was no basis for the Court to interfere.

55. On this submission, the Respondents relied on the case of **Doctors For Life** (*supra*) which discusses the law on separation of powers, where it was held, *inter alia*, that:

> "…***what the court should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligations that parliament is required to fulfil in respect of the passage of laws, on one hand and respect which they are required to accord to other branches required by the principle of separation of powers.***"

56. It was the Respondents' submission that the County Assembly and the Senate by virtue of their composition and political orientation are the best placed persons to make a proper decision or judgment with regard to the applicable standard and threshold for the removal of a governor. They argued that impeachment by its nature is a quasi-judicial and political question. This explained the rationale as to why the mandate to exercise that jurisdiction was properly vested in the County Assembly and Senate. As such, the Court has no jurisdiction to take out a merit review on such a process by seeking to replace the opinion of those two organs with its own.

57. The Respondents further argued that the Governor had failed to demonstrate any breach of his constitutional rights in the process aforesaid, having been given notice to defend himself; that he failed to offer any substantive defence to the charges levelled against him; and that the rights pleaded by the petitioners in the present petition were not absolute rights since they were limited by the very Constitution that provides for them – including providing for the removal of a governor.

58. It was urged that **Article 181 of the Constitution** sat on the premise that even where a County Governor is validly elected under the provisions of **Article 180** and is seized of a bona fide right under **Article 38** to hold a political office to which he has been elected, he could be validly removed from office for such reasons as are set out under **Article181.** As such, the operation of **Article 181 of the Constitution** and statute could not by itself without proof of a breach of due process, constitute an affront to the constitutional rights of the 1st Petitioner.

59. The Respondents stated that the finding of the special committee of the Senate was that the Governor had clearly failed in the discharge of his functions and in the role of the office of the Governor, resulting to the loss of public funds. This loss occasioned disenfranchisement, disadvantage, inconvenience, injustice and inequity upon the people of the Embu County.

60. On the Petitioners' allegations that the Senate select committee was tainted with bias, the Respondents argued that this was an unfounded and baseless claim. They noted that the court in ***Wambora 1*** did not make a finding that the select committee had misconducted itself in any way in the hearing of the matter; and that the Senate is established under **Article 93 of the Constitution** with a fixed membership set out under **Article 98** for a fixed five year term. Thus, in the absence of concrete evidence on bias in the present case, there would be no basis to impute bias on the part of the

Senate merely on the ground that the Governor was required to attend before the same members as those of the earlier select committee.

61. Further, the Respondents pointed out that the mandate of a select committee appointed under **section 33(3)(b) of the Act** is purely investigative, and does not make the decision as to whether or not a governor should be removed from office. That is a reserve of the Senate in plenary under **section 33(7)**. The Senate is enjoined under **section 33(6)(b)** to hear a governor even where a select committee finds that the charges have been substantiated. It is from this hearing that the Senate makes the determination by a vote on whether such a governor should cease to hold office.

62. On public participation, the Respondents argued that the complaints giving rise to the investigations and subsequent charges against the Governor were made by the public to their elected representatives. In turn, the representatives raised complaints in the County Assembly, prompting investigations against the Governor in respect of mis-procurements by his office. For example, with regard to the bad maize seed, extensive field research had been carried out with input from the farmers who were affected, and findings were made and considered. Consequently, findings were made by both the Assembly and the Senate that the seeds were unlawfully procured to the detriment of the farmers.

63. It was contended that the petitioners were not an objective public, but a diehard group of ardent supporters of the Governor who expressed clear bias against the Assembly and its officials in their petition. This explained why they constantly alleged that there was no public participation in the removal process. The Respondents further argued that the County Assembly, in fulfilment of the statutory requirement to involve the public in its business, developed infrastructure for public participation in July 2013. This included the establishment of public contact offices in each of the County Assembly wards and the recruitment of ward staff to facilitate public participation. Thus the County Assembly, through the office of the Clerk, disseminated notices of all its business to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose.

64. The Respondents argued that the requirement for public participation under **Article 196** of the **Constitution** does not create an obligation for establishment of a referendum of all citizens on all business of the Assembly. All that is necessary is that there is appropriate notice and a forum in which the public could participate in the business of the Assembly. Given that the notices by the Assembly had from time to time received various responses and input from the public – which information was maintained by the office of the Clerk – that amounted to public participation.

65. It was submitted that this Court, in examining whether or not there was public participation, has to consider the nature of the business and the context under which a specific undertaking is done. The Respondents cited the case of **Commission for implementation of the Constitution v Parliament of Kenya and another [2013] eKLR** where the court held that:

> **"*The National Assembly has a broad measure of discretion in how to achieve the object of public participation. How this is effected will vary from case to case but it must be clear that a reasonable level of participation has been afforded to the public*".**

66. They also cited the case of **Doctors for Life International v The speaker of the National Assembly and Others,** applied with approval in **Robert N. Gakuru & Others v Governor, Kiambu County [2014] eKLR** where the court held that:

> **"*Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes*".**

67. The Respondents contended that there was reasonable public participation sufficient to satisfy the requirement of **Article 10** as read together with **Article 196** of the **Constitution,** adding that the process of removal of a governor was a quasi-judicial and political process; that when an Assembly sits as a quasi-judicial body it exercises its Constitutional and Statutory mandate donated by **Article 181** of the **Constitution** and **Section 33** of the Act**;** and that it acts like a court receiving a complaint, examining facts, considering the defence offered by the person against whom the charges are brought and making a determination on whether or not the charges had been established.

68. It was also argued that the nature and extent of public participation in legislation and in removal of a governor would differ for the reason that the impact of promulgated legislation is long-term and affects everyone subject to it; in respect of a governor's removal the impact is less felt and concerns mostly the governance aspect. It was further submitted that in its legislative function the Assembly is enjoined to be more of a consultative forum receiving proposals and facilitating public participation. When it is performing a quasi-judicial and political function such as removal which concerns examining

and investigating a complaint or charges and making a determination thereon, it acts more like a court.

69. It was submitted by the Respondents that **Section 33** of the **Act** provides the procedural framework within which a removal charge under **Article 181** of the **Constitution** is predicated. Accordingly, in considering the question whether or not there was public participation in the process, one must consider how such participation would find expression within the framework of this law. In the context of a charge against a governor under **section 33** of the Act the nature and form of public participation required is specific to the various processes set out under the law that provide for the hearing, investigation and determination of the charges in issue. It was further submitted that on 29th April 2014, the County Assembly did in fact hold the debate in public as there was a public gallery register maintained by the Clerk of the Assembly and Senate as enjoined by **Article 196** of the **Constitution.**

70. On the issue of *sub-judice*, the Respondents faulted the Petitioners in their claim that the motion to impeach the governor was passed when **Embu Petition Nos 5 and 6 of 2014** had not been determined by the Court. They referred to **section 6** of the **Civil Procedure Act** and **Standing Order No. 86** of the Embu County Assembly which is *pari materia* **standing order 92 of the Senate Standing Orders** that provide for the principle of *sub judice*. They argued that **Section 6** of the **Civil Procedure Act** provided that for a matter to be *sub judice* it had to be considered against a previously instituted suit between the same parties on the same issues. In this case, however, the Motion before the Assembly was filed on the 16th April 2014 and notice given on 22nd April 2014, whereas **Embu Petition Nos 5 and 6 of 2014** were filed on the 28thApril 2014. Accordingly, when the motion before the Assembly was instituted there was no pending matter in Court in relation to the issues covered by the motion.

71. In this case, the petitioners had not demonstrated that Embu **Petition Nos**. **5** and **6 of 2014**, were active, or had been set down for trial, as no notice or proceedings had been exhibited to show that the matters were under active prosecution. Further, no orders of the court had been produced.

72. The Respondents also pointed out that under **Standing Order 86(2)** of the **County Assembly of Embu Standing Orders** it is for a member alleging *sub judice* to demonstrate that the discussion of such a matter in the Assembly would prejudice its fair determination. Indeed, it is for a member, under **standing Order 86(4),** to adduce evidence to show that the matter before the house was *sub judice*. The argument as to sub-judice was available only to a member of the Assembly in the specific sitting and not to third parties who are not subject to the standing orders.

73. The respondents submitted that the petitioners had not established any basis for their claim that **section 33 of the Act** is unconstitutional. Instead, they argued that **section 33** draws its life from **Article 181** of the Constitution, the substantive basis for impeachment, and noted that **Section 33** contains the procedural basis for operationalization of **Article 181.** Thus, the provision is not unconstitutional.

74. The Respondents relied on the case of **Walter Barasa –vs- The Cabinet Secretary Ministry of Interior and others Pet No 488 of 2013** where the Court considered the principles applicable to the question of whether or not a statute ought to be declared unconstitutional. Key among the requirements, is that the impugned section should be juxtaposed to the relevant Article, and a case made out as to how the section fails to square out with the Article. This had not been done. They therefore prayed that the petition be dismissed.

THE INTERESTED PARTY'S CASE

75. The Interested party filed its replying affidavit through **Jeremiah M Nyegenye,** the Clerk of the Senate. He stated that the orders sought by the 1st petitioner were a ploy to prevent the Senate from discussing matters arising from the decision of the County Assembly of Embu to remove him as the Governor of Embu County. He added that the orders sought infringed on the powers, privileges and immunities of Parliament as set out under **Article 117** of the **Constitution** and **sections 4** and **29 of the National Assembly (Powers and Privileges) Act Cap 6,** Laws of Kenya.

76. On the issue of public participation, the Interested Party submitted that a quasi-judicial body having the role of determining gross violation of the Constitution need not take views from the public, as this was a matter of fact and law.

77. The Interested Party concurred that **Articles 118(1)(b)** and **119(1)(b)** require Parliament and the County Assemblies to *"facilitate public participation and involvement in the legislative and other business"* of the houses, and their committees. This provision, they submitted, must be read in the light of **Article 259**, which requires that the Constitution *"shall be interpreted in a manner that promotes good governance"*. It was argued that the interpretation that would achieve this, is that the sort of public participation envisaged in proceedings for removal of a governor would be such as are open to the public so that they are aware of the charges that have been levelled against him.

78. It was also submitted that the Constitution and the Act have given a special quasi-judicial role of impeachment to the County Assemblies and the Senate comprising people who, under **Article 1(2),** exercise the

sovereign power of the people as democratically elected representatives. This was strengthened by the case of **Inakoju & 17 Ors v Adeleke & 3 Ors (2007)4 NwlR (PT1025)423 S.C**. which upheld **Akintola v Aderemi All NLR 442 (1962) 2 SCNLR 139** where it was stated that the proceedings leading to removal of a governor should be available to any willing eyes, and the public can see watching from the gallery.

79. With regard to the alleged unconstitutionality of **Section 33** of the Act , the Interested Party relied on the decision of the Supreme Court of the Phillipines in **Andres Sarmiento et al v. The Treasurer of the Phillipines (GR No 125680 & 126313, September 4, 2001)** where the court stated:

> ***"….In fine, jurisprudene is replete with cases that every law has in its favour the presumption of constitutionality, and to justify its nullification, there must be a clear and unequivocal breach of the Constitution, not a doubtful and argumentative one.***
>
> ***A statute or part thereof, will be sustained unless it is plainly, obviously, palpably and manifestly in conflict with some provisions of the fundamental law"***

80. The Interested Party submitted that the petitioners had not discharged the burden of proof to establish the unconstitutionality of **Section 33 CGA**.

81. The Interested Party submitted that the proceedings taken out by the petitioners should be struck out on the ground of incompetence. It was submitted that non-joinder of the Attorney General, was a fatal breach of **Section 12** of **the Government Proceedings Act,** which requires that any proceedings by or against the Government should be instituted against by or against the Attorney General.

AMICUS CURIAE'S CASE

82. The *amicus curiae,* through counsel, submitted that they are statutorily mandated to investigate any conduct in state affairs in both the national and county governments, dealing largely with issues of administrative justice.

83. The Amicus submitted that the process of impeachment of a governor is as much a parliamentary process as it is a quasi-judicial one. As such, Parliament cannot claim exclusive jurisdiction particularly where there are allegations of violation of the Constitution or fundamental rights. It added, however, that the Court can only interfere after the parliamentary process had been concluded by considering the decision making process. Counsel submitted that interference by the Court, when the proceedings were pending before Parliament, would go against the principle of separation of powers as that would interfere with the parliamentary mandate.

84. On the threshold for the removal of a governor, it submitted that under **Article 181** of the **Constitution,** the term gross violation would depend on the facts of a case. They cited the Supreme Court of Nigeria in **Inakoju (supra)** in which the Court gave the following guidelines for determining *"gross violation",* namely that the conduct must:-

> **(a) Be serious substantial and weighty;**
>
> **(b) There must be a nexus between the governor and the alleged gross violation of the Constitution or any other written law;**
>
> **(c) The Charged framed against the governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law ;**
>
> **(d) The charges as framed must state with a degree of precision the Article or even sub articles of the Constitution or the provisions of any other written law that are alleged to have been infringed.**

85. Counsel noted that **Article 181** provided for "abuse of office and gross misconduct" as one of the grounds for removal. He submitted that County Assemblies, being at the infant stages of their formation, may not have the infrastructure to conduct the necessary investigation to affirm whether a governor had abused his office or power or grossly misconducted himself. Amicus was of the view that under **Article 59(4)** of the **Constitution** the Commission on Administrative Justice has power to investigate complaints of abuse of power, or of conduct in state affairs, or acts or omissions in public administration in any sphere of government that is alleged or suspected to be prejudicial or improper.

86. It was submitted that it would be proper for the County Assemblies, the Senate or National Assembly when faced with the business of impeachment of a public or state officer on the grounds of abuse of powers or office, or gross misconduct, to refer the same to the Commission on Administrative of Justice for investigations and thereafter upon receiving the resultant report from the Commission proceed with the process. This would provide the basis for proper investigations thereby allaying fears of unfairness or administrative injustice.

87. It was further submitted that in light of **Articles 35** of the **Constitution** the objective of public participation in matters of governance was a principle adopted by the Kenyan people under **Article 10** of the **Constitution.** The object was to enable the people to be involved in the decision making process. In this regard, it was argued, the state is obliged to facilitate the involvement of the people and in this instance the County Assembly was required to facilitate public involvement in the legislative

and other business of the Assembly and its committees. It was further submitted that **Article 181** provided for grounds for the removal of a governor and **section 33** set out the removal procedure. It was submitted that where the law or the Constitution places a particular responsibility on a certain body, person or authority to perform that function, then it is the exclusive duty of that person, body or authority to perform that function.

88. Amicus was in agreement with the Interested Party that law places the function of the actual removal of a governor under the relevant County Assembly and the Senate. In instances where committees comprising members of the County Assembly have been formed and have inquired into certain conduct of a governor by inviting those privy to the allegations against the governor, that amounts to involving the public in the process. When the stage of conducting the actual removal proceedings is reached, it cannot be argued that members of the public ought to be involved as this is a jurisdiction that is exclusively granted by the Constitution and the law to the County Assembly and the Senate.

89. The Amicus argued that a provision of general application such as **Article 196(1)** of the **Constitution** cannot be invoked to defeat a jurisdiction granted by dint of the Constitution to a certain person, body or authority. If it were to be construed that the general public must be involved in the actual removal proceedings then the impeachment process would be converted from a quasi-legal process to a purely political process. In such case it could not be said that good governance would be promoted. The Amicus asserted that the principle of public participation cannot be construed to mean that there must be a direct physical involvement in all instances of parliamentary and county assembly business, and each case must be construed on its own facts.

90. It was submitted that a proper interpretation of **Article 35** on the right to access information held by the state, would suggest that the state was under an obligation to provide information it held to any citizen who had sought it. This would presuppose that the individual in need of certain information would have to prompt the state to provide the same. **Article 35(3)** then provides that the state should publish and publicize any important information affecting the nation. Counsel added that as it was not in contention that the removal of a governor is one piece of information that the state ought to publish and publicize, the court should be careful to pronounce at what stage the state is obliged to publish such information.

91. The Amicus further submitted that its view was that the information should be published at the end of the process so that the end result is communicated to the public. Counsel pointed out that the other reason for the duty to publicize information for the public was to ensure that the public are duly informed, and not so that the public may participate in those particular proceedings. One of the objectives of **Article 35(3),** it was contended, was to keep the public informed of happenings that affect the nation, so as to avoid a situation where decisions that affect the nation are made without such information being relayed to the public.

92. Finally, it was submitted that the removal of the 1st Petitioner was in the public domain through all forms of media as well as publication in public places. It therefore cannot be said that the matter had not come to the attention of the public. However, Counsel was clear that the duty of the state to publish and publicize information was neither diminished nor ousted, and that such failure in the situation such as the present case where the matter is actually in the public domain, could not alone invalidate the impeachment process unless for other reasons.

ISSUES FOR DETERMINATION

93. Having carefully listened to the parties and having considered the pleadings, we think that the issues which this Court is required to determine are as follows:

1. **Whether the petition is competent; which incorporates the issues as to:**
   a) **Non-Joinder of the Attorney General.**
   b) **The role of the Parliamentary Service Commission in the Petition.**
   c) **Whether the Petition was brought in good faith.**
2. **Whether the proceedings to impeach the Governor in both the County Assembly and the Senate were *sub-judice.***
3. **Whether Section 33 of the County Governments Act, 2012 is unconstitutional for being in contravention of Article 1, Article 2(1) and (2), Article 10, Article 118(1)(b); Article 174(a) and (c) and Article 196(1) (b).**
4. **What is the process and procedure for removal of a Governor?**
5. **Whether the Rules of Natural Justice were complied with in the removal of the Governor.**
6. **Whether the removal of the Governor requires public participation, and if so; whether there was public participation; and whether Article 35 of the Constitution on access to information was complied with.**
7. **To what extent, if any, can the Court intervene in the removal process?**
8. **Who should bear the costs of the petition?**

ANALYSIS AND DETERMINATION

94. We now deal with each of the issues identified for determination.

Whether the Petition is competent

95. The first issue raised in these proceedings touching on the competency of the consolidated petition is the failure to join the Attorney General to these proceedings.

96. The Petitioners also took issue with the participation of the PSC in these proceedings. According to them, **Article 127** of the **Constitution** establishes the said Commission and at **clause (6)** thereof provides that it is responsible for the efficient functioning of Parliament. However the actual legislative work is not part of the functions of the Commission. It was therefore submitted that if the Senate and the Speaker intend to urge a particular point they ought to appear before the Court and ought not to do so through a proxy or through the backdoor. According to the Petitioners the issues in this petition are not issues for the Commission.

97. On the part of the PSC, it was argued that **Article 127(6)(d)** and **(e)** of the **Constitution** provides that the PSC promotes parliamentary democracy and that the Court had already ordered the joinder of the Commission which was rightly assisting the Court. It was submitted that in parliamentary democracy the 1st and 2nd Respondents enjoy the powers, privileges and immunities under **Article 117** and **195** of the **Constitution** as read with the **National Assembly (Powers and Privileges) Act** Cap 6 the Laws of Kenya which apply by virtue of **section 7** of the **Sixth Schedule** to the **Constitution**. It was therefore submitted that pursuant to **sections 4 and 29** of the **National Assembly (Powers and Privileges) Act**, since the Speaker of the Senate and the Senate enjoy immunities from legal proceedings, they ought not to have been parties to these proceedings. Instead, the proceedings ought to have been served on the Attorney General by virtue of **section 12** of the **Government Proceedings Act** since impeachment is a quasi-judicial process.

98. In rejoinder, the Petitioners submitted that no body, including Parliament, is immune from judicial scrutiny and that immunity and privilege only apply to lawful actions since it is the Constitution which is supreme. It was contended that **Article 117** has nothing to do with the issues which fall for determination. Since the replying affidavit was sworn on behalf of the Interested Party the Court was urged to find that the complaints raised by the petitioners had not been defended by the Speaker and the Senate hence they had no answer thereto.

Non joinder of the Attorney General

99. **Article 156(4)(b)** of the **Constitution** provides that the Attorney-General shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. **Section 12(1)** of the **Government Proceedings Act, Cap 40 Laws of Kenya** on the other hand provides that *"subject to the provisions of any other written law, civil proceedings by or against the Government shall be instituted by or against the Attorney-General, as the case may be*".

100. However the preamble to the **Government Proceedings Act**, provides that it is:

> **"*An Act of Parliament to state the law relating to the civil liabilities and rights of the Government and to civil proceedings by and against the Government; to state the law relating to the civil liabilities of persons other than the Government in certain cases involving the affairs or property of the Government; and for purposes incidental to and connected with those matters*".** (Emphasis added)

101. It follows that **Government Proceedings Act** only applies to civil proceedings by and against the Government. It does not apply to proceedings which are not of a civil nature such as criminal proceedings. In our view matters relating to the interpretation of the Constitution are not civil matters as contemplated under the **Government Proceedings Act** but fall under their own class. In other words they are proceedings *sui generis*. To illustrate this it was held in **Masefield Trading (K) Limited vs. Rushmore Company Limited and Another [2007] 2 EA 288**, that:

> ***"The rights and duties of individuals are regulated by private law. The Constitution on the other hand is an instrument of government, which contains rules about the Government of the country…The Constitution is the supreme law of the land and the Constitution and the rules made thereunder do not provide for serving the notices that are required to be issued to the Attorney General prior to filing suits or applications in which there are allegations of breach of constitutional provisions. Once a party alleges violation of their fundamental rights, the court will hear them and the requirement of notices to the Attorney General like in civil cases does not arise."***

102. Similarly, in **Mureithi & 2 Others (For Mbari Ya Murathimi Clan) vs. Attorney General & 5 Others Nairobi HCMCA No. 158 of 2005 [2006] 1 KLR 443** it was held:

> ***"The respondents have contended that this matter is time barred under the Limitation of Actions Act Cap 22. However the Act does not apply to judicial review which is sui generis. "Suit" as defined in s 2 of the Civil Procedure Act means "all civil proceedings commenced in any manner, prescribed" "Action" under the Interpretation and General Provisions Act Cap 2 means "all civil proceedings in a Court and includes any suit as defined in s 2 of the Civil Procedure Act." Since the actions set out in Part II of the Limitation of Actions Act Cap 22 of the Laws of Kenya must have the same meaning as set out above, the Act has no application to judicial review matters and constitutional matters."***
>
> See also **Kibunja vs. Attorney General & 12 Others (No. 2) [2002] 2 KLR 6.**

103. **Article 156(4)(b)** of the **Constitution** on the other hand, in our view, only deals with legal representation of the national government in Court or in any other legal proceedings to which the national government is a party. It neither deals with criminal proceedings nor does it require that the Attorney General be a party to the proceedings.

104. **Rule 2** of **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**, otherwise known as the **Mutunga Rules**, defines "***respondent***" as meaning "***a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom***." It follows that the said **Rules** contemplate that a person other than the Attorney General may be cited as a Respondent.

105. It is therefore our view that the failure to bring these proceedings against the Attorney General is not fatal to these proceedings.

The Role of the PSC

106. Another argument by the Petitioners was that the PSC ought not to have been a party to these proceedings. In our view nothing turns on this objection as the said Commission was joined to these proceedings by an order of the Court which order has not been challenged either by review or on appeal and has not been set aside. In addition, it was not contended that the presence of the PSC had caused any prejudice to any party.

107. With respect to the immunities of the Senate and the Speaker of the Senate, **section 4** of the **National Assembly (Powers and Privileges) Act** is clear that it applies only to criminal and civil proceedings, and as we have held hereinabove, matters relating to interpretation and application of the Constitution are neither criminal nor civil. To hold otherwise would amount to elevating the Senate and the Speaker above the Constitution. It must always be remembered that under **Articles 1 and 2** of the **Constitution** all sovereign power belongs to the people of Kenya and is to be exercised only in accordance with the Constitution; that the Constitution is the supreme law of the Republic and binds all persons and all State organs; that no person may claim or exercise State authority except as authorised under the Constitution; and that any act or omission in contravention of the Constitution is invalid.

108. The institution constitutionally mandated to hear and determine any question respecting the interpretation of the Constitution ***including*** the question whether anything said to be done under the authority of the Constitution or if any law is inconsistent with, or in contravention of, the Constitution is the High Court under **Article 165** of the **Constitution**. It therefore follows that no State Organ can hold itself to be immune to proceedings challenging the constitutionality of its actions and that includes Parliament and its speakers. In other words immunity only applies to situations where the particular entity is acting constitutionally. The position was restated by the Supreme Court of India in **State of Rajasthan vs. Union of India [(1977) 3 SCC 592]** where it was observed that:

> ***"This Court has never abandoned its constitutional function as the final Judge of constitutionality of all acts purported to be done under the authority of the Constitution. It has not refused to determine questions either of fact or of law so long as it has found itself possessed of power to do it and the cause of justice to be capable of being vindicated by its actions. But, it cannot assume unto itself powers the Constitution lodges elsewhere or undertake tasks entrusted by the Constitution to other departments of State which may be better equipped to perform them. The scrupulously discharged duties of all guardians of the Constitution include the duty not to transgress the limitations of their own constitutionally circumscribed powers by trespassing into what is properly the domain of other constitutional organs. Questions of political wisdom or executive policy only could not be subjected to judicial control. No doubt executive policy must also be subordinated to constitutionally sanctioned purposes. It has its sphere and limitations. But, so long as it operates within that sphere, its operations are immune from judicial interference. This is also a part of***

the doctrine of a rough separation of powers under the Supremacy of the Constitution repeatedly propounded by this Court and to which the Court unswervingly adheres even when its views differ or change on the correct interpretation of a particular constitutional provision."

109. It was argued that this petition was brought in bad faith based on the fact that the petitioners failed to give particulars of and demonstrate any breach of their constitutional rights, and the petition is largely speculative and intended to achieve a political end being to safeguard and secure the 1st Petitioner's position as the Governor, Embu County. According to the Respondents, the petitioners before the court are not litigating *bona fide,* but are urging for a position that will secure and safeguard the position of the 1st Petitioner as governor of Embu County. The 2nd Petitioner, it was contended, was actively involved in meetings held to urge the respondents not to proceed with the motion and when that failed they collected signatures petitioning the President for the suspension of the county under **Article 192** of the **Constitution**. The 2nd - 33rd Petitioners, it was contended are therefore not persons claiming that they were not involved in the process but political supporters of the 1st Petitioner who have taken the position that if he cannot be governor, then the County should be suspended. The respondents relied on **Mumo Matemu vs. Trusted Society of Human Rights [2013] eKLR,** where it was held:

"However, we must hasten to add that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the court should not allow itself to be seized at the instance of such person and must reject their application at the threshold."

110. Even if it were correct that the action of the other petitioners apart from the 1st Petitioner are *mala fides*, that would not necessarily dispose of this Petition since the 1st Petitioner's petition would remain intact. Article 3(1) of the Constitution enjoins every person to respect, uphold and defend the Constitution. **Article 258** entitles any person to institute court proceedings, claiming that the Constitution has been contravened, or is threatened with contravention and such actions may be instituted by a person acting as a member of, or in the interest of, a group or class of persons or by a person acting in the public interest. It has not been contended that the petitioners are not entitled to bring these proceedings. The mere fact that the success of these proceedings may result in safeguarding and securing the 1st Petitioner's position as the Governor, Embu County, does not disentitle them from instituting these proceedings. In our view, in the current constitutional dispensation, the Courts must resist the temptation to try and contain constitutional challenges in a straight-jacket and must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them. In our view the petitioners cannot be faulted for bringing these proceedings simply because they are perceived supporters of the 1st Petitioner. Whereas we agree with the decision in ***Mumo Matemu Case*** (supra), we are of the view that the mere fact that attempts were made at resolving the impasse through alternative avenues does not necessarily connote bad faith.

Whether the impeachment proceedings were sub-judice.

111. It was claimed that the proceedings to impeach the 1st Petitioner were *sub judice*. *Sub judice* is defined in ***Blacks Law Dictionary*** 9th Edn. page 1562 as *"under a judge; Before the Court or judge for determination."* For proceedings to be said to be *sub judice*, the same must be pending before the court or a judge for determination. The *sub judice* doctrine applies to situations where there are pending proceedings in a Court of law. A person cannot institute proceedings in a Court of law with a view to stalling an ongoing legal process by relying on the *sub judice* principle. For *sub judice* to apply, the proceedings sought to be stayed ought to have been the ones subsequently commenced and not *vice versa*. In this case, Embu **PetitionNos. 5 and 6 of 2014** were filed on the 28thApril 2014, whereas the Motion before the County Assembly was filed on the 16th April 2014 and notice given on 22nd April 2014. Therefore when the motion was instituted there was no pending matter in court in relation to the issues herein. The two petitions filed in court were withdrawn and discontinued immediately after the motion was passed on the 29th April 2014. In our view the *sub judice* rule cannot in the circumstances of this case be successfully invoked.

Whether Section 33 of the County GovernmentsAct, 2012, is unconstitutional

112. It was asserted by the petitioners that **Section 33** of the Act is in violation of the Constitution. Specifically, it was alleged that the section contravened **Article 181,** upon which it derives its existence, and **Articles 1; 2(1),(2); 10; 118(1)(b); 174(a) and (c**) and **Article 196(1)(b)**.

113. In the petitioners' pleadings, the question raised for determination at paragraph 92(f) and also the declaration sought in that regard in prayer (g), both assert the unconstitutionality of **Section 33** of the **Act** in the following limited and narrow manner, namely, that it is unconstitutional:

"…for failing to allow public participation and involvement in the removal of a county Governor"

114. This narrow approach in respect of the scope of unconstitutionality of the section notwithstanding, we have taken the view that the section should be interrogated in a broad sense as to whether it is unconstitutional in any event, as against the cited provisions of the Constitution.

115. There was no contest as to whether this Court has jurisdiction to determine the constitutionality of a provision of a statute. For good measure, we will state such jurisdiction at the outset. It is contained in **Article 165(3)(d)(i)** of the Constitution which provides that the High Court has:

"(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution; "

116. It is now accepted that in interrogating the constitutionality of a provision of a statute or a statute, the starting point is statutory interpretation. There are several principles which have been developed over the years that must be taken into account.

117. The first guiding principle is that a statute is presumed to be constitutional unless the contrary is proved. This was reiterated in the case of **Wyclife Gisebe Nyakina & another v Institute of Human Resource Management & another {Petition No 450 of 2013} [2014] eKLR** where Mumbi Ngugi, J, quoting **Kenya Union of Domestic, Hotels, Education Institutions and Hospital Workers v Kenya Revenue Authority & Others High Court Petition No. 544 of 2013** stated as follows:

"*[25].The principles upon which the court determines the constitutionality of statutes are now well settled. It is well established that every statute enjoys a presumption of constitutionality and the court is entitled to presume that the legislature acted in a constitutional and fair manner unless the contrary is proved by the petitioner. In considering whether an enactment is unconstitutional, the court must look at the character of the legislation as a whole, its purpose and objects and effect of its provisions (see Ndyanabo v Attorney General of Tanzania (2001) 2 EA 485, Joseph Kimani and Others v Attorney General and Others Mombasa Petition No. 669 of 2009 [2010] eKLR, Murang'a Bar Operators and Another v Minister of State for Provincial Administration and Internal Security and Others Nairobi Petition No. 3 of 2011 (Unreported)), Samuel G. Momanyi v Attorney General and Another Nairobi Petition No. 341 of 2011 (Unreported)".* (Emphasis added)

118. The second guiding principle is that the courts are concerned only with the power to enact statutes not with their wisdom. This was well stated in the dissenting decision in **U.S v Butler, 297 U.S. 1 [1936],** in the U.S Supreme Court where it was observed that:

"The power of courts to declare a statute unconstitutional is subject to two guiding principles of decision which ought never to be absent from judicial consciousness. One is that courts are concerned only with the power to enact statutes, not with their wisdom. The other is that while unconstitutional exercise of power by the executive and legislative branches of the government is subject to judicial restraint, the only check upon our own exercise of power is our sense of self-restraint. For the removal of unwise laws from the statute books appeal lies, not to the courts, but to the ballot and to the processes of democratic government." [Emphasis supplied]

119. Clearly therefore, the primary role of the Court is to interpret the law, as enacted by Parliament, and that entails giving effect to the legislative intent of Parliament. Thus, the Court is not concerned with *'what ought to be'* but with *'what is'*, as exemplified in the Indian Case of **Re Application by Bahadur [1986] LRC 545 (Const.),** where it was stated:

"I would only emphasize that one should not start by assuming that what Parliament has done in a lengthy process of legislation is unfair. One should rather assume that what has been done is fair until the contrary is shown…"

120. In this regard, the Court in **Republic vs The Council of Legal Education [2007] e KLR,** cited with approval the Indian Case of **Maharashtra State Board of Secondary and Higher Secondary Education and Another v Kurmarstheth [1985] LRC** where it had been found as follows:

"…It is exclusively within the province of the Legislature and its delegate to determine, as a matter of policy, how the provision of the statute can best be implemented and what measures, substantive as well as procedural would have to be incorporated in the rules or regulations for the efficacious achievement of the objects and purposes of the Act. It is not for the court to examine the merits or demerits

of such a policy because its scrutiny has to be limited to the question as to whether the impugned regulations fall within the scope of the regulation…"

121. The third guiding principle is that the purpose and effect of the statute or provision impugned must be considered in determining the constitutionality or otherwise of a statute. This test was well stated by the Supreme Court of Canada in the case of **R. v Big M Drug Mart Ltd., [1985] 1 S.C.R. 295,** in the following words:

> ***"I cannot agree. In my view, both purpose and effect are relevant in determining constitutionality; either unconstitutional purpose or unconstitutional effect can invalidate legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through the impact produced with the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislation's objects and its ultimate impact, are clearly linked, if not indivisible. Intended and actual effects have often been looked to for guidance in assessing the legislation's object and thus, its validity."*** *(Emphasis added)*

122. The fourth guiding principle is that the court must look at the character of the legislation as a whole.

123. The fifth guiding principle is that the provision or statute alleged to contravene the constitution must be juxtaposed against the provision(s) of the constitution alleged to be impugned to determine the variance. That is to say, a comparative enquiry must be done to determine whether the statutory provision squares out with the constitutional provision. In the majority decision of the US Supreme Court in **U.S v Butler, 297 U.S. 1 [1936],** it was held that:

> ***"When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends."*** [Emphasis added]

124. Finally, within that exercise of seeking to determine the constitutionality of any statutory provision, there is the overarching constitutional obligation to interpret the constitution itself, in accordance with the constitutional construction imperatives stated in **Article 259** as follows:

> ***"259. (1) This Constitution shall be interpreted in a manner that—***
>
> ***(a) promotes its purposes, values and principles;***
>
> ***(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
>
> ***(c) permits the development of the law; and***
>
> ***(d) contributes to good governance***
>
> ***……***
>
> ***(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking…."***

125. The constitutional basis and rationale for the promulgation of the **Act** can be found embedded in the provisions of the Constitution. **Article 200** commands Parliament to enact legislation to provide for all matters relating to **Chapter 8** on Devolution. Specifically, Parliament is mandated to make provision as follows at **Article 200(2) (c)** and **(d)**:

> ***"(2) In particular, provision may be made with respect to –***
>
> ***(a)…***
>
> ***(b)…***
>
> ***(c) the manner of election or appointment of persons to, and their removal from, offices in county governments, including the qualifications of voters and candidates;***
>
> ***(d) the procedure of assemblies and executive committees including the chairing and frequency of meetings, quorums and voting…"***

126. With regard to the removal of a governor, **Article 181(1)** sets out the grounds for his or her removal, and **Article 181(2)**, requires Parliament to make legislation for removal procedures of a governor in the following terms:

> ***"(2) Parliament shall enact legislation providing for the procedure of removal of a county governor on any of the grounds specified in clause (1).***

127. **Article 261**, the **Sixth Schedule Section 3(b)** and the **Fifth Schedule** to the **Constitution** all stipulate the time frame within which Parliament must enact legislation on various aspects of devolved government. With regard to legislation on removal of a governor under **Chapter Eleven**, the constitutionally specified time frame is indicated as eighteen months from the effective date of the Constitution.

128. The constitutional mandate and time frame for enacting the said legislation is exceedingly stringent. So stringent, indeed, that **Article 261** of the **Constitution** provides for extension of the time frame only once by Parliament – pursuant to a two thirds majority – and the extension cannot be for a period of more than one year. Further, a failure to enact such legislation within the stipulated time frame may result in issuance of a declaratory order of the High Court specifying the period within which Parliament must enact the legislation and provide a progress report to the Chief Justice. Under **Article 261(7)**, should Parliament fail to comply with such an order of the Court, the Chief Justice shall advice the President to disssolve Parliament, and on such advice the President shall so dissolve Parliament.

129. Pursuant to the constitutional mandate, the objects and purposes of the **Act** are set out in **Section 3(a),** where the relevant object is stated as follows :

> ***"Provide for matters necessary or convenient to give effect to Chapter Eleven of the Constitution pursuant to Article 200 of the Constitution"***

130. In **Doctor's for Life International v The Speaker National Assembly and Others 9CCT12/05)[2006] ZACC II** the Constitutional Court of South Africa noted as follows regarding the court's role in maintaining the delicate balance between its role as the guardian and enforcer of constitutional values and principles on the one hand, and deference to legislative and executive functions, on the other:

> ***"What courts should strive to achieve is the appropriate balance between their role as the ultimate guardians of the Constitution and the rule of law including any obligation that Parliament is required to fulfill in respect of the passage of laws, on the one hand, and the respect which they are required to accord to other branches of government as required by the principle of separation of powers, on the other hand."*** *(at Para. 70)*

131. The obligation on Parliament to enact law to operationalise the removal procedures of governors was stringent and a constitutional necessity. As may be clearly seen from the above discussion, **the Act** and, in particular, **Section 33** thereof are intended to operationalise **Chapter 11** of the **Constitution** on Devolution, and **Article 181** of the constitution, respectively. The purpose of both the Act and of **Section 33** therefore have a sound constitutional underpinning, under stringent time demands.

132. The purpose of **Section 33** of the **Act** is to give effect to **Article 181** of the Constitution whose purpose is to foster accountable exercise of power through, *inter alia*, the removal of unfit public officials who have been elected by the people to govern at the county level. The power of self governance and participation of the people provided for by **Article 174 (c)** of the **Constitution** must be read together with **Article 1** to the effect that people may also indirectly exercise sovereignty. This they do through electing their representatives at the county level who make decisions on their behalf. To this extent the mandate of impeachment has been placed on the peoples' representatives. Thus, to the textual approach of interpreting the Constitution which asks the question: where does the power of impeachment lie? The answer is that it lies with the County Assembly and the Senate.

133. As far as the effect of **Section 33** is concerned, therefore, its effect is to ensure that the objectives of **Article 181** are met in accordance with the Constitution, and to this extent we find that **Section 33** is *intra vires* the **Constitution**.

134. What now remains is to answer the question whether **Section 33 of the Act** contravenes the various constitutional provisions cited by the petitioners. For this, we must employ the principle of juxtaposing the section against each constitutional provision alleged to be contravened, and determine whether they *'square'* out.

135. **Section 33** of the **County Governments Act**, **2012** provides as follows :

> ***"(1) A member of the county assembly may by notice to the speaker, supported by at least a third of all the members, move a motion for the removal of the governor under Article 181 of the Constitution.***
>
> ***(2) If a motion under subsection (1) is supported by at least two-thirds of all the members of the county assembly—***
>
> ***(a) the speaker of the county assembly shall inform the Speaker of the Senate of that resolution within two days; and***
>
> ***(b) the governor shall continue to perform the functions of the office pending the outcome of the proceedings required by this section.***

(3) Within seven days after receiving notice of a resolution from the speaker of the county assembly—

(a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and

(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.

(4) A special committee appointed under subsection (3) (b) shall—

(a) investigate the matter; and

(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.

(5) The governor shall have the right to appear and be represented before the special committee during its investigations.

(6) If the special committee reports that the particulars of any allegation against the governor—

(a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or

(b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the impeachment charges.

(7) If a majority of all the members of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.

(8) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the speaker of the concerned county assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate on the expiry of three months from the date of such vote.

(9) The procedure for the removal of the President on grounds of incapacity under Article 144 of the Constitution shall apply, with necessary modifications, to the removal of a governor.

(10) A vacancy in the office of the governor or deputy governor arising under this section shall be filled in the manner provided for by Article 182 of the Constitution."

136. This is then juxtaposed against **Article 1** which provides :

(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.

(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.

(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

(a) Parliament and the legislative assemblies in the county governments;

(b) the national executive and the executive structures in the county governments; and

(c) the Judiciary and independent tribunals.

(4) The sovereign power of the people is exercised at—

(a) the national level; and

(b) the county level.

137. The general complaint of the petitioners on this score was that the sovereign power of the people to participate in the removal of their popularly elected governor was denied. **Article 1(2)** is to the effect that sovereign power belongs to the people and may be exercised either directly **or** indirectly. **Article 1(3)(a)** is to the effect that the peoples' sovereign power is delegated to, among other state organs, the *"legislative assemblies in the county governments"*. Further, under **Article 38** of the Constitution the people exercise their sovereignty directly through the political right to vote by electing their representatives through a secret ballot.

138. Reading these provisions together, there can be no doubt that the elected representatives exercise sovereignty on behalf of the people, through the principle of delegation of power to state organs. In this case, the delegation is to the legislative assembly in the county government. There is nowhere any requirement for a popular exercise of political right to vote in respect of the removal of a governor.

139. We therefore find that **Section 33** is not in any way inconsistent with **Article 1** of the **Constitution**.

When they chose to invoke **Section 33** and to debate the motion on the impeachment of the Governor, and when the Senate followed suit, neither the Embu County Assembly members nor the Senate were acting in contravention of the Constitution, as **Section 33** is not unconstitutional to that extent.

140. We now juxtapose **section 33** against **Article 2(1)** and **(2)** of the Constitution. The latter provide:

> ***"(1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.***
>
> ***(2) No person may claim or exercise State authority except as authorised under this Constitution"***

141. We have carefully considered **section33** of the **Act** against the above Article, and we can find nothing either in the petitioners' arguments or in the content of the said provisions that suggests any sense of inconsistency between the two. We need say no more on this.

142. **Article 10** which is also alleged to be contravened by **Section 33** provides as follows:

> ***"10. (1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—***
>
> ***(a) applies or interprets this Constitution;***
>
> ***(b) enacts, applies or interprets any law; or***
>
> ***(c) makes or implements public policy decisions.***
>
> ***(2) The national values and principles of governance include —***
>
> ***(a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;***
>
> ***(b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;***
>
> ***(c) good governance, integrity, transparency and accountability; and***
>
> ***(d) sustainable development" (emphasis added)***

143. **Section 33** has provisions for the removal of the governor, and the question is whether those provisions have the content that meets the standards required under the national values and principles of governance in **Article 10**. Two essential points that arise concern: first, the distinction between the question whether **Section 33** contains all, or only some, of the ingredients comprising the national values and principles of governance and thus whether the absence of any one or more particular components in the list in **Article 10** would thereby render the Section unconstitutional; and the second is a question of fact as to whether in the actual impeachment process, the County Assembly and the Senate complied with **Article 10**. The latter issue is not a subject of contention in this case. In **Article 10(2)** the distinctive word used in identifying the national values and principles is the word *"include"*. **Article 259(4)(b)** of the **Constitution** provides the following interpretive assistance when that word is used:

> ***" the word 'includes' means 'includes but is not limited to' "***

144. Thus, in interpreting **Article 10** in light of **Article 259(4)(b),** it is implied that the list contained in **Article 10** is an example from an unexhausted generic categorization of the components of values and principles of good governan**ce.** Natu**r**ally, therefore, it cannot be construed that every aspect provided for under **Section 33** would, or should, be expected to contain all the unexhausted components listed as national values and principles. What is required in our view, is that for a statute or provision to be compliant with **Article 10**, it must contain a majority of, or fundamentally similar, components of the listed values and principles within the subject matter under consideration in the provision. In addition, it must not contain provisions with components contradictory to those within the generic ambit of those in the national values and principles list.

145. We now assess the subsections of **Section 33** in light of the above interpretation for compliance with **Article 10**. **Section 33Subsection 1** concerns issuance of notice, and support of a motion by one third of the members. These comply with the rule of law and fair administrative action principles. **Subsection 2** concerns the requirement for two-thirds support of a motion, and information to the Speaker of the Senate, and the right of a governor against whom an impeachment motion is passed to continue in office pending completion of proceedings. These comply with the rule of law and notice principles, and the principle of fair administrative action and non-prejudice to a governor's rights until found culpable. **Subsection 3** concerns convening of the Senate by notice, hearing of charges, and establishment of an investigation committee. These comply with due process rights and the right to be heard by an investigating body. These comply with principles of good governance, human dignity and rule of law.

146. **Subsections 4, 5** and **6** concern investigations into the complaint, reporting back to the Senate on the substantiation or otherwise of the particulars of

charges; the right of the governor to be represented and defend himself prior to a vote. These comply with due process rights, the right to be heard and be represented, fair administrative justice and good governance. **Subsections 7** and **8** concern a majority vote by members of the Senate. These comply with representative rights, good governance, rule of law and transparency and accountability principles.

> Having carefully considered **Section 33** against **Article 10**, we see nothing in **Section 33** that does not square with **Article 10**. In light thereof, we are unable to find anything unconstitutional about **Section 33**.

147. We now consider **Articles 118(1)(b)**, and **196(1)(b)** of the **Constitution** which relate to the requirement for public participation in legislative and other business. The petitioners made heavy weather of these provisions, particularly **Article 196(1)(b)** relating to county assemblies. Their contention was that removal of a governor amounted to other business, and it was incumbent on the County Assembly to ensure that the petitioners, and other interested members of the public generally, were facilitated to be involved in the removal of the Governor.

148. **Article 196(1)(b)** provides as follows:

> ***"196. (1) A county assembly shall—***
>
> ***(a) .....***
>
> ***(b) facilitate public participation and involvement in the legislative and <u>other business</u> of the assembly and its committees."***

149. What amounts to public participation is dealt with elsewhere in this decision where the question whether there was public participation has been considered. Here, the only question is whether **Section 33** squares with **Article 196(1)(b)** in respect of the process of removal of a governor. **Section 33** provides for participation of members of county assemblies and senators. At the Senate there is scope for investigations on the charges levelled against the governor, which could reasonably include inviting witnesses or any other person to appear before it pursuant to the Senate's powers under **Article 125** to call for evidence.

150. **Article 196(1)(a)**, and **(2)** provide that public participation includes: holding of county assembly business in an open manner; holding sittings in public and not excluding the public or media from any sitting except in exceptional circumstances. **Article 196(3)** requires Parliament to enact legislation, and such legislation on public participation under the Act is contained in **Part VIII, Sections 87-92** on **Citizen Participation** in the **Act**. We highlight two relevant provisions on "citizen participation" that may relate to public participation in the removal process: **Sections 87(d)** and **88** of the **Act.**

151. **Section 87(d)** requires citizen participation to be based on, *inter alia*, the principle of affording legal standing to interested or *affected* persons to appeal from, or review decisions or redress grievances. **Section 88(1)** provides citizens with the right to petition the county government as follows :

> ***" Citizens have the right to petition the county government on any matter under the responsibility of the county government."***
>
> These provisions of the Act would both apply to the situation of a governor facing removal where he, or the citizens, desire to participate in the process.

152. We must also take into account and consider the nature of public participation constitutionally required in respect of recall of a member of Parliament and member of County Assembly, as compared to that constitutionally provided for removal of a governor. All are elective political offices. However, whereas the people of Kenya provided for removal by recall of a member of Parliament through involving the electorate, the people did not provide a similar requirement for removal of a governor.

153. **Article 259** of the **Constitution** provides that the constitution shall be interpreted in a manner that promotes its purposes values and principles. As such it has to be read as an integral document. In the case of **Tinyefuza vs. AG**, **Constitutional Appeal No. 1 of 1997, [1997] UGCC 3*:***

> ***"…the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution."***

154. The Court of Appeal in the case of the **Center for Rights Education and Awareness & Another v John Harun Mwau& 6 Others Civil Appeal No 74 of 2012 [2012] eKLR** reaffirmed and set out the principles of interpreting the constitution and stated thus:

> ***"These principles are not new. They also apply to the construction of statutes. There are other important principles which apply to the construction of statues which, in my view, also apply to the construction of a Constitution such as presumption against absurdity – meaning that a court should avoid a construction that produces an absurd result; the presumption against unworkable or impracticable result - meaning that a***

court should find against a construction which produces unworkable or impracticable result; presumption against anomalous or illogical result, - meaning that a court should find against a construction that creates an anomaly or otherwise produces an irrational or illogical result and the presumption against artificial result – meaning that a court should find against a construction that produces artificial result and, lastly, the principle that the law should serve public interest –meaning that the court should strive to avoid adopting a construction which is in any way adverse to public interest, economic, social and political or otherwise. Lastly, although the question of the election date of the first elections has evoked overwhelming public opinion, public opinion as the High Court correctly appreciated, has minimal role to play. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution."

155. In light of the forgoing, we do not find **Section 33** of the **Act** to be contrary to **Article 196** of the **Constitution**, as alleged.

What Is The Process And Procedure For The Removal Of A Governor? Was It Complied With In Respect To The 1st Petitioner?

156. The devolved system of government under the Constitution, vests in the County government various powers. The Constitution under **Chapter Eleven** makes provision for Devolved Government. It, *inter alia,* makes provision for removal of a county governor. Through **Article 181(1)** provision is made for the removal from office of a county governor on any of the following grounds:

"(a) gross violation of this Constitution or any other law;

(b) where there are serious reasons for believing that the county governor has committed a crime under national or international law;

(c) abuse of office or gross misconduct; or

(d) physical or mental incapacity to perform the functions of office of county governor."

157. Through **Art 181(2)** the **Constitution** empowered Parliament to enact legislation providing for the procedure for the removal of a county governor on any of the grounds mentioned in **clause (1).** In compliance with **Article 181(2)** of the **Constitution,** Parliament provided through **Section 33** of the **Act** the procedure for the removal of a county governor. We have reproduced elsewhere in this judgement section 33 of the **Act**.

158. Specific to the 1st Petitioner is **Part 8** of the **County Assembly of Embu Standing Orders** which under **Standing Order No. 61** makes provision for removal of a governor by impeachment as follows:

"(1) Before giving notice of Motion under, section 33 of the County Governments Act, No. 17 of 2012 the member shall deliver to the Clerk a copy of the proposed Motion in writing stating the grounds and particulars upon which the proposal is made, for the impeachment of the Governor on the ground of gross violation of a provision of the Constitution or of any other law; where there are serious reasons for believing that the Governor has committed a crime under national or international law; or for gross misconduct or abuse of office. The notice of Motion shall be signed by the Member who affirms that the particulars of allegations contained in the motion are true to his or her own knowledge and the same verified by each of the members constituting at least a third of all the members and that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto and each of them sign a verification form provided by the Clerk for that purpose.

(2) The Clerk shall submit the proposed Motion to the Speaker for approval.

(3) A member who has obtained the approval of the Speaker to move a Motion under paragraph (1) shall give a seven (7) days notice calling for impeachment of the Governor.

(4) Upon the expiry of seven (7) days, after notice given, the Motion shall be placed on the Order Paper and shall be disposed of within three days; Provided that if the County Assembly is not then sitting, the Speaker shall summon the Assembly to meet on and cause the Motion to be considered at that meeting after notice has been given.

(5) When the Order for the Motion is read, the Speaker shall refuse to allow the member to move the motion, unless the Speaker is satisfied that the member is supported by at least a third of all Members of the County Assembly to move the motion; Provided that within the seven days' notice, the Clerk shall cause to be prepared and deposited in his office a list of all Members of the County

Assembly with an open space against each name for purposes of appending signatures, which list shall be entitled "SIGNATURES IN SUPPORT OF A MOTION FOR REMOVAL OF GOVERNOR BY IMPEACHMENT"

(6) Any signature appended to the list as provided under paragraph (5) shall not be withdrawn.

(7) When the Motion has been passed by two-thirds of all members of the County Assembly, the Speaker shall inform the Speaker of the Senate of that resolution within two days."

159. Through **Standing Order No. 68** of the **Senate Standing Orders** the procedure for the removal of a Governor is stated as follows:

"(1) Within seven days after receiving notice of a resolution from the speaker of a County Assembly supporting the removal of a governor of the county pursuant to Article181 of the Constitution—

(a) the Speaker of the Senate shall convene a meeting of the Senate to hear charges against the governor; and

(b) the Senate, by resolution, may appoint a special committee comprising eleven of its members to investigate the matter.

(2) A Special Committee appointed under subsection (2) shall—

(a) investigate the matter; and

(b) report to the Senate within ten days on whether it finds the particulars of the allegations against the governor to have been substantiated.

(3) The governor shall have the right to appear and be represented before the Special Committee during its investigations.

(4) If the special committee reports that the particulars of any allegation against the governor—

(a) have not been substantiated, further proceedings shall not be taken under this section in respect of that allegation; or

(b) have been substantiated, the Senate shall, after according the governor an opportunity to be heard, vote on the charges.

(5) If a majority of all the county delegations of the Senate vote to uphold any impeachment charge, the governor shall cease to hold office.

(6) If a vote in the Senate fails to result in the removal of the governor, the Speaker of the Senate shall notify the Speaker of the concerned County Assembly accordingly and the motion by the assembly for the removal of the governor on the same charges may only be re-introduced to the Senate after the expiry of three months from the date of such vote."

160. Further**, Standing Order 69** on the right to be heard provides that:

"Whenever the Constitution or any written law requires the Senate to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant Committee of the Senate considering the matter and shall be entitled to legal representation."

161. The Court of Appeal aptly summarised the procedure for the removal of a county governor when it stated at paragraph 31 in **Wambora 1 Appeal** that:

"…Section 33 of the County Governments Act provides for the procedure of removal of an erring Governor. The organ vested with the mandate at first instance to move a motion for the removal of a County Governor is the County Assembly. Neither the Courts nor the Senate have the constitutional mandate to move a motion for the removal of a County Governor. The Senate's constitutional mandate to hear charges against a Governor is activated upon receipt of a resolution of the County Assembly to remove a Governor. Upon receipt of such a resolution, the Senate shall convene a meeting to hear the charges against the Governor and may appoint a Special Committee to investigate the matter. It is our considered view that the jurisdiction and process of removal of a Governor from office is hierarchical and sequential in nature. There are three sequential steps to be followed: first is initiation of a motion to remove the Governor by a member of the County Assembly; second there is consideration of the motion and a resolution by two thirds of all members of the County Assembly and third, the Speaker of the County Assembly is to forward the County

Assembly's resolution to the Senate for hearing of the charges against the Governor."

162. The procedure for the removal of the 1st Petitioner is found in the Act and the standing orders of both the County Assembly of Embu and the Senate. The County Assembly and the Senate ought to strictly adhere to the procedure lest the removal is declared illegal for failing to comply with the law.

163. We have already set out the law governing the removal of a governor. We will now proceed to set out the events leading to the process of the removal of Mr. Wambora as Governor of Embu County. The 2nd Respondent avers that on 16th April, 2014 he received a notice of motion proposing the removal of the 1st Petitioner from office, which he approved after confirming that there was neither pending suit nor court order on the matter. It was supported by one third of the members of the County Assembly, and thus met the statutory threshold. On 22nd April, 2014 the said motion was presented to the Assembly by Hon. Ibrahim Swaleh. By a letter dated 23rd April, 2014, the 1st Petitioner was informed of the notice of motion for his removal from office by impeachment, and in the same letter he was invited to appear in person or to be represented by an advocate before the County Assembly during its plenary, on 29th April, 2014.

164. We find it important to reproduce the said letter which read as follows:

> ***"RE: NOTICE OF MOTION FOR REMOVAL OF GOVERNOR FROM OFFICE BY IMPEACHMENT.***
>
> ***I write to notify you that Members of the County Assembly gave a Notice of Motion on 22nd April 2014 seeking for removal of the Governor of Embu County by impeachment pursuant to article 181 of the Constitution of Kenya, 2010 and Section 33 of the County Government Act, 2012. The particulars of the allegations made against you are hereon attached.***
>
> ***The principles of natural justice and procedural fairness dictate that a person, who may be adversely affected by a decision, should be accorded an opportunity to be heard. In fulfillment of this principle, the House Business Committee in its sitting of 22nd April 2014 resolved the following;***
>
> ***(a) THAT, you be duly notified in writing of the notice of motion as tabled in the Assembly.***
>
> ***(b) THAT, you be invited in writing, which I hereby do, to appear in person or be represented by an advocate or yourself and advocate at the County Assembly of Embu Plenary on 29th April 2014 at 2.30p.m.***
>
> ***(c) THAT, you be allocated one (1) hour for your oral defense, which time you may share with your advocates on 29th April 2014.***
>
> ***(d) THAT, should you elect to make any written submissions to the Assembly as part of your defense, the same should be received on or before Monday 28th April 2014 at 9.00a.m. You are kindly requested to provide the Assembly with at least 35 copies of such written submissions."***
>
> The letter was signed by the Clerk of the County Assembly.

165. We were told, and this has not been controverted by the petitioners, that the 1st Petitioner neither appeared at the plenary nor filed any submissions. The Embu County Assembly Hansard that has been availed to this Court shows that the 2nd Respondent dispatched the Sergeant-at-Arms to locate the 1st Petitioner within the precincts of the Assembly but the search was futile.

166. On 29th April, 2014, the County Assembly debated the motion and 23 out of 33 members supported it. The statutory threshold of two-thirds was thus met. Following the resolution of the County Assembly, and by a letter dated 29th April, 2014, the Speaker of the County Assembly of Embu informed the Speaker of the Senate of the approval of the motion by the County Assembly pursuant to **Section 33(2)** of the **Act.**

167. Pursuant to **section33(3)(b)** of the **Act**, the Senate then constituted a Special Committee to hear the charges against the 1st Petitioner. He appeared through counsel during the hearing on 11thMay, 2014, and raised objection to the proceedings but he was overruled. Counsel indicated to the Committee that he had no instructions to proceed beyond that point. Prior to that, the 1st Petitioner had on 10th May, 2014 responded in writing to the allegations made against him.

168. The Committee later tabled its report with a finding that the allegations had been substantiated. The majority of the members of the Senate voted in support of **The Report Of The Special Committee On The Proposed Removal From Office Of Martin Nyaga Wambora, The Governor Of Embu County'** dated 13th May, 2014 (hereinafter referred to as "**the Report"**) thus leading to the removal of the 1st Petitioner.

169. It is the 1st and 2nd Respondents' case that the Governor was twice afforded a forum; before the County Assembly on 29th April, 2014, and subsequently before the Special Committee of the Senate on 11th May, 2014,

to raise his defence. However, he opted not to take advantage of these opportunities.

170. Looking at what took place prior to the ejection of the Governor, we are satisfied that the laid down procedure was followed in his removal. In fact, the petitioners have, correctly, not impugned the process and procedure followed by the Senate and the County Assembly. We have also looked at the law and we are satisfied that it provides several opportunities for a governor to be heard before being removed from office. As can be seen from **Section 33** of the Act**,** where the Senate opts for the formation of a special committee, as was done in the case of the 1st Petitioner, the governor will have an opportunity to be heard by the special committee and another opportunity to be heard by the full House, where removal has been recommended by the special committee.

Whether the Rules of Natural Justice were complied with in the removal of the Governor.

171. Related to the issue of the removal process is that of adherence to the rules of natural justice. It was argued by the petitioners that the principles of natural justice were not only available to the Governor but were also available to the other petitioners. The petitioners contended that their rights as enshrined in **Articles 1, 2(4), 10, 19, 33(1), 35(1), 47, 118(1)(b) and 196(1)(b) of the Constitution** were violated as they were denied the opportunity of participating in the removal of the Governor. They submit that failure to effectively facilitate an inclusive and participatory process violated the rules of natural justice.

172. The petitioners argued that the fact that all members of the Special Committee that had participated in the initial removal proceedings, had also been nominated to the Special Committee that recommended the ouster of the 1st Petitioner, was in breach of the rules of natural justice. According to the petitioners, this was equivalent to allowing judges to sit on appeal over their own decision. It is their case that since the initial removal had been quashed, the members of the Special Committee were naturally offended hence the likelihood of bias. The petitioners contended that there was no way that the members of the Committee would have arrived at a different conclusion considering that they were dealing with the same charges and facts.

173. On a related issue, the petitioners asserted that the removal proceedings were tainted with bad faith on the part of the 1st and 2nd respondents. Their argument was that the motion that led to the removal of the 1st Petitioner was moved by the same member of the 1st Respondent who had moved the removal motion resulting in the initial impeachment of the Governor, which had been declared illegal by the High Court at Kerugoya. In support of their allegation of bad faith they pointed to the fact that the motion was moved on the same date the Court declared the initial removal null and void. Further, that the 2nd Respondent and the Clerk of the 1st Respondent were facing contempt of court proceedings in respect of the initial removal, and their prompt commencement of the current removal proceedings could only have been driven by bad faith.

174. The petitioners were also perturbed that the respondents did not resort to the other constitutional processes for dealing with the issue, considering that the alleged violations had even been even referred to the Ethics and Anti-Corruption Commission for investigations which were indeed on-going. To them, the 1st and 2nd respondents abused their powers by resorting to the severe remedy of removal of the Governor. From the submissions of the petitioners, we conclude that their argument is that the twin pillars of the rules of natural justice were not adhered to.

175. What then are these two pillars of the rules of natural justice? They were succinctly summarised by the learned authors of **Halisbury's Laws of England** at **page 218 (paragraph 95), Vol. 1(1)** as:

> ***"Natural justice comprises two basic rules; first that no man is to be a judge in his own cause (nemo judex in causa sua), and second that no man is to be condemned unheard (audi alteram partem). These rules are concerned with the manner in which the decision is taken rather than with whether or not the decision is correct."***

176. Scholars have debated about the import and extent of these principles but the courts have had no problem with understanding what these rules mean. The overriding consideration is that the rules are applicable on a case by case basis. The underlying foundation of these principles is that in so far as the *audi alteram partem* rule is concerned, before a decision is taken, the person to be affected by the decision must be informed of the impending decision or action, notice of the matters to be taken into account against the person should be given, and that person must be given an opportunity to be heard. In a serious matter like the one before us, those rules must be applied without exception.

177. As for the *nemo judex in causa sua* rule, the first requirement is that no man should sit as an adjudicator in a case in which he has an interest. This is a rule that should be followed strictly, for one cannot be expected to be fair where the outcome of his decision will affect his interests. Secondly, no biased person should be allowed to sit in judgement over the fate of another. The bias could be real or perceived. What amounts to actual bias or perceived bias will be deduced from the facts of the case and the general observations on the behaviour and actions of the umpire.

178. The case of **R v London Rent Assessment Panel Committee, ex p. Metropolitan Properties Co (FGC) Ltd, [1969] 1 QB 577,** is a case that arose from the decision of a rent assessment committee. The chairman of the committee was a solicitor who lived with his father in a flat whose landlord was an associate company of the landlord involved in the case before the committee. The solicitor had also acted in the past for tenants against his father's landlord on matters similar to those in question in the case before the committee.

179. Setting the test for establishing whether there was bias Lord Denning, MR stated that;

> ***"In considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would, or did, in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was impartial as he could be, nevertheless if right-minded persons would think that, in the circumstances, there was a real likelihood of bias on his part, then heshould not sit."***

180. In Kenya, administrative action that is *"expeditious, efficient, lawful, reasonable and procedurally fair"* is entrenched in **Article 47** of the **Bill of Rights**. The petitioners have cited several reasons to demonstrate that the removal of the 1st Petitioner was not fair.

181. The procedure for the removal of a governor has already been outlined. It is clear that the process starts with the issuance of a notice of motion by a member of the county assembly. Once the Speaker is satisfied that the motion is in order, the same is debated and a vote taken on it. Where two-thirds of the members of the county assembly approve the motion, the matter is escalated to the Senate for investigation of the allegations.

182. We will now examine what happened at the County Assembly in this case. There is no evidence on record to show that the Speaker manifested bias or that a bystander would have formed the opinion that he was biased. By accepting the motion, he was only doing that which the law required him to do. The role of the Speaker in the process is therefore statutory.

183. As for the mover of the motion, it is indeed true that he is the one who had moved the initial motion. There was, however, no law pointed out to us barring him from moving a similar motion the second time. Since the earlier removal had been declared null and void, **Section 33(8)** of the **Act** which bars reintroduction of a removal motion on the same grounds within three months was inapplicable. The motion was therefore properly before the floor of the Assembly and the 2nd Respondent was mandated by the law to preside over the debate of the motion.

184. The petitioners claimed that the tabling of the motion on the day the Court declared the earlier proceedings null and void was influenced by the fact that the 2nd Respondent and the Clerk were facing contempt of Court proceedings in **Wambora 1.** That indeed could be one of the reasons why the motion was moved at lightning speed.

185. This allegation calls for examination of the role of the Speaker of a County Assembly. Under **Article 177** of the **Constitution**, the Speaker of the County Assembly is an *ex officio* member of the Assembly. It is not alleged that the motion to remove the 1st Petitioner was engineered by the Speaker of the County Assembly. To the contrary, the evidence before us is that the motion was in fact initiated by Hon. **Ibrahim Swaleh** a member of the Embu County Assembly representing Kirimari Ward. In our view no nexus has been made between the contempt proceedings which were facing the Speaker and the subsequent motion to impeach the 1st Petitioner. Further the tabling of the motion could not come to the aid of the 2nd Respondent as the matter was already in the hands of the Court and the motion could not have in any way influenced the direction of the contempt of Court proceedings.

186. Moving to the question of bias on the part of the Special Committee appointed by the Senate to conduct investigations into the allegations against the Governor, we note that it is indeed true that all the members of the initial Special Committee were picked to serve in the second Special Committee that was to investigate the allegations against the Governor. This issue was debated at length by the Senate and it was decided that there was nothing wrong in allowing the same members to sit in the new Committee.

187. Although we do not find anything untoward in the filling of the Special Committee with members who had dealt with the first removal, we share the petitioners' concerns that the decision by the Senate did not give the impression that justice would be seen to have been done. We would therefore strongly advice against such course of action in future. The Court in **Wambora 1** did indeed declare the first removal null and void, but that order did not disabuse the minds of the members of the Special Committee of the information gathered during the first hearing. Human beings are prone to prejudices and biases and any independent observer may easily reach the conclusion that the 1st Petitioner was not treated fairly by being subjected to the same people who had dealt with him before over the same matter.

188. In the circumstances, there ought to have been no difficulty in appointing different members of the Senate to the second Special Committee. In any case, a special committee is formed as and when the need arises. It should be remembered that under **Section 33(6)(a)** of the **Act** a special committee can report that particulars of any allegation against the governor have not been substantiated and that would be the end of the matter. The special committee therefore has a critical role to play in the removal proceedings. The fate of a governor may well depend on the report of the special committee.

189. Having said so, we find that no prejudice was occasioned to the 1st Petitioner as the report of the Special Committee was adopted by an overwhelming majority of the whole House. We, however, agree with those opposed to this petition that the Senate has a fixed membership, save for any vacancies, during its lifetime, and where a matter is supposed to be handled by the House then nobody should be heard to say that the matter ought to have been handled by different people for there can only be one Senate at a time. Nothing however, turns on this issue.

190. The petitioners posed the question as to why the County Assembly did not go for more palatable options, rather than removal, in dealing with the allegations against the Governor. We do not wish to speculate on answers to that question. Our view, however, is that violation of the law and the Constitution by a governor can be remedied, *inter alia*, through removal or institution of criminal charges. The people of Kenya must embrace the doctrine of political responsibility. Those voted into public offices should not be heard to say that theirs is only about policy formulation. They should know that they are in charge of the institutions they oversee and when those institutions fail they may be called upon to explain their role in such failures. Although removal from office is still at its infancy on our shores, we think it is a useful tool for ensuring that governors and public officers in general are accountable to the electorate and the public. Waiting for five years to remove an inept, incompetent, corrupt or unaccountable leader may be disastrous and that is why removal may sometimes be a useful tool in appropriate cases.

Whether the removal of the Governor requires public participation, and if so; whether there was public participation; and whether Article 35 of the Constitution on access to information was complied with.

191. The petitioners submitted that they were constitutionally entitled to participate in the impeachment process of the Embu County Governor as provided under **Article 10(1)** of the Constitution. This Article provides for the national values and principles of governance which bind all state organs, state officers and public officers whenever any of them applies or interprets the Constitution including peoples' participation.

192. Public participation in governance is an internationally recognised concept. This concept is reflected in international human rights instruments. **The Universal Declaration of Human Rights of 1948** proclaims in **Article 21** that everyone has the right to take part in the government of his country, directly or through freely chosen representatives. **The International Covenant on Civil and Political Rights (ICCPR)** affirms at **Article 25**, that:

> ***"Every citizen shall have the right and the opportunity, without any of the distinctions mentioned in Article 2 and without unreasonablerestrictions;***
>
> ***a. To take part in the conduct of public affairs, directly or through freely chosen representatives;***
>
> ***b. To vote and to be elected at genuine periodic elections which shall be by universal and equal suffrage and shall be held by secret ballot, guaranteeing the free expression of the will of the electors;***
>
> ***c. To have access, on general terms of equality, to public service in his country."***

193. The right to public participation is based on the democratic idea of popular sovereignty and political equality as enshrined in **Article 1 of the Constitution.** Because the government is derived from the people, all citizens have the right to influence governmental decisions; and the government should respond to them. Therefore, participation must certainly entail citizens' direct involvement in the affairs of their community as the people must take part in political affairs.

194. **Article 196(1)(b**) of the Constitution enjoins a County Assembly to facilitate public participation and involvement in the legislative and other business of the assembly and its committees. Whereas the Constitution does not expressly task the County Assembly with the role of removal of a Governor, **Article 181(2)** of the Constitution empowers Parliament to enact legislation providing for the procedure of removal of a county governor on the grounds specified under the said **Article**. Pursuant to the said provision Parliament enacted the **County Governments Act** and in **section 33** the procedure for removal of a Governor is to be initiated in the County Assembly. Accordingly, the removal of a governor is one of the businesses statutorily assigned to the County Assembly. In our view the question is not whether the public ought to participate in the process of the removal of a governor but to what extent should that participation go. In our view, some level of public participation must be injected into the process in order

to appreciate the fact that a governor is elected by the County, and in order to avoid situations where an otherwise popular governor is removed from office due to malice, ill will and vendetta on the part of the Members of the County Assemblies.

195. Our view is reinforced by the decision in **Matatiele Municipality and Others vs. President of the Republic of South Africa and Others (2),** (supra) where **Ngcobo, J** expressed himself *inter alia* as follows:

> ***"Our constitutional democracy has essential elements which constitute its foundation; it is partly representative and partly participative. These two elements reflect the basic and fundamental objective of our constitutional democracy. The provisions of the Constitution must be construed in a manner that is compatible with these principles of our democracy. Our system of government requires that the people elect representatives who make laws on their behalf and contemplates that people will be given the opportunity to participate in the law-making process in certain circumstances. The law-making process will then produce a dialogue between the elected representatives of the people and the people themselves. The representative and participative elements of our democracy should not be seen as being in tension with each other…….What our constitutional scheme requires is "the achievement of a balanced relationship between representative and participatory elements in our democracy." The public involvement provisions of the Constitution address this symbolic relationship, and they lie at the heart of the legislative function. The Constitution contemplates that the people will have a voice in the legislative organs of the State not only through elected representatives but also through participation in the law-making process……To uphold the government's submission would therefore be contrary to the conception of our democracy, which contemplates an additional and more direct role for the people of the provinces in the functioning of their provincial legislatures than simply through the electoral process. The government's argument that the provisions of section 118(1)(a) are met by having a proposed constitutional amendment considered only by elected representatives must therefore be rejected…..Before leaving this topic, it is necessary to stress two points. First, the preamble of the Constitution sets as a goal the establishment of "a society based on democratic values [and] social justice" and declares that the Constitution lays down "the foundations for a democratic and open society in which government is based on the will of the people." The founding values of our constitutional democracy include human dignity and "a multi-party system of democratic government to ensure accountability, responsiveness and openness." And it is apparent from the provisions of the Constitution that the democratic government that is contemplated is partly representative and partly participatory, accountable, transparent and makes provision for public participation in the making of laws by legislative bodies. Consistent with our constitutional commitment to human dignity and self respect, section 118(1)(a) contemplates that members of the public will often be given an opportunity to participate in the making of laws that affect them. As has been observed, a "commitment to a right to . . . public participation in governmental decision-making is derived not only from the belief that we improve the accuracy of decisions when we allow people to present their side of the story, but also from our sense that participation is necessary to preserve human dignity and self respect."***

196. In our view an opportunity must be availed to the voters in a County to air their views on the process of the removal of their Governor before a decision is arrived at either way. To completely lock out the voters from being heard on such important matter as the removal of their Governor would be contrary to the spirit of **Article 1(2)** of the Constitution. Whereas it may not be possible that each and every person in the County be heard on the issue, those who wish to put across their views on the impeachment ought to be allowed to do so though the ultimate decision rests with the County Assembly.

197. The essence of public participation was captured in the case of **Poverty Alleviation Network & Others vs. President of the Republic of South Africa & 19 others, CCT86/08 [2010] ZACC 5, in the following terms:**

> ***"…engagement with the public is essential. Public participation informs the public of what is to be expected. It allows for the community to express concerns, fears and even to make demands. In any democratic state, participation is integral to its legitimacy. When a decision is made without consulting the public the result can never be an informed decision. As this Court observed in Doctors for Life, both the duty to facilitate public***

involvement and the positive right to political participation "seek to ensure that citizens have the necessary information and the effective opportunity to exercise the right to political participation." This can be achieved not only through elected representatives, but also by enabling citizens to participate directly in public affairs, "through public debate and dialogue with elected representatives, referendums and popular initiatives or through self-organisation".

198. This was reaffirmed in **Doctors for Life International vs Speaker of the National Assembly and Others (CCT 12/05) 2006 ZACC 11,** where it was held:

> ***"The right to political participation is a fundamental human right, which is set out in a number of international and regional human rights instruments. In most of these instruments, the right consists of at least two elements; a general right to take part in the conduct of public affairs; and a more specific right to vote and/or to be elected ….Significantly, the ICCPR guarantees not only the "right" but also the "opportunity" to take part in the conduct of public affairs, This imposes an obligation on states to take positive steps to ensure that their citizens have an opportunity to exercise their right to political participation….The right to political participation includes but is not limited to the right to vote in an election. That right, which is specified in Article 25(b) of the ICCPR, represents one institutionalization of the right to take part in the conduct of public affairs. The broader right, which is provided for in Article 25(a), envisages forms of political participation which are not limited to participation in the electoral process. It is now generally accepted that modes of participation may include not only indirect participation through elected representatives but also forms of direct participation……"***

199. As already outlined hereinabove, **Standing Order** 61 which we have reproduced, of the County Assembly of Embu makes provision for the removal of a governor**.**

200. In our view public participation ought to commence from the time of the notification of the motion to remove the Governor by a member to the Clerk which notification in our view is the mandate of the Assembly. This is when the removal process crystallises. However, it is clear that the period provided between the notification and the time for debating and the determination of the motion by the Assembly in the Standing Orders is very limited. It is therefore not plausible to expect that the mode of public participation in such circumstances would be commensurate with that of the enactment of a legislation. As was appreciated by **Sachs J**. in the South African case of the**Minister of Health vs. New Clicks South Africa (Pty) Ltd [2005] ZACC:**

> ***"The forms of facilitating an appropriate degree of participation in the law-making process are indeed capable of infinite variation. What matters is that at the end of the day a reasonable opportunity is offered to members of the public and all interested parties to know about the issue and to have an adequate say. What amounts to a reasonable opportunity will depend on the circumstances of each case." [****Emphasis supplied****]***

201. A similar position was adopted in **Doctors for Life International vs. The speaker of the National Assembly and Others** (supra) cited with the approval in **Robert N. Gakuru & Others vs. Governor, Kiambu County**(supra) that*:*

> ***"Parliament and the provincial legislatures must be given a significant measure of discretion in determining how best to fulfil their duty to facilitate public involvement. This discretion will apply both in relation to the standard rules promulgated for public participation and the particular modalities appropriate for specific legislative programmes".***

202. A word of caution was, however, given in the **Gakuru Case** when the Court stated that:

> ***"In my view public participation ought to be real and not illusory and ought not to be treated as a mere formality for the purposes of fulfilment of the Constitutional dictates. It is my view that it behoves the County Assemblies in enacting legislation to ensure that the spirit of public participation is attained both quantitatively and qualitatively."***

203. In making a determination whether the County Assembly complied with its duty to facilitate public participation, the Court will consider what the County Assembly has done and in this case the question will be whether what the County Assembly has done is reasonable in all the circumstances. The factors that would determine reasonableness would include the nature of the business conducted by the County Assembly and whether there are timelines to be met as set by the law. This will be the ultimate determination on the method of facilitating public participation

204. The parameters of consultation was the subject of the holding in the South African case of**Maqoma vs. Sebe & Another 1987 (1) SA 483**, where the court held:

> ***"It seems that 'consultation' in its normal sense without reference to the context in which it is used, denotes a deliberate getting together of more than one person or party…in a situation of conferring with each other where minds are applied to weigh and consider together the pros and cons of a matter by discussion or debate. The word consultation in itself does not presuppose or suggest a particular forum, procedure or duration for such discussion or debate. Nor does it imply that any particular formalities should be complied with. Nor does it draw any distinction between communications conveyed orally or in writing. What it does suggest is a communication of ideas on a reciprocal basis."***

205. It is however our view that for the purposes of the impeachment proceedings public participation should relate to the impeachment proceedings themselves. It cannot be justified on the basis of events that took place before the said proceedings were formally commenced by notice to the Clerk of the Assembly. Therefore the prior processes of investigations of the alleged complaints by the farmers cannot in our view constitute public participation for the purposes of the impeachment process.

206. The respondents contended that the County Assembly in fulfilment of the statutory requirement to involve the public in its business developed infrastructure for public participation by July, 2013. This included the establishment of public contact offices in each of the County Assembly Wards, and the recruitment of Ward staff to facilitate public participation. It was further contended that the Assembly through the office of the Clerk disseminates notices of its business to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose. In support of these averments copies of notices were exhibited. From the annextures availed, the notices that fell within the period between 16th April, 2014 when the notification was received and 29th April 2014 when the motion was debated, were three. The same bore the stamps for Kyeni North Ward, Mbeti South Ward and Supreme Council of Muslims and were all dated 24th April, 2014 and received on 25th April, 2014. Was this sufficient notification?

207. In the **Gakuru Case,** it was stated as follows:

> ***"…It is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention to pass legislation and where the legislation in question involves such important aspect as payment of taxes and levies, the duty is even more onerous. I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action."***

208. In that decision the Court relied on the holding in **Doctors for Life International vs. Speaker of the National Assembly and Others** (supra) to the effect that:

> ***"The phrase "facilitate public involvement" is a broad concept, which relates to the duty to ensure public participation in the law-making process. The key words in this phrase are "facilitate" and "involvement". To "facilitate" means to "make easy or easier", "promote" or "help forward". The phrase "public involvement" is commonly used to describe the process of allowing the public to participate in the decision-making process. The dictionary definition of "involve" includes to "bring a person into a matter" while participation is defined as "[a] taking part with others (in an action or matter); . . . the active involvement of members of a community or organization in decisions which affect them". According to their plain and ordinary meaning, the words public involvement or public participation refer to the process by which the public participates in something. Facilitation of public involvement in the legislative process, therefore, means taking steps to ensure that the public participate in the legislative process. That is the plain meaning of section 72(1)(a).This construction of section 72(1)(a) is consistent with the participative nature of our democracy. As this Court held in New Clicks, "[t]he Constitution calls for open and transparent government, and requires public participation in the making of laws by Parliament and deliberative legislative assemblies." The democratic government***

that is contemplated in the Constitution is thus a representative and participatory democracy which is accountable, responsive and transparent and which makes provision for the public to participate in the law-making process."

209. **Section 91** of the **County Governments Act** establishes the modalities and platforms for citizen participation. It provides that the county government shall facilitate the establishment of structures for citizen participation including—

" a. information communication technology based platforms;

b. town hall meetings;

c. budget preparation and validation fora;

d. notice boards: announcing jobs, appointments, procurement, awards and other important announcements of public interest;

e. development project sites;

f. avenues for the participation of peoples' representatives including but not limited to members of the National Assembly and Senate; or

g. establishment of citizen fora at county and decentralized units."

210. At this juncture, it is important to set out the parties' evidence with respect to public participation.

211. According to the affidavit sworn by Aloise Victor Njage on behalf of the petitioners on 23rd May, 2014 at paragraphs 6 and 7:

"***6. That by virtue of Article 10, Article 118(1) (b), Article 174 (a) and (c) Article 196 (1) (b) of the Constitution, your Petitioners avers that they are entitled to directly participate <u>in all businesses</u> of the Respondents of whatever nature and form and most especially an activity that touches or relates to good governance and/or establishment of the Embu County Government and that the removal and impeachment of their 1st Petitioner constitutes or amounts to <u>any other business</u> contemplated in the fore mentioned Article, and that the said right has been infringed by the Respondents when they moved to remove and impeach the 1st Petitioner in exclusion of the Petitioners herein, and as such your Petitioners are therefore entitled to Petition this Honourable Court for protection and restoration of the said right.***

7. That the Petitioners contend that have a right to information as enshrined under Article 35(1) (a) and (3) of the Constitution to enable comprehensive participation based on accurate information that pertains to them and affairs of the County Assembly."

212. For the Respondents, the affidavit sworn by Justus Kariuki Mate on 3rd June, 2014 at paragraph 32 deposed as follows:

"That the County Assembly of Embu is consultative Assembly that has always involved the public in its business. Accordingly, I verily believe that the allegations made by the Petitioners that the 1st Respondent failed in its obligations under Article 196 with regard to public participation are not true for reasons that;

i. The complaints giving rise to the investigations and subsequent charges against the 1st Petitioner were made by the public to their elected representatives and who raised them in the County Assembly and thereby precipitating investigations against the 1st Respondent (sic).

ii. In investigations made and in receiving evidence on the allegations made against the 1st Petitioner and which have now been substantiated, the County Assembly received data and information from the public. In the matter of the procurement of bad maize seeds by the office of the 1st Petitioner, an extensive field research was carried out with input from the farmers and thereby leading to the findings of the assembly and the senate that the said maize seeds had been unlawfully procured to the detriment and loss of farmers.

iii. All the committee and plenary proceedings of the assembly are open to the public for their input and contribution.

iv. The only reason why the Petitioners herein allege that there was no public participation in the process herein is because they are not an objective public but a group of the 1st Petitioner's supporters who have even in their petition expressed clear bias against the Assembly and its officials and would therefore not be an objective guide on the question of whether or not there was public participation.

v. The motive of the collection of signatures by the Petitioners is clear from the depositions of Aloise Victor Njagi in the affidavit sworn on 7th May 2014 where at paragraph 8 thereof he confirms that the signatures presented to this court vide their annextures1 to that affidavit, are not of persons alleging that the County Assembly did not involve the public in the process herein but signatures in support of a Petition to have the County suspended by the President under the provisions of Article 192 (1)(b).

vi. The said signatures are now introduced to these proceedings to mislead the court that the public is not involved in the business of the Assembly.

vii. The county Assembly in fulfilment of the statutory requirement to involve the public in its business developed infrastructure for public participation by July 2013, which included establishment of Public contact offices in each of the County Assembly Wards, and the recruitment of Ward staff to facilitate public participation.

viii. The County Assembly of Embu Through The office of the clerk disseminates notices of its businesses to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose.

ix. I verily believe that the requirement for public participation under Article 196 does not require a referendum of all citizens on all business of the Assembly as long as there is provided notice and forum for the public to participate in the business of the Assembly.

x. From the notices, the Assembly has from time to time received various responses and input from the public and which information is maintained by the office of the clerk."

213. The averments above made by the Respondents were not rebutted by a further affidavit of the Petitioners.

214. We have taken into account the period provided within which public participation may be conducted and the statutory structures for citizens participation, as well as the mode of notification formulated by the County Assembly. According to the respondents these included establishment of public contact offices in each of the County Assembly Wards, and the recruitment of Ward staff to facilitate public participation. They also contended that the County Assembly through the office of the Clerk disseminates notices of its business to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose.

215. From the averments by the parties which are before the Court, we are not satisfied that the allegation made by the Petitioners that they were not afforded an opportunity to participate in the removal proceedings has been proved. We are unable to stretch the averments in the supporting affidavit set out hereinabove to mean that the respondent's infrastructure stated in paragraph 32 of the replying affidavit was not adhered to in this case. It must be emphasized that in matters such as this evidence is contained in the affidavit rather than in submissions.

To what extent, if any, can the Court intervene in the removal process?

216. Having decided that the formal procedure as provided by the law was followed in the removal of the 1st Petitioner, we will now look at the issue of threshold. Impeachment of governors came with the introduction of counties by the **2010 Constitution.** Although the Constitution replaced in 2010 had provision for impeachment of the President, such power was never exercised by Parliament and we need to look at decisions of other jurisdictions to have a clear understanding of how this power should be exercised.

217. **Black's Law Dictionary, 9th Edition** at **page 820** defines impeachment as:

> **"*The act (by a legislature) of calling for the removal from office of a public official, accompanied by presenting a written charge of the official's alleged misconduct; esp., the initiation of a proceeding in the U.S. House of Representatives against a federal official, such as the President or a judge….***
>
> ***In the United Kingdom, impeachment is by the House of Commons and trial by the House of Lords."***

218. The word '*impeachment*' derives from Latin roots expressing the idea of being caught or entrapped, and is analogous to the modern French verb *empêcher* (to prevent) and the modern English word *'impede'*. Impeachment also means prosecution, indictment or arraignment.

219. We note that although the Standing Orders of the County Assembly of Embu provide for the removal by impeachment, the **Constitution** and the **Act** do not mention impeachment in reference to governors. The two documents only refer to removal from office. A closer

look at the Constitution explains why the drafters of the Constitution stuck with the words *'removal from office'* in the case of governors.

220. There are two provisions in the Constitution for the removal of the President. Under **Article 144,** the President can be removed from office on grounds of incapacity whilst under **Article 145,** he may be removed by impeachment. However, in the case of a governor, the grounds of removal are lumped together under **Article 181**.

221. One of the grounds for removal of a governor from office is *'physical or mental incapacity to perform the functions of office'.* A person cannot be blamed, accused or prosecuted for being physically or mentally unable to discharge the duties of office hence the avoidance of the word *'impeach'* in respect of the removal of county governors from office. That also explains why Parliament provided under **Section 33(9)** of the **Act** that removal of a governor from office on the grounds of physical or mental incapacity will be done in accordance with **Article 144** of the **Constitution** with necessary modifications. Owing to our explanation, we think that it would not be wrong to say that a governor has been removed by impeachment if the removal is not on the ground of physical or mental incapacity to perform the duties of office.

222. In the United States of America, the Constitution under **Article 1, Section 3, Clause 6** provides that the "**Senate shall have the sole Power to try all Impeachments."** To better understand why the framers of the Constitution of the United States of America vest impeachment solely on the House of Representatives, Michael J. Gerhardt in his article, **'The Special Constitutional Structure of the Federal Impeachment Process'**, Law and Contemporary Problems, Vol. 63: Nos. 1 & 2, pages 245-256, at page 246 states that;

> ***"By vesting the impeachment authority in the politically accountable authorities of the House and the Senate, the framers of the Constitution deliberately chose to leave the difficult questions of impeachment and removal in the hands of officials well versed in pragmatic decision-making. Members of Congress are pragmatists who can be expected to decide or resolve issues, including the appropriate tests, by recourse to practical, rather than formalist, calculations. In fact, members of Congress decide almost everything pragmatically, and decisions about impeachment and removal are no exception. The vesting of impeachment authority in political branches necessarily implies the discretion to take various factors, including possible consequences, into consideration in the course of exercising such authority."***

223. Therefore, under the Constitution of the United States of America, the impeachment process is the preserve of the House of Representatives and the Senate. Accordingly, there is no provision for intervention by any other organ or arm of the government.

224. **Article XI, section 6** of the **1987 Constitution of the Republic of the Philippines** provides that:

> ***"The Senate shall have the sole power to try and decide cases of impeachment. When sitting for that purpose, the Senators shall be on oath or affirmation. When the President of the Philippines is on trial, the Chief Justice of the Supreme Court shall preside, but shall not vote. No person shall be convicted without the concurrence of two-thirds of all the Members of the Senate."***

225. Closer home, the **Constitution of the Federal Republic of Nigeria 1999** under **section 188** provides for the removal of a governor or deputy governor. This provision was set out by the Supreme Court in the case of **Hon. Muyiwa Inakoju** (supra). It provides that:

> ***"188. (1) The Governor or Deputy-Governor of a State may be removed from office in accordance with the provisions of this section.***
>
> ***(2) Whenever a notice of any allegation in writing signed by not less than one-third of the members of the House of Assembly -***
>
> ***(a) is presented to the Speaker of the House of Assembly of the State;***
>
> ***(b) stating that the holder of such office is guilty of gross misconduct in the performance of the functions of his office, detailed particulars of which shall be specified, the Speaker of the House of Assembly shall, within seven days of the receipt of the notice, cause a copy of the notice to be served on the holder of the office and on each member of the House of Assembly, and shall also cause any statement made in reply to the allegation by the holder of the office, to be served on each member of the House of Assembly.***
>
> ***(3) Within fourteen days of the presentation of the notice to the Speaker of the House of Assembly (whether or not any statement was made by the holder of the office in reply to the allegation contained in the notice), the House of Assembly shall resolve by motion, without any debate whether or not the allegation should be investigated.***

(4) A motion of the House of Assembly that the allegation be investigated shall not be declared as having been, passed unless it is supported by the votes of not less than two-thirds majority of all the members of the House of Assembly.

(5) Within seven days of the passing of a motion under the foregoing provisions of this section, the Chief Judge of the State shall at the request of the Speaker of the House of Assembly, appoint a Panel of seven persons who in his opinion are of unquestionable integrity, not being members of any public service, legislative house or political party, to investigate the allegation as provided in this section.

(6) The holder of an office whose conduct is being investigated under this section shall have the right to defend himself in person or be represented before the Panel by a legal practitioner of his own choice.

(7) A Panel appointed under this section shall -

(a) have such powers and exercise its functions in accordance with such procedure as may be prescribed by the House of Assembly; and within three months of its report its findings to Assembly (sic).

(b) within three months of its appointment, report its findings to the House of assembly.

(8) Where the Panel reports to the House of Assembly that the allegation has not been proved, no further proceedings shall be taken in respect of the matter.

(9) Where the report of the Panel is that the allegation against the holder of the office has been proved, then within fourteen days of the receipt of the report, the House of Assembly shall consider the report, and if by a resolution of the House of Assembly supported by not less than two-thirds of all its members, the report of the Panel is adopted, then the holder of the office shall stand removed from office as from the date of the adoption of the report.

(10) No proceedings or determination of the Panel or of the House of Assembly or any matter relating to such proceedings or determination shall be entertained or questioned in any court.

(11) In this section -

"gross misconduct" means a grave violation or breach of the provisions of this Constitution or a misconduct of such nature as amounts in the opinion of the House of Assembly to gross misconduct." [Emphasis supplied]

226. In Kenya, the threshold for removal from office of a governor is provided under the **Constitution** and the **Act.** The **Senate Standing Orders** and the standing orders of various county assemblies make further provision on the issue.

227. **Section 33 (1)** of the **Act** provides that to move a motion, it has to be supported by at least a third of all the members of the County Assembly. Thereafter, during the vote, the motion has to be supported by at least two-thirds of all the members of the County Assembly. At the Senate, **Section 33 (7)** of the **Act** provides that for removal of a governor to succeed it must be supported by a majority of all members of the Senate.

228. Looking at the applicable laws in the various jurisdictions it is clear that other jurisdictions have provided for a more stringent procedure for impeachment. For example the inclusion of the Chief Justice in the Philippines in the impeachment panel; and the constitution by the Chief Judge of an independent impeachment panel in Nigeria. Ideally, that should be the case as removal from office has the potential to ruin a person's career and reputation spanning many years. The Kenyan laws appear to have left this issue entirely in the hands of the politicians – the County Assembly and the Senate. It is judgement by peers. On account of this, it is imperative that the judiciary exercise greater vigilance in its supervisory role.

229. However, unlike in the United States where the power of impeachment is expressly reposed in the legislature and Nigeria where the jurisdiction of the judiciary is ousted, the Kenyan Constitution leaves room for the judiciary to ensure that whatever is done by the County Assembly and the Senate is in consonance with the Constitution-see **Article 165(2)(d)(ii).**

230. Do the numbers amount to threshold? **Black's Law Dictionary, 9th Edition at page 1619** defines threshold in respect to parliamentary law as **"the number or proportion of votes needed for election".** We do think that numbers constituting the threshold for the removal count for something.

231. With regard to the case presented before this Court, it was the petitioners' case that the allegations made by the 1st and 2nd respondents can be narrowed down to gross violations of the **Public Procurement and Disposal Act** and **Public Finance and Management**

Act. Of the four grounds listed in **Article 181**, it appears that the Governor's removal from office was narrowed to gross violation of the Constitution and other laws. We will therefore deal with this ground of removal only.

232. It has been argued that the gross violation attributed to Mr. Wambora had not been demonstrated. Gross violation of the **Constitution** or any other law is a ground for removal from office as provided under **Article 181(1)(a).** The question that then arises is how you qualify gross violation. Who is the one to assess that the allegations amount to gross violation?

233. In stating what amounts to gross violation, the Supreme Court of Nigeria in **Hon. Muyiwa Inakoju** (*supra*) held that:

> ***"(i) The word "gross" in the subsection does not bear its meaning of aggregate income. It rather means generally in the context atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious and shocking. All these words express some extreme negative conduct. Therefore a misconduct which is the opposite of the above cannot constitute gross misconduct. Whether a conduct is gross or not will depend on the matter as exposed by the facts. It cannot be determined in vacuo or in a vacuum but in relation to the facts of the case and the law policing the facts.***
>
> ***(ii) Gross misconduct is defined as (a) a grave violation or breach of the provisions of the Constitution and (b) a misconduct of such nature as amounts in the opinion of the House of Assembly to gross misconduct.***
>
> ***(iii) By the definition, it is not every violation or breach of the Constitution that can lead to the removal of a Governor or Deputy Governor. Only a grave violation or breach of the Constitution can lead to the removal of a Governor or Deputy Governor. Grave in the context does not mean an excavation in earth in which a dead body is buried, rather it means, in my view, serious, substantial, and weighty.***
>
> ***(iv) The following, in my view, constitute grave violation or breach of the Constitution: (a) Interference with the constitutional functions of the Legislature and the Judiciary by an exhibition of overt unconstitutional executive power, (b) Abuse of the fiscal provisions of the Constitution, (c) Abuse of the Code of Conduct for Public Officers, (d) Disregard and breach of Chapter IV of the Constitution on fundamental rights, (e) Interference with Local Government funds and stealing from the funds or pilfering of the funds including monthly subventions for personal gains or for the comfort and advantage of the State Government, (f) instigation of military rule and military government, (g) Any other subversive conduct which is directly or indirectly inimical to the implementation of some other ' major sectors of the Constitution.***
>
> ***(v) The following in my view, are some acts which in the opinion of the House of Assembly, could constitute grave misconduct (a) Refusal to perform constitutional functions, (b) Corruption. (c) Abuse of office or power, (d) Sexual harassment. I think I should clarify this because of the parochial societal interpretation of it to refer to, only the male gender. The misconduct can arise from a male or female Governor or Deputy Governor as the case may be. (e) A drunkard whose drinking conduct is exposed to the glare and consumption of the public and to public opprobrium and disgrace unbecoming of the holder of the office of Governor or Deputy Governor, (f) Using, diverting, converting or siphoning State and Local Government funds for electioneering campaigns of the Governor, Deputy Governor or any other parson, (g) Certificate forgery and racketeering. Where this is directly connected, related or traceable to the procurement of the office of the Governor or Deputy Governor, it will not, in my view, matter whether the misconduct was before the person was sworn in. Once the misconduct flows into the office, it qualifies as gross misconduct because he could not have held the office but for the misconduct. Such a person, in my view, is not a fit and proper person to hold the office of Governor or Deputy Governor. It is merely saying the obvious that a Governor or Deputy Governor who involves in certificate forgery and racketeering during his tenure has committed gross misconduct."***

234. With regard to what amounts to gross violation the Court in **Wambora 1** observed at paragraph 253;

> ***"….whatever is alleged against a Governor must:***
>
> ***(a) Be serious, substantial and weighty.***
>
> ***(b) There must a nexus between the Governor and the alleged gross violations of the Constitution or any other written law.***

(c) The charges framed against the Governor and the particulars thereof must disclose a gross violation of the Constitution or any other written law.

(d) The charges as framed must state with degree of precision the Article(s) or even sub-Article (s) of the Constitution or the provisions of any other written law that have been alleged to be grossly violated."

235. On appeal, the Court of Appeal at Nyeri as regards what amounts to gross violation, held at paragraph 46 in **Wambora 1 Appeal** that:

> ***"We reiterate that what constitutes gross violation of the Constitution is to be determined on a case by case basis. Gross violation of the Constitution includes violation of the values and principles enshrined under Article 10 of the Constitution and violation of Chapter six (Leadership & Integrity) of the Constitution; or intentional and/or persistent violation of any Article of the Constitution; or intentional and blatant or persistent violation of the provisions of any other law. The rationale for this definition is that the values and principles embodied in the Constitution provide the bedrock and foundation of Kenya's constitutional system and under Article 10(1) these values bind all state organs, state officers, public officers and all persons. We hasten to state that the facts that prove gross violation as defined above must be proved before the relevant constitutional organ. Examples of the constitutional Articles whose violation amounts to gross violation include:***
>
> ***i. Chapter 1 on the Sovereignty of the People and Supremacy of the Constitution more specifically Articles 1, 2, and 3 (2) of the Constitution.***
>
> ***ii. Chapter 2- Article 4 that establishes Kenya as a sovereign multi-party Republic & Article 6 that establishes devolution and access to services.***
>
> ***iii. Article 10 on national values and principles of good governance.***
>
> ***iv. Chapter 4 on the Bill of Rights.***
>
> ***v. Chapter 6- Articles 73 to 78 on Leadership and Integrity.***
>
> ***vi. Chapter 12 - Article 201 on principles of public finance.***
>
> ***vii. Chapter 13- Article 232 on values and principles of public service.***
>
> ***viii. Chapter 14 - Article 238 on principles of national security.***
>
> ***ix. Article 259 (11) on advice and recommendation.***
>
> ***x. Any conduct that comes within the definition of the offence of treason in the Penal Code (Cap 63 of the Laws of Kenya)."***

236. A body exercising its quasi-judicial function should be very careful in deciding what amounts to gross violation or misconduct. The Supreme Court of Nigeria in **Hon. Muyiwa Inakoju** (*supra*) warned that:

> ***"It is not a lawful or legitimate exercise of the constitutional function in section 188 for a House of Assembly to remove a Governor or a Deputy Governor to achieve a political purpose or one of organised vendetta clearly outside gross misconduct under the section. Section 188 cannot be invoked merely because the House does not like the face or look of the Governor or Deputy Governor in a particular moment or the Governor or Deputy Governor refused to respond with a generous smile to the Legislature qua House on a parliamentary or courtesy visit to the holder of the office. The point I am struggling to make out of this light statement on a playful side is that section 188 is a very strong political weapon at the disposal of the House which must be used only in appropriate cases of serious wrong doing on the part of the Governor or Deputy Governor, which is tantamount to gross misconduct within the meaning of subsection (11). Section 188 is not a weapon available to the Legislature to police a Governor or Deputy Governor in every wrong doing. A Governor or Deputy Governor, as a human being, cannot always be right and he cannot claim to be right always. That explains why section 188 talks about gross misconduct. Accordingly, where a misconduct is not gross, the section 188 weapon of removal is not available to the House of Assembly."***

237. The Court of Appeal in **Wambora 1 Appeal** did accept that the process had a political element when it held at paragraph 31 that:

> ***"Our reading and interpretation of Article 181 of the Constitution as read with Section 33 of the County Governments Act shows that removal of a Governor is a constitutional and political process; it is a sui generis process***

that is quasi-judicial in nature and the rules of natural justice and fair administrative action must be observed. The impeachment architecture in Article 181 of the Constitution reveals that removal of a Governor is not about criminality or culpability but is about accountability, political governance as well as policy and political responsibility."

238. On the doctrine of separation of powers, the Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] e KLR** held that:

> ***"It is not in doubt that the doctrine of separation of powers is a feature of our constitutional design and a pre-commitment in our constitutional edifice. However, separation of powers does not only proscribe organs of government from interfering with the other's functions. It also entails empowering each organ of government with countervailing powers which provide checks and balances on actions taken by other organs of government. Such powers are, however, not a license to take over functions vested elsewhere. There must be judicial, legislative and executive deference to the repository of the function. We therefore agree with the High Court's dicta in the petition the subject of this appeal that:***
>
> ***"[Separation of powers] must mean that the courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the executive sufficient latitude to implement legislative intent. Yet, as the Respondents also concede, the Courts have an interpretive role - including the last word in determining the constitutionality of all governmental actions..."""***

239. We have no doubt in our minds that this Court has a supervisory role to play in the process of the removal of a governor. Time and again it has been said and will continue being said, that so long as the Constitution remains as it is, this Court has a duty to check the constitutionality and legality of anything done by Parliament (National Assembly and Senate) and the county assemblies. The Court must zealously and firmly guard this power for to do otherwise would amount to subverting the Constitution by abdicating a clear constitutional responsibility. In the same breath it must be stated that the courts cannot take over the roles clearly reposed in the other arms of government by the Constitution. Again, that would amount to an overthrow of the Constitution in the pretext of exercising supervisory powers. Of course this is within the context of exercise by such state organ of its mandate within the Constitution and the law. A delicate balance must indeed be struck in order to attain harmonious and smooth operation of the engine of governance. The Court must not severely restrict the constitutional mandates of the other state organs to the extent that those organs cannot execute their work. Such restrictions may result in the Constitution looking like a green and beautiful tree that bears no fruit.

240. The Court of Appeal in **Wambora 1 Appeal** at paragraph 53 of the judgement delineated the role of the Court in removal proceedings as follows:

> ***"It is incumbent upon the High Court to determine if the facts in support of the charges against a Governor meet and prove threshold in Article 181 of the Constitution. For example, was the 4th appellant an employee of the 1st appellant or of the County Government? Is a Governor to bear personal vicarious liability for the acts and omissions of officers of the County Government? We are of the view that Article 181 and Section 33 of the County Governments Act are not ouster clauses that limit or oust the jurisdiction of the High Court as conferred by Article 165 (3) (d) (ii) and(iii) of the Constitution. Though the process of removal of a governor from office is both a constitutional and a political process, the political question doctrine cannot operate to oust the jurisdiction vested on the High Court to interpret the Constitution or to determine the question if anything said to be done under the authority of the Constitution or of any law is consistent with or in contravention of the Constitution."***

241. We hold the view that the powers exercisable by this Court are powers of review and such powers can only check compliance with the Constitution, the law, the rules of natural justice and the rationality of impugned decisions. Where the decision of the impeaching organs is contrary to common logic, then this Court can quash such a decision for being unreasonable.

242. We associate ourselves with the dicta of Souter, J in his concurring opinion in **Nixon v United States, 506 U. S. 224 (1993)** where he observes that although removal proceedings should be left to the Senate:

> ***"One can, nevertheless, envision different and unusual circumstances that might justify a more searching review of impeachment proceedings. If the Senate were to act in a manner seriously threatening the integrity of its results, convicting, say, upon a coin***

toss, or upon a summary determination that an officer of the United States was simply " 'a bad guy'"…judicial interference might well be appropriate. In such circumstances, the Senate's action might be so far beyond the scope of its constitutional authority, and the consequent impact on the Republic so great, as to merit a judicial response despite the prudential concerns that would ordinarily counsel silence."

243. In our view, the conduct of the county assemblies and the Senate should only raise the antenna of this Court if they do something perverse to normal conduct to the extent of perplexing and agitating the mind of the ordinary man going about his business in Gikomba market in Nairobi.

244. In our case there are clear steps provided in the process leading to the removal of a governor. That process begins at the county level then proceeds to the Senate. Where the motion for removal has succeeded in the County Assembly, it does not necessarily mean the Senate will automatically approve the removal. In fact a careful reading of the relevant laws shows that the actual trial is by the Senate. Under **Article 96(1)** of the **Constitution** the role of the Senate is to represent the counties, and protect the interests of the counties and their governments. In the removal of a governor, the County Assembly and the Senate are performing their functions under the **Constitution** and the **Act.**

Can the courts intervene?

245. It is our considered opinion that the courts have to be very careful before they intervene in matters that are properly in the domain of other state organs. We opine that the courts can only intervene where constitutional issues are raised. As was observed by the Supreme Court of India in the case **State of Rajasthan** (*supra*)**:**

'….it is true that if a question brought before the Court is purely a political question not involving determination of any legal or constitutional right or obligation, the Court would not entertain it, since the Court is concerned only with adjudication of legal rights and liabilities. But merely because a question has a political complexion that by itself is no ground why the Court should shrink from performing its duty under the Constitution if it raises an issue of constitutional determination. Every constitutional question concerns the allocation and exercise of governmental power and no constitutional question can, therefore, fail to be political. A constitution is a matter of purest politics, a structure of power and as pointed out by Charles Black in Perspectives in Constitutional law' "constitutional law' symbolizes an intersection of law and politics, wherein issues of political power are acted on by persons trained in the legal tradition, working in judicial institutions, following the procedures of law…."

246. We agree with the Court of Appeal in **Mumo Matemu** (*supra*) where it was stated that:

"We [also] reiterate that a court reviewing the procedure of a legislature is not a super-legislature, sitting on appeal on the wisdom, correctness or desirability of the opinion of the impugned decision-making organ. It has neither the mandate nor the institutional equipment for that purpose in our constitutional design. Moreover, the process cannot be wrong simply because another institution, for example the courts, would have conducted it differently. It must be accepted that the institutional environment is controlling on the manner in which an organ disposes of its issues."

247. In **Wambora 1 Appeal** (supra) the Court of Appeal was of the opinion that this Court has to interrogate the facts in order to determine whether there was nexus between the Governor and the alleged gross violations. That would call for a substantive interrogation of the charges and evidence leading to the removal in order for the Court to make any meaningful and legitimate intervention.

248. However in this case we were not supplied with material which would enable us to conduct interrogation, and there is the danger of the Court speculating as to whether what led to removal of the Governor met the threshold. For example, the evidence which was tabled before the investigations committees was not availed to this Court. In addition, evidence such as was availed to the Senate and which is referred to in the Hansard was not availed before the Court. This is the nature of evidence which might have enabled the Court to deal with the issues of nexus and threshold.

249. We now consider whether there was a nexus between the 1st Petitioner and the alleged gross violation of the Constitution and the relevant laws. The summary of the findings of the Special Committee of the Senate is found at page 68 of the Report where it is stated that:

*"**CONCLUSION***

153. The Special Committee, having executed its mandate under section 33 of the County Governments Act and standing order 68 of the Senate Standing Orders has found as follows-

(1) On the Charge of Gross Violation of the Public Procurement and Disposal Act, Chapter 412A of the Laws of Kenya, pursuant

to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated;

(2) On the Charge of Gross Violation of the Public Finance Management Act, Chapter 412 C of the Laws of Kenya, pursuant to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated; and

(3) On the Charge of Gross Violation of the Constitution of Kenya, 2010 pursuant to section 33(6) of the County Governments Act, 2012 and standing order 68(4) of the Senate Standing Orders, the Committee finds this Charge to be substantiated."

250. A perusal of the report clearly shows that the Senate analysed the evidence put forward in support of each allegation. The Senate also considered the 1st Petitioner's written answer to the charges before making its determination. The allegation of gross violation of the **Public Procurement and Disposal Act** was premised on the purchase and distribution of maize seed that did not germinate or whose germination did not surpass 20%, and the procurement of works for the face-lifting of Embu Stadium.

251. After considering the evidence availed to it concerning the purchase of maize seeds, the Special Committee at pages 46-49 of the **Report** observed and concluded that;

"99. The Governor, in his response, seems to have taken the approach of denying liability and assigning blame to other officials within the County, specially the procurement officials, arguing that procurement was not undertaken by the Governor but by these officials. On the lack of germination of seeds, the Governor, in his response, blamed "lack of adequate rainfall or other non-procurement reasons". This, however, is not corroborated by the documentation from the experts - KEPHIS and the County Executive Committee Member for Agriculture – which make no mention of lack of adequate rainfall as a factor that may have contributed to the non-germination or poor germination of the DK 8031 maize seeds.

100. Article 179(4) of the Constitution provides that the Governor is the "chief executive" of the County. Where the entire County is virtually at a stand-still due to a failed crop, and the County Executive is virtually on trial by the residents of Embu County, it is unthinkable that the chief executive of the County would do nothing except to shift blame to junior officers in the County and to blame, without any proof, lack of adequate rainfall as the cause of the failed crop. As chief executive, the Governor retains an overall oversight responsibility over the affairs of his County, including matters of procurement, and he cannot therefore be heard to say, on a matter so important to the County as the distribution of failed maize seeds that "it was not me".

101. Article 227 of the Constitution provides for "procurement of goods and services" and requires, at sub-article (1) that "when a State organ or any other public entity contracts for goods and services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective". In this matter, the Special Committee observes that there is no evidence that the procurement of the maize seeds was conducted in a fair, equitable, transparent, competitive and cost-effective manner. The evidence of the County Assembly and that of the County Executive Committee for Agriculture points to procurement of DK 8031 maize seed which was authorized by the Office of the Governor but that fell below the threshold under article 227 of the Constitution. The County Assembly in making its case stated that the entire procurement of the maize seeds demonstrated "complacency, incompetence and manipulation of the procurement system to aid fraud". This position was not rebutted by the response of the Governor which merely sought to place blame on the procurement officials.

102. Section 27 of the Public Procurement and Disposal Act, 2005, further requires at sub-section (3) that "each employee of a public entity and each member of a board or committee of the public entity shall ensure, within the areas of responsibility of the employee or member that this Act, the regulations and the directions of the Authority are complied with". No evidence was presented by the Governor to demonstrate that, as the chief executive of the County Executive, he had ensured compliance with the Public Procurement and Disposal Act, 2005 before taking the steps of launching the DK 8031 maize seeds and extensively distributing the maize seeds within the County. There was also no evidence that the

Governor had directed the County Secretary or the officials serving in his office to adhere to the procurement laws. Had the Governor done so, he would probably have forestalled the massive losses occasioned to the farmers.

103. The Committee further observed, as had been submitted by the County Assembly, that the annual procurement plan of the Director of Agriculture prepared in accordance with section 26(3) of the Public Procurement and Disposal Act, provided for the purchase of two varieties of maize: KDV 1 and KDV 6. The County Executive, with the authorization and full knowledge of the Office of the Governor, proceeded to instead purchase maize of variety DK 8031 without the authority of the Tender Committee as required under section 26(4) of the Public Procurement and Disposal Act and in accordance with the procurement procedure detailed under section 34 of the Act."

252. The Special Committee made almost similar findings on the procurement of works for the face-lifting of Embu Stadium. It observed that the tender was floated at a time that a Tender Committee did not exist within the County.

253. As for the allegation of gross violation of the **Public Finance Management Act, 2012,** the Special Committee concluded at page 62 that:

"143. As the chief executive of the County, the Governor had a responsibility to ensure that he discharged the obligation under section 162 of the Public Finance Management Act, 2012 with respect to the management and utilization of County resources. The response of the Governor to the allegations set out by the County Assembly does not demonstrate to the Committee that the Governor has indeed discharged his mandate under section 162 of the Public Procurement and Disposal Act, 2012."

254. The allegation of gross violation of the **Constitution** was considered by the special Committee which made several observations one of them being at pages 66-67 as follows:

"150. The Special Committee further observed that the standard response by the Governor to all the allegations set out by the County Assembly has been "it was not me". This response by the Governor does little to "promote public confidence" in the office of the Governor as required under Article 73(1)(a)(iv) of the Constitution. The Governor seems to have abdicated from taking any responsibility for the goings on in his office and in his County, despite being the elected chief executive of the County. This is in violation of section (sic) 73(2)(d) of the Constitution which requires that State officers be guided by the principle of "accountability to the public for decisions and actions".

255. In **Wambora 1 Appeal** the Court stated that the standard of proof in such proceedings is;

"….neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a governor involves "gross violation of the Constitution", we hold that the standard of proof required for removal of Governor is above a balance of probability but below reasonable doubt."

If that be so, then we do not hesitate to hold that the Senate attained this standard.

256. As a matter of observation, we note that the decision of the Senate came before the decision of the Court of Appeal. In its Report the Special Committee had grappled with the issue of the standard of proof required in removal proceedings and although it did not make any specific conclusion, it appears to have left the standard of proof, which was deemed to be above a balance of probabilities and rising up to beyond reasonable doubt, to the discretion of individual senators. Depending on the individual senators, their standard of proof was higher than that set by the Court of Appeal.

257. After citing **Article 73** of the **Constitution** on the responsibility of leadership, the Senate concluded at page 37 that;

"75. These are therefore the standards by which the Governor should be judged when considering the allegations against him and the evidence produced in support of the allegations. The violations must be gross, that is, a glaring error, flagrant and extreme. The violation must be such that it brings dishonour and lowers the dignity of the office of the governor. A minor infraction of the law cannot attract the sanction of impeachment."

258. From the foregoing it is apparent that the Senate understood the constitutional threshold that had to be met. We have no reason to fault the Senate in its conclusion.

259. In line with our power to consider the reasonableness of the decision of the Senate, we have looked at **the Report** and find nothing in it that would invite the review powers of this Court.

260. In summary, our view is that this Court can only review proceedings relating to the removal of a governor. We have nevertheless subjected to scrutiny **the Report** of the Special Committee on the removal of the 1st Petitioner and we have found the same to be satisfactory. We find no reason for disturbing the decision of the Senate. Whether or not we agree with it is another thing altogether.

APPRECIATION

261. Before we conclude we must express our gratitude to counsel for thorough research and very eloquent submissions made in the prosecution of and in opposition to this petition. If we have not referred to all the authorities referred to us by counsel, it is not due to disrespect or out of lack of the appreciation for counsels' industry.

DISPOSITION

262. Having considered this petition it is our view and we hold as follows on each of the issues vented for determination:

1. **This petition is not incompetent.**
2. **The proceedings to impeach the Governor of Embu County Hon. Martin Nyaga Wambora were not *sub judice*.**
3. **Section 33 of the County Governments Act, 2012 is not unconstitutional.**
4. **The due process for the removal of a governor was followed in the removal of the Governor of Embu County Hon. Martin Nyaga Wambora.**
5. **The removal process of the Governor requires that an opportunity be afforded to the public to participate therein which opportunity was afforded in the instant case.**
6. **The courts can intervene where constitutional issues are raised.**
7. **That in the result this petition fails and is dismissed.**

COSTS

262. On the issue of costs we find that this litigation has been useful in advancing the law concerning the removal of governors from office. Although the petition has been lost, we do not think that the litigation has been in vain. Therefore, the appropriate order on costs is to direct each party to meet own costs and we so order.

Orders Accordingly.

Signed and Dated at Nairobi this 12th day of February, 2015.

_____

R MWONGO

PRINCIPAL JUDGE

_____

W KORIR

JUDGE

_____

G V ODUNGA

JUDGE

In the presence of:

1. **Mr. Nyamu with Mr. Njoroge for the petitioners in petition No. 7 of 2014.**
2. **Mr. Ndegwa for the Petitioners in petition No. 8 of 2014**
3. **Mr. Njenga for the 1st and 2nd respondents.**
4. **Miss Thanjifor the interested party**
5. **Miss Tallam for the amicus**

Martin Nyaga & others v Speaker County Assembly of Embu & 4 others & Amicus Curiae [2014] eKLR

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

EMBU PETITION NOS. 7 & 8 OF 2014

HON. MARTIN NYAGA & OTHERS .....PETITIONERS

VERSUS

THE SPEAKER COUNTY ASSEMBLY OF EMBU…..1ST RESPONDENT

THE COUNTY ASSEMBLY OF EMBU..... 2ND RESPONDENT

THE SPEAKER OF SENATE…….....3RD RESPONDENT

THE CHANCELLOR, KENYATTA UNIVERSITY…....4TH RESPONDENT

THE SENATE, PARLIAMENT OF KENYA.....5TH RESPONDENT

THE PARLIAMENTARY SERVICE COMMISSION.....1ST INTERSTED PARTY

COMMISSION ON ADMINISTRATIVE JUSTICE.....AMICUS CURIAE

RULING

1. On 19th May, 2014, the Principal Judge of the High Court, **Hon. Mr Justice Richard Mwongo** issued directions in respect of these two consolidated Petitions on the mode of hearing thereof. Subsequently, on 30th May, 2014, due to official functions outside the country the Judge with the consent of the Hon. The Chief Justice directed that the petitions be heard by this Honourable Court with due expedition. The hearing of both petitions was then fixed for 12th June, 2014.

2. However, on 12th June 2014 the petitioners made an oral application that pursuant to Article 165(4) of the Constitution this Court ought to certify that the issues raised in the petitions disclose substantial questions of law warranting the empanelling of a bench consisting of uneven number of judges of not less than three.

3. It was submitted that the matters deal with issues whether impeachment is a political question hence the Court is barred from exercising jurisdiction; whether section 33 of the ***County Governments Act*** is unconstitutional; whether Article 181 of the Constitution presupposes a situation whereby impeachment proceedings is an exclusive affair of the County Assembly and the Senate; whether the Court can interpret and determine what amounts to gross violation of the law to warrant the impeachment of a Governor; whether the rule of bias in the principle of natural justice may be invoked in the case of the Senate and its Committee hearings as a justification to quash the decision under Article 165 of the Constitution; whether the *sub judice* rule applies to the Houses of Parliament where a matter is pending before the High Court and whether the Court would be interfering with another organ in violation of the principle of Separation of Powers.

4. It was further contended that in these petitions the Court would be called upon to interpret Articles 1, 3 and 25 of the***International Convention on Civil and Political Rights***, Article 20 of the ***African Charter on Human and Peoples' Rights*** vis-à-vis Article 2(5) of the Constitution as read with Article 196(1)(b), 118(1)(b) and 174 (a) and (c). Further Articles to be interpreted would include Articles, 33 and 35 as well as Article 1(2) with respect to the extent of sovereignty in so far as democracy is concerned. While appreciating that this Court has dealt with the issue of public participation at the legislative level, it was contended that under Article 196 the said participation is not limited to the legislative process but includes other business so that the Court would be called upon to determine what encompasses "other business".

5. It was contended that the need to refer the matters to the Chief Justice for empaneling of the said bench arose as a result of new issues raised in the amended petition and the change in circumstances occasioned by the impeachment proceedings which took place after the filing of the petitions.

6. It was therefore the petitioners' case that these issues are weighty enough to amount to substantial question of law as envisaged under Article 165(4) of the Constitution and warrants the expansion of the bench to hear the petitions. In their view a decision on these petitions will not only affect the parties to these proceedings but is likely to affect the Governors in this Country and the County Governments.

7. The arguments in opposition to the application, on the other hand were that directions for the hearing of the petitions were given after the issues were isolated and that a similar application was made before **Mwongo, J** who held that in consultation with the Chief Justice, he was of the view that the issues forming the subject of these petitions had been raised before the bench which heard an earlier petition between the parties herein hence there was nothing unique in these petitions to warrant the constitution of an enlarged bench. It was contended that the directions herein were given after the purported new developments had taken place and that the amendment to the petition was not meant to introduce new issues but was only meant to take into account the fact of the consolidation. According to the Respondents, it is not true that the amended petition raises new issues since all the Constitutional issues raised in the petitions such as gross violation have been determined in the past decisions and the petitioners are free to cite the same. In their view the constitution of an expanded bench would delay the matter yet there is no novel issue raised for determination.

8. Since the same application had been made before **Mwongo, J** who declined to grant the same, what the petitioners are now seeking is a variation of the same order by a Court of concurrent jurisdiction. In their view if the Court has dealt with one aspect of participation it may well deal with the other aspects.

9. I have considered the foregoing. In my view the decision whether or nor to empanel a bench of more than one Judge ought to be made only where it is absolutely necessary and in strict compliance with the relevant Constitutional and statutory provisions. In this country we still do not have the luxury of granting such orders at the whims of the parties. Judicial resources in terms of judicial officers in this country are very scarce. Empanelling such a bench usually has the consequence of delaying the cases which are already in the queue hence worsening the problem of backlogs in this country. I therefore associate myself with the position taken by **Majanja, J** in **Harrison Kinyanjui vs. Attorney General & Another [2012] eKLR** that the meaning of "substantial question" must take into account the provisions of the Constitution as a whole and the need to dispense justice without delay particularly given specific fact situation.

10. **Article 165** of the Constitution provides as follows:

(1) There is established the High Court, which—

(a) shall consist of the number of judges prescribed by an Act of Parliament; and

(b) shall be organised and administered in the manner prescribed by an Act of Parliament.

(2) There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

11. From the foregoing it is clear that the only constitutional provision that expressly permits the constitution of bench of more than one High Court judge is **Article 165(4).** Under that provision, for the matter to be referred to the Chief Justice for the said purpose the High Court must certify that the matter raises a substantial question of law:

1. **Whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; or**

2. **That it involves a question respecting the interpretation of this Constitution and under this is included *(i) the question whether any law is inconsistent with or in contravention of this Constitution; (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution; (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and (iv) a question relating to conflict of laws under Article 191.***

12. Therefore it is not enough that the matter raises the issue whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened or that it raises the issue of interpretation of the Constitution. The Court must go further and satisfy itself that the issue also raises a substantial question of law. The Constitution itself does not define what constitutes "substantial question of law". It is therefore upon the Court to determine what would amount to "a substantial question of law".

13. I associate myself with the decision in **Chunilal V. Mehta vs Century Spinning and Manufacturing Co. AIR 1962 SC 1314** that:

"a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial."

14. In **Santosh Hazari vs. Purushottam Tiwari** (2001) 3 SCC 179 it was held that:

"A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be "substantial" a question of law must be debatable, not previously settled by law of the land or a binding precedent, and must have a material bearing on the decision of the case, if answered either way, insofar as the rights of the parties before it are concerned. To be a question of law "involving in the case" there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any *lis*."

15. In India certain tests have been developed by the Courts as criterion for determining whether a matter raises substantial question of law and these are therefore (1) whether, directly or indirectly, it affects substantial rights of the parties, or (2) the question is

of general public importance, or (3) whether it is an open question, in the sense that the issue has not been settled by pronouncement of the Supreme Court or the Privy Council or by the Federal Court, or (4) the issue is not free from difficulty, or (5) it calls for a discussion for alternative view.

16. In my view these holdings offer proper guidelines to our Court in determining whether or not a matter raises a "a substantial question of law" for the purposes of Article 165(4) of the Constitution.

17. It is therefore my view that a matter would be construed to raise a substantial question of law if *inter alia* any or all of the following factors are present: whether the matter is moot in the sense that the matter raises a novel point, whether the matter is complex, whether the matter by its nature requires a substantial amount of time to be disposed of, the effect of the prayers sought in the petition and the level of public interest generated by the petition.

18. However, the operative word in Article 165(4) is "includes". To my mind the examples set out under Article 165(4) are not exclusive.

19. In my view the mere fact that there are conflicting decisions by the High Court does not necessarily justify a certification that the matter raises a substantial question of law. My view is informed by the fact that the mere fact that a numerically superior bench is empaneled whose decision differs from that of a single Judge does not necessarily overturn the single judge's decision. To overturn a decision of a single Judge one would have to appeal to the Court of Appeal. Similarly appeals from decisions of numerically superior benches go to the Court of Appeal.

20. It was contended that **Mwongo, J** had already dealt with the issue of the empanelling of a bench. I have perused the record of this matter and whereas on 12th May, 2014, **Mr Nyamu**, learned counsel for the petitioner in petition no. 7 of 2014 sought directions from the Court on that issue, the Court does not seem to have made a finding one way or the other on the issue. Even if it had done so, it is clear from the amended petition that there were issues which were raised therein which did not form part of the original petition hence the change in circumstances would justify the Court in entertaining a similar application without necessarily being caught up by the res judicata doctrine. In the cases of **Mburu Kinyua vs. Gachini Tuti [1978] KLR 69; [1976-80] 1 KLR 790** and **Churanji Lal & Co vs. Bhaijee (1932) 14 KLR 28** it was held that:

> **"However, caution must be taken to distinguish between discovery of new facts and fresh happenings. The former may not necessarily escape the application of the doctrine since parties cannot by face-lifting the pleadings evade the said doctrine. In the case of Siri Ram Kaura vs. M J E Morgan Civil Application No. 71 of 1960 [1961] EA 462 the then East African Court of Appeal stated as follows:**
>
> **"The general principle is that a party cannot in a subsequent proceeding raise a ground of claim or defence which has been decided or which, upon the pleadings or the form of issue, was open to him in a former proceeding between the same parties. The mere discovery of fresh evidence (as distinguished from the development of fresh circumstances) on matters which have been open for controversy in the earlier proceedings is no answer to a defence of res judicata.....The point is not whether the respondent was badly advised in bringing the first application prematurely; but whether he has since discovered a fact which entirely changes the aspect of the case and which could not have been discovered with reasonable diligence when he made his first application.".**

21. It is contended by the petitioners that they intend to urge the Court to determine what constitute "other business" in Article 196(1)(b) of the Constitution. If I understand the petitioners, they would wish the Court to determine whether the process of impeachment of a Governor constitutes "other business" under the said Article to warrant public participation and the level of such public participation. Whereas it is true that this Court in **Robert W. Gakuru & Others vs. The Governor of Kiambu County and 3 Others Petition No. 532 of 2013** dealt with the issue of public participation, I agree that in the said decision the issue of what constitutes "other business" did not arise and therefore was not determined by the Court.

22. It is not lost to this Court that this provision is on similar terms to Article 118(1)(b) of the Constitution which provides for facilitation of public participation and involvement in the legislative and other business of Parliament and its committees.

23. Therefore I am prepared to assume at this stage without deciding that a determination of the meaning of "other business" in Article 196(1)(b) may impact on the meaning of "other business" in Article 118(1)(b) of the Constitution hence a determination as to whether or not impeachment of a Governor amounts to "other business" may have a wider impact than what the parties herein contemplate. Taking into account the similarity in the language employed in the said Articles, such a determination may not only affect the procedure to be adopted in impeachment of Governors but also other

State Officers who are subject to impeachment as well.

24. In these petitions there are positions in serious contention. Firstly is whether a Governor who is popularly elected by the electorates ought to be removed from the office based on a decision of the County Assembly and the Senate without the participation of the electorates. One can envisage a situation where the electorates by popular mandate elect a governor whose party neither controls the County Assembly nor the Senate and who might easily fall victim of his "unpopularity" within the Assembly and Senate rather than his/her popularity with the electorates. On the other side of the coin in the feasibility of involving the public in the removal of the Governor without conducting what may well amount to mini-election. These issues are in my view by no means insubstantial. They are issues which may not only affect how the County Assemblies operate but also how the Parliament operate. Accordingly, the doctrine of separation of powers in light of the two provisions must once again come into serious scrutiny.

25. These issues taken together with the other issues to be raised in the petition such as the need for the Court to determine the threshold for what amounts gross misconduct, bias and the thorny issue of separation of powers cumulatively lead me to the inescapable conclusion that the two petitions taken together raise substantial questions of law under Article 165(4) as read with under clause (3) (b) or (d) of Article 165 of the Constitution as to justify the empaneling of a bench of uneven number of Judges of this Court of not less than three, assigned by the Chief Justice. I so certify.

26. Accordingly, I direct that the Petitions be transmitted to the Hon. the Chief Justice forthwith to consider empaneling the said bench. Further directions will await the decision by Hon. the Chief Justice.

Dated at Nairobi this 16th day of June 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Nyamu, Mr Njoroge and Mr Ndegwa for the Petitioners

Mr Njenga for the 1st and 2nd Respondents

Miss Dhanji for interested party

Mr Mutongo for amicus curiae

Mr Wachira for intended interested party

Cc Kevin

Judicial Service Commission v Gladys Boss Shollei & another [2014] eKLR

IN THE COURT OF APPEAL

ATNAIROBI

(CORAM: OKWENGU, G.B.M. KARIUKI & KIAGE JJA.)

CIVIL APPEAL NO. 50 OF 2014

BETWEEN

JUDICIAL SERVICE COMMISSION ……..APPELLANT

AND

GLADYS BOSS SHOLLEI……..1ST RESPONDENT

COMMISSION ON ADMINISTRATIVE JUSTICE…....2ND RESPONDENT

(An appeal from the Judgment and Decree of the Industrial Court of Kenya at

Nairobi (Mathews N. Nduma, J.) dated 7th day of March, 2014

in

PetitionNo. 39 of 2013 (formerly Nairobi Petition No. 528 of 2013)

****

JUDGMENT OF OKWENGU JA

Introduction

[1] The ***Judicial Service Commission*** (*hereinafter referred to as the "appellant"*) is a Constitutional Body established under ***Section 171(1)*** of the Constitution of Kenya 2010 (*herein the "Constitution").* The main function of the appellant as provided under ***Section 172(1)*** of the Constitution is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice.

[2] The position of the Chief Registrar of the Judiciary is established under ***Article 161(2)(c)*** of the Constitution, in which the holder of the office is designated as the Chief administrator and accounting officer of the Judiciary. Under ***Article 171(3)*** of the Constitution, the holder of the office of the Chief Registrar of the Judiciary is also the Secretary to the appellant. ***Gladys Boss Shollei***, (*hereinafter referred to as the "respondent*") is the first holder of the office of the Chief Registrar of the Judiciary having been appointed through Gazette Notice No.13095 duly signed by the Chairman of the appellant and published on 21st October 2011.

[3] The appeal before us is the culmination of an industrial dispute pitting the respondent against the appellant in the performance of their respective functions. Following what the appellant termed "disciplinary proceedings", against the respondent, the appellant terminated the respondent's employment as Chief Registrar of the Judiciary through a letter dated 18th October 2013. Being aggrieved by the disciplinary proceedings and her termination of employment, the respondent moved to the High Court and filed a constitutional petition on 1st November 2013 seeking orders of Judicial Review and Declaratory orders in regard to violation of her constitutional rights.

The Pleadings

[4] The specific orders sought by the respondent in the petition were as follows:

"a) That, order of certiorari to issue to quash the letter of removal dated 18.10.13.

b) That, an order of certiorari to issue to quash the proceedings of 18.10.13.

c) That an order of mandamus to issue compelling the Respondent to comply with the applicable law.

d) That, prohibition do issue against the Respondent from in any way proceeding against the Petitioner other than as by law provided.

e) That, Declaratory orders do issue that the Respondent violated the Petitioner's right as set out.

f) That, Declaratory orders to issue that the allegations against the Petitioner in the reasons given for her dismissal do not exist in law, and thereby void.

g) That, Declaratory orders do issue that the Judicial Service Act, 2011 is void to the extent of its inconsistency with the Constitution.

h) That, an order of compensation do issue for violation of the Petitioner's rights and an inquiry to quantum be gone into.

i) That, such further orders or relief do issue pursuant to Article 23(3) of the Constitution.

j) That, costs be provided for the Petitioner."

[5] Filed contemporaneously with the petition, was a notice of motion under ***Article 23(3)*** of the Constitution and ***Rules 4, 11, 13*** and ***23*** of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, for *inter alia* interim orders of certiorari to temporarily quash the respondent's letter dated 18th October 2013; and a conservatory order reinstating the respondent to office.

[6] On the 4th of November, the Notice of Motion, which had been certified urgent, came up for hearing before ***M. Ngugi, J***. who transferred the suit to the Industrial Court for hearing and determination. This was upon indication by the parties that the Industrial Court would be best suited to deal with the matter as the dispute was basically between an employee and an employer. Thereafter the matter came before ***Nduma,J.*** who upon hearing the notice of motion, delivered a ruling on 22nd November 2013, in which he found that the respondent had established a *prima facie* case against the appellant with regard to the issue of bias and violation of the rules of natural justice. However, noting that the respondent had not specifically pleaded for reinstatement in the petition, and that it was not in the public interest for the office of the Chief Registrar of the Judiciary that plays a key role in the judiciary administration and accounting to remain vacant, the learned judge declined to issue a temporary order for reinstatement of the respondent or to issue orders restraining the occupation of the office of the Chief Registrar.

[7] Before the hearing of the main petition commenced the ***Commission on Administrative Justice***, a Commission established pursuant to ***Article 59(4)*** of the Constitution, was granted leave to appear in the suit as an *Amicus Curiae*. This was in light of the recognition that the decision of the Court on the jurisdiction of the Commission, and the administrative process, would impact on disciplinary disputes within the public sector.

The Affidavit Evidence

[8] In support of the petition, the respondent swore an affidavit in which she outlined the circumstances leading to her dismissal. Paragraph 9 of her affidavit sums up her grievances as follows:

a) I have not to-date been informed of a case against me, as provided in law

b) That I was not afforded or given reasonable time to prepare my defence.

c) I was not allowed to call witnesses to rebut the allegations.

d) That I denied all the allegations and showed that I didn't break any law.

e) The power of JSC to institute any disciplinary process against me is only referral and never suo moto as it did.

f) The respondent didn't have any power to proceed as it did.

g) The trove of emails from and to the Chief Justice demonstrates a contrived mission dubbed "The war strategy' to remove me and that it was agreed that for the public to accept my removal, it had to be designed to be a fight against a criminal enterprise in the judiciary.

h) That the existence of the "War Council" and the "War Strategy" is real as all the steps set out therein to remove me have been followed to the letter.

i) That the reasons given for my removal in the Media Release are at variance with the allegations made against me.

[9] On its part the appellant responded to the petition through an affidavit sworn by its Registrar ***Ms Winfrida Mokaya (*Mokaya*)*** on 14th November 2013, and a supplementary affidavit also sworn by the same Registrar on 23rd January 2014. In a nutshell Ms Mokaya deposed that the respondent's employment was properly terminated following disciplinary proceedings conducted in accordance with the provisions of the Constitution, the Judicial Service Act, and the rules of natural justice; that the appellant acted in its corporate capacity and the allegations of bias against individual commissioners which were in any case denied, did not affect its decision; and that there was no "War Council" or any predetermined plan against the respondent.

The Judgment of the Industrial Court

[10] In his judgment, the learned judge having heard oral arguments and the benefit of the submissions of the *amicus curiae*, identified the issues for determination as follows:

"(i) Did the appellant have jurisdiction to discipline the respondent?

(ii) If the answer to (i) is correct, was the respondent given a fair and impartial hearing?

(iii) Was the respondent removed for a valid reason in terms of fair procedure?

(iv) What remedy if any is available to the respondent?"

[11] The learned judge found *inter alia*, that the appellant had jurisdiction to institute disciplinary proceedings against the respondent; that the disciplinary process against the respondent was a quasi-criminal affair because of the serious allegations laid against her; that the allegations were not properly framed as the charges were vague, duplex and embarrassing to the respondent; that the appellant did not specify in its letter of dismissal its specific findings on the allegations made against the respondent; that none of the commissioners against whom the allegations of bias was made, nor the Chief Justice who was alleged to have been involved in the "War Council" scheme to remove the respondent, filed any affidavits denying the allegations; that the allegations especially against the **Chief Justice** and **Commissioner Ahmednassir** were of such a serious nature that there was reasonable apprehension of the likelihood of bias; that the commissioners ought to have stepped aside and a disciplinary tribunal of lesser members constituted; that the time given to the respondent to collect information from officers under her so as to defend herself was wanting, and the respondent was not given documents she required to defend herself; that the mandatory provisions of ***Section 32*** of the Judicial Service Act as read with ***Regulation 25*** of the Third Schedule to the Act (Provisions relating to the Appointment, Discipline and Removal of Judicial Officers and Staff) with regard to proceedings for dismissal were not complied with; that the proceedings and decision of the appellant was a nullity as the appellant not only acted *ultra vires* the Judicial Service Act but also violated the constitutional rights of the respondent under ***Article 27(1) 35 (1) & (b), 47(1) & (2), 50 (1) & (2)*** and ***236 (b)*** of the Constitution.

[12] The learned judge therefore made orders as follows:

"a) That, an order of certiorari is issued to quash the letter of removal dated 18th October 2013.

b) That, an order of certiorari is issued to quash the proceedings of 18th October 2013.

c) That, the Respondent violated the Petitioner's right under Articles 27(1), 35(1)(b), 47(1)&(2),50(1)&(2) and 236 (b).

d) That, the Petitioner is entitled to compensation for the unlawful and unfair loss of employment and for violation of her constitutional rights and that an inquiry to quantum be gone into.

e) That, the Petitioner is to be paid the costs of this suit.

The Appeal

[13] Being aggrieved by the judgment of the Industrial Court, the appellant has moved to this Court seeking to have the judgment set aside and the respondent's petition filed on 1st November 2013, dismissed with costs. In the memorandum of appeal, the appellant has cited Gladys Boss Shollei as 1st respondent and the Commission on Administrative Justice as 2nd respondent. This is a misnomer as the Commission on Administrative Justice was enjoined in the petition as amicus curiae to assist the Court. It was not therefore *strictu sensu* a party to the proceedings such as to be made a respondent to the appeal. For ease of reference, I shall continue to refer to Gladys Boss Shollei as respondent and the Commission on Administrative Justice as amicus curiae.

[14] In its memorandum of appeal the appellant has raised sixteen grounds, which in a nutshell are that the learned judge of the Industrial Court failed to consider the core constitutional issue in the petition, which was the mandate of the appellant under ***Article 172*** of the Constitution and ***Section 12*** of the Judicial Service Act on the removal of the respondent; that the learned judge erred in assuming the role of defending and answering allegations levelled against the respondent by creating grounds for the respondent, and misapplying criminal law and procedure, in an employment petition; that the learned judge took into account irrelevant matters, made contradictory findings and showed open bias against the appellant; that the learned judge failed to properly address the constitutional violations alleged by the respondent, or to appreciate the nature of the dispute between the appellant and the respondent; that the learned judge misinterpreted the Constitution and the Judicial Service Act and thus arrived at a decision not supported by pleadings and facts before him.

[15] The appellant was represented in this appeal by ***Mr. Mansour Issa*** led by ***Mr Paul Muite Senior Council***. The respondent was represented by ***Mr. Donald Kipkorir***, and the amicus curiae by ***Mr. Chahale***, whose brief was held by ***Mr. Angima***. Following directions given by the Court, written submissions and supporting authorities were duly filed and highlighted before the court. I wish to record my sincere appreciation to all counsel for their industry, patience and co- operation. The contending arguments were extremely useful in helping me identify the law, sift and distil the issues in a bid to resolve this dispute.

Appellant's Submissions

[16] For the appellant, it was submitted that the Industrial Court had no jurisdiction to hear and determine a constitutional petition for redress of fundamental rights and freedoms; that jurisdiction was by virtue of ***Article 165(3)*** as read with ***Article 23(1)*** of the Constitution, vested in the High Court; that although the Industrial Court has the same status as the High Court, the jurisdiction conferred on the Industrial Court under ***Section 12*** of the Industrial Court Act does not extend to determining matters for redress of violation or infringement of a right or fundamental freedom in the Bill of Rights.

[17] It was argued that the core issue raised by the respondent in its petition was that the appellant did not have jurisdiction to remove her as the Chief Registrar of the Judiciary as she was not answerable to the appellant; that the respondents assertions that she was not accountable to the appellant in regard to the allegations of mismanagement leveled against her, betrayed a fundamental dereliction of duty and a gross act of insubordination that was a sufficient ground for removal of the respondent. In this regard, the following passage from the Canadian case of ***Michael Dowling v Workplace Safety & Insurance Board [2004] CAN LII 436 92*** was relied upon:

> ***"It can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional- dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature and circumstances of the misconduct."***

[18] Further, the learned judge was criticized for framing the issues on the basis of an employment dispute and not a constitutional issue; that having found that the appellant had jurisdiction to institute disciplinary proceedings against the respondent, the judge erred in failing to apply the provisions of ***Section 12*** of the Judicial Service Act which governs the removal of the respondent, and instead erred in applying ***Regulations 25*** in the Third Schedule to the Act; that in any case ***Regulations 25*** which was applied by the judge was *ultra vires* ***Section 12*** of the Judicial Service Act and therefore could not be given preference over the substantive provision. In this regard the following statement from ***Maitha v Said & Another[1999]2EA***, was relied upon:

> ***"Rules must be read together with the relevant Act; they cannot contradict express provisions in the Act from which they derive their authority. If the act is plain, the rules must be interpreted so as to be reconciled with it, or if it cannot be reconciled, the rule must give way to the plain terms of the Act."***

[19] Counsel for the appellant further submitted that the learned judge determined the petition on issues which were not pleaded as the respondent had not alleged violation of ***Section 32*** of the Judicial Service Act or ***Regulations 25*** of the Third Schedule to the Act; that the appellant had powers to receive and investigate complaints and remove judicial officers and staff; that the Chief Registrar of the Judiciary being a Registrar, was subject to the jurisdiction of the appellant; that the removal proceedings were undertaken by the appellant under ***Section 12*** of the Judicial Service Act as disciplinary proceedings; that the disciplinary proceedings could not be equated with criminal proceedings nor was the criminal law or the Criminal Procedure Code applicable; that the appellant complied with ***Section 12*** of the Judicial Service Act to the extent that it informed the respondent the case against her in writing and gave her reasonable time to respond; and that the respondent did in fact submit responses to the allegations made against her.

[20] In regard to the issue of bias in the disciplinary proceedings, it was maintained that the allegations of bias made against the appellant's Chairman and Commissioners were not substantiated and the learned judge had no jurisdiction to consider matters of fact that were neither pleaded nor deposed under oath; that contrary to the position taken by the respondent in her petition, the respondent had confirmed during the disciplinary proceedings that there was no bias real or apparent on the part of the Chief Justice; that the allegations of bias were a red herring intended to scuttle the disciplinary proceedings which would have aborted due to lack of quorum if the respondent's bias complaint was acceded to; that the trove of emails relied upon by the learned judge were of dubious origin whose authenticity or source the respondent could not vouch for; that the learned judge exhibited outright bias in the way in which he ignored incriminating evidence against the respondent, and discredited the appellant by relying on submissions from the Bar on matters of fact.

[21] In addition, it was submitted that the learned judge erred in going into the merits of the allegations raised against the respondent at the disciplinary proceedings and in effect substituted the decision of the appellant with his own contrary to the holding in the South African case of ***Nampak Corrugated Wadeville v Khoza(JA14/98) [1998] ZALAC 24*** that:

> ***"A court should, therefore not lightly interfere with the sanction imposed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether the court would have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was reasonable"***

[22] Finally, it was submitted that the finding of the learned judge that there was violation of the respondent's right to a fair hearing and fair administrative action was baseless and contrary to the evidence on record as the disciplinary proceedings revealed that the respondent was not only informed of the allegations against her but was given reasonable time to respond to the same. In this regard several authorities were cited. Suffice to mention two cases in which the right to fair hearing was discussed.

[23] In the Nigerian Supreme Court decision ***BA Imonikhe v Unity Bank PLC S.C 68 of 2001*** it was held:

> ***"Accusing an employee of misconduct, etc by way of a query and allowing the employee to answer the query, and the employee answers it before a decision is taken satisfies the requirement of fair hearing or natural justice. The appellant was given a fair hearing since he answered the queries before he was dismissed***."

[24] In ***Selvarajan v Race Relations Board [1976] 1 ALL ER 12 at 19*** *Lord Denning* held that:

> ***"…in all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it. The investigating body is however the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only."***

Submissions by the Amicus Curiae

[25] The *Amicus Curiae* relied on ***Section 2(1)*** of the Commission on Administrative Justice Act 2011, in submitting that the appellant's decision to terminate the respondent's employment as Chief Registrar of the Judiciary was an administrative action falling within the purview of ***Article 47*** of the Constitution; and that such an action had to be conducted in a lawful, reasonable and procedurally fair manner. Drawing from a South African Statute, the "***Promotion of Administrative Justice Act" (No. 3 of 2000)***, the Court was urged to adopt ***Section 3*** of that Act that requires a procedurally fair process in administrative action to include the following:

a. ***adequate notice of the nature and purpose of the proposed administrative action,***
b. ***reasonable opportunity to make representation,***
c. ***clear statement of the administrative action,***
d. ***adequate notice of any right of review or internal appeal where applicable and,***
e. ***adequate notice of the right to request reasons in terms of section 5.***

[26] The *Amicus Curiae* further contended that the term "Registrar" as used in ***Article 172 (1)(c)*** of the Constitution and in the Judicial Service Act includes the Chief Registrar of the Judiciary; that since there was no other provision dealing with the disciplinary process for the Chief Registrar ***Article 172(1)(c)*** of the Constitution which mandates the appellant to discipline Registrars should apply; that the appellant therefore had the mandate to terminate the respondent's employment subject to compliance with the Constitution and ***Section 12*** and ***32*** of the Judicial Service Act; that the right to fair hearing under ***Article 50*** of the Constitution applies to disciplinary proceedings exercised by judicial or quasi- judicial authority; that the right to a fair hearing includes the right to a public hearing and can only be denied in very exceptional circumstances as specified under ***Article 50(8)***.

[27] The amicus Curiae argued that a fair, just and transparent process requires that where appropriate, external bodies mandated to conduct investigations should carry out their investigations and present their findings before any disciplinary action is taken; that investigations by an independent body would avert allegations of bias as the decision would be based on an independent report; that any termination carried out before investigations by an independent body could only be anchored on allegations that do not require investigations; that before the appellant could terminate the respondent's employment, she had to be informed

of the case against her and given reasonable time to defend herself, and that the Industrial Court had jurisdiction to grant reinstatement under the Industrial Court Act. The *Amicus Curiae* noted that there was an ambiguity in the law with regard to the removal process for the office of the Chief Registrar of the Judiciary.

Respondent's Submissions

[28] For the respondent it was pointed out that the party who was sued by the respondent was the appellant and not the Chief Justice who was only involved in the suit in his capacity as the chair of the appellant; that although ***Article 165(3) (b)*** of the Constitution gives the High Court jurisdiction to determine questions involving violation of the Bill of Rights, the Article did not oust the jurisdiction of the Industrial Court to deal with such issues; that in any case ***Article 20*** of the Constitution gives all courts and bodies powers to deal with constitutional matters; that the appellant had admitted the jurisdiction of the Industrial Court to deal with the petition and could not approbate and reprobate on the jurisdiction of the court; and that the Industrial Court has jurisdiction to deal with all constitutional matters that arise before it in employment and labour disputes. The decision in the cases of ***Prof. Daniel N. Mugendi v Kenyatta University & Others Nairobi Civil Appeal No. 6 of 2012*** (Unreported); ***U.S.I.U v A.G &Others (2012) eKLR*** and ***Seven Seas Technologies v Eric Chege Nairobi HC Misc. Appl. No. 29 of 2013*** (Unreported) were relied upon.

[29] It was argued that the jurisdiction of the Court of Appeal was restricted by ***Rule 29(1)*** of the Court of Appeal Rules, to re-appraising evidence and drawing inferences of fact and therefore the Court of Appeal could only interfere with the decision of the superior court if it found that the finding of the court was based on no evidence or that the court misapprehended the evidence and/or acted on wrong principles; that the appellant had failed to show that the trial court acted on wrong principles; that the Industrial Court was sitting both as a High Court and an Industrial Court; that the Court of Appeal should confine itself to issues of law only; and that the appellant had not demonstrated that the trial judge based his findings on no evidence. Relying on the decision in the case of ***Mbogo & Anor v Shah(1968) EA 93*** counsel urged that there was no justification for the Court to interfere with the judgment of the learned judge as he exercised his discretion properly.

[30] Counsel further submitted that ***Section 12*** of the Judicial Service Act did not provide the procedure for removal of the Chief Registrar and therefore it had to be read together with ***Section 32*** and the ***Third schedule*** to the Judicial Service Act, as well as ***Article 172*** of the Constitution; that the removal of the respondent had to comply with ***Chapter 4*** of the Constitution; that the learned judge had not equated the disciplinary process to a criminal process, but was merely adopting the best practice in the criminal procedure and expounding the law, to give effect to the Bill of Rights in accordance with ***Article 20*** of the Constitution; that the charges/ allegations made against the respondent were not framed in a clear and coherent manner. To fortify his submissions, counsel relied on the case of ***Hon. Martin Nyaga Wambora & Others v The Speaker of the Senate & Others-Kerugoya HC Petition No. 3 of 2014 (Unreported)*** .

[31] On the ground of fair hearing, it was argued that the respondent was not contesting the merits of the decision to remove her, but the process leading to her removal; that there was no proper hearing conducted during the disciplinary proceedings, that the respondent was only informed that the proceedings were disciplinary proceedings after the proceedings had commenced; that despite the respondent's objection to the proceedings on grounds of bias, lack of jurisdiction and impartiality, the appellant insisted on continuing with the proceedings; that the appellant did not object to the production of the trove of emails in the trial court, and that the emails showed a contrived process to remove the respondent from office; that the appellant refused to give the respondent copies of the disciplinary proceedings; that the respondent never admitted any allegations made against her; that as the accounting officer of the Judiciary, the respondent was answerable in financial matters to Parliament and the Auditor General under ***Article 266*** of the Constitution; that while the respondent was answerable to the Chief Justice, she was not answerable to the appellant and therefore there was no insubordination in the respondent asserting her powers and independence as provided under the law. Finally the respondent also raised an issue with regard to the competence of the appeal contending that ***Rule 75*** of this Court's Rules had not been complied with, as they were not served with a Notice of Appeal.

The Facts

[32] From the affidavit evidence that was before the learned judge the following facts were not disputed:

(i) That the appellant served the respondent with a letter dated 10th September 2013 seeking her response to eighty seven allegations categorized as financial mismanagement; mismanagement in human resource; irregularities and improprieties in procurement; insubordination and countermanding decisions of the appellant and misbehavior; that the respondent was given twenty one days to respond to the allegations; that the respondent requested for extension of time to enable her gather appropriate information; that the respondent submitted an initial interim

report on 1st October 2013 and reiterated her request for extension of time; that having been informed that no further extension of time would be granted and that the hearing would proceed on 16th October 2013, the respondent submitted under protest a further response to the allegations entitled "final report" on 15th October 2013.

(ii) That the respondent appeared before the appellant for a "hearing" on 16th October, 2013, when upon inquiry, the appellant informed the respondent that the hearing was not an investigative process, but was a disciplinary process.

(iii) That the respondent raised a preliminary objection to the disciplinary proceedings contending that the appellant had no jurisdiction to question the respondent on matters pertaining to finance, human resource or procurement because she was only accountable to Parliament, the Auditor General, and the Secretary to the National Treasury; this objection was overruled by the appellant who maintained that it had jurisdiction under ***Article 171*** and ***172*** of the Constitution, and ***Section 12*** of the Judicial Service Act to undertake the disciplinary process.

(iv) That the respondent raised further objections to the disciplinary process contending: that four members of the appellant would not be impartial in handling the allegations against her because of the attitude that they had demonstrated towards her; that her right to fair hearing and right to fair administrative action was compromised as she had not been informed who her accusers were nor was she told the allegations against her from the time she was suspended on 18th August up to 10th September; that she had come across exchange of e-mails between the Chief Justice and people designated as "war council" members which revealed that there was a plan to have her removed from her position, hence, her legitimate expectation of a fair hearing was compromised.

(v) That the respondent sought more time to prepare for the disciplinary proceedings, a right to call witnesses, and a public hearing as accusations against her had been made in public through the media, and she wanted an administrative process that was open and transparent.

(vi) That the objections raised by the respondent were all overruled by the appellant as having no substance, while the request for a public hearing was rejected on the ground that a public hearing was not necessary, as the disciplinary process was an internal process subject only to the principles of fairness and due process, the respondent was nonetheless granted two days adjournment to enable her prepare for the disciplinary hearing which was adjourned to 18th October, 2013.

(vii) That on 18th October 2013, the appellant's counsel submitted written submissions entitled "closing submissions under protest" in which he reiterated his objections to the disciplinary proceedings maintaining that the appellant lacked jurisdiction to entertain the proceedings; and that the respondent's rights to administrative action and fair hearing had been violated; and that the entire process was a sham and the allegations against the respondent spurious and lacking legal and factual basis.

(viii) That subsequently the appellant served the respondent with a letter dated 18th October 2014 communicating its resolution to terminate her employment pursuant to **Article 172** of the Constitution and **Section 12** of the Judicial Service Act.

The following allegations of facts were contested:

(i) That four of the appellant's Commissioners had differences with the respondent that compromised their impartiality towards the respondent.

(ii) The authenticity of a trove of emails allegedly circulating from and to the Chief Justice.

(iii) The presence of a "war council," or a contrived scheme by the Chief Justice and persons in and outside the Judiciary to have the respondent removed from office.

The issue of Jurisdiction

[33] Several issues arise in this appeal. First is the issue of jurisdiction which is threefold; the extent of the jurisdiction of this Court in hearing the appeal; the jurisdiction of the Industrial Court if any to hear a constitutional petition such as that of the respondent; and the jurisdiction of the appellant in the disciplinary proceedings. The jurisdiction of this court to hear and determine appeals is provided under ***Article 164(3)*** of the Constitution under which this court has jurisdiction to hear appeals from:

"(a) the High Court;

(b) any other court or tribunal as prescribed by an Act of Parliament"

[34] ***Section 17*** of the Industrial Court Act provides for a right of appeal from the Industrial Court to this court on matters of law only. This is consistent with Article 164(3) (b) of the Constitution, as well as ***Section 3(1)*** of the Appellate Jurisdiction Act that states as follows:

"3 (1) The Court of Appeal shall have jurisdiction to hear and determine appeals from the High Court and any other Court or Tribunal as prescribed by an Act of Parliament in cases in which an appeal lies to the Court of Appeal under law…"

[35] The question is how can this right of appeal which is limited to matters of law, be reconciled with ***Rule 29*** of the Court of Appeal Rules that states as follows:

"(1) On any appeal from a decision of a superior court acting in the exercise of its original jurisdiction, the Court shall have power-

(a) ***To re-appraise the evidence and to draw inferences of fact;***

and

(b) ***In its discretion, for sufficient reason, to take additional evidence or to direct that additional evidence be taken by the trial court or by a commissioner.***

(2) When additional evidence is taken by the Court, it may be oral or by affidavit and the Court may allow the cross-examination of any deponent…" (emphasis added).

[36] In my view to the extent that this Rule empowers the court to reappraise evidence, draw inferences of fact, and take additional evidence, it is inconsistent with ***Section 17(2)*** of the Industrial Court Act which limits the jurisdiction of this court in hearing appeals from the Industrial Court to matters of law only. However, this inconsistency is easily resolved by ***Article 164(3)(b)*** of the Constitution which provides that the jurisdiction of this Court where the right is conferred by an Act of Parliament must be "as prescribed" by that particular Act. Therefore **Rule 29** of the Court of Appeal Rules must be read together with the **Section 17(2)** of the Industrial Court Act such that the power of the court in re-considering and re- evaluating evidence is limited to matters of law only. As this court (differently constituted) stated in ***Timamy Issa Abdalla v Swaleh Salim Imu & Others, Civil Appeal No. 36 of 2013:***

"…Although the court has jurisdiction to re-consider the evidence, re-evaluate and draw its own conclusion, this jurisdiction must be exercised cautiously. This caution is of greater significance in an appeal such as the one before us where the right of appeal is limited to matters of law only, because, the jurisdiction of this court to draw its own conclusion can only apply to conclusions of law. We must therefore be careful to isolate conclusions of law from conclusions of facts and only interfere if two conditions are met. Firstly that the conclusions are conclusions of law, and secondly that the conclusions of law arrived at cannot reasonably be drawn from the findings of the lower court on the facts…"

[37] Further, in ***Petition No. 2B of 2014 Gatirau Peter Munya v Dickson Mwenda Kithinji & Others [2014] eKLR,*** the Supreme Court considered ***Section 85A*** of the Elections Act, which like ***Section 17(2)*** of the Industrial Court Act limits the right of appeal to this Court to matters of law only. After reviewing comparative jurisprudence from several jurisdictions on the question of matters of law and matters of fact, the Supreme Court provided an appropriate guideline in identifying matters of law as follows:

"From the forgoing review of the comparative judicial experience, we will characterize the three elements of the phrase "matters of law" as follows:

(a)*The* *technical element****: involving the interpretation of the constitutional or statutory provision.***

(b)*the* *practical element****: involving the application of the Constitution and the law to a set of facts or evidence on record.***

(c) *the* *evidential element:* ***involving the evaluation of the conclusion of the trial court on the basis of the evidence on record***

…….

Flowing from these guiding principles, it follows that a petition which requires the appellate Court to re-examine the probative value of the evidence tendered at the trial Court, or invites the Court to calibrate any such evidence, especially calling into question the credibility of witnesses, ought not to be admitted. We believe that these principles strike a balance between the need for an appellate Court to proceed from a position of deference to the trial Judge and

the trial record, on the one hand, and the trial Judge's commitment to the highest standard of knowledge, technical competence, and probity in electoral dispute adjudication , on the other hand. "

[38] Thus, the jurisdiction of this Court in this appeal as circumscribed by the Constitution and the Industrial Court Act, requires the appraisal and evaluation of the learned Judge's interpretation of the Constitution and statutory provisions relating to the appellants mandate, and the respondent's constitutional right; the application of these laws to the undisputed and established facts; and the evaluation of the reasonableness of the conclusions of the learned Judge.

[39] As regards the jurisdiction of the Industrial Court, the court has been established under ***Section 4*** of the Industrial Court Act 2011 (Cap 234) pursuant to ***Article 162(2)(a)*** of the Constitution, as a court with the status of the High Court to hear and determine disputes relating to employment and labour relations. The jurisdiction of the Industrial Court has been extensively prescribed under ***Section 12*** of the Industrial Court Act. Of relevance to this appeal is ***Section 12(1)(a)*** which grants the Industrial Court exclusive original and appellate jurisdiction to hear disputes relating to or arising out of employment between an employer and an employee. Under ***Section 12(3),*** the Industrial Court has powers to make interim preservatory injunctive orders, prohibitory orders, orders of specific performance, declaratory orders, award of compensation or damages, an order for reinstatement, and any other relief as the court may deem appropriate. As already observed at paragraph 3 & 4 (supra), the reliefs sought by the respondent in her petition were orders of Judicial Review and Declaratory Orders in regard to violation of her constitutional rights. To that extent, the application was a constitutional reference. Nonetheless, the violations alleged by the respondent arose from a dispute in the employment relationship between the respondent and the appellant. Indeed, it was this acknowledgement that informed the consensus before the High Court to have the matter transferred to the Industrial Court for determination.

[40] ***Article 23(1)***&***Article 165(3)(b)*** of the Constitution grants the High Court powers to hear and determine questions involving redress of violations or infringement or threatened violations of fundamental rights and freedoms in the Bill of Rights. However, ***Article 23(2)*** provides for legislation giving original jurisdiction to subordinate courts to hear and determine disputes for enforcement of fundamental rights and freedom. In addition, ***Article 23(3)*** does not limit jurisdiction in the granting of relief in proceedings for enforcement of fundamental rights to the High Court only, but empowers "a court" to grant appropriate relief including orders of Judicial Review in the enforcement of rights and fundamental freedoms under the Bill of Rights. Also of note is ***Article 20(3)*** that places an obligation on "any court" in applying a provision of the Bill of Rights to develop the law and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom. These provisions confirm that the Constitution does not give exclusive jurisdiction in the enforcement of the Bill of Rights to the High Court, but anticipates the enforcement of the Bill of Rights by other Courts.

[41] Under ***Article 162(2)(a)***, the Constitution has provided for special Courts with the "status" of the High Court to determine employment and labour relations disputes. The fact that the Industrial Court has been given the "status" of the High Court enhances the power and discretion of the Court in granting relief. In my considered view, the general power provided to the Industrial Court under ***Section 12(3)(viii)*** of the Industrial Court Act to grant relief as may be appropriate, read together with ***Article 23(3),*** empowers the Industrial Court to grant the kind of reliefs that the respondent sought in her petition. Indeed I concur with the position taken by *Majanja,J*. in ***United States International University (USIU) v Attorney General & 2 Others[2012] eKLR*** that:

"Labour and employment rights are part of the Bill of Rights and are protected under Article 41 which is within the province of the Industrial Court. To exclude the jurisdiction of the Industrial Court from dealing with any other rights and fundamental freedoms howsoever arising from the relationships defined in *Section12* ***of the Industrial Court Act 2011 or to interpret the Constitution, would lead to a situation where there is parallel jurisdiction between the High Court and the Industrial Court. This would give rise to forum shopping thereby undermining a stable and consistent application of employment and labour law.***

[42] In my view to hold that the Industrial Court has no jurisdiction to hear and determine a petition seeking redress of violations of fundamental rights arising from an employment relationship would defeat the intention and spirit of the Constitution in establishing special courts to deal with employment and labour disputes. Indeed such a stance would not only be inimical to justice, but would expressly contravene Article 20 of the Constitution that provides that the Bill of Rights "applies to all law and binds all state organs and persons", and enjoins a court to promote the spirit, purport and objects of the Bill of rights and adopt an interpretation that most favours the enforcement of a right or fundamental freedom.

[43] From the respondent's petition, it was evident that although the dispute between the appellant and the

respondent was anchored on the employment labour relationship, the respondent's claim arose from the alleged violation of her fundamental rights in the disciplinary process. In particular paragraph 12 of the petition states as follows:

> ***"12 In purporting to terminate the employment of the Petitioner, the Respondent violated the Petitioner's right and freedoms as follows:-***
>
> (i) ***Her right to fair trial was violated in contravention of Articles 25(c), 47(1) and (2) of the Constitution.***
>
> (ii) ***Her right to public hearing was denied in violation of Article 50(1) of the Constitution.***
>
> (iii) ***Her right to presumption of innocence, to be informed of the charges in sufficient detail and to have adequate time to prepare her defence were denied in contravention of Article 50 (2) (a) (b) and (c) of the Constitution.***
>
> (iv) ***Her right to be heard by an impartial tribunal was violated in contravention of Article 50(1) of the Constitution.***
>
> (v) ***Her right to due process of the law has been violated in contravention of Article 236 (b) of the Constitution.***
>
> (vi) ***The Respondent has refused to give material copies of the proceedings and related documents in contravention of Article 35(1) (b) of the Constitution.***
>
> (vii) ***The entire process against the Petitioner violated the Petitioner's right to inherent dignity pursuant Article 28 of the Constitution"***

[44] The above pleading is consistent with the prayers for orders of Judicial Review and declaratory orders that were sought by the respondent in her petition. In this regard, the respondent's position is distinguishable from that in ***Prof. Daniel M. Mugendi v Kenyatta University & Others*** (supra) where although the claim filed in the Constitutional Court sought to enforce fundamental rights, only breaches of the contract of employment were set out in the petition and no concise or specific allegations of violations of rights under the Constitution were pleaded. I would nonetheless reiterate what this court (differently constituted) stated in the Mugendi case whilst setting aside the High Court order striking out that petition for want of jurisdiction and directing that the petition be transferred to the Industrial Court for determination, that the Industrial Court can determine Industrial and labour relation matters alongside claims of fundamental rights ancillary and incidental to those matters.

[45] In this case, the respondent filed her petition in the Constitutional and Human Rights Division of the High Court and the same was properly transferred to the Industrial Court by the High Court as the violations alleged arose from the employment relationship. Accordingly, I would thus reject the contention that the Industrial Court had no jurisdiction to entertain the respondent's claim.

Other Issues

[46] With regard to the issue of the jurisdiction of the appellant, the same may be appropriately disposed of in dealing with the substantive issues remaining for determination in this appeal. These are first, what was the law applicable to the petition before the learned judge and did the learned judge properly identify and apprehend the law or did he misapprehend the law such as to arrive at a wrong decision or miscarriage of justice? Were the conclusions of law arrived at by the learned judge in regard to the procedural fairness and legality of the process, conclusions that could reasonably be drawn from the findings on the facts? And finally was the learned judge right in granting the orders issued in favour of the respondent?

[47] As what was before the Industrial Court was a constitutional reference which sought the intervention of the court through *inter alia*, orders of Judicial Review, to redress violation of constitutional rights, the position is similar to what was stated by *Chaskalson, J.* in the South African Case ***Pharmaceutical Manufacturers Associationof South Africa & Another: exparte President of the Republic of South Africa & Others(CCT) 31/99) [2000] ZACC 1; 2000 (2) ZA 674:***

> "***Review power of the court is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead the Constitution itself has conferred fundamental rights to administrative justice and through the doctrine of Constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of 'constitutionalizing' what had previously been common law grounds of judicial review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of the constitution."***

[48] The following often quoted passage from the Ugandan case of ***Pastoli v. Kabale District Local Government Council and Others [2008] 2 EA 300*** remains relevant in determining such a reference.

"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

...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality... Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or failure to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.

[49] Thus, the determination of the respondent's petition by the learned Judge called for the interrogation of the process leading to the termination of the respondent's employment with a view to determining the procedural fairness, reasonableness and legality of the appellant's action in light of the respondent's constitutional right to a fair hearing, and right to fair administrative action. Although anchored on the employer-employee relationship, the respondent's complaint was not that of a claim in contract for unlawful dismissal that would have required consideration of the merit of the appellant's decision, but it questioned the procedural fairness and legality of the process. Therefore, it was not the merits of the appellant's decision, or the merit of the allegations made against the respondent that were in issue, but the procedural fairness, legality of the process and the reasonableness of the appellant's decision. The questions that needed to be addressed included the nature of the process subject of the respondent's complaint, the jurisdiction of the appellant in the process, and the application of the constitutional provisions relating to a fair hearing and right to administrative action.

Jurisdiction of the appellant

[50] As already stated the respondent was employed by the appellant pursuant to its mandate under ***Article 172(1)(c)*** of the Constitution which states as follows:

"172 (1) The Judicial Service Commission shall promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice and shall-

(a) …

(b) …

(c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;

[51] Pursuant to the above provision, the Judicial Service Act 2011 has been put in place. This Act provides substantive provisions for the operationalization of the appellant's mandate. It is worthy of note that although the Constitution establishes the office of the Chief Registrar of the Judiciary under ***Article 161(1) (c),*** it has not provided any specific provisions for appointment or removal in regard to that office. This notwithstanding, the appellant appointed the respondent as Chief Registrar of the Judiciary. The appointment could only have been made pursuant to the appellant's mandate under ***Article 172 (1)(c)*** of the Constitution that gives the appellant general powers to appoint, investigate and discipline officers of the Judiciary, read together with ***Section 9*** of the Judicial Service Act which provides for qualifications for appointment of Chief Registrar of the Judiciary. This is in sync with the argument that was made by the *Amicus Curiae* that the use of the term "Registrar" in ***Article 171(1)(c)*** of the Constitution includes the Chief Registrar of the Judiciary, and therefore empowers the appellant to appoint and discipline the respondent.

[52] Of importance is ***Section 12*** of the Judicial Service Act that provides for the removal of the Chief Registrar as follows:

"12 (1) The Chief Registrar may at any time, and in such manner as may be prescribed under this Act, be suspended or removed from office by the Commission for:-

(a) ***inability to perform the functions of the office, whether arisingfrom infirmity of body or mind;***

(b) ***misbehavior;***

(c) ***incompetence;***

(d) ***violation of the prescribed code of conduct for judicial officers;***

(e) ***bankruptcy;***

(f) ***violation of the provisions of Chapter Six of the Constitution; or***

(g) ***any other sufficient cause.***

(2) ***Before the Chief Registrar is removed under subsection (1), the Chief Registrar shall be informed of the case against him or her in writing and shall be given reasonable time to defend himself or herself against any of the grounds cited for the intended removal."***

[53] The respondent has maintained that the appellant had no jurisdiction to initiate disciplinary proceedings against her as she was not answerable to the appellant but was answerable to Parliament and the Auditor General in financial matters, and that she was only answerable to the Chief Justice in administrative matters. This argument is not supported by any statutory provision. While ***Article 226 (2)*** of the Constitution provides that the accounting officer of a national public entity is accountable to the national assembly for its financial management, this is in actual fact external accountability of the public entity through its accounting officer, for the public funds allocated to it. The external accountability is mandatory. It does not however absolve the accounting officer from internal accountability within the public entity, nor does it remove the accounting officer from the authority of the public entity. Indeed, such internal accountability is not only prudent but also imperative in facilitating the achievement of the appellant's objectives as set out in ***Section 3*** of the Judicial Service Act. That Section provides wide powers to the appellant and the Judiciary for the management, accountability and facilitation of the efficient, effective and transparent administration of justice.

[54] Moreover, it stands to reason that an employer must of necessity have control over its officers and the operations of its establishment. As the chief administrator and accounting officer, the respondent had to answer to the "Chief Executive and the board," which in this case was a role played by the Chief Justice as the head of the Judiciary, and the appellant as the oversight body. In the absence of any specific provisions in the Constitution, it must be inferred that the Constitution contemplated that the appellant shall handle the discipline of the respondent. I come to the conclusion that the learned judge was right in concluding that the disciplinary process was a function that was within the mandate of the appellant.

[55] The argument that the appellant could not initiate disciplinary proceedings against the respondent on its own motion, without having first obtained an investigations report from either Parliament or Auditor General or Public Procurement Oversight Authority or the Anti-Corruption Commission, appears to be anchored on Article 259(11) of the Constitution that states as follows:

"If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with another person, the function may be performed on the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise."

[56] In this regard it is remarkable that, ***Article 172(1)(c)*** of the Constitution as read together with ***Section 12*** of the Judicial Service Act, does not provide the disciplinary process of the Chief Registrar of the Judiciary as a function or power of the appellant that is restricted by the Constitution in terms of ***Article 259(11).*** It cannot therefore be a function that is exercisable only on the advice or recommendation or in consultation with another person. In addition the argument for an investigation report, presupposes that the disciplinary proceedings must relate to financial mismanagement, yet under ***Section 12*** of the Judicial Service Act the grounds for removal from office are not restricted to financial mismanagement. In my view although a report from the external oversight bodies may be a necessary prerequisite in criminal proceedings, it is not a prerequisite in the disciplinary function of the appellant. This position is reinforced by ***Article 252*** of the Constitution that gives general powers to the appellant as a commission as follows:

"252 (a) may conduct investigations on its own initiative or on a complaint made by a member of the public;

(a) ***has the powers necessary for conciliation, mediation and negotiation;***

(b) ***shall recruit its own staff; and***

(c) ***may perform any functions and exercise any powers prescribed by legislation, in addition to the functions and powers conferred by this Constitution".***

[57] Therefore, the appellant had jurisdiction to initiate the disciplinary proceedings against the respondent *suo moto* without any recommendation or report from any of the external oversight bodies, and the learned Judge erred in making a contrary finding.

Applicability of the Criminal law and Procedure

[58] In his judgment, the learned judge devoted a lot of space in considering the format and substance of the allegations made against the respondent. At paragraph 56 and 57 of the judgment, the learned judge rendered himself as follows:

"56. At this stage, the court agrees that the seriousness of the allegations made against the CRJ effectively made the disciplinary process a quasi-criminal affair. The JSC assumed a responsibility equivalent to if not equal to a judicial process in every respect. The entire career of the Chief Administrator and Accounts Officer of the Judiciary hang in the balance.

…

57. It is appropriate to note that Section 12 (2) of the Judicial Service Act under which JSC acted provides:

"Before the Chief Registrar is removed under subsection (1) the Chief Registrar shall be informed of the case against him or her in writing and shall be given reasonable time to defend himself or herself against any of the grounds cited for the intended removal."

58. In this regard, the Court has found it useful to seek guidance from the Provisions of the Criminal Procedure Code Cap 75 of the Laws of Kenya with regard to the framing of charges under section 37 as follows:

"the following provisions shall apply to all charges and information's and, notwithstanding any rule of law or practice a charge or information shall, subject to this code, not be open to objection in respect of its form or contents if it is framed in accordance with this code:

…

59 … these high standards are usually required in criminal proceedings but glaring deviations from the accepted form must be avoided in quasi-criminal proceedings especially before statutory tribunals with powers to mete out punitive measures, with far reaching consequences to those who appear before them."

[59] It is noteworthy, that the learned judge then proceeds to examine the specific allegations that were made against the respondent noting that in many of the "charges" there was no statement of the offence, or specific provisions of the law infringed and that many of the counts were bad for duplicity. At paragraph 76, 77, 78 and 79 the learned judge further states:

"76. Again, though the disciplinary hearing is not a criminal prosecution in the strict sense of the word the requirements of a plea of guilty is (sic) equally applicable in a quasi-criminal disciplinary hearing such as this one.

…

77. In the present case, JSC did not, during the hearing read over to the Petitioner the 87 allegations and explain all the ingredients of the alleged offences to her.

78. In Adan v The Republic [1973] EA 445, the Court of Appeal of East Africa considered the manner in which plea of guilty should be recorded and the steps which should be followed. It laid down the following guidelines: …

79. In the present case, it is obvious on the face of the response by the Petitioner, she did not intend to admit any of the allegations or offences set out against her. It was therefore incumbent on the Respondent to embark on a proper hearing to have the offences proved on a balance of probabilities, which it did not do. The matrix attached to the Replying Affidavit of the Respondent containing three columns of; Allegations by JSC; Response by CRJ and observations by JSC clearly shows that the Petitioner in her written response did not in respect of any of the offences make unequivocal admission at all and therefore the findings by JSC that 33 offences were admitted is preposterous and therefore untenable.

[60] The extracts of the judgment quoted above reveal that contrary to the statement of the learned judge at paragraph 61 of the judgment, that he was not imposing on the appellant the strict requirements under the Criminal Law Procedure, that is precisely what the learned judge proceeded to do by applying the criminal procedure rules relating to framing of charges, taking of plea, and recording an unequivocal plea of guilty. The question is was the disciplinary process undertaken by the appellant a quasi-criminal process? And if so, was Criminal Law and Procedure applicable to the disciplinary process such that it can be said that the process was flawed without observance of such procedure?

[61] The disciplinary process undertaken by the appellant was a quasi- judicial process as it involved the appellant in an adjudicatory function that required the appellant to ascertain facts and make a decision determining the respondent's legal rights in accordance with the Constitution and the Judicial Service Act, both of which provided for fair hearing. The disciplinary proceedings were anchored on a contractual relationship and the appellant was not empowered to provide penal sanctions. Notwithstanding the seriousness of the allegations made against the respondent, the disciplinary proceedings could not

be treated like criminal proceedings, as the nature of the sanctions that could be imposed in the disciplinary proceedings did not include penalties or forfeitures akin to those that could be applied in a criminal trial. Thus the learned Judge misdirected himself, in holding that the disciplinary proceedings were quasi-criminal. The Criminal Procedure Code which is an Act providing for the procedure in criminal cases had absolutely no application in the disciplinary proceedings, and the learned Judge erred in applying the provisions of the Criminal Procedure Code.

The Applicable Procedure

[62] The respondent having been appointed by the appellant pursuant to powers under ***Section 172(1)(c),*** it follows that the disciplinary process against her had to be undertaken in accordance with the manner provided under the Judicial Service Act. In this regard, it is only ***Section 12*** of the Judicial Service Act that provides for the disciplinary process against the respondent. It was argued that this section ought to be read together with ***Section 32*** which provides as follows:

> ***"32. (I) For the purpose of appointment, discipline and removal of judicial officers and staff, the Commission shall constitute a Committee or Panel which shall be gender representative.***
>
> ***(ii) Notwithstanding the generality of subsection (i) a person shall be qualified to be appointed as a magistrate by the Commission unless the person-***
>
> ***(a) …***
>
> ***(b) …***
>
> ***(c) …***
>
> ***(d) …***
>
> ***(e) …***
>
> ***(iii) The procedure governing the conduct of a Committee or Panel constituted under this section shall be as set out in the Third Schedule.***
>
> ***(iv) Members of the Committee shall elect a chairperson from amongst their number.***
>
> ***(v) Subject to the provisions of the Third Schedule, the Committee or Panel may determine its own procedure****. (emphasis added)*

[63] The Third Schedule is entitled "Provisions relating to the Appointment, Discipline and Removal of Judicial Officers and Staff." This Schedule provides a more elaborate procedure at ***Section 23*** to ***25*** for disciplinary proceedings leading to dismissal of judicial officers and staff. Judicial officer is defined under ***Section 2*** of the Judicial Service Act to include: "*a registrar, deputy registrar, magistrate or Kadhi or the presiding officer of any other court or local tribunal as may be established by an Act of Parliament…"* Judicial staff is defined in the same section as "*persons employed in the Judiciary but without power to make judicial decisions and includes the staff of the Commission*". As per ***Section 8(b)*** **of** the Judicial Service Act the functions of the Chief Registrar includes performing judicial functions. Therefore, the Chief Registrar does not therefore fall within the definition of judicial officer or judicial staff as defined in ***Section 2*** of the Judicial Service Act.

[64] The position of Chief Registrar has been defined under ***Section 2*** of the Judicial Service Act as "*Chief Registrar of the Judiciary"*. That position has neither been included under section 32 of the Judicial Service Act nor the Third Schedule to that Act which provides general provisions applicable to judicial officer and judicial staff as defined in section 2 of the Judicial Service Act. In my view the definition in Section 2 of the Judicial Service Act must be distinguished from the definition of judicial officer in ***Article 172(1)(c)*** of the Constitution that I have accepted to include the Chief Registrar of the Judiciary as the definition in the Constitution is applicable to the Constitution only. Unlike the Judicial Service Act, which defines Chief Registrar, the Constitution does not define the Chief Registrar hence the adoption of the definition of Judicial Officer in the Constitution.

[65] In light of ***Section 12*** of the Judicial Service Act that makes clear reference to the position of the Chief Registrar, it is clear that the legislature intended to create a special provision for the removal of the Chief Registrar of the Judiciary. This is understandable given the senior position that the office occupies. ***Section 12*** of the Judicial Service Act (See Paragraph 51 above) provides for procedural safeguards that include the establishment of specific grounds for removal of the respondent; the respondent being informed of the case against her in writing; and the respondent being given reasonable opportunity by the Commission to defend herself. For reasons stated in the preceding paragraph, ***Section 32*** of the Judicial Service Act, and the ***third Schedule*** to that Act, which provides for a preliminary inquiry and investigation by a Committee or a Panel before the matter is referred to the Commission is not applicable to the respondent. Thus the learned judge misdirected himself in finding that ***Section 32*** of the Judicial Service Act and the ***third Schedule*** to that Act were applicable to the disciplinary process against the respondent. In particular sections 25 and 26 of the Third Schedule to the Judicial Service Act which relates to disciplinary powers delegated to the Chief Justice are not applicable to the office of the Chief Registrar of the Judiciary.

[66] Under Section 12 of the Judicial Service Act, the issue of drawing of charges did not arise, as all that was required was for the respondent to be informed of the case against her in terms of the specific matters that were subject of the disciplinary proceedings. No particular format was necessary as long as the information given was sufficiently clear for the respondent to understand the allegations and complaints against her. In this case the allegations communicated to the respondent through the letter dated 10th September 2013, were clear, and the respondent not only understood the case against her, but also specifically responded to the case against her according to the leaned Judge, "blow by blow'.

Right to Fair Hearing

[67] ***Article 50***of the Constitution provides as follows:

> ***"50***
>
> (1) ***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.***
>
> (2) ***Every accused person has the right to a fair trial, which includes the right-…***
>
> (3) ***If this Article requires information to be given to a person, the information shall be given in language that the person understands.***
>
> (4) ***Evidence obtained in a manner that violates any right or fundamental freedom in the Bill of Rights shall be excluded if the admission of that evidence would render the trial unfair, or would otherwise be detrimental to the administration of justice.***
>
> (5) **…** (6) **…**
>
> (7) **…**
>
> (8) ***This Article does not prevent the exclusion of the press or other members of the public from any proceedings if the exclusion is necessary, in a free and democratic society, to protect witnesses or vulnerable persons, morality, public order or national security.***
>
> (9) **…"**

[68] Article 50(2) of the Constitution provides for a right to a fair trial to an accused person in criminal trials. That sub-article was not applicable in the disciplinary proceedings against the respondent which, as already noted were neither criminal proceedings nor quasi-criminal proceedings. The respondent was entitled to a right to a fair hearing as provided under Article 50(1) of the Constitution that deals with "any dispute that can be resolved by application of law." I will address this right in two parts. First is the need for the adjudicator to be independent and impartial, and the second is the requirement for fairness in the hearing procedures adopted.

Independence and Impartiality

[69] As a Commission established under the Constitution, the appellant is under Article 249(2) firstly, subject only to the Constitution and the law, and secondly is an independent body not subject to the control or direction of any person. The concept of impartiality is deeply engrained in the Constitution. Some of the constitutional provisions that apply the concept of impartiality include:

> a) Article 10(2)(b) of the Constitution that reflects impartiality as one of the national values and principles of governance adopted in the Constitution as "human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination, and protection of the marginalized" (Underlining added);
>
> b) Article 20(4) of the Constitution makes it mandatory for the Court to promote amongst other things "human dignity, equality and equity" in the interpretation of the Constitution;
>
> c) Article 159 enjoins the court in the exercise of judicial authority to be guided by amongst other principles, the principle that "justice shall be done to all, irrespective of status;"
>
> d) Article 50(1) of the Constitution which has already been referred to reflects impartiality as a key attribute in the administration of justice by providing for hearing before an "independent and impartial tribunal or body" as a fundamental right in the resolution of legal disputes.

[70] Bias is the nemesis to impartiality. Black's law Dictionary 9th Edition has the following definitions in regard to bias.

> ***"Bias-Inclination; prejudice; predilection;***
>
> ***Actual bias - genuine prejudice that a judge, Juror, witness, or other person has against some person or relevant subject;***
>
> ***Implied bias – prejudice that is inferred from the experiences or relationship of a judge, juror, or other person"***

[71] The following passage from the judgment of the Court of Appeal in England in ***Medicament and related Classes of Goods (2001) 1WLR 700*** bring insight in understanding bias:

> "***Biasisan attitude of mind which prevents the Judge from making an objective determination of the issues that he has to resolve. A Judge may be biased because he has reason to prefer one outcome of the case to another. He may be biased because he has reason to favour one party rather than another. He may be biased not in favour of one outcome of the dispute but because of the prejudice in favour of or against a particular witness, which prevents an impartial assessment of the evidence of that witness. Bias can come in many forms. It may consist of irrational prejudice or it may arise from particular circumstances which, for logical reasons, predispose a judge towards a particular view of the evidence or issues before him."***

[72] The constitutional provisions quoted at paragraph 66 (supra) confirm that bias and prejudice have no room in the administration of justice. Indeed for the requirement of impartiality to be achieved the proceedings must be free from bias or appearance of bias. This is reiterated in the constitutional oath of office that all judicial officers are obliged to take in accordance with the third Schedule to the Constitution, before assuming office, undertaking *inter alia* to:

> ***"impartially do justice ……without any fear, favour, bias, affection, ill-will, prejudice or any political, religious or other influence…"***

[73] Drawing from comparative jurisprudence, I note the position in England where the debate regarding the test to be applied in determining apparent bias has taken twists and turns revealing the complexities in this area. The test applied for a long time was that set out in ***R v Gough [1993] AC 646***reflected in the following statement made by Lord Goff of Chieveley at page 670:

"I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances, there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavour, the case of a party to the issue under consideration by him…"

[74] The test laid down in **R v Gough** (supra) has been the subject of sharp criticism, with Australia specifically rejecting it in ***Webb v the Queen (1994) 181 CAR 41*** as follows:

> ***"Both the parties to the case and the public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias, the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality. The test of 'reasonable likelihood' or 'real danger' of bias tends to emphasize the court's view of the fact. In that context the trial judges acceptance of the explanation becomes of primary importance. Those two tests tend to place inadequate emphasis on the public perception of the irregular incident…. In light of the decision of this court which hold that the reasonable apprehension or suspicion test is the correct test for determining a case of alleged bias against a judge, it is not possible to use a 'real danger' test as a general test for bias without rejecting the authority of those decisions."***

[75] In the ***Medicaments and related Classes of Goods*** case (Supra), the Court of Appeal in England suggested modification of the test of real danger as applied in the **R v Gough**(Supra), putting forward the following proposal:

> ***"The court must first ascertain all the circumstances which have a bearing on the suggestion that the judge was biased. It must then ask whether those circumstances would lead a fair minded and informed observer to conclude that there was a real possibility or a real danger, the two being the same that the tribunal was biased.***
>
> ***The material circumstances will include any explanation given by the judge under review to his knowledge or appreciation of those circumstances. Where that explanation is accepted by the applicant for review, it can be treated as accurate. Where it is not accepted, it becomes one further matter to be considered from the view point of the fair minded observer. The court does not have to rule whether the explanation should be accepted or rejected. Rather it has to decide whether or not the fair minded observer would consider that there was a real danger of bias notwithstanding the explanation advanced."***

[76] The House of Lords rose to the occasion and set the debate to rest in ***Magill v Porter Magill v Weeks [2001] UKHL 67***. Lord Hope of Craighead having reviewed the test as applied in previous House of Lord's decisions, and jurisprudence from the European Court of Justice, and the proposal of the Court of Appeal in The ***Medicaments and related Classes of Good***(Supra) stated at paragraph 103 of the judgment as follows:

> ***"I respectfully suggest that your Lordships should now approve the modest adjustment of the test in R v Gough set out in that paragraph. It expresses in clear and simple language a test, which is in harmony with the objective test, which the Strasbourg court applies when it is considering whether the circumstances give rise to a reasonable apprehension of bias. It removes any possible conflict with the test, which is now applied in most Commonwealth countries and in Scotland. I would however delete from it the reference to "a real danger". Those words no longer serve a useful purpose here, and they are not used in the jurisprudence of the Strasbourg court. <u>The question is whether the fair-minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased."</u>*** (emphasis added)

[77] Nearer home in ***Attorney-General v. Anyang' Nyong'o & Others [2007]1E.A. 12***, the court identified the test for bias as follows:

> ***"The objective test of 'reasonable apprehension of bias'isgood law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially[?] Needless to say, a litigant who seeks [the] disqualification of a Judge comes to Court because of his own perception that there is appearance of bias on the part of the Judge. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case..."***

[78] Thus it is crucial in determining real or apparent bias, that the first step be the ascertainment of the circumstances upon which the allegation of bias is anchored. The second step is to use the ascertained circumstances to determine objectively the likely conclusion of a fair minded and informed observer, on the presence or absence of reasonable apprehension of bias.

[79] In regard to the issue of bias the learned Judge had made the following findings in his ruling in the interlocutory application:

> "***There is an arguable case though not tested at this stage, that some of the Commissioners of JSC had a personal interest in the removal of the Chief Registrar and that a strategy had been developed through connivance with persons in and out of JSC to implement the strategy. The Court at this stage is satisfied that a prima facie case in this respect has been made out by the applicant."***

[80] In the judgment subject of this appeal, the learned Judge directed himself on the issue of bias at paragraph 83 as follows:

> ***"The Court need not restate the competing allegations on this issue which we have herein before set out in this judgment.***
>
> ***The Court now will make a decision whether on the facts presented, JSC ought to have reconstituted another disciplinary tribunal in terms of section 32 and Regulation 25 of the Schedule to the JSC Act, 2011 on grounds of the alleged bias and by necessary implication whether by proceeding to hear this matter the result is a nullity for violating Articles 2(4), 27(1), 47(1)&(2), 50(1)&(2), 72(1) and 236(b) of the Constitution; the JSC Act and the regulations thereunder and the rules of natural justice Nemo judex in causa sua and audi alterram partem by sitting in their own cause and denying the petitioner a fair hearing."***

[81] The learned Judge then made reference to his afore quoted finding in the interlocutory application, and noted that none of the Commissioners had personally sworn any affidavit in response to the serious allegations made against them, but that all relied on denials made in an affidavit sworn by Mokaya the appellant's Registrar. After referring to several authorities on bias, the learned Judge concluded on this issue as follows:

> ***"96. The Court also noted that the obligation to be impartial also brings with it the duty to disclose any facts that may call into question a Judge's impartiality.***
>
> ***On the facts of the case, it is clear that the allegations made especially against the CJ and Commissioner Ahmednasir Abdillahi are of such a serious nature that any reasonable person would have reasonable apprehension of bias in the circumstances.***
>
> ***"Public perception of the possibility of even subconscious bias is a relevant determinant. The Judge could actually be as fair as can be but that is only relevant in case of actual bias…what matters is whether a fair minded reasonable person knowing of the facts could conclude that there was likelihood of bias" concluded Justice Majanja in the Trust Bank case (supra).***

On the facts of this case, the apprehension of likelihood of bias by the petitioner appears to be well founded from a reasonable by standers point of view.

97. This finding does not necessarily mean that the allegations made against each of the Commissioners and the Chairman have been found to be truthful since in civil proceedings the test is on a balance of probabilities. However, the Commissioners mindful of the law regarding perceived bias ought to have stepped aside and reconstituted another disciplinary tribunal of probably lesser members of the JSC or otherwise within the confines of section 32 to the JSC Act 2011 and regulations 25 in the Third Schedule."

[82] At paragraph 8 of her affidavit sworn in support of the petition, the respondent complained of the absence of impartiality on the part of the appellant, real and apparent bias. The circumstances upon which the respondent's complaint was anchored are not specifically deposed to in the affidavit but are stated in documents entitled interim report, final report, closing submissions and trove of emails which were annexed to the respondents affidavit as annextures GBS 10, GBS 12, GBS 11, and GBS 13 respectively. Of note here is Order 19 Rule 3 of the Civil Procedure Rules 2010 that which provides that affidavits must be confined to facts that the deponent is able of her own knowledge to prove.

[83] This Court as a first appellate court has the obligation to defer to the findings of the trial court on matters of facts. In this case however an issue of law arises in regard to the conclusions of the learned Judge on matters of law drawn from findings of facts which are in turn derived from the affidavit evidence anchored on contents of annextures to the affidavit, whose veracity are not parts of the oath sworn in the affidavit. For instance the respondent has not specifically sworn in her affidavit the specific allegations made in her reports (annexture GBS 10 and 12) against Commissioner Ahmednassir Abdillahi or any of the other Commissioners. In the case of the trove of emails the respondent not only declined to reveal the source of her information but also conceded during the disciplinary proceedings of 16th October 2013 that she could not vouch for the authenticity of the emails. The issue here is not simply one of credibility of the witness and the facts alleged in the annexture, but whether these allegations of facts which are grave and crucial, are facts which the respondent could of her own knowledge prove, or sources of which has been revealed such as to form part of the facts established through the affidavit. To this extent there is need to address these circumstances.

[84] From the afore-quoted extract of the judgment, it is evident that the learned judge properly considered and accepted the test in determining bias as ***"reasonable apprehension in the mind of a fair minded and informed member of the public."*** The learned judge did not however, apply his mind to the need to ascertain the circumstances under which the allegation of bias arose. The circumstances, upon which the alleged animosity between the respondent and Commissioner Ahmednassir, and the alleged communication between the Chief Justice and some members of "a war council" was anchored, needed to be established. In this regard, the learned judge observed that in the initial affidavit the appellant did not respond to the allegations of bias, and that denials of the allegations were only subsequently made through an affidavit sworn by the appellant's Registrar. The learned judge without establishing the circumstances merely concluded that the allegations made against the Chief Justice and Commissioner Ahmednasir Abdillahi, were of such a serious nature that any reasonable person would have reasonable apprehension of bias. In my view, the learned judge erred in failing to ascertain the facts or circumstances upon which the allegations were anchored. True the allegations were of a serious nature. However, it is one thing to allege facts and another to establish the facts. The perception of bias can only be based on established facts. In this case the circumstances giving rise to the respondent's allegations were not established and therefore could not be the basis of the perception of a reasonable man. For, if every allegation made by a party were to be the subject of disqualification without verification, litigants would have a field day avoiding judges they did not, for any reason, like. That is a situation which would be inimical to justice.

[85] Further, the learned judge appears not to have addressed his mind to the issue of actual bias. Indeed at paragraph 97 of the judgment, he makes it clear that his concern is that of perceived bias and not necessarily the truth of the allegation made against the Chairman and commissioners of the appellant. The allegations of outright animosity towards the respondent by Commissioner Ahmednassir, and the allegations that there was a scheme to remove the respondent from office, inferred that there was actual bias against the respondent. Strict proof of the alleged circumstances revealing actual bias was imperative, as it rendered the Chief Justice and the Commissioners involved in the scheme subject to automatic disqualification from the disciplinary proceedings. Surprisingly the respondent's reaction during the proceedings of 16th October implied that she did not believe the allegations against the Chief Justice.

[86] The trove of emails that were exhibited revealed an ingenious scheme that formed curious and alarming reading. The concept of the independence of the Judiciary has been clearly adopted in the Constitution as reflected under Article 160 of the Judiciary, and therefore a situation where people in and outside the Judiciary are alleged to direct or manipulate the Chief Justice in decision making in the affairs of the Judiciary, must be one of concern. However, without the source of the emails having been disclosed, the authenticity of the emails remained doubtful. It was not enough for the respondent to say, "I have come across these documents" without revealing where and how she has come across the documents. The respondent needed to demonstrate her good faith and the accuracy of her complaint, by coming clean and giving all information in her possession. Otherwise how could one rule out the appellant's contention that the emails were a red herring coined to scuttle the disciplinary proceedings against the respondent? Without establishing the reliability of the source and the authenticity of the trove of emails they remained no more than rumours, hearsay or conjecture. In the circumstances a fair minded and informed member of the public could not have been swayed by such intrigues into concluding that there was actual bias or reasonable apprehension of bias. I find that the conclusion of the learned Judge on the issue of bias and impartiality was clouded by his failure to properly address and establish the circumstances upon which the allegations were anchored.

Hearing Procedures

[87] Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body. In this regard, the respondent's complaints were that she was not informed of the case against her; that she was not given adequate time to present her defence; that she was not accorded an opportunity to call witnesses; that she was not accorded a public hearing; and that she was not given any reasons for the appellant's decision to terminate her employment.

[88] A perusal of the respondent's affidavit which was sworn in support of her petition reveals that at paragraph 8(iii) and (iv) of the affidavit, the respondent conceded that she was served with the allegations against her; that she responded to the said allegations; and that she did appear before the appellant with her lawyers on 16th October, 2013. The allegations that were served on the respondent and her responses to the allegations were all annexed to her affidavit. A perusal of these annextures reveals a detailed list of 87 allegations to which the respondent has provided a comprehensive response, demonstrating that she clearly understood the case against her. This negates the respondent's contention that she was not informed of the case against her or given sufficient time to respond to the case against her. Further, in the letter of 10th September, 2013 the respondent was initially given 21 days to respond to the allegations against her. She responded through two reports. The first response to the allegations was sent to the appellant on 1st October, 2013 and the second and final response was received by the appellant on 15th October, 2013. The truth of the matter is that although the appellant indicated through its Chairman a reluctance to extend time, time was actually extended as by 15th October 2013, the respondent had the benefit of a total of 35 days within which she responded to the allegations. Given the nature of the allegation against the respondent, 35 days was reasonable time within which to respond to the allegations against her.

[89] In regard to the respondent's request for a public hearing and a right to call witnesses, the proceedings before the appellant being disciplinary proceedings of a quasi judicial nature, there was no trial per se upon which an automatic right of public hearing could be anchored. Subject to compliance with basic fairness procedures, and taking into account the nature of the complaints and the peculiarities of the matter before it, the appellant was at liberty to determine whether the hearing should be public or private. To the extent that the respondent was in charge of public funds allocated to the Judiciary, and that some of the allegations against her involved misuse and misappropriation of the public funds entrusted to her, the disciplinary process was a matter of public interest and the request for a public hearing to enable the respondent clear her name appeared reasonable. Nevertheless, in light of the fact that the issue of external auditing of the judiciary accounts and misappropriation of public funds was still subject to action by other specialized bodies, a public hearing and the calling of oral evidence would have been pre-emptive and prejudicial to both the respondent and any subsequent investigations. The rejection of both the request for a public hearing and the calling of oral evidence cannot therefore be faulted. All that was mandatory was to ensure that the respondent was informed of the case against her and given an appropriate opportunity to present her defence. It is evident that this was done and that the respondent exploited the opportunity by presenting written representations and appearing before the disciplinary committee with her advocate. The respondent chose not to argue her substantive defence before the appellant but pursued what she called objections to the proceedings. Nonetheless, the appellant had sufficient information regarding the respondent's substantive defence in her

detailed written responses, and properly exercised its discretion in assessing the defence.

Right to Fair Administrative Action

[90] The right to fair administrative action in Kenya is now enshrined as a fundamental right under ***Article 47*** of the Constitution, which provides as follows:

> ***"47***
>
> (1) ***Every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> (2) ***If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, that person has the right to be given written reasons for the action.***
>
> (3) ***Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall-***
>
> (a) ***provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and***
>
> (b) ***promote efficient administration."***

[91] The critical question is what constitutes the right to fair administrative action? Since the legislation envisaged under Article 47(3) of the Constitution has not yet been put in place, it is apt to borrow from the equivalent South African Statute the Promotion of Administrative Justice Act (Act No.3 of 2000) which was cited by the *amicus curiae*. At Section 2 of this Statute "administrative action" is defined to mean:

> ***any decision taken, or any failure to take a decision, by –***
>
> ***(a) an organ of state, when-***
>
> ***(i) exercising a power in terms of the Constitution or a provincial constitution; or***
>
> ***(ii) exercising a public power or performing a public function in terms of any legislation; or***
>
> ***(b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, Which adversely affects the rights of any person and which has a direct, external legal effect, …***

[92] Prior to the enactment of the Promotion of Administrative Justice Act 2000, the Constitutional Court of South Africa gave guidance in the case of ***President of The Republic of South Africa & Others v South Africa Rugby Football Union & Others***, ***(CCT 16/98) [1998] ZACC 21,*** as follows:

> ***"the test for determining whether conduct constitutes 'administrative action' is not the question whether the action concerned is performed by a member of the Executive arm of Government… what matters is not so much the functionary as the function. Further, that the purpose of the inquiry as to whether conduct is administrative action is not on the arm of Government to which the relevant actor belongs but on the nature of the power he or she is exercising."***

[93] The functions and powers of the appellant as provided under ***Article 172*** of the Constitution as read with ***Sections 3*** and ***12*** of the Judicial Service Act, reveal that the appellant exercises powers that are administrative in nature and which involve decision making process that may affect the rights of judges and officers of the Judiciary. In this regard there is no doubt that the right of the respondent was likely to be adversely affected by the exercise of the appellant's disciplinary powers, and therefore it was necessary for the appellant to comply with ***Article 47*** in the exercise of such powers. I have already addressed the issue of procedural fairness and will therefore not dwell on that aspect of the administrative action. Suffice to mention as stated by *Majanja, J.* in ***Dry Associates Limited v Capital Market Authority & Another[2012] eKLR***, that the element of procedural fairness in ***Article 47*** must be balanced against reasonableness, expediency and efficiency in the decision making process. Of further relevance is whether the respondent was given reasons for the administrative action taken by the appellant.

[94] It is not disputed that following the disciplinary proceedings of 16th and 18th October 2013, the appellant served the respondent with a letter communicating its resolution to terminate the respondent's employment. The letter stated as follows:

> ***"October 18th 2013***
>
> ***Dear Gladys,***
>
> ***RE: REMOVAL FROM OFFICE AS THE CHIEF REGISTRAR OF THE JUDICIARY***
>
> ***Following the disciplinary proceedings initiated against you by the Judicial Service Commission as per allegations set out in the Commission's letter dated 10th September 2013, and having considered your written and oral responses, the Commission has deliberated on the same and reached a decision.***
>
> ***The Commission is satisfied that the***

requirement set out under Section12 (1)(b) (c) (d)(f) and (g) of the Judicial Service Act have been met.

Accordingly the Commission in its sitting of 18th October 2013 in exercise of its mandate as set out under Article 172 of the Constitution has unanimously resolved to terminate your appointment and remove you from office as the Chief Registrar of the Judiciary with effect from 18th October 2013

Yours Sincerely

HON DR WILLY MUTUNGA, D Jur, SC. EGH CHAIRMAN

JUDICIAL SERVICE COMMISSION"

[95] The issue is whether the letter reproduced above communicated reasons for the action taken by the appellant against the respondent. This letter read together with Section 12 of the Judicial Service Act (see paragraph 52 supra) conveys the reason that the respondent had been removed on the grounds of ***misbehavior, incompetence, violation of the prescribed code of conduct for judicial officers, violation of the provisions of Chapter Six of the Constitution, and any other sufficient cause.*** Although the last ground of "any other sufficient reason" is vague, the letter has identified the other grounds clearly. No doubt the letter could have been more explicit in giving specific reasons in support of the identified grounds. Nonetheless, taking into account that there were a total of 87 allegations, it would have been impractical for the appellant to give specific findings in regard to the 87 allegations in the letter of termination. The letter was not a judgment of a court such as to contain findings on each allegation and a verdict. It suffices that the letter of 18th October, 2013 was concise and effectively communicated the reasons for the removal of the respondent. Indeed, section 12 of the Judicial Service Act does not require all the grounds mentioned in that section to be established. Any single ground if sufficiently demonstrated is enough to justify the dismissal of the Chief Registrar of the Judiciary. Moreover, the appellant issued a press statement which gave detailed reasons for the termination of the respondent's employment.

[96] Given the attitude displayed by the respondent that she was not answerable to the appellant, and her refusal to deal with the substantive issues, it cannot be said that the decision taken by the appellant was outrageous or had no rational basis. Thus in my view the respondent's right to administrative action was not violated as the action taken was reasonable, procedurally fair, and lawful.

[97] The respondent raised an issue with regard to the propriety of the appeal contending that the same was fatally defective and ought to be struck out for want of service of the notice of the appeal as required under ***Rule 77*** of the Court of Appeal Rules. However, under ***Rule 84*** of the Court of Appeal Rules, the respondent ought to have brought an application for striking out the notice within thirty days from the date of service of the record of appeal. The respondent not having brought such an application, she is caught up with time. Secondly, the failure of service of the notice of appeal has not caused any injustice to the respondent nor is it one that goes to jurisdiction. It is the kind of technicality of procedure that ***Article 159(2)(d)*** of the Constitution enjoins the court not to pay undue regard to.

Conclusion

[97] I come to the conclusion that the learned Judge misinterpreted and misapplied the Constitution and the statutory provisions relating to the appellant's mandate, and the respondent's constitutional rights; misdirected himself in treating the disciplinary proceeding as a quasi criminal process to which criminal law and procedure was applicable; and failed to establish the circumstances upon which the allegations of bias were anchored. As a result of these flaws the learned Judge arrived at wrong conclusions regarding the violation of the constitutional rights of the respondent under ***Article 27(1) 35 (1) & (b), 47(1) & (2), 50 (1) & (2)*** and ***236 (b)*** of the Constitution.

[98] In my view the judgment of the learned Judge cannot stand. I would therefore allow this appeal, and set aside the judgment and all consequential orders. As my two brother Judges GBM Kariuki JA, and Kiage JA, are of the same view, this appeal shall be allowed with costs, and the judgment of the learned Judge and all the consequential orders set aside and substituted with an order dismissing the respondent's petition with costs. Those shall be the orders of this Court.

Dated and delivered at Nairobi this19th day of September, 2014.

H. M. OKWENGU

……

JUDGE OF APPEAL

JUDGMENT BY JUDGE G.B.M. KARIUKI SC

1. This judgment is in relation to the Appeal from the decision of the Industrial Court in which the learned trial Judge, (Nduma, PJ) held, *inter alia,* that the appellant, Judicial Service Commission, wrongfully terminated the employment of the 1st respondent, Glady's Boss Shollei, and removed her from office, and that in doing so the appellant violated the 1st respondent's rights under Articles 27(1), 35(1)(b), 47(1) & (2), 50(1) & (2) and 236(b) of the Constitution. The Industrial Court also ordered that certiorari would issue to quash both the letter by the appellant dated 18th October removing the 1st respondent from office as Chief Registrar of the Judiciary and the proceedings of 18th October 2013. It further ordered that the 1st respondent is entitled to compensation for the unlawful and unfair loss of employment and for violation of her constitutional rights and that an inquiry as to quantum be gone into. The appellant was ordered to pay the costs of the suit.

2. The record of appeal shows that the 1st respondent, was employed in 2011 as the Chief Registrar of the Judiciary following her recruitment by the appellant. On 18th October 2013 the appellant unanimously terminated her appointment and removed her from office with effect from 18th October 2013. The action followed disciplinary proceedings initiated by the appellant against the 1st respondent. The allegations against the 1st respondent were set out in the appellant's letter to the 1st respondent dated 10th September 2013.They ranged from allegations of financial mismanagement, mismanagement in human resource, irregularities and improprieties in procurement, insubordination and countermanding decisions of the appellant and misbehavior. These allegations indicated that failure by the 1st respondent to exercise prudence in expenditure of public funds resulted in loss of approximately Shs.1.2 billion. It was alleged that the 1st respondent, as the Accounting Officer of the Judiciary, failed to ensure that public funds in the Judiciary were utilized prudently and in accordance with the provisions of Chapter 12 of the Constitution, the Public Finance Management Act, the Judicial Service Act, the Government Financial Regulations and directions given by the appellant, resulting in misuse of public funds to the tune aforestated.

3. The record of appeal further shows that the appellant set out in writing the grounds for the removal of the 1st respondent from office which were in tandem with those stipulated in Section 12(1) of the Judicial Service Act. It also framed the allegations in support of those grounds with apparent clarity. The 1st respondent was initially given 21 days to respond but the period was enlarged to 39 days.

4. The 1st respondent responded prolifically to the allegations and was also accorded the right to attend the hearing of the disciplinary proceedings and she appeared on 16.10.2013 and again on 18.10.2013 in company of her advocate, Mr. B.K. Kipkorir, and made oral representation but got miffed when her request for the proceedings to be kept open to the public was turned down. Of her own volition, the respondent left the hearing prematurely on 18.10.2014 thereby forfeiting her right to be present throughout.

5. Citing the interest of transparency and public accountability, and in accordance with the Judicial Service Act 2011, the appellant issued a statement on the allegations against the 1st respondent giving reasons for the 1st respondent's dismissal which was uploaded to the Judiciary website where everyone was able to access it.

6. The record of appeal shows that the statement was titled *"JSC ALLEGATIONS, CRJ RESPONSES AND JSC FINDINGS AND OBSERVATIONS"*. It read –

"On September 9, 2013, the Judicial Service Commission served the Chief Registrar of the Judiciary, Mrs. Gladys Boss Shollei, with 87 allegations touching on financial and human resource mismanagement, irregularities and illegalities in procurement, and misbehavior. In her responses, filed on October 1, 2013 and subsequently amended on October 15, Mrs. Shollei admitted 33 allegations and denied 38 others. Responses to the other 16 allegations balance were equivocal. And qualified.

Although time stopped for the former CRJ on October 1, the JSC bent over backwards to accommodate her amended responses, which were filed several weeks after the deadline. They considered these extra responses and took into account what was submitted. It is noteworthy that the CRJ responded to the 31 pages of allegations with 73 pages of her own. The initial 21 days allowed for responses were extended by a further 18 days. JSC is satisfied that due process was followed.

In the final analysis, the financial outlay in the allegations against Mrs. Shollei stands at Kshs.2,2007,400,000: Those she admitted to are estimated to be valued at Kshs.1,696,000,000 while those she denied stands at a value of Kshs.250,400,000 and Kshs.361,000,000 where there are mixed responses.

On Friday October 18, 2013, the JSC unanimously resolved to remove the CRJ from office on the grounds of:

1. ***Incompetence***
2. ***Misbehavior***
3. ***Violation of the prescribed code of conduct for judicial officers***

4. Violation of chapter 6, and Article 232 of the Constitution of Kenya, 2010

5. Insubordination"

7. On 19th August 2013, the 1st respondent proceeded to address the media and publicly referred to the appellant's resolution, among others, as "irresponsible" which the appellant's counsel later described as an exhibition by the 1st respondent of open contempt for the appellant. Being aggrieved by the appellant's decision, the 1st respondent moved to court to challenge it. She filed a Petition (No. 528 of 2013) in the Constitutional and Human Rights Division of the High Court at Milimani, Nairobi.

8. In the petition, the 1st respondent contended that the disciplinary action by the appellant against her and the decision to terminate her employment and remove her from office as the Chief Registrar of the Judiciary violated her rights and freedoms in that:

(i) her right to fair trial was violated in contravention of Articles 25(c)and 47(1) & (2) of the Constitution.

(ii) her right to public hearing was denied in violation of Article 50(1) of the Constitution

(iii) her right to presumption of innocence to be informed of the charges in different detail and to have adequate time to prepare her defence were denied in contravention of Article 50(2) (a) (b) and (c) of the Constitution

(iv) her right to be heard by an impartial tribunal was violated in contravention of Article 50(1) of the Constitution.

(v) her right to due process of the law was violated in contravention of Article 236(b) of the Constitution

(vi) the appellant refused to give material copies of proceedings and related documents in contravention of Article 35(1)(b) of the Constitution

(vii) the entire process against the 1st respondent violated her right to inherent dignity pursuant to Article 28 of the Constitution.

9. In paragraph 13 of her petition the 1st respondent contended that the appellant exercised powers it did not have because:

(i) The offence of the Chief Registrar of the Judiciary as the Accounting Officer of the Judiciary is accountable to the National Assembly pursuant to Article 226 (2) of the Constitution

(ii) The accounts of the Judiciary are subject to audit by the Auditor General pursuant to Article 226(3) of the Constitution

(iii) Further, oversight of the Judiciary is by the National Treasury pursuant to the Public Finance Management Act 2012

(iv) Further, oversight of the Judiciary is subject to oversight by the Public Procurement Authority (PPOA) pursuant to the Public Procurement and Disposal Act, 2005

(v) On allegations of corruption, or corrupt practices, the mandate belongs to the Ethics and Anti-Corruption Commission pursuant to Article 79 of the Constitution.

(vi) On allegations of any crime, it is the exclusive preserve of the Director of Public Prosecutions, pursuant to Article 157 of the Constitution.

10. With regard to allegations of crime, the 1st respondent contended that this was the exclusive preserve of the Director of Public Prosecutions, pursuant to Article 157 of the Constitution.

11. It was the 1st respondent's case that the appellant had no jurisdiction to take disciplinary action against her as it did and that the appellant could only deal with the 1st respondent upon referral from any of the government agencies or bodies but could not act *suo moto* as it did.

12. The 1st respondent prayed for the following orders:

a. THAT, order of certiorari to issue to quash the letter of removal dated 18.10.13

b. THAT order of certiorari to issue to quash the proceeding of 18.10.13.

c. THAT an order of mandamus to issue compelling the Respondent to comply with the applicable law.

d. THAT, prohibition do issue against the respondent from in any way proceeding against the petitioner other than as by law provided.

e. THAT declaratory order to issue that the respondent violated the petitioner's rights as set out.

f. THAT Declaratory orders to issue that the allegations against the petitioner in the reasons given for her dismissal do not exist in law, and thereby void.

g. THAT Declaratory orders do issue that the Judicial Service Act, 2011 is void to the extent of its inconsistency with the Constitution.

h. THAT an order of compensation do issue for violation of the petitioner's rights and on inquiry to quantum be gone into.

i. THAT such further orders or relief do issue pursuant Article 23(3) of the Constitution.

j. THAT costs be provided for the petitioner.

13. It is patent that the 1st respondent resorted to judicial review to compel performance by the appellant of what the 1st respondent viewed as a public duty, but it seemed debatable whether this was a judicial review matter and it is no surprise that after a careful scrutiny of the matter, the learned Judge of the Constitutional and Human Rights Division at the High Court, the Hon. Lady Justice Mumbi Ngugi, correctly ascertained and made a finding that it was in fact a labour relations dispute falling under the mandate of the Industrial Court and accordingly transferred it to the Industrial Court in terms of Article 162(2) of the Constitution as read with Section 12 of the Judicial Service Act (Act No. 1 of 2011) following a consent recorded by the parties to that effect. The petition in the Industrial Court was re-numbered No. 39 of 2013. It was not amended following the transfer. It remained intact.

14. The 1st respondent also applied in the Industrial Court for interim orders to enable her to remain in office pending the hearing and determination of the matter. She specifically sought two orders, namely, that she be reinstated and in the alternative, that the office be kept vacant until her petition was heard and determined. In short, she prayed that she should not be replaced. However, on 22nd November 2013 the Industrial Court declined to do so and ordered that –

> ***"it is in public interest that, that office (of CRJ) which is critical to the functioning of the Judicial Arm of Government does not remain vacant. That is where the balance of convenience falls with regard to this matter. The application is therefore not allowed and costs will be in the cause.."***

15. I take judicial notice of the fact that as at the time of the hearing of this appeal, the office of the Chief Registrar formerly held by the 1st respondent had been filled.

16. The Industrial Court had before it the 1st respondent's Petition and the documents in its support as well as the appellant's replying and supplementary affidavits and the supporting documents annexed thereto. I have perused them. No oral evidence was adduced.

17. The petition came up for hearing before M.N. Nduma, PJ. On 5.11.2013, 14.11.2013, 15.11.2013, 22.11.2013 and 24.1.2014 and learned counsel **Mr. Donald Kipkorir** appeared for the 1st respondent while learned Senior Counsel **Mr. Paul K. Muite** assisted by learned Counsel **Mr. Issa Mansur** appeared for the appellant. Counsel for both parties made submissions before the learned Judge.

18. The Industrial Court determined the petition (No. 39 of 2013) and delivered its judgment on 7th March 2014 and ordered –

> (a) ***that an order of certiorari would issue to quash the letter of removal dated 18th October 2013***
>
> (b) ***that an order of certiorari would issue to quash the proceedings of 18th October 2013***
>
> (c) ***that the respondent violated the petitioner's (respondent in this appeal)right under Articles 27(1), 35(1)(b), 47(1) & (2), 50(1) & (2) and 236(b)***
>
> (d) ***that the petitioner (1st respondent in this appeal) is entitled to compensation for the unlawful and unfair loss of employment and for violation of her constitutional rights and that an inquiry to quantum be gone into***
>
> (e) ***that the petitioner should be paid the costs of this suit."***

19. Dissatisfied with the judgment of the Industrial Court the appellant gave notice of appeal pursuant to Rule 75 of this Court's Rules on 11th March 2014 manifesting its intention to appeal against part of the said decision and on 25th March 2014, lodged the record of appeal.

20. The Memorandum of Appeal contained 16 grounds of appeal which can be summarized into 5 grounds as follows:-

> (i) ***That the learned Judge erred in law in failing to consider the mandate of the appellant under the Constitution and the Judicial Service Act and in particular Article 172 of the Constitution and Section 12 of the Judicial Service Act on the removal of the Chief Registrar and whether the latter was accountable to the appellant.***
>
> ***(ii) That the learned Judge erred in law in applying criminal law principles in a matter of a contract of employment and failed to appreciate that the dispute before him related to employer- employee relationship largely requiring the Judge to consider the circumstances in which the removal of the 1st respondent from office took place.***
>
> ***(iii) That the learned Judge dwelt on issues that were not pleaded and labored under***

gross misapprehension of the facts of the case and the law applicable and failed to apply the law correctly and to direct his mind properly to the issues on the allegations of constitutional violations.

(iv) The learned Judge showed open bias against the appellant and erred not only in taking into consideration irrelevant matters and in failing to consider relevant matters but also in making contradictory findings while descending into the arena of conflict between the parties and in defending and answering the allegations leveled by the appellant against the 1st respondent.

(v) The learned Judge erred in law in failing to appreciate that Regulation 25 of Part IV of the Third Schedule of the Judicial Service Act is only applicable to disciplinary proceedings initiated by the Chief Justice while exercising delegated authority pursuant to Regulation 15 of the said Schedule and not disciplinary proceedings against the Chief Registrar under Section 12 of the Judicial Service Act.

21. The appellant sought the following orders:

(1) ***that the appeal be allowed***

(2) ***that the judgment of the Industrial Court dated 7th March 2014 be set aside and the Petition datd 31st October 2013 be dismissed with costs***

(3) ***that such further orders and relief be made as this court may deem necessary***

22. The duty of this court as the first appellate Court has been articulated in many decisions including **Kenya Ports Authority V Kuston (Kenya) Limited** (2009) 2 EA 212 in which this court stated that –

> ***"on a first appeal from the High Court, the Court of Appeal should reconsider the evidence, evaluate it itself and draw its own conclusion though it should always bear in mind that it has neither seen nor heard the witnesses and should make due allowance in that respect. Secondly, that the responsibility of the court is to rule on the evidence on record and not to introduce extraneous matters not dealt with by the parties in the evidence"***

23. When the appeal came up for hearing before us on 10th April 2014, learned Senior Counsel **Mr. Muite** assisted by learned Counsel **Mr. Issa Mansour** appeared for the appellant while learned Counsel **Mr. Donald Kipkorir** appeared for the 1st respondent. The 2nd respondent, Commission on Administrative Justice, was an *amicus curiae* and was represented by the learned Counsel **Mr. Angima** who held brief for learned Counsel **Mr. Chahale** who was on record. The Court gave directions for filing of written submissions and on 16.5.2014 the appellant's counsel filed submissions as did counsel for the *amicus curiae* while the 1st respondent filed submissions on 15.5.2014.

24. On 17th May 2014, counsel highlighted their written submissions. **Mr. Muite** told the Court that insubordination by the 1st respondent went to the core of the matter. He submitted that the Judiciary has only one head and referred to Articles 161, 161(2) (a) & (c) of the Constitution on the basis of which he contended that the Chief Registrar was Accounting Officer in Financial management only and that this entailed the need by the National Treasurer to know who was responsible and would be accounting for finances. In no way did Article 161 confer power to the 1st respondent to be head of the Judiciary along with the CJ and the JSC, contended Mr. Muite who submitted that the Chief Registrar was adamant that she was not answerable to the CJ or the JSC on finances and that she was answerable only to Parliament and Treasury and that she saw herself as the head in relation to finances in respect of which she took the position that she had sole mandate. According to the 1st respondent, he said, the Judiciary had two heads. But nothing could be further from that, contended Mr. Muite, who referred the Court to the responses given by the 1st respondent in which the stance the latter took is reflected. In particular, he referred to allegations on **Libra House** and wondered how the appellant could work with the 1st respondent who maintained that she was not answerable to the CJ or the JSC. This, contended, Mr. Muite, clearly demonstrated insubordination on the part of the 1st respondent who refused to give information on acquisition of a building where funds were being expended. The 1st respondent even publicly called the JSC irresponsible, pointed out Mr. Muite. It was Mr. Muite's submission that the 1st respondent made it impossible for an employee/employer relationship to subsist between her and the appellant. On this ground alone, Mr. Muite urged that the appeal ought to succeed because the 1st respondent did not recognize the authority of her employer.

25. With regard to removal of the Chief Registrar, **Mr. Muite** submitted that the relevant provisions of the law were contained in Article 172(1)© of the Constitution and Section 12 of the Judicial Service Act. He criticized the learned trial Judge for resorting to Regulation 25 and Section 32 of the Judicial Service Act which deal with removal of other staff and judicial officers. With regard to the right to be heard, Mr. Muite pointed out that the allegations were in writing and were forwarded on 10th September 2013 to the 1st respondent who was given 21 days to respond. This period was later enlarged by a

further 18 days. The allegations were very serious, said Senior Counsel, and the particulars of the allegations were given with considerable clarity. It was Mr. Muite's submission that the learned trial Judge misdirected his mind when he held that criminal law applied to the disciplinary proceedings against the 1st respondent and that he erroneously failed to have regard to the provisions of Section 12 of the Judicial Service Act. Mr. Muite urged the Court to have regard to the appellant's written submissions and the list of authorities and allow the appeal.

26. **Mr. Donald Kipkorir**, the learned counsel for the 1st respondent, started highlighting his submissions by making a statement to the effect that the 1st respondent did not want to be Chief Registrar again and did not want to come back to the Judiciary. All that the 1st respondent wanted, he said, was to tell her side of the story.

27. It was Mr. Kipkorir's submission that the Industrial Court had jurisdiction to deal with constitutional matters and that the High Court does not have exclusive jurisdiction to deal with constitutional issues. He pointed out that the case was filed as a constitutional matter in the High Court and was subsequently transferred to the Industrial Court. He told the Court that the findings made by the Industrial Court were supported by evidence and that the learned Judge of the Industrial Court did not refer to extraneous matters and that the issues he crystallized were from evidence. It was Mr. Kipkorir's submission that it was fallacious to state that a Judge cannot go beyond what is brought before him. The Judge can look up new case law, he opined. Mr. Kipkorir submitted that Section 12 of the Judicial Service Act does not provide for procedure of removal of the Chief Registrar. In his view, it is the Third Schedule to the Act that provides the road map.

28. With regard to the application of criminal law by the learned Judge to the disciplinary proceedings, Mr. Kipkorir submitted that the Judge was expanding the law as required by the Constitution by applying in the proceedings best practices from criminal law. He alluded to Wambora's case.

29. Mr. Kipkorir conceded that the 1st Respondent had been served with written allegations to which she responded but contended that she did not admit any of them. In the High Court, said Mr. Kipkorir, the 1st respondent argued about the process of dismissal and not about dismissal *per se.* He lamented that the disciplinary proceedings were a closed-door-affair when it should have been open to the public. Moreover, it was not clear whether the proceedings were investigatory or disciplinary, contended counsel. He urged the Court to dismiss the appeal with costs.

30. Before delving into the issues for determination in this appeal, a look at the legal structures as they relate to the office of the Chief Registrar of the Judiciary vis-à-vis Judicial Service Commission, the appellant, might illuminate and enhance appreciation of the matter falling for resolution.

31. The Judiciary consists of the Judges of the Superior Courts, Magistrates, other Judicial Officers and Staff **(See Article 161(1)** of the Constitution).

32. The office of the Chief Registrar of the Judiciary (CRJ) to which the respondent was appointed in 2011 is established under **Article 161(2)(c)** of the Constitution which states –

> ***"161(2) (c) there is established the Office of the Chief Registrar of the Judiciary who shall be the Chief Administrator and Accounting Officer of the Judiciary."***

33. Though created by the Constitution, the Office of the Chief Registrar of the Judiciary, unlike that of Judges of the Superior Courts, has no security of tenure. It is however a public office and the holder thereof is bound by the National values and principles of governance enshrined in **Article 10** of the Constitution.

34. The Judiciary Fund which constitutes the resources for running the Judiciary is established under **Article 173 (1)** of the Constitution. It is administered by the Chief Rgistrar of the Judiciary. It is required under Article 173(2) of preparing estimates of expenditure for the following year and submitting them to the National Assembly for approval as required by Article 173 (3) of the Constitution to be used for administrative expenses of the Judiciary and such other purposes as may be necessary for the discharge of the functions of the Judiciary.

35. The role of the Chief Registrar is to support and facilitate judicial officers in the discharge of their constitutional mandate to administer justice to Kenyans. The functions and powers of the Chief Registrar, in addition to the Constitution, are set out in Section 8 of the Judicial Service Act. They show clearly that the Chief Registrar is in charge of support services in the Judiciary.

36. The Judicial Service Commission (appellant) is established under **Article 171** of the Constitution and its functions and mandate are set out in **Article 172** of the Constitution. The mandate vested in the Appellant by Article 172 is to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice and to appoint, receive complaints, investigate and remove from office or otherwise discipline Registrars, Magistrates, other Judicial officers and other for inability to perform

the functions of the office, misbehavior , incompetence, violation of the prescribed code of conduct for judicial staff of the Judiciary.

37. The Judicial Service Act (No.1 of 2011) was enacted to make provisions with regard to judicial services and administration of the Judiciary; the appointment and removal of Judges and the discipline of other Judicial Officers and staff; regulation of the Judiciary Fund and the establishment, powers and functions of the National Council on Administration of Justice, and for connected purposes.

38. The Judicial Service Commission (JSC) has power under Section 12 of the Judicial Service Act to **suspend** or **remove** the Chief Registrar from office officers, bankruptcy, violation of the provisions of Chapter six of the Constitution or for any other sufficient cause.

39. Before the Chief Registrar of the Judiciary is removed under Section 12(1) of the Judicial Service Act, Section 12(2) of the said Act requires the CRJ **be informed** of the case against him/her **in writing** and be given **reasonable time to defend** herself against any of the grounds cited for the intended removal.

40. As stated earlier, the pleadings before the Industrial Court were the Petition by the 1st respondent together with its annextures and the appellant's Replying and supplementary Affidavits sworn on 14th November 2013 and 23rd January 2014 respectively.

41. In the answer filed by the appellant to the petition, the latter had a comprehensive reply including the allegations against 1st respondent and the grounds for her removal and the latter's responses and the findings made by appellant. It shows that out of 87 allegations, the 1st respondent admitted 33 and denied 38 and that 16 were equivocal and qualified. The admitted allegations accounted for loses valued at Kshs.2,696,000,000/=; those denied were valued at 250,400,000/=; and those with mixed responses stood at 361,000,000/=.

42. The 1st respondent acknowledged in paragraph 7 of her petition that she was served with a written statement of allegations constituting the grounds for 12 of the Judicial Service Act (No.1 of 2011). She also confirmed in paragraph 8 of her petition that she responded to the allegations in her interim and final reports with supporting documents. In addition, she confirmed in paragraph 9 of her petition that she was given the right to be heard and that on 16.10.2013 she attended the hearing at which she appeared with her counsel who raised objections on jurisdiction of the appellant to institute the disciplinary proceedings against her and on alleged bias against some of the Commissioners of the Appellant. However, the appellant overruled the objection and the hearing proceeded on 18.10.2013. In paragraph 13 of his judgment, the learned Judge of the Industrial Court acknowledged that on 18.10.2013, the 1st respondent and her counsel appeared in the disciplinary proceedings and counsel presented what was referred to as *"closing submissions under protest"* after which counsel applied for adjournment which was declined and the hearing proceeded whereupon the 1st respondent "excused herself from the proceedings" and resorted to Court action in which she alleged violation of her constitutional rights and lack of powers on the part of the appellant to discipline or remove her from office. In the circumstances, the hearing of the disciplinary proceedings continued and the appellant made the decision to remove the 1st respondent from office.

43. After perusing the material before it and hearing counsel for all the parties, the learned Judge of the Industrial Court (M.N. Nduma, PJ) crystallized issues for determination as follows:

> (***1) Did the (appellant) JSC have jurisdiction to discipline the petitioner***?
>
> ***(2) If the answer to 1 is correct, (sic) (meaning "is in the affirmative") was the petitioner given a fair and impartial hearing?***
>
> ***(3) Was the petitioner (1st respondent) removed for a valid reason and in terms of a fair procedure?***
>
> ***(4) What remedy if any, is available to the petitioner***

44. Although the matter before the Industrial Court was with regard to termination of employment in respect of which pleadings and documents annexed to them were placed before the Court, the Court expressed its desire for and lamented lack of more evidence by way of affidavit from the commissioners of the appellant who the 1st respondent alleged were biased against her. The Court stated in this regard:-

> ***"In the supplementary affidavit, Ms Wilfrida Mokaya does not attest to any personal knowledge or information from the said commissioners on these issues. It would have been more helpful for the named persons to directly place their perspective on the allegations of personal nature made against them before….."***

45. There was no case before the Industrial Court against any of the individual Commissioners. The appellant as a corporate body had been sued by the 1st respondent on account of the latter's removal from office. There was no legal requirement for individual Commissioners to respond to accusations not touching on or relating to the grounds for the removal of the 1st respondent and which, at any rate, were not shown to be admissible in law. It was a misdirection on

the part of the Court to purport to place on the individual Commissioners the burden of disproving the allegations which had not been established by evidence and were clearly inadmissible. In any case, the burden of proving that her employment was wrongfully terminated reposed on the 1st respondent could not be shifted or discharged or diminished by attack on individual Commissioners. Bias, as I shall show below, was not established.

46. The first issue decided by the Industrial Court which had far reaching implication on the decision on the entire petition was that the disciplinary process against the 1st respondent was quasi-criminal and that the threshold required in framing and proving the grounds for removal of the Chief Registrar was that obtaining in criminal law. The learned Judge applying criminal law standards held that the removal of the Chief Registrar was that obtaining in criminal law. The learned Judge applying criminal law standards held that the removal of the Chief Registrar from office did not meet such standards. In his judgment, the learned trial Judge stated –

> ***"the disciplinary process is quasi-criminal in nature and must have the following basic elements that were lacking in the present case;***
>
> ***a) A complaint and charge setting out the offence and the particular provisions of the law broken;***
>
> ***b) Particulars of the offence;***
>
> ***c) Names and statement of the complainants; and***
>
> ***d) Sufficient time for the accused to prepare adequately and be allowed to gain access to all exculpatory evidence.***

47. The learned trial Judge then proceeded in paragraphs 24, 25 & 26 of his judgment to make the following findings:

> ***"it is apposite to not that CRJ was not involved in the Preliminary investigations even though the same became the basis of the raft of allegations against her.***
>
> ***The JSC indicates that it has "undertaken to engage the public and other Government agencies including Parliament, to explain the profundity of the issues at hand." This is an acknowledgement by JSC that up to the time the Petitioner was removed from the office, none of these agencies had been involved of their own motion, or through invitation by JSC in the issues at hand.***
>
> ***The documentation presented by the Respondent before court do not now show what allegations upon consideration by JSC was the Petitioner found guilty of and in respect of which she was not found guilty.***
>
> ***If the Court is meant to assume that CRJ is guilty of the allegations she is said to have admitted, that does not follow in law or in fact. The JSC had in its decision to determine if these facts admitted in the light of the law applicable constitute an offence and if so what administrative penalties are available and therefore applicable to the Petitioner.***
>
> ***The Court is yet to receive any such evidence from the Respondent, documentary or otherwise.***
>
> ***As a matter of fact, the letter of removal dated 18th October, 2013, does not indicate whether the Petitioner was found guilty of any of the 87 (33+38+16) allegations preferred against her and if so, in respect of which allegations she had been acquitted.***
>
> ***The letter says:***
>
> ***"The Commission is satisfied that the requirements set out under Section 12(1)(b)(c)(d)(f) and (g) of the Judicial Service Act 2011, have been met" and no more.***
>
> ***As at the time of hearing this matter the Petitioner had no way of knowing what specific offences she had committed and the reasons for the Respondent arriving at that conclusion especially whether her defence as contained in the final report was taken into account in arriving at that conclusion."***

48. The burden of proving the allegations in the petition reposed not on the appellant but on the 1st respondent who was enjoined to satisfy the Court that either the allegations constituting the grounds for her removal from office were not in consonance with the grounds stipulated in Section 12 of the Judicial Service Act or had no basis or lacked veracity; that 1st respondent was not given a fair hearing; that in any case the appellant had no jurisdiction to remove her from office as it did.

49. It is patent that the 1st respondent was an employee of the Judiciary and the appellant's action and decision to remove her from office was an administrative action within the meaning of Article 47 of the Constitution. The rationale of **Article 47** of the Constitution is to promote and protect administrative justice with regard to administrative action affecting individuals.

50. As any student of law knows, the indicia of a contract of service include the employer's power of selection of his employee and the right to suspend or dismiss an employee. It is not disputed that, the 1st respondent was hired by the appellant. The Judicial Service Act gives the appellant the power to remove the Chief Registrar from office. The 1st respondent asserted that the appellant had no power over her. It is axiomatic that whether the relation between the parties to a contract is that of an employer and employee or otherwise is a conclusion of law dependent upon the rights conferred and the duties imposed by the contract. If these are such that the relation is that of employer and employee, *"it is irrelevant that one of the parties has declared it to be something else"* **(see Ready Mixed Concrete (South East) Ltd. v Minister of Pensions and National Insurance** [1968] 2 QBD 497; see also Mersey Docks & Harbour Board [1946] 62 TLR 427; **Yewens** [1880] 6 QBD 530

51. All the Indicia of the contract of service between the appellant and the 1st respondent clearly showed that the 1st respondent as an employee of the Judiciary was answerable under the law to the appellant which under the Judicial Service Act is charged with the constitutional mandate of running the Judiciary. I so find. The assertion to the contrary by the 1st respondent (namely that she was not answerable to the appellant) seems from the evidence to have been rightly described by counsel for the appellant as a action as required by **Article 47** of the Constitution. However, the invocation of Article 50 of the Constitution by the 1st respondent and its endorsement by the Industrial Court was misplaced. The right to fair hearing in Article 50 relates to hearing before a **Court** i.e. a court of law (as defined by the interpretation and general provisions Act Cap 2) or, if appropriate, another independent and impartial tribunal or body. In the instant appeal, the disciplinary process against the 1st respondent was not a proceeding before a court of law. It did not relate to a criminal proceeding. It was a civil matter between an employer and an employee.

53. Did the appellant have power to remove the 1st respondent from office? The answer is not far to seek. The appellant, Judicial Service Commission, is a body corporate with perpetual succession and a seal by dint of Article 253 of the Constitution and it is capable of suing and being sued in its corporate name. Its functions include appointing, receiving complaints against, investigating and removing from office or otherwise disciplining registrars, magistrates, other judicial officers and other staff of the judiciary in the manner prescribed by an Act of Parliament. The Chief Registrar of the Judiciary is one of the registrars referred to in Article 172(1)(c) of the costitution

54 The removal of the 1st respondent from office is regulated by the provisions of Section 12 of the Judicial Service Act (No. 1 of 2011). Needless to repeat, the process of removal is an administrative action within the meaning of Article 47 of the Constitution which confers on every person the right to expeditious, efficient, lawful, reasonable and procedurally fair administrative action. The tenets of fair administrative action are spelt out in Section 12(2) of the Judicial Service Act. They are that before the Chief Registrar is removed from office pursuant to Section 12(1) of the said Act, the Chief Registrar must (1) be informed in writing of the case against him/her and (2) be given reasonable time to defend himself/herself against any of the grounds cited for the intended removal. Section 2(1) of the Commission on Administrative Justice Act 2011 defines an administrative action as *"an action relating to matters of administration and includes a decision made or an act carried out in the public service."*

55. Perusal of Section 12 of the Judicial Service Act shows that the appellant was vested, as it still is, with power to remove the holder of the office of the Chief Registrar from office on any of the grounds set out in the Section and that the exercise of that power is of civil nature. In exercising it, criminal law did not come into it. The 1st respondent's rights as an employee were a verdict in a criminal trial and a decision in Civil or disciplinary proceedings, unlike criminal proceedings, were not designed to establish the guilt or innocence of the 1st respondent in relation to criminal offences nor were they initiated with a view to criminal sanction. While criminal proceedings are normally mounted to determine the guilt or innocence of a person in relation to specific criminal offence/s the culpability of which results in punishment as may be provided in a given statute, disciplinary proceedings are of civil nature between an employer and an employee and where the employee is not vindicated, the outcome is normally dismissal from employment. This does not, of course, stop law enforcement agencies from pursuing criminal proceedings where criminal offences have been committed.

56. Although disciplinary proceedings and professional proceedings are not the same as they serve different purposes, the point that in neither is criminal law applied is relevant.

57. This point has been discussed in a number of cases in several other jurisdictions. For instance, in **Sinha and General Medical Council** (Neutral citation number [2009] EWCA Cir 80] the Court of Appeal (Civil Division) in London, observed that it is often very difficult for highly intelligent people who are not lawyers to understand the difference between protected in the context of principles of natural justice and administrative

action (under Article 47) the requirements of which were that the disciplinary process would be reasonable, fair, lawful and efficient. The proceedings. The Court further observed that –

> *"**criminal proceedings are designed to establish guilt or innocence of a member of the public with a view to punishment by society if the verdict is guilty, and acquittal if the verdict is not guilty. Proceedings before a professional body are designed to establish whether or not professional men and women have fallen below the standards expected of their profession; whether or not the professionals concerned should remain members of the profession concerned and if so, on what terms."***

58. In **Dr Anil Mussani** and **College of Physicians and Surgeons of Ontario** (reported at (2003)), 64 O.R. (3d)641 the Court of Appeal for Ontario, Canada, referred to a plethora of authorities to demonstrate that:

> *"**professional disciplinary hearings are not criminal or quasi- criminal in nature because despite their potentially serious sanctions, they do not result in true penal consequences. Rather, they are administrative and regulatory in nature, designed to maintain ……., professional integrity and professional standards and to regulate conduct within the profession in question."***

59. In the administrative action leading to the removal of the 1st respondent from office the appellant was enjoined, in public interest, to act fairly. In addition, the principles of natural justice also applied to the administrative action (see **Cooper v Wilson [1937] 2 All ER 726.** The heresy that rules of natural justice apply only to judicial proceedings and not to administrative action was scotched in **Ridge v Baldwin** [1963] 2 All ER 66 [1964] AC the Judicial Service Act were complied with and the principles of natural justice were adhered to for the simple reason that the 1st respondent was afforded reasonable time to answer the charges. The grounds for her removal were set out with clarity and the 1st respondent responded copiously to them. She was also invited by the appellant to appear before it ostensibly to highlight or amplify her answers. She instead left huffily when her request for public hearing was disinclined. Her appearance before the appellant on 18.10.2013 was not necessary nor would her absence prejudice her rights as she had been heard on her written answers. It is difficult to see the basis or the justification for the allegation that the 1st respondent was not answerable to the appellant or was not accorded a fair administrative action or that bias existed as alleged. There was no substance in these allegations.

60. The issue of criminal charges or application of criminal law and procedure which the learned trial Judge introduced did not arise. The learned trial Judge went into error when, without interrogating the matter, made a finding that the disciplinary process against the 1st respondent was quasi-criminal to which criminal law and procedure applied. He referred to authorities in criminal law including **Dande v Republic** [1977] KLR 71, and **Cherere s/o Gakuhi** [1955] EACA 478 on framing of criminal charges. He also referred to **Lusiti v The Republic** [1977] KLR 143 on admission of offence and plea and its unequivocability. **Adan v The Republic** [1973] EA 445 on recording of plea was also followed by the learned trial Judge. Yet clearly, criminal law had no application to the disciplinary proceedings against the 1st respondent which gave rise to the suit before the Industrial Court whose decision provoked this appeal. The learned Judge fell into error in this regard.

61. The learned trial Judge in paragraph 58 of his judgment stated with regard to allegations against the 1st respondent –

> ***"58. In this regard, the court has found it useful to seek guidance from the provisions of the Criminal Procedure Code Cap 75 of the Laws of Kenya with regard to the framing of the charges under Section 37 as follows:……..***

62. The learned Judge then preceded to analysis the allegations and their non- conformity with the criminal law and practice and reached the conclusion that they were not drafted in conformity with criminal law standards. In short, that they were bad in law. As to the allegations which the 1st respondent had admitted, the trial Judge found that the admission did not conform to the standards required in a plea of guilty in criminal cases. In the words of the learned Judge at paragraph 75 of his judgment:

> ***"After a careful reading of both the interim and final response by the petitioner to the charges, and the matrix presented by the respondent the court has been unable to find any unequivocal admission or plea of guilty to any of the 87 allegations made against her."***

63. In effect, the learned trial Judge came to the conclusion that under criminal law, the respondent had not admitted any of the allegations. He held the view that the disciplinary proceedings were quasi-criminal and that the admissions of the allegations by the 1st respondent were not in tandem with an unequivocal plea of guilty and therefore were invalid. He stated in paragraph 80 of his judgment:-

> ***"to finalize the court's analysis of the pronouncement by JSC on the 87 allegations made against the petitioner (1st respondent),***

no verdict was made in the undated communication on each and every allegation but instead, JSC said:-

"the Chief Registrar of the Judiciary is hereby removed from office with immediate effect for:

- ***Incompetence***
- ***Misbehavior***
- ***Violation of the prescribed code of conduct for Judicial officers***
- ***Violation of Chapter 6 and Article 322 of the Constitution***

64. The learned trial Judge went on to hold in paragraph 81 of his judgment that:

"this was done without any record of decision or verdict on the specific charges preferred against her. No such verdicts are evident from the matrix referred to earlier…."

65. At the end of paragraph 82 of his judgment the learned Judge stated:

"this document (meaning the allegations made against the 1st respondent) cannot comprise final decision by JSC on the face of it."

respondent alleged bias against members of the appellant although it was raised in other documents and submissions. The learned Judge also alluded in paragraph 83 of his judgment to *competing allegations."* Yet this was an employment matter in which the appellant *qua* employer had instituted disciplinary proceedings and furnished evidence for the grounds of removal of the 1st respondent. The learned Judge stated that *"the Court will make a decision whether on the facts presented, JSC ought to have constituted another disciplinary tribunal in terms of Section 32 and regulation 25 of the schedule to the JSC Act 2011 on the grounds of the alleged bias and any necessary implication whether by proceeding to hear this matter the result is a nullity for violating Articles 2(4), 27(1), 47(1), 50(1) & (2) and 236 (b) of the Constitution."* For starters, Section 32 (supra) did not relate to removal of the Chief Registrar. It is Section 12 of the Judicial Service Act that does. In addition, the burden of proving bias reposed on the 1st respondent. That burden was not discharged. Bias not having been proved, the issue was dead in the water. As an employer, the appellant could not be disqualified from discharging its mandate on a mere allegation of bias. The Court fell into error by finding that bias and breach of the respondent's constitutional rights and been proved In the effect, the 1st respondent alleged violation of constitutional rights in relation to Articles 47(1) & (2); 50(1), 50(2) (a) & (b), 236(b), 35(1) (b) and 28 in the context of her removal from office. Allegations of violations of constitutional rights are viewed seriously by courts which are enjoined to enforce such rights. Indeed, courts of law are enjoined to vigorously enforce the fundamental rights and freedoms of the individual guaranteed by the Constitution which is the voice of the people of Kenya who gave it to themselves on 27th August 2010 with the intent that all sovereign power belonging to them shall be exercised by, *inter alia,* the judiciary and other State organs in accordance with the Constitution. The Constitution is the supreme law and it binds all persons and all State organs at County and National levels of government. There is no limitation in the enforcement of fundamental rights and freedoms. As a Superior Court of record, the Industrial Court is bound by the decisions of the Supreme Court by dint of Article 163(7) of the Constitution which provides that –

"All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court"

68. In view of this, the Industrial Court was bound by the Supreme Court decision in **Mumo Matemu V Trusted Society of Human Rights** the case of ANARITA KARIMI set the threshold to be met in a petition alleging constitutional violations and opined that it should define the dispute to be decided by the court and plead with particularity and reasonable precision on the provisions breached and the nature or manner of the breach alleged or complained of.

69. There was submission that the Industrial Court has no jurisdiction to deal with issues of Constitutional violations. But that argument does not hold good not least because the Industrial Court, though not entitled to handle Constitutional petitions that should otherwise go to the High Court Constitutional and Human Rights Division has power to determine constitutional issues arising in and intertwined with labour relations litigation before it. This question has been addressed by the High Court which has rightly held that constitutional issues arising in labour relations cases before the Industrial Court can be determined by the Industrial Court which has (under Article 162(2) of the Constitution) the status of the High Court notwithstanding that its powers under Article 162(2) of the Constitution relates to hearing and determining labour disputes. Section 12(1) (Part III) of the Industrial Court Act (Act No. 20 of 2011) defines the jurisdiction of the court as follows:

> (i)**12.** (1) The Court shall have exclusive original and appellate jurisdiction to hear and determine all disputes referred to it in accordance with Article 162(2) of the Constitution and the provisions of this Act or any other written law which extends jurisdiction to the Court relating to employment and labour relations including—

(ii)

(a) disputes relating to or arising out of employment between an employer and an employee;

(b) disputes between an employer and a trade union;

(c) disputes between an employers' organization and a trade unions organization;

(d) disputes between trade unions;

(e) disputes between employer organizations;

(f) disputes between an employers' organisation and a trade union; (g) disputes between a trade union and a member thereof;

(h) disputes between an employer's organisation or a federation and a member thereof;

(i) disputes concerning the registration and election of trade union officials; and

(j) disputes relating to the registration and enforcement of collective agreements.

70. The orders that the Industrial Court is empowered to make in exercise of its jurisdiction under Section 12(1) (supra) are spelt out in Section 12(3) of the Act. The Section States -

12 (3) In exercise of its jurisdiction under this Act, the Court shall have power to make any of the following orders—

(i) Interim preservation orders including injunctions in cases of urgency

(ii) a prohibitory order;

(iii) an order for specific performance;

(iv) a declaratory order;

(v) an award of compensation in any circumstances contemplated under this Act or any written law;

(vi) an award of damages in any circumstances contemplated under this Act or any written law;

(vii) an order for reinstatement of any employee within three years of dismissal, subject to such conditions as the Court thinks fit to impose under circumstances contemplated under any written law; or

(viii) any other appropriate relief as the Court may deem fit to grant.

71. In considering whether the Industrial Court has jurisdiction to determine issues of violations of fundamental rights under the Constitution, the High Court (Majaja, J) observed in the case of **United States International University (USIU) versus Attorney General [2012] eKLR** that labour and employment rights are part of the Bill of Rights as they are protected under Article 41 of the Constitution and proceeded to hold that –

"In my view to hold that the Industrial Court has no jurisdiction to hear and determine a petition seeking redress of violations of fundamental rights arising from employment relationship would defeat the intention and spirit of the constitution in establishing special courts to deal with the employment and labour disputes. Indeed, such a stance would not only be inimical to justice, but would expressly contravene Article 20 of the Constitution that provides that the Bill of Rights "applies to all law and binds all state organs and persons" and enjoins a court to promote the spirit, purport and objects of the Bill of Rights and adopt an interpretation that most favours the enforcement of a right or fundamental freedom."

72. Clearly, that is sound reasoning and the argument that the Industrial Court cannot determine issues of violations of constitutional rights interwoven with employment and labour relations does not hold good as it would be antithetical to the letter and spirit of the Constitution. The Industrial Court had jurisdiction to determine the 1st Respondent's petition alleging wrongful termination of her employment and whether the 1st Respondent's fundamental rights and freedoms were breached in the process of the termination of the latter's employment. The Court held that the 1st Respondent's constitutional rights were violated in relation to Articles 25(c); 47(1) & (2); 50(1); 50(2) (a), (b) & (c); 236(b)' 35(1) (b) and 28. The 1st respondent pleaded the violations in the petition and relied on affidavit evidence as proof of the alleged violations. Did the Articles referred to apply to her employment case and if so were they breached in relation to her?

73. The invocation of Article 50(2)(a)(b) & (c) of the Constitution was misplaced. In the context, it did not apply to the 1st Respondent who faced disciplinary proceedings and removal from office as Chief Registrar of the Judiciary A careful perusal of the Constitution shows that Article 50(2)(a),(b) &(c) applies to criminal trials and not to civil litigation or disciplinary proceedings. That this is so is clear from the plain reading of Article 50(2)(a) to (q). There can be no argument that on correct interpretation of the Article, it does not apply to disciplinary proceedings and the learned trial judge misdirected his mind in reaching the conclusion that it applied to the case before him. So too with regard to Article 25(c) relating to the constitutional right to fair

trial, the learned trial judge failed to appreciate that the disciplinary proceedings were not a trial and the issue of fairness in the proceedings was addressed by Principles of natural justice and Article 47 which enjoined the appellant in the disciplinary proceedings to ensure that the 1st Respondent's right to administrative action was observed. With regard to Articles 35(1)(b) which reads

> *35(1) Every citizen has the right of access to -*
>
> *(a) information held by the State; and*
>
> *(b) information held by another person and required for the exercise or protection of any right or fundamental freedom.*

proceedings and related documents" did not specify the particulars of the materials or the related documents." It was far too vague. It was bereft of particulars. The appellant and indeed any person in the shoes of the appellant could not tell what "material copies and related documents" the 1st respondent required. Applying the principle in ANARITA KARIMI'S case, the claim was bound to fail on the grounds that it lacked specificity.

75. With regard to Article 236(b) which states: *236: "A public officer shall not be*

> *(a) (not applicable)*
>
> *(b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of the law."*

The affidavit evidence by the respondent did not establish the violation alleged. The disciplinary action followed the law and in pursuance with Section 12 of the Judicial Service Act (No. 1 of 2011) the grounds for the 1st respondent's removal from office were given in writing as required by Section 12(2) of the Act and the 1st respondent was accorded a total of 39 days to respond to the allegations made against her. The 1st respondent gave long and detailed answers to the allegations. The requirements of Article 47 of the Constitution was adhered to and disciplinary proceedings cannot be said not to have been reasonable and procedurally fair, expeditious, efficient and lawful. The 1st respondent did not show the process fell short of the requirements of the law. That allegation too must fail.

76. As regards Article 28, the 1st respondent alleged that "the entire process violated the 1st respondent's right to inherent dignity." Again this allegation did not specify in what way or manner the dignity of the 1st respondent was violated by the disciplinary proceedings. The proceedings were lawful. They were initiated in accordance with the provisions of the law. That allegation too must fail. Yet the learned Judge took the view that there was violation even before he had interrogated the matter fully. He misdirected his mind and exhibited ostensible bias in purporting to decide whether the JSC (the appellant) ought to have reconstituted another *"disciplinary tribunal"* because, in his conclusion, the JSC was biased.

77. The House of lords in **Porter v Nagill [2002] All E R 465** held that in determining whether there had been apparent bias on the part of a tribunal, the court should no longer simply ask itself whether, having regard to all the relevant circumstances, there was a real danger of bias. Rather, the test was whether the relevant circumstances, as ascertained by the court, would lead a fair minded and informed observer to conclude that there was a real possibility that the tribunal had been biased. In that case, Lord Hope of Craighead stated –

> ***"I prefer to state the test in terms of real danger rather than real likelihood, to ensure that the court is thinking of possibility rather than probability of bias. Accordingly, having ascertained the relevant circumstances, the court should ask itself whether, having regard to those circumstances there was a real danger of bias on the part of the relevant member of the tribunal in question, in the sense that he might unfairly regard (or have unfairly regarded) with favour, or disfavor, the case of a party to the issue under consideration by him…."***

78. In the instant appeal, the alleged bias is pegged to "a trove of emails" which the 1st respondent has attributed to several of the members of the appellant body. But the genesis of the emails was not established and no evidence was adduced or presented to link any of the members of the appellant to the emails. As the basis for the alleged bias was the "trove of emails" and their origin and authenticity not having been established, the allegation must fail. I so find and hold.

79. The judgment of Lord Denning M.R. in **Selvarajan v Race Relkations Board [1976] 1 All ER 12 at pg 19 letters** (a) to (e) is relevant in relation to the issue of disciplinary process. The learned Judge opined that in cases of administrative action,

> ***"the investigative body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution of proceedings, or deprived of remedies or redress or in some such way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. <u>The investigating body is, however, the master of its own procedure. It</u>***

need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice it if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover, it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But in the end, the investigating body itself must come to its own decision and make its own report."(the underlining is mine).

80. To the extent to which the learned trial Judge of the Industrial Court dealt with and evaluated the evidence relating to the disciplinary proceedings against the 1st respondent on the basis that they were quasi-criminal and that criminal law principles and procedures applied, he was clearly wrong. The threshold adopted by the Industrial Court on the burden and standard of proof on the part of the appellant and the decision arrived at was erroneous. While the standard of proof in the disciplinary proceedings was not beyond the balance of probabilities, the test in quasi-criminal proceedings is much higher.

81. In conformity with Article 47 of the Constitution on fair administrative action and **Section 12(2)** of the Judicial Service Act, the appellant (before removing the 1st respondent from office) informed her in writing of the case against her and accorded her a total of 39 days to defend herself against any of the grounds cited for the intended removal. That period cannot be said not to be reasonable. In addition, the 1st respondent was accorded the right to be heard and not only did she respond prolifically to the allegations but also attended the disciplinary hearing. The appellant therefore conformed to the requirements of Article 47 of the Constitution and Section 12 of the Judicial Service Act and to the national values and principles of governance enshrined in Article 10 of the Constitution as well as to principles of natural justice.

82. The 1st respondent's contention that the appellant did not have jurisdiction to remove her from office as the Chief Registrar or that the 1st respondent was not answerable to the appellant had no support in law.

83. On the material on record in this appeal, this contention was glaringly incorrect in law and it smacks of impunity and disregard for accountability. Clearly, it went against Article 10 of the Constitution not least because it violated the national values and principles of governance especially integrity, transparence and accountability

84. On the only issue whether the disciplinary exercise was conducted fairly as required by law the learned trial Judge stated in paragraph 125 of the judgment, the learned Industrial Court Judge sated:

".....it is difficult to understand the shortcut taken by very imminent members of the legal profession in a situation where the mandatory procedure that should have been followed speaks so loudly from the express provisions of Section 32 and Regulation 25 of the Judicial Service Act (revised edition 2012)."

85. The learned trial Judge also stated at paragraph 50 of the judgment that:

".....the court accordingly finds that JSC (the appellant) had jurisdiction to institute disciplinary proceedings against the CRJ (the 1st respondent in terms of Article 172(1)(c) of the Constitution as read with Section 12(1) of the Judicial Service Act.

86. Clearly these are contradictory positions taken by the Judge in the same judgment. Needless to re-emphasize, Regulation 25 of Part IV of the Third Schedule of the Judicial Service Act and |Section 32 of the Act apply to discipline and removal of judicial staff and judicial officers other than Judges of the Superior Courts and the Chief Registrar of the Judiciary. The latter's removal from office is provided in Article 172(1)(c) of the Constitution and Section 12 of the Judicial Service Act while the former's removal is provided for in Article 168 of the Constitution.

87. It is quite clear the appellant had the jurisdiction to discipline the petitioner and to remove her from office as it did. The allegation that the appellant had violated Section 32 of the Judicial Service Act was raised by the learned Judge in his judgment as it had not been pleaded in the petition. In doing so, he ignored accepted principles in civil practice that the essence of pleading issues is to ensure that all the parties in a litigation are informed of the case against them to enable to prepare and defend the same, should they wish to do so. Counsel for the appellant drew the attention of the Court to the following authorities on the point which serve to buttress the proposition:

"Captain Harry Gandy v Caspair Air Charters Ltd. [1956] EACA 159; Nairobi City Council v Thabit Enterprises Ltd. [1995-98] EA 231;*and* ***BLAY V POLLARD & MORRIS [1930] 1 KB 682."***

88. The 1st respondent alleged in paragraph 12 of her petition violation of her constitutional rights alleged that the disciplinary process was not fair. The learned trial Judge held –

"At this stage, the Court agrees that the seriousness of the allegations made against the CRJ (the 1st respondent) effectively made the disciplinary

process a quasi-criminal affair. JSC assumed a responsibility equivalent to if not equal to a judicial process in every respect. The entire career of the Chief Administrator and Accounts Officer of the Judiciary hand in the balance."

89. I know of no law that supports the proposition that where in disciplinary proceedings the allegations against an employee are serious, that, *ipso facto*, coverts the proceedings which are essentially non-criminal into quasi- criminal proceedings.

90. It is patent from the petition initially filed in the constitutional and Human Rights Division of the High Court that the 1st respondent sought Judicial review order of certiorari to quash the dismissal letter and the proceedings thereof and orders of mandamus and prohibition to stop the appellant from dismissing her.

91. But it was glaringly that the relationship between the appellant and the 1st respondent was that of an employer and an employee and it thus imported the existence of power in the appellant as employer to demand information from the 1st respondent as the employee in discharge of the latter's duties and that relationship was characterized by a contract of employment and inherent in it was the principle that misbehavior inconsistent with the faithful discharge of the employee's duties was good cause for dismissal as was also breach of the prescribed code of conduct for judicial officers and disobedience of lawful and reasonable order as these were in tandem with the grounds stipulated in section 12(1) of the Judicial Service Act for removal of the Chief Registrar.

92. With great respect, and at the risk, unfortunately, of appearing uncharitable to the learned Judge, his judgment was somewhat convoluted, not least because it was difficult without great circumspection to discern the findings of the Court and the reasoning thereof as opposed to submissions of counsel and pleadings in the case.

93. The learned trial Judge was enjoined to be dispassionate and was required to be guided by the facts emerging from the evidence in the case and to apply correctly the law to such facts. He was bound to adhere, inter alia, to the national values and principles under Article 10 of the Constitution. It was not in the purview of his jurisdiction to engage in speculation or conjecture, much less to show partiality in the dispute. A Judge should never take sides or be guided by extraneous matters. A Judge is required to be guided by the evidence before him from which facts emerge to which he/she should properly apply the law. A Judge should not be intimidated or be influenced in his decision by the status, wealth, power or influence of a party and a weaker party does not have greater rights by dint of his/her station in life though the Court may be more sympathetic to such party. In a nutshell, litigants are equal in the eyes of the law and none has greater rights than the other. The Constitution enjoins every judicial officer to be fair and to serve justice to all without discrimination.

94. The learned Judge erred in that he:

(i) *applied criminal law principles to the civil dispute before him and arrived at the conclusion that as criminal law and procedure was not followed, the allegations on which the removal of the 1st respondent was predicated could not hold good and was null and void.*

(ii) found that the 87 allegations against the 1st respondent were not drafted in conformity with the requirements of criminal procedure code, Chapter 75 of the Laws of Kenya, and were therefore bad in law.

(iii) rejected the admission of the 33 allegations by the 1st respondent on the ground that the admission was not in tandem with the requirements of plea taking in criminal cases and therefore was not unequivocal and consequently was bad in law.

(iv) found that the disciplinary process against the 1st respondent was "judicial process in every respect" and that "the proceedings were quasi-criminal."

(v) found that the standards in criminal law were not met with regard to the time given to the 1st respondent to prepare for her defence in relation to the allegation which the Judge termed "serious" involving as they did, loss of 1.2 billion Kenya Shillings. He termed the allegations "charges" that were "vague, embarrassing, and replete with duplicity." He erred in finding that the 1st respondent's constitutional right to a fair hearing under Article 50 was violated.

(vi) after finding that the appellant had jurisdiction to discipline and remove the 1st respondent from office, also made a finding that the 1st respondent had made allegations against one of the Commissioners of the appellant which the concerned Commissioners had not responded to and that there was ostensible bias against the 1st respondent by the appellant which resulted in violation of the former's constitutional right .

(vii) found that the allegations made by the 1st respondent against some of the Commissioners in the Appellant (body) though denied, were serious and this, ipso facto, was a basis for reasonable apprehension notwithstanding that the Court had concluded, rightly in my view, that the veracity of the allegations against the named Commissioners was not established.

Nevertheless, the Court held the view and erred in so doing, that the appellant should not have heard the matter itself.

(viii) made a finding that standards under criminal law were not met with regard to the time given to the 1st respondent to prepare her defence to the allegations which led to her removal from office

(ix) held that the appellant should have delegated the disciplinary exercise to a Committee because, in his view, the relevant procedure for the disciplinary process was that set out in Regulation 25 and Section 32 of the Judicial Service Act (No.1 of 2011). It was his finding that "the role of the Commission (appellant) only kicks in after receipt of this (committee) report" which would be considered by the Appellant before making any decision.

(x) had regard to the emails relating to what was termed as the "war council" although their existence was denied by the appellant and they (emails) were not proved and did not relate to or form the basis of the allegations on which the 1st respondent was removed from office. In his own words, the learned trial Judge expressed the view that "it is not for the Court to act sleuth and determine the authenticity of the trove of emails. However, common sense demands, in a matter of this nature, with consequences so dire to the 1st respondent, the Court goes a little further into the matter than JSC thought the documents deserve. The Court will recall these observations shortly in the legal analysis of the issue at hand…"

95. The 1st respondent failed to prove the allegations in her petition and the learned trial Judge erred in his conclusions, findings and application of the law and his decision was clearly wrong. The petition was devoid of merit and the trial Judge was wrong in upholding it and in giving the orders as he did.

96. It is my finding that the appeal is meritorious. I allow it. The judgment of the Industrial Court dated 7th March 2014 is hereby set aside in its entirety and the 1st respondent's petition dated 31st October 2013 is hereby dismissed with costs. As costs follow the event, the costs of this appeal shall be borne by the 1st respondent. The appeal is disposed of as per the orders of my learned sister the Hon. Lady Justice Hannah Okwengu, JA.

Dated and delivered at Nairobi this 19th day of September, 2014.

G. B. M. KARIUKI

SC

……

JUDGE OF APPEAL

I certify that this is a true

Copy of the original.

DEPUTY REGISTRAR

JUDGMENT OF KIAGE J.A.

The background, pleadings, issues, procedural history and the submissions made by the parties to this matter have been succinctly captured in the judgment of my sister Hon. Okwengu J.A which I had the advantage of reading in draft. I will therefore make no attempt to rehash them herein. This appeal arises from the litigation relating to the acrimonious removal of Gladys Boss Shollei (the 1st Respondent) from the position of Chief Registrar of the Judiciary. That removal was by the Judicial Service Commission (the Appellant) and was the culmination of a very public and depressing controversy of epic proportions that called into serious question the goings-on in the Judiciary. That institution had just embarked on a transformative path, its tentative first steps aimed at raising it, aided by the spirit and letter of the new Constitution, from a past of prurient public mistrust into a new dawn of public confidence that it can be trusted to deliver justice, with integrity. What damage the war between these two parties, be it clean or dirty, has done to the institution and what deleterious effects it will continue to have, both in terms of morale and a renewed public mistrust manifesting in skepticism or downright cynicism, will be left to historians of a later day.

What is before us is an appeal by the 1st Respondent against a judgment of the Industrial Court of Kenya (Ndima Nderi J) by which he issued the following orders, in the appellant's perception erroneously, as captured at **Ground 14** of the **Memorandum of Appeal**;

"(i) That an order of certiorari to issue to quash the letter of removal by the appellant dated 18th October 2013

(i) ***That an order of certiorari to issue to quash disciplinary proceedings of 18th October 2013***

(ii) ***That the Appellant violated the 1st Respondent's rights under Articles 27 (1), 35 (1) (b), 47 (1) &***

(2), 50 (1) and (2) and 236 (b) of the Constitution

(iii) ***That the 1st Respondent is entitled to compensation for the unlawful and unfair loss of employment and for violation of her constitutional rights and that an enquiry into quantum be gone into***

(iv) ***That the 1st Respondent be paid the costs of the Petition."***

It is worth noting that even though the impugned decision was ultimately made by the Industrial Court following proceedings before it, the claim had initially been instituted as a Petition before the High Court's Constitutional and Human Rights Division for the enforcement of and redress for violation of the 1st Respondent's rights and freedoms as enshrined in the Constitution.

When counsel for the parties appeared before Majanja J of that Division, it was observed and agreed that the main issue raised in the Petition was an employer/ employee relationship falling under the jurisdiction of the Industrial Court. The matter was therefore ordered transferred to that court where it was heard and determined culminating in the orders I have already set out herein.

The appellant has taken the view, which I need to dispose of presently, that the transfer of the Petition from the High Court to the Industrial Court was for the limited purpose of the real issue in controversy, namely the employment dispute, being adjudicated upon by the latter court as the forum specialized in and invested with the jurisdictional wherewithal to determine that issue. It is the appellant's contention that the Industrial Court crossed the jurisdictional red line when it proceeded to adjudicate on the Petition as a whole and in particular to enquire onto allegations of violation of rights and freedoms found in the Constitution. The appellant's specific grievance is captured in paragraph 3 of its Memorandum of appeal as follows;

> ***"3. THAT the learned judge erred in law by exceeding his jurisdiction in purporting to determine questions as to whether the 1st Respondent's rights or fundamental freedoms had been denied, violated, infringed or threatened which jurisdiction is reserved for the High Court".***

In its submissions, the appellant has elucidated and expanded upon that theme by asserting that under **Article 23 (1)** of the **Constitution**, the High Court, and it alone, has jurisdiction, in accordance with **Article 165,** to hear and determine applications for redress of a denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights. The appellant is emphatic that the Constitution did not intend to extend the jurisdiction on interpretation of the Constitution to the courts created under **Article 161(2)** of the **Constitution**. Superior courts the latter may be, it contends, but they have no jurisdiction in matters of enforcement of the Constitution.

With great respect to the appellant, its assertions, though attractive, do not at all persuade me. I am far from convinced that the Constitution that the people of Kenya passed through a popular, participatory process, created an exclusive interpretation and enforcement jurisdiction in the High Court. It seems to me, rather, that the High Court holds a central and pre-eminent place in the scheme of things but other judicial authorities are not thereby barred from interpreting and enforcing the Constitution. The language of the Constitution is not an esoteric tongue known, spoken and expressed only by the High Court. Rather, the Constitution itself essentially breaks and tears down the middle wall of partition and invites all organs and all persons to the high table of constitutional discourse. The new Constitution is the handwork of all and its ethos is inclusivity not exclusivity. I would be loathe to accept for the briefest moment that the constitutional text, meanings and interpretations are the exclusive property and treasure of a single court, which, from the nature of the division of labour and convenience at the High Court, would translate to a single division manned by a few Judges, eminent though they may be.

In this I propound no constitutional heresy. My reading of the Constitution persuades me that its aim is to create a constitutional culture in Kenya. It declares its own supremacy **(Article 2)** and imposes an obligation on 'every person' to respect, uphold and defend it **(Article 3(1)).** Another of its defining features is a progressive Bill of Rights **(Chapter 4)** which it declares to be an integral part of Kenyas' democratic state and a framework for social, economic and cultural policies **(Article 19 (1))** with the recognition and protection of human rights a clear desideratum for the preservation of individual and community dignity as well as the promotion of social justice.

The application of the Bill of Rights is a duty that falls on all courts while the interpretation of the same falls on **"a court, tribunal or other authority"** which must promote the values that underline an open and democratic society based on human dignity, equality, equity and freedom as well as the spirit, purport and objects of the Bill of Rights **(Article 20)**. The Constitution does not limit or reserve this task to the High Court. It is telling that **Article 22** of the **Constitution** which deals with the enforcement of the Bill of Rights declares every person's right to institute court proceedings where a right or fundamental rights has been denied, violated, infringed or is threatened. The court at which such person, whether acting on his own behalf or on behalf of a person unable to act on his own behalf or of an association or in

the public interest is not specified to be the High Court. Nor is any court excluded from contemplation.

Article 23 of the **Constitution**, which is the bedrock of the appellant's exclusivity thesis, warrants full reproduction;

> "(1) ***The High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.***
>
> (2) ***Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.***
>
> (3) ***In any proceedings brought under Article 22, a court may grant appropriate relief, including—***
>
> ***(a) a declaration of rights;***
>
> ***(b) an injunction;***
>
> ***(c) a conservatory order;***
>
> ***(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;***
>
> ***(e) an order for compensation; and***
>
> ***(f) an order of judicial review."***

The provision of **Section 165** that is cross-referenced above is **sub-rule 3** which lists and states the various jurisdictions of the High Court as including;

> ***"(c) Jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened."***

There is nothing in **Article 165** that is exclusive in character. That Article only lists the various aspects of the High Courts' jurisdiction. It does not by investing the High Court with a Bill of Rights enforcement jurisdiction thereby bar other courts from dealing with the subject any more than the declaration of its unlimited original jurisdiction in criminal and civil matters would bar other courts from dealing with criminal and civil matters. It does not and cannot, without doing violence to language, logic and reality.

There is, in fact, a tacit recognition that superior courts do have an original jurisdiction in appropriate cases, as I shall shortly demonstrate, to deal with questions of alleged denial, violation, infringement or threat to the corpus of the Bill of Rights. The Constitution goes further and commands Parliament to further disperse this judicial function to subordinate courts;

> ***"2. Parliament shall enact legislation to give original jurisdiction in appropriate cases to subordinate courts to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights."***

It is clear from the foregoing that far from limiting this Bill of Rights- enforcement jurisdiction to the High Court or to superior courts, the Constitution expects that such jurisdiction be found in subordinate courts as well. It matters not that the jurisdiction-donating legislation is yet to be enacted. It is enough for the point to be made that the Constitution does not commit its application and enforcement to a narrow and rarefied forum. It would therefore be a misdirection for argument to be made that the superior courts contemplated by **Article 162** must consider the Constitution and its application and interpretation, even when touching on matters fundamentally within the special competence of those courts, as anathema. The law, as I understand it, is that whereas those courts may not embark on a generalized handling of Bill of Rights disputes, they would definitely be entitled and are jurisdictionally empowered to address such constitutional issues as arise directly and in relation to the matters within their jurisdictional competence and specialization.

We had occasion to recently pronounce ourselves on this precise point in **PROF. DANIEL N. MUGENDI –VS- KENYATTA UNIVERSITY & OTHERS CIVIL APPEAL NO. 6 OF 2012,[2013] e KLR**. There, as here, questions had been raised whether the Industrial Court had jurisdiction to address questions of violation of constitutional rights and we held that it did, when such violations are raised as matters incidental and connected to the employer-employee dispute that is properly to be resolved before that court. In doing so we approved the decision of Majanja J. on the same point in **UNITED STATES INTERNATIONAL UNIVERSITY (USIU) -VS- THE ATTORNEY GENERAL & OTHERS H.C. PETITION NO. 170 OF 2012, [2012]eKLR.**

I am firmly of the view that this remains the correct position, for it is not uncommon for allegations of violation of constitutional rights to be made out within the context of and related to the employment relationship. It would be absurd and quite inimical to the self-evident duty of efficient, timely and cost-effective delivery of justice were a complaining party to be required to deal with the contractual aspect proper before the Industrial Court and then file separate proceedings at the High Court with regard to the violation of rights.

I therefore hold that the Industrial Court did have jurisdiction and this particular point of grievance by the appellant, itself a complete reversal of its position in the court below where it either consented to or at any rate did not protest the transfer of the petition from the High Court to the Industrial Court, must fail.

The gravamen of this appeal as I see it concerns the learned Judge's consideration and application of the law relating to the mandate of the appellant in the matter of the removal or discipline of the Chief Registrar of the Judiciary. The criticism of the learned Judge's handling of this issue is variously expressed in **Grounds 1, 2, 5, 9** and **15** of the Memorandum of Appeal where the appellant complains that the learned judge misapprehended the applicable law on the subject with the result that he arrived at an erroneous decision.

The centrality of this issue was fully appreciated by the learned Judge himself who captured it in three of the issues he delineated for determination thus;

> **"(1) Did the Judicial Service Commission have jurisdiction to discipline the Petitioner?**
>
> **(2) If the answer to 1 is correct, was the Petitioner given a fair and impartial hearing?**
>
> **(3) Was the Petitioner removed for a valid reason and in terms of a fair procedure"**

On jurisdiction, the learned Judge upheld the submissions made by the appellant and the 2nd respondent who had appeared as *Amicus Curiae,* that the appellant did have jurisdiction to discipline the Chief Registrar of the Judiciary, for to hold otherwise would be absurd. Such jurisdiction, the learned Judge held, flowed from **Article 172 (1) (c)** of the **Constitution** as read with **Section 12(1)** of the **Judicial Service Act**.

Having found that the appellant was seized of jurisdiction to discipline the 1st respondent, the learned judge proceeded to make certain critical and definitive findings as to the process that should be followed. The first was that the appellant was guilty of a fatal deviation from the statutory procedure that it was obligated to observe. Said the Judge:-

> ***"The deviation from the mandatory procedure set under Regulation 25, by Judicial Service Commission is so gross in material terms that it is an understatement to say that the disciplinary hearing was a complete none starter.***
>
> ***Section 32 and Regulation 25 under which the disciplining committee or panel is established is (sic) couched in such mandatory terms that there is no room for deviation."***

He also listed in his judgment what he referred to as the appellant's major failings with regard to its 'mandatory obligations under **Regulation 25 (3)'** as follows;

> (i) ***"It was mandatory for the Judicial Service Commission to appoint a disciplinary committee of at least 3 persons from its ranks.***
>
> (ii) ***It only required at least 3 members to hear the disciplinary case and therefore it was unreasonable to insist on the sitting of members against whom objections had been made. The enthusiasm for the entire Commission to hear the matter is confounding.***
>
> (iii) ***The Chief Justice, is prohibited in mandatory term to sit (sic) in a disciplinary panel. The court fails to understand why the Chief Justice insisted on chairing the panel even after allegations of bias had been made against him and was specifically requested to consider recusing himself."***

It is clear from the phraseology employed by the learned Judge that he took an extremely dim view of the manner in which the appellant dealt with the disciplinary process that led to the removal of the first respondent. The learned Judge considered the entire process as fatally flawed and contrary to law. He saw this as symptomatic of an enthusiastic and insistent, overzealous even, attempt by the Appellant and its chairman, in the person of the Hon. the Chief Justice, to hear the matter and deal with the 1st Respondent in a partial manner even if it meant breaching the law in the process. With respect to the learned Judge, he appears to have floundered in the same marshy bog of erroneous zeal with which he charged the appellant and this is why: the learned Judge collapsed and conflated two separate and distinct disciplinary processes and mistakenly used the statutory markers of one to test the other with the inescapable consequence of erroneous conclusions.

I have no doubt in my mind that whereas the office of Chief Registrar of the Judiciary is established by **Section 161 (2) (c)** of the Constitution as the Chief Administrator and Accounting Officer of the Judiciary, that office is subject to the Judicial Service Commission. The Chief Registrar of the Judiciary is the first among registrars, which offices may be established by the Judicial Service Commission under **Article 161 (3)** of the Constitution as may be necessary. The office of Chief Registrar of the Judiciary is established by the Constitution, but the holder, *qua* administrative chief of the Judiciary, is neither a judge nor a judicial officer. The holder is a member, foremost though he or she be, of the judicial staff complement of the Judiciary. The office is not a tenured one under the Constitution and the mode

and process of removal of its holder is not governed by the Constitution save as to the need for the application of the appropriate constitutional principles and safeguards that apply to other public officers or employees generally. I consider this understanding to be key to a proper appreciation of the nature, status, role and accountability paths of the office of the Chief Registrar of the Judiciary, the bottom line of which is that the office is accountable to the Judicial Service Commission. It is an office perched atop a bureaucracy whose *raison d'etre* is to facilitate the judicial function of the Judiciary. The bureaucracy is not an end in itself and owes its existence only to the necessity for oiling of the machinery by which judicial officers are to render timely and efficient justice to the people who are the fountain head from which judicial authority is derived (See **Article 159 (1)** of the **Constitution**).

Article 172 of the Constitution lists the functions of the Judicial Service Commission. These include to:-

"appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament."

The Act of Parliament that deals with these matters is of course the **Judicial Service Act, No.1** of **2011**. At **Section 9** it makes provision for the qualifications that a person must have in order to qualify to hold the office of Chief Registrar of the Judiciary. It also sets out the functions and powers of the Chief Registrar of the Judiciary at **Section**

8. The Chief Registrar of the Judiciary is also constituted Secretary of the Judicial Service Commission and his or her functions as such are set out in **Section 21** of the **Act**. On the specific question of suspension or removal of the Chief Registrar of the Judiciary, **Section 12** of the **Act** provides as follows:-

"12. (1) The Chief Registrar may at any time, and in such manner as may be prescribed under this Act, be suspended or removed from office by the Commission for:-

(a) ***Inability to perform the functions of the office, whether arising from infirmity of body or mind;***

(b) ***Misbehaviour;***

(c) ***Incompetence;***

(d) ***Violation of the prescribed code of conduct for judicial officers;***

(e) ***Bankruptcy;***

(f) ***Violation of the provisions of Chapter Six of he Constitution; or***

(g) ***Any other sufficient cause."***

Of significance, as far as this appeal is concerned, is the fact that the **Act** ordains that it is ***the Commission*** that is to take action. It further stipulates six specific grounds upon which the Chief Registrar of the Judiciary may be suspended or removed from office. The grounds are however not exhaustive for the seventh ground **"any other sufficient cause"** opens wide the reasons for removal or suspension rendering the list inclusionary, as opposed to exclusionary. It is also noteworthy that this section, though not heavy on procedural detail, does nonetheless constitute a design and structure that meets the due process requirements for fair administration action. The possible grounds for removal are known in advance. A Chief Registrar of the Judiciary must be informed of the case against him or her in writing. Reasonable time shall be given for the Chief Registrar of the Judiciary to defend himself or herself against the grounds cited.

The question that must however be decided in this appeal is whether the Judicial Service Commission can, properly and without violation of the law, proceed with the process of a Chief Registrar of Judiciary's removal under **Section 12** without reference to and compliance with the detailed procedure set out in **Part IV** of the **Third Schedule** to the **Act**, with specific reference to **paragraph 25** of the said **Schedule.** I answer in the affirmative.

I have spent long hours anxiously going through the Act and the Third Schedule thereto. It has not been a particularly enjoyable undertaking as I find that there are all manner of typographical errors, errors of cross-referencing and a general inelegance about the legislation manifesting in ponderous and disharmonious gender mix- ups and other grammatical and syntactical annoyances. All that notwithstanding, it is quite plain to me that the disciplinary process set out in **Part IV** of the **Third Schedule** relates to judicial officers and staff of the judiciary other than the Chief Registrar of the Judiciary. This conclusion in inevitable for a number of reasons of which I will cite but a few.

First, the Legislature in its wisdom made two distinct and separate references to the process of discipline and removal by which it made clear that the removal of the Chief Registrar of the Judiciary stands alone and apart from that of other officers and staff of the Judiciary. The Chief Registrar of the Judiciary is dealt with under the already quoted **Section 12** ***(suspension or removal of the Chief Registrar)*** while that of all the other staff is under **Section 32** ***(appointment, discipline and removal of judicial officers and staff).***

Under **Section 12** which deals with the removal or suspension of Chief Registrar of the Judiciary the statute is very specific that action shall be

taken by ***the Commission***, meaning the entire Judicial Service Commission. In contrast, **Section 32 (1)** provides that:-

"For the purpose of appointment, discipline and removal of judicial officers and staff, the Commission shall constitute a committee or panel which shall be gender representative".

(my emphasis)

Given these express provisions of the statute, I am of the firm persuasion that it was never open to the Judicial Service Commission to substitute one process for the other and the learned Judge's criticism of the appellant for having sat as a full Commission in dealing with the 1st respondent's removal was a patent misdirection. It is also noteworthy that the statutory foundation for the detailed provision for the discipline and removal of judicial officers and staff as contained in the **Third Schedule** is expressly stated to be **Section 32**. There is no mention of **Section 12** as part of that underpinning for the process under the Schedule. And there is no corresponding set of rules or regulations created under **Section 12** of the **Act** which means, to my mind, that Parliament considered the section sufficient without further elaboration or expansion. And so it is.

A careful analysis of **paragraph 25** of the **Third Schedule,** which deals specifically with the proceedings for dismissal of judicial officers and staff, shows that disciplinary proceedings are initiated by the Chief Justice who frames a charge or charges which he forwards with a brief statement thereon to the concerned officer, who is invited to respond to the charges. If the officer does not exculpate himself, the Chief Justice lays the matter with all the relevant material before the Judicial Service Commission, which then decides whether disciplinary proceedings should continue. If it decides that the proceedings should continue, the Judicial Service Commission appoints a committee or panel to investigate the matter. That committee or panel exercises delegated powers on behalf of the Judicial Service Commission and must not include the Chief Justice. It conducts a hearing with the assistance of legal counsel from the office of the Director of Public Prosecutions, if need be, and the accused officer is entitled, as of right, to be represented by an advocate. At the end of the hearing the Committee or Panel reports to the Judicial Service Commission indicating its clear opinion on whether the charge or charges have been proved and whether there are any matters aggravating or alleviating the gravity of the case. This report is then considered by the full Judicial Service Commission whose role is limited to deciding on the punishment, if any, to be inflicted on the officer or whether he should be required to retire in the public interest.

It seems clear to me that a disciplinary process under the control of a committee or panel, being a part only of the Judicial Service Commission, with the full Judicial Service Commission's role being that of determining punishment only, is appropriate for other judicial officers and staff of the Judiciary as the Third Schedule decrees. It is not, and cannot be appropriate for proceedings that may lead to the suspension or removal of the Chief Registrar of the Judiciary. The status and importance of the office of the Chief Registrar of the Judiciary, in the thinking of Parliament, and correctly so in my view, must require the participation of the entire Judicial Service Commission at all stages and not merely at the tail and limited end of inflicting punishment. At any rate, the punishment contemplated under the **3rd Schedule** at **paragraph 19** is clearly different and inappropriate for the Chief Registrar of the Judiciary for whom only removal or suspension are open for imposition by the full Judicial Service Commission once the stipulated grounds are established.

Given due consideration after a holistic and exhaustive perusal and analysis of the provisions of the **Act**, the Judicial Service Commission's approach to the 1st respondent's case was statutorily sufficient. The learned Judge's importation and attempted superimposition of the **Section 32** and **3rd Schedule** process into the determination of the matter before him was an error of law that calls for reversal. All of the criticism directed at the Judicial Service Commission proceeded from that misapprehension by the learned Judge of the statutorily-ordained procedure for removing or suspending the Chief Registrar of the Judiciary. It starts and ends with **Section 12** of the **Act**. If the Judicial Service Commission is to be faulted, it would be, in my opinion, not for non compliance with **Section 12,** which it substantially did, but rather for attempting, in a misapprehension of its obligation under the **Act**, to comply with the **Third Schedule**. The result of such a gratuitous attempt is to create a hybrid process unintended and unlegislated by Parliament that succeeds only in inviting the kind of criticism that the learned Judge leveled against the Judicial Service Commission.

Having found that the learned Judge fell into error in equating the removal procedure for the Chief Registrar of the Judiciary to that other officers and staff of the Judiciary and eventually subordinating **Section 12** of the **Act** to **paragraph 25** of the **Third Schedule**, I turn to a troubling feature of the learned Judge's judgment; namely his having equated the disciplinary and removal proceedings against the 1st respondent to a criminal trial. Proceeding on that assumption, the learned Judge proceeded to test the several steps and elements of that process against the provisions of the **Criminal Procedure Code Cap 275,** with the inevitable consequence that he found the process to have been

woefully inadequate and inconsistent with the provisions of that **Code**.

Predictably, that handling of the case by the learned Judge is the subject of the potent complaint by the appellant as captured in **Ground 8** of the **Memorandum of appeal**;

> ***"THAT the learned Judge erred in law by misapplying criminal law and procedure in an employment petition and failing to apply the relevant law".***

I have no hesitation in finding that this ground of appeal has full merit. The dispute between the 1st respondent and the appellant was, shorn of all niceties, an employment dispute. The learned Judge came to be seized of the matter precisely because it was an employment dispute. It is therefore quite remarkable how the learned judge dealt with the matter before him and treated it as if he was exercising some appellate, review or revisionary jurisdiction in testing procedural compliance with the **Criminal Procedure Code,** a statute entirely alien to the handling of employment disputes between employees and their employers.

It is also apparent that the learned Judge proceeded from the understanding, erroneous in my view, that a fair and impartial hearing in the context of an employment disciplinary hearing must accord with or mirror the hearing of a criminal case. I do not see that such a view is supported by the law. I am unable to find constitutional, statutory or other legal backing for the learned Judge's approach as expressed in the following portion of his judgment;

> ***"At this stage the court agrees that the seriousness of the allegations made against the Chief Registrar of the Judiciary effectively made the disciplinary process a quasi-criminal affair. The Judicial Service Commission assumed responsibility equivalent to, if not equal to, a judicial process in every respect. The entire career of the Chief Administrator and Accounts Office (Sic) of the Judiciary hang on the balance."***

With the greatest respect to the learned Judge, no employer, not even the Judicial Service Commission, assumes the responsibility equivalent to, less still equal to, a judicial process when it conducts a disciplinary hearing. In the case of the Judicial Service Commission, its constitutive and governing statute does not impose such an obligation and the learned Judge was clearly in error in assuming that the 1st appellant was on trial on criminal charges. Well may it be that the long catalogue of alleged misconduct by the 1st appellant may straddle both the disciplinary and criminal realms, but in deciding to remove a Chief Registrar of the Judiciary under **Section 12** of the **Act**, the Judicial Service Commission does not, and can never purport to make a definitive finding of guilt in the sense reserved for a criminal court at the conclusion of a criminal trial. It is rather puzzling that the learned Judge equated the two distinctly separate and decidedly different processes.

Indeed, even a cursory look at certain provisions of **Part IV** of the **Third Schedule** to the **Act,** which deals with discipline, would show beyond disputation that the Act conceives of disciplinary and criminal proceedings as totally different. Indeed, paragraph 18, side – noted ***"where criminal proceedings are pending",*** which I set out for purposes only of dispelling the notion that disciplinary proceedings before the Judicial Service Commission are criminal or quasi criminal, and without detracting from my earlier finding that the Schedule does not apply to **Section 12** proceedings in respect of a Chief Registrar of Judiciary, provides as follows;

> "***18. (1) when a preliminary investigation or disciplinary inquiry discloses that a criminal offence may have been committed by an officer the Chief Justice shall act under either paragraph 27, as may be appropriate.***
>
> ***(3) An officer acquitted of a criminal charge shall not be dismissed or otherwise punished on any charge upon which he has been acquitted, but nothing in this paragraph shall prevent their being dismissed or otherwise punished on any other charge arising out of their conduct in the matter, unless the charge raises substantially the same issues as those on which they have been acquitted."***

It follows from what I have stated so far that the learned Judge was clearly wrong in ***"seek[ing] guidance from the provisions of the Criminal Procedure Code, Cap75 of the Laws of Kenya with regard to the framing of charges under Section 37(Sic)".*** The Judge set out the provision of **Section 137** of the **Criminal Procedure Code** on the framing of charges and informations in criminal trials before going into a detailed exposition of the rules and rationale for drafting charges then adopting them thus;

> ***"These high standards are usually required in criminal proceedings but glaring deviations from the accepted form must be avoided in quasi-criminal proceedings especially before statutory tribunals with powers to mete out punitive measures, with far reaching consequences to those who appear before them."***

The learned Judge here made a sweeping statement of a general character quite unsupported by any law. He cited no authority for such a re-writing of the law and

I would find it to be a misdirection. If anything, what authorities there are posit the contrary position. The decision of the British Columbia Court of Appeal in **LANDRY –VS- LEGAL SERVICES SOCIETY [1986] CanLII (1165) (BC CA)**, for instance, provides an excellent exposition of the distinction between criminal and disciplinary proceedings.

The learned Judge proceeded on that erroneous path in passing judgment on the propriety or otherwise of the allegations leveled against the 1st respondent in *inter alia*, the following manner;

> ***"With specific reference to the allegation of failure to exercise prudence in expenditure of public finds resulting into the loss of approximately 1,200,000,000 (One billion two hundred million);***
>
> (a) ***The charge is split into very many counts which, if properly consolidated and framed would have resulted in very few counts. Some*** *other counts* ***would have been the subject of separate charges;***
>
> (b) ***Many of the counts do not start with a statement of offence followed by particulars and therefore do not in law disclose any offence capable of being pleaded to;***
>
> (c) ***The most serious failure discernible on the face of the lengthy charge sheet is that in numerous counts different allegations constituting or capable of constituting different offences are made resulting in debilitating duplicity."***

It is obvious from the foregoing that the learned Judge wholly misapprehended the case before him. He treated the removal proceedings as if they were full-fledged judicial proceedings, of a criminal kind. He dealt with the matter as would a judge sitting in the Criminal Division of the High Court scrutinizing the record of proceeding of a subordinate court to determine their legality, propriety or correctness. This approach cannot be described as anything but an aberration and a totally unwarranted foray into an area that had no place in the employment dispute that was before the learned Judge.

Those reversible errors are only compounded by the learned Judge's reliance on the judgment of Trevelyan and Todd JJ in **DANDE – VS-REPUBLIC[1977] KLR 71**, in which the learned Judges, sitting on a criminal appeal had cited the old case of **CHERERE S/o GAKUHI – VS-R[1955] EACA 478** on defective charges as a basis for purporting to find that ***"Counts 1, 2, 3, 4, 5, 7, 9, 11, 12 under charge 'A' (relating to the KShs. 1.2 billion … are therefore incurably bad."***

The learned Judge then took the matter to the realm of the surreal, in my view, when he purported to state that **"count 10 titled irregular earning of sitting allowances does not disclose any offence"** because the work **"paid"** was omitted in the sentence **"you irregularly caused yourself to be sitting allowances"**.

The Judge found that;

> ***"However the omission above with regard to a count is incurable once the proceedings have been concluded. The effect of omitting the word 'paid' is fatal to the count in my view. It is not a formal error but it goes to the substance of the charge and the same is therefore bad in law."***

The learned Judge's judgment is replete with many such misdirections and errors of law in subjecting the **Section 12** proceedings to the law of drafting criminal charges. He purports to hold various **"counts"** as being bad for duplicity and failure to disclose the provisions of the law or regulations contravened by the 1st Respondent and appears wholly oblivious of the flagrant irony of quoting the **DANDE** case in stating that it was difficult for the 1st respondents to "know exactly with what she is charged, and if she is convicted she does not exactly know of what she has been convicted".

The irony is obvious in that the language of 'charges' and 'convictions' is language that is indicative and reserved to criminal proceedings and has no place in proceedings under **Section 12** of the **Judicial Service Act**.

That same paradox of the learned Judge's absolute misapprehension of the character of the matter before him relates to his dealing with the allegation that the 1st Respondent irregularly paid some KShs.177,955,376.95 in advance on account of some partitioning works. Here the learned Judge stated, again dealing with the matter as a purely criminal proceeding;

> ***"Count 23 therefore is not only bad for duplicity but is an example if serious splitting of charges by the Respondent against the Petitioner making it almost impossible for the Petitioner to defend herself. Splitting the charges is a serious infraction in criminal justice system and I dare say in quasi-criminal proceedings the subject of this suit…"***
>
> (my emphasis)

If I have taken long on this aspect of this appeal, it is because it is constitutes a most striking and rare departure from a court's proper mandate and involves a wholesale importation of a totally different regime of law with rather strange consequences. The learned Judge went into a remarkably detailed analysis of the matters that were before the Judicial Service Commission in a manner that leaves the unmistakable impression, that he was on a mission to exonerate the 1st

respondent without the benefit of a proper enquiry into grave allegations by the proper investigative agencies. Even where the Judicial Service

Commission considered that the 1st respondent had admitted to some of the allegations made against her, the learned Judge, again using the specialized and unique jurisprudence of the criminal bench, went well out of his way to reverse those findings. It was a case of the Judge substituting the Judicial Service Commission's findings with his own and most improperly so. In doing so, he quoted the criminal case of **LUSITI –VS- REPUBLIC [1977] KLR 143;**

> ***"On a plea of guilty being recorded by the Court, notwithstanding the proviso to Section 207 (2) of the Criminal Procedure Code, it should ensure that the defendant wished to admit without any qualification each and every essential ingredient of the charge especially if he is not asked to admit or deny the facts outlined by the prosecution".***

The phraseology and nomenclature employed by the two judges and the context of that case all show that it was wholly inapplicable to the matter before the learned Judge and it was a gross misdirection for him to use that criminal law analysis in an employment dispute. His quoting our predecessor Court's decision in **ADAN – VS- REPUBLIC [1973] EA 445**, the *locus classicus* on the procedure for taking of an efficacious plea of guilty in a criminal trial, only goes to show how wrong the learned Judge was in dealing with the case before him. His conclusion that in the present case it is obvious on the face of the responses by the Petitioner she did not intend to admit any of the offences against her and his characterization of the Judicial Service Commission's finding that 33 of the allegations, (which the Judge christens offences) were admitted as **"preposterous and therefore untenable"** is as mind- boggling as it is unfortunate.

There is absolutely no requirement and no contemplation that the provisions of the **Criminal Procedure Code** with regard to the drafting or framing of charges should apply. For the avoidance of doubt I do not for a moment understand the fact that the Judicial Service Commission may request the Director of Public Prosecutions to direct a legally qualified officer to present to the Committee or Panel the case against the officer concerned under paragraph **25 (b)** of the **Third Schedule** to the **Judicial Service Act** converts the proceedings into a criminal trial. Nor does it require that the said counsel should draft the charges. The framing of charges, a wholly non-criminal undertaking, is to be done by the Chief Justice under the express provisions of **paragraph 25 (1)** and (**8)** of the **Third Schedule**. At any rate, this relates to the discipline of other officers and staff under **Section 32** of the **Judicial Service Act** and not to the Chief Registrar of Judiciary.

What I have held so far should suffice to dispose of various others of the appellant's grounds of appeal including:-

> *"**6. THAT the learned Judge seriously erred in law by going on a frolic of his own and citing legal provisions in the Judicial Service Act on behalf of and in aid of the 1st Respondent when the same had not been pleaded or in any manner referred to in the Petition or in the 1st Respondent's supporting affidavit.***
>
> ***7. THAT the learned Judge seriously erred in law by descending into the arena of conflict and assuming the role of defending and answering the allegations leveled against the 1st Respondent in the course of judgment, thus violating all known rules of judicial conduct."***

The applicable law and procedure for the removal of the Chief Registrar of the Judiciary aside, the appellant has taken exception to the manner in which the learned Judge dealt with the action it took against the 1st respondent. The appellant in **Ground 13** of its Memorandum of appeal complains thus;

> ***"13. THAT the learned Judge failed to appreciate that the nature of the dispute before him was that of an employer and employee and largely requiring the judge to consider the circumstances in which the termination or removal from office took place, including the extent to which the employee caused or contributed to the termination."***

In support of this ground and others to like effect, the appellant in its written submissions as well as in the address by its learned Senior Counsel Mr. Muite, laid great emphasis on the fact the 1st Respondent had by her conduct rendered her further holding of the position of Chief Registrar of the Judiciary both untenable and impossible. The appellant contended that by declaring herself not answerable and not accountable to the appellant in her response to allegations of mismanagement, the 1st Respondent had betrayed a fundamental dereliction of duty and a gross act of insubordination that on its own, without any other ground, justified her removal as Chief Registrar of the Judiciary.

In making this submission, the appellant pointed to the 1st Respondent's Petition itself where she pleaded at **paragraph 13** that in taking disciplinary action against her, the appellant **"exercised powers it did not have"** because in essence, her accountability was to other bodies and organs and not the appellant, namely:-

(i) ***as accounting officer the Chief Registrar of the Judiciary is accountable to the National Assembly***

(ii) ***the Judiciary's accounts are subject to audit by the Auditor – General***

(iii) ***further oversight of the Judiciary is by the National Treasury***

(iv) ***in procurement the Judiciary is subject to oversight by the Public Procurement Authority***

(v) ***the mandate to investigate corruption allegations falls on the Ethics and Anti-Corruption Commission.***

The Petition cited the various constitutional and statutory provisions underpinning the 1st Respondent's position as to where the Chief Registrar of the Judiciary's accountability lay while the supporting affidavit at **paragraph 9 (v)** and **(iv)** had the 1st Respondent repeating that the appellant was devoid of powers to institute any disciplinary proceedings against her as the only power it was possessed of was **"only referral"**, presumably to those other agencies and organs, ***"and never suo moto as it did".***

It was Mr. Muite's submission that the attitude displayed by the 1st Respondent was the root and cause of the problems between the parties because she somehow regarded herself as the head of the Judiciary and in no way answerable to the appellant, which he, rather graciously or perhaps tongue in cheek, ascribed to a possible genuine misunderstanding of the Constitution and the law. Whatever the basis for her belief, however, the record shows that the appellant did consider some aspect of the conduct of the 1st Respondent as amounting to insubordination. Indeed, paragraph 23 of the allegation against her was titled **"INSUBORDINATION AND COUNTERMANDING DECISIONS OF THE COMMISSION "**and detailed at some length some NINE specific instances of the same. In the end, insubordination was one of the Grounds upon which the decision to remove the 1st Respondent was based, as communicated by the letter of 18th October 2013 from the Chief Justice. Mr. Muite urged us to treat as gross insubordination the 1st Respondent's press–conference on 19th August, 2013, given moments after the Chief Justice and other members of the appellant announced the disciplinary action commenced against her, in which she termed the said action as "irresponsible". This particular allegation is listed under **misbehavior** on the appellant's case against the 1st Respondent.

The idea that an employee, no matter how good at one's work and no matter how important and critical one's office, can declare oneself unaccountable and unanswerable to her employer appears to me so contrary to reason, good sense and the practical realities of life as to be a fantastic oxymoron. It is in the nature of life that no one is indispensable and no one is immutably immune from a vertical accountability to one's employer. Anything else would seem to stand reason on its head and to create a halo of invincibility about an individual that cannot possibly be productive of a healthy working relationship.

Nowhere in my reading of the **Constitution**, and the **Judicial Service Act** do I see even a whispered hint that the Chief Registrar of the Judiciary is a special kind of public officer hoisted upon the Judiciary, of and from whom no accountability is to be expected. Such impunity cannot be arrived at by some process of reasoning and by mere declaration or attempted exercise of it by the person who claims it. Nothing short of an express declaration of it, largely and conspicuously writ in the law, would convince me of its existence. No such provision exists.

To the contrary, our entire constitutional make up proceeds from certain clear principles and values that must inform the holding and exercise of public office and from which the office of Chief Registrar of the Judiciary is not exempt. The *national values and principles of governance*, which are binding on all State Officers and Public officers, in **Article 10 (2)** of the Constitution include good governance, integrity, transparency and accountability. These are echoed in **Chapter Six** which deals with "Leadership and Integrity" under which the authority assigned to a State Officer is a public trust to be exercised in a manner that, *inter alia*, promotes public confidence in the integrity of the office and also constitutes a responsibility to serve the people rather than to rule them **Article 73 (1).** The guiding principles of leadership and integrity include accountability to the public for decisions and actions as well as discipline and commitment in service to the people.

Viewed with these values and principles in mind, it is clear to me that it sounds ill for it to fall from the mouth of any public officer that he or she is not answerable to his employer. That cannot be an emanation or a demonstration of accountability or discipline or selfless service. At any rate, the fact that under **Article 172 (1) (c),** the Judicial Service Commission has power to receive complaints against, investigate and remove Registrars, Magistrates and other Judicial Officers should of itself dispel any notion that the Chief Registrar of the Judiciary is not accountable to the Judicial Service Commission.

That the Chief Registrar of the Judiciary may be accountable to all those other agencies and bodies in certain specific respects is additional to and not exclusive of that office's accountability to the Judicial

Service Commission as the body charged with the promotion of the independence and accountability of the Judiciary. **Section 21** of the **Judicial Service Act** in fact expressly makes provision for the functions of the Chief Registrar of the Judiciary as its secretary and these include:-

> (b) the enforcement of decisions of the Commission….
>
> (e) undertaking any duties assigned by the Commission. In addition, the Chief Registrar of the Judiciary under **Section 8(1)** of that Act has various functions spelt out and they include:-
>
> (a) giving effect to the directions of the Chief Justice and
>
> (m) perform such other duties as may be assigned by the Chief Justice from time to time.

It seems to me clear quite beyond peradventure that not only is the Chief Registrar of the Judiciary's accountability to the Chief Justice and the Judicial Service Commission a matter of statutory and constitutional requirement, but such accountability and responsibility is in no way lessened or diluted by any other responsibility to account and answer to other organs, offices or institutions as may be by law required. Being of that mind, I would consider a denial, defiance, violation or repudiation of such accountability and answerability to the Judicial Service Commission on the part of the Chief Registrar of the Judiciary to be an insufferable act of insubordination inviting appropriate disciplinary measures.

The modern law on the meaning and consequence of insubordination has ancient antecedents and has always had at its heart willful disobedience. In **LAWS –VS- LONDON CHRONICLE LTD [1959] 1 WLR690, Lord Evershed M.R.** put it thus;

> ***"It is generally true that willful disobedience of an order will justify summary dismissal, since willful disobedience of a lawful and reasonable order shows a disregard - a complete disregard – of a condition essential to the contract of service, namely, the condition that the servant must obey the proper orders of the master, and that unless he does so the relationship is, so to speak, struck at fundamentally".***

A more contemporary expression of this notion, with the "master- servant" phraseology having fallen by the wayside in the intervening half century, is to be found in the Canadian case of **MICHAEL DOWLING -VS- WORK PLACE SAFETY AND INSURANCE BOARD [2004] CAN LII 43692** cited to us by the appellant. There, the Ontario Court of Appeal stated the test to be applied as:

> ***"… It can be seen that the core question for determination is whether an employee has engaged in misconduct that is incompatible with the fundamental terms of the employment relationship. The rationale for the standard is that the sanction imposed for misconduct is to be proportional - dismissal is warranted when the misconduct is sufficiently serious that it strikes at the heart of the employment relationship. This is a factual inquiry to be determined by a contextual examination of the nature of the circumstances of the misconduct".***

That court was following the decision of the Canadian Supreme Court in **Mc KINLEY –VS- B.C. TEL [2001] 2 S.C.R 161** in which the standard to be employed in determining whether an employees' misconduct (in that case dishonesty) gives rise to just cause for dismissal. I consider the test there propounded to be sound and am persuaded to apply it;

> ***"[W]hether an employer is justified in dismissing an employee on the grounds of dishonesty is a question that requires an assessment of the context of the alleged misconduct. More specifically the test is whether the employee's dishonesty gave rise to a breakdown in the employment relationship. This test can be expressed in different ways. One could*** *say,* ***for example, that just cause for dismissal exists where the dishonesty violates an essential condition of the employment contract, breaches the faith inherent to the work relationship, or is fundamentally or directly inconsistent with the employee's obligations to his or her employer."*** *(My emphasis)*

Speaking for myself, and having conducted a careful analysis, and re-appraisal of the evidence on record so as to draw my own inferences of fact as obligated by **Rule 29** of the **Court of Appeal Rules**, I have come to the unhesitating conclusion that the 1st Respondent's conduct in denying and defying the appellant's oversight authority over her, and in declaring herself immune to its demand for accountability and answerability, was a total if audacious repudiation of the employer- employee relationship. Her characterization of the decisions and actions of the appellant in attempting to rein her in as irresponsible was so far beyond the pale of what is permissible of an employee to say of an employer if the relationship is to subsist that, on the facts of the case, the appellant was presented with ample and irresistible cause for her dismissal.

I am of the respectful view that the learned Judge unduly diminished the gravity of the allegations of misconduct, defiance and misconduct that were not only leveled, but quite clearly proved as well, against the 1st Respondent in the proceedings against her. I am quite clear that the 1st respondent's action, attitude and utterances as against the appellant wholly and fatally compromised her position as an employee thereof and rendered her continued holding of the office of Chief Registrar of the Judiciary both untenable and intolerable. On the law and the facts the learned Judge should have so found. In failing to do so, he erred and misdirected himself.

It is worth noting that courts ought to be slow to make determinations that are on the face of them, unrealistic and bordering on the cynical. Courts do intervene in employer-employee disputes but even as they do so, they must appreciate that the work-place must be allowed and enabled to operate in a manner that is productive and harmonious. Courts cannot micro-manage the human resource function of other institutions be they in the public or in the private sector. It is thus clear to me that a judge oversteps his mandate when he fails to give due and grave consideration to the intractable difficulty an employer faces when faced with insubordination which is really a form of headstrong defiance and open rebellion to lawful authority. In such instances, the act of firing the employee properly taken should not invite the courts' quashing power by way of certiorari as happened herein.

In this respect I fully agree with the decision of the South African Labour Court in **NAMPAK CORRUGATED WADEVILLE –VS- KHOZA (JA 14/98)[1998] ZALAC 24** in which **Ngcobo** JA stated;

> **"33] The determination of an appropriate sanction is a matter which is largely within the discretion of the employer. However, this discretion must be exercised fairly. A court should, therefore, not lightly interfere with the sanction composed by the employer unless the employer acted unfairly in imposing the sanction. The question is not whether it could have imposed the sanction imposed by the employer, but whether in the circumstances of the case the sanction was *reasonable."***

Justice Ngcobo proceeded to quote a passage from the decision of **BRITISH LEYLAND UK LIMITED –VS- SWIFT [1981] IRLR 91** at **93** on the approach that a court should take in assessing the reasonableness of the action taken by an employer suggestive that there is quite a wide spectrum of actions that would nonetheless qualify as reasonable and there is a huge element of subjectivity, and I agree:-

> ***"There is a band of reasonableness with which one employer may reasonably take one view; another quite reasonably take a different view. One would quite reasonably dismiss the man. The other would quite reasonably keep him on. Both views may be quite reasonable. If it was quite reasonable to dismiss him, then the dismissal must be upheld as fair: even though some other employers may not have dismissed him."***

From my own analysis of the record before us, I would very much doubt that there are many employers who, faced with conduct such as displayed by the 1st respondent, would have retained her in her position. I am not saying there would be none, only that such an employer would be a rarity indeed. As to the action of dismissing the 1st respondent, I find and hold that it was an eminently reasonable action to take by an employer. It probably would have been the only reasonable and responsible cause of action left open to the employer. The dismissal therefore passes with ease the test propounded by Lord Denning in the same **BRITISH LEYLAND** case (ibid.);

> *"**Was it reasonable for the employer to dismiss him? If no reasonable employer would have dismissed him, then the dismissal was unfair. But if a reasonable employer might have reasonably dismissed him then the dismissal was fair."***
>
> *(my emphasis)*

The dismissal was fair and the orders by the learned judge quashing the proceedings and the dismissal cannot be countenanced.

What I have said is enough to show that this appeal is for allowing. A few matters more call for my comments, however. For the first, which relates to whether the appellant violated the 1st respondent's constitutional rights, the learned Judge's holding was as follows;

> ***"Accordingly, JSC not only acted ultra vires the JSC(Sic!) Act 2011 and the Regulations thereunder, but also violated the Constitutional Rights of the Petitioner under Articles 27(1), 35 (1)(b), 47(1) & (2), 50(1) & (2) and***
>
> ***236(b) of the Constitution. The end result was a total failure of justice. The decision by Judicial Service Commission was a nullity ab initio as it was made in excess of jurisdiction and in gross violation of the rules of natural justice. The decision is accordingly quashed by this Court."***

It seems to me that the learned Judge placed the stamp of judicial approval on what I see as a clear misapprehension of the nature, extent and context of the right to fair trial as enshrined in the Constitution. Under the heading **"D. NATURE OF INJURY"** the 1st respondent had in her Petition pleaded as follows;

> ***"12. In purporting to terminate the employment of the Petitioner, the Respondent violated the Petitioner's right (sic) and freedom as follows:-***
>
> ***Her right to fair trial was violated in contravention of Articles 25(c), 47(1) and (2) of the Constitution.***
>
> (i) ***(sic) Her right to public hearing was denied in violation of Article 50 (1) of the Constitution.***
>
> (ii) ***Her right to presumption of innocence, to be informed of the charges in sufficient detail and to have adequate time to prepare her defence were denied in contravention of Article 50 (2) (a) (b) and (c) of the Constitution,***
>
> (iii) ***Her right to be heard by an impartial tribunal was violated in contravention of Article 50 (1) of the Constitution.***
>
> (iv) ***Her right to due process of the law has been violated in contravention of Article 236 (b0 of the Constitution …"***

The right to a fair trial is of course one of the inalienable, non-non- deragable super-rights and fundamental freedoms protected from abrogation or limitation under **Article 25** of the **Constitution**. It is in a special category that cannot be constricted or denied regardless of any other provision of the Constitution and regardless of circumstances. As long as our Constitution endures, it never can be permissible that the right to a fair trial can be denied, suspended or in any other way limited.

That being said, the right itself must be properly understood. It is provided for under **Article 50** but this needs careful reading. **Article 50** deals with two related but distinct fundamental rights. **Article 50(1)** provides as follows;

> ***"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."***

This provision of law clearly refers to legal proceedings. It decrees that legal proceedings should be heard fairly and held in public. It is because they are legal proceedings that the locus is identified as a court. Courts are to hear disputes in the manner prescribed. Since they are disputes determinable by the application of law, they are generally disputes that would fall under the wider rubric of civil proceedings. In appropriate cases the disputes may be heard in the same fair and public manner, before tribunals which must, even as courts are (or ought to be), both independent and impartial.

This right to fair hearing as enshrined in **Article 50 (1)** relates to legal proceedings in courts and other judicial tribunals. There is nothing in the constitutional text that suggests that the right applies to internal disciplinary hearings whether or not they should lead to dismissal, touching on the conduct of an employee. Employers and their disciplinary panels are not courts or judicial tribunals and it is therefore a huge misdirection to assess their conduct of disciplinary hearings using the judicial paradigm. It is for this reason that in the case of **GEORGES BROSSEAU –VSTHE ALBERTA SECURITIES COMMISSION[1989] & R.C.S 301**, the Canadian Supreme Court took the view that a non-judicial body was not bound by the strict rules as to impartiality that are expected of a court of law and which provide an answer to some at least, of the complaints by the 1st Respondent about bias and improper motive, repeated by her learned counsel Mr. Kipkorir in submissions before us:

> ***"Securities Commission, by their nature, undertake several different functions. The Commission's empowering legislation clearly indicates that the Commission was not meant to act like a court in conducting its internal reviews and certain activities, which might otherwise be considered 'biased', from an integral part of its operations…"***

As to the application of **Article, 50 (2)** of the **Constitution**, which is the content and essence of the right to a fair trial envisaged in **Article 25**, I wish to state quite categorically that it relates solely to criminal proceedings before a court of law and has absolutely no application in an employee's disciplinary hearing. It definitely does not apply to the removal or suspension of a Chief Registrar of the Judiciary under **Section 12** of the **Judicial Service Act, 2011**. That much is clear from the Sub-Article itself which states in language too plain for mistaking:

> ***"(2) Every accused person has a right to a fair trial which includes the right "***

The elements of a fair trial that are then enumerated, running to nearly a score all, without exception, relate to a criminal trial before a court. The language is straight out of criminal jurisprudence: it speaks of an accused person; the presumption of innocence; the right to remain silent; a public trial before a court established under the Constitution; the right to be present when being tried; the prosecution as the other party; refusal to give self-incriminating evidence; conviction for offences and crimes; reference or allusion to the concepts of *autrofois*

acquit or *autrofois convict*; the benefit of least severe sentence; the right of appeal or review to a higher court on conviction and the exclusion of tainted evidence. This paraphrase I have penned is all indicative that **Article 50(2)** spells out the right to a fair trial as one that is enjoyed by persons charged with criminal offences in courts of law within the criminal justice system. It has absolutely no application to the proceedings the subject of this litigation and the learned Judge's attempt to christen them as 'criminal' or 'quasi criminal' was a grave and reversible error and misdirection. I am not persuaded by Mr. Kipkorir's submission that the Judge was exhibiting admirable industry and developing the law in importing criminal law.

Reference by the1st respondent to **Articles 47** of the Constitution was proper in that she was entitled to fair administrative action which the Constitution provides for thus;

> ***"47 (1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has a right to be given written reasons for the action."***

The Article imposes an obligation on Parliament to enact legislation to give effect to the right and among other things provide for appeals, but such legislation is yet to be enacted. I have noted the 2nd Respondent's useful reference to such legislation in South Africa, namely the **Promotion of Administrative Justice Act, No. 3 of 2000** which is worthy of our own legislation's borrowing. The bottom line however, is that the 1st respondent was entitled to a process that was fair and this resonates with **Article 236 (b)** of the **Constitution** which protects public officers from dismissal, removal from office, demotion in rank or other disciplinary action without due process of law.

Having given due consideration to these constitutional provisions, I am unable to agree with the learned Judge that they were flouted as against the 1st respondent. She was notified of the allegations against her. The use of the term 'charges' in the statute means no more than a formal notification of the accusation that was leveled against her and has nothing to do with **Section 137** of the inapplicable **Criminal Procedure Code**, as I have already stated. The allegations were clear and detailed, if numerous, the multiplicity being a reflection more of the audacity with which certain things are alleged to have been done than anything else. She was given 21 days to respond in writing. She was given 18 days thereafter for an oral hearing. She was represented by very able counsel. I am satisfied that the requirements of both the **Constitution** and **Section 12** of the **Judicial Service Act** were satisfied. The decision of the appellant cannot therefore be properly impugned and the learned Judge, in my respectful view, did not have a proper basis for doing so. I am therefore unable to agree with Mr. Kipkorir that the entire process was **"constrived and a sham".** I accept as good law, persuasive to me, the decision of the English Court of Appeal in **SELVARA JAN –VS-RACE RELATIONS BOARD [1976] 1 ALL ER 12** on the manner in which boards and committees should conduct investigation to satisfy the requirement of fairness. I agree with the holding by Lord Denning MR, as captured in the case summary:

> ***"What the duty to act fairly requires depends on the nature of the investigation and the consequence which it may have on the person affected by it. The fundamental rule is that, if a person may be adversely affected by the investigation and report, he should be informed of the substance of the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure." (my emphasis)***

In all the circumstances of this case, the learned Judge ought to have been extremely circumspect and avoid getting into a semblance of a merit determination of the myriad allegations of impropriety that had been leveled against the 1st respondent. That was not his remit as a court being invited to exercise its certiorari powers. He ought to have confined himself to the process of the 1st respondent's removal to determine its procedural fairness. In going into a detailed analysis of the minutiae comprising the allegations and purporting to exonerate the 1st respondent, the learned Judge went way beyond his legitimate sphere and was in error.

The final matter I will comment on is the learned Judge's wholesale acceptance of submissions on behalf of the appellant that some of the members of the appellant were biased against her. The appellant complains that the learned Judge was remiss to entertain and give weight to that aspect of the matter yet the same was never part of the 1st respondent's case as pleaded. The complainant is not without substance. The Petition was neither premised nor predicated on the ground of bias. No evidence by way of affidavit under oath was tendered. It being trite that parties are bound by their pleadings, **(See NAIROBI CITY COUNCIL –VS-THABITI ENTERPRISES LTD [1995- 98] 2EA 231)**, it was improper for the learned Judge to have permitted an issue not properly before him by way of pleadings to intrude upon the decision of the matter to the extent that it did. In the absence of clear proof by proper evidence, I consider it a misdirection for the learned Judge to have

stated that;

> ***"On the facts of this case, it is clear that the allegation made especially against the Chief Justice and Commissioner Ahmednassir Abdullahi are of such a serious nature that any reasonable person would have reasonable apprehension of bias in the circumstances."***

I do not accept the thesis that bias is established merely by the seriousness or the stridentness of the allegations. What is required is proof by evidence, the burden being borne by he or she that alleges. It is not difficult to see what mischief would arise were courts to hold that seriousness of allegations, as opposed to their proof, is the proper basis for apprehending bias. Such apprehension, in my respectful view, is regrettable, not reasonable.

For all the reasons I have stated, I find this appeal to be meritorious and would allow it. I hold that the appellant was perfectly entitled to proceed against the 1st respondent as it did and that her removal was in accordance with the Constitution and the law. I would set aside the judgment of the Industrial Court in entirety.

The appeal shall be disposed of as proposed by my learned sister Hon. Okwengu JA.

Dated at Nairobi this 19th day of September 2014.

P. O. KIAGE

……

JUDGE OF APPEAL

Martin Nyaga Wambora v County Assembly of Embu & 37 others [2015] eKLR

IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OKWENGU, GBM KARIUKI, & MOHAMED JJA)

CIVIL APPEAL NO. 194 OF 2015

BETWEEN

MARTIN NYAGA WAMBORA……APPELLANT

AND

COUNTY ASSEMBLY OF EMBU……..1ST RESPONDENT

SPEAKER OF THE COUNTY ASSEMBLY OF EMBU.....2ND RESPONDENT

THE SPEAKER OF THE SENATE……3RD RESPONDENT

THE SENATE……4TH RESPONDENT

PARLIAMENTARY SERVICE COMMISSION……5TH RESPONDENT

COMMISSION ON ADMINISTRATION OF JUSTICE.....6TH RESPONDENT

ANDREW IRERI NJERU & 31 OTHERS……7TH RESPONDENT

(Being an appeal from the Judgment and Decree of the of the High Court of Kenya at Nairobi delivered on 12th February 2015 by Hon Mwongo PJ, Korir and Odunga JJ

in

Embu Constitutional Petition Nos. 7 & 8 of 2014 (Consolidated*)*

JUDGMENT OF OKWENGU JA

Introduction

[1] This is an appeal from the Judgment and Decree of a three judge bench of the High Court (***Mwongo PJ, Korir & Odunga, JJ***) delivered on 12th February 201. The judgment was in regard to two petitions that were consolidated. That is **Embu H.C. Constitutional Petition No. 7 of 2014** that was lodged by **Martin Nyaga Wambora**, the Governor of Embu County (*hereinafter referred toas the appellant*); and **Embu H. C. Constitutional Petition No. 8 of 2014** that was lodged by Andrew Ireri Njeru and 31 others who described themselves in the petition as citizens of Kenya who reside, vote and work for gain within the Embu County. The latter that are the 7th respondent in this appeal have also cross-appealed and shall therefore hereafter be referred to as the cross-appellants.

The Background

[2] The facts leading to this appeal are substantially not in dispute. On 29th January, 2014 the County Assembly of Embu (now the 1st respondent) passed a motion for removal of the appellant from the office of Governor of Embu County on the grounds that he had refused and/or neglected to act on the recommendations of the County Assembly of Embu, and that this amounted to gross violation of the Constitution and abuse of office. An appropriate resolution for the removal of the appellant was thereafter forwarded to the Speaker of the Senate in accordance with section 33 of the County Government Act. That motion was tabled before the Senate and a Special Committee of the Senate was mandated to look into the allegations. The Special Committee reported back to the Senate, and the Senate having considered the report unanimously voted that the appellant be removed from office and an appropriate Gazette Notice No. 1052 of 17th February 2014 was published. In the meantime, the appellant had moved to court and obtained interlocutory orders restraining the Speaker of the Senate and the Senate from proceeding with the removal proceedings. By a judgment dated 16th April 2014, the High Court sitting in Kerugoya ruled that the removal proceedings against the appellant were null and void, and consequently the appellant was restored to office.

[3] On the same day of the judgment the County Assembly of Embu again commenced removal process against the appellant, and on 29th April, 2014 passed another resolution for removal of the appellant which resolution was forwarded to the Senate for a second round of removal proceedings against the appellant. The Senate mandated a Special Committee made up of the same members that had earlier investigated the allegations during the first removal process, to investigate the allegations in regard to the second removal process. On the 13th May 2014, the Senate having received and debated the report of the Special Committee passed a resolution to remove the appellant from the office of Governor of Embu. In the meantime, the appellant and the cross-appellants who had separately moved to the High Court seeking to stop discussions of the second removal motion in the County Assembly, filed an amended consolidated petition dated 23rd May 2014. This amended petition was the subject of the judgment of the High Court now subject of this appeal.

The Orders sought in the Amended Petition

[4] The prayers sought in the amended consolidated petition were of three categories. Those seeking interpretation of constitutional and statutory provisions concerning removal of a County Governor, Declaratory orders regarding the removal and impeachment of the Embu County Governor, and orders of Certiorari with regard to the impeachment of the Governor. The prayers may be paraphrased as follows:

First, the interpretation of constitutional and statutory provisions regarding:

i. the threshold of the number of members of public who should participate in the removal process under Article 118(1)(b), 174 (a)(c) and 196 (1)(b);

ii. the criteria that should be applied in determining the threshold;

iii. whether the removal of the Governor without involvement of the public and the petitioners was a violation of the Constitution;

iv. whether section 33 of the County Government Act is unconstitutional for being in conflict with Articles 1, 2(1)&(2); 10, 118(1)(b), 174(a)&(c) and 196(1)(b); and 259 of the Constitution;

v. whether the petitioner's right to information under Article 35 has been violated.

Secondly, declaratory orders that:

a. the petitioners and members of the public are entitled to the right to participate in the process of removing the Governor of Embu County from office and the same has been violated;

b. the court be pleased to establish the required threshold of the members of public who should participate under Article 118 (1) (b), Article 174 (a) and (c) and Article 196 (1) (b).

c. public participation is a pre-condition to proceedings for removal of a governor under Article 181 of the Constitution.

d. the act of removing a county Governor is not an exclusive affair of the county assembly and the senate.

e. the resolution passed by the County Assembly on 29th April 2014 is null and void for having been passed by the County Assembly in contravention of County Assembly of Embu Standing Order No. 86 and the Senate in total contravention of Standing order No. 92 of the Senate Standing Orders.

f. the impeachment passed by the Senate pursuant to a resolution passed by the County Assembly of Embu on 29th April 2014 is null and void

g. Section 33 of the County Government Act is unconstitutional for being in conflict with and flying over the face of Article 1, Article 2(1) and (2), Article 10, Article 118(1) (b), Article 174 (a) and (c) and Article 196 (1) (b) for failing to allow public participation and involvement in the removal of a county Governor.

h. the petitioners herein are entitled to the full protection of their right to information and the same right has been violated.

[5] Thirdly orders of certiorari:

i. to remove to the High Court and quash the resolution passed by the County Assembly of Embu dated 29th April 2014 and the Senate on the 13th May 2014 to remove 1st respondent as the Governor of Embu County.

ii. to remove to the High Court and quash the resolution passed by the Senate on the 13th May 2014 to impeach the Governor of Embu County.

The Decision of the High Court

[6] Upon hearing the amended petition the High Court dismissed the Petition, holding *inter alia* as follows:

i. ***that the petition was not incompetent;***

ii. ***that the proceedings to impeach the Governor were not sub judice as the motion before the County Assembly was instituted when there was no pending matter in court;***

iii. ***that the power of self governance and participation of the people provided for by Article 174 (c) of the Constitution must be read together with Article 1 to the effect that people may also indirectly***

exercise sovereignty. This they do through electing their representatives at the county level who make decisions on their behalf. To this extent the mandate of impeachment has been placed on the peoples' representatives;

iv. ***that the Constitution obligated Parliament to enact a Law to operationalize the removal procedures of Governor; that the purpose of the County Government Act 2012 and in particular section 33 was to operationalize Chapter 11 of the Constitution on Devolution and Article 181 of the Constitution; and that section 33 was therefore not unconstitutional;***

v. ***that Article 196(1)(b) of the Constitution requires the County Assembly to facilitate public participation and involvement in the Legislative and other business of the Assembly and its committee; and that the removal of the Governor was one of the business statutorily assigned to the County Assembly; thus some level of public participation had to be injected in the process and an opportunity availed to voters to air their views on the process of the removal of the Governor before a decision was arrived at;***

vi. ***that the allegations made by the petitioners, that they were not afforded an opportunity to participate in the removal proceedings were not proved;***

vii. ***that there was no bias in the hearing of the matter against the Governor by the special committee that had previously considered similar complaints against the Governor as the report of the special committee was adopted by an overwhelming majority of the whole house;***

viii. ***that due process was followed in the removal of the Governor, several opportunities having been provided for the Governor to be heard and the principles and rules of national justice complied with.***

The Appeal

[7] The appellant who was aggrieved by the judgment of the High Court lodged an appeal raising 17 grounds. He was represented by a team of advocates led by Mr. Paul Muite (SC) who was assisted by Mr. Peter Wanyama, Mr. Wilfred Nyamu and Mr. Issa Mansur. The cross-appellants who were represented by Mr Ndegwa Njiru also filed a cross appeal with a Memorandum of Appeal that was a near replica to the one filed by the appellant. Professor Tom Ojienda (SC), and Mr Njenga appeared for the Speaker of the County Assembly of Embu and the County Assembly of Embu, the 1st and 2nd respondent respectively, whilst Ms. Thanji appeared for the Parliamentary Service Commission that was the 5th respondent. The Speaker of the Senate and the Senate who were the 3rd and 4th respondent respectively neither participated in the proceedings in the High Court nor in the appeal before us. The Commission on Administration of Justice who were the 6th respondent appeared in the High Court but was by leave of the Court excused from participating in the appeal proceedings. Following an agreement between the parties' advocate's and directions given by the court, written submissions were duly filed and orally highlighted before the Court.

Appellant's Submissions in support of the Appeal

[8] In the written and oral submissions, the appellant's grounds of appeal were collapsed into four categories. These were; the principle of *stare decisis;* the threshold for removal of Governor under Article 181 of the Constitution; public participation in the impeachment process; and lack of fair hearing and bias in the Senate proceedings.

[9] As regards the principle of *stare decisis*, it was argued that the learned Judges of the High Court erred by failing to apply the decision of this Court in ***Nyeri Civil Appeal No. 21 of 2014, Martin Wambora & 3 others v Speaker of the Senate & 6 others, (***herein referred to as***Nyeri Civil Appeal No. 21 of 2014),***in which this court found that the High Court erred in failing to exercise its constitutional mandate under Article 165 (3) (d), (ii) and (iii) of the Constitution to determine whether the removal of the appellant as Governor of Embu County was inconsistent with or in contravention of the Constitution; and further erred in failing to exercise its supervisory jurisdiction under Article 165 (6) to determine the specific question whether the constitutional threshold for removal of the Governor had been proved and if there was any nexus between the allegations in the motion tabled in the County Assembly and the appellant.

[10] Counsel for the appellant further submitted that because the motion before the County Assembly and the Senate was premised on the same facts as the first impugned removal process, the High Court was duty bound to consider whether the Senate had found any nexus established between the applicant and the allegations of misconduct. The Appellant's counsel cited the case of ***Mwai Kibaki v. Daniel Toroitich Arap Moi [2000] 1 EA 115***, in support of the contention that the principle of *stare decisis* is a fundamental aspect of our legal system meant to ensure uniformity in judicial decisions. Counsel argued that because the first and second impeachment process was identical, the learned judges of the High Court were bound by the precedent set in ***Nyeri Civil Appeal No. 21 of 2014*****.** In addition that the High Court adopted a narrow and restrictive interpretation of its role by holding that it could only review the proceedings relating to the removal process

in disregard of the mandate conferred by Article 165 (3) (d) (ii) and (iii).

[11] On the threshold for removal under Article 181 of the Constitution, it was argued that the removal of a Governor is a quasi-judicial process, governed by the Constitution and the threshold is provided under Article 181 of the Constitution; that in removing the appellant from the office of Governor, the County Assembly of Embu and the Senate were exercising powers donated to them by the Constitution and were therefore bound by the provisions of Article 181. As to what constitutes gross violation, Counsel for the appellant relied on a Nigerian case ***Hon. Muyiwa Inakoju & others v. Hon. Abraham Adeolu AdekeleS.C.272/2006*****(unreported);** and***Nyeri Civil Appeal No. 21 of 2014***(*supra*).

[12] It was submitted that the High Court failed in its supervisory jurisdiction and duty to determine whether the appellant's removal was in accord with the Constitution; That the High Court having held that there was no material provided to enable it determine the issue of nexus and threshold; and it being the duty of the County Assembly of Embu and the Senate to provide the said material in order to validate the removal of the appellant and satisfy the court that the removal process was in accordance with the Constitution. It was perplexing that the High Court went ahead and found that the Report of the Committee did not contain in it anything that could invite the review powers of the High Court.

[13] It was asserted that the High Court failed to determine whether there was any nexus between the acts complained of and the conduct of the appellant to warrant his removal. This Court's decision in ***Mumo Matemu v. Trusted Society of Human Rights Alliance & others Civil Appeal No. 290 of 2012*** was relied on for the submission that the High Court ought to have considered whether there was a nexus between the appellant and the acts complained of. Further, it was contended that the charges against the appellant related to the tendering process for refurbishment of the Embu Stadium as well as the procurement of maize seeds, which process the appellant was not involved in. The learned Judges of the High Court were faulted for failing to consider whether the appellant had personal liability for the alleged violations. Finally it was reiterated that the High Court having already confirmed that no evidence had been placed before it to validate the removal of the appellant, the High Court could not make a determination as to whether there was a nexus between the appellant and the gross violations.

[14] On public participation in the impeachment process, it was argued that the High Court failed to properly interpret and consider the role of the public and residents of a County in the impeachment process; that the democracy enshrined in the Constitution is partly representative and partly participative and this required the court to give effect to the principles of democracy; that public participation plays a key role in governance; that the new constitutional dispensation had been brought closer to the people through devolution; that under Article 196(1)(b) public participation is a mandatory requirement in the legislative and/or any other business of the county; and that similarly Article 118 (1) (b) requires Parliament to facilitate public participation and involvement in the legislative and other business of Parliament and its committees. It was maintained that the removal of a governor is part of the business of the County Assembly and as such there must be both qualitative and quantitative public participation as a condition precedent to constitutional impeachment, and thus the removal of the appellant from office without participation of the people who voted him into office was a derogation of their rights.

[15] On lack of fair hearing and bias in the Senate proceedings, it was submitted that the removal of a governor from office is a constitutional and political process in the nature of quasi-judicial process and therefore the Rules of natural justice and fair administrative action must be observed. In this regard ***NyeriCivil Appeal No. 21 of 2014***was relied upon. Further it was submitted that the appellant was entitled to a fair hearing before the special committee of the Senate; and that given that the Special Committee of the Senate that was constituted to investigate the charges in the appellant's second impeachment was the same one selected to investigate the charges in the first impeachment process, and that the second impeachment was based on the same facts, the committee could not possibly evaluate the same allegations objectively and was biased from the outset; that the High Court failed to appreciate that the impeachment process before the Senate did not meet the constitutional standard of fairness; that the appellant was not accorded a fair hearing by the Special Committee despite raising the issue of bias before the committee; and that the High Court erred by failing to apply the correct test of bias and failing to find that there was prejudice occasioned to the appellant.

Submissions by the Speaker and County Assembly of Embu

[16] The County Assembly of Embu and the Speaker of the County Assembly of Embu opposed the appeal through written and oral submissions, in which the Court was urged to be alive to the fact that the process of removal of the appellant from office was based on his established actions of flouting relevant law and procedure and therefore causing loss of public funds that ought to have been applied to further public interest; and that in interpreting the Constitution the court should favour a determination that contributes to good governance and public interest.

[17] In response to the issues raised by the appellant, it was submitted that on the issue of *stare decisis* the High Court considered and applied ***Nyeri CivilAppeal No. 21 of 2014; and***in particular that the following interpretation by the Court of Article 181 of the Constitution as read with section 33 of the County Government Act:

> "**that removal of a Governor is a constitutional andpolitical process. It is a *sui generis* process that is*quasi judicial* in nature and the rules of natural justice and fair administrative action must be observed. The impeachment architecture in Article 181 of the Constitution reveals that removal of a Governor is not about criminality or culpability but is about accountability, political governance as well as policy and political responsibility**".

[18] It was argued that the High Court appreciated that it had to interrogate the facts to establish the question of nexus between the appellant and the allegations made against him; that the failure to do so was explained by the inadequacy of the available facts and evidence; that it was not enough for the appellant to merely plead violations of rights and their particulars and not avail to the court all the necessary material and evidence; that the burden of proof on all material facts arising in the petition lay with the petitioners; and that where they fail to discharge this burden neither the Senate nor the High Court could be faulted.

[19] On lack of fair hearing and bias it was submitted that the appellant had not demonstrated any actual or apparent bias sufficient to vitiate the impeachment process; that the appellant had conceded that no evidence of actual prejudice was availed to the court, but that he was simply relying on prejudice arising from apparent bias. Relying on the case of ***Judicial Service Commission v. Gladys Boss Shollei & another*** **[2014] eKLR** it was submitted that no circumstances had been pleaded to give the impression of bias on the part of the Senate; that according to the test given in the **Judicial Service Commission(*supra*)** case the impression or perception of bias has to be evaluated with reference to a reasonable person who is fair minded and informed about all the circumstances of the case; and that in the mind of an objective citizen conscious that the process of impeachment concerned loss of public resources and being aware of all the facts, there would be no apparent bias arising from the process.

[20] As regards public participation, it was maintained that the appellant had not demonstrated any failure on the part of the County Assembly of Embu, to undertake public participation of the process of removal of the appellant using the forum and infrastructure provided under Chapter VIII of the County Government Act that provides for citizen participation in the business of the County and the County Assembly; that the appellant and the cross-appellants only claim that there was no public participation because the result of the process did not match their expectations; that there was no error demonstrated on the part of the High Court in its finding that there was public participation; that there was no basis in law or any judicial authority for the contention that public participation must only be direct participation; and that it would be practically impossible to hold a public referendum on all decisions made by the County Assembly.

[21] On the issue of constitutionality of Section 33 of the County Government Act, it was asserted that the section was not unconstitutional; that the High Court gave detailed reasons for its finding that the section was consistent with the Constitution; and that no specific error had been identified that could fault that finding. Further that section 33 of the County Government Act provides the procedure for the operation of Article 181 of the Constitution; that the section is not a substantive provision of law but a procedural provision that provides for the forum and process of raising charges against a Governor; the hearing of such a charge and determination thereof; that although section 33 is not intended to give effect to Article 196 of the Constitution, Chapter VIII of the County Government Act provides extensively for the requirement of the County Assembly to facilitate public participation and therefore there is a deliberate and mandatory imperative obligation imposed by Article 196 of the Constitution for the County Assembly to facilitate public participation.

[22] On nexus and threshold it was pointed out that the functions of a Governor are clear in the Constitution and the Statute, and that he is enjoined to perform these functions as a matter of legal obligation; that where there was a failure to perform such legal obligations a manifest breach of the law could be inferred; that the Senate considered how each of the charges against the appellant related to his functions and found that there was sufficient link to him making him culpable of breach of the various laws and the constitution; that the appellant as the Chief Executive of the County is responsible for all executive functions including the outlay of expenses and use of funds; that under **Article 73** and **179(3)** of the **Constitution** as read with **section 30(3)** of the County Government Act, the Governor provides leadership in the County governance and is accountable for the management and use of the County resources; that there was sufficient nexus established between the governance functions and the impugned procurement process; and that the threshold was anchored on accountability, good governance and political management, and not criminal culpability.

Submission for 5th Respondent

[23] On her part Ms. Thanji counsel for the 5th respondent addressed the role of the court on impeachment, the issue of bias, rules of natural justice and the extent of public participation. In a nutshell, the submissions were that the role of the court in impeachment proceedings is limited to review and the court should not delve into the merits of the case; that impeachment is a quasi-judicial and quasi-political process; that the courts lack the tools to delve into political matters and its role is limited to review of the procedure only; and that the procedure contained in Section 33 of the County Government Act was properly followed. On bias it was submitted that the committee of the Senate deliberated on the issues and warned themselves; that in any event the Senate through an overwhelming majority took the final decision; that the procedure was open to the public and that the Court of Appeal decision in ***Nyeri Civil Appeal No. 21 of 2014*** was followed.

Submissions for the Cross-Appellants

[24] In support of the appeal and the cross-appeal, Mr. Ndegwa Njiru counsel for the cross-appellant addressed the court on the issue of public participation, bias and unconstitutionality of section 33 of the County Government Act. On public participation it was submitted that the High Court only took into account delegated democracy through the people's representatives, but ignored the other limb of Article 1(2) that provides for direct participation in the exercise of the people's sovereignty; that Article 196(1)(b) of the Constitution obligates the County Assembly to provide for public participation in its business and this should be direct participation; that in interpreting the Constitution, the High Court should have applied the principle of harmonization and Article 259 of the Constitution. On the question of bias, it was submitted that this need not be actual as mere apprehension was sufficient; that the committee of the Senate was not constituted as a political committee but was vested with a quasi-judicial function of determining whether or not the charges against the appellant were substantiated; that the role of such a committee is crucial as it can stop the impeachment process and must therefore be devoid of bias. On the constitutionality of Section 33 it was submitted that the High Court misapplied the law on constitutionality; that the cross appellants' complaint was the lack of public participation in the impeachment process; that the court had to look at Section 33 in light of removal of the Governor *vis-a-vis* the required public participation in the County Assembly business; and that the High Court failed to consider whether public participation was a condition precedent to impeachment.

The Issues for Determination

[25] This is a first appeal in a matter in which the High Court was called upon to exercise its supervisory and constitutional powers under Article 165(3)(b) &(d) of the Constitution. The obligation of this Court is to appraise and evaluate the High Court's interpretation of the Constitution and the County Government Act (the Statute), the findings of facts, and the conclusions arrived at by the High Court, with a view to drawing our own conclusions in regard to the issues raised by the appellant.

[26] Having considered the record of appeal, the respective submissions by learned counsel and the authorities cited I discern the main issue for determination to be the jurisdiction of the High Court in the impeachment process of the Governor of Embu in regard to the petition that was before the High Court, and whether the High Court properly understood and discharged its mandate. In addressing this main issue the answer to the ancillary issue posed regarding whether the learned High Court Judges failed to follow the principle of *staredecisis* by not applying the decision of the Court of Appeal in***Nyeri Civil AppealNo. 21 of 2014***will emerge. Addressing the main issue will also lead to the interpretation of the various constitutional and statutory provisions regarding the removal of a County Governor; the constitutionality of section 33 of the County Government Act; and the question of the extent of public participation and threshold of removal of a County Governor. Finally, the interpretation of the constitutional provisions will lead to a conclusion regarding the propriety of the process of removal of the appellant including the fairness of the process.

Jurisdiction of the High Court and The Doctrine of *Stare Decisis*

[27] *Stare decisis* is defined in Black's Law Dictionary 9th Edition as

> "***the doctrine of precedent, under which a court mustfollow earlier judicial decisions when the same points arise again in litigation.***"

The same Black's Law Dictionary defines "precedent" as

> "***the making of law by a court in recognizing andapplying new rules while administering justice… A decided case that furnishes the basis for determining later cases involving similar facts or issues***."

[28] In further explanation of "precedent," Black's Law Dictionary cites **William M Lile** *et al* in "**Brief Making and Use of Law Books"** 288 (3rd Edition, 1914) wherein it is stated as follows:

> **"In law a precedent is an adjudged case or decision of a court of justice, considered as furnishing a rule or authority for the determination of an identical or similar case afterwards arising, or of a similar question of law. The only theory on which it is possible for one decision to be an authority for another is that the facts are alike, or, if the facts are different, that the principle which governed the first case is applicable to the variant facts."**

[29] *Stare decisis* is a common law doctrine that has been applicable in Kenya by virtue of the nation's common law heritage. The doctrine now enjoys constitutional protection by dint of Article 163 (7) of the Constitution. Although that provision only recognizes the doctrine in regard to the Supreme Court, the doctrine must of necessity be extended to the Court of Appeal in relation to courts lower in rank to it. This is particularly so since the Court of Appeal is in many cases the court of last resort. Indeed the following holding by a 5 Judge Bench of this Court in ***Mwai Kibaki vs Daniel Toroitich Arap Moi*[1999] eKLR,** though decided before the establishment of the Supreme Court in Kenya, still holds true:

a. ***that the High Court has no power to over-rule the Court of Appeal;***

b. ***the High Court has no jurisdiction to flout the first principles of precedent and stare decisis; and***

c. ***that the High Court, while it has the right and indeed the duty to critically examine the decisions of this Court must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as that of obiter dictum if applicable.***

[30] In ***Jasbir Singh Rai & 3 Others v Tarlochan Singh & 4 Others*, [2013] eKLR,** the Supreme Court identified the rationale for the doctrine of *staredecisis* as the need for stability, predictability, consistency, reliability, integrity, coherence and flexibility. This calls for horizontal application of the principle to the extent that the Court of Appeal will ordinarily not depart from a precedent it has set, unless it has come to the conclusion for reasons stated, that the decision was made *per incuriam* or that there are other compelling reasons for it to depart from that precedent. This was reiterated in ***P. H. R. Poole vs R*** [1960] E.A. 62 by a full bench of the Court of Appeal as follows:

> "**Prior to the hearing of the appeal counsel for theappellant intimated that he intended to ask the court to depart from one of its own previous decisions and, in accordance with the dictum of the court in *JosephKabui v. R. (1)[1954], 21 E.A.C.A. 260*, applied that a bench of five judges should be assembled to hear the appeal. This court adheres to the principle of stare decisis, unless it is of opinion that to follow its earlier decision which is considered to be erroneous involves supporting an improper conviction (*Joseph Kabui v.R. (1); Kiriri Cotton Co. v. R. K. Dewani*(2), *[1958] E.A. 239 (C.A.)* at p. 245). A full Court of Appeal has no greater powers than a division of the court (*Commissioner for Lands v. Sheikh Mohamed Bashir* (3), [1958] E.A. 45 (C.A.) at p. 50; *Young v. BristolAeroplane Co., Ltd.*(4), *[1944] 2 All E.R. 293*); but if it is to be contended that there are grounds, upon which the court can act, for departing from a previous decision of the court, it is obviously desirable that the matter should, if practicable, be considered by a bench of five judges.**"

[31] The much-cited ***Nyeri Civil Appeal No. 21 of 2014*** was an appeal against part of the judgment of the Kerugoya High Court in regard to the first removal process against the appellant. The Court in that appeal identified the issues for determination as follows:

i. ***Did the learned judges err in law in holding that the County Assembly and the Senate (as opposed to the courts), were best placed to determine whether a motion for the removal of a Governor was in accordance with the Constitution?***

ii. ***Did the learned judges err in law by failing to exercise their constitutional mandate under Article 165(3)(d)(iii) and (iv) of the Constitution to determine whether the grounds for removal of the 1st appellant met the constitutional threshold under Article 181 of the Constitution?***

iii. ***Must there be a nexus between the allegations in the motion tabled in the County Assembly and the 1st appellant? And***

iv. ***Was impeachment and removal of the 1st appellant as Governor in accord with the Constitution and the County Governments Act?***

[32] The issues raised in that appeal are in many regards similar to those raised in this appeal not to mention that the parties are also the same. For instance in ***Nyeri Civil appeal No 21 of 2014***, the court dealt with the question of the interpretation of Article 181 of the Constitution and section 33 of the County Government Act and expressed itself succinctly as follows:

> ***" 31. Our reading and interpretation of Article 181 of the Constitution as read with section 33 of the County Government's Act shows that***

removal of a Governor is a constitutional and political process; it is a sui generis process that is quasi-judicial in nature and the rules of natural justice and fair administrative action must be observed. The impeachment architecture in Article 181 of the Constitution reveals that removal of a Governor is not about criminality or culpability but is about accountability, political governance as well as policy and political responsibility. Section 33 of the County Governments Act provides for the procedure of removal of an erring Governor. The organ vested with the mandate at first instance to move a motion for the removal of a County Governor is the County Assembly. Neither the Courts nor the Senate have the constitutional mandate to move a motion for the removal of a County Governor. The Senate's constitutional mandate to hear charges against a Governor is activated upon receipt of a resolution of the County Assembly to remove a Governor. Upon receipt of such a resolution, the Senate shall convene a meeting to hear the charges against the Governor and may appoint a Special Committee to investigate the matter. It is our considered view that the jurisdiction and process of removal of a Governor from office is hierarchical and sequential in nature. There are three sequential steps to be followed: first is initiation of a motion to remove the Governor by a member of the County Assembly; second there is consideration of the motion and a resolution by two thirds of all members of the County Assembly and third, the Speaker of the County Assembly is to forward the County Assembly's resolution to the Senate for hearing of the charges against the Governor."

[33] In my view the above is a clear exposition of the law in regard to the application of Article 181 and section 33 of the County Government Act in the removal of a County Governor. The process of removal lies entirely with the County Assembly wherein it is initiated, and the Senate wherein it is concluded. The court may only come in where necessary to confirm that the process has been properly followed as laid down in the Constitution and the Statute. By implication the learned judges found section 33 of the County Government Act to be in harmony with Article 181 of the Constitution that provides for the removal of a County Governor on specified grounds such as gross violation of the Constitution, abuse of office or gross misconduct.

Right to Public Participation in the Removal of a Governor

[34] In this appeal apart from the focus on Article 181 that deals with grounds for removal of the Governor, the appellant has also shown the spotlight on **Articles 1, 2(1)&(2), 10, 118(1)(b), 174(a)&(c), 196(1)(b)** and **259** of the Constitution in regard to public participation in the removal of a County Governor *vis a vis* **section 33** of the County Government Act that only provides for the participation of the County Assembly and the Senate in the removal of the Governor. The appellant and the cross-appellants are aggrieved that **section 33** of the County Government Act does not provide an inclusive and participatory process such that their right to public participation has been violated. In this regard, the High Court in its judgment appreciated the right to public participation stating as follows:

193. The right to public participation is based on the democratic idea of popular sovereignty and political equality as enshrined in Article 1 of the Constitution. Because the government is derived from the people, all citizens have the right to influence governmental decisions; and the government should respond to them. Therefore, participation must certainly entail citizens' direct involvement in the affairs of their community, as the people must take part in political affairs.

194. Article 196(1)(b) of the Constitution enjoins a County Assembly to facilitate public participation and involvement in the legislative and other business of the assembly and its committees. Whereas the Constitution does not expressly task the County Assembly with the role of removal of a Governor, Article 181(2) of the Constitution empowers Parliament to enact legislation providing for the procedure of removal of a county governor on the grounds specified under the said Article. Pursuant to the said provision Parliament enacted the County Governments Act and in section 33 the procedure for removal of a Governor is to be initiated in the County Assembly. Accordingly, the removal of a governor is one of the businesses statutorily assigned to the County Assembly. In our view the question is not whether the public ought to participate in the process of the removal of a governor but to what extent should that participation go. In our view, some level of public participation must be injected into the process in order to appreciate the fact that a governor is elected by the County, and in order to avoid situations where an otherwise

popular governor is removed from office due to malice, ill will and vendetta on the part of the Members of the County Assemblies.

[35] The learned Judges' position on the right to public participation in the removal of the Governor is further discerned from the following paragraph:

> ***196. In our view an opportunity must be availed to the voters in a County to air their views on the process of the removal of their Governor before a decision is arrived at either way. To completely lock out the voters from being heard on such important matter as the removal of their Governor would be contrary to the spirit of Article 1(2) of the Constitution. Whereas it may not be possible that each and every person in the County be heard on the issue, those who wish to put across their views on the impeachment ought to be allowed to do so though the ultimate decision rests with the County Assembly.***

[36] Further the following paragraph reflects the learned judges' appreciation of the limitation placed on the right to public participation in the removal of the Governor of Embu County through the application of the County Assembly Standing Order 61.

> ***200. In our view public participation ought to commence from the time of the notification of the motion to remove the Governor by a member to the Clerk which notification in our view is the mandate of the Assembly. This is when the removal process crystalizes. However, it is clear that the period provided between the notification and the time for debating and the determination of the motion by the Assembly in the Standing Orders is very limited. It is therefore not plausible to expect that the mode of public participation in such circumstances would be commensurate with that of the enactment of legislation.***

[37] In coming to its final conclusion regarding the issue of public participation, the learned judges considered the affidavit evidence. In a nutshell the appellant and cross-appellants had asserted in the supporting affidavit that removal of the appellant was a business of the County Assembly in which the appellants and cross-appellants had a right to directly participate, and that this right was infringed by their exclusion. On the other hand the respondents had asserted through their replying affidavit that there was public participation in the removal process as the committee and plenary proceedings of the Assembly were open to the public; and that the County Assembly had established public contact offices in the County Assembly wards through which notices of its business were disseminated to the public, and the appellants therefore had opportunity to participate in the removal process.

[38] On the above the learned judges concluded as follows:

213. ***The averments above made by the Respondents were not rebutted by a further affidavit of the Petitioners.***

214. ***We have taken into account the period provided within which public participation may be conducted and the statutory structures for citizens participation, as well as the mode of notification formulated by the County Assembly. According to the respondents these included establishment of public contact offices in each of the County Assembly Wards, and the recruitment of Ward staff to facilitate public participation. They also contended that the County Assembly through the office of the Clerk disseminates notices of its business to the public through public notice boards, religious institutions and the ward office infrastructure developed for that purpose.***

215.***From the averments by the parties which are before the Court, we are not satisfied that the allegation made by the Petitioners that they were not afforded an opportunity to participate in the removal proceedings has been proved. We are unable to stretch the averments in the supporting affidavit set out hereinabove to mean that the respondent's infrastructure stated in paragraph 32 of the replying affidavit was not adhered to in this case. It must be emphasized that in matters such as this evidence is contained in the affidavit rather than in submissions.***

[39] I have quoted extensively from the judgment of the High Court because in my view, the quotations demonstrate that the conclusion arrived at by the learned judges was not consistent with their exposition and findings on the right to public participation. In coming to their conclusion, the learned judges did not take into account Standing Order No. 61 that they had noted was an impediment to the exercise of public participation. In order to appreciate this impediment, I reproduce herein County Assembly of Embu Standing Order No. 61 which was also quoted in the impuned High Court judgment:

"(1) Before giving notice of Motion under, section 33 of the County Governments Act, No. 17 of 2012 themember shall deliver to the Clerk a copy of the proposed Motion in writing stating the grounds and particulars upon which the proposal is made, for the impeachment of the Governor on the ground of gross violation

of a provision of the Constitution or of any other law; where there are serious reasons for believing that the Governor has committed a crime under national or international law; or for gross misconduct or abuse of office. The notice of Motion shall be signedby the Member who affirms that the particulars of allegations contained in the motion are true to his or her own knowledge and the same verified by each of the members constituting at least a third of all the members and that the allegations therein are true of their own knowledge and belief on the basis of their reading and appreciation of information pertinent thereto and each of them sign a verification form provided by the Clerk for that purpose.

2. ***The Clerk shall submit the proposed Motion to the Speaker for approval.***

3. ***A member who has obtained the approval of the Speaker to move a Motion under paragraph (1) shall give a seven (7) days' notice calling for impeachment of the Governor.***

4. ***Upon the expiry of seven (7) days, after notice given, the Motion shall be placed on the Order Paper and shall be disposed of within three days; Provided that if the County Assembly is not then sitting, the Speaker shall summon the Assembly to meet on and cause the Motion to be considered at that meeting after notice has been given.***

5. ***When the Order for the Motion is read, the Speaker shall refuse to allow the member to move the motion, unless the Speaker is satisfied that the member is supported by at least a third of all Members of the County Assembly to move the motion; Provided that within the seven days' notice, the Clerk shall cause to be prepared and deposited in his office a list of all Members of the County Assembly with an open space against each name for purposes of appending signatures, which list shall be entitled "SIGNATURES IN SUPPORT OF A MOTION FOR REMOVAL OF GOVERNOR BY IMPEACHMENT"***

6. ***Any signature appended to the list as provided under paragraph (5) shall not be withdrawn.***

7. ***When the Motion has been passed by two-thirds of all members of the County Assembly, the Speaker shall inform the Speaker of the Senate of that resolution within two days."(****Underlining added****)***

[40] As observed by the learned judges, the timeline set in the Standing Order No. 61 provides a stricture that did not allow for effective public participation. Moreover, in the affidavit the appellant maintained that their right to public participation was compromised and much as the respondents denied that allegation, the Constitution and the Statute place an obligation on the County Assembly of Embu to facilitate public participation in the removal process of the Governor. This placed the burden upon the Speaker and the County Assembly of Embu to demonstrate compliance with the Constitution and the Statute in regard to the right to public participation in the removal of the appellant. The averments made in the replying affidavits were general averments regarding the structures put in place for public participation. No specific averments or confirmation has been made that in regard to the removal of the appellant appropriate information and or opportunity for public participation was given either before the motion was debated or during the debate of the motion. The fact that the proceedings of the County Assembly are public only provides an opportunity for members of the public who are interested to go and witness the County Assembly proceedings. It does not provide an opportunity for a member of the public to participate in those proceedings. Therefore it is misleading to conclude that there was public participation merely because the proceedings in the County Assembly were public.

[41] In particular **Article 196(1)(b**) of the Constitution obligates a County Assembly to facilitate public participation and involvement in the legislative and other business of the assembly and its committees; while **section 91** of the County Government Act requires a County Government to establish particular structures for information, communication technology based platforms, town hall meetings, notice boards for announcements of matters for public interest, avenues for the participation of people's representatives and establishment of citizens fora at county and decentralized units. The respondents did not demonstrate use or availability of such structures in regard to the motion for removal of the appellant.

[42] I am in agreement with the dicta in the South African case ***Doctors for Life International vs. Speaker of the National Assembly and Others*** (supra) that:

> ***"According to their plain and ordinary meaning, the words public involvement or public participation refers to the process by which the public participates in something. Facilitation of public involvement in the legislative process therefore means taking steps to ensure that the public participates in the legislative process."***

[43] Therefore it was for the County Assembly of Embu to show the steps that it had taken to ensure the public involvement and participation in the removal process

of the Governor, and for the High Court to determine whether the steps taken provided adequate facilitation of public involvement in the removal process. While I am mindful of the fact that what was before the County Assembly was not a legislative process, the removal of the Governor was not just any other business of the County Assembly, but a matter in which the electorate in the County Assembly were deeply interested, the Governor having been directly elected by the electorate. The matter was weighty and of great interest to the people of Embu whose only opportunity to participate effectively in the removal process, was from the time of communication of the motion to the Speaker of the County Assembly to the time the motion was debated in the County Assembly.

[44] With the greatest respect to the learned judges of the High Court their brief included making an inquiry and a finding whether the infrastructure stated by the appellant as available for general public participation was adhered to in the appellant's removal process, and if so whether the same provided adequate opportunity for public participation in the removal process. The information relating to the public participation was a matter within the special knowledge of the County Assembly. Given the constitutional and statutory obligation placed on the County Assembly of Embu in regard to public participation, the appellant and cross appellants having established that the appellant was removed from the position of County Governor of Embu following a process carried out by the County Council of Embu and the Senate, the evidentiary burden shifted to the County Assembly of Embu and the Senate to show that it followed the required process. For instance, that the County Assembly of Embu had indeed discharged the obligation of facilitating public participation in the process by not only providing ample opportunity for public participation in the removal process (including providing Standing Orders that could facilitate such public participation), but also evidence of dissemination of specific information relating to the removal motion.

[45] The High Court appears to have lost focus of what it had earlier set out to do as set out in paragraph 203 of its judgment:

> ***In making a determination whether the County Assembly complied with its duty to facilitate public participation, the Court will consider whatthe County Assembly has done and in this case the question will be whether what the County Assembly has done is reasonable in all the circumstances. The factors that would determine reasonableness wouldinclude the nature of the business conducted by the County Assembly and whether there are timelines to be met as set by the law. This will be the ultimate determination on the method of facilitating public participation (underlining added)***

[46] Having found that the period provided in the Standing Order 61 was not sufficient for public participation, coupled with the absence of evidence of dissemination of specific information relating to the removal of the appellant, the learned judges ought to have come to the conclusion that the cross-appellants and the people of Embu County were not afforded a reasonable opportunity to participate in the removal of the County Governor.

Threshold in the Establishment of Grounds for Removal of Governor

[47] In Nyeri Civil Appeal No 21 of 2014, the Court stated as follows:

> ***"52. In our view, in addition to the supervisory jurisdiction of the High Court under Article 165 (6) of the Constitution, the High Court has a specific constitutional jurisdiction under Article 165 (3) (d) (ii) and (iii) of the Constitution. These paragraphs vest upon the High Court jurisdiction to hear any question on whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of this Constitution; and to hear and determine any matter relating to constitutional powers of state organs in respect of county government. It is not contestable that removal of a Governor from office is a thing done under the authority of the Constitution and it is the duty of the High Court to determine if such removal is inconsistent with or in contravention to the Constitution.***
>
> ***53. It is incumbent upon the High Court to determine if the facts in support of the charges against a Governor meet and prove the threshold in Article 181 of the Constitution.***
> …"

[48] In my view the above is a clear pronouncement of the law by this Court in regard to the jurisdiction of the High Court. In accordance with the doctrine of *stare decisis* the High Court was obliged to follow the precedent as set in Nyeri Civil Appeal No 21 of 2014. Thus in determining the petition before it, the High Court had to go beyond its supervisory mandate, by invoking its constitutional mandate to determine whether the removal of the appellant was done in accordance with the Constitution, and in particular whether the facts laid before the Senate in support of the allegations made against the appellant had met the threshold in Article 181 of the Constitution that lays down the grounds upon which a Governor can be removed.

[49] In regard to the determination of the constitutionality of the removal process in accordance with the above stated precedent, the following extract from the judgment of the High Court is pertinent:

> ***"247. In Wambora 1 Appeal (supra) the Court of Appeal was of the opinion that this Court has to interrogate the facts in order to determine whether there was nexus between the Governor and the alleged gross violations. That would call for a substantive interrogation of the charges and evidence leading to the removal in order for the Court to make any meaningful and legitimate intervention.***
>
> ***248. However in this case we were not supplied with material which would enable us to conduct interrogation, and there is the danger of the Court speculating as to whether what led to removal of the Governor met the threshold. For example, the evidence which was tabled before the investigations committees, was not availed to this Court. In addition, evidence such as was availed to the Senate and which is referred to in the Hansard was not availed before the Court. This is the nature of evidence which might have enabled the Court to deal with the issues of nexus and threshold.***
>
> ***249. We now consider whether there was a nexus between the 1st Petitioner and the alleged gross violation of the Constitution and the relevant laws. The summary of the findings of the Special Committee of the Senate is found at page 68 of the Report where it is stated ..."***

[50] Upon perusing the report of the Special Committee, the High Court noted that the Senate analyzed the evidence put forward in regard to each allegation and also properly directed itself in regard to the standard of proof. The High Court concluded as follows:

> ***"258. From the foregoing it is apparent that the Senate understood the constitutional threshold that had to be met. We have no reason to fault the Senate in its conclusion.***
>
> ***259. In line with our power to consider the reasonableness of the decision of the Senate, we have looked at the Report and find nothing in it that would invite the review powers of this Court.***
>
> ***260. In summary, our view is that this Court can only review proceedings relating to the removal of a governor. We have nevertheless subjected to scrutiny the Report of the Special Committee on the removal of the 1st Petitioner and we have found the same to be satisfactory. We find no reason for disturbing the decision of the Senate. Whether or not we agree with it is another thing altogether."***

[51] It is evident from the above that the High Court only exercised its supervisory jurisdiction by reviewing the exercise of the Senate's powers in so far as the report of the Special committee was concerned. The High Court failed to discharge its constitutional mandate that required it to go beyond mere review, and determine whether the charges levelled against the appellant had met the threshold of Article 181 of the Constitution. Article 165(3)(d)(iii) of the Constitution gives the High Court jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of any matter relating to constitutional powers or state organs in respect of County Governments and any matter relating to the constitutional levels relating to the constitutional relationships between the levels of Government.

[52] The High Court put a caveat to the exercise of its constitutional mandate by stating that it did not have the facts which it could interrogate to enable it determine the issue of nexus and threshold with regard to the exercise of the Senate's power in the removal of the appellant as Governor. In undertaking the process of removal of the appellant as Governor of Embu County, the 1st and 2nd respondent, and the Senate, were exercising constitutional and statutory powers. A question having arisen regarding the exercise of those powers, the HighCourt was obligated to make a determination whether what was done was consistent with the Constitution.

[53] In that regard, it was material that the nexus and threshold regarding the allegations upon which the appellant was being impeached be established. As already noted the evidentiary burden was upon the 1st and 2nd respondent whom it was not disputed, caused the motion for removal of the appellant to be debated in the County Assembly and its resolution carried to the Senate. That burden was also upon the Senate that passed the resolution for removal to satisfy the Court that the there was nexus and threshold to meet the constitutional standard required for removal of the appellant as County Governor. This is information that was especially within the knowledge of the 1st and 2nd 3rd and 4th respondents. Interestingly, the 3rd and 4th respondents did not even challenge the petition! Again in this regard, the learned judges not only misdirected themselves in regard to the burden of proof, but also failed to discharge its constitutional mandate of determining whether nexus between the appellant's governance function and the impugned procurement process was established such as to meet the threshold of Article 181 of the Constitution. I would therefore concur with the submissions made by the appellant and the cross appellant that the learned

judges erred in failing to discharge its constitutional powers and also failing to apply the precedent set in Nyeri Civil Appeal No 21 of 2014.

Lack of Fair Hearing and Bias

[54] On the issue of lack of fairness and bias, the appellant contended that there was likelihood of bias on the part of the Special Committee of the Senate tasked with investigating the allegations against the appellant. This was because it was the same Committee that had investigated the allegations against the appellant in regard to the first process of removal wherein they had found the appellant culpable; and that the allegations made in the second process of removal was based on the same allegations that they had earlier investigated.

[55] In this regard the following finding in the judgment of the High Court is pertinent:

> ***"Although we do not find anything untoward in the filling of the Special Committee with members who had dealt with the first removal, we share the petitioners' concerns that the decision by the Senate did not give the impression that justice would be seen to have been done. We would therefore strongly advice against such course of action in future. The Court in Wambora 1 did indeed declare the first removal null and void, but that order did not disabuse the minds of the members of the Special Committee of the information gathered during the first hearing. Human beings are prone to prejudices and biases and any independent observer may easily reach the conclusion that the 1st Petitioner was not treated fairly by being subjected to the same people who had dealt with him before over the same matter.***
>
> ***188. In the circumstances, there ought to have been no difficulty in appointing different members of the Senate to the second Special Committee. In any case, a special committee is formed as and when the need arises. It should be remembered that under Section 33(6)(a) of the Act a special committee can report that particulars of any allegation against the governor have not been substantiated and that would be the end of the matter. The special committee therefore has a critical role to play in the removal proceedings. The fate of a governor may well depend on the report of the special committee.***
>
> ***189. Having said so, we find that no prejudice was occasioned to the 1st Petitioner as the report of the Special Committee was adopted by an overwhelming majority of the whole House. We, however, agree with those opposed to this petition that the Senate has a fixed membership, save for any vacancies, during its lifetime, and where a matter is supposed to be handled by the House then nobody should be heard to say that the matter ought to have been handled by different people for there can only be one Senate at a time. Nothing however, turns on this issue."***

[56] With respect, while the learned Judges made a clear finding that there was likelihood of bias in the appointment of the same members of the committee that had earlier investigated similar allegations against the appellant, as members of the Special Committee in the second removal process, the Judges erred in overlooking that likelihood because in their opinion there was no prejudice caused to the appellant. The test that the Judges were obliged to apply was not whether there was actual bias or prejudice, but simply likelihood of bias. I reiterate what this Court stated in ***Attorney-General v. Anyang' Nyong'o& Others*** [2007] 1E.A. 12;

> ***"The objective test of 'reasonable apprehension of bias' is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable apprehension, in the view of a reasonable, fair-minded and informed member of the public that a Judge did not (will not) apply his mind to the case impartially [?]….. The Court, however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair-minded and informed about all the circumstances of the case..."***

[57] The test that the High Court was obliged to apply was the impression of a reasonable and fair- minded member of the public, in regard to the impartiality of the Special Committee of the Senate in the circumstances obtaining before them. In that regard having found that a reasonable member of the public would form the impression that there was likelihood of bias, the issue of actual prejudice was irrelevant. In any case, the deliberations and the motion by the Senate on the removal of the appellant were guided by the report of the Special Committee of the Senate, and if the Committee that produced that report was made up of members whose impartiality was in issue, then it cannot be truly said that there was no actual prejudice caused to the appellant.

Conclusion and Final Orders

[58] I come to the conclusion that although the High Court carried out its supervisory jurisdiction and reviewed the exercise of power by the 1st to 4th respondents in the removal process of the appellant, the conclusions arrived at by the learned judges that the process was flawless was inconsistent with the findings made by the learned judges which findings revealed that there was no public participation in the process; and that there was appearance of bias on the part of the Special Committee of the Senate that carried out investigations into the allegations upon which the process was anchored. Further, the High Court failed to carry out its constitutional mandate, as it did not address the issue of nexus and threshold in regard to the grounds upon which the removal was made. Therefore the judgment of the High Court cannot stand. I would allow the appeal. As my brother and sister Judges are in agreement, final orders shall issue setting aside the orders made by the High Court on 12th February, 2014, and substituting thereof an order allowing the amended petition and issuing orders as follows:

i. A declaration that section 33 of the County Government Act is not inconsistent with Article 1, 2(1), 10, 118 (1)(b), 174, 196 (1)(b) of the Constitution in regard to public participation in the removal of a County Governor rather it is the Embu Standing Orders that are inconsistent with the constitutional requirement of public participation because of the stringent timelines;

ii. A declaration that the cross-appellants and members of the public are entitled to participate in the process of removing the Governor of Embu County from office and that the process of removal of the appellant from office as Governor of Embu County was vitiated by lack of public participation;

iii. A declaration that the resolution of impeachment passed by the Senate pursuant to the report of the Special Committee of the Senate was vitiated by the appearance of bias on the part of the Special Committee of the Senate;

iv. A declaration that Article 181 of the Constitution was not complied with as the threshold for the impeachment of a Governor envisaged under Article 181 was not met no nexus having been established between the conduct of the appellant and the allegations subject of the grounds for removal;

v. That orders of certiorari do issue to remove to the High Court and quash the resolutions passed by the County Assembly of Embu dated 29th April 2014 and the Senate on the 13th May 2014 to remove the appellant as the Governor of Embu County;

vi. That an order of certiorari do issue to remove to the High Court and quash the resolution passed by the Senate on the 13th May 2014 to impeach the Governor of Embu County.

vii. That in light of the public interest element and the jurisprudence emerging from this matter, each party shall bear their own costs in the High Court and this appeal.

Those shall be the orders of the Court

Dated, Signed and delivered this 11th day of December, 2015

H. M OKWENGU

…….

JUDGE OF APPEAL

JUDGMENT BY G.B.M. KARIUKI SC

1. This judgment springs from the decision of the High Court (Mwongo PJ, Korir & Odunga JJ) delivered on 12th February 2015 dismissing consolidated Petitions Numbers 7 and 8 both of 2014. Petition No.7/2014 was by Governor Martin Nyaga Wambora (who is hereinafter referred to as "the appellant") and Petition No 8 of 2014 was by 32 registered voters in the County of Embu, who contended that their rights to participate in the process of removal of the appellant from office as governor of Embu County had been violated and they sought a declaration to that effect. In both petitions, it was contended that the required threshold for participation by members of the public entitled to participate pursuant to Articles 118 (1) (b), 174 (a), and (c) and 196 (1) (b) of the Constitution had not been attained. Declarations were sought to the effect that –

> ***"public participation is a Pre-condition to proceedings for removal of a governor under article 181 of the Constitution; the act of removing a County Governor is not an exclusive affair of the county assembly and the Senate; the resolution passed by the County Assembly on 29th April, 2014 is null and void for having been passed by the County Assembly in contravention of County Assembly of Embu Standing Order No.86 and the Senate in toto contravention of Standing Order No.92 of the Senate Standing Orders; that the impeachment passed by the Senate pursuant to a resolution passed by the County Assembly of Embu on 29th April, 2014 is null and void; that Section 33 of the County Government Act is unconstitutional***

for being in conflict with the flying over the face of Article 1, Article 2(1) and (2), Article 10, Article 118 (1)(b), Article 174 (a) and (c) and Article 196(1)(b) for failing to allow public participation and involvement in the removal of a county Governor; that the threshold of the impeachment of a Governor as convisaged (sic) under Article 181 of the Constitution were read together with other provisions (sic); that the petitioners herein are entitled to the full protection of their right to information and the same right has been violated;"

2. The petitioners in both Petitions sought an order of certiorari to remove to the High Court for the purpose of quashing the resolution passed by the county assembly of Embu dated 29th April 2014 to remove the appellant from office as Governor of Embu County. Also sought were orders of certiorari to remove into the High Court for quashing the resolution passed by the Senate dated 13th May 2014 to impeach the appellant as Governor of Embu County.

3. When the appeal came up for hearing before us on 22nd October 2010, the appellant was represented by learned Senior Counsel Mr. Paul Muite who led Messrs Issa Mansur, Mr. Wilfred Nyamu and Mr. Peter Wanyama. The 1st and 2nd respondents were represented by learned Senior Counsel Mr. Tom Ojienda who led Mr. Njenga. Learned counsel Mr. Thanji appeared for the 5th respondent. There was no representation for the Speaker of the Senate and the Commission on Administration of Justice who were named as the 3rd and 6th respondents respectively. The 7th respondent was represented by learned counsel Mr. Ndegwa. The parties had filed written submissions which the learned counsel highlighted as shown in the lead judgment by the presiding judge, Okwengu JA.

4. The brief background to the petitions that resulted in the impugned judgment of the High Court in this; the appellant was first governor to be elected in the County of Embu after the promulgation of the 2010 Constitution. He became the first governor to be impeached under the Constitution which introduced devolution as a new structure of governance and also brought power to the people at the grassroots on how they are to be governed. The appellant survived the first impeachment in January 2014 when the High Court invalidated it. But no sooner had the High Court invalidated the impeachment of the appellant than the Embu County Assembly initiated on 16th April 2014 another motion for his removal from office which the appellant and 32 voters of the County of Embu challenged in Petitions Nos. 7 of 2014 and 8 of 2014 respectively.

5. The appellant's impeachments in January 2014 and 29th April 2014 were based on the same grounds. That the High Court was alive to this fact is reflected in paragraph 4 of its impugned judgment which states, correctly in my view, that –

"4. The basis of the impeachment presently complained about, is a replication of the first impeachment process. The substance of the facts giving rise to the complaints allegedly occurred in 2013. The County Government of Embu had advertised tenders for the supply of maize, and had procured services to face-lift Embu stadium. According to the complaint in the County Assembly, the maize was allegedly below quality and did not germinate. Where it did grow, such growth did not exceed more than 20 percent. As for Embu Stadium, it was alleged that the amount spent on it far exceeded what had been budgeted for, and the refurbishment was unsatisfactory. The Members of the County Assembly found this inexplicable as the project had been taken over from the Ministry of Works which had done some of the works."

6. It seems the appellant declined to act on the recommendation of the County Assembly as a result of which the latter tabled an impeachment motion in the County Assembly for his removal from office.

7. The record of appeal shows that the appellant did not appear in the County Assembly to respond to the motion and consequently, on 29th April 2014, the Embu County Assembly debated it and 23 out of 33 members constituting two-thirds supported it and ostensibly the threshold was met. The speaker of the Senate was notified pursuant to Section 33 (2) of the County Governments Act who in turn constituted a Special Committee of the Senate pursuant to Section 33(3)(b) of the County Governments Act which found merit in the allegations against the appellant.

8. The High Court (Mwongo PJ, Korir and Odungu, JJ) heard the parties through written submissions and oral hearing on 6th November 2014. After perusing and examining the amended petition, and the affidavits and annextures thereto, including the reports in the record of appeal and after examining questions for interpretation put forward by the appellant in the context of the respective cases for the appellant and the respondents, and after considering the submissions and the law including **The Constitution, TheCounty Governments Act** (Chapter 265), **The Public Procurement and Disposal Act**, 2005, **The Public Finance Management Act 2012**, (Chapter 412), **International Convention on Civil and Political Rights of 1996**, **The African (Banjul) Charter on Human and Peoples' Rights, Government Proceedings Act** Chapter 40, the High Court found that the Special Committee of the Senate in execution of its

mandate under Section 33 of the County Governments Act and Standing Order 68 of the Senate Standing Orders had found as proved the charges against the Appellant on gross violation of the Public Procurement and Disposal Act, Chapter 412A, and Public Finance Management Act, Chapter 412C, and The Constitution of Kenya (2010) and upheld the decision (by the Senate Special Committee). At paragraph 250 of its judgment, the High Court observed that –

> ***"a perusal of the report clearly shows that the Senate analysed the evidence put forward in support of each allegation. The Senate also considered the 1st Petitioner's (i.e. the appellant's) written answer to the charges before making its determination ..."***

9. In paragraph 254, 255, and 258 of its judgment the High Court stated –

> ***"254.The allegation of gross violation of the Constitution was considered by the special Committee which made several observations one of them being at pages 66-67 as follows:***
>
> ***"150. The Special Committee further observed that the standard response by the Governor to all the allegations set out by the County Assembly has been "it was not me". This response by the Governor does little to "promote public confidence" in the office of the Governor as required under Article 73(1)(a)(iv) of the Constitution. The Governor seems to have abdicated from taking any responsibility for the goings on in his office and in his County, despite being the elected chief executive of the County. This is in violation of Article (sic) 73(2)(d) of the Constitution which requires that State officers be guided by the principle of "accountability to the public for decisions and actions".***
>
> ***"255.In Wambora 1 Appeal the Court stated that the standard of proof in such proceedings is;***
>
> ***"...neither beyond reasonable doubt nor on a balance of probability. Noting that the threshold for removal of a governor involves "gross violation of the Constitution", we hold that the standard of proof required for removal of Governor is above a balance of probability but below reasonable doubt."***
>
> ***If that be so, then we do not hesitate to hold that the Senate attained this standard.***
>
> ***"258.From the foregoing it is apparent that the Senate understood the constitutional threshold that had to be met. We have no reason to fault the Senate in its conclusion."***

10. The High Court in paragraphs 260 and 259 of its judgment made the following findings –

> ***"259.In line with our power to consider the reasonableness of the decision of the Senate, we have looked at the Report and find nothing in it that would invite the review powers of this Court.***
>
> ***260. In summary, our view is that this Court can only review proceedings relating to the removal of a governor. We have nevertheless subjected to scrutiny the Report of the Special Committee on the removal of the 1st Petitioner and we have found the same to be satisfactory. We find no reason for disturbing the decision of the Senate. Whether or not we agree with it is another thing altogether."***

11. The High Court disposed the petitions before it in paragraph 262 of its judgment in which it held, inter alia, that *"the due process for theremoval of a governor was followed in the removal of the governor of Embu County, Hon. Martin Nyaga Wambora"* and *"the removal process of the governor requires that an opportunity be afforded to the public to participate therein which opportunity was afforded in the instant case"* and that "the courts can intervene where constitutional issues are raised and that the petition failed and was therefore dismissed.

12. The Memorandum of Appeal contains 17 grounds of appeal which raise the issues whether the High Court failed to observe stare decisis by not upholding and applying the binding decision in C. A. Civil Appeal No.21 of 2014 (**Martin Wambora & 3Others V. Speaker of theSenate and 6 Others**; **whether** the High Court failed to determine the threshold in Article 181 of the Constitution in light of Civil Appeal No.121 of 2014; **whether** the alleged gross violations of the Constitution were proved; **whether** there was any nexus between the acts complained of and the conduct of the appellant qua governor to warrant removal; **whether** Section 33 of the County Governments Act is constitutional; **whether** the special committee of the Senate was impartial and **whether** the High Court should have found that it was not; **whether** the right test on bias in relation to the special committee of the Senate was applied; **whether** there was public participation in the removal of the appellant from office and **whether** the High Court erred in law in holding that it was not possible in the case of the appellant due to strict time lines; **whether** the court contradicted itself in holding that there was compliance with Article 196(1)(b) of the Constitution; **whether** the Speaker of the Senate and the Senate had controverted the appellant's case; **whether** the due process envisaged by the Constitution in removal of a governor from office was followed; **whether** the High Court applied correct principles in interpreting the Constitution.

13. The appellant prays in his memorandum of appeal that (a) the appeal be allowed and the judgment of the High Court be set aside and in its place an order be made allowing the Petition dated 30th April 2014 and (b) the removal of the appellant from office pursuant to resolutions passed by the County Assembly of Embu on the 29th of April 2014 and the Senate be set aside and declared null and void and (c) that costs of the appeal be granted to the appellant and be borne by the 1st, 2nd, 3rd, 4th and 5th respondents.

14. I have perused in draft the lead judgment by the presiding judge, Lady Justice Okwengu JA. I am in agreement with it. It renders it unnecessary for me to repeat all the facts or to delve into all the issues raised in this appeal. I therefore propose to focus my comments only on some of the issues.

15. The issues that emerge for determination in this appeal in relation to the removal of the appellant from office and public participation relate to the questions **whether** the appellant qua governor bore personal responsibility for the charges relating to procurement on which his removal was predicated and/or was vicariously liable for the actions of the officers under him; **whether** the special committee of the Senate which comprised the same members who found the appellant guilty in the first impeachment could escape the charge of bias in the circumstances of the second impeachment; **whether** there was public participation as required by law in the removal of the appellant from office; **and whether** the threshold of impeachment was attained in the appellant's case.

16. Removal of a governor under Article 181 of the Constitution for gross violation of the Constitution must be in harmony with the Constitution and in considering the threshold must have regard to, first, the objects of the devolved government set out in Article 174 of the Constitution which include promotion of democratic and accountable exercise of power; giving powers of self-governance to the people and enhancing the participation of the people in the exercise of the powers of the State and in making decisions affecting them. Secondly, the principles of devolved government which are required by Article 174 of the Constitution to reflect democratic principles and the separation of powers. Thirdly by dint of Article 179 (1) of the Constitution, the fact that the executive authority of a county is vested in and exercisable by a county executive committee headed by the governor to whom members of the county executive committee are accountable for the performance of their functions and exercise of their powers by virtue of Article 179 (6) of the Constitution.

17. Article 181(1) of the Constitution provides that a county governor may be removed from office on, inter alia, ground of gross violation of the constitution or any other law; or for abuse of office or gross misconduct.

18. The procedure for removal of a county governor from office is provided in Section 33 of the County Governments Act. The process is triggered by a motion of the county assembly supported by two thirds of all the members of the County Assembly presented to the Speaker of the Senate who in turn convenes a meeting of the Senate to hear the charges against the governor. The Senate by resolution may appoint a special committee as was the case in this appeal comprising eleven members to investigate the matter and report to the Senate on whether it finds the allegations substantiated.

19. Gross violation of the Constitution which the appellant was accused of is a serious charge. Where, as in this appeal, the acts constituting the charge involve a member of the county executive, a nexus must be established between the governor and such member and the alleged violation. If complicity or collusion is alleged on the part of the governor in illegal procurement of goods or services, the court must be satisfied that evidence was tendered to prove it for a charge of gross violation of the Constitution to hold.

20. It is common knowledge that Kenya is besotted with politics. Is there growing polarity between county governors and members of County Assemblies, and might this undermine the object of the Constitution on devolution which is in its nascent stages? Might this in turn polarize public opinion? Do powers of County Assemblies to impeach governors constitute a sword of Damacles that might undermine democratic governance and emasculate devolution? Do Governors have to look over their shoulders all the time to ensure they do not rub the County Assembly members the wrong way least they incur their wrath through impeachment? If so, is this healthy for devolution; how will the expectations of the Constitution be better safeguarded and met?

21. The Judiciary as an independent arm of the government has the unique responsibility of ensuring proper interpretation and enforcement of the Constitution. Gross constitutional violations were alleged in the removal from office of the appellant as governor of Embu County.

22. On the issue of the appellant's responsibility for the acts constituting the charges; there is no dispute that the acts related to procurement of goods and services by the Tender Committee. There was no evidence on the basis of which complicity or collusion on the appellant's part could in law be justified. Without such evidence, the necessary nexus was nonexistent. The governor could not carry personal responsibility for the acts of the junior officers in the county executive committee and the doctrine of vicarious liability has no application. The fact that a county governor is accountable for the management and use of the county resources by dint

of Section 30(3) of the County Governments Act as the High Court correctly found, did not provide a nexus. A nexus had to be established between the alleged gross violation and the conduct of the governor. For that reason, it behoved the High Court to interrogate the facts to see if there was a connection. It did not. The court however lamented that there was no evidence supplied to enable it interrogate whether the governor was personally involved. Yet the court went ahead and analysed the report of the Senate Special Committee on the allegations against the appellant and held –

> ***"we have nevertheless subjected to scrutiny the Report of the Special Committee on the removal of the 1st Petitioner (the appellant) and we have found the same satisfactory. We find no reason for disturbing the decision of the Senate. Whether or not we agree with it is another matter altogether."***

23. Here, on the one hand, the court acknowledged that there was no material placed before the Special Committee of the Senate to assist in determining whether there was a connection between the conduct of the appellant as governor and the alleged gross violation. On the other hand, the court "scrutinized" the Senate Special Committee Report to its satisfaction. Even more startling is the court's decision that *"whether ornot the court agrees with it"* it was satisfactory. Allegations of gross violation of the Constitution against a public officer are serious. They call for high standard of proof as stated in the Nyeri C.A. Civil Appeal No.21 of 2014 (Martin Wambora & 3 Others Vs Speaker of the Senate. In the instant appeal, there was nothing to show the nexus and therefore the charge against the appellant could not hold.

24. On the **issue of bias**, the facts are clear. The charges were the same in the 2nd impeachment as they were in the first impeachment. The issues were also the same in the first impeachment as they were in the second. They related to procurement of goods and services. The composition of the Senate Special Committee that found the appellant responsible in the first impeachment was the same as the one in the second impeachment. Could the members of the Senate Special Committee fairly investigate the charges having already done so earlier and arrived at a decision to impeach? Were the minds of the members not tainted? The High Court on the one hand expressed the view that it was not proper for the same committee in the first impeachment to deal with the second impeachment. It agreed with the appellant's concerns and in their own words stated –

> ***"we share the petitioner's (appellant's) concerns that the decision by the Senate did not give the impression that justice would be seen to have been done. We would therefore strongly advise against such course of action in future.... Human beings are prone to prejudices and biases and any independent observer may easily reach the conclusion that the 1st petitioner (the governor) was not treated fairly by being subjected to the same people who had dealt with him before over the same matter."***

25. It is plain to see that the High Court found that there was a perception of bias in the composition of the Special Committee of the Senate. In spite of this, they went ahead to find that all was well. In its view, no prejudice would be occasioned to the appellant. That smacked of indecision if not also of contradiction.

26. On the basis of the facts before the Court, it was clear that reasonable apprehension of bias was shown. The appellant could not expect fairness. Accordingly, the decision by the Senate Special Committee could not stand as fair. It was clearly in breach of the appellant's right to a fair administrative action under Article 47 of the Constitution.

27. In Committee for **Justice and Liberty et al. V. National Energy Board et al [1978] 1 SCR 369, 1976 Can L 112 (SCC**), the Supreme Court of Canada (per Laskin C.J. and Ritchie, Spence, Pigeon and Dickson JJ) where objection was taken to the participation of one Mr. Crowe in the National Energy Board which considered applications under S.44 of the National Energy Board Act because he had in a representative capacity participated in a Study Group and where the Board was quasi-judicial and was enjoined to observe the rules of national justice, the Court held –

> ***"a reasonable apprehension of bias arises where there exists a reasonable probability that the judge might not act in an entirely impartial manner...***
>
> ***The test of probability or reasoned suspicion of bias, unintended though the bias may be, is grounded in the concern that there be no lack of public confidence in the impartiality of adjudicative agencies, and emphasis is added to this concern in this case by the fact that the Board is to have regard to the public interest."***

28. Yet in another decision by the Supreme Court of Canada in the case of Ontorio Labour Relations Board, (**International Brotherhood of Electrical Workers**, local 894 **Versus Ellis – don Limited** [1990] 1 SCR 282 –) the question of breach of rules of national justice arose when the appellant learnt that a first draft of the decision would have dismissed the grievance and that a full Board meeting had been held during which this draft was discussed. The Court held –

> ***"in the case of bias, the state of mind of the decision-maker, evidence of bias is often difficult to apprehend directly. Therefore, the test adopted had to be usually limited to the demonstration of a reasonable apprehension that the mind of the adjudicator might be biased. If a requirement to establish actual bias had been adopted as a general principle, judicial review for bias would be a rare event indeed."***

29. On the ground of reasonable apprehension of bias, the report of the Special Committee of the Senate could not stand.

30. The issue of **public participation** has been elaborately dealt with in the lead judgment of the presiding judge. I need only add a few comments. People's participation is not only one of the national values and principles under Article 10 of the Constitution. It is also a requirement in legislative and other businesses of the County Assembly vide Article 196 of the Constitution. One of the issues raised in the petition was whether public participation is a requirement in impeachment of a governor. The High Court correctly held that there ought to be public participation in the removal of a governor. The court expressed the view that some level of participation is necessary to avoid situations where a popular governor is removed from office due to malice, ill-will and vendetta of the members of the County Assembly. (But more often it is due to rivalry and turf political wars.) The problem however lies on the extent of public participation as in the case in this appeal. The litany of activities presented by the County Assembly as constituting public participation were general in nature and were not specific enough as to the event of removal of the governor, the Appellant. The High Court was persuaded that that was enough public participation.

31. While public participation is not cast in stone and while there are no hard and fast rules on how it should be conducted, the extent of public participation conducted by the Embu County Assembly was clearly far too inadequate. In his decision in **Nairobi Petition No.532 of 2013 Peter N. Gakuru & Others V. Governor of Kiambu County & Others**, Odunga J provided useful guidelines. The learned judge correctly expressed himself as follows on the matter –

> ***"... it is not just enough in my view to simply "tweet" messages as it were and leave it to those who care to scavenge for it. The County Assemblies ought to do whatever is reasonable to ensure that as many of their constituents in particular and the Kenyans in general are aware of the intention... I hold that it is the duty of the County Assembly in such circumstances to exhort its constituents to participate in the process of the enactment of such legislation by making use of as may fora as possible such as churches, mosques, temples, public barazas, national and vernacular radio broadcasting stations and other avenues where the public are known to converge to disseminate information with respect to the intended action."***

32. The decision of the High Court on public participation is not supportable. The court was in error.

33. On the issue relating to ***"gross violation of the Constitutionor any other law"*** under Article 181 (1) (a) of the Constitution, the court rightly held that gross violation has to be intentional and persistent violation of the Constitution and that the standard proof must be above the balance of probabilities and not necessarily beyond reasonable doubt.

34. The court pronounced itself correctly on the law, but drifted away from determining whether the impeachment met the **threshold** or whether the alleged facts and evidence supported the impeachment charge. In skirting around the issue, it consoled itself that the court ought to be careful not to determine what amounts to gross violation in the circumstance under the guise of separation of powers. In the face of the serious charge of gross violation of the Constitution, it behoved the High Court to examine the basis on which the charge was pegged. The High Court should have upheld and applied this court's decision in Nyeri Civil Appeal No.21 of 2014. It did not. The High Court erred in its decision in this regard.

35. This appeal reflects the dire need to better safeguard devolution and good governance at both the County government level as well as the National government level. Governors who are popularly elected by the majority voters, who discharge their duties satisfactorily and adhere to the Constitution and the law, ought not to be in office at the mercy of the County Assembly. That is not what is intended by the Constitution.

36. In the result, I allow the appeal and set aside the High Court judgment and the order dated 12th February 2014 dismissing the petition and in its place, I concur with the orders proposed by the presiding judge in her lead judgment.

Dated and made at Nairobi this 11th day of December, 2015.

G.B.M. KARIUKI SC

.....

JUDGE OF APPEAL

I certify that this is a true copy of the original

DEPUTY REGISTRAR

JUDGMENT OF J. MOHAMMED, J.A.

I have had the advantage of reading in draft the lead judgment of Okwengu, J. A. and agree with her entirely.

Dated and **delivered** this 11th day of December, 2015.

J. MOHAMMED

……

JUDGE OF APPEAL

Gladys Boss Shollei v Judicial Service Commission & another [2014] eKLR

REPUBLIC OF KENYA

IN THE INDUSTRIAL COURT OF KENYA

AT NAIROBI

PETITION NO. 39 OF 2013

GLADYS BOSS SHOLLEI ..... PETITIONER

Versus

JUDICIAL SERVICE COMMISSION ..... RESPONDENT

COMMISSION ON ADMINISTRATIVE JUSTICE.....AMICUS CURIAE

Donald Kipkorir for the Petitioner

Senior Counsel Paul Muite, assisted by

Issa Mansour for the Respondent

Vincent Chahale for the *Amicus Curiae*

JUDGMENT

1. The Petitioner, Gladys Boss Shollei is the erstwhile Chief Registrar of the Judiciary (hereinafter 'CRJ') whereas the Respondent is the Judicial Service Commission (hereinafter 'JSC').

The Petition dated 31st October 2013 was filed on 1st November 2013 at the Constitutional Division of the High Court.

The Petitioner sought various orders pursuant to *Article 23(3) of the Constitution* against the Respondent as follows:-

a. *that, order of Certiorari to issue to quash the letter of removal dated 18th October, 2013.*

b. *that, order of Certiorari to issue to quash the proceedings of 18th October 2013.*

c. *that, an order of Mandamus to issue compelling the Respondent to comply with the applicable law.*

d. *that, prohibition do issue against the Respondent from in any way proceeding against the Petitioner other than as by law provided.*

e. *that, Declaratory orders to issue that the Respondent violated the Petitioner's rights as set out.*

f. *that Declaratory orders to issue that the allegations against the Petitioner and the reasons given for her dismissal do not exist in law, and thereby void.*

g. *that, Declaratory orders do issue that the Judicial Service Act, 2011 is void to the extent of its inconsistency with the Constitution.*

h. *that, an order of compensation do issue for violation of the Petitioner's rights and an inquiry to Quantum be gone into.*

i. *that, such further orders or relief do issue pursuant to Article 23(3) of the Constitution.*

j. *that, costs be provided for the Petitioner.*

2. The Petition together with an Interlocutory Application dated 31st October, 2013 seeking various interim orders were transferred by **Honourable MumbiNgugi J.** pursuant to *Article 162(2)* of the Constitution as read with *Section 12 of the Industrial Court Act, 2011*.

The matter was heard interparties on 15th November 2013, and a ruling was made on 22nd November 2013 where the Court;

i. declined to reinstate the Petitioner to the position of CRJ pending the hearing of this petition;

ii. found that a prima facie case of bias by JSC against the Petitioner had been established.

3. The Commission on Administrative Justice was admitted as *Amicus Curiae* and directed by the Court to file *Amicus Curiae* written brief, which brief was filed on 6th December 2013.

The Respondent sought leave to file supplementary response to the petition. The leave sought was not opposed by the Petitioner and the same was granted.

Accordingly, the Respondent relies on the initial Replying Affidavit deposed to by **Winfred Mokaya** dated 14th November 2013 and filed on the same date and the Supplementary Affidavit dated 23rd January 2014 and filed on 24th January 2014 deponed to by the said Winfred Mokaya.

4. Facts of the case

That the Respondent resolved to terminate the appointment and remove the Petitioner from office as the CRJ vide a letter dated 18.10.13 with immediate effect.

That though the letter of termination did not contain the reasons for the decision to terminate, a media release of the same date by The Hon. The Chief Justice (hereinafter 'The CJ') set out that they had removed the Petitioner for:

i. incompetence;

ii. misbehavior;

iii. violation of prescribed code of conduct for Judicial Officers;

iv. violation of Chapter 6, and Article 232 of The Constitution; and

v. insubordination.

5. The letter of termination and removal reads thus;

"RE: Removal from office as the Chief Registrar of the Judiciary:

"Following the disciplinary proceedings initiated against you by the Judicial Service Commission as per the allegations set out in the Commission's letter dated 10th September, 2013, and having considered your written and oral responses, the Commission has deliberated on the same and reached a decision.

The Commission is satisfied that the requirements set out under Section 12(1)(b)(c)(d)(f) and (g) of the Judicial Service Act 2011, have been met.

Accordingly, the Commission in its sitting of 18th October, 2013 in exercise of its mandate as set out in Article 173 of the Constitution has UNANIMOUSLY resolved to terminate your appointment and remove you from office as the Chief Registrar of the Judiciary with effect from 18th October, 2013.

Hon. Dr. Willy Mutunga,

D. Jur, Sc, EGH

Chairman Judicial Service Commission."

6. That on 20th August 2013, the Petitioner was sent on compulsory leave and the public was invited to lodge complaints against her. This followed a meeting of the JSC held at Mombasa on 17th August 2013 in which it is common cause that The CJ, The CRJ, and The Hon. The Attorney General (hereinafter 'The AG') who are members of the JSC were absent.

It is also common cause that on 7th August 2013, the Registrar of JSC **Winfrida B. Mokaya** notified all the Commissioners of the proposed JSC members retreat scheduled for the 15th to 18th August 2013 via an Email. In that email, she noted that the Petitioner had already travelled out of the country and would therefore not be available during the period of the retreat. The email ended thus;

"In view of the discussions and for team building during the retreat, the Hon. Chairman has advised that we consult Commissioners if the retreat should proceed in the absence of the Secretary."

The email is attached to the supplementary affidavit of the Respondent.

7. As it came to pass, the retreat went on as scheduled in the absence of the Petitioner and on 17th August, 2013, members present resolved to suspend the Petitioner from her office. That there was no Agenda circulated to the members nor to the Petitioner prior to the retreat to discuss the Petitioner's conduct or intended removal from her office.

That upon return to Nairobi, a full meeting of JSC was convened on 18th August, 2013 and the Mombasa decision was ratified by a majority of five(5) members out of the nine(9) at the meeting.

8. Following the ratification of the Mombasa decision, and at a press conference held after the meeting on 18th August, 2013, which was a Saturday, it was announced that the Petitioner had been suspended from office.

On 20th August, 2013 the Petitioner was sent on compulsory leave pending investigations into her conduct and the members of the public were invited to lodge complaints against her.

Two committees of JSC were tasked by JSC to investigate the Petitioner's conduct and make a report to the JSC.

9. The Charge Sheet

By a letter dated 10th September, 2013, JSC sent the Petitioner a charge sheet comprising of 87 specific allegations under five heads as follows;

1. financial mismanagement;
2. mismanagement in Human Resource;
3. impropriety in procurement
4. insubordination; and
5. misbehaviour.

The charge sheet spreads over 18 pages from page 17 to 34 of the Petitioner's supporting affidavit.

In addition the document refers the Petitioner to many annextures in most of the counts.

10. The CJ via the forwarding letter of 10th September, 2013, gave the Petitioner 21 days within which to respond to the allegations aforesaid.

The Petitioner on 1st October, 2013, submitted an interim response to the allegations under protest contained in the covering letter of the same date.

The substance of the protest was that due to the nature of allegations made, she required reports from the various Directors and the Procurement Committee on the specific allegations.

On 12th September 2013, two days after receiving the allegations, she had requested for extension of time to enable her gather information from the Directorates of Procurement, Finance, Human Resources and the Tender Committee. The Directors had themselves requested for four (4) weeks to submit their reports.

The rationale was that the CRJ managed the Judiciary by proxy and relied most of the time on these officers.

The Petitioner did not receive a response to her request until she wrote again on 29th September 2013 and got a response from the CJ via an email dated the same date in which the Petitioner's request for extension of time was refused.

The Petitioner indicated that, given more time she was in a position to make a comprehensive response to the allegations made against her.

It is noteworthy that by this time, the petitioner had resumed her duties from compulsory leave by consent of the parties following an urgent Application filed by the Petitioner at the High Court.

The Petitioner requested to be allowed to submit her final response by 15th October, 2013. She also requested to be allowed to make oral presentation at the hearing and since the allegations against her were made to the public and the matter had generated a lot of public interest, the hearing be held in public to allow Kenyans to judge the matter for themselves.

On 3rd October, 2013, the Respondent issued a press release indicating that upon considering the response by the Petitioner to the allegations of impropriety leveled against her, a hearing was scheduled to take place on 16th October 2013.

Indeed on 15th October, 2013, the Petitioner submitted a final report comprising 73 typed pages.

12. On the 16th October, 2013, Petitioner appeared before the full JSC accompanied by her advocate, **Donald B. Kipkorir**. Preliminary objections to the proceedings were raised by counsel for the Petitioner to wit;

i. that JSC had no jurisdiction to discipline CRJ;

ii. that some of the Commissioners had previous issues with the Petitioner and thus, the Petitioner had real apprehension of likelihood of bias by the named Commissioners.

iii. that there was a trove of emails to and from the CJ (sources not disclosed) which shows that the fate of the Petitioner had already been decided by persons within and out of the Judiciary who had designated themselves as a 'war council.' That it was up to the CJ to decide if his conscience allowed him to sit in judgment of the Petitioner given this background.

iv. that the Petitioner required at least one(1) week to prepare for the hearing because the Petitioner was not aware of the nature of the proceedings up until that moment in that they were not sure whether this was a Preliminary Inquiry or if it was a disciplinary hearing;

The JSC considered the objections by the Petitioner, summarily dismissed them to be without merit, and granted the Petitioner two days more to prepare for the disciplinary hearing which was then scheduled for the 18th August 2013.

13. On the 18th October 2013, Counsel, Donald B. Kipkorir again appeared before the JSC with the Petitioner and presented what was referred to as **"Closing submissions under Protest."** The five (5) page document signed by the counsel was presented to the Court on page 99 – 104 of the Petitioner's supporting affidavit.

14. The disciplinary hearing did not proceed on the substantive issues because again on the 18th August 2013, the Counsel for the Petitioner reiterated the objections raised on 16th August 2013 as follows:

i. **The JSC had no jurisdiction to conduct a disciplinary process against the CRJ on the allegations made because;**

a. **CRJ reports only to and is accountable to the National Assembly and Auditor General on financial matters pursuant to *Articles 226(2) and 229 of the Constitution;***

b. **That by the provisions of *The Public Finance Management Act 2012*; *The Public Procurement and Disposal Act (PPDA) 2005*, *The Public Officer Ethics Act, 2003 and Economic and Anti-corruption Commission (EACC)Act,2011, the CRJ* is subject to oversight by the *National Assembly, PPOA and EACC.***

That were the CRJ in breach of any provisions of the law, it is these statutory bodies who will carry out investigations and make recommendations to the JSC to initiate disciplinary proceedings. That the JSC needed

to determine this issue of jurisdiction before proceeding any further with the disciplinary hearing.

15. The JSC was not impartial and would not give the Petitioner a fair hearing because;

a. CRJ has demonstrated in the final Report that Commissioners Christine Mango, Emily Ominde, Ahmednassir Abdullahi, and Mohammed Warsame were biased against her due to past incidents between each one of them and the Petitioner. The Petitioner pointed out that JSC does not make a corporate decision removed from the alleged bias, as it acts by individual votes, in favour or against a decision;

b. The CRJ had filed a bundle of emails running into nearly 200 pages emanating from and to the CJ demonstrating that the removal of the CRJ is a continued conspiracy by a 'war council' to which the CJ is a member. The CJ is thereof presiding over a process tainted with ulterior motive and illegality. That moral conscience, if not anything else demands that the CJ should not sit in these proceedings.

16. The disciplinary process is Quasi-criminal in nature and must have the following basic elements that were lacking in the present case;

a. a complaint and charge setting out the offence and the particular provisions of the law broken;

b. particulars of the offence;

c. names and statement of the complainants; and

d. sufficient time for the accused to prepare adequately and be allowed to gain access to all exculpatory evidence.

That none of the above was provided to the CRJ, therefore the allegations as they stood were embarrassing, cannot possibly be a addressed in two(2) days provided by the JSC to ventilate the matter. Accordingly the whole procedure was in contravention of *Articles 27(1), 35(1)(b), 47(1)&(2) and 50(1)&(2) and 236(b) of the Constitution* in that it had contravened the Petitioner's right to fair administrative action, that is expeditious, efficient, lawful, reasonable and procedurally fair.

Furthermore, the Petitioner had been denied the right to a fair hearing by resolving the dispute at hand;

"by the application of law decided in a fair and public hearing before a Court or, if appropriate, another independent and impartial tribunal orbody." (emphasis mine); in that she was not presumed innocent until proved guilty, had no access to essential information and had been denied adequate time to prepare for her defence.

18. The Petitioner's counsel concluded, as he did before Court that the purported disciplinary hearing was tainted with malice, political scoring, tribalism and vendetta and nothing to do with the law. That it was instructive that none of the statutory organs aforementioned had complained against the Petitioner.

19. The Court as had the JSC prior, was asked to find that none of the allegations against the Petitioner had been substantiated. That the same lacked factual and legal basis and in pursuit of this process JSC may have played mortician to the Judiciary.

With regard to the specific allegations made against CRJ, the Final Report from page 105 to page 178 responded blow by blow to each and every of the allegations made against the Petitioner. She denies having admitted any of the offences as alleged by the Respondent.

20. Response

As said earlier, the Respondent filed a replying affidavit of **Winfrida Mokaya**, a Registrar of JSC.

The Respondent has attached to the reply to the Petition a comprehensive matrix of 138 pages comprising JSC allegations; CRJ Responses and JSC findings and observations.

Page I of the annexture to the reply is the letter of removal dated 8th October 2013 followed on page 2 by a document titled: **"A working summary."**

The document summarises the process JSC took in this matter and concludes that Mrs Shollei admitted 33 allegations and denied 38 others and that responses to the other 16 allegations remaining were equivocal and qualified.

21. The Respondent through its counsel**Paul Muite** and **Issa Mansur** has strenuously submitted that the Petitioner was accorded fair administrative action and was indeed given a fair hearing. That JSC is satisfied that due process was followed and in the final analysis Mrs Shollei admitted allegations that account for losses valued at Ksh. 1,696,000,000/=, those denied stood at a value of Ksh. 250,400,000/= and those with mixed responses stood at Kshs. 361,000,000/=.

That JSC accorded the Petitioner 21 days within which to respond and this period was extended by a further 18 days.

22. Counsel submitted that the disciplinary process was fair, transparent, impartial and was in accordance with the law.

Counsel, urged the Court to find that allegations of incompetence, misbehaviour, violation of the prescribed code of conduct for Judicial Officers, violation of *Chapter 6, and Article 232 of the Constitution of Kenya, 2010* and insubordination had been proved against the Petitioner. That this Petition has no merit and same should be dismissed with costs to the Respondent.

23. In the Matrix aforesaid on page 3, it is alleged that JSC has invited the Ethics and Anti-corruption Commission to launch inquiry into the various issues highlighted by the initial disciplinary investigation.

24. Analysis of Facts

It is apposite to note that CRJ was not involved in the Preliminary investigations even though the same became the basis of the raft of allegations against her.

The JSC indicates that it has *"undertaken to engage the public and other Government agencies including Parliament, to explain the* profundity *of the issues at hand."* This is an acknowledgement by JSC that up to the time the Petitioner was removed from the office, none of these agencies had been involved of their own motion, or through invitation by JSC in the issues at hand.

25. The documentation presented by the Respondents before Court do not show what allegations upon consideration by JSC was the Petitioner found guilty of and in respect of which she was not found guilty.

If the Court is meant to assume that CRJ is guilty of the allegations she is said to have admitted, that does not follow in law or in fact. The JSC had in its decision to determine if these facts admitted in the light of the law applicable constitute an offence and if so what administrative penalties are available and therefore applicable to the Petitioner.

The Court is yet to receive any such evidence from the Respondent, documentary or otherwise.

26. As a matter of fact, the letter of removal dated 18th October, 2013, does not indicate whether the Petitioner was found guilty of any of the 87 (33 + 38 +16) allegations preferred against her and if so, in respect of which allegations she had been acquitted.

The letter says:

"The Commission is satisfied that the requirements set out under *Section 12(1)(b)(c)(d)(f) and (g) of the Judicial Service Act 2011*, have beenmet" and no more.

As at the time of hearing this matter the Petitioner had no way of knowing what specific offences she had committed and the reasons for the Respondent arriving at that conclusion especially whether her defence as contained in the final report was taken into account in arriving at that conclusion.

27. Before I embark on delineating the issues that fall to be determined emanating from the aforesaid analysis of facts and the law applicable in the circumstance of this case, it is apposite to examine briefly, the additional evidence introduced by the Respondent by way of a supplementary affidavit filed on 24th January 2014.

The affidavit deponed to by Winfrida Mokaya attempts largely to dispel the specific allegations by the Petitioner that made her to have a reasonable apprehension or suspicion that certain Commissioners including The Hon. Chief Justice; Commissioner Ahmednasir Abdullahi; Hon. Emily Ominde and Christine Mango were biased against her and would therefore not give her a fair hearing.

28. It is instructive to note that none of the Commissioners against whom specific allegations of personal interest were made found it fit to put in their own affidavits denying the specific allegations made against them. The accusations made are largely matters that are said to have arisen as between the Petitioner and the named Commissioners. With regard to Commissioner Ahmednasir Abdullahi, he is alleged to have started a witchhunt against the Petitioner following her refusal to accede to his request with regard to the purchase of a building for the Judiciary in Mombasa, and Eastleigh in Nairobi. He was also alleged to have prodded the Petitioner to let him provide the Judiciary with ICT infrastructure and the Case Management System for the Judiciary which overtures were rebuffed by the Petitioner. Indeed an email from Commissioner Ahmednasir Abdullahi providing his contact person for the purchase of Eastleigh building has been attached to the supporting affidavit of the Petitioner.

29. Hon. Mr. Justice Mohammed Warsame is alleged to have approached the Petitioner with a view to get employment for his acquaintances, which request was severally refused by the Petitioner.

30. Regarding Commissioner Honourable Emily Ominde she is said to have had bad blood with the Petitioner from the word go and this was exacerbated by the Commissioner questioning the deployment of pupils and interns by the Petitioner to the Kibera Law Courts where she was serving as the Chief Magistrate.

Commissioner Christine Mango is said to have developed bad blood against the Petitioner after she questioned and stopped payment of Per diem to her whenever she was in Nairobi contrary to the Public Finance Management Act and regulations which prohibited an officer to earn Per diem for more than 30 days.

In the supplementary affidavit, M/s Winfrida Mokaya does not attest to any personal knowledge or information from the said Commissioners on these issues. It would have been more helpful for the named persons to directly place their perspective on the allegations of personal nature made against them before Court.

31. There was no attempt by the deponent to respond to allegations made against Commissioner Christine Mango.

32. The war council

Regarding the very serious allegation that the disciplinary process against the Petitioner was contrived and pre-determined by the 'war council', as stated earlier, a trove of emails nearing 200 pages to and from the Hon. CJ while communicating with the alleged members of the war council Hon. Justice Joel Ngugi, Mr Dennis Kabaara, Mr Duncan Okello and Mr. Makokha Kwamuchetsi, Counsel for the Petitioner Mr. Donald B. Kipkorir extensively submitted on the matter stating that these members of the 'war council' conceived and executed 'a war strategy' to frame and remove CRJ from her office. Accordingly, the raft of allegations set out against Gladys and the purported disciplinary hearing was a farce and a facade aimed at covering the real reason for her removal. The authenticity of these emails is strongly refuted by the Respondent.

33. Counsel submitted that out of the Group of Generals in the 'war council', only the Hon. The Chief Justice and Hon. Justice Ngugi were employees of the Judiciary.

That the council had agreed that the Chief Justice had a short time before he left office and he must leave a legacy.

That the Executive represented by Gladys Shollei was on his way to leave this lasting legacy.

That the council advised him to take back the Judiciary from the Executive and they designated themselves as Generals.

The Council agreed that Gladys must be removed and the way to do that was not to say she stood in the way of transformation as that would not sell, but she should be alleged of being in charge of a criminal enterprise.

34. That a thirty (30) point plan was developed and she was named *'Darth Vader'* a leading character in star wars movie about clash of the *'Gods'* in Outer Cosmos. That only one 'God' and not two could succeed to do that and thus it was either the CJ or the CRJ to survive.

The CJ was given an ultimatum and the process to deliver. That the road map was followed to the letter to ensure only one '*God'* survived.

Counsel submitted that the die had been cast long before the disciplinary process began.

35. In further elucidation of how the strategy was implemented, counsel submitted that, the council said they would engage Gladys in public, and they did to make the public believe that she headed a criminal enterprise. That they would intellectually and morally terrify any officer seen to be in her support and they did. They said they would not give her a public hearing and they did. They said time was of essence to execute the plan and would deny her time to defend herself, and they did. The CJ was told to call meetings to reclaim his Judges and support their cause and he did.

36. A strategy called *'Mbwa'* was adopted to ensure that the CJ was visible within the Judiciary and get the support of the non-judicial staff officials and he did exactly that among other steps taken.

The high watermark of the strategy was the 1st October 2013, which was called the **"bloodbath."** This was the day the CRJ was to be dismissed and the CJ to take over as the commander-in-chief. Counsel told the Court that this evidence illustrates clearly that CRJ had no fair hearing and that her removal was a foregone conclusion.

37. The Respondent has responded to these allegations in the supplementary affidavit of Winfrida Mokaya. The registrar denies the existence of a "war council" and the allegation of a pre-determined outcome and reiterated that the Petitioner was removed from office on the basis of the charges proved against her as contained in the report. That the disciplinary process was in accordance with the law and there was no influence from any other third party real or imaged.

38. Though the Registrar deposes that none of the Commissioners of the Respondent is mentioned in the trove of emails of **"dubious origin"** the fact of the matter is that all the emails are purported to be written or copied to the CJ.

In the preliminary objections made by counsel Donald B. Kipkorir and the JSC on 16th October, 2013 and on 18th October 2013 *(see closingsubmissions on page 101 Vol. I – supporting affidavit)* wherein counsel states:

> **"the CRJ has filed the bundle of emails emanating from and to the CJ demonstrating that her removal is a continued conspiracy.**
>
> **The Chief Justice is thereof presiding over a process tainted with ulterior motive and illegality. The trove of emails running into nearly 200 pages set out the *raisond'etre* for her removal. It is not what the public is being told. Moral conscience, if not anything else demands that the CJ should not sit in these proceedings."**

39. It is important to note that on 16th October 2013 and 18th October 2013, the Petitioner and her counsel objected to the sitting of the named Commissioners and the proceedings of 16th October 2013 on page 1350 of the supporting affidavit of the Petitioner is attached minutes detailing the various preliminary objections made on that day including the specific facts on which the application for recusal was based, *see pages 1360 – 1361.*

The Court has taken note of these complaints against the named Commissioners and the responses made in the supplementary affidavit by the Respondent.

The Court also notes that JSC dismissed the allegations of bias but the CJ did not take the invitation to comment on the trove of emails though Commissioner Ahmednasir Abdullahi vehemently contested the authenticity of the emails and demanded the source of the documents from the Petitioner and her counsel.

40. In its ruling, JSC gave the Petitioner two days extension to prepare for the hearing which extension was accepted by the Petitioner under protest; decided that JSC had jurisdiction over the matter; found there was no basis that any of the named Commissioners would be biased in the process as JSC was acting in its corporate capacity and the decision arrived at would only be based on material before JSC; that it was not necessary for the accusers of CRJ to be named as CRJ knew the case facing her well and had submitted an interim report and that JSC was not in possession of the trove of emails nor were they availed to the Commission as of that date. Furthermore the source of the emails was unknown and that the matter was under police investigations and that the emails would not affect the fairness of the process.

41. The Respondent persists in the denial of knowledge of these emails in both the replying affidavit and the supplementary affidavit recently filed but there is no reference in the affidavits to the alleged police investigations on the matter.

42. The Court notes the following from a perusal of those emails attached in *Vol. II of the supporting affidavit from page 1187 to 1316:*

1. all of them are marked "Hide" at the top.
2. most of them are from the named members of the 'war council' to each other and/or to the Chief justice.
3. a few of them are copied to Gladys Shollei, Abdul Omar, Katras. Martha K. Mueni, and K. Bidali and Frida Mokaya. *See pages 1287, 1294, 1295, 1280,1268,1263.*
4. The one on page 1263 copied to Frida Mokaya is from Duncun Okello to CJ dated 21/8/2013 forwarding the TORs for Dennis and his CV to be tabled before JSC the following day for his formal appointment to take effect.
5. One on page 1268 dated 17/8/2013 at 1:45 p.m. is from the CJ copied to Duncan Okello, Joel Ngugi, Kwamuchetsi Makokha and Gladys Shollei upon receipt of the Resolution of JSC meeting at Mombasa on CRJ. Contents are as follows:

   "I cannot believe this! I cannot believe Smokin, Lenaola and Kobia did not bring sanity to JSC. We must meet immediately to discuss this looming crisis for the Judiciary."

43. It is not for the Court to act sleuth and determine the authenticity of the trove of emails. However common sense demands, in a matter of this nature, with consequences so dire to the Petitioner, the Court goes a little further into the matter than JSC thought the documents deserve. The Court will recall these observations shortly in the legal analysis of the issue at hand. The Court also notes that the copying of some of the emails to Gladys Shollei possibly exposed the entire trove to her though she does not own up to this.

At this stage, the Court will say no more but observe that the CJ was the chairman of the disciplinary tribunal conducted against the Petitioner and has not placed before Court, an affidavit or oral evidence to elucidate on these allegations by the Petitioner touching on his person and on matters the deponent of the Respondent's replying and supplementary affidavit clearly has no knowledge of.

44. The issues and the law

The Court has made an extensive analysis of the evidence presented by the Petitioner vis a vis that presented by the Respondent and has delineated the following issues for determination:

1. **Did the JSC have jurisdiction to discipline the Petitioner?**
2. **If the answer to 1 is correct, was the Petitioner given a fair and impartial hearing?**
3. **Was the petitioner removed for a valid reason and in terms of a fair procedure?**
4. **What remedy, if any, is available to the Petitioner?**

45. Jurisdiction

It is the Petitioner's case that The JSC lacked jurisdiction to proceed against the CRJ in that;

i. The office of the CRJ is a Constitutional one and is established under *Article 161* which creates the office of the Chief Justice and the Deputy Chief Justice. As such the office is only one of the three judicial offices established under the Constitution.

ii. That the office was not one of the ordinary registrars to be subjected to disciplinary action by JSC under *Section 12 of the Judicial Service Commission Act.*

iii. That CRJ being the Chief Accounting and Administration Officer of the Judiciary is only accountable to the National Assembly on financial management matters in terms of *Article 226(2) of the Constitution* which reads:

"The accounting officer of a national public entity is accountable to the National Assembly for its financial management....." and in terms of Clause (3) which reads:

"Subject to *Clause (4)*, the accounts of all Governments and state organs shall be audited by the Auditor General."

That matters of procurement are governed by *Article 227* of the Constitution which provides for an *Act of Parliament* to prescribe a framework with which policies relating to procurement and asset disposal shall be governed and therefore JSC has no business questioning her on these matters.

In this regard, the Public Procurement and Disposal Authority established in terms of *Section 8 of The Public Procurement andDisposal Act No. 3 of 2005* has oversight on matters of procurement in terms of *Section 9* thereof and not the JSC.

In particular, *Section 27(1)* provides:

"A public entity shall ensure that this Act, the regulations and the directions of the Authority are complied with respect to each of its procurements."

Whereas *Sub-Section(2)* provides:

"The Accounting Officer of a Public entity shall be primarily responsible for ensuring that the public entity fulfills obligations under subsection (1)."

Furthermore, under *Sections 66 to 74 of the Public Finance andManagement Act, 2012* is set out powers and responsibilities of Accounting Officers and the reporting line including *"The Judiciary, Parliament and Independent offices."*

46. In terms of *Section 74*, the Accounting officers, like the Petitioner are subject to the Constitution and the Public Officers Ethics Act, as read with the *Ethics and Anti-Corruption Act, 2011*.

It was the Petitioner's submission, which was denied by the Respondent that JSC could only deal with CRJ upon referral from any of the above cited bodies and could not act *suo moto* as it did in this matter.

47. The Court benefitted from submissions of ***Amicus Curiae*** on this issue to whom the Court is very grateful as follows:

> *Article 172(1) of the Constitution requires in mandatory terms the JSC to "promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice."*
>
> That in terms of *Clause (c)* the JSC is to;
>
> **"appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary in the manner prescribed by an *Act of Parliament*."**

48. It was the submission by counsel for the Respondent and the Amicus Curiae that the term registrar under *Article 172* includes the Chief Registrar of the Judiciary for the reason that there is no other provision of the constitution that provides for the manner in which the Chief Registrar of the Judiciary may be disciplined or removed from office. That had there been such intention, then a different provision for that purpose would have been provided under *Article 172(1).*

49. Furthermore, in terms of the *Judicial Service Act in Section 12*, is provided as follows:

> **"(1) The Chief Registrar may at any time, and in such manner as may be prescribed under this Act, be suspended or removed from the office by the Commission for:**
>
> *a. Inability to perform the functions of the office, whether arising from infirmity of body or mind;*
>
> *b. Misbehaviour;*
>
> *c. Incompetence;*
>
> *d. Violation of the prescribed code of conduct for Judicial officers;*
>
> *e. Bankruptcy;*
>
> *f. Violation of the provisions of Chapter six of the Constitution; or*
>
> *g. Any other sufficient cause.*

50. It was the submission by *Amicus Curiae* that it would be absurd to hold that the use of the term registrar under *Article 172(1)(c)* does not include the CRJ. That would amount to shielding CRJ from any disciplinary proceedings since there is no other provision in the Constitution providing for the same.

The Court agrees with this proposition by the counsel for Amicus Curiae which is in tandem with that advanced by counsel for the Respondent.

The Court accordingly finds that JSC had jurisdiction to institute disciplinary proceedings against the CRJ in terms of *Article 172(1)(c)* of the Constitution as read with *Section 12(1) of the Judicial service Act.*

51. Was the petitioner accorded a fair and impartial hearing?

From the submissions by counsel for the Petitioner before the JSC and this Court, there are specific aspects of this matter that arise as follows;

1. firstly, there is the issue as to whether there were proper charges facing the CRJ;
2. if so if the tribunal ought to have been reconstituted on account of the alleged perceived bias by CRJ by the named Commissioners including the chairman.

3. if the answer to item (ii) above is in the affirmative, what was the effect to the said proceedings and the subsequent decision.

52. The charges

The allegations communicated to CRJ via a letter by the CJ dated 10th September 2013 found on *page 16 Vol. I* of the supporting affidavit by Gladys Shollei span from *pages 17 to 34* of the same document.

As pointed out earlier in this judgment, there are 87allegations categorised into;

a. allegations of Financial mismanagement;

b. allegations of mismanagement in Human Resources;

c. irregularities and improprieties in procurement;

d. insubordination and countermanding decisions of the Commission;

e. misbehaviour.

53. It was submitted by counsel for Petitioner that this raft of allegations did not amount to charges in law in respect of which CRJ was capable of addressing. That the manner the same were presented was meant to embarrass the CRJ as it was not possible for her to know what specific offences she was alleged to have committed.

That this defeated the purpose of the entire process as it was impossible for one to defend him/herself properly in the circumstances.

54. That the itemized allegations do not amount to counts known in our law in that framing of the same is vague and non specific. That the same do not disclose violation of any particular provisions of the law; the complainants; the date when they were alleged to have been committed and the specific actions and/or omissions by the Petitioner. In the final analysis, this resulted in a gross miscarriage of justice, especially because these were quasi-criminal proceedings with the potential of tainting the reputation of CRJ forever and effectively ending her ability to hold any public or private position of responsibility in future.

55. That as at the time of going to court, no one knows whether any public funds were misappropriated and/ or got lost at all as that is not evident from the framed allegations nor were any witnesses called to substantiate the blank allegations.

That CRJ's attempt to call as witnesses before the JSC, the senior officers, including the respective Directors and the members of the procurement committee and the Judiciary that evidently were responsible factually and in terms of the law and actually carried out most of the transactions the subject of most of the charges and counts fell on deaf ears.

Accordingly the so called disciplinary process was a non starter and a nullity and the court should find so.

56. At this stage, the court agrees that the seriousness of the allegations made against the CRJ effectively made the disciplinary process a quasi-criminal affair. The JSC assumed a responsibility equivalent to if not equal to a Judicial process in every respect. The entire career of the Chief Administrator and Accounts Officer of the Judiciary hang in the balance.

The nature of the allegations if proved were likely to paint the CRJ as a criminal then and henceforth effectively killing her career spanning over many years in high and respected positions in Public Service, at the Independent Electoral and Boundaries Commission (IEBC) and the Law Reports Commission of Kenya respectively among other Public Service CRJ had offered the country.

57. It is appropriate to note that *Section 12(2) of the Judicial Service* Act under which JSC acted provides:

"Before the Chief Registrar is removed under subsection (1), the Chief Registrar shall be informed of the case against him or her in writing and shall be given reasonable time to defend himself or herself against any of the grounds cited for the intended removal."

58. In this regard, the Court has found it useful to seek guidance from the *Provisions of the Criminal Procedure Code Cap 75 of the Laws ofKenya* with **regard to the framing of charges under *Section 37* as follows:**

"the following provision shall apply to all charges and informations and, notwithstanding any rule of law or practice a charge or information shall, subject to this code, not be open to objection in respect of its form or contents if it is framed in accordance with this code:

(a)(i) a count of a charge or information shall commence with a statement of the offence charged, called the statement of offence.

(ii) the statement of offence shall describe the offence shortly in ordinary language, avoiding as far as possible the use of technical terms, and without necessarily stating all the essential elements of the offence, and if the offence charged is one created by enactment shall contain a reference to the section of the enactment creating the offence.

(iii) after the statement of the offence particulars of the offence shall be set out in ordinary language, in which the use of technical terms shall not be necessary."

The Second schedule to the Act, has forms which conform to the manner of framing charges and informations.

59. It is noteworthy in summary that a count of a charge commences with a statement of offence followed by particulars and where a charge has more than one count, each count commences with statement of offence followed by the particulars seriatim.

The court also notes that counts in one charge must be related and emanating from same or related conduct otherwise the counts must be framed as separate charges.

The court further notes that, in framing of charges, the accuser must avoid splitting of charges and duplicity likely to embarrass the accused thereby defeating the ends of justice.

These high standards are usually required in criminal proceedings but glaring deviations from the accepted form must be avoided in Quasi-criminal proceedings especially before statutory tribunals with powers to mete out punitive measures, with far reaching consequences to those who appear before them.

60. It is also apposite for the court to note that the general rule as to description in a charge requires the accuser to use ordinary language so as to indicate with reasonable clearness the place, time, thing, matter, act or omission referred to. It is not necessary to state the intent of the accused.

See *Section 137(f) and (g).*

61. The court does not impose on the Respondent herein the strict requirements under the criminal procedure code, but specific objections to the manner in which the allegations against CRJ were framed were made to the JSC by the counsel of the Petitioner although in not very clear terms. It was said that CRJ could not from the raft of allegations tell whether she was faced with an investigation or a disciplinary hearing as this was not clear on the face of the statement of information. It was also not clear under what provisions of the law, the allegations were based and whether specific infractions of those specific provisions was alleged.

Counsel reiterated those submissions with more clarity before court hence the consideration by the court.

62. The court finds as follows:

With specific reference to the allegation of;

"**failure to exercise prudence in expenditure of public funds resulting into loss of approximately 1,200,000,000/= (One Billion two hundred million).**"

- The charge is split into very many counts which, if properly consolidated and framed would have resulted in very few counts. Some other counts would have been the subject of separate charges;
- Many of the counts do not start with a statement of offence followed by particulars and therefore do not in law disclose any offence capable of being
- The most serious failure discernible on the face of the lengthy charge sheet is that in numerous counts different allegations constituting or capable of constituting different offences are made resulting in debilitating duplicity.

63. In the case of **Dande Vs. Republic, High Court Appellate side,Nairobi (1977)**. **The Kenya Law Reports Page 71 at 79**. **Trevelyan and Todd JJ** upon reviewing numerous English and Local Authorities stated thus;

"On the authority of **Cherere s/o Gakuhi VR (1955) EACA 478** where two or more offences are charged in the alternative in one count, the count is bad the defect being not merely formal, but substantial, for where an accused is so charged he does not know exactly with what he is charged , and if he is convicted, he does not know exactly of what he has been convicted. The charge, as laid is then, incurably bad."

64. Counts 1, 2, 3, 4, 5, 7, 9, 11, 12 under charge 'A' i.e. failure to exercise prudence of expenditure of Public Funds resulting into loss of approximately Ksh. 1,200,000,000/= (Kenya shillings one billion two hundred million) all fall in this category and are therefore incurably bad.

Count 10 titled **'irregular earning of sitting allowances'** does not disclose any offence in its opening statement which reads;

"you irregularly caused yourself to be *sitting allowances ....."

65. The court observes that in high pressure work, that conduct of Judicial and Quasi-Judicial proceedings are, certain errors do occur especially typographical errors which the court or tribunal is permitted by the rules to later on correct *suo moto* or at the instance of either party. However, the omission above with regard to a count is incurable once the proceedings have been concluded. The effect of omitting the word **"paid"** is fatal to this count in my view. It is not a formal error but it goes to the substance of the charge and the same is therefore bad in law.

66. With regard to count 13 titled: **"Audit Report 2012/2013 Financial year,"** no offence is disclosed therein.

That leaves us with counts 6 with regard to irregular payment of Ksh.29,934,975/= to one **Francis Simiyu Werunga** for security services rendered to Judges and senior Judicial Officers and staff and count 8 irregular medical expenditure of Ksh. 39,284.80 in November 2012, in respect of one **Benedict Abonyo Mollo** while still in the employment of one Biblical Organization, his former employer.

The Court notes that the provisions of the law alleged to have been infringed in these two counts, as is in many other counts is not disclosed.

67. Under *charge 13* titled: **"Allegations of mismanagement in Human Resource,"** the following counts are bad for duplicity and failure to disclose the provisions of the law or regulations contravened by the Petitioner; **14, 15, 17, 18, 19, 20, 21, 22.**

This leaves us with count 16 in which the specific provisions of the law alleged to have been contravened are disclosed but the count is bad for duplicity in that it relates to alleged engagement of services of students interns, casuals and temporary staff not named. Each of these actions constitutes a different alleged offence and this would in the word of the learned Judges in **Dande case, (supra)**, make it difficult for the Petitioner to **"know exactly withwhat she is charged, and if she is convicted, she does not exactly know of whatshe has been convicted."** (I have substituted he for she in the quotation).

68. With respect to charge C "irregularities and improprieties in procurement." *Count 23***"Authorising irregular procurement processes:"**

arises from authorizing "**the irregular procurement of services and works for partitioning and furnishing the Elgon Place premises in breach of the law and without authorization of the Commission in that:"**

This count arises from procurement of the same premises the subject of count 3 which we have already found is bad for serious duplicity as it has got items a to h most of which constitute separate offences. Indeed under item 3(h) the Petitioner is accused of irregularly paying in advance Ksh. 177,955,376.95 in four instalments on **"account of the premises for partitioning works."**

This is the same offence charged under count 23 above among other offences contained in the same count.

69. *Count 23* therefore is not only bad for duplicity but is an example of serious splitting of charges by the Respondent against the Petitioner making it almost impossible for the Petitioner to defend herself. Splitting of charges is a serious infraction in criminal justice system and I dare say in Quasi-criminal proceedings the subject of this suit. It is akin to a person facing accusations from all sides, not knowing which one to listen to and which to respond to as it were. The result is suffocation and failure of justice.

70. To illustrate the duplicity and splitting of charges under *count 23,* the Petitioner is said to have procured irregularly;

(a) without authorization of the Commission;

i. by single sourcing

ii. by paying without certificate of works

iii. by furnishing the premises without authorization by authorizing consultancy services from one **Evans SimiyuWeruga** an entity not known in law for security services. (Note this is the subject of count 6)

(c) by single sourcing a generator and accessories.

(d) by direct procurement of goods and repair works for CJ's parking area and refurbishment of a kitchen for the Supreme Court.

(e) by direct procurement of Case Management System from one DewCis.

(f) by not availing for scrutiny of the result of the works.

(g) by allowing Joworld Agencies Ltd to provide 20 IBM Servers, 20 medium enterprise servers and 40 data cabinets without authorizing any procurement for a presidential swearing in dais.

(i) by failure to provide JSC with critical information to make an informed decision on the purchase of the premises to house the CJ.

(J) by, without the authorization of the Commission put in place mechanisms of purchasing a building in Mombasa, a process that was to cost the Judiciary hundreds of millions of shillings.

(Note these are not quoted verbatim but have been summarised).

It is difficult to discern whether these are separate charges or constitute counts under charge number 23 under item D.

71. The last category of charges under Item E is misbehavior.

It is alleged that "on 19th August, 2013, you addressed the media and publicly referred to the Commission's resolution among others as **"irresponsible" thereby exhibiting open contempt for the Commission."**

It is noteworthy that this press address was in response to the Commission's decision to suspend the Petitioner and in the process JSC had issued a public statement on the decision it had taken, hence the rejoinder from the Petitioner. I will say no more on this charge at this stage except to say that the text of the alleged address to the media referred to as annex 28 in the charge was not placed before the Court to allow an objective evaluation of the same. Similarly, all the other annexes referred

to in the various charges and counts were not placed before the Court for evaluation of content.

72. Decision of JSC on the specific charges and counts.

The Decision of JSC on the 87 allegations touching on financial mismanagement, mismanagement in Human Resources, irregularities and illegalities in procurement, insubordination and countermanding decisions of the Commission; and misbehavior was communicated via a statement by the chairperson on *page 2 to 3 of Vol. I* of the Petitioner's supporting affidavit. The statement is undated. In *Paragraph 10* of the replying affidavit, Respondent confirms that this was the decision by JSC giving reasons for dismissal in terms of *Section 24 of the JSCAct* and to remove her from office. The letter of removal is cited in full elsewhere in this Judgment.

For the avoidance of doubt the letter does not contain specific findings on the 87 allegations made against her. The Respondent told the Court the full decision was uploaded to the Judiciary website where everyone including the Petitioner had access.

In the statement communicating the decision to the public however, it is alleged inter-alia, that;

73. (a) "In her responses, filed on 1st October 2013 and subsequently amended on October 15th Mrs Shollei admitted 33 allegations and denied 38 others. Responses to the balance were equivocal evasive and contradictory."

74. The Petitioner has denied admitting or pleading guilty to any of the allegations as alleged by the Respondent.

She has stated that though she was denied adequate time to prepare her defence she made sufficient rebuttal of the allegations made against her.

75. After a careful reading of both the interim and final Response by the Petitioner to the charges, and the matrix presented by the Respondent the court has been unable to find any unequivocal admission or plea of guilty to any of the 87 allegations made against her.

Where she has confirmed that a certain action or omission occurred, it has been followed with an explanation justifying the action or omission. This to my mind cannot be admission or plea of guilty to these occurrences.

76. Again, though the disciplinary hearing is not a criminal prosecution in the strict sense of the word the requirements of a plea of guilty is equally applicable in a Quasi-criminal disciplinary hearing such as this one.

In this regard in the **Case of Lusiti Vs. The Republic, the High Court, Appellate side, Nairobi (1977) Kenya Law Reports 143, Kneller and Sachdera JJ found;**

"on a Plea of guilty being received by the Court notwithstanding the proviso to *Section 207(2)* of the Criminal Procedure Code, should ensure that the defendant wished to admit without any qualification each and every essential ingredient of the charge especially if he is not asked to admit or deny the facts outlined by the prosecution."

77. In the present case, JSC did not, during the hearing read over to the Petitioner the 87 allegations and explain all the ingredients of the alleged offences to her.

78. In **Adan Vs. The Republic (1973) EA 445, the Court of Appeal of EastAfrica** considered the manner in which plea of guilty should be recorded and the steps which should be followed. It laid down the following guidelines:

"(i) The charge and all the essential ingredients of the offence should be explained to the accused in his language or in the language which he understands (ii) the accused's own words should be recorded and, if they are an admission, a plea of guilty should be recorded; (iii) the prosecution should then immediately state the facts and the accused should be given opportunity to dispute or explain the facts, or to add any relevant facts; (iv) if the accused does not agree with the facts or raises any question of his guilty his reply must be recorded and change of plea entered; and (v) if there is no change of plea a conviction should be recorded and a statement of facts relevant to sentence together with the accused's reply should be recorded."

79. In the present case, it is obvious on the face of the responses by the Petitioner, she did not intend to admit any of the allegations or offences set out against her. It was therefore incumbent on the Respondent to embark on a proper hearing to have the offences proved on a balance of probabilities, which it did not do. The matrix attached to the Replying Affidavit of the Respondent containing three columns of; Allegations by JSC; Response by CRJ and observation by JSC clearly shows that the Petitioner in her written response did not in respect of any of the offences make unequivocal admission at all and therefore the findings by JSC that 33 offences were admitted is preposterous and therefore untenable.

80. To finalise the court's analysis of the pronouncement by JSC on the 87 allegations made against the Petitioner, no verdict was made in the undated communication on each and every allegation but instead, JSC said:

"the Chief Registrar of the judiciary is hereby removed from office with immediate effect for:

- **Incompetence**
- **misbehavior**
- **violation of the prescribed code of conduct for Judicial Officers**
- **violation of Chapter 6, and article 232 of the Constitution of Kenya 2010**
- **insubordination"**

81. This was done without any record of decision or verdict on the specific charges preferred against her. No such verdicts are evident from the matrix referred to earlier titled:

"JSC allegations; CRJ responses and JSC findings and observations – A working summary."

Furthermore, the said document is undated and there is no telling whether the matrix was compiled prior to the date of the receipt of the final report by the petitioner or prior to the date of the disciplinary hearing. This observation is apposite because, the deponent to the replying affidavit did not make any comment at all on the matrix in the replying affidavit.

82. From the observations made by the JSC, it would appear the matrix was made in preparation of the hearing as a working document because on page 29 for example it reads;

"The Commission notes the need to seek for clarification from the CRJ on why there were two different documents over the same premises and whether by looking at the documents one should tell which of the documents is outdated and which is not."

This document cannot comprise final decision by JSC on the face of it.

83. Allegations of Bias by members of the Tribunal

The Court need not restate the competing allegations on this issue which we have herein before set out in this judgment.

The Court now will make a decision whether on the facts presented, JSC ought to have reconstituted another disciplinary tribunal in terms of *Section 32* and *Regulation 25* of the schedule to the JSC Act, 2011 on grounds of the alleged bias and by necessary implication whether by proceeding to hear this matter the result is a nullity for violating *Articles 2(4), 27(1),47(1)&(2), 50(1)&(2),72(1) and 236(b)* of the Constitution; the *JSC Act* and the regulations thereunder and the rules of natural justice *Nemo judex* in *causa sua*, and audi *alterram partem* by sitting in their own cause and denying the Petitioner a fair hearing.

84. In my ruling on the interlocutory Application that sought reinstatement of the Petitioner pending the hearing and determination of the Petition, I found as follows:

"There is an arguable case though not tested at this stage, that some of the Commissioners of JSC had a personal interest in the removal of the Chief Registrar and that a strategy had been developed through connivance with persons in and out of JSC to implement the strategy. The Court at this stage is satisfied that a prima facie case in this respect has been made out by the Applicant."

85. Now the Court has had the benefit of examining all the evidence placed before it with regard to this matter.

In particular, the Respondent has with the Leave of Court filed a supplementary affidavit to augment what it had hitherto placed before Court.

As a matter of fact, as I observed in my ruling, the Respondent in its initial replying affidavit had chosen to remain silent on the very serious allegations made by the Petitioner against the chairman of JSC, Commissioners Ahmednasir Hussein Abdullahi, Professor Christine Mango; Hon. Justice Mohammed Warsame; and Hon. Emily Ominde.

86. The particulars of matters that made the Petitioner to believe that the said Commissioners were biased against her are well articulated in the Final Report of the Petitioner to the JSC; and in the initial oral submissions made by counsel Donald Kipkorir to the JSC on 16th October 2014; in the final submissions made to the JSC on 18th October 2014; the supporting affidavit of the Petitioner and the various annextures on the issue; and in the lengthy submissions before Court by counsel Donald Kipkorir and Dr. Ekuru, Aukot at the interlocutory stage and during the final hearing of this matter.

87. The Respondent has in paragraphs 4 and 5 (a) – (g) denied the allegations of personal interest made by the Petitioner against the four Commissioners.

The deponent of the affidavit Winfrida Mokaya, has in paragraph 5(a) and (b) denied that Commissioner Ahmednasir Abdullahi had personal interest in the purchase of a building for the Judiciary in Mombasa and Eastleigh in Nairobi and in the procurement of ICT infrastructure or the case management system of the Judiciary as alleged by the petitioner. That he had engaged the Petitioner on such matters only in his capacity as the chair of the Respondent's Finance and Administration Committee whose mandate is to ensure prudence in the utilization of Judiciary funds.

88. Under paragraph 5(c), she states that Hon. Mr. Justice Mohammed Warsame had not been involved in the appointment or employment of any member of staff as alleged. That it was not true that the Hon. Judge of Appeal was biased against the Petitioner for failure to employ his relatives and the allegation is outrageous.

89. With respect to Commissioner Hon. Emily Ominde she deposes that the Commissioner had no personal interest in the recruitment of pupils or interns in the Judiciary and had not questioned the placement of such staff by the Petitioner at Kibera Law Courts, where she served as the Chief Magistrate.

That CRJ's office was not involved in the interviews or placement of pupils in the Judiciary and therefore there is no merit in the allegation.

90. Under sub-paragraph (e) and (h), the Registrar denies in toto the serious allegation that the disciplinary process against the Petitioner was connived and pre-determined by the so called **"war council."** That the Respondent considers the allegations to be an insult to the distinguished members of the JSC. That to suggest that such distinguished members of the legal profession would be party to such a plot is outrageous.

The Respondent denies the existence of the so-called "war council" or the allegation of pre-determined outcome and reiterates that the Petitioner was removed from office on the basis of the charges proved against her as contained in the report.

That the disciplinary process was in accordance with the law and there was no influence from any other third parties, real or imagined

91. That none of the Commissioners of the Respondent are mentioned in the trove of emails of dubious origin attached to the Petitioner's supporting affidavit. That the Petitioner has not disclosed the source of the emails and how they were obtained, and the Court is duty bound to reject such evidence.

92. This is a case where the Chairman and the named Commissioners are accused of having a direct interest in the removal of the Petitioner and the Petitioner is apprehensive of the likelihood of bias.

93. It is now established that in assessing whether or not there was apparent bias, regard is to be had to a reasonable person. See the decision of **Hon. Justice Majaja inAjay Shah Vs. The Attorney General and others**. **H.C. Commercial and Admiralty Division Civil Suit No. 1243 of 2001**. In **Republic Vs. David Makali and others, CA Criminal application No. NAI 4 and5 of 2995, cited therein, Tunoi JA.** stated that:

> *"the test is objective and the facts constituting bias must be specifically alleged and established.*
>
> *It is my view that where such allegation is made, the Court must carefully scrutinize the affidavit on either side ....."*

94. Likewise in**Attorney General of Kenya Vs. Professor Anyang' Nyong'o and 10 others EACJ Application No. 5 of 2007** the East Africa Court of Justice stated that:

> **"We think that the objective test of "reasonable apprehension of bias" is good law. The test is stated variously, but amounts to this: do the circumstances give rise to a reasonable, apprehension in the mind of a fair minded and informed member of the public that the Judge did not (will not) apply his mind to the case impartially. Needless to say, litigant who seeks disqualification of a Judge comes to court because of his own perception that there is appearance of bias on the part of the Judge. The Court however, has to envisage what would be the perception of a member of the public who is not only reasonable but also fair minded and informed about all the circumstances."**

95. The test of a 'reasonable person' was adopted by the Supreme Court of Kenya in the case of **Jasbir Singh Rai and 30 others Vs. Tarlocha Singh Rai and 4 others; S C Petition No. 4 of 2012 [2013] e KLR.** The Court cited with Approval **the American case of Pery Vs. Schwarzenegger 671 F. 3d 1052 (9th Circ. February 7, 2012)** where it was held that the test for establishing a Judge's impartiality is the perception of a reasonable person this being a **"well-informed, thoughtful observer who understands all the facts" and who has "examined the record and the law"**, and thus, **"Unsubstantiated suspicion of personal bias or prejudice"** will not suffice.

Justice Majaja in Ajay shah (supra) relied on the case of R vs Bow Street Metropolitan Stipendiary Magistrate, exparte Pinochet (No. 2) as follows;

> **"it is not a question of whether or not the learned Judge was actually biased, she might as well have been as impartial and as fair as one can get but if the circumstances are such that a reasonable person with the full knowledge of the facts would discern an appearance of bias, then the evidence of actual bias is a superfluous ingredient."**

96. The Court also noted that the obligation to be impartial also brings with it the duty to disclose any facts that may call into question a Judge's impartiality.

On the facts of this case, it is clear that the allegations made especially against the CJ and Commissioner Ahmednasir Abdullahi are of such a serious nature that any reasonable person would have reasonable apprehension of bias in the circumstances.

"Public perception of the possibility of even subconscious bias is a relevant determinant. The Judge could actually be as fair as can be but that is only relevant in case of actual bias ..... what matters is whether a fair minded reasonable person knowing of the facts could conclude that there waslikelihood of bias" concluded Justice Majanja in

the Trust Bank case (Supra).

On the facts of this case, the apprehension of likelihood of bias by the petitioner appears to be well founded from a reasonable by stander's point of view.

97. This finding does not necessarily mean that the allegations made against each of the Commissioners and the Chairman have been found to be truthful since in Civil proceedings, the test is on a balance of probabilities. However, the Commissioners mindful of the law regarding perceived bias ought to have stepped aside and reconstituted another disciplinary tribunal of probably lesser members of the JSC or otherwise within the confines of *Section 32* to the *JSC Act, 2011 and regulation 25 in the Third Schedule.*

98. It must be remembered that *Article 35(1)* provides:

"Every citizen has the right of access to;

b. **information held by another person and required for the exercise or protection of any right or fundamental freedoms."**

This right was affirmed in the case of ***Nairobi Law Monthly Co. Ltd.Vs. Kenya Electricity Generating Co. Ltd. and 2 others (2013 e KLR).***

99. The time lines given to the Petitioner to collect information from many officers under her so as to properly defend herself against a raft of 87 allegations was wanting and indeed she submitted her responses under protest due to the time constraint.

Her attempt to get those officers to appear personally to table the necessary evidence on her behalf before the JSC was refused.

100. The requirement to observe the requirements of natural justice were formulated inter-alia in **Desouza Vs. Tanga Town Council, (1961) EA 377** to include;

a. if circumstances so require, adjournment of the proceedings to enable him or her to prepare adequately for the proceedings;

b. to be given clear charges;

c. to be supplied with witness statements to be used at the hearing;

d. to cross examine the makers of the statements;

e. to be supplied with all the relevant documents needed in his or her defence;

f. to call witnesses in support of his or her case; and

g. to make submissions

See also **Geothermal Development Co. ltd. Vs. Attorney General and Another, H.C.C.Petition No. 352 of 2012.**

101. In the Case of **Oliver Vs. University of Stellenbosch, contemporary LabourLaw Vol. 14 No. 9, April 2005**, a forensic Investigation report implicated Oliver in certain irregularities at the University. He was given notice of a disciplinary hearing and the right to be represented by an external representative.

Six days before the hearing was due to begin, the employee requested documents he needed for the hearing and gave notice that he would be requesting further clarity on the charges. He also requested that the hearing be postponed.

The application for the required documentation and for the postponement were not granted as the University believed that the employee had been given all the documents he needed. The employee was also not given further clarity on the charges. On an application to the High Court, it was held:

i. the employee had not been given sufficient time to prepare and the University's decision not to postpone was wrong;

ii. it was presumptuous of the employer to decide what documents the employee would need;

iii. The charges against the employee were vague.

102. In an article by **Ivan Israelstantitled "Do employees have the right to prepare for a disciplinary hearing?" dated 2nd April 2012 – Skills Portal. Co. za;** the author observed, which observation the Court fully embraces,

> *"The employee's right to prepare for a disciplinary hearing is sacrosanct; formulating charges that are general or vague will not assist the employer's cause, but will instead, be seen to be unfair. Formulating charges clearly, legally and in a manner useful both to the employee and to the employer is difficult. This should not be done without the assistance of a Labour Law expert."*

103. This problem is envisaged under regulation 25(b) of the JSC Act, 2011 which provides:

"The Director of Public Prosecutions shall if requested by the Commission, direct a legally qualified officer from the office of the Director of Public Prosecutions to present to the Committee or panel the case against the officer concerned."

Drafting of complex charges is a highly skilled and regulated affair and should not be taken for granted. I have no doubt if JSC had availed itself of the services of an officer from the office of the Director of Public Prosecutions, the process would have been different.

These standards were clearly not met with respect to the time given to the Petitioner to prepare a defence against 87 serious charges involving alleged loss of 1.2

billion Kenya Shillings; with respect to the framing of the charges which are vague and embarrassing and fraught with the ills of duplicity within the counts and splitting of charges. The standard was also not met with respect to availing requested documentation and in a timely manner and the requests for more time and to have own witnesses attend the hearing were denied. No wonder, the final submissions by counsel were made under protest as the document clearly shows.

104. The Court particularly observes that under *Section 32 of the JSC Act2011,* JSC is mandated to constitute a committee or panel which shall be gender representative for the appointment, discipline and removal of Judicial Officers and staff. Sub-*section 3* thereof provides that the conduct of such a committee or panel under this section shall be as set out in the Third Schedule. (emphasis mine).

105. *Part IV* of the Third Schedule provides for Discipline and under *Regulation 15(1)* the disciplinary powers vested in the JSC are delegated to the Chief Justice which include, power to interdict, suspend or administer a severe reprimand or a reprimand provided the CJ in exercise of such powers shall act in accordance with the provisions of this schedule.

106. Regulation 25 titled **"proceedings for dismissal"** was applicable to the case of the Petitioner upon the institution of an inquiry that led to framing of charges against the Petitioner. The charges were served on the Petitioner and she was informed to exculpate herself in writing within 21 days.

The CJ then placed the charges and the interim response before the JSC who upon consideration decided to continue with a disciplinary hearing.

107. So far all was well, but serious failings occurred with respect to observation of regulation 25(3) which states:

"If it is decided that the disciplinary proceedings should continue, this Commission *shall appoint a committee or panel* to investigate the matter *consisting of at least three persons* who shall be persons to whom the Commission may by virtue of the Constitution delegate its powers;

***Provided that the Chief Justice shall not be a member of the committeeor panel*, but if puisne Judge of the High Court have been designated as members of the Commission under the Constitution, they may be members of the committee panel."** (emphasis mine).

108. The JSC had major failings with regard to its mandatory obligations under this clause in that;

i. It was mandatory for the JSC to appoint a disciplinary committee of at least 3 persons from its ranks;

ii. It only required at least 3 members to hear the disciplinary case and therefore it was unreasonable to insist on the sitting of members against whom objections had been made. The enthusiasm for the entire commission to hear the matter is confounding.

iii. The Chief Justice, is prohibited in mandatory terms to sit in a disciplinary panel. The Court fails to understand why the CJ insisted on chairing the panel even after allegations of bias had been made against him and was specifically requested to consider recusing himself.

109. Regulation 25(5) provides for examination of witnesses and it was therefore a violation of this regulation to refuse the Directors and members of the procurement committee whom the Petitioner intended to call to appear before them to be examined by the counsel for the Petitioner and the panel.

The sub-rule also expressly prohibits the panel from using any documentary evidence against the Petitioner unless the same has previously been supplied with a copy thereof or given access thereto. JSC also violated this regulation in many respects demonstrated in the correspondence between the Petitioner and the JSC.

If there was any doubt that it is not contemplated under the *JSC Act*, and the Regulations thereunder that the entire JSC may constitute itself into a disciplinary committee or panel, *Regulations 25(9); 25(10) and 25(11)* makes it very clear as follows;

110. ***"25(9)*** **The Committee or panel having investigated the matter shall forward its report thereon to the Commission together with the record of the charges framed, the evidence Led, the defence and other proceedings relevant to the investigation; and the report of the committee or panel shall include;**

a. a statement whether in the committee or panel's judgment, the charge or charges against the officer have been proved and the reasons therefore;

b. details of any matters which, in the committee or panel's opinion, aggravate or alleviate the gravity of the case; and a summing up and such general comments as will indicate clearly the opinion of the committee or panel on the matter being investigated, but the committee shall not make any recommendation regarding the form of punishment to be inflicted on the officer."

111. 25(10) **The Commission, after consideration of the report of the committee or panel, shall, if it is of the opinion that the report should be amplified in any way or that further investigation is desirable, refer**

the matter back to the committee or panel which shall conduct the investigation for a further report.

112. 28(1) **The Commission shall consider the report and shall decide on the punishment, if any, which should be inflicted on the officer or whether he should be required to retire in the public interest."**

113. Fatal Deviation

The Deviation from the mandatory procedure set under *Regulation 25*, by JSC is so gross in material terms that it is an understatement to say that the disciplinary hearing was a complete none starter.

114. *Section 32* and *Regulation 25* under which the disciplinary committee or panel is established is couched in such mandatory terms that there is no room for deviation.

115. It is very clear from the provisions that the Commission is separate and distinct from the disciplinary committee or panel. It is very clear that the Disciplinary Committee or panel is supposed to hear the disciplinary case completely independent of the Commission and only after it has made its findings in writing does it report to the Commission.

116. That the disciplinary Committee or panel has no authority to recommend or mete out any punishment to the accused.

117. That the committee or panel is to make a judgment stating what charges have been proved and the reasons for that.

118. The panel is also to indicate any aggravating or mitigating circumstances in the case.

119. The role of the Commission only kicks in after receipt of this report which is to:

(a) Consider the report of the Committee or panel and make a decision on;

i. whether to refer the matter back to the Committee or panel which shall conduct further investigation and make a further report or;

ii. the punishment, if any, to be meted out on the accused officer or;

iii. whether the officer should be retired in the public interest.

120. Following this further exegesis, it is clear that the proceedings and the decision by the Commission was not only a nullity due to failure to observe the rules of national justice but it was also conducted in total disregard of its own Regulations and the*JSC Act* and therefore ultravires and null and void.

The Court refers to the decision of the **Retired Judge Jeanne Gacheche in Nairobi High Court Miscellaneous Application No. 920 of 2005 Joyce Manyasi Vs. Evan Gicheru, Charles K. Njai, The Judicial Service Commission and the Honourable Attorney General;**

to affirm the proposition that JSC is bound by the provisions of the *JSC Act,* and the regulations thereunder in the conduct of disciplinary proceedings.

121. I affirmed this proposition in the **Industrial Court of Kenya at Nairobi Petition No. 17of 2013 Gilbert Mwangi Njuguna Vs. The Attorney General** and in so doing made reference to the words of the **Court of Appeal in Republic Vs.Commissioner of Co-operatives (1998) 1 EACA, 245 at 249** as follows:

> *"It is axiomatic that statutory powers can only be exercised validly if they are exercised reasonably. No statute ever allows anyone on whom it confers a power to exercise such power arbitrarily, capriciously or in bad faith."*

Accordingly, JSC not only acted ultravires the JSC Act 2011 and the Regulations thereunder, but also violated the Constitutional Rights of the Petitioner under Articles 27(1), 35(1)(b), 47(1)&(2), 50(1)&(2) and 236(b) of the Constitution of Kenya 2010. The end result was a total failure of justice. The decision by JSC was a nullity *abinito* as it was made in excess of jurisdiction and in gross violation of the rules of natural justice. The decision is accordingly quashed by this Court.

122. Remedy available to the Petitioner

In the case of **Kenya National Examination Council Vs. Republic, exparte Geoffrey Gathenji Njoroge and others, Court of Appeal, Civil Appeal No. 266 of 1995,** the Court had this to say of the efficacy and scope of mandamus, prohibition and certiorari:

"To conclude this aspect of this matter, an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons."

123. During the final hearing of this matter, counsel for the petitioner did not push for reinstatement of the Petitioner and instead argued for payment of damages to be quantified and submitted to Court for consideration and approval.

Clause 23(3)(a) permits the Court to make declaration of rights and an order for compensation under *Clause 23(3)(e).*

The Court has also made a specific finding that the said removal was in violation of the Petitioner's rights protected under *Articles 27(1), 35(1)(b), 47(1)&(2), 50(1)&(2) and 236(b)of the Constitution*, and the Petitioner is entitled to redress in terms of *Article 23(3) of the Constitution;* and the provisions of *Section 12 of the IndustrialCourt Act, 2011 and Section 49 of the employment Act, 2007.*

124. The privy council in the case of **the Attorney General of Trinidad& Tobago Vs. Ramawop** stated as follows;

"The function that the granting of relief is intended to serve is to vindicate the constitutional right. In some cases a declaration on its own may achieve all that is needed to vindicate that right. This is likely to be so where the contravention has not yet had any significant effect on the party who seeks relief.

But in this case, the contravention was as the judge said, calculated to affect the appellant's interests and it did so.

On the Judge's findings, it was a deliberate act in violation of the constitution to achieve what the time consuming procedures of the Commission could not achieve. He rejected the submission that it was an innocuous administrative act. The desire was to get rid of the appellant quickly."

125. This decision profoundly, speaks to the facts of this case. It is difficult to understand the short cut taken by very eminent members of the legal profession in a situation where the mandatory procedure that should have been followed speaks so loudly from the express **provisions of *Section 32* andRegulation 25 of the Judicial Service Act 2011 (revised Edition 2012).**

126. I say no more but refer to our charter, *Article 27* as follows:

"(1) every person is equal before the law and has the right to equal protection and equal benefit of the law."

The Respondent gravely failed Gladys Boss Shollei in her hour of need in this respect yet Article 2(1) of the same Constitution provides;

"this Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government."

127. In the final analysis the Court makes the following orders:

a. that, an order of certiorari is issued to quash the letter of removal dated 18th October, 2013.

b. that, an order of certiorari is issued to quash the proceedings of 18th October, 2013.

c. that, the Respondent violated the Petitioner's rights under *Articles 27(1), 35(1)(b), 47(1)&(2), 50(1)&(2) and 236(b).*

d. that, the Petitioner is entitled to compensation for the unlawful and unfair loss of employment and for violation of her constitutional rights and that an inquiry to quantum be gone into.

e. that, the Petitioner is to be paid the costs of this suit.

Dated and delivered at Nairobi this 7th day of March, 2014

MATHEWS N. NDUMA

PRINCIPAL JUDGE

Judicial Service Commission v Speaker of the National Assembly & 8 others [2014] eKLR

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

CORAM: MWONGO, PJ; MEOLI, J; CHEMITEI, J;

OMONDI, J; NGUGI,J.

CONSTITUTION & HUMAN RIGHTS DIVISION

PETITION NO. 518 OF 2013

IN THE MATTER OF ENFORCEMENT AND INTERPRETATION OF THE CONSTITUTION

AND

IN THE MATTER OF THE INDEPENDENCE OF CONSTITUTIONAL COMMISSIONS AND INDEPENDENT OFFICES

BETWEEN

THE JUDICIAL SERVICE COMMISSION.....PETITIONER

AND

SPEAKER OF THE NATIONAL ASSEMBLY.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

JUSTICE (RTD) AARON GITONGA RINGERA.....3RD RESPONDENT

JENNIFER SHAMALLAH.....4TH RESPONDENT

AMBROSE OTIENO WEDA.....5TH RESPONDENT

MUTUA KILAKA.....6THRESPONDENT

AND

COMMISSION ON ADMINSTRATIVE JUSTICE.....AMICUS CURIAE

AND

LAW SOCIETY OF KENYA……INTERESTED PARTY

JUDGMENT

INTRODUCTION

1. This petition brings into sharp focus the tensions that have arisen under the new Constitution with regard to the doctrine of separation of powers and the relationship between the arms of government and state organs in the execution of their respective mandates under the Constitution. In particular, it calls for an inquiry into the important oversight role played by Parliament and its implications with regard to independent commissions established under the Constitution. It also raises the question of the extent to which the Court can intervene in the exercise of this oversight role by the Legislature where it is alleged that such exercise of the oversight role has been conducted in violation of the Constitution.

BACKGROUND

2. The events that precipitated the filing of this petition started with the decision of the Petitioner to take certain disciplinary action against the then Chief Registrar of the Judiciary (hereafter **CRJ**), **Mrs. Gladys Boss Shollei**. During its deliberations at a meeting held on 17th August, 2013, the Judicial Service Commission (hereinafter referred to as the **'Petitioner**' or '**JSC'**) passed a resolution to send the CRJ on compulsory leave to facilitate investigations and inquiry into allegations leveled against her in the discharge of her duties. Following a full meeting of the JSC on 19th August, 2013, the decision to send the CRJ on compulsory leave was confirmed.

3. Hot on the heels of this decision by the JSC, the Committee on Justice and Legal Affairs of the National Assembly (hereafter the '**Committee'**) by a letter dated 20th August, 2013, summoned the Petitioner for a meeting on 22nd August, 2013, to:

> *"'…**deliberate on the process, issues and circumstances surrounding her [CRJ] suspension and the general state of the Judiciary**."*

4. The Petitioner declined vide its letter to the Committee dated 26th August, 2013 informing the Clerk of the National Assembly that in making the decision to send the CRJ on 15 days' compulsory leave to facilitate investigations into the allegations of impropriety, the Petitioner was executing its mandate under the Constitution.

5. The Committee did not respond to this letter, but by a further letter dated 5th September 2013, the Committee demanded the annual reports of the JSC in respect of the financial year 2011/2012 and 2012/2013 pursuant to **Article 254(1)** and **(2).**

6. On 17th September 2013, the Petitioner forwarded a copy of the Judiciary's Annual Report and Financial Statements for the 2011/2012 fiscal year and explained that allocations for the Commission were drawn from the Judiciary vote R 26 operated by the CRJ. They also attached the JSC's Annual Report regarding its activities in the said year. It also explained that the reports for the following year were not ready.

7. Again, the Committee did not react to the JSC response. Instead, by a letter dated 17th October, 2013, the Clerk of the National Assembly wrote to six of the JSC Commissioners forwarding a petition by one Riungu Nicholas Mugambi (hereafter the '**Mugambi Petition'**) seeking the removal of the six Commissioners who were members of the Finance and Administration Committee of the JSC. The Petitioner responded through its Counsel, Senior Counsel Mr. Paul Muite, who wrote to the Clerk of the National Assembly requesting for two weeks within which the Petitioner would respond to the Mugambi Petition as requested by the Committee. On 25th October, 2013, the Petitioner's Counsel, in the company of the Deputy Registrar of the Judiciary appeared before the Committee. The Committee, however, declined to hear the Petitioner's Counsel and resolved to proceed and prepare its report for presentation before the National Assembly for adoption on 31st October, 2013.

8. On 30th October, 2013, the Petitioner filed an application before the High Court for conservatory relief against the National Assembly staying any or further proceedings and restraining the Committee from hearing, deliberating, or in any way determining the Mugambi Petition.

9. An interim conservatory order was issued by the Court directed at the National Assembly and or the Committee staying any further proceedings under **Article 251 (3)** of the Constitution and restraining the Committee from hearing, deliberating, or in any way determining the Mugambi Petition. The said order was served on the 1st Respondent, the Speaker of the National Assembly (hereafter The **Speaker)** and the 2nd Respondent, the Attorney General (hereafter the **AG**) on the 30thand 31st of October, 2013, respectively.

10. Despite service, the Speaker and the AG did not file any response to the petition or the application for conservatory relief, and the application proceeded unopposed on 5thNovember, 2013 before Odunga J. On 6th November, 2013, Odunga J, made an order staying the suspension or removal from office of the six commissioners who were the subject of the Mugambi Petition, pending the hearing and determination of the Petition which was scheduled for hearing on 22nd January, 2014. The Court Order was served on the Speaker and the AG on 6th November, 2013.

11. Despite service of the Court order, the Speaker transmitted the Mugambi Petition to the President in accordance with the resolution of the National Assembly, leading to the appointment of a Tribunal under **Article 251 (3)**. On 29th November, 2013, the 3rd - 6th Respondents were gazetted *vide* **Special Gazette Notice No. 15094** as members of the Tribunal appointed by the President under **Article 251 (4)**to investigate the conduct of the six commissioners with a view to their removal.

12. Upon application by the Petitioner, Odunga J, in his ruling of 3rd December 2013, extended the Orders barring the suspension of the six Commissioners and restrained the Tribunal comprising the 3rd -6th respondents from sitting to deliberate on the Mugambi Petition.

THE PARTIES

13. This petition pits the JSC, a constitutional commission established under **Article 171** and constituted as a body corporate with perpetual succession and a common seal under **Article 253**,against the Speaker and the AG. The AG is joined pursuant to **Article 156**which establishes the office and provides that the AG is the principal legal advisor of the government.

14. The 3rd- 6threspondents were appointed by the President as members of a tribunal under **Article 251(4)***vide* **Special Gazette Notice No. 15094** of 29th November, 2013.They did not file any pleadings or appear in these proceedings.

15. The Commission on Administration of Justice was admitted as a friend of the Court and shall hereafter be referred to as the ***'Amicus'***. It is established under **Article 59(4)** of the **Constitution** and the **Administration of Justice Act, 2011**. It states that its mandate obliges it to

protect the sovereignty of the people of Kenya, defend and ensure observance of the Constitution.

16. Last is the Law Society of Kenya (hereinafter the '**LSK**') which was admitted as an Interested Party. LSK is established under the **Law Society of Kenya Act** with a mandate under **section 4** thereof to assist the Government and the Courts in all matters affecting legislation and the practice of law in the country.

PRELIMINARY MATTERS

17. Prior to the hearing of this petition, three applications were made for joinder of the applicants in different capacities, either as interested parties or friends of the Court. **Mr. Onesmus Mboko** and the **LSK** applied to be enjoined as Interested Parties while **Katiba Institute (**hereafter **Katiba)** sought admission as *Amicus Curiae*. All the applications were opposed by the AG, while the petitioner opposed the application by Mr. Mboko. After hearing the submissions of the parties, we allowed the application by LSK but dismissed the application by Mr. Mboko and Katiba. Given the need to proceed with the hearing of the petition and the time constraints at play, we reserved our reasons which we now present hereunder.

18. Katiba had sought to be enjoined as a friend of the Court as it is an institution with expertise in constitutional law, administrative and public international law; that it is a non-partisan, charitable organization dedicated to the full and effective implementation of the Constitution; and that its Counsel and Directors have ample experience in making submissions before Kenyan Courts and international human rights *fora* regarding interpretation and application of national, foreign and international law.

19. In opposing the joinder of Katiba, the AG contended that Katiba was clearly partisan on the issues in dispute. Mr. Regeru for the AG referred to three articles published in ***The Star Newspaper*** to illustrate the alleged partisan position of Katiba. One was written by Learned Counsel for, and a Director of, Katiba, Mr. Waikwa Wanyoike. It was titled ***"The President Erred in Forming JSC Tribunal***" and is dated 6th December, 2013; another by Prof. Yash Pal Ghai, also a Director of Katiba, titled ***"In Defence of The CJ and Judiciary Politics Right of Reply"*** dated 12th December, 2013; and a third article also by Prof. Ghai titled ***"Katiba Corner: Separation of Powers A Principle, Not A Formula"*** dated 14th December, 2013. The AG argued that Katiba held strong views regarding the issues raised in this petition, which views support some of the parties.

20. In considering whether or not to allow the participation of any party either as an interested party or as a friend of the Court, the Court is guided by the provisions of **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** (hereafter the "**Mutunga Rules"**).**Rule 2**thereof defines "***friend of court***" as an independent and impartial expert on an issue which is the subject matter of proceedings but is not a party to the case and serves to benefit the Court with their expertise.

21. In the case of **Trusted Society of Human Rights Alliance v Mumo Matemu & 5 Others[2014] eKLR**, the Supreme Court observed that an *Amicus* ought not to be partisan and that it was a 'neutral' party admitted into the proceedings so as to aid the Court in reaching an 'informed' decision, either way. It had also reached a similar position in the case of **Raila Odinga & 5 Others v Independent Electoral and Boundaries Commission & 3 Others (2013) eKLR** in which it held that where, in adversarial proceedings, parties allege that an applicant for joinder as an *Amicus Curiae* is biased or hostile to one or more of the parties, or where the applicant through previous conduct appears to be partisan on an issue before the Court, then such objection must be considered seriously.

22. Consequently, in considering whether to allow participation by a party as a friend of the Court, we must consider whether the party can be deemed 'neutral' or 'non-partisan'.

23. In the present case, while the expertise of Katiba and its Directors is not disputed, the same could not be said for their non-partisanship. A reading of the three newspaper articles clearly shows that the two Directors of Katiba have taken a position on the issues arising in this matter and expressed strongly their views thereon. Their expertise notwithstanding, given the precedent from the Supreme Court on the issue of who qualifies as a friend of the Court, we could not properly allow their participation in the matter.

24. We reached a similar conclusion with regard to the participation of Mr. Mboko, who, as a former Member of Parliament, alleged that as a politician and an opinion leader, he has a duty to promote the Constitution in accordance with **Article 3, 4** and **10**.He contended that he would be able to make valuable contribution to the issues at hand, drawing from his experience in Parliamentary matters and the workings of Parliamentary Committees. It was also his contention that the AG would not be in a position to properly represent the public interest as he had a conflict of interest in light of his role as a member of the JSC and as the principal advisor to the government under **Article 156**.

25. The AG's response was that his office was capable of dealing with the responsibilities imposed on it by the Constitution under **Article 156**; and that in any event, such conflict as was alleged could not be resolved by the joinder of Mr. Mboko as an interested party.

26. **Rule 2** of the **Mutunga Rules** defines an interested party as a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the Court, but is not a party to the proceedings or may not be directly involved in the litigation. In our view, the application by Mr. Mboko did not meet the criteria set in the **Mutunga Rules**. No identifiable stake or legal interest in the proceedings was demonstrated; nor was it shown how the outcome of these proceedings would impact on him. Further, with regard to his knowledge of Parliamentary matters and proceedings of Parliamentary committees, there was already a substantive party, the Speaker of the National Assembly, who could deal with the issues in dispute, and was the proper party to do so.

27. As noted above, we allowed the LSK to participate in the proceedings as an Interested Party. In **Trusted Society of Human Rights Alliance** (*supra*), the Supreme Court observed as follows with regard to an Interested Party:

> ***"Suffice it to say that while an interested party has a 'stake/interest' directly in the case, an Amicus' interest is its 'fidelity' to the law… Consequently, an interested party is one who has [a] stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause."***

28. In opposing the joinder of LSK, the AG argued, among other things, that LSK had not shown an identifiable stake in the matter or in its outcome, or what prejudice it would suffer if it was not enjoined as a party. In response, LSK submitted, correctly in our view, that the provisions of **section 4** of the **Law Society of Kenya Act, Cap 16**,list its objects as, *inter alia*, the obligation to assist the Court and to protect the public interest; that it has two members in JSC, elected by its membership in accordance with **Article 171(2)**.We therefore took the view that it was entitled to participate in the proceedings as an interested party.

29. Having disposed of the application in relation to joinder of the parties, we proceeded with the hearing of the petition on the 1st and 2nd of April 2014. We now proceed to deal with the petition and the respective cases of the parties.

THE PLEADINGS

30. The petitioner filed an Amended Petition dated 3rd December, 2013 supported by an affidavit sworn by **Ms. Winfrida B. Mokaya,** the JSC Registrar, on 10th March, 2014. The Petitioner also filed written submissions dated 28th March 2014.

31. The Speaker did not file a reply or appear in the proceedings at all, though the Court record indicates that he was duly served with all pleadings and processes. The Speaker's failure to participate was regrettable because the Court would no doubt have benefitted from hearing the National Assembly's perspective on the important national issues raised in this petition.

32. The AG did not file an affidavit in response to the Amended Petition but relied on his written submissions dated 28th March, 2014.LSK filed an affidavit sworn by its Secretary, **Mr. Apollo Mboya** on 21st March 2014, as well as written submissions dated 31st March 2014.

THE PETITION

33. It is useful, for a better understanding of the issues that we are confronted with, to set out in full the orders sought in this matter. In its amended Petition, the JSC seeks the following orders:

1. **"** ***A declaration that the Petitioner as a Constitutional commission is not subject to the control or direction of the National Assembly or any or any of its Departmental Committees established under the Standing Orders in the lawful discharge of its Constitutional mandate under Article 172 of the Constitution.***

2. ***A declaration that members of the Judicial Service Commission are not personally liable for the corporate decisions if the Commission.***

3. ***A declaration that the attempt by the National Assembly through the Committee on Justice and Legal Affairs to supervise and sit on appeal on the decisions of the Judicial Service Commission is a violation of the Constitution.***

4. ***A declaration that the purported Petition filed by Riungu Nicholas Mugambi seeks to punish members of the Judicial Service Commission for discharging their mandate and is therefore an unconstitutional encroachment on the independence of the Judicial Service Commission and the Judiciary.***

5. ***A declaration that the Petition presented by Riungu Nicholas Mugambi was filed to achieve a collateral purpose of disbanding and crippling the operations of the Judicial Service Commission and is therefore unconstitutional.***

6. ***An order of Certiorari to remove to the High Court and quash the Petition presented by Riungu Nicholas Mugambi seeking the removal of members of the judicial Service Commission.***

7. ***An order of Certiorari to remove to the High Court and quash the proceedings before the Committee on Justice and Legal Affairs seeking the removal of members of the Judicial Service Commission.***

8. ***An order of Certiorari to remove to the High Court and quash the resolution of the National Assembly to forward the Petition to the President that is null and void in law having been made in defiance of a court order.***

9. ***A declaration that the appointment of the 3rd to 6th Respondents by the President of the Republic of Kenya as members of the Tribunal contemplated under Article 251(4) of the Constitution is null and void.***

10. ***An Order of Certiorari to remove to the High Court and quash the appointment of the 3rd to 6th Respondents as members of the Tribunal contemplated under Article 251(4) of the Constitution under Special Gazette Notice No. 15094.***

11. ***An order do issue prohibiting Justice (Rtd) Aaron Gitonga Ringera, Jennifer Shamalla, Ambrose Otieno Weda and Mutua Kilaka from taking oath, assuming office, carrying on or in any way discharging their mandate as members of the Tribunal appointed under Special Gazette Notice No. 15094.***

12. ***The Respondents to pay the Petitioner costs of the Petition in any event."***

THE SUBMISSIONS

34. The parties made lengthy and comprehensive submissions which revolved around five main issues: the independence of constitutional commissions and their insulation by the Constitution from untoward interference by other organs of state; the doctrine of separation of powers and its implications with regard to the jurisdiction of the Court under the Constitution to check the acts of the Legislature and the Executive; the meaning and extent of the oversight role of Parliament vis-a-vis other state organs; the constitutional threshold for the removal of constitutional commissioners; and the question whether there had been a misjoinder of parties.

35. We shall briefly set out hereunder the salient arguments raised by the parties in respect of each issue. In doing so, it is perhaps appropriate to start by setting out the submissions on the last issue which goes to the competence of the petition.

Non-joinder and Misjoinder of Parties

36. The AG raised the joinder issue by posing three questions: who should be the proper parties to this petition; whether a party wrongfully enjoined as a respondent to the petition can be held accountable for the actions of others; and whether a person who is not a party to the petition can be bound by the orders made in the petition which were not served on him.

Whether JSC is the proper Petitioner

37. The AG argues that the JSC is not the proper party to this petition; that it should not have filed this petition in its own name as the issues that gave rise to it relate to the removal of six individual members of the Commission and not the Commission itself. It was the AG's contention that the JSC was the wrong party and was litigating the personal issues of individual commissioners at tax payers' expense.

38. The *Amicus* agrees with the AG on this issue. Its contention is that this dispute was precipitated by the Mugambi Petition seeking the removal of six Commissioners; the petition made adverse allegations against these six Commissioners, and the orders of the Court were obtained for their protection. Its view was therefore, that these six Commissioners would have been the proper persons to challenge the decision of the National Assembly. The mere fact that they were discharging their functions as members of the JSC, which could have been a defence at the Tribunal appointed by the President, was not a sufficient reason for the JSC to file this petition in its name.

39. The petitioner takes the contrary view, contending that JSC is the right petitioner. As a constitutional commission, it is entitled, where its functions are threatened, to approach the Court under **Article 22** and seek relief under **Article 23**. It further argued that the Mugambi Petition was seeking to remove members of the Commission, not in their individual capacity but as members of the Finance and Administration Committee of the JSC, (one of the two Committees established under **section 14** of the **Judicial Service Act(JSA))**, for alleged violation of the Constitution. It contended further that under **section 22(5)** of the **JSA**, the quorum at sittings of the JSC is six of its eleven members, and if the six Commissioners were suspended, the JSC would not be able to function. In its view, this would mean that the disciplinary process against the CRJ would not proceed, which it alleges was the intention behind the petition.

Joinder of the Speaker

40. The second issue under this head relates to the joinder of the Speaker. The AG argued that the Speaker should not have been sued in his personal capacity

while the orders sought are directed at the National Assembly, which is established under **Article 93.** The AG's contention is that the Speaker, being an *ex officio* member of the National Assembly as provided under **Article 97(1) (d),** is not the proper party; that he merely presides over the business of the National Assembly in accordance with **Article 107** and that the business of the National Assembly, whether of the whole House or when the House is acting through Committees, is not the Speaker's business but the business of the House. Counsel's submission therefore was that it was the National Assembly that should have been a party to the suit, placing reliance on the decision of Majanja J, in **High Court Petition No. 454 of 2012, Commission for the Implementation of the Constitution v Parliament of Kenya and 5 Others.** His contention was that these entire proceedings and the resultant orders may have been misdirected. targeted at the wrong party.

41. Mr. Issa, Counsel for the Petitioner, argued that the Speaker is properly a respondent in the matter as the the National Assembly is not a juristic person. He relied on the case of **Speaker of the Senate & Another v Attorney General & 4 Others [2013] KLR-SCK (Advisory Opinion No 2 of 2013)**, involving the Speaker of the National Assembly and the Speaker of the Senate and submitted that no objection was raised before the Supreme Court even though the National Assembly was not a party. Heal so called in aid the decision of the High Court of Tanzania in the case of **Hon. Augustine Lyatonga Mrema v Speaker of the National Assembly & Another Misc. Civil Application No. 36 of 1998 (Unreported)** with regard to the pre-eminent role of the Speaker and why he should be a party to these proceedings.

42. LSK's position was that though the Speaker chose not to appear in these proceedings, under **section 7 (1) (b)** of the **Office of the Attorney General Act,** the AG has a right of audience where matters before the Court involve the Legislature, Executive and Judiciary; and that consequently, by virtue of the AG's presence, given his constitutional and statutory mandate, the government is represented.

Non-joinder of the President

43. The final argument raised by the AG with regard to joinder of parties relates to the place of the President in the scheme of things in this matter. The AG contended that the President is not a party to these proceedings, yet certain allegations have been made against him, and orders made by the Court which have affected his decision materially and directly. He argued, further, that if the President was a party to the petition any orders intended to bind him should have been served on him or concrete proof provided that he was aware of the orders in question.

44. Counsel submitted that it is trite law that only parties to proceedings can be affected by those proceedings. He relied on the decision of Odunga J, in **Gideon Mwangangi Wambua v Independent Electoral and Boundaries Commission and 2 Others [2013] eKLR** in which the Learned Judge cited the Court of Appeal decision in **Ernest Orwa Mwai v Abdul Rashid & Another, Civil Appeal No. 39 of 1995**. He further submitted that injunctive orders must be served upon the party whose actions are sought to be restrained, placing reliance on **Rodgers Muema Nzioka & 2 Others v Tiomin Kenya Limited [2001] eKLR.** It was his contention that the only exception was in situations where actual knowledge of the existence of an order is established. (See also **Basil Criticos v the Attorney General and 4 Others (2012) eKLR**.)

45. To the contention that the Attorney General was served with the orders issued by the Court on 30th October and 6th November 2013, and that therefore the President could not validly appoint a Tribunal under **Article 251(4),** the AG made a three pronged response.

46. First, he conceded that he is the principal legal adviser to the government, and that if the national government were a party, then his office would be deemed to be representing the government in accordance with **Article 156 (4)**. He maintained, though, that the government is not a party to these proceedings, and that it would therefore be an unreasonable extension of the AG's role under **Article 156(4)** for him to be depicted, in Mr. Regeru's words, as ***"Advocate on record for the President",*** and therefore that service of Court orders on the AG translates to service thereof on the President. It was the AG's position that the Petitioner seeks to amend and enlarge his clear constitutional mandate under **Article 156(4)**.

47. To the submission by LSK that the AG represents the President and indeed, even the Speaker by virtue of **Section 7(1)** of **the Office of the Attorney General Act, 2012,** it was the AG's contention that he has already assumed the public interest mandate referred to in **Section 7(1) (a)** which is reflected in the superior provision in **Article 156(6)**. He was not therefore representing the President and the Speaker as the national government referred to in **Article 156(4)** was not a party

48. With regard to **section 7(1) (b)** of the **Office of the Attorney General Act**, it is the AG's case that it cannot be used to justify his participation on behalf of the Legislature as a central issue in this petition is the doctrine of separation of powers and the conflict that has arisen between the Legislature and the Judiciary. In his view, it would be remiss of the AG to take sides with either of the two arms of government to which he is the principal legal adviser; that **section 7(1) (b)** gives the AG

a right of audience in matters involving the Legislature or the Judiciary, and as the present proceedings involve both, he cannot reasonably be expected to represent, simultaneously, the conflicting positions of these two organs of state; and that his office has endeavoured to place before the Court objective material as will assist the Court to arrive at an informed and just decision.

49. The petitioner's response is that it was not necessary to join the President as a party or to serve the orders on him personally. Since the Speaker and the AG were served but disregarded the orders of the Court, the acts of the President could not be sanitised as the process under **Article 251** can only be proper if done in accordance with the Constitution. It was Counsel's further submission, in reliance on the decision of the Court in **Republic v Chief Justice of Kenya & 6 Others *ex parte* Moijo Mataiya Ole Keiwua (2010) eKLR**, that it was not necessary to make the President a party to the proceedings.

The Independence of Constitutional Commissions

50. It was argued for the petitioner that as one of the independent constitutional commissions and offices under **Article 248,** it was subject only to the Constitution in accordance with the provisions of **Article 249(2)** and was not subject to the direction or control of any party. The petitioner relied on the decision of the Supreme Court in **The Matter of the Interim Independent Electoral Commission [2011] eKLR** where the court observed that **Article 249(2)** secures the independence of commissions.

51. It is the petitioner's contention that as an independent commission, it is not subject to the 'oversight' mandate, direction or control of the National Assembly and its Committees when discharging its mandate lawfully. Therefore, by attempting to intervene in the disciplinary process of the former CRJ, the National Assembly acted in violation of the Constitution and the doctrine of separation of powers.

52. LSK agreed with the Petitioner that under **Section 3** of the **JSA** as read with **Article 249 (2)**, the JSC and its members are independent and only subject to the Constitution and the law. Further that the petitioner is mandated to perform its functions without interference, direction or control from third parties. That being the case, LSK and the public in general, have the legitimate expectation that the independence of the JSC should be protected in order to enable it discharge its functions and exercise its mandate under **Article 172** .

53. On this issue, Mr. Angima for the *Amicus* supported the petitioner's case. He argued that **Article 249(2)** was intended by the framers of the Constitution, for good reason, to confer independence on the JSC given the nature of its work. For the JSC to succeed in facilitating the independence and accountability of the Judiciary, it must be insulated from both Executive and Legislative influence. The *Amicus* also relied on the Supreme Court decision in **Advisory Opinion No. 2 of 2011,** (supra) arguing that the JSC cannot exercise its mandate with respect to the Judiciary if it was vulnerable to improper influence from other arms of government.

54. While acknowledging that the JSC and other commissions and independent offices enjoy constitutional protection of their independence, Mr. Regeru submitted on behalf of the AG that they were also subject to the Constitution and the law; that their powers were not unlimited or unfettered and must be exercised within the strict confines of the law. Counsel argued that the same Constitution subjected JSC to the oversight authority of Parliament, and the JSC cannot apply the Constitution selectively or interpret its provisions piece-meal. The AG relied on the case of **Nderitu Gachagua v Thuo Mathenge and Others Nyeri Civil Appeal 14 of 2014** in which the Court held that the Constitution must be interpreted in a wholesome and purposive manner. Accordingly, whilst the JSC asserts its independence under **Article 249(2)**, it must also acknowledge that it is subject to Parliament's oversight authority under **Articles 95**and **125**.

The Doctrine of Separation of Powers

55. JSC contended that by purporting to interfere with its functions, the Committee was infringing on the independence of the Judiciary. This was because of the integral role that the JSC plays in ensuring the independence and accountability of the Judiciary. Further that bearing in mind the doctrine of separation of powers, the JSC should not be subjected to interference from any other organ of government. The petitioner relied on the case of **Commission for the Implementation of The Constitution v National Assembly of Kenya, Senate& 2 Others [2013] eKLR,** where the court held that the doctrine of separation of powers enables the three traditional arms of government as well as independent commissions to function freely without any direction or control by any other person.

56. With regard to Court orders, it is the Petitioner's case that the National Assembly is not immune to court orders. Counsel submitted that the misconception by members of the National Assembly that they are not subject to court proceedings springs from a misreading and misinterpretation of the **National Assembly (Privileges and Immunities) Act**. Mr. Issa relied on the Supreme Court of Zimbabwe case of **Smith v Mutasa &Another LRC [1990] 87** that dealt with the question of Parliamentary privileges. In that case, the Court in Zimbabwe acknowledged that unlike the Parliament of the United Kingdom, the Parliament in Zimbabwe could not enjoy privilege, immunities and powers which were

inconsistent with the fundamental rights guaranteed in the constitution. Thus, whereas Parliamentary privilege is recognized, it does not extend to violation of the Constitution, and further, that Parliament cannot flout a Court order and then plead immunity.

57. LSK agreed with the petitioner that the Committee and the National Assembly in discussing and passing a resolution to forward the Mugambi Petition to the President, acted in contravention of a Court Order. Reliance was placed on the decision of the Court of Appeal in **Central Bank of Kenya and another v Ratilal Automobiles Ltd and others (Civil Application No. Nai 247 of 2006)** where it was held that Court orders must be obeyed and it is not open to any person or persons to choose whether or not to comply with or ignore such orders. By discussing and passing the resolution, the Committee and the National Assembly acted in violation of the Constitution, and the decision to send the petition to the President was therefore a nullity.

58. With regard to the reception of the petition by the President and the subsequent appointment of a tribunal, Mr. Mwenesi relied on the decision in **Commercial Bank of Africa Ltd v Isaac Kamau Ndirangu (Civil Appeal No. 157 of 1995 {1990 – 1994} EA, 69)**, for the proposition that where any action is taken in contravention of a Court order, it was a nullity in law, and void.

59. The AG took a position diametrically opposed to that of the Petitioner and the LSK on the orders issued by the High Court pursuant to its jurisdiction under **Article 165**restraining the proceedings of the Committee and the National Assembly. It was the AG's contention that this Article does not give jurisdiction to the High Court to deal with matters which are, by dint of the Constitution and other written laws, the preserve of the other organs of state.

60. Counsel contended that **Articles 117** and **124** insulated Parliament's Committee from supervision by the High Court under **Article 165(6)** when exercising its mandate of removal of a state officer; that unlike other tribunals and bodies, Committees of Parliament are grounded in the Constitution. Consequently, the suggestion that such committees could be susceptible to supervision by another organ of state offends the principle of separation of powers. The AG relied on the case of **Republic v Registrar of Societies & 5 Others *ex parte* Kenyatta & 6 others Misc. Civil Appl. No. 747 of 2006**where the Court observed that the doctrine of separation of powers connotes that Parliament is supreme**.**

61. It was the AG's further contention that Courts should not be seen to prevent the National Assembly from undertaking its constitutional obligations as it goes against the important tenet of Parliament's oversight role. Counsel referred the Court to the case of **Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others [2013] (supra)** submitting that in that case the Court interrogated the issue of judicial encroachment on matters wholly reserved for Parliament and held that the Court must restrain itself in order not to trespass onto that part of the legislative field which has been reserved by the Constitution, and for good reasons, to the Legislature.

62. The AG further relied on **Peter O. Ngoge v Francis Ole Kaparo & Others (2007) eKLR** for the proposition that it is not the function of the Court to interfere with the internal arrangements of Parliament unless it can be shown that they violate the Constitution; and to the holding in **Kenya Youth Parliament & 2 Others v Attorney General & Another, Nairobi Petition No. 101 of 2011** where the Court held that it would hesitate to enter into the arena of merit review of a constitutionally mandated function by another organ of State that has proceeded with due regard to procedure. In the instant case, Mr. Regeru submitted, there is nothing to show that Parliament violated the Constitution in dealing with the Mugambi Petition.

63. The AG further contended that Courts should be slow to interfere with Parliamentary processes; that the privilege of Parliament is absolute, placing reliance on **Section 12** and **29** of the **National Assembly (Powers and Privileges) Act** which ousts the jurisdiction of the Court in respect to proceedings or decisions of the National Assembly. The AG relied on the case of **Kiraitu Murungi & 6 others v Hon. Musalia Mudavadi & Another, Nairobi HCCC No. 1542 of 1997** where Ole Keiuwa J. recognized Parliamentary immunity.

The Meaning and Scope of the Oversight Role of Parliament

64. It is the Petitioner's case that the National Assembly does not enjoy unlimited oversight over independent Commissions and offices, and if the Constitution so intended, it would have spelt out the same under **Article 95(5)**. It argued that the National Assembly was from the outset trying to supervise the petitioner's disciplinary process against the former CRJ; that the Committee purported to summon the JSC for a meeting to ***'deliberate on the process, issues and circumstances*** 'surrounding the investigations relating to the CRJ; that the JSC declined to participate in the patently unconstitutional deliberations. JSC insists that the oversight role by the National Assembly cannot be conflated with the unlawful attempts to assist the former CRJ in the disciplinary proceedings; that the proceedings before the National Assembly were a charade and a mockery of the new Constitutional order; was in contravention of the Constitution and therefore null and void.

65. The *Amicus* argued that a distinction could be drawn between the first summons of the Committee to the JSC and the second letter which demanded production of certain financial information. With regard to the first, its case was that in so far as the first summons of the Committee were meant to discuss the disciplinary process of the former CRJ, they were not legitimate as they related to the performance of a constitutional function by the JSC **under Article 172** which is insulated by **Article 249(2)**. The *Amicus* argued, however, that the summons to inquire into the general state of the Judiciary, was a legitimate matter which the JSC should have acceded to.

66. The submissions on behalf of the AG in this regard were that the true test of democracy is the extent to which Parliament can ensure that government remains answerable to the people, achieved by maintaining constant monitoring of government's actions pursuant to **Article 95**; that the JSC, a state organ, notwithstanding its independence under **Article 249(2)**is not exempt from oversight by Parliament.

67. The AG submitted further that it is critically important to appreciate how the independence of the JSC should be balanced against the oversight authority of Parliament. He relied on **Advisory Opinion No. 2 of 2011**(supra) where the Supreme Court made a finding that the independence clause did not accord commissions and independent offices a *carte blanche* to act or conduct themselves on a whim but to operate within the terms of the Constitution and the law. Counsel submitted that Parliament in exercising its constitutional mandate can summon anyone for the purpose of providing evidence or giving information, and therefore the issues raised in the Mugambi Petition fell squarely within the Committee's statutory mandate pursuant to **Standing Order 216** and **Articles 124(1)** and **125(1)**.

68. It was also the AG's submission that the proceedings before the Committee were of a special nature governed by specific provisions in the Constitution and the relevant standing orders and did not amount to a hearing within the meaning of **Article 50**.

69. He submitted further that it is the Committee's mandate to determine the documents or evidence to be furnished before it in order to safeguard its role under **Articles 95** and **125** of the Constitution. He relied on the case of **British Railways Board and another v Pickin (1974) 1 All ER 609** where the Court stated that it was for Parliament to decide what documentary material or testimony it requires. In the AG's view, when the JSC was summoned by the Committee, it was bound to comply with the Committee's summons; that it was not open for the JSC to decline to appear or decide the evidence it would avail before the Committee as such an approach would undermine and defeat the object of the Parliament's oversight role.

The Threshold for Removal of a Constitutional Commissioner

70. The petitioner contended that the Constitution sets the threshold for the removal of a member of the JSC under **Article 251**. Counsel also adverted to the decision of the Supreme Court of Canada in **R v Boulanger, [2006] 2 S.C.R. 49, 2006 SCC 32**, where the Court set out the threshold for the removal of a public officer. Thus, Counsel argued that none of the unsubstantiated allegations in the Mugambi Petition meets the threshold of serious violations of the Constitution and statute or of gross misconduct. At best, the allegations as set out in the Mugambi Petition are speculative. Further, Counsel stated that the Mugambi Petition was not supported by any affidavit.

71. As regards the power of the National Assembly to call for evidence, it was the Petitioner's case that **Article 125(1)** has been misinterpreted by the National Assembly to mean that they have powers to summon any person. It was Mr. Issa's submission that the power conferred under **Article 125** is not unique to Parliament but is also vested in County Assemblies. Further, that the powers conferred under **Article 125** must be interpreted in the context of the National Assembly's mandate in the Constitution. To assert this position, the petitioner relied on the case of **International Legal Consultancy Group v The Senate& Another, Petition No. 74 of 2014.**According to the Petitioner, the power to call for evidence as provided under **Article 125** does not extend to situations in violation of the independence of constitutional commissions acting within their mandate.

72. On the Mugambi Petition, LSK's position was that whereas under **Article 251 (1) (a),** a member of a constitutional commission or holder of an independent office may be removed from office, that can only be done for serious violation of the constitution or any other law, including a contravention of **Chapter Six** of the **Constitution**, and that such violation must be proved by sound and legally obtained or admissible evidence.

73. LSK argued, further, that the evidence, information and documents filed in support of the Mugambi Petition were subject to confidentiality under **section 43(1)** of the **JSA**, and that the circumstances under which they were obtained are unclear; that they violate the petitioner's right to fair administrative action under **Article 47** and are inadmissible, under **Article 50(4).** LSK submitted that the information did not meet the requirements of **Article 251(1)** to warrant sending the Petition to the President under **Article 251(3).**

74. The Petitioner contended that since the Speaker transmitted the petition to the President in total disregard of Court orders, the act of the President in appointing a

tribunal by **Special Gazette Notice No. 15094 of 29th November, 2013,**was null and void.

ISSUES FOR DETERMINATION

75. The parties to this matter have proposed certain issues for determination and have filed two lists in that regard; one agreed upon by the petitioner and the Interested Party and a separate list by the AG. We have considered the pleadings, the affidavits on record as well as the parties' respective submissions against the two lists of issues and have framed the following four issues, which we believe capture the real dispute properly before us:

i. **Whether there has been proper joinder or misjoinder of parties;**

ii. **Jurisdiction of the Court in relation to the acts of other arms of government;**

iii. **The meaning and scope of Parliamentary oversight of state organs;**

iv. **What orders to grant in the matter, and the question of costs.**

76. We now turn to consider and make our determination thereon.

ANALYSIS AND DETERMINATION

Joinder of Parties

77. In addressing our minds to the question of joinder, we bear in mind the provisions of **Rule 5 (b)** and **(c)** of the **Mutunga Rules** which state as follows:

> ***"(b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.***
>
> ***(c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit."***

Whether the JSC is the proper petitioner

78. The starting point in considering this issue is, we believe, the constitutional status of the petitioner. **Article 253** provides that:

> ***"Each commission and each independent office—***
>
> ***(a)is a body corporate with perpetual succession and a seal; and***
>
> ***(b)is capable of suing and being sued in its corporate name."***

79. Under **Article 250(9)**, the Constitution insulates Commissioners and holders of independent offices from personal liability for actions and decisions taken in good faith in the course of their functions. It provides as follows:

> ***"(9) A member of a commission, or the holder of an independent office, is not liable for anything done in good faith in the performance of a function of office."***

80. In the present case, the six Commissioners named in the Mugambi Petition were targeted, as is apparent from the wording of the petition, not because of actions taken in their individual capacity, but because of acts that they had done as members of a lawful committee of the Petitioner, the Finance and Administration Committee, and which actions had been adopted by the entire Commission.

81. In essence, the Mugambi Petition at Ground 1 states that the complaint concerned the six Commissioners in:

> ***"…abrogating to themselves oversight powers over fiscal management of the Judiciary under the guise of being members of the Finance and Administration Subcommittee of the Judicial Service Commission…***."

In such circumstances, it is our view that the Petitioner rightly instituted this petition in its own name, since what was at issue was, essentially, its corporate decision. The Mugambi Petition appears to conflate the corporate liability of JSC and individual responsibility of the Commissioners.

82. Further, the effect of the suspension of the six Commissioners would be to cripple the operations of the Petitioner as it would be unable to reach the quorum of six members required for it to transact business under **section22(5)** of the **JSA**.

83. As observed above, however, in reference to the provisions of the **Mutunga Rules**, a petition shall not be defeated by reason of the joinder or misjoinder of parties. We therefore find and hold that the JSC is the proper petitioner in this matter. In any event, even if there had been a misjoinder, which we find is not the case, the Court would not, by virtue of **Rule 5(b)**, be precluded from dealing with the issues in dispute.

Whether the Speaker should have been joined as a respondent

84. In determining this issue, we consider the place of the Speaker in relation to the operations of the National Assembly. The position and functions of the Speaker are provided for in general terms in the Constitution. **Article 97** provides for the composition of the National Assembly, and at **Article 97(1)(d),** indicates that the National Assembly includes the Speaker, who is an *ex officio* member. **Article 107** provides that it is the Speaker of the respective Houses of Parliament who shall preside at sittings of the Houses, with the Speaker of the National Assembly presiding at joint sittings of both Houses.

85. The specific roles are better spelt out or emerge from the **National Assembly (Powers and Privileges) Act,** the **Standing Orders** and Parliamentary practice. To illustrate, under the **National Assembly (Powers and Privileges) Act**, it is the Speaker who is given power to safeguard the privileges of the National Assembly by the issue of such orders as are necessary for the better carrying out of the provisions of the Act, and issue a Code of Conduct for Members under **section 9**. Under the Standing Orders, it is the Speaker who determines the business of the House, restrains disorderly conduct and restricts debate **(Standing Orders 98, 102, 103 – 107, 112)**; and whether motions tabled by Members of Parliament are admissible. If they are in violation of the Constitution or an Act of Parliament, he may propose changes or rule that they are inadmissible. Indeed, nothing is done within the National Assembly that does not have the approval of the Speaker.

86. The Speaker is the Presiding Officer of the House, with very wide discretion under **Standing Order 1**. He is the representative of the House in relation to other organs and authorities such as the Presidency and the Senate **(Standing Order 41 and 42)**. He rules on points of order in the House and his rulings are binding precedents in the National Assembly.

87. The Speaker makes orders in relation to procedures and debate in the House; and has the responsibility to transmit decisions of the House. Further, under **section 6** of the **National Assembly (Powers and Privileges) Act** which prohibits service of process within the precincts of Parliament, such processes where they relate to the attachment of a Member's salary can be served or executed through the Speaker. He is, in law and effect therefore, the Presiding and Principal Officer of the National Assembly on whose shoulders lie the responsibility for the proper constitutional conduct of proceedings and decisions in the National Assembly. If we may borrow from the words of the High Court in Tanzania in the case of **Hon. Augustine Lyatonga Mrema v Speaker of the National Assembly & Another** (supra)with regard to the place of the Speaker in a constitutional democracy, as extrapolated from his multifarious roles in Parliament:

> ***"So far for the authority above, and what is sought to be protected, is what goes on in the National Assembly, while on active duty. But allow me to pose, a mischievous question, for the National Assembly to deserve immunity, what goes [on] in there? I am sure, the MPs know better, but we reasonably know, that, the National Assembly, is the power-house for the legislation of law, see Article 64 of the Constitution. And a moulder of policy of State, under the guiding Parliamentary Standing Orders, 1988, promulgated under Article 89(1) and (2) of the Constitution, under the Chairmanship of the Hon. Speaker, who in this case, is the impleaded party. And the Speaker thereof is impleaded, or impleadable, because by virtue of Article 84 of the Constitution, and Section 12(2) of the Act, I view him, to have such duties, as follows: -1- he is first, the spokesman and representative, of the National Assembly, -2- he is the custodian of the Powers and Privileges of the Assembly, -3- chief functionary and Constitutional head, -4- he is required under Section 12(2) of the Act, to discharge duties of a Judicial, or interpretative character, having finality attached to the same, and -5- the Speaker is the Chairman of the Assembly, and in that capacity, he maintains order in its debates, decides such questions, as may arise, on points of order, puts the questions, and declares, the determination of the Assembly. The speeches, participation, debates, immunised, being the base of the essence of Parliamentary system of Government, that MPs express themselves without fear of legal consequences, - but the orders and rules of parliament being under control of the Speaker of the Assembly.***
>
> ***Objectively observed, this is no mean portfolio, though the said Speaker should not shelter thereunder, where human rights are involved."*** (Emphasis added)

88. As submitted by the Petitioner, the National Assembly is not a juristic person. Its actions are taken and communicated through the Speaker, not through the entire House. It follows, therefore, that there is nothing remiss in civil processes under the law which question acts of the National Assembly being instituted against the Speaker, or in orders emerging therefrom being served upon the Speaker.

89. Indeed, the practice in this jurisdiction has shown that the Speaker can be joined as a party or respondent in matters pertaining to the National Assembly. The latest illustration of this is the **Advisory Opinion No. 2 of 2013** in **Speaker of the Senate & Another v Hon. Attorney-General & Another & 4 Others** [**2013] eKLR** which pitted the Speaker of the National Assembly and the Speaker of the Senate in a dispute regarding the role of the Senate in Parliamentary Bills that would impact on devolved government. In that matter, there was no argument that the Speakers of both Houses were not properly before the Supreme Court.

90. The AG has sought to make what in our view is a somewhat specious argument that the distinction in that case from the present matter is that it was an advisory opinion, not adversarial proceedings. In our view, the nature of proceedings does not make a difference. If the Speaker is a proper party before the Supreme Court, there is nothing in law to bar the Speaker from being a party in proceedings directed at acts of the National Assembly.

91. The AG also relied on the decision of Majanja J in **Commission for the Implementation of the Constitution v Parliament and the Attorney General** (supra),specifically paragraph 40 thereof, where the Court stated as follows:

> ***"[40.] I have been cautioned that the doctrine of separation of powers forbids this court from straying into what is seen as the sphere of Parliament. I have also been warned that 'Parliament of Kenya' as a state organ cannot be sued by its own name. I think the latter issue is effectively answered by the question of jurisdiction I have discussed above. In any case, and on this I agree with Mr. Regeru, counsel representing CIC, that a reading of Article 261(5) and (6) contemplates Parliament as the Party to any Petition that may be filed therein. The provision reads that, 'If Parliament fails to enact any particular legislation within the specified time, any person may petition the High Court on the matter'."***

92. This Court observes that the argument made before the Court (Majanja J) as it appears at paragraph 29 of the judgment is that the Court would need to interrogate the issue whether Parliament could be sued as an entity; as 'Parliament of Kenya'. The submission by the *Amicus* in that matter, Transparency International, was that nonetheless, even if Parliament could not be sued in its own name, the Petitioner should not be non-suited as the AG was party to the suit. In dealing with this argument, the Court therefore went on to state as follows at paragraph 41 of the judgment:

> ***"[41.] I therefore reject the respondent's contention that Parliament, as a State organ, cannot be sued by its own name at least for purposes of this suit. I think the common law notions of whether regarding capacity to be sued must yield to the Constitution which recognizes Parliament as a State organ and imposes on its*** (sic) ***specific responsibilities. The doctrines of legal personality must be read against the beam of the rich provisions of our Constitution."***

93. Our understanding of the decision of Majanja J, in which Parliament had been sued in its name, is that under the current constitutional dispensation, a party with a legitimate claim cannot be barred from recourse simply because of the technical doctrine of legal personality. In the present case, we have taken the view that the Speaker is properly made a party to the suit, but nonetheless, irrespective of whether it was the Speaker or the National Assembly that had been enjoined in the proceedings, the constitutional dictates demand that the Court exercise its jurisdiction when moved appropriately.

> **Whether the President can be bound by Orders not served on him in a matter to which he is not a party**

94. The President's actions were predicated on actions taken by the National Assembly resulting in a petition to the President under **Article 251(3)**. The validity and *bona fides* of this petition is in contention. If, as the Petitioner contends, it was invalid for having been the result of a process in Parliament that took place in violation of a Court order, then the President's acts would have been based on an invalid act; and as the Court observed in the case of **Clarke and Others v Chadburn and Others [1985] 1 ALL ER 211,** an act done in wilful disobedience of a Court order is both a contempt of Court and an illegal and invalid act which cannot effect any change in the rights and liabilities of others. (See also the decision in **Commercial Bank of Africa Ltd v Isaac Kamau Ndirangu (Civil Appeal No. 157 of 1995 {1990 – 1994} EA, 69)**.

95. We are further bolstered in our finding on this issue by the decision of the High Court in **Hon. Mr. Justice Joseph Mbalu Mutava v The Attorney General and The Judicial Service Commission High Court Petition No. 337 of 2013**where the Court had no hesitation in making orders invalidating the appointment of a tribunal by the President, even though he was not a party to the matter before it.

96. We therefore find and hold that it was not necessary to join the President as a party to the present proceedings.

The Role of the Attorney General

97. In closing on the issue of joinder and non-joinder of parties, we feel that it would be remiss if we did not comment on the role of the AG envisaged under the Constitution and the **Office of the Attorney General Act**.

98. Mr. Regeru submitted at length on the issue of whether or not the AG could be taken as representing the President and the Speaker given the provisions of **Article 156** and **section 7** of **the Office of the Attorney General Act**. His argument is that as the national government is not a party to these proceedings, and as the same involve a dispute between two arms of government, the AG cannot be seen to be taking sides with either arm of government.

99. We appreciate the somewhat awkward and untenable predicament that the AG is placed in by this petition, and indeed by the many other disputes that have arisen as a consequence of the implementation of the new Constitution and the interplay between the new governance structures that it introduces.

100. However, the Constitution and the Act impose on the AG a duty that he cannot run away from, and which he must confront with fortitude, mettle and vigour, and without fear or favour.

101. In the present case, while proclaiming that he is not representing either the Speaker or the President, the AG has made very lengthy and eloquent submissions doing exactly that. The danger is that in so doing, he may fail to be guided by the public interest which he is under a constitutional duty to safeguard. He may also fail in his duty to promote constitutionalism and the rule of law.

102. **Section 7** of the **Office of the Attorney General Act** provides as follows:

> *"**7(1) Despite the provisions of any written law to the contrary or in the absence of any other written law, the Attorney General shall have the right of audience in proceedings of any suit or inquiry of an administrative body which the Attorney General considers:-***
>
> ***a. to be of public interest or involves public property; or***
>
> ***b. to involve the legislature, the judiciary or an independent department or agency of the Government."***

103. The provisions of **Article 156** relevant for the purposes of this analysis are **sub-articles 4 -6** which are in the following terms:

> ***"(4) The Attorney-General—***
>
> ***(a) is the principal legal adviser to the Government;***
>
> ***(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and***
>
> ***(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.***
>
> ***(5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.***
>
> ***(6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest."***

104. The Constitution does not define the national government, but it is implicit in its provisions that the national government is the national Executive, the Legislature and the Judiciary as opposed to the County or devolved government. That being the case, any dispute in Court that involves either of these organs of state to which the people of Kenya have delegated their sovereign power are proceedings in which the AG has a constitutional duty to appear.

105. We appreciate also that these are troubled and troubling times in the history of our country. We have a new Constitution that has brought an earth shaking change in our governance structures, and has consequently brought the organs of government, which are mandated to work together in the spirit of mutual respect and co-operation, into an unseemly conflict that does not augur well for the people of Kenya. The AG must find the middle ground that enables him to play his constitutional role as the principal legal advisor of the government, as the legal representative of the national government in proceedings before the Court, and to "***promote, protect and uphold the rule of law and defend the public interest."*** In doing so, he must emphasise the core principle of our Constitution: that it is the Constitution that is supreme; and that all organs of state are bound by the provisions of the Constitution.

THE COURT'S JURISDICTION WITH REGARD TO ACTS OF OTHER ARMS OF GOVERNMENT

106. The AG asserted that this Court should not entertain this petition as matters before Parliament and the Committee were privileged. He relied on **Article 117 (1)** which provides that there shall be freedom of speech and debate in Parliament, which provision is echoed in **section 4** and **12** of the **National Assembly (Powers and Privileges) Act**. He also cited several judicial decisions for the proposition that Parliament's

immunities and privileges insulate it from the Court's scrutiny. In this section, we examine the jurisdiction that the Constitution vests in the Court vis-a-vis other organs of government.

The Immunities and Privileges of Parliament

107. In addressing the issues relating to the powers, privileges and immunities alluded to by the AG, it is prudent to consider the meaning and history of Parliamentary privilege, and how Courts in jurisdictions similar to ours have dealt with the issue.

108. **Black's Law Dictionary 6th Edition** defines immunity as ***"exemption from duties which the law generally requires other citizens to perform".***

109. According to **Erskine May** on **Parliamentary Practice, 23rd edition** page 75:

> ***"Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively as a constituent part of the High Court of Parliament, and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to a certain extent an exemption from the general law. Certain rights and immunities such as freedom from arrest or freedom of speech belong primarily to individual Members of each House and exist because the House cannot perform its functions without unimpeded use of the services of its Members. Other such rights and immunities such as the power to punish for contempt and the power to regulate its own constitution belong primarily to each House as a collective body, for the protection of its Members and the vindication of its own authority and dignity. Fundamentally, however, it is only as a means to the effective discharge of the collective functions of the House that the individual privileges are enjoyed by Members."***

110. In the same text, at page 176, **Erskine May** observes as follows with regard to the history of the relationship between the Courts and Parliament:

> ***"The earliest conflicts between Parliament and the courts were about the relationship between the lex parliamenti and the common law of England. Both Houses argued that under the former, they alone were the judges of the extent and application of their own privileges, not examinable by any court or subject to any appeal. The courts initially professed judicial ignorance of the lex parliamenti, but after a time came to regard it not as a particular law but as part of the law of England, and therefore wholly within their judicial notice."***

111. The key features of the English model are seen in many parliaments, predominantly those which were once British colonies or possessions which later made changes in parliamentary principles either by legislation or constitutional provisions.

112. In the 19th and 20th centuries, three major cases (**Budget v Abolt (1811) 14 East 1) Stockdale vs. Hansard (1839) 9 A2 &E**, **Bradlaugh v. Gosset (1884) 12 QBD 271** were determined by the English courts. In **Stockdale v Hansard**, the Court accepted the exclusive jurisdiction of Parliament over its internal proceedings, stating, however, that it was for courts to determine whether or not a claim of privilege fell within that category. In **Bradlaugh v Gosset**, the Court upheld the exclusive jurisdiction of the House of Commons in matters found to relate to the management of internal proceedings of the House.

113. In Zimbabwe, in the case of **Biti and Another v Minister of Justice, Legal and Parliamentary Affairs and Another [2002] ZWSC 10**, where the Supreme Court was called upon to resolve a conflict between fundamental rights and privileges of Parliament, the Court held that where a claim to parliamentary privilege violated constitutional provisions, the Court's jurisdiction would not be defeated by the claim to privilege.

114. In the Indian decision of **Kihoto Holohan v Zachillu and Others 1992 SCR (1) 886**, the Supreme Court of India was called upon to consider an ouster clause which sought to impart statutory finality in the Speaker of Parliament. The Court held that the concept of statutory finality did not detract from or abrogate the Court's jurisdiction in so far as the complaints made were based on violation of constitutional mandates or non-compliance with rules of natural justice.

115. In this jurisdiction, Parliamentary privileges and immunities were first addressed in the **National Assembly (Powers and Privileges) Act** of 1952. Although the legislation has been amended from time to time until 1981, a perusal of the revised 2012 edition shows no amendment has been made in accordance with **section 7** of the **Sixth Schedule** of the **Constitution**, to bring it into conformity with the Constitution.

116. **Section 12** of the Act provides that proceedings before the National Assembly or the Committee of Privileges shall not be questioned in any Court. At **section 14,** the Act sets out the power of the National Assembly or any Standing Committee to order attendance of witnesses to give evidence or produce documents. Also worth mentioning is **Section 4,** which

confers immunity from legal proceedings to members of the National Assembly for words spoken before or written in a report to the Assembly or a committee of the Assembly.

117. It is against this legislative backdrop that the AG submits that the effect of the orders issued by the Court were an undue encroachment in areas reserved by the Constitution to the Legislature, and that the subsequent order of 6th November 2013 extended to the Executive in execution of its constitutional mandate under **Article 251 (4)** .

118. Counsel argued that the JSC ought to have awaited the appointment of the tribunal, then challenge the process because:

> ***"Intervention would only be appropriate if an applicant can show that there would be no effective remedy available to him or her, once the legislative process is complete as the unlawful conduct will have achieved the object in the course of the process. The applicant must show that the resultant harm will be material and irreversible."***

119. The AG acknowledged that there may be exceptional circumstances in which Courts may interfere with Parliament's exercise of its powers where the latter acts in breach of the Constitution. This would include, for instance, where Parliament enacts a law that is contrary to the Constitution. On the whole, however, as it emerged from the authorities that he relied on, the AG leaned strongly on the side of Parliamentary supremacy, urging the Court to exercise restraint when matters before it involved the Legislature.

120. We fully acknowledge the need for the Court to exercise restraint in dealing with matters vested in the other arms of government by the Constitution. However, we must emphasise that the doctrine of Parliamentary supremacy, which once gave Parliament the unbridled right to regulate and conduct any of its business as it pleased, is no longer central in the Constitution of Kenya.

121. The Constitution disperses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the Constitution, then the Courts are empowered by **Article 165 (3)(d)(ii)**to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent or in contravention of the Constitution.

122. In the case of **Okiya Omtatah & 3 Others v Attorney General & 3 Others [2014] eKLR**, the Court acknowledged, as we indeed do, that the people of Kenya gave the responsibility of making laws to Parliament, and such legislative power must be fully respected. This means Courts can *only* interfere with the work of Parliament in situations where Parliament acts in a manner that defies logic and violates the Constitution.

123. We note that, in carrying out its affairs, debates are a critical aspect of Parliament's business. It is in such instances that the concept of immunity of Parliamentary debate applies. This is what was held in the Canadian case of **Canada (House of Commons) v Vaid [2005] 1 S.C.R** where the Court stated at paragraph 42 that:

> "***Parliamentary privilege consists of rights and immunities which the two Houses of Parliament and their members and officers possess, to enable them carry out their Parliamentary functions effectively. Without this protection then the members would be handicapped in performing the parliamentary duties..."***

124. We acknowledge that there is Parliamentary privilege which covers debate and deliberation within the precincts of Parliament, and we believe that this Court is not being called upon to restrain Parliamentary debate ***in the course of its lawful business***. That does not, however, limit the Court's jurisdiction to deal with matters where allegations are made regarding violation of the Constitution.

125. Counsel for the AG referred us to, among others, the case of **Kiraitu Murungi & 6 Others v Musalia Mudavadi & Another Civil Case No. 1542 of 1997** (Unreported) where Bosire, J (as he then was) stated that Parliament had created and provided itself with powers and privileges giving it absolute immunity by virtue of **section 4** of the **National Assembly (Powers and Privileges) Act**. However, as we have observed above, the situation prevailing in that case can be easily distinguished from the present scenario. In that case, the Judge indeed observed that no provision of the Constitution had been presented to show that the Court had jurisdiction to deal with the matters brought before it. That is not the situation in the instant case, as **Article 165 (3) (d)** of the Constitution expressly gives this Court such power. In a constitutional democracy like we have, Parliament is not beyond the reach of the Court.

126. Our view is that the provisions in the **National Assembly (Powers and Privileges) Act** along with **Article 117 (2)**, must be read alongside **Article 165 (3) (d) (ii)**and **165 (6)** which give the High Court jurisdiction first, to determine whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution; and secondly, gives the High Court jurisdiction over subordinate courts and any person, body or authority exercising judicial or quasi-judicial functions but not over a superior court. These provisions state as follows:

> ***(3) Subject to clause (5), the High Court shall have—***

(a) unlimited original jurisdiction in criminal and civil matters;

…

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;…

….

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

127. A reading of the **National Assembly (Powers and Privileges) Act** and **Article 117 (2)** as we propose would give life to the spirit of interpreting the Constitution in a wholesome manner that promotes its objectives and values, and recognises the supremacy of the Constitution.

128. We are bolstered in this finding by the decision of the Supreme Court in the matter of **Speaker of the Senate and Another v The Hon. Attorney General and 3 others**, **Advisory Opinion Reference No. 2 of 2013.** In that case, the respondents had argued that pursuant to the doctrine of separation of powers, the Judiciary had no legitimate business to intervene in matters falling within the legislative competence of Parliament. Further, that Parliament's business was strictly conducted within its own standing orders which are recognised by the Constitution.

129. The Court recognised the legislative authority vested in Parliament by the Constitution, and said it would be reluctant to question Parliamentary procedures or workings, *as long as they did not breach the Constitution*. However, where a dispute arises which alleges violation of the Constitution, then judicial intervention would not be a violation of the doctrine of separation of powers as the Court would merely be performing its solemn duty under the Constitution.

130. We wish to echo what Justice Chaskalson, the President of the South African Constitutional Court stated in the case of **The State v T. Makwanyane and Another 1995 (3) S.A. 391 (C.C.)** that:

"Public opinion may have some relevance... but in itself it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public opinion were to be decisive, there would be no need for constitutional adjudication. The protection of right could then be left to Parliament, which has a mandate from the public, and is answerable to the public, for the way its mandate is exercised, but this would be a return to parliamentary sovereignty, and a retreat from the new legal order..."(Emphasis added)

131. This statement is in consonance with Kenya's current constitutional dispensation. Indeed, Courts will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privilege, if this is done within the confines of the Constitution.

132. We therefore hold that there was no breach of either the constitutional or statutory provisions under the **National Assembly (Powers & Privileges Act)** by the Court when it issued the orders impugned by the AG as being a violation of the privileges and immunities of Parliament. The Committee and the National Assembly, while carrying out their constitutional mandate, must do so with strict fidelity to the Constitution.

133. In reaching this conclusion we have drawn, as illustrated above, from decisions made in various jurisdictions dealing with issues similar to the ones currently before us which are new to our jurisprudence but are well established in other jurisdictions. However, we are cautious and bear in mind the supremacy of our Constitution and the circumstances prevailing in those jurisdictions. What we find is that history is replete with examples from other Commonwealth countries which have similar constitutional and statutory provisions regarding parliamentary privileges and immunities, yet have declined to apply narrow strictures to provisions ousting the Court's intervention. The position we have taken is therefore not peculiar to Kenya.

The Nature of the Proceedings before the Departmental Committee of the National Assembly

134. Having found that the Court has jurisdiction to deal with proceedings before the House or its Committees where allegations of violation of the Constitution are made, we now turn to consider the nature of the proceedings before the Committee. It was submitted on behalf of the Petitioner that the proceedings, which

were quasi-judicial in nature and subject to the Court's jurisdiction under **Article 165(6)**, violated its rights under **Article 47** and **50** of the Constitution. In response, Counsel for the AG submitted that the proceedings were not a trial but proceedings of a special nature and therefore Article 50 did not apply. He argued that the **Standing Orders** bound the Committee to abide by strict timelines, relying on **Standing Order 230** that requires the Committee to investigate a petition and report to the House within 14 days.

135. The proceedings before the Committee, which were purported to be pursuant to the provisions of **Article 251 (2)** and (**3),** were aimed at investigating the allegations made in the Mugambi Petition against the six Commissioners**.** Of necessity, they were to involve hearings and, according to the summons from Parliament, the Commissioners could elect to appear in person or by legal representative.

136. **Black's Law Dictionary 9th Edition** defines a quasi-judicial process as a term applied to the action of bodies which are required to investigate, or ascertain the existence of facts, hold hearings, weigh evidence and draw conclusions from them as a basis for their official action, and to exercise discretion of a judicial nature. At page 34 of their text **Administrative Law,10th Edition, H.W.RWade and C.F. Forsyth** define a quasi-judicial function as:

> "…***an administrative function which the law requires to be exercised in some aspects as if it were judicial. The procedure is subject to the principles of natural justice."***

137. Upon receipt of the summons from the National Assembly, the JSC sent its Counsel to attend the hearing. At the conclusion of the proceedings of the Committee, a resolution was reached in respect of the Mugambi Petition, and a report presented to the full House for debate and adoption. Thereafter, a resolution was made to transmit the petition to the President.

138. In the circumstances therefore, and with great respect, we disagree with the submissions by the AG as regards the nature of the Committee proceedings. We hold the view that from the provisions of **Articles 95(5)**, **251** and **125**, the scrutiny and oversight function, primarily discharged through Parliamentary committees, is intrinsically a quasi-judicial function. We are therefore satisfied that the proceedings of the Committee, being quasi-judicial proceedings in nature, are subject to the supervisory jurisdiction of the Court in terms of **Article 165(6).**

139. What does the law require of a body exercising quasi-judicial functions? In the case of **Local Government Board v Arlidge (1915) AC 120 (138) HL** the Court stated**:**

> ***"...those whose duty it is to decide must act judiciously. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come in the spirit and with the sense of responsibility of a tribunal whose duty it is to mete out justice."***

140. In addition to the requirement to act judiciously, a body exercising a quasi-judicial function must accord parties a fair hearing. In **Halsbury's Laws of England, 5th Edition 2010 vol. 61 at paragraph 639,** it is stated that:

> ***"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him, and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court…."***

141. In this jurisdiction, the requirement of fairness is echoed in the case of **Onyango Oloo v The Attorney General [1986 – 1989] EA 499** where the Court stated that:

> ***"...ordinary people would expect those making decisions which will affect others to act fairly..."***

142. Indeed, **Standing Order 67** of the Parliamentary Standing Orders states that:

> ***"Whenever the Constitution, any written law or these Standing Orders –***
>
> ***a). requires the National Assembly to consider a petition or a proposal for the removal of a person from office, the person shall be entitled to appear before the relevant Committee of the Assembly considering the matter and shall be entitled to legal representation;"*** (Emphasis added)

143. The right to a hearing and fair administrative action is no longer just a rule of natural justice, but is now a constitutional principle which applies in equal measure to all proceedings, investigations and hearings whether judicial, quasi-judicial or administrative. **Article 47** guarantees to everyone administrative action that is ***"expeditious, efficient, lawful, reasonable and procedurally fair***". The right to a fair hearing is guaranteed under **Article 50**.

144. It is not disputed that the six Commissioners were given notice and copies of the Mugambi Petition, but the complaint by the JSC is that adequate time was not given to respond to the petition. It alleges therefore that its rights to fair administrative action and fair hearing were violated.

145. We appreciate that a hearing may take various forms, and indeed the Petitioner's members were given the option to either appear before the Committee in person or send a written response. They elected to send their Counsel in accordance with **Standing Order 67** cited above, which entitles a party to appear before the Committee and to legal representation.

146. We agree with the views of the Court in **Joseph Mutava v. Attorney General & JSC, Petition No. 337 of 2013** that a Committee involved in a decision making process that would affect the rights of a party is quasi-judicial and administrative in nature and is therefore subject to **Article 47.** In the present case therefore, we hold that the proceedings of the Committee were quasi-judicial and administrative in nature as they involved a decision making process that would affect the rights of the six Commissioners and are therefore subject to **Article 47**.

147. In exercising its mandate under **Article 251,** the Committee performs a quasi-judicial function, and has powers to summon any person to tender evidence or provide information, and enforce attendance of witnesses and compel production of documents. In doing so, in accordance with **Article 125**, it has, as a Committee of Parliament, the *same powers as those of the High Court*. It follows therefore that in the same manner that Courts have inherent powers to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Court, the Committee in exercising its mandate, acquires the power to enlarge time within which to adjudicate over a matter before it. The reliance on **Standing Order 230** which the AG contended imposed strict time lines could not override the requirements of substantive justice under the Constitution.

148. It is uncontroverted that the Committee declined to afford the Petitioner time within which to make a response to the Mugambi Petition and secondly, the Committee declined to afford a hearing to the Petitioner's Counsel to make representation before it. From the foregoing provisions of the Constitution and the National Assembly Standing Orders, together with the authorities referred to hereinabove, it is our finding that the Committee, acting in its quasi-judicial capacity, not only breached the Standing Orders but also express provisions of the Constitution.

149. We now turn to consider whether the issuance of orders by the Court was justified and in accordance with its jurisdiction within the context of the doctrine of separation of powers.

What goes on in Parliament falls outside court's jurisdiction.

Court Orders and the Doctrine of Separation of Powers

150. The jurisdiction bestowed on Courts by the Constitution has assumed new significance in its impact on the balance of power between the three arms of government. This is particularly so with regard to the issuance of conservatory orders directed at the other arms of government. We have emerged from a constitutional dispensation in which the acts of the Executive and Legislature were hardly ever questioned or restrained.

151. We have entered a new constitutional era in which it is the Constitution which is supreme; in which none of the arms of government can claim supremacy; and which vests the High Court with the onerous responsibility of being the watchdog for the new Constitution. It is in this light that we must view the question of separation of powers and the rule of law against the orders issued by the Court in this matter.

152. In considering this issue, we begin by echoing the words of the High Court in **Trusted Society of Human Rights v The Attorney General and Others High Court Petition No. 229 of 2012,** at paragraph 63:

> ***"In answering [these constitutional questions], it is imperative that we begin by re-stating that the doctrine of separation of powers is alive and well in Kenya. Among other pragmatic manifestations of the doctrine, it means that when a matter is textually committed to one of the coordinate arms of government, the Courts must defer to the decisions made by those other coordinate branches of government. Like many modern democratic Constitutions, the New Kenyan Constitution consciously distributes power among the three co-equal branches of government to ensure that power is not concentrated in a single branch. This design is fundamental to our system of government. It ensures that none of the three branches of government usurps the authority and functions of the others. "***

153. The concept of **separation of powers** was succinctly articulated in the 18th century by the French Philosopher, Montesquieu in his treatise, the ***Spirit of Laws*** published in 1748**.** Arguing that no person or organ should exercise or wield absolute power as this would invariably lead to tyranny, he postulated:

> ***"When the legislative and executive powers are united in the same person, or in the***

> ***same body of magistrates, there can be no liberty; because apprehensions may arise, lest the same monarch or senate should enact tyrannical laws, to execute them in a tyrannical manner.... There would be an end of everything, were the same man or the same body, whether of the nobles or of the people, to exercise those three powers, that of enacting laws, that of executing the public resolutions, and of trying the causes of individuals.*"** 1 Charles Secondat, Baron de Montesquieu, The Spirit of the Laws 151-52 (Thomas Nugent trans., Hafner Publishing Co. 1949) (1748).

154. The need for power to be dispersed to various arms of government in order to avoid abuse of the rights of citizens is reflected in our Constitution. Article 1(1) vests sovereignty in the people who delegate their sovereign power to the three organs of government to be exercised in accordance with the Constitution.

155. **Article 1** provides that

> ***"(1) All sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution.***
>
> ***(2) The people may exercise their sovereign power either directly or through their democratically elected representatives.***
>
> ***(3) Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution––***
>
> ***(a) Parliament and the legislative assemblies in the county governments;***
>
> ***(b) the national executive and the executive***
>
> ***(c) the Judiciary and independent tribunals.***
>
> ***....***

156. At **Article 2**, the Constitution states that:

> ***2. (1) This Constitution is the supreme law of the Republic and binds all persons and all State organs at both levels of government.***
>
> ***(2) No person may claim or exercise State authority except as authorised under this Constitution.***

157. It is then provided at Article 3(1) that***"Every person has an obligation to respect, uphold and defend this Constitution."***

158. We thus recognise fully the doctrine of separation of powers and the need for Courts to be always conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. As observed by the Supreme Court of Zimbabwe in **Smith v Mutasa (1990) LRC 87,** the Judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.

159. It is important at this juncture to restate the provisions of **Article 165 (3)(d)(ii)** with regard to the jurisdiction of the Court. The Constitution expressly mandates the Court with jurisdiction to determine the question ***"…whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution…"***

160. In dealing with this petition in its initial stages, the High Court (Odunga J) was confronted with the challenge of determining whether he had jurisdiction under our Constitution to issue orders directed at a Parliamentary committee and thereafter at the National Assembly itself. It can be safely assumed from the orders made that he was satisfied that he was vested with the necessary constitutional authority.

161. The issuance of orders with respect to a decision or act of Parliament is not a novelty. It is a recognition that there has been a sea change in governance, from the situation in which Parliament was deemed, and deemed itself, supreme, to a constitutional dispensation where the Constitution is the overlord and all organs of state are its handmaidens.

162. In making orders directed at Parliament, the Court in South Africa in **De Lille & Another v The Speaker of the National Assembly (1998)(3) SA 430(c)** stated as follows:

> ***"The National Assembly is subject to the Supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication."***

163. On appeal by the Speaker in the above case, (**Speaker of National Assembly v De Lille MP & Another 297/98 (1999)(ZASCA 50)** the Court rendered itself as follows:

> ***"This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme- not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No parliament, no official and no institution is immune from Judicial scrutiny in such circumstances."*** (Emphasis added)

164. Similarly, in **Doctors for Life International v Speaker of the National Assembly and Others CCT 12/05)[2006]ZACC 11 at para 38,** the Court held that:

> **"….***Under our Constitutional democracy, The Constitution is the Supreme Law. It is binding on all branches of government and no less parliament when it exercises its legislative authority, Parliament must act in accordance with and within the limits of the constitution, "and the Supremacy of the Constitution requires that "the obligations imposed by it must be fulfilled" Courts are required by the Constitution "to ensure that all branches of Government Act within the Law "and fulfil their constitutional obligations."*

165. We agree fully with the sentiments of the Court set out above. We need not emphasise how closely our constitutional provisions reflect those contained in the Constitution of South Africa, and how heavily we borrowed therefrom.

166. In this jurisdiction, Ringera J (as he then was) had pronounced himself long before the promulgation of the current Constitution on the supremacy of the Constitution. In the case of **Njoya & 6 Others v Attorney General and 3 Others (2004) 1 EA 194**, where he said that:

> ***"I would rank constitutionalism as the most important. The concept of constitutionalism betokens limited government under the Rule of Law.***
>
> ***Every organ of Government has limited powers, none is inferior or superior to the other, none is supreme, the Constitution is supreme and they all bow to it."***

167. It emerges from the facts of the case before us that when the six Commissioners were served with the Mugambi Petition, JSC went to Court and obtained interim conservatory orders to stop deliberations of the Committee on the petition. This order was not complied with. A further order was then issued by the Court barring deliberations of the full House in respect of the report of the Committee on the petition. This order was also disobeyed. Finally, the Court issued a stay of the Special Gazette Notice No. 15094 pending the *inter-partes* hearing of the application. The effect of the order was to bar the chairperson and the members of the tribunal appointed on 29th November 2013 from commencing the investigations into the conduct of the six Commissioners and further stayed their suspension. The orders were served on the National Assembly and the AG.

168. One of the essential attributes of the rule of law is that the authority of the Court should be respected and obeyed by all in society. Those against whom Court orders are directed, and those affected, should obey them. The *locus classicus* in this regard is the case of **Hadkinson v Hadkinson (1952) 2 ALL ER 567** in which the Court held that:

> ***"It is [the] plain and unqualified obligation of every obligation of every person against or in respect of, who an order is made by a court of competent jurisdiction to obey it unless and until that order is discharged. The uncompromising nature of this obligation is shown by the fact that it extends even to cases where the person affected by an order believes it to be irregular or even void."***

169. In the case of **Democratic Alliance v President of The Republic of South Africa & Others (263/11) [2011] ZASCA 241**, the Supreme Court of Appeal of South Africa quoted with approval what the former Chief Justice Mahomed, of South Africa in an address on the Independence of the Judiciary in Cape Town on 21st July, 1998 stated that the mandate of the legislature is to make only those laws permitted by the Constitution, and

> "…***to defer to the judgment of the court, in any conflict generated by an enactment challenged on constitutional grounds .... A democratic legislature does not have the option to ignore, defy or subvert the court. It has only two constitutionally permissible alternatives, it must either accept its judgment or seek an appropriate constitutional amendment,***

if this can be done without subverting the basic foundations of the Constitution itself." (Emphasis added)

170. The Court was of the view that these statements apply with equal force where decisions of the Executive are concerned.

171. In this jurisdiction, the Court (Ibrahim, J (as he then was)), in the case of **Econet Wireless Kenya Ltd v Minister for Information and Communication of Kenya and Another [2005] 1 KLR 822,** quoted an extract from the Court of Appeal ruling in **Refrigeration and Kitchen Utensils Ltd. v. Gulabchand Popatlal Shah and Another, Civil Application No. 39 of 1990** as follows:

"... It is essential for the maintenance of the rule of law and good order, that the authority and dignity of our courts are upheld at all times. This court will not condone deliberate disobedience of its orders, and will not shy away from its responsibility to deal firmly with proved contemnors ...."

172. From the foregoing, the place of court orders in any civilized society is well settled – they must be obeyed. The only option available to a party aggrieved by a Court order is to, appeal or apply for variation or discharge of that order. This is the only way to maintain the rule of law and the people's confidence in the judicial system. Kenya's legislative bodies have the obligation under **Article 94 (4)** to discharge their mandate in accordance with the terms of the Constitution and cannot plead any internal rule or statutory provision as a reprieve.

173. We conclude therefore that it is not a violation of the doctrine of separation powers for the Court to issue orders restraining acts of the Legislature that were alleged to be in violation of the Constitution.

Validity of the Appointment of the Tribunal

174. We have found that all state organs are under a constitutional obligation to obey Court orders. The question that then arises is whether the act of the President in setting up a tribunal pursuant to the recommendation of the National Assembly, made in disobedience of a Court order, is valid. The answer to this question must be in the negative. From the foregoing discussion, it follows that any decision made or action taken in defiance of a lawful Court order is null and void. We therefore hold that the appointment of the tribunal in consequence of the proceedings before the Committee and the resolution of the National Assembly was null and void.

Parliamentary Oversight of State Organs

175. The genesis of the dispute that led to the present petition is the purported exercise by the Committee of what it saw as its constitutional oversight role in relation to the petitioner. Before considering the nature and extent of the role of parliamentary oversight, it is useful to start with a definition of the term.

Definition of oversight

176. **Black's Law Dictionary (6thEdn)** defines the term "overseer" as a superintendent or supervisor, a public officer whose duties involve general superintendence on routine duties. The verb **"oversee"** is defined in the **Concise Oxford English Dictionary (12th Edn)** as ***"Supervise (a person or their work.)"***

177. The dictionary defines ***"oversight"*** as the action of overseeing. With regard to Parliament, one of the earliest traditional definitions of oversight is contained in the statement by John Stuart Mill, the British Utilitarian Philosopher, to the effect that:

"... the proper office of a representative assembly is to watch and control the government; to throw the light of publicity on its acts; to compel a full exposition and justification of all of them which anyone considers questionable."

178. There is no definition of the word "*oversight*" in the Constitution. **Article 95 (4) (c)** and **5 (b)** assign the oversight role with respect to the national budget and expenditure, and of state organs, respectively, to Parliament. In this regard **Article 95 (1)** sets the basis for this assignment. It states:

"***The National Assembly represents the people of the constituencies and special interests in the National Assembly."***

179. The above Article resonates with the principle of the people's sovereignty under **Article 1** and the fact that Parliament, while performing its oversight role under the Constitution, is exercising the power delegated to it by the people of Kenya. We therefore agree with the submission by the Amicus that oversight is a form of monitoring and further that:

"Monitoring does not entail controlling, giving instructions or micro managing, but checking regularly the progress or development (of a subject).The true test of a democratic State is the extent to which Parliament can ensure that the government is accountable to the people."

180. We were also referred by the Amicus to **Hironori Yamamoto's Study Report** entitled **"Parliamentary oversight: A Comparative Study of 88 Parliaments",** which gives a good guide on what Parliamentary oversight ought to entail**.** In that study, Yamamoto observes that:

"Parliamentary oversight encompasses the review,monitoring and supervision of government and public agencies including the implementation of policy and legislation."

181. It is also worthwhile, for a better understanding of the concept of oversight, to consider the situation in South Africa. Section 55 of the Constitution of South Africa, from which we borrowed liberally in drafting and enacting our own Constitution, has provisions which are in many respects similar to the provisions of our Constitution, contained in **Article 95**, with regard to Parliamentary oversight.

182. In a 1999 report prepared at the request of the Speaker of the National Assembly in South Africa **by Hugh Corder, Saras Jagwanth and Fred Soltau of the Faculty of Law, University of Cape Town titled**

"REPORT ON PARLIAMENTARY OVERSIGHT AND ACCOUNTABILITY"(*available online at pmg.org.za*)

the authors make a distinction between the term **'oversight'** and **'accountability'** by defining accountability as follows:

"At a basic textual level accountability means 'to give an account' of actions or policies, or 'to account for' spending and so forth. On a wider understanding accountability can be said to require a person to explain and justify - against criteria of some kind - their decisions or actions (….). It also requires that the person goes on to make amends for any fault or error and takes steps to prevent its recurrence in the future.'

183. It must be obvious why the oversight function must be considered side by side with the responsibility to account. It is a requirement of our Constitution, as it is under the Constitution of South Africa, that those charged with the affairs of state and governance are accountable to the citizen. **Article 10(2)(c)** provides that the values and principles of governance include "***transparency and accountability".***

184. With regard to oversight, the **University of Cape Town Report**states as follows:

"Oversight refers to the crucial role of legislatures in monitoring and reviewing the actions of the executive organs of government. The term refers to a large number of activities carried out by legislatures in relation to the executive. In other words oversight traverses a far wider range of activity than does the concept of accountability."

185. In considering Parliamentary oversight, it is useful to also consider the purpose and scope of such oversight, as this further helps in understanding the meaning and implications of the concept. We now turn to address the purpose and scope of oversight

The Purpose and Scope of Oversight

186. **The University of Cape Town Report** lays emphasis on the purpose of oversight as a constitutional imperative. The authors stated:

"Oversight is the function of the legislature which flows from the separation of powers and the concept of responsible government, like law-making, which entails certain powers. Foremost among these is the power to hold the executive accountable. Monitoring the implementation of laws goes to the heart of the oversight tool....the legislature is in this way able to keep control over the law it passes and to promote constitutional values of accountability and good governance. Thus oversight must be seen as one of the central tenets of democracy...accountability is also designed to encourage open government. It serves the function of enhancing public confidence in government ".

187. In his study**, Yamamoto** (supra) identified several key functions of oversight as including detection and prevention of abuse, arbitrary, illegal, or unconstitutional conduct. This function underscores the protection of rights and liberties. By holding the government accountable for expenditure, Parliament is able to detect and prevent wastage, thereby enhancing efficiency and economy. Through Parliamentary oversight, the government is kept on its toes, so to speak, to deliver on its own policies or goals set through legislation. Oversight contributes to improving transparency of government operations and enhances people's trust in the government.

188. It is thus manifest from these functions that *Parliamentary oversight is intended to be people-centred: the people must be the beneficiaries or intended beneficiaries of Parliamentary oversight*. Thus, Parliamentary oversight is not an end in and of itself, or a mandate to be exercised in a whimsical or capricious manner.

189. In a paper entitled **"Parliamentary Oversight for Government Accountability**" edited by **Riccardo Pelizzo, Rick Stapenhurst** and **David Olson** (available online at wbi.worldbank.org) it is stated:

" Regardless of whether oversight is viewed as a sort of* ex post *review of government policies and programmes, or whether it is viewed instead as a supervision of government activities that can be performed both* ex post *and* ex ante*, scholars have

> ***generally agreed on the fact that effective oversight is good for the proper functioning of a democratic political system. Effective oversight is beneficial for a political system, for, at least, two basic reasons: First, because the oversight activity can actually contribute to improving the quality of policies/programs initiated by the government; second, because as the government policies are ratified by the legislative branch, such policies acquire greater legitimacy."***

190. Closer to home, the legislature in South Africa, in an endeavor to develop an effective model for oversight, grappled with the meaning, scope and purpose of oversight:

> ***"In the South African context, oversight and accountability are constitutionally mandated functions of legislatures to scrutinize and oversee executive action and any organ of State. Oversight entails the informal and formal, watchful, strategic and structured scrutiny exercised by legislatures, including Parliament, in respect of the implementation of laws, the application of the budget, and the strict observance of statutes and the Constitution. In addition, and most importantly, it entails overseeing the effective management of government departments by individual members of relevant executive authority in pursuit of improved service delivery for the achievement of a better quality of life for all people."***(Emphasis added)

191. The above quotation is taken from a report titled "**Oversight Model of the South African Legislative Sector** "commissioned by the **South African Legislatures' Secretaries" Association (SALSA)** (available online at *sals.gov.za*)**.** The model was developed as a unified framework for the Legislative Sector in South Africa with a view to creating a common oversight practice, common standards, vision, principles and best oversight practices in South Africa**.**

192. As an integral process for the enhancement of the rule of law, Parliamentary oversight is bound within established legal contours hence must be exercised in accordance with the law. **Article 95 (4) (b)** and **(5) (b)** provides for oversight by Parliament over national revenue and expenditure, on one hand, and of state organs on the other. Ordinarily, this mandate is exercised by Parliament through *ad hoc* or standing committees of Parliament established in accordance with the provisions of **Article 124**.

193. Under **section 7 (d)** of the **Public Financial Management Act (PFMA)**, Parliament has the mandate to monitor adherence by the three arms of government to the principles of public finance through the relevant committee, in this case the **Budgetary and Appropriations Committee** created under **Standing Order 207**. The duties of that Committee are, inter alia, to investigate, inquire into and report on all matters related to coordination, control and monitoring of the national budget.

194. Under **Standing Order 216 (3)** and the **Second Schedule** of the **Standing Orders**, matters related to constitutional affairs and the administration of law and justice, including the Judiciary, ethics and integrity, fall under the Committee.

195. Commissions such as the JSC, and independent offices are required under **Article 254 (1)** to submit a report to Parliament and the President after the end of each financial year; and these two state organs may also require such Commission or independent office to submit a report on a particular issue at any time.

196. Article **254(3)** requires that every report thus required of a constitutional commission or independent office must be ***"published and publicized"***. This, in effect, means that just as the annual reporting process must result in a publication which is publicized, so also, when an *ad hoc* report is required of a commission by the President, the National Assembly or Senate, such report must be published and publicized.

197. "**Publication**" is defined in the **Collins Complete and Unabridged Dictionary** as including ***"the act or process of publishing a printed work… the act or instance of making information public"*** while **"publish"** is defined as **"*to produce and issue (printed or electronic matter) for distribution and sale; to have one's written work issued for publication; to announce formally or in public….*"** Finally, **"publicise"** is defined in the same dictionary as ***"to bring to public notice; advertise."*** (Emphasis added).

198. One may ask why the Constitution makes express provision for these requirements for publication and publicization. These two requirements create the obvious presumption and expectation that, in respect of the ***annual*** report and an ***ad hoc*** report that may be constitutionally called for, both require a measure of time and transparent engagement between the state organs involved. In addition, there is the required expectation of engagement with the general public. These do not seem to us to be idle constitutional provisions.

199. To our minds, the purpose of publication and publicization is twofold. Firstly, it is to ensure that the people of Kenya are not kept in the dark with regard to the nature of information these two arms of government seek or obtain from independent commissions. Secondly, it is to ensure that the process is open and formal rather than informal. The openness resulting from publication and

publicization would also be in accord with the provisions of **Article 10** which require public participation in matters of governance.

200. Consequently, it is evident that the Constitution does not envisage that any one organ of state, in exercising its oversight role over another, should make haphazard or un-coordinated incursions of inquiry into the mandate of another state organ or independent commission or office.

201. For the purpose of its oversight functions, Parliament through its committees is empowered, by dint of **Article 125**, to summon any person to appear before it to give evidence or provide information. It is therefore beyond disputing that the power of Parliament in the exercise of its oversight role of state organs is fairly wide. The caveat, however, is in **Article 93 (2)** which states that:

> ***"The National Assembly and the Senate shall perform their respective functions in accordance with this Constitution."***

202. It is indeed true, as submitted by Counsel for the AG, that under **Standing Order 216 (5) (a)** and **(e)** and the **Second Schedule** of the **Standing Orders,** part of the functions of a Parliamentary Departmental Committee are to investigate, inquire into and report on all matters "***relating to the management activities, administrations, operations and estimates of the assigned ministries and departments,"*** and to ***"investigate and inquire into all matters relating to the assigned ministries and department as they deem necessary."*** However, such investigations and inquiries must be conducted in a manner that does not violate the Constitution, as for instance breaching fundamental rights, or by exceeding the scope prescribed within the enabling Articles of the Constitution.

203. A pertinent question that arises in the circumstances of this case is whether the procedure prescribing the removal of members of constitutional commissions or holders of independent offices under **Article 251** falls within the oversight role of Parliament. The answer to this question is, in our view, simultaneously yes and no. We say this because, strictly speaking, the oversight role envisaged in **Articles95** and **125,** for instance, appears quite distinct from the purposes of **Article 251**. While oversight relates to a body corporate, generally, the removal process is with respect to an individual commissioner. However, given that Parliament is involved in all aspects of the life of a commission including the appointment of commissioners (see **Article 250 (2) (b**), funding of commissions (**Article 249 (3),** oversight proper (**Article 254**) and removal of commissioners (**Article 251**)), Parliament's oversight role (and here, we use the word oversight loosely with regard to **Article 251)** with respect to independent commissions appears to be generally on a *continuum*, from inception or appointment to removal.

204. In that light, removal can be said to be the ultimate sanction in the oversight process which is otherwise routine. The ultimate threat of the sanction of removal is in and of itself a tool for regulating the conduct of commissioners and independent office holders while in office. It is intended as the ultimate check on the competence, capacity and integrity of such commissioners and office holders. It is the oversight tool of last resort. The process of removal touches personally upon, and is concerned with, the conduct or capacity of individual members of a commission.

205. The removal process under **Article 251** is not, however, part of the routine oversight vested in Parliament by the Constitution. It is initiated, not by the House or committee of Parliament, unlike other oversight mechanisms, but by a petition by any person who desires the removal of a commissioner under **Article 251(2)**.

206. One of the issues identified by the parties and upon which Counsel made submissions related to the threshold for removal of a constitutional commissioner. We were invited to consider and find that the Mugambi Petition did not meet the constitutional threshold for such removal; that the evidence relied on was illegally obtained; and that in any event it did not meet the constitutional threshold.

207. We agree that this is an important issue, and were the facts and circumstances of this matter different, we would no doubt consider it and make appropriate findings. However, in this petition, we are not concerned with the validity or constitutionality of the Mugambi Petition. Whether or not it meets the constitutional threshold is a question that would have properly belonged to the proposed tribunal. Since we have held that the appointment of that tribunal was null and void, this question is moot and we shall say no more about it.

208. We now turn to consider whether the JSC is subject to the oversight of Parliament.

Whether the JSC is Subject to Oversight by Parliament

209. **Article 249**describes the objects of the commissions and independent offices set up under **Chapter Fifteen** of the **Constitution** as the protection of the sovereignty of the people, securing the observance by all state organs of democratic values and promotion of constitutionalism. The South African Constitution describes the independent institutions as **"strengthening constitutional democracy"** (see **section 181(1)** which is in *parimateria* with our **Article 249**).

210. Discussing the unique and special role of the independent commissions in South Africa, the **University of Cape Town Report**(supra) states:

> ***"They are an integral part of the checks and balances of a constitutional democracy and accountable government. An important part of each of their functions is calling government to account and strengthening and promoting respect for the Constitution and the law by society at large. In relation to Parliament they have two roles. Firstly they should be seen as complementary to Parliament's oversight function: together with Parliament they act as watch-dog bodies over the government and organs of state. Secondly, they support and aid Parliament in its oversight function by providing it with information that is not derived from the executive."***

211. Citing the challenges of inadequate resources and political independence faced by members of Parliament, the Report goes on to state:

> ***"As pointed out above, one of the constitutional functions of Parliament is to be an oversight body to provide a check on the arbitrary use of power by the executive. However, with the complex nature of modern government, members of parliament often do not have the time and resources to investigate in depth, or because of party discipline do not have the political independence that is required….Hence state institutions supporting constitutional democracy have been created to assist parliament in its traditional functions. This function is most obvious in relation to the office of the Auditor-General which performs the primary part of oversight of financial matters, but this is clear also in relation to the other institutions in chapter 9. The Public Protector for example has as its main function the investigation of improper conduct in state or government affairs and in the public administration which also forms a crucial part of Parliament's oversight role. Similarly, the Human Rights Commission not only ensures the protection and development of human rights but is also the main vehicle through which the implementation of socio-economic rights in government departments is monitored."***

212. The authors of the Report concluded as follows:

> ***"Thus Parliament's oversight function can be enhanced by ensuring the effective functioning of state institutions supporting constitutional democracy. Much the same arguments may be advanced in respect of other bodies established in terms of the Constitution, including the Judicial Service Commission, the Financial and Fiscal Commission and the Public Service Commission."***

213. In light of the foregoing discussion, the question whether the JSC is subject to Parliamentary oversight must be answered in the affirmative. The JSC is a creature of the Constitution, an independent commission subject only to the Constitution and the law and, as provided under **Article 249 (2**), is not subject to direction or control by any person or authority. Like other constitutional commissions and independent offices, the JSC must however operate within the confines of the Constitution and the law. While enjoying financial and administrative independence, the JSC is accountable to Parliament. The JSC is also a partner to Parliament in supporting constitutional democracy.

214. The key functions of the JSC, its *raison d'etre* so to speak, is spelt out in **Article 172 (1)** as follows:

> "***The Judicial Service Commission shall promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice ...."***

215. The rest of its mandate is spelt out in **sub-articles (1) (a), (b), (c), (d)** and **(e).** Of relevance to this case is **sub-article172 1 (c)** which empowers the JSC, inter alia, to appoint, receive complaints against, investigate and remove from office or discipline registrars, magistrates and other staff ***"in the manner provided by an Act of Parliament"*** – in this case the **JSA**. Like Parliament, the Auditor General, the National Land Commission and the National Commission on Human Rights, the JSC is empowered under **Article 252** to conduct general investigations *suo motu,* or on a complaint lodged by a member of the public, and to summon witnesses.

216. For the facilitation of the constitutional mandate of the Judiciary under **Article 159**, the **JSA** makes provision for the administration of the Judiciary, the powers and functions of the JSC, financial matters, procedures for appointment and removal of Judges, and the discipline of judicial officers and staff, among other matters. These objects are accurately captured in the preamble to the **JSA** as follows:

> ***"An Act of Parliament to make provision for judicial services and administration of the Judiciary; to make further provision with respect to the membership and structure of the Judicial Service Commission; the appointment and removal of judges and the discipline of other judicial officers and staff; to provide for the regulation of the Judiciary***

Fund and the establishment, powers and functions of the National Council on Administration of Justice, and for connected purposes".

217. These objects are restated, together with the functions set out in **Article 172**, within **section 3** of the **JSA**. In particular, Parliament found it fit to provide at **Section 3(h)** that the Judiciary and the JSC shall:

> **"…be the *administrative manifestation of the Judiciary's autonomy and inherent power to protect and regulate its own processes in achieving these objects through application of principles set out in the Constitution and other laws."*** (Emphasis added)

218. **Section 13 (1)** of the Act is, *inter alia*, in the following terms:

> ***"In addition to the power of the Commission under Article 253 (sic) of the Constitution, the Commission shall have the power to –***
>
> ***...***
>
> ***(d) do or perform all such other things or acts necessary for the proper performance of its functions under the Constitution and this Act which may be lawfully done or performed by a body corporate."***

219. **Sub section 2** states that in the discharge of their responsibilities, the members of the commission "***shall be guided ... by the principles contained in the Constitution and in this Act."***

220. It is clear from these provisions that the intention of Parliament in enacting the JSA was to give effect to the provisions of **Article 172** thereby *freeing Judiciary's administrative processes from interference by other organs*. The provisions also clearly demonstrate the *symbiotic relationship* between the JSC and the Judiciary, even though both have distinct and separate legal identity. These provisions were intended to accord financial and administrative independence to the JSC and ultimately to the Judiciary itself. These terms were defined in the **University of Cape Town Report** (supra) as follows:

> ***"Financial independence implies the ability to have access to funds reasonably required to perform constitutional obligations…. Linked to financial independence is the ability of constitutional institutions to perform their functions without administrative control by the executive…(it) implies control over matters directly connected with the functions that such institutions must perform."***

221. Therefore a clear reading of **Articles 172 and 249 (2)** vis-a-vis **Articles 95**, **125,251** and **254,** together with the above provisions of the **JSA** suggest that oversight, in the context of the JSC cannot translate to **control** and **direction**. Nor is oversight micromanagement of the JSC.

222. **Black's Law Dictionary (9th Edition)** defines **control** as "…***the direct or indirect power to govern the management and policies of a person or entity, whether through ownership of voting securities…. or otherwise, the power or authority to manage, direct….***" On the other hand, to **direct** means to guide (something or someone), to govern or instruct (someone) with authority. These are the ordinary meanings ascribed to the words **"control"** and **"direction"** by the **Supreme Court in its Advisory Opinion on Article 163 (6) and the Date of the First General Election (Advisory Opinion No 2 of 2011)**.

223. The distinction between oversight and direction/ control is important and ought to guide Parliament in the exercise of its mandate under **Articles 95** and **125.**

224. It was submitted by Counsel for the AG that ***"the relevance or otherwise of the documents or evidence required by the committee is to be determined by the committee and the committee alone"*** in reference to **Articles 95** and **125.** This submission was based on the authority of the English decision in **British Railways Board and Another v Pickin (1974) 1 ALL ER 609.** On that basis Counsel went on to submit that:

> "***the JSC was bound to comply with the committee's summons and to appear before it to produce the evidence that had been called for and to answer any queries… This is a strict constitutional requirement on the part of the JSC ... neither is it open to the JSC to decide what evidence it shall avail and which it shall not. Such approach would undermine and defeat the whole object of parliament's oversight role."***

225. With respect, that submission is untenable on two accounts. Firstly, the English authority on which it is based emanates from a jurisdiction where Parliamentary supremacy is observed. That is not the position in this country under the Constitution. Indeed, though Kenya followed the Westminster model prior to 2010, the said model was modified to the extent that we had a constitutional democracy in which the constitution was supreme. In this regard, the words of Ringera J,(as he then was) in **Njoya and 6 Others v AG and 3 Others (Supra)**are apt:

> ***"I would rank constitutionalism as the most important....(it) betokens limited government under the rule of law. Every organ of government has limited powers, none is inferior or superior to the other, none is supreme, the Constitution is supreme and they all bow to it"*** (see also the Indian Supreme Court

decision in **Raja Ram Pal v The Honourable Speaker, Lok Sabha & Others. Writ Petition (Civil) 1 of 2006).**

226. In the case of **New National Party v Government of the RSA And others [1999] (5) BCLR 489**, the Court was asked to determine the constitutionality of the conduct of the government in its dealings with the Electoral Commission. Part of the commission's complaint was that the government had usurped and interfered, through its Department, with the powers, duties, and functions of the electoral commission and violated its financial independence through inadequate funding. Emphasising the importance of administrative and financial independence of independent commissions, Lwanga DP, went on to state that:

> ***"Administrative independence implies control over matters directly connected with the functions the commission has to perform under the Constitution and the law".***

227. In our considered view, the Constitution of Kenya contains inbuilt limits to the scope and purpose of Parliamentary oversight. A proper reading of **Articles 254(2)**, **171(2),** and **249** on one hand and **Articles 95** and **125** on the other, does not support the proposition advanced by the AG. Parliament's oversight mandate is not a *carte blanche*. It must be exercised in obedience and full perspective of all provisions of the Constitution and the law. The power to oversee organs of state including independent commissions like the JSC does not extend to a violation of the independence of the commission acting within their mandate. Such is the construction that accords with Article 259 of the Constitution. We agree on this issue with the submissions made by the Petitioner and the *Amicus*. Parliament can only summon the JSC over a legitimate cause.

228. In the result, the answer to the issue under discussion must be a qualified one: that the JSC is subject to lawful and proper oversight by Parliament. This in our considered view, represents the wholesome and purposive reading of the Constitution urged upon us by Counsel for the AG on the authority of **Nderitu Gachagua v Thuo Mathenge & Others, Nyeri C.A. No. 14 of 2014.**

Whether Parliament properly exercised its Oversight Role over JSC.

229. In the preceding paragraphs, we have drawn a distinction between the meaning and purport of oversight in contradistinction with direction and control. We have also demonstrated that oversight is not an end in itself but is intended to serve a clear purpose in the advancement of Kenya's constitutional democracy and improvement of the quality of life of its citizens.

230. It is undisputed that the conflict between the JSC and the National Assembly was triggered by the action taken by the former against the erstwhile CRJ, Gladys Boss Shollei, on 17th August, 2013. The Petitioner subsequently resolved in a full meeting on 19th August 2013 to send the said CRJ on compulsory leave for 15 days pending investigation and inquiry into allegations made against her in respect of her discharge of duties. The joint committees of the JSC responsible for Finance and Administration and Human Resource Management were thereafter mandated to inquire into the allegations, inter alia, on procurement, employment, administration, finance and corporate governance and to frame specific issues to enable a response from the CRJ, against whom the allegations had been brought. We will review the subsequent events in the following portion of our judgment.

231. Following the decision of the Petitioner to send the CRJ on compulsory leave, the Departmental Committee on Justice and Legal Affairs of the National Assembly summoned the JSC through a letter dated 20th August, 2013 for a meeting whose agenda was stated to be to: "***deliberate on the process, issues and circumstances surrounding her [CRJ] suspension and the general state of the Judiciary."***

232. The authority cited by the said Committee was **Standing Order 216 (5) (a)** of the Standing Orders of the National Assembly which states that:

> ***"The functions of a Departmental Committee shall be to:***
>
> ***Investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments."***

233. The AG's submission with regard to the summons was as follows:

> ***"...the JSC was bound to comply with the Committee's summons and to appear before it and to produce the evidence that had been called for and to answer any queries put to the commission .... it was certainly not open to the commission to decline to appear ... or to decide what evidence it shall avail ... when the people's chosen representatives, through the committee summon the JSC, they are bound to drop all else and to answer the summons and to be fully responsive to all issues raised on behalf of the people."***

234. On its part the *Amicus*, though agreeing that the JSC ought to have honoured the summons of the Committee, argues that the question of the suspension

of the CRJ was not a legitimate matter for the Committee to handle, but that the question of the ***"general state of the Judiciary"*** was. The reason given for this distinction is that with regard to the first matter, ***"it related to the performance of a constitutional function by JSC under Article 172 and was therefore insulated by the independence clause of Article 249 (2) of the Constitution."***This latter submission is in agreement with the Petitioner's arguments.

235. As regards the topic of the general state of the Judiciary, we think that the whole question of the purport of **Article 125,** and the circumstances of the summons, must be considered. Firstly, we do not accept the AG's argument that the JSC, once summoned, regardless of the subject matter of the summons should have ***"dropped everything"*** and hurried to answer ***"all questions and provide all documents required of them"***. We take this view because this submission appears to be based on the notion of a supreme Parliament with unlimited oversight power. This notion runs counter to the provisions of **Article 2** which declares the Constitution to be supreme.

236. The authority of **British Railways Board & Another v Pickin**(supra) is therefore not relevant in our constitutional design. Parliamentary oversight must be conducted within the strictures of the Constitution. As the *Amicus* has stated, the matter of the removal of the CRJ was out of bounds for the Committee, in as much it amounts to micromanagement of the JSC in its assigned functions. In dealing with the matters related to complaints or allegations against the CRJ, the JSC was exercising its mandate under **Article 172(1)(c)**, a matter properly within its constitutional functions.

237. In carrying out its oversight role, Parliament must respect the independence of the JSC and other independent offices. This is particularly important because of the pivotal role assigned by the Constitution to the JSC to facilitate and promote the independence and accountability of the Judiciary under Article 172. As we have stated before, the JSC plays a complementary role to Parliament in overseeing the entire Judiciary. It is not a competitor, or intended to be a competitor against Parliament. It is ideally a partner in the constitutional scheme.

238. Secondly, the JSC and indeed the Judiciary must be seen to be free from the undue influence of other organs. The Chief Justice of the Republic is the Head of the Judiciary under **Article 161** and also the chairman of the JSC. A sustained and patently unconstitutional assault on the JSC from whatever quarters could well symbolize an actual assault on the Judiciary as an arm of government. This symbolism and the utterances ascribed by the media to key members of the Committee are an important consideration in viewing the propriety of the summons by the Committee to the entire JSC. It bears reiterating the words of Parliament in **section 3(h)** of the **JSA** that the JSC and the judiciary are "... ***the administrative manifestation of the Judiciary's autonomy and inherent power…"*** (Emphasis added)

239. In **Constitutional Petition No. 74/2014, International Legal Consultancy Group v. The Senate and Another**, the Court grappled with a similar question respecting summons to several County Governors by the Senate. The Court stated that the Senate could not arrogate to itself powers not given to it under the Constitution and then went on to observe as follows with regard to the Senate:

> "***While it does have power under Article 125 to summon anyone, that power cannot have been intended to be exercised arbitrarily and in isolation but must be read in conjunction with other provisions of the Constitution which allocate functions and powers to the various organs created by the Constitution ... The court as the final arbiter under the Constitution is obliged to adjudicate any dispute between various arms of the State and to determine the contours of separation having regard to the Constitutional functions of each organ."***

240. It must be said for the JSC that in its letter declining the Committee's summons, rather than advancing its own opinion or interpretation of its independence, it relied on a binding pronouncement of the Supreme Court on the meaning of **Article 249 (2),** the independence clause of the Constitution with regard to constitutional commissions and independent offices, in **Constitutional Application No. 2 of 2011**(supra).After quoting verbatim from the said decision, the JSC went on to state at paragraph 4 of the letter:

> **4. "*By requiring the Commission to appear before it to deliberate on the "process, issues and circumstances surrounding the suspension (sic) of the Chief Registrar, the Departmental Committee on Justice and Constitutional Affairs (herein, "the Committee") would not only be calling into question the purpose of the constitutional provisions cited above, but would undermine the doctrine of separation of powers which runs through the Constitution (the Commission is the facilitator of the independence and accountability of the Judiciary)."***

241. The JSC also notified the Committee that its actions against the CRJ were already the subject matter

of court proceedings brought against the JSC in which orders were issued to restrain the JSC from instituting or continuing disciplinary proceedings against the CRJ.

242. The JSC letter in our view amounts, not to "defiance" as viewed by one member of the Parliamentary Committee (see **Annexture WBM5** to Amended Petition) but a robust assertion of its independence and the law. In the **New National Party** case (supra), the Court endorsed the electoral commission's assertions of independence communicated in various correspondence addressed to the "interfering party".

243. Parliament's Standing Orders cannot override the Constitutional insulation provided to independent commissions in the lawful exercise of their mandate. The question relating to the sending of the CRJ on compulsory leave and issues and circumstances thereof were matters of which the JSC was properly seized under **Article 172 (1) (c)**. Consequently, the attempt by the Committee to interfere with the matter even before the JSC could complete its own inquiries cannot be defended under the banner of Parliamentary oversight. In the circumstances, the summons to the JSC by the Committee must be seen to reflect an intention to direct and control the JSC's exercise of its mandate under **Article 172 (1) (c)**. Parliamentary exercise of the oversight mandate and authority to summon under **Article 95** and **125** of the Constitution must be balanced against the independence of the commission as long as it was acting lawfully.

244. There is no evidence cited by the Committee in its communication with the Petitioner that the JSC had acted in an unlawful manner. Neither the summons dated 20th August, 2013 nor the subsequent demand for annual reports dated 5th September, 2013 make any reference to unlawful or improper conduct by the JSC.

245. We agree with the submissions by the *Amicus* that the attempt by the Committee to engage in the matter of the suspension of the CRJ was not a legitimate exercise of its oversight role. We are bolstered in our view by the fact that, upon receipt of the JSC's response of 26th August, 2013 to their first letter in which JSC pleaded independence, the Committee did not make a rejoinder. However, a day after the JSC formally communicated its resolution not to honour the summons, a member of the Committee was quoted in the Standard of 27th August 2013 issuing threats of dire consequences including removal of Commissioners of the JSC for its alleged ***"defiance"*** of the summons. He suggested that the JSC members had realised they were guilty of violating the law and were avoiding "*scrutiny*". (see annexure **WBM5** in the affidavit of Wilfrida Mokaya sworn in support of the Amended Petition).

246. Not having responded to the JSC letter of 26th August, 2013, the Committee's next step was a demand for annual reports from the Commission in respect of the financial year 2011/2012 and 2012/2013 pursuant to **Article 254 (1)** and **(2)**vide a letter dated 5th September, 2013. This letter not only made no reference to the previous communication or issues but it also encompassed items which on the face of it could arguably fall under **Part IV** of the **Public Financial Management Act (PFMA)**, and for which the Controller of Budget and Auditor General were responsible under **Section 68** of the **PFMA**, as well as the Budget and Appropriations Committee established under **Standing Order 207**.

247. On 17th September, 2013 the JSC forwarded a copy of the Judiciary Annual Report and Financial Statements for the 2011/2012 fiscal year, explaining that allocations for the Commission were drawn from the Judiciary vote R26 operated by the CRJ as chief administrator and accounting officer of the Judiciary. Also attached was the Commissions Annual Report regarding the JSC activities in the said year. The JSC explained in the said letter that the reports for the following year were not ready.

248. With regard to the information sought under **Article 254 (2)** the JSC took the position that these items formed part of the "***ongoing investigations by the Judicial Service Commission into various allegations of mismanagement in human resource, procurement process and finances against the Chief Registrar of the Judiciary."***That is an indication that despite the previous notification by the JSC to the Committee that the CRJ's matter was *sub-judice*, the Committee continued to demand related information. The demand is also intriguing in another respect: any report supplied under Article 254(2) ought to be published and publicized. What purpose we ask, would be served by the premature publication of material related to an inchoate investigation other than sabotaging the investigation? However, no further communication issued from the Committee in response to the JSC letter of 17th September, 2013.

249. A month later, on 17th October, 2013, the Mugambi Petition was forwarded by the Clerk of the National Assembly, on behalf of the Committee, to the six Commissioners of the JSC. The said Commissioners were given an election to appear in person or submit written responses to the Committee on 25th October, 2013. Two events that occurred two days before and seven days respectively, after this letter deserve mention. The first is a letter addressed to the CRJ and copied to the Chief Justice. Its stated purpose was to clarify that the CRJ is the accounting officer of the Judiciary, by virtue of **Article 161(2)(f)** and to point out her designation as Accounting Officer by the Cabinet Secretary of The National Treasury Henry K. Rotich, the author of the letter. For good measure the letter adds that:

> ***"Please note, that Section 197(m) of PFMA provides that 'a public official commits an offence of financial misconduct if, without lawful authority, the officer intentionally or recklessly obstructs or hinders a person while that person is acting in the performance or exercise of the person's functions or powers under the PFMA' ".***

250. Firstly, the Cabinet Secretary was in his letter purporting, contrary to the Constitutional provision he cited in his letter, that the CRJ was his appointee; but secondly, and more disconcerting he was issuing a veiled threat against those he perceived as obstructing the CRJ in her duties.

251. On 20th October, 2013, the Cabinet Secretary wrote directly to the Chief Justice informing him that a special audit of the Judiciary would be conducted ***"with immediate effect to ascertain whether there are material challenges in the performance of financial functions in the Judiciary Department...(and) to determine appropriate intervention"***. The Cabinet Secretary explained that the latter letter was prompted by media reports ***"highlighting financial management and accountability issues"*** concerning the Judiciary.

252. It is undisputed that while the formal communications between these bodies were being exchanged, the media, especially the print media, continued to carry reports associating the Chairman of the Committee with threats directed at the JSC. For example, on 21st August, 2013 the said chairman allegedly stated that the Committee had "***huge dossiers of serious and damaging allegations made against some of the Commissioners. It is in their interest that they appear."***

253. On the very date that the Committee forwarded the Mugambi Petition to the six members of the JSC, the Chairman was again reported in *The Standard* newspaper of 19th October 2013 (annexure **WBM9** in the affidavit of Wilfrida Mokaya) as stating:

> ***"We as the Committee that play the oversight role on matters of justice have the ultimate say on the future of JSC. We shall be failing in our duties if we allow this kind of wastage to go on without our intervention. JSC must be willing to be controlled or we disband them."***

254. At paragraph 15 of the Petitioner's affidavit, it is stated that the said Chairman was the father of an Administrative Assistant employed by the CRJ in the Judiciary, and that her irregular recruitment and payment of her postgraduate studies fees formed part of the investigation against the CRJ. The allegations are supported by an extract by the CRJ to the JSC, (annexure "**WBM-4")** and none have been disputed. Secondly, allegations of close or family ties between the said Chairman and the CRJ have not been disputed. The Petitioner therefore deponed that the Chairman was driven by personal interests.

255. As urged by the **Amicus**, the events preceding the removal of the six commissioners of the JSC must be viewed as one transaction starting with the sending on compulsory leave of the CRJ by the JSC. We find it significant that following the last communication by the JSC to the Committee (in its letter of 17th September, 2013) no rejoinder was sent to the JSC. Instead a Petition dated 4th October 2013, on the face of it by an independent citizen, was forwarded by the National Assembly to the JSC, targeting the removal of six commissioners.

256. This Petition appears to take over matters from where the Committee left off. We say this cautiously and respecting Mr. Mugambi's right, under **Article 251(2),** to present a petition to Parliament seeking the removal of the six commissioners. We take this view because it is an inescapable observation, and on this score we rely on **section 119** of the **Evidence Act**, that looking at the language and substance of the Mugambi Petition, it uncannily harks back to the ***"process and circumstances of the removal"*** of the CRJ which ignited this dispute. If the sentiments of the key members of the Committee on this matter were accurately carried in the print media, as set out above, and considering the unwillingness of the Committee to extend time for the Commissioners to appear or make presentations to the Committee with regard to the Petition, any reasonable person would begin to see a disturbing pattern.

257. The ensuing plenary discussion in Parliament suggests that the real intention of this entire exercise was the subjugation of the JSC to the National Assembly, rather than a genuine desire to exercise oversight for the benefit of the people represented by Parliament. The beneficiary would seem to be the erstwhile CRJ and the assertion by Parliament of its assumed positional supremacy. This does not accord with a simple purpose test drawn from the functional definition of oversight in the oversight model of the South African Legislative Sector, earlier cited in this judgment; that:

> ***"Oversight entails the informal and formal, watchful, strategic and structured scrutiny ... overseeing the effective management of government departments by individual members of relevant executive authority in pursuit of the improved service delivery for the achievement of a better quality of life for all people."***

258. We have taken judicial notice of the report of the debate in Parliament as reported in the Official Hansard of 6-7th November, 2013. This is in accordance with the

provisions of **section 60** of the **Evidence Act**. A cursory reading of the same, retrieved from the official website of the National Assembly, demonstrates the *animus* by a majority of the speakers towards the JSC and the desire for its control. Two examples will suffice. At page 33 of the Hansard, one Honourable Member is reported to have stated as follows:

> ***"The horns of the JSC can only be trimmed by this House through our oversight role."***

259. At page 20 another Honourable Member of Parliament, who was also a member of the Committee, in seconding the motion to adopt its report, stated that:

> ***"From the outset I wish to state that the journey which this Committee has travelled with the JSC has been very turbulent. This is a commission (JSC) that would only wish to oversee itself. Before this petition, we had issues with this Commission. This is the time for this House to assert itself ... this Commission snubbed a Committee of Parliament. If members will not assert its authority, tomorrow another Commission will snub another Committee...we have always had commissions appear before us in the past whenever the Committee required them to appear...They have always appeared before this Committee but the JSC did not"***

260. Despite objections by several Honourable members of Parliament casting doubt on the identity/existence of the petitioner Riungu Nicholas Mugambi, and observing that he had not appeared before the Committee, as well as noting the inadequacy of the allegations in the Petition, the Committee's Report was adopted.

261. The ultimate question then is whether the kind of oversight disclosed in this case is that anticipated in **Article 125, 95** and **254,** of an independent commission protected under **Article 249**. In our view, when the interaction between JSC and the Committee is reviewed in its entirety, the answer must be a resounding no. Whereas the oversight provisions anticipate a purposeful, lawful, objective and careful oversight, the actions undertaken by the Committee reveal a disregard for constitutionalism, sabre rattling, and partiality.

262. The circumstances of this case make it difficult not to believe that the actions of the Committee were driven by motives other than the execution of the legal oversight obligation for the benefit of the people. To use the words ascribed in the media to the Chairman of the Committee, the apparent intent was to subjugate and control the JSC. The Committee's "oversight" amounted in substance and procedure to piling undue influence on the petitioner in the investigations involving the erstwhile CRJ.

263. As the Court stated in the **New National Party** case, tensions are inevitable between the legislature and independent commissions and institutions. But it is incumbent upon the parties involved to endeavour to resolve the tensions. We take the view that a proactive intervention through meaningful discussions between the Chairman of the JSC and the Speaker of the National Assembly could have resolved the initial tensions, obviating the need for court proceedings which should ideally come as a last resort. Perhaps this calls for an early warning mechanism, and a protocol to facilitate timely and effective intervention in the future.

264. In order for such a system to work, parties must understand their place in the constitutional design and the value of constitutionalism. It is unfortunate that the JSC's assertion of its independence in this case was seen by the Committee and Parliament as an act of "defiance". In the **New National Party** case, the Court endorsed a robust exchange between two state organs in which the "offended party", the Electoral Commission, questioned what it claimed to be the usurpation/interference with its mandate by the "offending party". Although the dispute eventually ended up in court, the court appeared to lean in favour of the proposition that court action between state organs ought to be a last resort.

265. We find that in the circumstances of this case, the purported exercise of oversight of the JSC by the National Assembly was improper and constituted a violation of the Constitution.

RECOMMENDATIONS

266. Before giving our final orders in this matter we deem it appropriate to, respectfully, make certain recommendations which we hope will form a basis for future cordial and constructive engagement between state organs. In making these recommendations we go back to the **University of Cape Town Report** in which it was postulated that:

> ***"Effective and proper exercise of oversight thus requires Parliament and members of the executive to fully understand the constitutional justification and rationale behind accountable government and the purpose it serves."[1]***

267. For independent Commissions or those in power, and therefore subject to, or responsible for, oversight, accountability and oversight will be more effective if they all recognise ***"the central organising principle of the Constitution"***: it is a two way street in the enhancement of democracy and the well-being of the people. These ideals were seemingly lost in the tensions generated by this dispute.

268. The Constitution has brought fundamental changes in the governance structure of our country, including through the introduction of no less than twelve

new constitutional commissions and independent offices. Their number and the complexity of overseeing these new institutions, with their important yet diverse functions, means that there is a need for Parliament to be innovative in order to efficiently carry out its oversight role over these new entities, so as to realize real benefits for the people of Kenya. Further, and in order to facilitate better working relationships between organs of state that enhance performance of their respective constitutional mandates for the people of Kenya, we make the following recommendations:-

A. **That Parliament considers the establishment of a committee within Parliament dedicated to the oversight of all the independent offices and commissions.**

B. **That Parliament considers developing an appropriate, structured, oversight model that takes into account and facilitates strategic and structured scrutiny of state organs by Parliament with the aim of advancing our constitutional democracy, enhancing service delivery and better quality of life for the people of Kenya.**

C. **That the Executive, Legislature and Judiciary develop a Protocol for Engagement between the heads of the three arms of government to facilitate amicable discussion and resolution of issues of governance and areas of potential conflict, in the spirit of co-operation and mutual respect that underlies our Constitution.**

SUMMARY OF FINDINGS

269. We now summarise hereunder our findings in respect of the substantive issues which we dealt with.

270. On the first issue of joinder and or misjoinder, we have found that JSC was a proper Petitioner; that the Speaker of the National Assembly was properly enjoined; and that in the circumstances of this case, even if there had been a misjoinder, which was not the case, the President can be bound by Court orders arising from proceedings to which he was not a party;

271. On the second issue regarding the jurisdiction of the Court in relation to acts of other arms of government, we have found that judicial intervention by the High Court is not a violation of the doctrine of separation of powers insofar as the Court is performing its solemn duty under **Article 165(3)(d)(ii)** of the **Constitution** in inquiring into alleged constitutional violations or contraventions.

272. On the third issue as to the meaning and scope of Parliamentary oversight of state organs, our findings are three pronged:

a. Firstly, that the constitutional provisions for Parliamentary oversight of constitutional commissions and independent offices anticipate a purposeful, lawful, objective and carefully structured oversight for accountable governance for the achievement of a better quality of life for the people of Kenya;

b. Secondly, that Parliament's constitutional powers of over sight do not amount to a right to subjugate, micromanage, control or direct the JSC;

c. Finally, that oversight connotes the constitutional imperative aimed at the enhancement of constitutional democracy and the rule of law through upholding and protecting the financial and administrative independence of constitutional commissions.

DISPOSITION

273. In light of the foregoing, the following orders commend themselves to us:

1. ***We issue a declaration that the Petitioner as a constitutional commission is not subject to the control or direction of the National Assembly or any of its Departmental Committees established under the Standing Orders in the lawful discharge of its Constitutional mandate under Article 172 of the Constitution;***

2. ***We declare that the National Assembly through the Departmental Committee on Justice and Legal Affairs is not entitled to supervise and sit on appeal on the decisions of the Judicial Service Commission when the Commission is lawfully discharging its mandate under the Constitution;***

3. ***We hereby issue an order of Certiorari to remove to the High Court and quash the proceedings before the Committee on Justice and Legal Affairs seeking the removal of members of the Judicial Service Commission;***

4. ***We hereby declare that the resolution of the National Assembly to transmit the Petition to the President in defiance of a Court order is null and void and is hereby quashed;***

5. ***We declare that the appointment of the 3rd to 6th Respondents by the President of the Republic of Kenya as members of the Tribunal contemplated under Article 251(4) of the Constitution under Special Gazette Notice No. 15094 is null and void, and is hereby quashed;***

6. ***We issue an order prohibiting Justice (Rtd) Aaron Gitonga Ringera, Jennifer Shamalla, Ambrose Otieno Weda and Mutua Kilaka from taking oath, assuming office, carrying on or in any way discharging their mandate as members of the Tribunal appointed under Special Gazette Notice No. 15094.***

7. ***We decline Prayers 2, 4, 5 and 6 of the Petition.***

Costs

274. Under Rule 26 of the **Mutunga Rules,** the award of costs is at the discretion of the court. This has been the holding in several decisions of the courts including **John Harun Mwau v The Attorney General Petition No 65 of 2010 [2012]eKLR** and **Rose Wangui Mambo and Others v Limuru Country Club Petition No. 160 of 2013 [2014] eKLR.**

275. Taking into account that this matter raises issues of great public interest and importance, we make no order as to costs.

276. Finally we wish to thank Counsel who participated in these proceedings for their thorough preparation and incisive submissions, as well as for the assistance which they gave to the Court in this matter.

Orders accordingly.

Signed and Dated at Nairobi this 15th day of April, 2014

_____

RICHARD MWONGO

PRINCIPAL JUDGE

_____

HELLEN OMONDI

JUDGE

_____

CHRISTINE MEOLI

JUDGE

_____

MUMBI NGUGI

JUDGE

_____

HILARY CHEMITEI

JUDGE

In the presence of:

1. **Mr. P.K. Muite, Mr. Issa and Ms. Mutua for the Petitioner**
2. **Mr. Njoroge Regeru for the Attorney General**
3. **Mr. S.M Mwenesi for the Interested Party**
4. **Mr. Y. Angima for the Amicus**

In the Matter of Kenya National Commission on Human Rights [2014] eKLR

REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

AT NAIROBI

(CORAM: Tunoi, Ibrahim, Ojwang, Wanjala, Ndungu, SCJJ)

REFERENCE NO. 1 OF 2012

In the matter of an Application by the Kenya National Commission on Human Rights for an Advisory Opinion under Article 163(6) of the Constitution of Kenya

-AND-

In matter of the Bill of Rights and Fundamental Rights and Freedoms under Articles 19, 20, 21, 22, 48 and 50 of the Constitution of Kenya

-AND-

In the matter of Section 40 of the Supreme Court Rules, 2011 under Legal Notice No. 141 of 2011 made pursuant to the Supreme Court Act (No. 7 of 2011) and Article 163(8) of the Constitution of Kenya, 2010

-BY-

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS……APPLICANT

-AND-

THE HON. THE ATTORNEY-GENERAL…..1st INTERESTED PARTY

THE COMMISSION ON ADMINISTRATIVE JUSTICE

(OFFICE OF THE OMBUDSMAN)……..2nd INTERESTED PARTY

R U L I N G

A. **BACKGROUND**

[1] The applicant herein is the Kenya National Commission on Human Rights. The applicant, by way of **Reference No.1 of 2012,** seeks to invoke the Supreme Court's Advisory Opinion Jurisdiction pursuant to the provisions of **Article 163 (6)** of the Constitution. The said Article provides that:

> "**The Supreme Court may give an advisory opinion at the request of the national government, any State organ, or any county government with respect to any matter concerning county government."**

[2] The applicant seeks an advisory opinion from this Court to the effect that "Rule 40 (1) of the Supreme Court Rules 2011 published under Legal Notice No. 141 pursuant to the Supreme Court Act No. 7 of 2011 and Article 163 (8) of the Constitution of Kenya is restrictive and requires re-drafting and/or amendment to enable parties other than the national government, county governments and State organs to seek the advisory opinion of this Honorable Court under Article 163(6) of the Constitution of Kenya. Further, the advisory opinion is sought based on the apprehension by the applicant that, the said Rule 40 (1) as presently drafted may violate Articles 19, 20, 21, 22, 48 and 50 of the Constitution of Kenya and should, therefore, be repealed, re-written, re-drafted and/or amended to conform to the Constitution of Kenya."

Rule 40 (1) of the Supreme Court Rules, 2011 reads as follows:

> "**The national government, a State organ or county government may apply to the Court by way of reference for an advisory opinion under Article 163(6) of the Constitution"**

[3] Although the **Supreme Court Rules, 2011** have since been revoked vide **Rule 56 of L.N No. 123 of 2012,** the contents of **Rule 40(1)** of those Rules have been replicated word for word, as **Rule 41(1) of the Supreme Court Rules 2012.** Therefore, it is to this latter Rule that we shall make reference, in considering the merits of the application before us.

[4] In support of this reference, is an Affidavit sworn and filed by the applicant's Advocate, Senior Counsel Mr. Nzamba Kitonga. Counsel avers that this rule may be erroneously, wrongly and irregularly interpreted to mean that no person whether human or corporate, other than a national government, a State organ or a county government can seek an advisory opinion before this Court on any matter concerning county government, in terms of Article 163 (6) of the Constitution. Such a narrow and restricted interpretation, counsel further contends, would defeat the fundamental basis of the Constitution which gives citizens unlimited, unfettered and unrestricted access to justice and the Courts, in equal measure with all State organs.

[5] The applicant further expresses the view that a holistic reading of the Constitution and, in particular, Articles 1, 19, 20, 21, 22, 27, 48 and 50 thereof, supports the proposition that any person whether human or corporate, may seek an advisory opinion on county government under Article 163(6) of the Constitution, in addition to the national government, a State organ, or county government. Therefore, it is contended, limiting access to this Court in terms of Rule 41 (1) of the Supreme Court Rules, 2012 may amount to discrimination under the Constitution.

[6] In view of the averments thus highlighted, the applicant requests this Court ***"by way of an advisory opinion [to] advise the Honourable The Chief Justice, who is also the President of the Court, on his own behalf and on behalf of the Court, to re-write, redraft, repeal and/or amend Rule 40 (1) (now Rule 41(1)) of the Supreme Court Rules, 2012 in a manner that enables any person whether human or corporate to seek an advisory-opinion from this Court under Article 163(6) of the Constitution of Kenya."***

[7] A second affidavit in support of the contentions of the applicant is sworn by one Mohammed Hallo, who is also the secretary of the applicant. In his averments, Mr. Hallo reiterates the basic arguments advanced by the applicant's advocate, to the effect that Rule 41(1) of the Supreme Court Rules, 2012 is restrictive and should be amended or redrafted. However, this particular deponent makes a curious averment, to the effect that the applicant had intended, in furtherance of its objectives, and for purposes of greater clarity of the Constitution of Kenya, to seek the advisory opinion of this Court on questions such as:

a. *the status of the Provincial Administration in relation to county governments in the current constitutional dispensation;*

b. *the status of the Constituency Development Fund in relation to county governments and the national government in the current constitutional dispensation; and*

c. *several other matters in relation to devolution and the role of the national government.*

[8] We say *"curious"* because, it is unusual for an affidavit sworn in support of a cause, to contain the deponent's intentions of future litigious action. Moreover, the use of the words *"had intended"* means that such intentions (as disclosed in paragraph 5 of the affidavit) have, in fact, been abandoned. One is left to wonder whether, if at all, the jettisoning of such a scheme is in any way connected to the reference herein.

B. **SUBMISSIONS**

[9] Be that as it may, the application is opposed by both the first and second interested parties, to wit, the Attorney-General and the Commission on Administrative Justice respectively. The second interested party submits that *this Court lacks jurisdiction to entertain the matter before it,* as requests for an advisory opinion are limited to matters concerning county government; and that the application before the Court does not in any way concern itself with county government. Mr. Chahole for the second interested party submits that Article 163(6) *limits both the parties and the scope for seeking an advisory opinion.* He urges that while the applicant passes the first test (being a state organ), it fails the second test, since the subject matter of the application is not one concerning county government. The request, he submits, is one that seeks the interpretation of the Constitution, more particularly, Article 163(6) thereof, and not an advisory opinion. Therefore, counsel urges, the application should be dismissed for want of jurisdiction. Learned counsel Mr. Moimbo, on the other hand, is of the opinion that *the Court has jurisdiction to entertain the application but should, however, decline to exercise it.* This opinion appears to be informed by the written submissions earlier filed by Mr. Munyi, learned counsel for the first interested party, in which he argues that Article 163 (6) *does not limit the national government and State organs, in terms of the nature of the issues on which they may seek an advisory opinion from this Court.* It is Mr. Munyi's view that only county governments are limited to matters concerning county government.

[10] The first interested party urges that the reference be dismissed on grounds that it is not only an abuse of the process of Court, but is based on a misinterpretation of the Constitution. The impugned Rule, counsel for the first and second interested parties (Mr. Moimbo and Mr. Chahole, respectively) contend, is a replica of Article 163(6) of the Constitution (both in content and word sequencing). That being the case, the two counsel submit, to grant an advisory opinion in the terms prayed for by the applicant, would be tantamount to amending the Constitution through the back door by this Court. They urge that Rule 41(1) of the Supreme Court Rules can only be amended/re-written or redrafted after Article

163 (6), of which it is a replica, has been amended. Counsel further submits that the Rule in question was deliberately drafted so as to reflect the constitutional provision in content and basic intent. They urge that the Constitution can only be amended in the manner provided, and not through an advisory opinion. It is their submission that if Rule 41(1) had been drafted in any manner other than in its present form, it would have been repugnant to Article 163(6) of the Constitution.

[11] Regarding the claim that Rule 41 (1) of the Supreme Court Rules is restrictive and has the effect of excluding persons other than the national government, state organ or county government from seeking an advisory opinion from this Court, counsel for the first and second interested parties submit that indeed the restriction is what the Constitution intended, and that Article 163(6) is categorical as to who may seek an advisory opinion from the Supreme Court. The Rule, it is submitted, has remained faithful to the letter and spirit of the Constitution.

[12] In response to the applicant's claim that Article 41(1) of the Supreme Court Rules offends the Bill of Rights, due to its discriminatory effect (restricting those who can seek advisory opinions from this Court), both counsel for the interested parties argue that the proper forum for adjudicating such a claim would be *the High Court*, in light of the provisions of Article 165 (3) of the Constitution. The reference, they contend, ought to have been filed as a constitutional reference before the Constitutional and Human Rights Division of the High Court, since it is basically seeking a declaration that the Rule offends the fundamental rights of the individual enshrined in the Constitution.

[13] The second interested party also considers the issue as to whether a constitutional provision can be deemed *"unconstitutional".* This is based on the premise that what the applicant is seeking, in effect, is a *declaration of Article 163(6) as being "unconstitutional"*, through the guise of an advisory opinion. The second interested party argues that the intention of the makers of the Constitution was to limit the persons who may seek an advisory opinion to the *three entities specified in Article 163(6).*

[14] The second interested party further submits that in seeking an advisory opinion, the three entities i.e., the national government, State organs and county governments, would be doing so on behalf of "the people": which defeats the argument that Rule 41(1) discriminates against "the people".

[15] The interested parties urge that the reference be dismissed on grounds that it is incompetent.

C. **ANALYSIS**

i. ***On Jurisdiction***

[16] This Court has had occasion to pronounce itself on the parameters within which an advisory opinion may be sought, pursuant to the provisions of Article 163(6) of the Constitution: ***In the Matter of the Interim Independent Electoral Commission: Constitutional Application Number 2 of 2011***. *A*t paragraph 83 (i) and (ii) in that decision, the Court was categorical that:

> *"For a reference to qualify for the Supreme Court's Advisory Opinion discretion, it must fall within the four corners of Article 163 (6): it must be* ***'a matter concerning county government****.' The question as to whether a matter is one concerning county government, will be determined by the Court* ***on a case- by- case basis.***
>
> *"The only parties that can make a request for an Advisory Opinion are the* ***national government, a State organ, or county government****. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as* ***an intervener (interested party) or as amicus Curiae."***

The two principles have been restated and reaffirmed in subsequent references to this Court for advisory opinions. Thus, there can be no doubt as to the import of Article 163 (6) of the Constitution, regarding *who* has the competence to request the Court for an advisory opinion. The Article itself is clear and unambiguous on this score. Secondly, the subject matter for an advisory-opinion must be one concerning *county government*. We therefore agree with Mr. Chahole in his reading of the meaning of Article 163(6), as far as the basis for seeking an advisory opinion is concerned. In equal measure, we disagree with Mr. Munyi's assertion that ***"the national government and State organs have not been limited on the nature of issues they may wish to[seek] advisory opinions on…."***

ii. ***The Reference***

[17] The question to be answered is, whether the subject matter of the reference before us is one *concerning county government*. Can it be said that the applicant, a State organ, is seeking an advisory opinion from this Court on a matter concerning county government? The applicant seeks an advisory opinion in the following terms:

"1. THAT Rule 40 (1) of the Supreme Court Rules 2011 (now 41 (1) of the Supreme Court Rules of 2012) pursuant to the Supreme Court Act No. 7 and Article 163 (8) of the Constitution of Kenya is restrictive and requires re-drafting and/or amendment to enable parties other than

the national government, county governments and State organs to seek the advisory opinion of this Honourable Court under Article 163(6) of the Constitution of Kenya.

"2. THAT the said Rule as presently drafted may violate Articles 19, 20, 21, 22, 48 and 50 of the Constitution of Kenya and should therefore be repealed, re-written, re-drafted and/or be amended to conform to the Constitution of Kenya."

[18] Is the applicant really seeking an advisory opinion? In our view, the applicant is not seeking an advisory opinion within the meaning of Article 163(6) of the Constitution. *Where is the matter concerning county government in the two paragraphs as framed by the applicant?* On the face of the application it is clear to us that, what the applicant seeks is not an advisory opinion, but a declaration that Rule 41(1) of the Supreme Court Rules of 2012 is unconstitutional. This *"reference for an advisory opinion"* is actually a *constitutional reference* in disguise. The main objective of the applicant is to elicit a declaration from this Court regarding the constitutionality or otherwise of Rule 41 (1). This is the true nature of the application, notwithstanding the contention by counsel for the applicant, Mr. Kitonga in his written submissions, to the effect that *"this application….squarely relates to county governments."*

[19] We agree with counsel for the interested parties in their contention that this application ought to have been filed at the High Court. The High Court is seized with original jurisdiction to determine whether a piece of legislation or subsidiary legislation is unconstitutional. Mr. Kitonga submits that it would be ridiculous to file a petition in the High Court to challenge rules made by the Supreme Court which is superior to the High Court. We, however, see no hierarchical impropriety if a party were to challenge a Supreme Court Rule in the High Court. What would be at stake in such circumstances is not the reputation of the Supreme Court, but the constitutionality of the rule in question. Moreover, it should be clear that Rules and Regulations are only *subsidiary legislation;* and, more emphatically than in the case of an *enactment,* they are subject to annulment by the High Court in exercise of its unlimited jurisdiction.

[20] The Constitution remains supreme over all other laws in the land. Mr. Kitonga will be aware that even the provisions of the Supreme Court Act itself have been questioned not just in this Court, but at the High Court. In ***Samuel Kamau Macharia v. Kenya Commercial Bank Limited Civil Application No. 2 of 2011****,* this Court declared Section 14 of the Supreme Court Act unconstitutional, for vesting in the Court a jurisdiction that exceeded the confines of the Constitution. Recently, in ***The Commission on Administrative Justice v. The Attorney-General, Petition No. 284 of 2012,*** the High Court declared section 16 (2) (b) of the Supreme Court Act, and Rules 17, 41, 42 and 43 of the Supreme Court Rules unconstitutional.

[21] Flowing from the foregoing, we must arrive at the conclusion that the reference before us, as framed by the applicant, is incompetent, and must be dismissed. This conclusion would have been sufficient to dispose of the matter at this stage. However, we take note of the fact that the issue of jurisdiction was not raised by the interested parties by way of preliminary objection. The matter was raised in the course of the substantive application. We therefore think it is proper to consider the entire application on its merits. This brings us to the question as to whether, as urged by the applicant, Rule 41 (1) of the Supreme Court Rules is *discriminatory* and ought to be amended.

[22] Rule 41 (1) of the Supreme Court Rules of 2012 provides that *"the National Government, a State organ or County Government may apply to the Court by way of reference for an advisory opinion under Article 163(6) of the Constitution."* The Rule is on all fours with the Article 163(6) of the Constitution. It actually replicates the provisions of that Article. Yet, Mr. Kitonga for the applicant strongly submits that the Rule as framed has the effect of excluding parties other than the ones specified, from making applications to this Court for advisory opinions. He contends that individuals, Non-Governmental Organizations and professional bodies are excluded by the restrictive words of the Rule. Mr. Kitonga submits that Article 163 (6) of the Constitution has to be read broadly and holistically, taking into account the provisions of Articles 19, 21, 22, 27, 28 and 50 of the Constitution. It is his submission that the said Articles have opened the frontiers *"for all citizens to access justice by approaching the courts of law to vindicate their rights."* And so, he urges, Article 163(6) should not be interpreted in a manner that locks out other persons whether human or corporate, from making applications for advisory opinions.

[23] We are unable to appreciate the cogency of such an argument. *"Rights",* as they are attributed to persons under the Constitution, bear the dictionary meaning *(Black's Law Dictionary,* 8th ed. (2004), at p. 1347):

> *"Something that is due to a person by just claim, legal guarantee or moral principle".*

Do persons in general, have a *right to an advisory opinion* of the Supreme Court? We do not think so: for the rights declared in the Constitution are, by Article 22, enforceable by way of regular *"court proceedings".* Such proceedings, in our perception, do not necessarily include the Supreme Court's *advisory opinions.* Such opinions, in our view, are of an exceptional nature and, by design, are meant to serve as a device in aid of the main tasks of the institutional conduct of governance. And thus, those entitled to resort to such opinion are:

the national government; any State organ; or any county government (Article 163(6)).

[24] In the ***Interim Electoral Commission*** case, this Court duly considered the nature and purpose of the advisory-opinion mandate in common law and other jurisdictions. It was noted that where it exists, the advisory- opinion jurisdiction is closely defined both in terms of procedure, and juridical effect. In Kenya, the advisory-opinion jurisdiction is a creature of the Constitution of 2010. This Court found it necessary to set guidelines for the exercise of its advisory-opinion jurisdiction. One of the guidelines set by the Court reads as follows:

> *"The only parties that can make a request for an advisory-opinion are the **national government, a state organ, or county government**. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as **an intervener (interested party) or amicus curiae**."*

[25] It is clear that this Court has already pronounced itself on the meaning of Article 163(6), as to who may move the Court for an advisory opinion. Rule 41 (1) accurately reflects Article 163(6) of the Constitution. It also reflects the Court's interpretation of the same. It cannot be said to be either restrictive or discriminatory, in any manner. Indeed, contrary to the applicant's apprehension, the Court's guideline makes it possible for parties *other than* the national government, State organ or county government, to participate in advisory-opinion proceedings, as interveners or *amici curiae*. So far, many persons have participated in such proceedings as have been initiated before this Court. We do not see how Rule 41 (1) of the Supreme Court Rules in any way hinders one's enjoyment of the Bill of Rights, as stipulated in Chapter 4 of the Constitution. All the rights therein are enforceable in the High Court, with avenues for appeal open all the way to the Supreme Court. The advisory-opinion jurisdiction, on the other hand, is not only discretionary, but exercisable in the manner provided for in Article 163(6).

[26] In his written and oral submissions, Mr. Kitonga has persistently urged us to holistically, broadly and robustly interpret the Constitution, so as to find that Article 163(6) means *all persons*, and not just the entities mentioned therein, can apply for advisory opinions. Counsel is, in effect, asking us to find that Article 163(6) of the Constitution does not mean what it says, through *"a holistic interpretation".* But what is meant by a *'holistic interpretation of the Constitution'?* It must mean interpreting the Constitution *in context*. It is the contextual analysis of a constitutional provision, reading it alongside and against other provisions, so as to maintain a rational explication of what the Constitution must be taken to mean in light of its history, of the issues in dispute, and of the prevailing circumstances. Such scheme of interpretation does not mean an unbridled extrapolation of discrete constitutional provisions into each other, so as to arrive at a desired result.

ORDERS

[27] In view of the foregoing, this reference for an advisory opinion is hereby dismissed. We make no order as to costs.

DATED and **DELIVERED** at **NAIROBI** this **27th day of February, 2014.**

.....

P. K. TUNOI

JUSTICE OF THE SUPREME COURT

.....

MOHAMMED K. IBRAHIM

JUSTICE OF THE SUPREME COURT

.....

J. B. OJWANG

JUSTICE OF THE SUPREME COURT

.....

S. C. WANJALA

JUSTICE OF THE SUPREME COURT

.....

S. N. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true copy of the original

REGISTRAR, SUPREME COURT

Commission on Administrative Justice v Attorney General & another [2013] eKLR

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

PETITION NO.284 OF 2012

BETWEEN

COMMISSION ON ADMINISTRATIVE JUSTICE.....PETITIONER

AND

THE HON. ATTORNEY GENERAL.....RESPONDENT

AND

LAW SOCIETY OF KENYA.....INTERESTED PARTY

JUDGMENT

Introduction

1. The Petitioner is a Commission established pursuant to **Article 59(4)** of the **Constitution** as read with the provisions of the **Administrative Justice Act, No.23 of 2011** and in its Petition dated 6th July 2012, it raises the following questions for determination;

i. *Whether **Section 14(1)** of the **Supreme Court Act, 2011** is ultra vires **Article 163(3), (4)** and **(5)** of the **Constitution** to the extent that it arrogates new or extended jurisdiction other than that contemplated under the Constitution.*

ii. *Whether **Section 16(1)** and **(2) (b)** of the **Supreme Court, 2011** is ultra vires **Article 163** of the **Constitution** to the extent that it adds to the jurisdiction of the Supreme Court to determine appeals where the Court is satisfied that it is in the interests of justice for the Court to hear and determine the proposed appeal or where a substantial miscarriage of justice may have occurred or may occur unless the Appeal is heard.*

iii. *Whether **Section 23(2)** of the **Supreme Court Act** is ultra vires the Constitution to the extent that it provides that any two judges may act as the Court.*

iv. *whether the consequent provisions of the **Supreme Court Rules** namely **Rules 17, 41, 42 and 43** are unconstitutional.*

Case for the Petitioner

2. The Petitioner filed written submission on 7/5/2013 and its case is as follows;

3. That it has an obligation and the standing under **Articles 159(2)(d) and 258(1)** and **(2)** of the **Constitution, 2010** to bring the present proceedings and that under **Article 165(1)(d)** of the said **Constitution**, the High Court has jurisdiction to hear and determine whether any law is inconsistent with or in contravention of the Constitution.

4. That the Supreme Court is created by **Article 163** of the **Constitution** and under **Article 163(9),** Parliament is granted the power to make further provision for the operationalisation of the Court but Parliament in doing so, has no powers to expand the constitutional jurisdiction of the Court and that any legislation enacted in that regard should not depart from the jurisdiction specifically conferred by the Constitution.

Article 14 of the Supreme Court Act

5. The Petitioner has admitted that the constitutionality or otherwise of the above Article was settled on 23/10/2012 by the Supreme Court when it declared as follows;

> ***"Flowing from the foregoing, we hold that Section 14 of the Supreme Court Act is unconstitutional insofar as it purports to confer "special jurisdiction" upon the Supreme Court, contrary to the express terms of the Constitution. Although we have a perception of the good intentions that could have moved Parliament as it provided for the "extra" jurisdiction for the Supreme Court, we believe this, as embodied in Section 14 of the Supreme Court Act, ought to have been anchored under Article163 of the Constitution, or under Section 23 of the Sixth Schedule on "Transitional Provisions."***

The above finding was made in the case of **Samuel Kamau Macharia & Anor vs Kenya Commercial Bank Limited & 2 Others, Petition No.2 of 2012.**

I need not go further than stating that this Court is bound by the decision of the Supreme Court by dint of **Article 163(7)** of the **Constitution** which states as follows;

> "***All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court. "***

6. There is nothing more to say and the first question, for avoidance of doubt, must therefore be answered in the affirmative and **Rule 17** of the **Supreme Court Rules** like **Section 14** aforesaid are declared to be unconstitutional.

Section 16(1) and (2) (b) of the Supreme Court Act

7. **Section 16** of the **Supreme Court Act** provides as follows;

"(1) The Supreme Court shall not grant leave to appeal to the Court unless it is satisfied that it is in the interests of justice for the Court to hear and determine the proposed appeal.

(2) It shall be in the interests of justice for the Supreme Court to hear and determine a proposed appeal if—

(a) the appeal involves a matter of general public importance; or

(b) a substantial miscarriage of justice may have occurred or may occur unless the appeal is heard.

(3) The Supreme Court shall not grant leave to appeal against an order made by the Court of Appeal or any other court or tribunal on an interlocutory application unless satisfied that it is necessary, in the interests of justice, for the Supreme Court to hear and determine the proposed appeal before the proceedings concerned is concluded.

(4) The Supreme Court may grant leave to appeal subject to such conditions as it may determine.

(5) The Supreme Court may, on application, vary any conditions imposed under subsection (4) if it considers it fit."

8. The Petitioner's complaint in this regard is that the provisions above purport to unilaterally and unconstitutionally extend the appellate jurisdiction of the Supreme Court to include areas where the Court is satisfied that the matter is in the *"interests of justice"* and *"where a substantial miscarriage of justice may have occurred or may occur"* which are situations that were and are not contemplated by the Constitution. That in fact the Constitution only recognises *"a matter of general public importance"* as the basis for admission of an appeal for hearing by the Supreme Court and therefore the wide powers given by the Act are ultra vires **Article 163(4)** of the **Constitution** and to that extent are unconstitutional and should be so declared.

Section 23 of the Supreme Court Act

9. **Section 23** of the **Act** provides as follows**;**

"(1) For the purposes of the hearing and determination of any proceedings, the Supreme Court shall comprise five Judges.

(2) Any two or more judges of the Supreme Court may act as the Court—

(a) to decide if an oral hearing of an application for leave to appeal to the Court should be held, or whether the application should be determined solely on the basis of written submissions; or

(b) to determine an application for leave to appeal to the Court."

10. The Petitioner takes issue with the above provision and submits that under **Article 163(2)** of the **Constitution**, the Supreme Court *"shall be properly constituted for purposes of its proceedings if it is composed of five judges.*" That the unwritten principle in that regard is that at no time should the Court have an even number of judge and to that extent any legislation that creates a bench of two judges in the Supreme Court is unconstitutional and should be so declared.

Rules 17, 41, 42 and 43 of the Supreme Court Rules

11. The above **Rules** all flow from the impugned **Section 14** of the **Supreme Court Act** but for clarity of issues, they provide as follows;

"Rule 17

(1) The Court may in proceedings under Section 14 of the Act call for fresh evidence.

(2) A party seeking to adduce fresh, evidence under this rule, may apply orally in Court.

(3) The Court may call for or receive from any Court or Tribunal any record on any matter connected with the proceedings before it."

"Rule 41

(1) An application under Section 14 of the Act, shall be by petition in Form D set out in the First Schedule.

(2) The applicant shall serve the petition upon the Attorney- General and the parties to the proceeding in which the judgment or decision was made.

"Rule 42

(1) The Court may, on its own motion, call for any judgment or decision made by a judge who has resigned or has been removed form office and upon hearing the parties review the judgment or decision.

(2) The Registrar shall issue a notice, to the Attorney-General and the parties to the proceedings in which the judgment or decision was made, inviting them to attend the Court for directions as to the mode and date of hearing."

"Rule 43

A two Judge Bench shall, before hearing the petition under this part, conduct a preliminary inquiry to determine the admissibility of the matter inviting them to attend the Court for directions as to the mode and date of hearing"

The Petitioner's point is that once the substantive provisions of the Act are declared unconstitutional, any rule that is made pursuant to those provisions must suffer the same fate.

Case for the Respondent

12. The Attorney-General as Respondent has urged the point that the issue raised regarding **Section 14** of the Act was settled in the **Samuel Macharia case (supra)** and with regard to **Section 16** aforesaid, that the Petitioner's arguments are self-defeating because whereas it claims to be the primary custodian of the right to fair administrative action, it is also saying that the interests of justice and substantial miscarriage of justice are not matters of general public importance. That the argument made is not sustainable in any democratic State that has respect for the values of justice, rule of law, equity and human rights. In any event, that the issue was addressed by the Supreme Court in **Hermans Phillipus Steyn vs Giovanni Guecchi – Ruscone [2013] eKLR** when it explained what constitutes a matter of general public importance and acknowledged that it is a general principle of rendering justice as contemplated by **Article 159(2)** of the **Constitution**.

13. On **Article 23**, the Respondent's answer to the Petitioner's contention is that the issue was settled in the case of **Erad Supplies & General Contractors Ltd vs National Cereals and Produce Board, Petition No.5 of 2012** where the Supreme Court overruled arguments made that two judges of the Court could not sit to determine simple applications made before the Court.

14. The Respondent further states that whereas the Petitioner qua Commission has the standing to institute the present proceeding, it questions the fact that in its view the Chairman of the Commission is the one who brought the Petition but I will quickly dismiss that argument as it is not borne out by the record.

In any event, the Respondent seeks that the Petition be dismissed with costs.

Case for the Interested Party

15. The Law Society of Kenya was enjoined to these proceedings as an Interested Party and its position is that the Petition is frivolous and without merit because;

*i) The impugned provisions of the Supreme Court Act must be looked at in the circumstances under which the **Constitution 2010** was enacted including the apparent perception, real or imagined, that the Judiciary was generally corrupt, inept and lacked independence and fairness and that it generally disregarded the public interest in its decision-making processes.*

*ii) **Sections 14** and **16** of the **Supreme Court Act** were intended to ensure that persons who may have suffered injustices in the past because of the conduct of judicial officers receive justice in the ultimate and that the provisions are therefore meant to serve the ends of justice and are in the general interests of the public.*

*iii) The Petitioner on the other hand is acting contrary to the public interest and its interpretation of the Constitution is narrow, technical and in contravention of **Article 259** of the **Constitution.***

Determination

16. At the beginning of this judgment, I disposed of issue No.1 above in limine for reasons that I have given. Before I go to the remaining questions however, it is imperative to clarify a number of issues that have arisen albeit in passing.

17. The first is the jurisdiction of this Court to interpret the Constitution and to determine the legality and/or constitutionality of any legislation passed under it. In that regard **Article 165(3)(d) (i)** is clear. It provides as follows;

"3)Subject to Clause 5, the High Court shall have-

(a) …

(b) …

(c) ...

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution".

18. The principles applicable in exercising the above jurisdiction are also well set out in various **Articles** of the **Constitution 2010** and they include;

"***Article 2***

1. This Constitution is the supreme law of the Republic and Supremacy of this binds all persons and all State organs at both levels of government.

2. *No person may claim or exercise State authority except as authorised under this Constitution.*

3. *The validity or legality of this Constitution is not subject to challenge by or before any court or other State organ.*

4. *Any law, including customary law, that is inconsistent with this Constitution is void to the extent of the inconsistency, and any act or omission in contravention of this Constitution is invalid.*

5. *The general rules of international law shall form part of the law of Kenya.*

6. *Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution"*

"***Article 10***

1. *The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them––*

   (a) applies or interprets this Constitution;

   (b) enacts, applies or interprets any law; or

   (c) makes or implements public policy decisions.

2. *The national values and principles of governance include––*

   (a) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

   (b) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalised;

   (c) good governance, integrity, transparency and accountability; and

   (d) sustainable development".

"Article 159

1. *Judicial authority is derived from the people and vests in, and shall be exercised by, the courts and tribunals established by or under this Constitution.*

2. *In exercising judicial authority, the courts and tribunals shall be guided by the following principles—*

   (a) justice shall be done to all, irrespective of status;

   (b) justice shall not be delayed;

   (c) alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms shall be promoted, subject to clause (3)

   (d) justice shall be administered without undue regard to procedural technicalities; and

   (e) the purpose and principles of this Constitution shall be protected and promoted.

3. *Traditional dispute resolution mechanisms shall not be used in a way that—*

   (a) contravenes the Bill of Rights;

   (b) is repugnant to justice and morality or results in outcomes that are repugnant to justice or morality; or

   (c) is inconsistent with this Constitution or any written law. "

"Article 160 (1)

In the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subject only to this Constitution and the law and shall not be subject to the control or direction of any person or authority."

"Article 259(1)

1. *This Constitution shall be interpreted in a manner that—*

   (a) promotes its purposes, values and principles;

   (b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

   (c) permits the development of the law; and

   (d) contributes to good governance. "

19. The above provisions in the context of the present case must also be viewed from the premise that the High Court is a Court subordinate to the Supreme Court and therefore bound by the provisions of **Article 163(7)** which I have reproduced elsewhere above.

20. Further, the appellate process set out in the Constitution is such that decisions of this Court may well be conclusively affirmed or overturned by the Supreme Court and in that regard, this Court cannot purport to sit on appeal over matters already determined by the Supreme Court and that is why **Article 165(5)(a)** provides that;

"1) …

2) …

3) …

4) ...

The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court

under this Constitution; or

(b) …"

21. In that context, one of the aspects of jurisdiction conferred on the Supreme Court is appellate jurisdiction under **Article 163(4)(a)** which is relevant to the matter at hand.

22. The second issue, minor as it may seem, is still important to address; whether the Petitioner is blowing hot and cold by claiming that while it is the primary custodian of the right to fair administrative action as protected by **Article 47** of the **Constitution**, by filing this Petition it is stifling the realisation of the fruits of the Constitution, 2010 and the need to ensure that the ends of justice and the public interest are met at every instance.

That point need not take my time because it is the merits of the Petition that I shall focus on and not the Petitioner's real or perceived failings in the execution of its mandate under the Constitution and the enabling Act as seen in the eyes of the Respondent and Interested Party.

23. Regarding **Section 16** of the **Supreme Court Act**, I am in agreement with the Respondent that the Supreme Court has also settled the meaning to be attributed to the terms *"a matter of general public importance"*. This was in the case of **Hermans Steyn (supra)** where the Supreme Court gave clear guidance in the following words;

"58. The foregoing comparative survey, in our opinion, sheds sufficient light on the position to be taken by this Court, as contemplated by the terms of Article 163(4)(b) of the Constitution. Before this Court, "a matter of general public importance" warranting the exercise of the appellate jurisdiction would be a matter of law or fact, provided only that: its impacts and consequences are substantial, broad-based, transcending the litigation-interests of the parties, and bearing upon the public interest. As the categories constituting the public interest are not closed, the burden falls on the intending appellant to demonstrate that the matter in question carries specific elements of real public interest and concern.

59.From the research material availed to this Court, it is clear that a matter of general public interest may take different forms: in instances, an environmental phenomenon involving the quality of air or water may not affect all people, yet it affects an identifiable section of the population; a statement of law may affect considerable numbers of persons in their commercial practice, or in their enjoyment of fundamental or contractual rights; a holding on law may affect the proper functioning of public institutions of governance, or the Court's scope for dispensing redress, or the mode of discharge of duty by public officers.

60. In this content, it is plain to us that a matter meriting certification as one of general public importance, if it is one of law, requires a demonstration that a substantial point of law is involved, the determination of which has a bearing on the public interest. Such a point of law, in view of the significance attributed to it, must have been raised in the Court or Courts below. Where the said point of law arises on account of any contradictory decisions of the Court below, the Supreme Court may either resolve the question, or remit it to the Court of Appeal with appropriate directions. In summary, we would state the governing principles as follows;

(i) for a case to be certified as one involving a matter of general public importance, the intending appellant must satisfy the Court that the issue to be canvassed on appeal is one the determination of which transcends the circumstances of the particular case, and has a significant bearing on the public interest;

(ii) where the matter in respect of which certification is sought raised a point of law, the intending appellant must demonstrate that such a point is a substantial one, the determination of which will have a significant bearing on the public interest;

(iii) such question or questions of law must have arisen in the Court or Courts below, and must have been the subject of judicial determination;

(iv) where the application for certification has been occasioned by a state of uncertainty in the law, arising from contradictory precedents, the Supreme Court may either resolve the uncertainty, as it may determine, or refer the matter to the Court of Appeal for its determination;

(v) mere apprehension of miscarriage of justice, a matter most apt for resolution in the lower superior courts, is not a proper basis for granting certification for an appeal to the Supreme Court; the matter to be certified for a

final appeal in the Supreme Court, must still fall within the terms of Article 163(4)(b) of the Constitution;

(vi) the intending applicant has an obligation to identify and concisely set out the specific elements of "general public importance" which he or she attributes to the matter or which certification is sought;

(vii) determination of fact in contests between parties are not, by themselves, a basis for granting certification for an appeal before the Supreme Court."

24. I am wholly guided and I am bound by the above decision but there is then the language of S**ection 16** which introduces the words, "*in the interests of justice",* and *"substantial miscarriage of justice"* over and above that of *"a matter of general public importance".* **Section 16(2)** uses the word *"or"* to denote that *"substantial miscarriage of justice"* is an alternative to proof of *"a matter of general public importance" a*s a criteria for leave to appeal to the Supreme Court.

25. In **Steyn's case,** the Supreme Court addressed the words *"miscarriage of justice"* in passing and in an *obiter dictum*, it stated thus;

"61. Beyond the reliance on the provisions of law for a review of the Court of Appeal's certification, the applicant calls in aid the general principle of the rendering of justice, as contemplated in Article 159(2) of the Constitution of Kenya, 2010: he avers that "the intended appeal is necessary as a substantial miscarriage of justice might have occurred or may occur unless the said appeal is heard".

62. "Miscarriage of justice" is thus defined in Black's Law Dictionary, 8th ed (2004) (atp.1019): "A grossly unfair outcome in a judicial proceeding, as when a defendant is convicted despite lack of evidence on an essential element of the crime …..... also termed failure of justice."

26. In that judgment, the words *"in the interests of justice"* were never addressed. Those words in any event are only important to the extent that the word *"justice"* is the operative word.

27. The entire Court system in Kenya is however obligated to operate from and within the principles in **Article 159(2)(a)(b)** and **(d) in** that;

*i) **Justice** shall be done to all irrespective of status.*

*ii) **Justice** shall not be delayed.*

*iii)**Justice** shall be administered without undue regard to technicalities.*

28. But what is *"justice"*? Elusive as the term may seem, it is simply *"thefair and proper administration of the Law"* - See Black's Dictionary, (Ninth Edition). The *"interests of Justice"* would therefore simply mean in the *"interests of fair and proper administration of the law"* which is what **Article 159** above lays down and which Courts are routinely expected to do.

29. With that background, I can only say this; clearly the more fundamental issue to be addressed is whether the addition of the words "s*ubstantial miscarriage of justice"* is an affront to **Article 163 (4) (b)** of the **Constitution**.

30. In **Steyn** *(ibid)*, the Supreme Court did not make a firm declaration whether those additions were unconstitutional but reading between the lines, it is obvious where it was headed.

31. I have also elsewhere above stated that this Court is properly clothed with the jurisdiction to go beyond the *obiter dictum* of the Supreme Court and by this Petition it is being called to rise to the occasion and address the issue squarely.

32. In that regard, the Supreme Court itself in the **Macharia case(supra)** set the test to be applied when a Court is considering the constitutionality of a Statute. It stated thus;

"A Court's jurisdiction flows from … the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents … that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of he matter, for without jurisdiction, the Court cannot entertain any proceedings … Where the Constitution exhaustively provides for the jurisdiction, of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution."

33. Further, declaring **Section 14** of the **Supreme Court** to be unconstitutional and guided by the above principles, the Court rendered itself as follows;

"The Act contemplated by Article 163(9) is operational in nature … Such an Act was never intended to create and confer jurisdiction upon the Supreme Court beyond the limits set by the Constitution...

Flowing from the foregoing, we hold that Section 14 of the Supreme Court Act is unconstitutional insofar as it purports to confer 'special jurisdiction' upon the Supreme Court, contrary to the express terms of the Constitution. Although we have a

perception of the good intentions that could have moved Parliament as it provided for the 'extra' jurisdiction for the Supreme Court, we believe this, as embodied in Section 14 of the Supreme Court Act, ought to have been anchored under Article 163(4) of the Constitution, or under Section 23 of the Sixth Schedule on 'Transitional Provisions'."

In addition to the above, the principles applicable when determining the constitutionality of a statute are now settled. For example in **Hamrardda Wakhama vs Union of India AIR 1960 at 554**, it was stated as follows;

"When an enactment is impugned on the ground that it is ultra vires and unconstitutional what has to be ascertained is the true character of the legislation and for that purpose regard must be had to the enactment as a whole to its objects and purpose and true intention and the scope and effect of its provisions or what they are directed against and what they aim at".

The same proposition was expounded on in **Republic vs Big M Drug Mart Ltd [1985] I S.C.R. 295** where the Court stated thus;

"Both purpose and effect are relevant in determining constitutionality; either an unconstitutional purpose or an unconstitutional effect can invalidate a legislation. All legislation is animated by an object the legislature intends to achieve. This object is realised through impact produced by the operation and application of the legislation. Purpose and effect respectively, in the sense of the legislations object and its ultimate impact, are clearly, linked, if not indivisible. Intended and achieve effects have been looked to for guidance in assessing the legislation's object and thus the validity"

The High Court has approached the question in a similar fashion –see for example **Murang'a Bar Operators & Anor vs Minister of State for Provincial Administration and Internal Security and Others, Petition No.3 of 2011** per Musinga, J.

34. I am duly guided and looking at **Section 16** of the **Act**, it is obvious that the addition of the words *"a substantial miscarriage of justice"* serves to grant the Supreme Court an extra criteria and jurisdiction to hear and determine applications for leave to appeal to that court. I need not say more than that because the glaring addition is blinding enough.

35. I have chosen to take the above path because the truth of the matter is that the Petitioner's argument can hardly be challenged and the Respondents failed to point to the constitutionality of the said provisions.

In the instance, there being no other decision on the subject by either the Court of Appeal or the Supreme Court, then this Court will proceed and invoke its jurisdiction under **Article 165 (3)(d) (ii)**and declare that **Section 16(2)(b)** of the **Supreme Court** is unconstitutional and it is so declared. As for the truth, justice non *povit patrem nec matrem; solum verrtatem spectat justitia (justice knows neither father nor mother; justice looks to the truth alone)* and so whether the Supreme Court is in a sense the mother of all courts, the truth of the unconstitutionality of **Section 16** aforesaid must be directed at it.

36. Turning to **Section 23** of the **Act**, I will spend very little time with it because on 6/2/2013 the Supreme Court settled the Applicant's complaint in dismissing the argument made that two judges of that Court cannot constitutionally constitute a panel for the purposes of determining certain matters that may be placed before. They stated as follows in **Rai vs Rai, Petition No.4 of 2012** (Tunoi, Ojwang,Ndungu, Ibrahim and Wanjala, SCJJ)

"By Article 163(2) of the Constitution, the Supreme Court membership comprises seven judges; and this Court is properly composed for normal hearings only when it has a quorum of five judges. We take judicial notice that, for about a year now, the Court has had a vacancy of one member, and also that half of the current membership were previously in service in other superior Courts – and so having the possibility of having heard matters which could very well come up now before the Supreme Court. Recusal, in these circumstances, could create a quorum-deficit which renders it impossible for the Supreme Court to perform its prescribed constitutional functions."

37. Ibrahim, SCJ, in a separate but concurring opinion was even more emphatic on the question at hand when he stated as follows;

"Article 163(1) establishes the Supreme Court comprising of seven judges. Sub-article 2 states that the Supreme Court shall be properly constituted for the purposes of its proceedings if it is composed of five judges. The total number of the Supreme Court judges that this Country can have at any given time under the Constitution is seven. The minimum that must sit and determine a matter is five. This means that the only allowance given by the Constitution of the judges who may be away for whatever reason, including illness or worse still, death, is two. If one of the remaining five is required to disqualify him/herself, it may be argued that out of necessity the judge would have to sit to ensure that there will be no failure of justice due to the bench being below the quorum set by the Constitution."

38. I will say no more because the elucidation of the law by the learned judges is not a matter for any opinion on my part save to stand guided by their eloquent exposition of it.

39. Having addressed the three main questions for determination and having found in favour of the Respondent and Interested Party in three out of four of them, it follows that issue No.(iv) must also be answered in the affirmative with respect to **Rules 17, 41, 42** and **43** of the **Supreme Court Rules.** They all flow from **Section 14** of the **Act** which has been declared unconstitutional and similarly those Rules are so declared.

40. The conclusion I must therefore necessarily reach is that the following orders must be issued in favour of the Petitioner;

*i) That **Section 16(2) (b)** of the **Supreme Court Act 2011** is declared to be ultra vires the **Constitution, 2010** to the extent that it adds to the jurisdiction of the Supreme Court to determine appeals where the Court is satisfied that a substantial miscarriage of justice may have occurred or may occur unless the Appeal is heard.*

ii) All other prayers in the Petition are hereby dismissed.

iii) To costs both the Petitioner and the Respondents are organs of State and have no funds of their own. To burden one with costs against the other would be unfair to them and the tax payer. In the event, there shall be no order as to costs.

41. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 19TH DAY OF SEPTEMBER, 2013

ISAAC LENAOLA

JUDGE

In the presence of:

Irene – Court clerk

Mr. Mwihuri holding brief for Mr. Regeru for Interested Party

Mr. Wamotsa for Respondent

No appearance for Petitioner

Order

Judgment duly read.

ISAAC LENAOLA

JUDGE

In the Matter of the Principle of Gender Representation in the National Assembly and the Senate[2012]eKLR

ADVISORY OPINION NO. 2 OF 2012

IN THE MATTER OF AN APPLICATION FOR ADVISORY OPINION UNDER ARTICLE 163 (6) OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF ARTICLE 81, ARTICLE 27 (4), ARTICLE 27 (6), ARTICLE 27(8), ARTICLE 96, ARTICLE 97, ARTICLE 98, ARTICLE 177(1) (b), ARTICLE 116, ARTICLE 125 AND ARTICLE 140 OF THE CONSTITUTION OF KENYA

-AND-

IN THE MATTER OF THE PRINCIPLE OF GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND THE SENATE

-AND-

IN THE MATTER OF THE ATTORNEY-GENERAL (ON BEHALF OF THE GOVERNMENT) AS THE APPLICANT

ADVISORY OPINION

A. INTRODUCTION

[1] This Advisory Opinion relates to two discrete elements in respect of which the Attorney-General thus moved the Court:

"The Advisory Opinion of the Court is sought on the following issues:

A. Whether Article 81(b) as read with Article 27(4), Article 27(6), Article 27(8), Article 96, Article 97, Article 98, Article 177(1)(b), Article 116 and Article 125 of the Constitution of the Republic of Kenya require progressive realization of the enforcement of the one-third gender rule or requires the same to be implemented during the general elections scheduled for 4th March, 2013?

B. Whether an unsuccessful candidate in the first round of Presidential election under Article 136 of the Constitution or any other person is entitled to petition the Supreme Court to challenge the outcome of the first round of the said election under Article 140 or any other provision of the Constitution?"

[2] The learned Attorney-General annexed his depositions indicating the factual circumstances necessitating motion in the Supreme Court, on the matters in hand. He notes the principle in Article 81(b) of the Constitution: "not more than two thirds of the members of elective public bodies shall be of the same gender"; that in Article 81(d) which provides for "universal suffrage based on the aspiration for fair representation and equality of vote"; and that in Article 81(e) which provides for "free and fair elections." The Attorney-General notes the Bill of Rights safeguard for "equality and freedom from discrimination," in Article 27, in particular sub-Article 3 which declares that "women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres." He states that the Constitution reposes positive obligations on the State to move by appropriate instruments to lay the necessary equality-rendering structures; he cites Article 27(6) which thus provides:

*"To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative **and other** measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination."*

The foregoing provision gives a discretion to be exercised by the State in good faith and in a progressive manner; it thus stipulates in sub-Article (7):

*"Any measure taken under clause (6) shall adequately provide for any **benefits to be on the basis of genuine need**."*

In that same spirit, Article 27(8) imposes upon the State the obligation to redress gender disadvantage:

*"In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement **the principle** that not more than two-thirds for the members of elective or appointive bodies shall be of the same gender."*

[3] The Attorney-General in his affidavit, signals both *guiding principles*, and *quantized rights and claims*, running in parallel, in the safeguards of the Constitution.

For instance, Article 38(1) states the broadly-ascertainable entitlement: "Every citizen is free to make political choices" – which includes the right "to form or participate in forming a political party", "to participate in the activities of, or recruit members of, a political party", "to campaign for a political party or cause." That runs alongside the strictly-ascertainable right provided for in Article 38(3): "Every adult citizen has a right....to be registered as a voter; ..... to vote by secret ballot...."

[4] Of the place of *broad principle* in the Kenya Constitution, the Attorney-General recalls the terms of Article 10, on "national values and principles of governance"; he remarks the hortatory as well as obligatory tone attached to new situations facing government:

"The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them –

(a) applies or interprets this Constitution;

(b) enacts, applies or interprets any law; or

(c) makes or interprets public policy decisions [Article 10(1)]."

[5] The Attorney-General sets the provisions regarding membership of the Legislature against the principles of governance declared in the Constitution. He notes that Article 97(1) prescribes as membership of the National Assembly:

(a) 290 members elected in single-member constituencies;

(b) 47 elected women representatives from each county;

(c) 12 special interest-group members nominated by the ***political parties;***

(d) the Speaker.

And the Attorney-General sets out the prescribed membership of the Senate [Article 98(1)]:

(a) 47 elected members representing each county;

(b) 16 women ***nominated by the political parties****;*

(c) 2 members – a man and a woman, representing the youth;

(d) 2 members – a man and a woman, representing persons with disabilities;

(e) the Speaker.

[6] The gravamen of the Attorney-General's application now emerges clearly. He perceives an inconsistency – or potential inconsistency – between the equality principles contained in Article 27 of the Constitution, and the specific provisions on membership of the National Assembly and the Senate, as provided in Articles 97 and 98. This perception is the factual matter that, in the Attorney-General's deposition, gives cause to move the Supreme Court to render an ***Advisory Opinion.***

[7] The Attorney-General apprehends that "*there is no guarantee that the number of nominated persons from the lists of nominees provided by the political parties will ensure that at least one-third of the members in each House will be of one gender."*

[8] There is a foundation to the Attorney-General's qualms. The uncertainty left in Articles 97 and 98 of the Constitution are not repeated in the case of *County Assemblies* [Article 177], in respect of which the two-thirds-and-one-third rule is clearly provided for.

[9] The Attorney-General's concern, and his further reason for seeking this Court's Advisory Opinion, is that recent superior Court decisions have had a bearing on the principle of gender equality: and therefore, a *state of uncertainty* in the law prevails which the ultimate Court should lay to rest.

[10] The Attorney-General deposes that it was not, in the nature of the matter, possible for him to resolve the likely contentions on questions of law, and it thus became necessary to seek an Advisory Opinion, in time before the institution of the next Legislature through the *electoral process* due to take place on ***4 March 2013.***

[11] The second question referred to this Court by the Attorney-General is on a potential sphere of dispute, in the *Presidential election* due to take place on ***4 March 2013.*** The relevant depositions run as follows:

"That Article 163(3)(a) of the Constitution of Kenya provides that the Supreme Court shall have exclusive original jurisdiction to hear and determine disputes relating to the office of the President arising under

Article 140.

"That Article 140(1) provides that a person may file a petition in the Supreme Court to challenge the election of President-elect within seven days after the date of declaration of the results of the Presidential election.

"That, however, there is a question as to whether an unsuccessful candidate in the first round of the Presidential election under Article 136 of the Constitution is or is not entitled to petition the Supreme Court to challenge the outcome [of the] said election under Article 140.

"That there exists a lacuna in the Constitution as to what process should be followed to resolve any possible controversy that might arise: for example, challenging the results in the first round of a Presidential election should there not be a clear simple-majority winner. There is no clear indication [of the mode of] resolution of disputes from the first round of Presidential election. There is no express right to bring an election petition over a run-off. What happens where the runner-up position is contested, for instance?"

B. PARTIES AND AMICI CURIAE

[12] The subject of this Advisory Opinion is one of *general public interest*. Thus, on the occasion of mention, on 8 November 2012 several bodies sought and were admitted to interested-party status: the Commission on the Administration of Justice (CAJ); the Independent Electoral and Boundaries Commission (IEBC); the Commission on the Implementation of the Constitution (CIC); and the National Gender and Equality Commission (NGEC). On the same occasion the following were admitted as ***amici curiae***: the Centre for Rights Education and Awareness (CREAW); the Katiba Institute; the Centre for Multi-party Democracy (CMD); FIDA-Kenya; the Kenya Human Rights Commission (KHRC); the International Centre for Rights and Governance (ICRG); and Mr. Charles Kanjama, Advocate.

C. CONTEST TO JURISDICTION

[13] Several ***amici curiae*** objected to the Attorney-General's application on grounds of jurisdiction. Learned counsel Mr. Kanjama, in agreement with counsel for CREAW (Ms. Thongori and Mr. Ongoya) and CMD (Mr. Mwenesi and Ms. Kimani), urged that the gender question in the electoral process concerned *national government* exclusively and was unrelated to *county government* – and hence, by the authority of this Court's earlier decision, ***In the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Civil Application No. 2 of 2011, is not proper matter for an Advisory Opinion.

[14] It was the position of both CREAW and CMD that moving this Court for an Advisory Opinion was an abuse of process: for the Attorney-General had not stated whether, as the Government's principal legal advisor, his opinion on the question had been sought and if so, what opinion he had given, and what redressive action had been taken on the basis of his opinion. It was CREAW's position, further, that the Attorney-General's motion was occasioned by no dilemma in his line of duty, as he still has on Parliament's agenda two separate Bills seeking implementation of the gender rule.

[15] The Attorney-General's response was that the Supreme Court, under Article 163(6), has a discretionary jurisdiction to give an Advisory Opinion at the request of the National Government, any State organ, or County Government with respect to any matter concerning county government: a jurisdiction already defined in ***In the Matter of the Interim Independent Electoral Commission***, Sup. Ct. Constitutional Application No. 2 of 2011.

[16] The Attorney-General's position is supported by learned counsel, Mr. Nowrojee who represented IEBC; he urged that matters of national and of devolved government are closely intertwined. Mr. Nowrojee gave the example of Articles 110 and 111 of the Constitution which lay down the procedures for the passing of Bills "concerning county governments"; such Bills have to be deliberated upon and enacted by the *National Assembly* and the *Senate.*

[17] In the earlier Advisory-Opinion matter, this Court had elected to proceed with caution in such cases. Only a truly deserving case will justify the Court's Advisory Opinion, as questions amenable to ordinary litigation must be prosecuted in the normal manner; and the Supreme Court ought not to entertain matters which properly belong to first-instance-Court *litigation*. Only by due deference to the assigned jurisdiction of the different Courts, will the Supreme Court rightly hold to its mandate prescribed in section 3(c) of the Supreme Court Act, 2011 (Act No. 7 of 2011), of developing "rich jurisprudence that respects Kenya's history and traditions and facilitates its social, economic and political growth."

[18] The Supreme Court must also guard against improper transformation of normal dispute-issues for ordinary litigation, into Advisory-Opinion causes: as the Court must be disinclined to take a position in discord with core principles of the Constitution, in particular, a principle such as the *separation of powers*, by assuming the role of general advisor to Government.

[19] The Court recognizes, however, that its Advisory Opinion is an important avenue for settling matters of great public importance which may not be suitable for conventional mechanisms of justiciability. Such novel situations have clear evidence under the new Constitution, which has come with far-reaching innovations, such as those reflected in the institutions of county government. The realization of such a devolved governance scheme raises a variety of structural, management and operational challenges unbeknown to traditional dispute settlement. This is the typical situation in which the Supreme Court's Advisory- Opinion jurisdiction will be most propitious; and where such is the case, an obligation rests on the Court to render an opinion in accordance with the Constitution.

[20] We have no doubt that the issues upon which an opinion has been sought, are indeed matters of *county government*. The gender composition of both the National Assembly and Senate, if it could touch on the constitutionality of these organs, is an issue bearing impact on county government. The Court had on this question, in ***In the Matter of the Interim Independent Electoral Commission,*** Sup. Ct. Constitutional Application No. 2 of 2011, held electoral matters to be matters of county government:

"On the question whether election date is a matter of "county government', we have taken a broader view of the institutional arrangements under the Constitution as

a whole; and it is clear to us that an independence of national and county governments is provided for through a devolution-model that rests upon a unitary, rather than a federal system of government....[We] have taken note too that the Senate (which brings together County interests at the national level) and the National Assembly (a typical organ of national government), deal expressly with matters affecting county government; and that certain crucial governance functions at both the national and county levels...dovetail into each other and operate in unity."

[21] The Court came, in the earlier instance, to the conclusion that the question as to when the general elections would be held was central to county government – and so, belonged to the jurisdiction of the Court in respect of Advisory Opinions.

[22] By the same token, we hold the opinion that the two questions referred to this Court by the Attorney-General are of such a nature as to bring the reference within the ambit of matters that qualify for this Court's Advisory Opinion.

[23] Learned counsel Ms. Thongori and Mr. Nderitu, while not disputing the jurisdiction of this Court, have asked that we should nonetheless, decline to render an Advisory Opinion: for the reason that it was not a plain opinion being sought but rather, a precise *interpretation of the law*, which should be a matter for regular dispute settlement.

[24] It is not our perception, however, that all the Attorney-General seeks is an *interpretation* of Article 81(b) of the Constitution. In fact, the Attorney-General has moved this Court seeking an opinion as to whether the terms of Article 81(b) apply in respect of the very next general elections, to be held on 4 March 2013, or on the contrary, apply *progressively* over an extended period of time.

[25] It is clear to us that this Court, while rendering Advisory Opinion, will almost invariably engage in the exercise of constitutional interpretation, and it is not precluded from such an exercise. It does not follow, therefore, that the Court will decline a proper request for an Advisory Opinion, merely because rendering such opinion will entail constitutional interpretation. The basic requirement for an application for an opinion is that it should, as contemplated by Article 163(6) of the Constitution, be seeking to unravel a legal uncertainty in such a manner as to promote the rule of law and the public interest.

[26] The Attorney-General's request for an Advisory Opinion, in our view, raises issues of great public importance. The forthcoming general elections are not only the most important since independence, but are complex and novel in many ways. The elections come in the context of the first progressive, public-welfare-oriented, historic Constitution which embodies the people's hopes and aspirations. Not only are these elections one of the vital processes instituted under the Constitution, but they constitute the *first act of establishing a whole set of permanent governance organs.* Clearly, any ambivalence or uncertainty in the path of such crucial elections must, as a matter of public interest, be resolved in time: and the task of resolution rests, in the circumstances prevailing, with the Supreme Court, by its Advisory-Opinion jurisdiction.

D. GENDER EQUITY IN THE MEMBERSHIP OF THE LEGISLATURE: MUST REALIZATION BE IMMEDIATE? OR PROGRESSIVE?

[27] It was the Attorney-General's submission that no consensus has been achieved thus far, in the interpretation of Articles 81(b) as read with Articles 27(6), 27(8), 96, 97, 98, 177(1), 116 and 125 of the Constitution, and that these articles were silent on *effective dates*. Moreover, the Attorney-General urged, there are divers interpretations of the said provisions – leading to the likelihood that the gender quotas may not be realized during the general elections of 4 March 2013. Such a prospect, the Attorney-General urged, may lead to a constitutional crisis, with the possibility of the National Assembly being declared unconstitutional.

[28] The learned Attorney-General submitted that the full and timeous fulfilment of the gender-equity principle rests on a diverse foundation that does not fall to the charge of one agency. The role of *political parties* is central; and appropriate legislative arrangements are required under the Political Parties Act, 2011 (Act No. 11 of 2011) and the Elections Act, 2011 (Act No. 24 of 2011). Yet, as of now, the two enactments have provided no mechanisms for the implementation of the gender-equity principle. Although the Attorney-General has endeavoured to address the gender-representation problem, neither of his proposed amendments to the Constitution [by way of the Constitution of Kenya (Amendment) Bill, 2011 and the Constitution of Kenya (Amendment) Bill, 2012] has been tabled and passed by the outgoing Parliament, the tenure of which expires soon, and earlier than the forthcoming elections-date.

[29] The Attorney-General asked the Court to give meaning to a relevant word that creates the gender-equity principle, in Article 81 of the Constitution; it thus provides:

*"The electoral system **shall** comply with the following principles –*

(a) ....

(b) Not more than two-thirds of the members of elective public bodies shall be of the same gender..."

The Attorney-General urges that, depending on how this Court, in proper context, interprets the word "shall", an authoritative position would crystallize on whether the two-thirds-one-third gender-equity rule in the national legislative agencies, is for *immediate,* or phased-out (or *progressive*) implementation. He submitted that the meaning of the word "shall" is not cast in stone.

[30] The Attorney-General submitted that as a consequence of the *uncertainty of language* in the Constitution's gender-equity clauses, there is only one certainty: that, by Article 97(1)(b), the mandatory number of those of the female gender to form part of the National Assembly's membership is ***13.4 percent***. Thus, if the electorate in its uninhibited mode, should fail to elect women in numbers satisfying the gender-equity rule, the only way to comply with prescribed equity-fractions would be through *nominations*. Nominations on those lines would automatically raise the membership figure of the national legislative bodies well *beyond the prescriptions of the Constitution*. So there would be a conflict between the Constitution's terms on *gender proportions*, and its terms on the *overall numerical strength* of these organs. Besides such contretemps in fundamental principles, the Attorney-General urged, unduly-large national legislative bodies would place the citizen under an undue *tax burden*. Upon weighing such imponderables attendant on an all-new Constitution, the Attorney-General commended an interpretation that supports a *progressive realization* of the gender-equity principle in elective representation, for the central legislative agencies.

[31] The Attorney-General's stand is not agreeable to most of the interested parties and the ***amici curiae***. (An exception is to be made for IEBC, which is willing to adopt any position conscientiously adopted by this Court). They urge that the implementation of the gender-equity principle must take place *immediately.*

[32] CAJ, through its chief officer, Mr. Amollo, takes a lone stand, as follows. *In principle,* the gender-equity rule should be given immediate effect. However, it is to be realized that imprecision in the language of the Constitution occurred at the last stages of negotiating the provisions. Parliament itself, Mr. Amollo proposes, should, within certain *phased-out time frames*, take action to give meaning to the gender-equity principle. He invokes Article 100 of the Constitution, which provides that:

"*Parliament shall enact legislation to promote the representation in Parliament of –*

(a) women;
(b) persons with disabilities;
(c) youth;
(d) ethnic and other minorities; and
(e) marginalized communities."

Mr. Amollo urges that Parliament, which bears an *obligation to enact legislation* to promote the representation of women, has a *five-year leeway under the Fifth Schedule to the Constitution*. He asks the Court to require that the *five-year legislation span* be complied with and that, within that time-frame, the one-third, two-thirds gender-equity principle be realized.

[33] Such a compromise does not feature in the submissions by CIC and CMD. Their Advocates (M/s. Aruwa and Ligunya for the former; Mr. Mwenesi and Ms. Kimani for the latter) contend that there never was any controversy as to the interpretation of Article 81(b) of the Constitution which states that "not more than two-thirds of the members of elective public bodies shall be of the same gender." Counsel urge that, as to the immediacy of implementation of the gender rule, the position was always clear to the Attorney-General: as there had been a series of consultative meetings running from May 2011 to September 2012, involving civil society, parliamentary representatives and members of the Executive, on the issue of the implementation of Article 81(b). It had always been CIC's and CMD's understanding that the terms of Article 81(b) were for implementation during the general elections of 4 March 2013. Counsel submitted that to interpret the relevant provisions as requiring progressive realization would be inconsistent with a holistic reading of the Constitution; and he invoked, to that intent, a passage in the Ugandan case, ***Olum v. The Attorney-General of Uganda*** [2002] E.A. 508 [the principle of which had been relied on by Majanja, J in ***U.S.I.U. v. Attorney-General & Another*** [2012] eKLR]:

"[T]he entire Constitution has to be read as an integrated whole and no particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other.

[34] Learned counsel Mr. Mwenesi, for CMD, expressed disagreement with the CAJ position: that it should take Parliament as much as two election cycles to attain compliance with the gender-equity principle. Learned counsel, while acknowledging the *five-year leeway* for Parliament to comply, states a case based on foreboding: that as the said five-year period expires on ***27August 2015,*** Parliament *runs the risk of being declared unconstitutional* as from that date.

[35] Another ***amicus curiae***, Katiba Institute argues in favour of immediate realization of the gender-equity principle: for the very principle running through the Bill of Rights, of *non-discrimination*, indeed, demands *equal* sharing in the elective assemblies, as between the male and the female gender. Learned counsel, Mr. Sing'oei, for Katiba Institute, urged that this Court do start from the foundation that the one-third reserved

gender representation is only *the minimum;* and that the functioning of progressivity has to begin from that threshold. Counsel impeaches *Parliament's tardiness* in passing law to promote the representation of women in accordance with the terms of Article 100(a) of the Constitution. What is the effect of a possible delayed action by an elected body, in terms of the crystallization of rights such as may be claimed by individuals, or social groups? This specific jural question is not addressed by counsel. But Mr. Sing'oei still urged that Parliament's delays are untenable, and must give way to asserted rights: women being held *entitled* to equal representation in the elective national constitutional organs. For such "delays", counsel submitted, the Court should *hold Parliament's conduct to be unconstitutional*. Counsel did not, however, commit himself as to whether an elective body suffering from the effects of alleged legislative tardiness should be regarded as *unconstitutional.* Yet this, as we will later signal, is an issue of fateful significance, in terms of the sustainability of the constitutional order itself.

[36] Those interested parties and ***amici curiae*** who objected to the principle of progressivity in the realization of gender-equity in the national elective bodies, contend that the notion of progressivity where relevant under the Constitution, has clear application only with regard to *social and economic rights* under Article 43; and with regard to *persons with disabilities* under Article 54. It was contended that the Constitution does not associate the principle of progressivity with regard to the *conduct of elections*, or the *proscription of gender discrimination* as contemplated in Article 27(6) and (8).

[37] To reinforce the case against progressivity as a principle in the realization of gender equity in the national elective bodies, the National Gender and Equality Commission invokes the imperative of safeguarding the *separation of powers*. NGEC, through its counsel M/s. Nyaoga and Imende, contend that the ground-operations in developing standards and functionalizing the gender rule are reposed in the *Executive,* the Court being left only with the single-event task of adjudging upon *compliance or breach*; and that, for the Supreme Court, the *sole task* is to give effect to the fundamental rights and freedoms, the values and principles of governance, as declared in the Constitution.

[38] Both the Commission on the Administration of Justice and Katiba Institute favour a relatively interventionist approach by the Judiciary, for the purpose of ensuring the protection of the marginalized; they urge that the female gender has, historically, been marginalized by the political system, and that to this social category, the Court should be guided by goals of "substantive equality".

[39] Mr. Mwenesi, for CMD, submits that it is an instance of discrimination, that the Government should *fail to introduce appropriate legislation* to secure gender equity in the State's national elective bodies; such an omission offends the safeguard of Article 27(1) of the Constitution, which stipulates that "*Every person is equal before the law and has the right to equal protection and equal benefit of the law";* or Article 27(3) which provides that "*Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres."*

[40] Counsel's powerful argument on the safeguards for equality and freedom from discrimination, however, proceeded on the premise that the rights in question are cut-and-dried and fully vested, so that in respect of them, right and wrong spoke for itself; no legal argument was advanced on the basis that the Constitution's guarantees were wholly new, and would have to be implemented in a progression beginning from the *status quo* of the yesteryear. This element in counsel's submissions, in our opinion, bears a forensic shortfall that must be taken into account in rendering this Advisory Opinion.

[41] It was CMD's position that the Attorney-General, by calling for a progressive approach to the gender-equity principle, was seeking *to limit a right guaranteed under Article 27 of the Constitution* – and so he must first fulfil the terms of Article 24 which stipulates that:

"A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors....."

Mr. Mwenesi submitted that no such limitation could be allowed, because the Attorney-General *had not secured the enactment of a law* to impose the proposed limitation. This argument, however, does not address the Attorney-General's essential argument: that there is a series of provisions in the Constitution itself that lacks harmony as to the *scope and time-span* of the guarantees made. The contest, in this regard, is conducted at cross-purposes: and the Court must set its sights on, firstly, the *clear intent of all the safeguards*, and secondly, the manifest matter of judicial notice – that implementation of the guarantees commences from a pre-Constitution *status quo*, into the transformative phase of the new constitutional order.

[42] CMD has further built its case on the terms of Article 4 of the Convention on the Elimination of All forms of Discrimination Against Women (CEDAW) which thus provides:

"1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered

discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved."

CMD has clearly taken the position that such variable, discretionary, regulatory approaches to gender equality, do place positive obligations on the Kenyan State, by virtue of the current Constitution. Although such a stand calls for explication, CMD merely asks the Court to place a duty on Parliament and the Attorney-General to employ appropriate provisional measures to eliminate gender discrimination. Such an obligation, as Mr. Mwenesi submitted, is lodged in the Constitution by the fact that CEDAW has been adopted under Article 2(6) which provides that –

"Any treaty or convention ratified by Kenya shall form part of the law of Kenya under this Constitution."

[43] ICRG takes a different position: that the equality and anti-discrimination rights set out under Article 27 of the Constitution are not, in essence, crystallized rights for any *particular mode of application,* but are in the nature of principles to guide public actions.

[44] In summary, two distinct and contrasted approaches have emerged, in relation to the applicability of Article 81(b) of the Constitution as read alongside other provisions. The first contends that Article 81(b) as read with other Articles requires a "progressive realization" of the enforcement of the ender-equity rule. The implication is that the rule need not be implemented *during the general elections of* ***4 March 2013,*** but that it has to be implemented or realized *in stages, through legislative, policy-making, and other measures.*

[45] In direct opposition to the foregoing approach, it is contended that the one-third gender rule embodied in Article 81(b) of the Constitution must be realized *immediately* and at the general elections of 4 March 2013.

[46] We have benefited from the learned submissions of counsel, and on that basis we re-examine the question: *whether Article 81(b) as read with other provisions of the Constitution requires a progressive realization of the one-third gender rule, or requires the same to be implemented during the general elections of* ***4 March 2013?***

[47] This Court is fully cognisant of the distinct social imperfection which led to the adoption of Articles 27(8) and 81(b) of the Constitution: that in elective or other public bodies, the participation of women has, for decades, been held at bare nominal levels, on account of discriminatory practices, or gender-indifferent laws, policies and regulations. This presents itself as a manifestation of historically unequal power relations between men and women in Kenyan society. Learned counsel Ms. Thongori aptly referred to this phenomenon as "the socialization of patriarchy"; and its resultant diminution of women's participation in public affairs has had a major negative impact on the social terrain as a whole. Thus, the Constitution sets out to redress such aberrations, not just through affirmative action provisions such as those in Articles 27 and 81, but also by way of a detailed and robust Bill of Rights, as well as a set of "national values and principles of governance" [Article 10].

[48] From the foregoing facts, arguments and standpoints, this Court, by a majority, has identified the broad concerns which it should bear in mind, in rendering an Advisory Opinion.

These are as follows:

a. What constitutes the "*progressive realization of a right?"*

b. How should *general principles* declared in the Constitution be interpreted, in determining the content, and scheme of enforcement of safeguarded rights?

c. Is it appropriate to treat the general guiding principles in the Constitution in the same way as *specific, quantized rights* declared in the same Constitution?

d. Where the Constitution requires the Legislature (or any other organ) *to take certain steps for the realization of a particular rights* or welfare situation, how is such to be timed? does the Legislature have a discretion?

e. Suppose such a requirement is placed on a collective, programme-bound and life-time-regulated organ such as the National Assembly, can the right be *presumed to have crystallized*, notwithstanding that no legislative measure was passed – on the principle that there has been some intolerable default?

f. Suppose the default in realizing the gender-equity principle is more directly occasioned by the pre-election process, by the actions of *political parties* which are essentially political organizations, would the resultant elected-assembly be adjudged to stand in violation of the terms of the Constitution?

g. Under what circumstances is the Constitution's prescribed membership-quota amenable to *immediate* or to *progressive* realization? Does interpretation in favour of a progressive application contradict the principle of the holistic implementation of the Constitution?

h. Is it the case that the interpretation calling for progressivity offends the constitutional principle of

separation of powers, because the Judiciary has no role in standard-setting and implementation which are to be restricted to the Executive Branch?

i. Can it be contemplated that an interpretation favouring the immediate realization of the gender-equity principle, could lead to the inference that the National Assembly or Parliament, as constituted following the general elections of March 2013, is unconstitutional?

j. Considering that the Supreme Court, by the Supreme Court Act, 2011 (Act No. 7 of 2011) is required to [s.3(a)] "assert the supremacy of the Constitution and the sovereignty of the people of Kenya", how would this Court, in the instant case, perform its role as the guardian of the public interest in constitutional governance by declaring the parliamentary pillar of the constitutional order to be a nullity? How could the constitutional order, in such circumstances, be saved? How would the sovereignty of the people be secured against a possible governance vacuum?

E. PROGRESSIVE REALIZATION OF A RIGHT

[49] The concept of "progressive realization" is not a legal term; it emanates from the word "progress," defined in the ***Concise Oxford English Dictionary*** as *"a gradual movement or development towards a destination*." Progressive realization, therefore, connotes a *phased-out attainment of an identified goal*. The expression gained currency with the adoption of the Universal Declaration of Human Rights in 1948 – and this landmark international instrument stepped up the growth of the "human rights movement," worldwide. The legal milestones in this development were later marked by other instruments: such as the International Covenant on Civil and Political Rights (ICCPR), and the International Covenant on Economic, Social and Political Rights (ICESCR). Such instruments introduced a set of expressions that has become part of the standard language of international human rights jurisprudence. Such language entails no technicality, but is simply concerned to prescribe the extent of a State's obligation in the realization of rights embodied in the human rights Conventions.

[50] Article 3 of the ICCPR states that:

"The States Parties to the present Covenant undertake to ensure the equal right of men and women to the enjoyment of all civil and political rights set forth in the present Covenant."

On the same lines, Article 2 of the ICESCR thus states:

"Each State Party to the present Covenant undertakes to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realization of the rights recognized in the present Covenant by all appropriate means, including particularly the adoption of legislative measures."

[51] Article 3 of the Convention on the Elimination of All forms of Discrimination Against Women, 1981 (CEDAW) states that:

"States Parties shall take in all fields, in particular in political, social, economic and cultural fields, all appropriate measures, including legislation, to ensure the full development and advancement of women, for purposes of guaranteeing them the exercise and enjoyment of human rights and fundamental freedoms on the basis of equality with men."

[52] It is clear to us that the Constitution of Kenya, 2010 which generously adopts such language of the international human rights instruments, draws inspiration from them.

[53] We believe that the expression "progressive realization" is neither a stand-alone nor a technical phrase. It simply refers to the gradual or phased-out attainment of a goal – a human rights goal which by its very nature, cannot be achieved on its own, unless first, *a certain set of supportive measures are taken* by the State. The Exact shape of such measures will vary, depending on the *nature of the right in question,* as well as *the prevailing social, economic, cultural and political environment.* Such supportive measures may involve *legislative, policy* or *programme* initiatives including *affirmative action.*

[54] Certain provisions of the Constitution of Kenya have to be perceived in the context of such variable ground-situations, and of such open texture in the scope for necessary public actions. A consideration of different Constitutions shows that they are often written in different styles and modes of expression. Some Constitutions are highly legalistic and minimalist, as regards *express safeguards* and *public commitment*. But the *Kenyan Constitution fuses this approach with declarations of general principles and statements of policy.* Such principles or policy declarations signify a *value system*, an *ethos,* a *culture,* or a *political environment* within which the citizens aspire to conduct their affairs and to interact among themselves and with their public institutions. Where a Constitution takes such a fused form in its terms, we believe, a Court of law ought to keep an open mind while interpreting its provisions. In such circumstances, we are inclined in favour of an interpretation that *contributes to the development of both the prescribed norm and the declared principle or policy;* and care should be taken not to substitute one for the other. In our opinion, a norm of the kind in question herein, should be interpreted in such a manner *as to contribute to the enhancement and delineation*

of the relevant principle, while a principle should be so interpreted as to contribute to the clarification of the content and elements of the norm.

[55] It is on the basis of the foregoing principles, that we will consider the gender-equity question under the Constitution. The Constitution has prescribed certain gender minima to be met in both *elective* and *appointive* public bodies. These quotas are to be seen as a *genre* of affirmative-action programmes, aimed at redressing the social aberrations and injustices of the past. Thus, membership of certain Constitutional Commissions is subject to certain gender prescriptions. It is provided as regards the Judicial Service Commission [Article 171(2)], that membership shall consist of:

".....

(d) one High Court judge and one magistrate, one a woman and one a man...

(f) two advocates, one a woman and one a man...

(h) one woman and one man to represent the public interest...."

[56] The foregoing example demonstrates that, so far as the Judicial Service Commission is concerned, it is for certain that the gender-equity rule of one-third-to-two-thirds is *immediately* realizable. The normative prescription is clear, and readily enforceable; the required numbers of male and female members are specified, and the mechanism of bringing them to office clearly defined.

[57] The Judicial Service Commission is both an *appointive* and *elective* body. As there is clear provision on how the women members are to be elected, the Commission will always have a minimum of ***three*** women out of eleven members: which falls short of the one-third-to-two-thirds gender rule. But were the female membership of the Commission to rise to ***four*** out of eleven, then there would be *no basis* for claiming the existence of any breach of the terms of the Constitution. But what provisions dictate that the number of female members of the Commission *must rise from at least three to the figure of four*? By Article 27 (8) of the Constitution, failing a purely providential attainment of the figure of *four,* the *State's duty* would be *to take "legislative and other measures" to have the number of women-members raised accordingly.*

[58] From the foregoing example, it is clear that the realization of a female membership for the Judicial Service Commission, of ***three***, is *immediate*; but the attainment of the number of ***four*** is *progressive*, being dependent on the State's *further action.*

[59] This leads us to the inference that whether a right is to be realized "progressively" or "immediately" is not a self-evident question: it *depends* on factors such as the *language* used in the normative safeguard, or in the expression of principle; it depends on the *mechanisms* provided for attainment of gender-equity; it depends on the *nature of the right* in question; it depends on the *mode of constitution* of the public body in question (e.g. appointive or elective; if elective, the mode and control process for the election); it depends on the identity and character of the *players who introduce the candidates* for appointment or election; it depends on the *manner of presenting candidature* for election or nomination.

F. IMMEDIATE REALIZATION OF THE GENDER-EQUITY RULE, AND FOR GENERAL ELECTIONS OF MARCH 2013?

[60] The proponents of immediate implementation of the gender-equity rule have placed a premium on the terms of Article 81(b) of the Constitution, in particular its adoption of the word "shall":

"not more than two-thirds of the members of elective public bodies ***shall*** *be of the same gender."*

The assumption made is that the term "shall" connotes a *mandatory obligation*, so the rule must be enforced immediately. This contention was a factor in the Attorney-General's mind, and he faced it by urging that the word "shall" as applied in Articles 81(b) and 27(8) of the Constitution, in fact, bore a "permissive" connotation and, therefore, the one-third gender rule was for progressive realization.

[61] After considerable reflection upon this point, we have come to the conclusion that the expression "progressive realization", as apprehended in the context of the human rights jurisprudence, would signify that there is no mandatory obligation resting upon the State to take *particular measures*, at a *particular time*, for the realization of the gender-equity principle, save where a time-frame is prescribed. And any obligation assigned in mandatory terms, but involving *protracted measures*, legislative actions, *policy-making* or the *conception of plans* for the attainment of a particular goal, is not necessarily inconsistent with the *progressive realization* of a goal. This position does not change, notwithstanding that the word "*shall"* may have attended the prescription of the task to be performed by the State. The word "shall" in our perception, will translate to immediate command only where the task in question is a cut-and-dried one, executed as it is without further moulding or preparation, and where the subject is *inherently disposable* by action emanating from a single agency. But this word "shall" may be used in a different context, to imply the broad obligation which is more institutionally spread-out, and which calls for a chain of actions involving a plurality of agencies; when "shall" is used in this sense, it calls not for immediate action, but for the *faithful and responsible discharge of a public obligation*; in this sense, the word "shall" incorporates the element of management

discretion on the part of the responsible agency or agencies.

[62] The word "shall", in this new dimension, has gained currency in current human rights treaties, essentially to address the tendency on the part of States Parties to resile from their obligations to institute implementation measures. From that analogy, we perceive the word "shall" as an emphasis on the *obligation to take appropriate action*, in the course of the *progressive realization of a right conferred by the Constitution.*

[63] Relevant example is afforded by Article 7 of CEDAW, which thus states:

"States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country."

We have asked ourselves whether the use of the word "shall", in that instrument, can by itself eliminate discrimination against women in the political and public life *immediately.* Even though the word "shall" has been sued, it is clear to us that the objectives to be attained through State action are of such a nature that they can only be realized *progressively*. Indeed, the Convention places a duty on the State Parties, in their regular reports to the managing committees, to announce the measures which they have taken *over a certain period of time*, for the purpose of attaining the specific goal.

[64] Article 27(8) of the Constitution leaves no doubt that its language is distinctly inspired by that of the United Nations Conventions; it states:

"In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender."

And the said clause (6) thus states:

"To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination."

Since the task is expressed as "to give full effect", it follows that the rights in question, which are civil and political in nature, are not capable of *full realization* unless the State takes "certain specified measures." Such *unspecified measures*, it is clear to us, can only be taken *in stages, over a period of time*, and by means of positive and good-faith exercise of *governance discretion*.

[65] We take judicial notice that the passage of legislation ["legislative measures"] to redress an injustice, or to deliver public goods, is not the single execution-oriented act that can be discharged immediately upon command; it is, inherently, a *process* and must run over time, in the context of supportive measures, and responsible exercises of discretion. It involves the conduct of studies, and the development of legislative proposals. Indeed, by the Constitution, the development of legislation is no longer the preserve of Parliament, or the legal draftspersons in the State Law Office; *public participation* in the legislative process is a constitutional imperative.

[66] Affirmative action programmes require careful thought, multiple consultations, methodical design, co-ordinated discharge. Such measures cannot, by their very nature, be enforced *immediately.*

[67] It was argued for some of the parties and ***amici curiae*** that the progressive approach to the realization of certain rights is not tenable: because only the economic and social rights provided for in Article 43 of the Constitution are amenable to the progression mode. It was contended that for the Article 43-type of rights, what is at stake is resource outlay; whereas, for rights such as gender-equity rights, the question is only the political will: so the Courts should merely make orders requiring a progressive political will. We are not persuaded by this reasoning. We take judicial notice that women's current disadvantage as regards membership of elective and appointive bodies, is accounted for by much more than lack of political will. It arises from deep-rooted historical, social, cultural and economic-power relations in the society. It thus, must take much more than the prescription of gender quotas in law, to achieve effective inclusion of women in the elective and appointive public offices. For the female gender to come to occupy an equitable status in civil and political rights, the State has to introduce a wide range of measures, and affirmative-action programmes. It is not the classification of a right as economic, social, cultural, civil or political that should suit a particular gender-equity claim to the progressive mode of realization; it is the inherent *nature of the right*, that should determine its mode of realization. It is relevant in this regard, that Article 27(8) of the Constitution calls for "legislative and *other* measures" to be taken by the State, for the realization of the gender-equity rule. That such "other measures" are generic, underlines the

draftsperson's perception that the categories of actions, by the State, in the cause of gender-equity, are *not closed*.

[68] We are concerned by the fact that none of the counsel who urged the immediate enforcement of the gender-equity rule, devoted their attention to the inherently different paths of enforcement for a specific, accrued right on the one hand, and a broad, protective principle on the other. It is clear to us that Article 81 of the Constitution, which bears the heading "general principles for the electoral system", is a statement of *general principles*; these principles underpin the electoral system under which general elections are to be conducted on 4 March 2013; the gender-equity principle in Article 81(b), regarding the one-third-and-two-thirds criterion, does not stand alone, but is one of a set of principles; the general principles interlock with and operate in common with other provisions in Articles 81-92 of the Constitution. The relevant Chapter [7] of the Constitution is concerned with "Representation of the People", and Article 81 is about the "electoral system" and "public elective bodies." "Electoral system", in this regard, means the policies, laws, regulations, processes, environment and institutions that determine the conduct of elections in Kenya; and "public elective bodies" refers to all public institutions the composition and membership of which is determined through some form of election. Thus, Article 81 is not confined to the *National Assembly*, the *Senate,* or *County Assemblies*; it contemplates all public bodies properly so-called, which hold elections for their membership. In this context, it is clear to us that the principle in Article 81(b) of the Constitution is a statement of *aspiration*: that wherever and whenever elections are held, the Kenyan people expect to see mixed gender.

[69] Counsel, on the contrary, urged that the terms of Article 81(b) signify a concrete right, the content of which is ascertainable and capable of single-act implementation. As already remarked in this Opinion, Kenya's Constitution carries both *specific normative prescriptions*, and *general statements of policy and principle:* the *latter inspire the development of concrete norms for specific enforcement; the former* ***can*** *support the principle maturing into a specific, enforceable right.*

[70] We consider that **Article 81(b),** which stands generally as a *principle,* would only transform into a specific, enforceable right *after it is supported by a concrete normative provision.* What is the exact status of **Article 81(b)?** It is, at this stage, *to be read together with Article 177*, on *"Membership of county assembly"*: and this leads us to the conclusion that, as regards the *composition of county government*, Article 81(b) has been transformed into a *specific, enforceable right.*

[71] When, however, we examine Article 81(b) in the context of **Articles 97** [on membership of the National Assembly] and **98** [on membership of the Senate], then we must draw the conclusion that *it has not been transformed into a full right,* as regards the composition of the National Assembly and Senate, capable of *direct enforcement.* Thus, in that respect, Article 81(b) is not capable of *immediate realization*, without *certain measures* being taken by the State. Article 81(b) is also not capable, in our opinion, of replacing the concrete normative provisions of ***Articles 97*** *and* ***98 of the Constitution***: these two Articles prescribe in clear terms the composition of the National Assembly and the Senate. For Articles 97 and 98 to support the transformation of Article 81(b) from *principle* to *right,* the two would have to be *amended* to incorporate the element which learned counsel, Mr. Kanjama referred to as the "hard gender quota." In the alternative, a *legislative measure* [as contemplated in Article 27(8)] would have to be introduced, to ensure compliance with the gender-equity rule, always taking into account the terms of **Articles 97** and **98** regarding *numbers in the membership of the National Assembly and the Senate.*

[72] Neither course of adjustment to Article 81(b) of the Constitution falls within the competence of the *Judicial Branch*; it is for action lying squarely within the domains of the *Legislative* and *Executive* Branches of Government, supported by *other proper organs* such as the relevant Constitutional Commissions.

[73] Only an *adjustment to Article 81(b)* following the path we have described above, will fall within the terms of the main clause in **Article 81,** that "the electoral system shall comply with [the principles enumerated in paragraphs (a) – (e) of the Article]."

G. OPINION ON THE GENDER-EQUITY QUESTION

[74] As Article 81(b) of the Constitution standing as a *general principle* cannot replace the specific provisions of Articles 97 and 98, not having ripened into a specific, enforceable right as far as the composition of the National Assembly and Senate are concerned, it follows – and *this is the burden of our Opinion on this matter* – that ***it cannot be enforced immediately***. If the measures contemplated to ensure its crystallization into an enforceable right are not taken before the elections of 4 March 2013, then it is our opinion, Article 81(b) will ***not*** be applicable to the said elections. The effect is that Article 81(b) of the Constitution is amenable only to *progressive realization* – even *though it is immediately applicable in the case of County Assemblies under Article 177.*

[75] That leaves open the question: if Article 81(b) is not applicable to the March 2013 general elections, in relation to the national legislative organs, then *at what*

stage in the succeeding period should it apply?

[76] Learned counsel, Messrs Aruwa and Mohammed called our attention to the pertinent terms of Article 20(3) (a) and (b) of the Constitution, which thus provide:

"In applying a provision of the Bill of Rights, a court shall –

(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom."

[77] We see as the requisite manner to develop the principle in Article 81(b) of the Constitution into an enforceable right, setting it on a path of maturation through progressive, phased-out realization. We are, in this regard, in agreement with the concept urged by learned ***amicus*** Mr. Kanjama, that *hard gender quotas* such as may be prescribed, are immediately realizable, whereas *soft gender quotas,* as represented in Article 81(b) with regard to the National Assembly and Senate, are for *progressive realization*. We have also benefited in developing this line of reasoning, from the learned submission of Mr. Amollo for CAJ.

[78] This, we believe, answers the compelling question raised in contest to the case for progressivity, by learned counsel Mr. Nderitu and Ms. Thongori: *When will the future be,* as baseline of implementation of the gender-equity rule?

[79] Bearing in mind the terms of Article 100 [on promotion of representation of marginalised groups] and of the Fifth Schedule [prescribing time-frames for the enactment of required legislation], we are of the majority opinion that *legislative measures for giving effect to the one-third-to-two-thirds gender principle, under Article 81(b) of the Constitution and in relation to the National Assembly and Senate, should be taken by 27 August, 2015.*

[80] The foregoing opinion is a basis for action in accordance with the terms of *Article 261(6), (7), (8)* and *(9)* under the "Transitional and Consequential Provisions" of the Constitution: by way of the High Court being duly moved to issue appropriate orders and directions.

[81] In the course of arriving at this Opinion we noted certain elements in the submission by counsel, in respect of which we will make a number of observations. Our remarks in this regard inclusively cover the related issues identified earlier, as meriting this Court's attention.

[82] It was contended that the progressive mode in the implementation of the gender-equity rule would run into conflict with the constitutional principle of the separation of powers: as the Courts would be straying into business falling to the Executive or Legislative Branch. It was being urged that the judicial approach must stand in favour of the accrued-right principle, and it should be held that there had been a breach of Article 81(b) of the Constitution. We are not, however, in agreement with this contention, as the provision in Article 27 (6) for the State to "take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups," presupposes open-ended schemes of decision-making and programming, which can only be effected over a span of time. By accommodating such prolonged time-spans of action by the Legislative and Executive Branches, the Judiciary by no means negates the principle of the separation of powers.

[83] The ultimate question was whether, if the Courts were to take the position that a breach of the Constitution would be entailed if the general elections of March 2013 did not yield the stated gender proportions in the membership of the National Assembly and Senate, it was conceivable that the relevant organs would in their membership, be held to offend the Constitution. We would state that the Supreme Court, as a custodian of the integrity of the Constitution as the country's charter of governance, is inclined to interpret the same holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights, are enabled to discharge their obligations, as a basis for sustaining the design and purpose of the Constitution.

[83A] On the gender-equity issue, the Honourable The Chief Justice will read out a minority opinion.

H. PRESIDENTIAL ELECTION: JURISDICTION FOR RESOLVING DISPUTES NOT MENTIONED IN ARTICLE 140 OF THE CONSTITUTION

[84] The learned Attorney-General raises an issue of merit: as to whether an unsuccessful candidate in the first round of the Presidential election under Article 136 of the Constitution is or is not entitled to petition the Supreme Court to challenge the outcome under Article 140. There is a lacuna in the Constitution and, short of a suitable amendment being effected, in accordance with the detailed provisions of Chapter 16 thereof, it is the Supreme Court's responsibility to make such interpretation as will have the effect of upholding the meaning, intent and integrity of the Constitution as a whole. This is a typical occasion when this Court must provide guidance, as sought by the Attorney-General, for the purpose of upholding the authority of the Constitution.

[85] In relation to Presidential election, the basic provision is set out in Article 136 of the Constitution, as follows:

"(1) The President shall be elected by registered voters in a national election conducted in accordance with this Constitution and any Act of Parliament regulating Presidential elections."

The Constitution then provides (Article 140) for the resolution of such disputes as may arise from the conduct and outcome of the said election. The relevant provision thus reads:

"(1) A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the Presidential election."

[86] There is a lacuna in the foregoing provision. Election of the President is a *process,* beginning from primary elections to the final election which will lead to the identification of the President-elect. Article 140(1) provides for dispute settlement only at the *final stage*, and not at earlier stages. With no provision on the mode of resolution of disputes at the earlier stages, there would be no express right to seek the Court's intervention, for instance, in respect of the runner-up position. Such a dispute may be, on the facts, one of merit and, therefore, one to be resolved judicially. The urgency of the issue would remain the same as that which attends dispute-settlement in relation to the position of the President-elect; and accordingly, this would still be a contest on *an issue of the Presidential election.* What is the proper jurisdiction for resolving such an issue?

[87] Counsel held differing viewpoints on the question. Learned counsel, Mr. Mwenesi for CMD submitted that the Supreme Court's jurisdiction is adequately provided for under Article 140, and that all matters not covered therein, and touching on the office of President, should be confined to the jurisdiction of the High Court under Article 165 of the Constitution. Learned counsel Mr. Arwa, for CIC, urged that the Constitution does not envisage any electoral challenge at the conclusion of the first round of elections; that any irregularities arising at earlier stages can only be contested at the end of the electoral process; and that when the first round of elections fails to produce an outright winner, then the electoral process is incomplete and cannot be challenged until after the conclusion of the second round.

[88] Similarly, Mr. Sing'oei for Katiba Institute, urges that a dispute at the first round which does not produce a President, will not be ripe for an invocation of the High Court's jurisdiction. Learned counsel submits that even though it is the Supreme Court that has exclusive jurisdiction in respect of Presidential-election disputes, this jurisdiction only takes effect upon declaration of a President-elect; and consequently, disputes arising before the last round should not be determined by the Supreme Court.

[89] ***Amicus curiae*** Mr. Kanjama, similarly, submits that disputes occasioned by the first round of Presidential elections properly belong to the *High Court's* jurisdiction; and that the Supreme Court's jurisdiction should be held to be limited to the matters specified in Article 140.

[90] Learned counsel Mr. Amollo, for CAJ, by contrast, submits that an aggrieved person is entitled to petition the Supreme Court to challenge the outcome of the

first round of the Presidential elections; and that it is inapposite to adjudicate an election dispute at the final stage when it preceded the run-off election. Mr. Amollo urged that the Supreme Court should apply the provisions of Article 140 of the Constitution to the resolution of *all disputes* arising from the conduct of Presidential elections – whether or not this be expressly provided for.

[91] In agreement is learned counsel Mr. Mungai, for the International Centre for Constitutional Research and Governance. He submits that all candidates in the Presidential election have equal rights to contest the outcome; and in this regard, the first round of election is just as important as the second round. Counsel urges that the validity of the run-off election can only be properly determined when the Supreme Court has heard and determined any grievance relating to the first round. Only in this way, counsel urged, would the Supreme Court be able to deal fairly and conclusively with disputes arising from the process of Presidential election.

[92] A similar position is taken by learned counsel, Mr. Nyamodi for the IEBC; he urges that it is desirable the Supreme Court should resolve Presidential election matters with finality, and should insulate petitions relating to such elections from the residual jurisdiction of the High Court.

[93] As signalled in this Court's first Advisory-Opinion application [***In the Matter of the Interim Independent Electoral Commission as the Applicant***, Sup.Ct. Const. Application No. 2 of 2011], an opinion will be given only in exceptional circumstances, when the various organs established under the Constitution are, for cause, unable to exercise their authority to resolve a major governance issue; when the issues involved are weighty and of constitutional significance; and when the public interest in the matter is manifest.

[94] We have read the many documents, including depositions and submissions lodged by the parties and by the ***amici curiae***; and we have attentively heard all the learned counsel. We are unanimously confirmed in our persuasion that the two issues referred to this Court by the Attorney-General who sought an Advisory Opinion, fall within the broad terms guiding us in rendering such an opinion.

[95] Several questions have emerged, which we must address:

(a) under what circumstances does a dispute emerge, as contemplated in Article 140 of the Constitution?

(b) are there categories of potential disputes in respect of Presidential elections, other than those referred to in Article 140?

(c) how should the various categories of Presidential-election disputes be resolved?

[96] Article 140(1) of the Constitution provides:

"A person may file a petition in the Supreme Court to challenge the election of the President-elect within seven days after the date of the declaration of the results of the Presidential election."

It is clear that the aggrieved, in such a case, may be a *candidate* in the election, or indeed, *any other person*. The petitioner will be contesting the status of the President-elect: contesting the declaration of a certain candidate as President-elect (Article 138(1)); contesting the declaration from the first round of election – that a certain candidate has received more than half of all the votes cast in the first round of election and so this candidate is destined to be President-elect if the candidate meets other prescribed criteria; contesting the declaration that a certain candidate has won at least twenty-five per cent of the votes cast in each of more-than-half of the counties, and so this candidate is destined to be President-elect; contesting fresh Presidential elections held by virtue of Article 138(5), when the first round of elections results in no candidate being elected as President in accordance with Article 138(4) of the Constitution.

[97] It is clear that Article 140 of the Constitution makes no provision regarding the procedure to be followed where a dispute emanates from the fact that nobody is elected as President under Article 138(4), and when this fact leads to fresh elections under Article 138(5). When such is the case, it follows that there will be ***no*** President-elect.

[98] Article 138(5) provides that if no candidate is elected, a fresh election is to be held within 30 days after the earlier election: but in this fresh election, candidature is limited; only *two candidates* from all the original Presidential-election candidates will feature as candidates. These two candidates must be only those who obtained the greatest number of votes in the original Presidential election.

[99] Article 140 is silent on the mode of resolving such dispute as may arise in the course of ascertaining the two top candidates to proceed to the fresh Presidential elections. Such a dispute could, for instance, relate to the vote-tallying process: because the return is alleged to be invalid, or some related matter. Or one of the two candidates could be claiming to have fully met the requirement for being declared President-elect [Article 138(4)] and so there is no need to go to fresh election. If the return for the first round of Presidential election is *disputed*, is it tenable that the second-round, fresh election can be held? It would not be fair – and this would aggrieve the complainant, apart from undermining the legitimacy of the electoral process. Clearly, this Court must stand on the side of fairness, legitimacy and constitutionality.

[100] It is clear to us, in unanimity, that there are potential disputes from Presidential elections *other than* those expressly mentioned in Article 140 of the Constitution. A Presidential election, much like other elected-assembly elections, is not lodged in a *single event*; it is, in effect, a process set in a plurality of stages. Article 137 of the Constitution provides for "qualifications and disqualifications for election as President" – and this touches on the tasks of agencies such as *political parties* which deal with early stages of nomination; it touches also on election management by the Independent Electoral and Boundaries Commission (IEBC). Therefore, outside the framework of the events of the day of Presidential elections, there may well be a contested question falling within the terms of the statute of elections, or of political parties. Yet still, the dispute would still have clear bearing on the conduct of *the Presidential election*.

[101] Does the *entire question* concerning Presidential elections belong to the Supreme Court's jurisdiction? Or is the Supreme Court's power limited by the express language of Article 140 of the Constitution? An analogy may be drawn with other categories of elections; **Article 87(2),** on electoral disputes, thus provides:

"Petitions concerning an election, ***other than a Presidential election****, shall be filed within twenty-eight days after the declaration of the election results by the Independent Electoral and Boundaries Commission."*

It is clear that ***Presidential elections*** have separate provisions, in Article 163(3)(a) which provides:

"The Supreme Court shall have –

(a) exclusive original jurisdiction to hear and determine disputes relating to the elections to the office of President arising under Article 140……"

On a literal construction, it may be stated that the foregoing reference to "the *elections* to the office of President" suggests the draftspersons contemplated that *several* rounds of election may be involved, before the emergence of a duly elected President.

[102] Besides, a reading of Article 87(2) alongside Article 163(3) suggests, as we perceive it, that the Supreme Court was intended to adjudicate upon ***all*** such disputes as would arise from *the Presidential election*. We find no reason to presume that the framers of the Constitution

intended that the Supreme Court should exercise original jurisdiction only in respect of a specific element, namely, disputes arising *after* the election – while excluding those disputes which might arise *during* the conduct of election.

[103] From our conclusion on the foregoing point, a practical problem arises, in respect of which we will express an opinion: ***Must*** the second round of Presidential elections be held within ***30 days,*** regardless of whether there is a justiciable dispute as to the conduct of the first round? For instance, regardless of the fact that the return of the first round is disputed?

[104] It is our unanimous opinion that the validity of the Presidential election is not for determination only *after* the administrative pronouncement of the final result; *at any stage* in the critical steps of the electoral process, the Supreme Court should entertain a dispute as to validity.

[105] Such a position would have implications for the time-lines prescribed under the Constitution; and it is proper to give a further opinion in this regard. Is it practicable to conduct a second round of Presidential elections within 30 days, in accordance with Article 138(5) of the Constitution, even when the first round of elections is disputed?

I. OPINION ON THE SUPREME COURT'S JURISDICTION AT THE SEVERAL STAGES IN THE PRESIDENTIAL ELECTION

[106] A purposive approach would take into account, firstly, the agonized history attending Kenya's constitutional reform; secondly, the crucial importance of the electoral process in the current constitutional dispensation; and thirdly, the overwhelming case for free, fair and efficiently-conducted elections. In this context, ***Presidential-election disputes, in their whole range, should be impartially and expeditiously resolved by the Supreme Court as the ultimate judicial body, within practical time-lines to be read into Article 138(5); and in our unanimous opinion, in the event of a second round of election, the words "within thirty days after the previous election" should be read to mean thirty days from the date on which disputes in respect of the first round will have been resolved. Within such guidelines, the Supreme Court, acting by virtue of its rule-making powers under Article 163(8) of the Constitution, would establish morespecific, and efficient time-lines to guide the hearing of first-round election disputes.***

[107] ***This opinion, on the second question raised by the Attorney-General, gives an indication of the course of practice, in the absence of any relevant constitutional change, or new legislation on the subject.***

DATED and **DELIVERED** at **NAIROBI** this 11th day of December, 2012.

……..

W.M. MUTUNGA

CHIEF JUSTICE & PRESIDENT

……..

P.K. TUNOI

JUSTICE OF THE SUPREME COURT

……..

J.B. OJWANG

JUSTICE OF THE SUPREME COURT

……..

S.C. WANJALA

JUSTICE OF THE SUPREME COURT

……..

N.S. NDUNGU

JUSTICE OF THE SUPREME COURT

I certify that this is a true Copy of the original

Ag. REGISTRAR

SUPREME COURT OF KENYA

IN THE MATTER OF AN APPLICATION FOR ADVISORYOPINION UNDER ARTICLE 163(6) OF THE CONSTITUTION

AND

IN THE MATTER OF ARTICLE 81, ARTICLE 27(4), ARTICLE 27(6) ARTICLE 27(8), ARTICLE 38, ARTICLE 96, ARTICLE 97, ARTICLE 98, ARTICLE 177(1)(b), ARTICLE 116, ARTICLE 125, AND ARTICLE 140 OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

AND

IN THE MATTER OF THE PRINCIPLE OF GENDER REPRESENTATION IN THE NATIONAL ASSEMBLY AND THE SENATE

AND

IN THE MATTER OF THE ATTORNEY GENERAL (ON BEHALF OF THE GOVERNMENT) AS THE APPLICANT

DISSENTING ADVISORY OPINION

1 **Introduction**

1.1 The Attorney General filed this request for an advisory opinion on 10th October 2012. He seeks this Court\'s advisory opinion on

the following questions:

(a) Whether **Article 81(b**) as read with **Article 27(4)**, **Article 27(6), Article 27(8), Article 96, Article 97, Article 98, Article 177(1)(b), Article 116,** and **Article 125** of the Constitution of the Republic of Kenya require progressive realization of the enforcement of the one third gender rule or if it requires the same to be implemented during the general elections scheduled for 4th March 2013.

(b) Whether an unsuccessful candidate in the first round of presidential election under **Article 136 of the Constitution** or any other person is entitled to petition the Supreme Court to challenge the outcome of the first round of the said election under Article 140 or any other provision of the Constitution?

1.2 At the mention of this case on 8th November 2012, The Commission on Administrative Justice (CAJ), The Independent Elections and Boundaries Commission (IEBC), the Commission on the Implementation of the Constitution (CIC) and the National Gender and Equality Commission (NGEC) were admitted as interested partiesunder Rule 23 of the Supreme Court Rules 2011 (now repealed). The Centre for Rights Education and Awareness (CREAW), the Katiba Institute, the Centre for Multi-party Democracy (CMD), FIDA-Kenya, the Kenya Human Rights Commission (KHRC), the International Centre for Rights and Governance (ICRG) and Mr. Charles Kanjama were admitted as amici curiae for the Courtunder Article 22 (3) (e) of the Constitution and Rule 54 of the Supreme Court Rules 2011 (now repealed).

1.3 On this date, certain *amiciCuriae* addressed us on issues of jurisdiction.

2 **Jurisdiction**

2.1 The objections on lack of jurisdiction of this court articulated by CREAW, CMD and Mr. Kanjama are that the issue of gender representation in the National Assembly and Senate is a pure national government issue that does not concern county governments. Neither is the election of a President, nor any challenge that may come from such an election. They argue that the issue of gender representation does not touch county governments as an elaborate procedure for resolving this has already been prescribed by Article 177 of the Constitution. In support of this position, they rely on the authority of **Petition no. 1 of 2011, In Re the Independent Electoral and Boundaries Commission** where this honourable court refused to apply its jurisdiction over a matter dealing with the electoral boundaries.

2.2 CREAW and CMD further object to the Attorney General\'s reference for an advisory opinion on the ground that the reference is an abuse of the process of court. They argue, that being the case, this court's jurisdiction is thereby vitiated. They claim that it should be a bar from seeking this opinion because the Attorney-General has not stated whether, as principal legal advisor to the government, his opinion over this matter has been sought, and if sought, what opinion he gave, and if given, what action was taken on the basis of the opinion.

2.3 CREAW further objects to this court\'s jurisdiction on grounds that the jurisdiction in an advisory opinion, being discretionary in nature, can only be sought when the party seeking is in a genuine dilemma in relation to the subject matter. CREAW opines that the Attorney-General is not in any dilemma as there are two pending bills before the Parliament that have not been removed from the house\'s agenda. These bills seek the implementation of the two-thirds gender principle.

2.4 Lastly, CREAW is of the opinion that the Attorney-General is guilty of an abuse of process of court by selectively citing the decision in **Federation of Women Lawyers & Others vs Attorney General [2011] eKLR** where the court held that the two-thirds gender principle was subject to progressive realization. The Attorney General, though a party to other decisions of the High Court that held otherwise has neither disclosed these decisions nor sought to distinguish them. The cases in question are: ***Centre for Rights Education and Awareness & Others vs. the Attorney General and Others (Nairobi High Court Constitutional Petition Number 16 of 2011); Milka Adhiambo Otieno& Another vs. The Attorney General & Another (Kisumu High Court Constitutional Petition Number 33 of 2011) and; Centre for Rights Awareness & Others vs. The Attorney General and Another (Nairobi High Court Constitutional Petition Number 208 of 2012 as consolidated with Nairobi High Court Constitutional Petition Number 207 of 2012.***

2.5 The Attorney General in response states that under Article 163(6) the Supreme Court has a discretionary jurisdiction to give an Advisory Opinion at the request of the National Government, any State Organ or County Government with respect to any matter concerning county government. The Jurisdiction of this Court has now been stated in **Constitutional Application No. 2 of2011 in The Matter of Interim Independent Electoral Commission** where the Court set the guidelines and the sphere of jurisdiction of this Court in giving advisory opinion. It is the Attorney General\'s position that this reference squarely falls within the four corners thereby set by this court in that decision.

2.6 For the IEBC, Mr. Norwojee responded stating that the matters of national and local government were closely intertwined. As an illustration, he pointed to Articles 110 and 111 of the Constitution, which give procedures for the passing of bills concerning county governments. These bills would be discussed and passed by the National Assembly and the Senate. Therefore, one could see a nexus as to how the composition and validity of the various houses of Parliament affected county governments.

3 **Two-thirds Gender principle: Immediate or Progressive realization?**

3.1 Various provisions of the Constitution are implicated in the resolution of this question. I will reproduce the various Articles of the Constitution as they relate to arguments of Counsel for and against the immediate realization of the two-thirds gender rule.

3.2 Article 97 decrees as follows:

97. (1) The National Assembly consists of—

(a) Two hundred and ninety members, each elected by the registered voters of single member constituencies;

(b) Forty-seven women, each elected by the registered voters of the counties, each county constituting a single member constituency;

(c) Twelve members nominated by parliamentary political parties according to their proportion of members of the National Assembly in accordance with Article 90, to represent special interests including the youth, persons with disabilities and workers; and

(d) The Speaker, who is an *ex officio* member. Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (a).

3.3 Article 98 decrees as follows:

98. (1) The Senate consists of—

(a) Forty-seven members each elected by the registered voters of the counties, each county constituting a single member constituency;

(b) Sixteen women members who shall be nominated by political parties according to their proportion of members of the Senate elected under clause (a) in accordance with Article 90;

(c) Two members, being one man and one woman, representing the youth;

(d) Two members, being one man and one woman, representing persons with disabilities; and

(e) The Speaker, who shall be an *ex officio* member.

(2) The members referred to in clause (1) (c) and (d) shall be elected in accordance with Article 90.

(3) Nothing in this Article shall be construed as excluding any person from contesting an election under clause (1) (a).

3.4 The composition of the two houses must be read against Article 81, which states:

Article 81.

The electoral system shall comply with the following principles—

(a) ...

(b) Not more than two-thirds of the members of elective public bodies shall be of the same gender;

(c) ...

(d) Universal suffrage based on the aspiration for fair representation and equality of vote; and

(e) ...

3.5 The Attorney General argues that there has been no consensus on the interpretation of these Articles (81 (b) as read with articles

27 (6), 27 (8), 96, 96, 98, 177 (1), 116 and 125 of the Constitution). He is concerned that the time when these articles strictly apply is not clear.He states that there are prevailing diverse interpretations, leading to likelihood that the gender quota may not be realized in the elections of March 2013, which may lead to a constitutional crisis in that the National Assembly may be declared unconstitutional.

3.6 The Attorney General further explains that the legitimate expectation of Kenyans would have been that the two-third gender principle would be implemented in the Political Parties Act, Act No. 11 of 2011, and the Elections Act, Act No. 24 of 2011.This legislation, however, is devoid of any mechanisms to implement the principle. He highlights that his office has been involved in the drafting of certain bills that sought to provide a formula for the realization of the electoral gender quotas. The bills, namely, the Constitution of Kenya (Amendment) Bill, 2011 and the Constitution of Kenya (Amendment) Bill, 2012, have however not been passed by Parliament. .

3.7 The Attorney General then turns his focus on the use of the word shall in Article 81. He posits that the Supreme Court\'s interpretation of the word will result in either the provision decreeing its immediate or progressive implementation. Citing various authorities, including **R v THE MINISTER FORHEALTH AND THE MEDICALPRACTITIONERS ANDDENTISTS BOARD, EX PARTE AVENUE HEALTH CARELTD, NBI HC JR MISC APPL. 280 OF 2007 and the Black's Law Dictionary, 2nd Edition,** he states that the interpretation of the word shall has not always been as an imperative, leading to mandatory application, and the Court can therefore interpret the word to achieve a progressive realization of these provisions.

3.8 The Attorney General proceeds to delve into a comparative study of how quota systems have worked in Africa, giving examples of South Africa, Mozambique, Senegal, Rwanda, Uganda and Tanzania. In all these countries, he illustrates that the provision of quotas has resulted in a rise in representation of women in their respective legislative assemblies, but has also spurred some problems that are unique to each country.

3.9 The Attorney-General concludes by stating that the mandatory number of women in the National Assembly in accordance with Article 97 (1) (b) amounts to a mere 13.4%. Should the electorate not elect sufficient numbers to comply with the two-thirds gender principle, he posits that the only way to achieve compliance would be by nominations. This would result in Parliament having higher numbers that those expressly stipulated with considerable financial implications for the taxpayer. He therefore states that when all these factors are considered, the tenable interpretation in respect of this issue would be one that supports progressive realization of the principle.

3.10 The Interested parties (except CAJ that is not wholly categorical on the issue, and IEBC that is ready to implement whatever opinion this court gives) and amici curiae are united that the Attorney General\'s position is wrong. All assert that the implementation of this provision should be immediate. The IEBC takes a very neutral standpoint on this issue, stating that it will abide by the decision of the Court and will conduct the March 4, 2013 elections in accordance with as this Court\'s Advisory Opinion.

3.11 CAJ is categorical that the present dilemma is to be blamed on the legislature. Mr. Otiende Amollo argues that Parliament was responsible for the removal of the provisions implementing the requirements under Article 81 (b). As proof of this, he states that the mechanism-proportional representation, using the counties as electoral colleges- always existed in all drafts of the Constitution, from the Bomas Draft, the Wako Draft, the Harmonised Draft and the Proposed Draft. The provisions only disappeared once the Parliamentary Select Committee on Constitutional Review met with the CoE in Naivasha. Furthermore, Parliament has shot down constitutional amendments that would seek to implement the 2/3 gender principle.

3.12 He is categorical that the implementation should be immediate. However, due to the inaction of Parliament, he seeks to introduce a compromise: under Article 100, Parliament has an obligation to pass legislation that would promote the representation of women. This legislation has been given a time line of 5 years as per the Fifth Schedule. He calls for the Court to pronounce that this is to be strictly followed, achieving the 2/3 gender principle by the next election cycle, that is, in 2017/18.

3.13 The CIC and CMD are both assertive that there has never been any controversy regarding the interpretation of Article 81 (b) of the Constitution. Both CMD and CIC document details of series of consultative meetings have taken place from May 2011 to September 2012 between civil society, Parliamentary representatives and members of the Executive on the issue of the implementation of the provisions of this Article. The cardinal objective of such meetings has always been, in CIC\'s considered opinion, that this provision needs to be implemented by the March 2013 elections. Mr. Nyamodi for CIC argues that to interpret the relevant provisions as requiring progressive realization would be contrary to a reading of the Constitution as a whole. He cites the authority of **USIU v AG & ANOR [2012]eKLR,** where Majanja J., reiterated with approval the holding in **OLUM v THE ATTORNEY-GENERAL OF UGANDA[2002] 2 EA 508:**

"*the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other."*

3.14 CMD further argues that it does not make sense for the Court to grant, as CAJ suggests, a period of 2 election cycles for Parliament to come into conformity with the rule. Mr. Mwenesi argues that though the period within which Parliament is supposed to have passed legislation under Article 100, that period expires on 27th August, 2015. As such, Parliament will find itself being unconstitutional mid-term. He asserts this is not a desirable situation.

3.15 Katiba Institute is assertive that the principle is to be immediately achieved. Mr. Sing'olei argues that as such, the principal of non-discrimination calls for a 50% representation of women in Parliament, who are slightly higher than 50% of the population. He argues that the affirmative action principle of 1/3 is a minimum, and any progressive realization must proceed from that minimum. He also argues that Parliament by its inaction cannot deny women their entitlement to equality in political representation. The Courts must step in to ensure that the Constitution is complied with.

3.16 All interested parties and *amici curiae* further state that the words signaling progressive realization have been expressly used in the Constitution with regard to other rights, in particular, socio-economic rights under Article 43. However, except in the case of Article 54 (2) regarding the representation of persons with disabilities, the words progressive realization have never been used in reference to the conduct of elections or to the removal of gender discrimination under Article 27 (6) and (8) of the Constitution. They, therefore, posit that the constitutional requirement that not more than two thirds in elective bodies shall be occupied by the same gender, applies to the March 2013 elections. Their collective argument is that if the intention of the framers of the constitution was as the Attorney General argues and urges, they would have so stated.

4 **Separation of powers**

4.1 NGEC warns that in delivering this Advisory Opinion, the Court should not overstep its purview and violate the principle of separation of powers. It states that the duty to determine whether a principle has been, is being, or will be realized is an executive function that requires clear standards to be developed. It argues that the role of the Court is to determine whether a legal principle or obligation has been enacted, complied with or implemented. However, in conclusion to its written submissions, it states that this Court\'s concern, as the highest judicial authority in Kenya, should be to give effect to the fundamental rights and freedoms and the values and principles of governance espoused by the Constitution. No other party addresses the Court on this question.

5 **Discrimination**

5.1 The CAJ argues that our history records the struggle for women's representation. This history of exclusion owes itself to the patriarchal nature of the Kenyan society. CAJ argues that this is demonstrated by how previous attempts to introduce affirmative action for women representation have been scuttled by a male dominated parliament. Such prejudice, it argues, still exists in today\'s Parliament, as it rejected the two constitutional amendment bills brought by the Attorney General to try and provide mechanisms for the implementation of this constitutional imperative.

5.2 The Katiba Institute agrees with this proposition, stating that the Constitution is well aware of this and states in Article 10 that one of the Constitution's principles is the protection of the marginalized. Thus, the two-thirds gender principle recognizes that certain sectors of the society- historically women- have been marginalized by the political system. The Katiba Institute then introduces the concept of ?substantive equality. This, it states is a recognition that formal equality (equality before the law) does not to ensure that women enjoy the same kind of political representation as men. It therefore posits, with reference to Colm O'Cinneide's article *"The Right to Equality: A Substantive Legal Norm or Vacuous Rhetoric?"*(2008)UCL Human Rights Journal that the right to equality is interpreted as requiring the elimination of historically rooted patterns of prejudice, discrimination and disadvantage that contribute to the subordination of women.

5.3 CMD perhaps most widely canvasses this issue of discrimination in its submissions. Counsel for CMD argues strongly that it would be discrimination, contrary to Article 27, particularly sub-articles (6) and (8) for the government to fail to introduce legislation to secure the principles enacted in the Article and in Article 81 (b). Article 27 states as follows:

27 (1) Every person is equal before the law and has the right to equal protection and equal benefit of the law.

(2) Equality includes the full and equal enjoyment of all rights and fundamental freedoms.

(3) Women and men have the right to equal treatment, including the right to equal opportunities in political, economic, cultural and social spheres.

(4) The State shall not discriminate directly or indirectly against any person on any ground, including race, sex, pregnancy, marital status, health status, ethnic or social origin, colour, age, disability, religion, conscience, belief, culture, dress, language or birth.

(5) A person shall not discriminate directly or indirectly against another person on any of the grounds specified or contemplated in clause (4).

(6) To give full effect to the realization of the rights guaranteed under this Article, the State shall take legislative and other measures, including affirmative action programmes and policies designed to redress any disadvantage suffered by individuals or groups because of past discrimination.

(7) Any measure taken under clause (6) shall adequately provide for any benefits to be on the basis of genuine need. In addition to the measures contemplated in clause (6), the State shall take legislative and other measures to implement the principle that not more than two-thirds of the members of elective or appointive bodies shall be of the same gender.

5.4 CMD further argues that any denial of this right must fulfill the requirements under Article 24. Article 24 states:

24. (1) A right or fundamental freedom in the Bill of Rights shall not be limited except by law, and then only to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including—

(*a*) the nature of the right or fundamental freedom;

(*b*) the importance of the purpose of the limitation;

(*c*) the nature and extent of the limitation;

(*d*) the need to ensure that the enjoyment of rights and fundamental freedoms by any individual does not prejudice the rights and fundamental freedoms of others; and

(*e*) the relation between the limitation and its purpose and whether there are less restrictive means to achieve the purpose.

(2) Despite clause (1), a provision in legislation limiting a right or fundamental freedom—

(*a*) in the case of a provision enacted or amended on or after the effective date, is not valid unless the legislation specifically expresses the intention to limit that right or fundamental freedom**,** and the nature and extent of the limitation;

(*b*) shall not be construed as limiting the right or fundamental freedom unless the provision is clear and specific about the right or freedom to be limited and the nature and extent of the limitation; and

(*c*) shall not limit the right or fundamental freedom so far as to derogate from its core or essential content.

(3) The State or a person seeking to justify a particular limitation shall demonstrate to the court, tribunal or other authority that the requirements of this Article have been satisfied.

(4) ...

5.5 CMD argues that as the Attorney General is seeking to limit a right guaranteed under Article 27, he must fulfill the requirements of Article 24, in that the limitation should be by legislation that specifically states its intention to limit such rights. It is CMD\'s contention that the Attorney General has not fulfilled this requirement.

5.6 CMD also refers to the Convention on the Elimination of all forms of Discrimination Against Women (CEDAW). In particular, they refer to Article 4 which states:

Article 4

1. Adoption by States Parties of temporary special measures aimed at accelerating de facto equality between men and women shall not be considered discrimination as defined in the present Convention, but shall in no way entail as a consequence the maintenance of unequal or separate standards; these measures shall be discontinued when the objectives of equality of opportunity and treatment have been achieved.

2. Adoption by States Parties of special measures, including those measures contained in the present Convention, aimed at protecting maternity shall not be considered discriminatory.

5.7 Here, CMD seeks to proffer a remedy to the State so as to remedy the discrimination that has been dealt upon women in Kenya in this area of political representation. CMD therefore asks the Court to require that Parliament and the Attorney General fulfill the constitutional mandate and install some stop-gap measures to eliminate this discrimination. CMD also argues that Article 4 of CEDAW has constitutional force under Article 2 of the Constitution.

5.8 KHRC and FIDA-KENYA adopt a similar line of argument, referring to the preamble of CEDAW to the effect that discrimination against women violates the principle of equality of rights and respect for human dignity, and is an obstacle to the participation of women on equal terms with men in the political life of their country. Mr. Nderitu, counsel for both of these *amici* therefore points to the obligation on the State under Article 7 of the Convention as follows:

Article 7

States Parties shall take all appropriate measures to eliminate discrimination against women in the political and public life of the country and, in particular, shall ensure to women, on equal terms with men, the right:

(a) To vote in all elections and public referenda and to be eligible for election to all publicly elected bodies;

(b) To participate in the formulation of government policy and the implementation thereof and to hold public office and perform all public functions at all levels of government;

(c) To participate in non-governmental organizations and associations concerned with the public and political life of the country.

5.9 ICRG argues that Article 27 rights are merely *principles* against discrimination and not fully rights. He further argued that their existence in the Constitution is as a result by lobbying from women\'s groups, which he referred to as *sectarian* interests. He further argues that the wording of Article 81 is clear- the provisions therein are principles, not rights or obligations of the State. As such, they do not result in express government obligations.

5.10 Mr. Charles Kanjama argues that the obligations of the State that call for immediate action under Article 27 lie under clauses

(1) – (4). The obligations under clauses (5) – (6) under the Article are more aspirational, and therefore call for progressive realization. Similarly, he argues that the principles under Article

81 are very aspirational, and may never be fully realized when considered realistically. He therefore argues that they should be implemented over a period of time, and thus, progressively.

5.11 The Attorney General has unfortunately not responded to the arguments on discrimination put forward by CAJ, Katiba Institute, KHRC and CMD, even in his reply to the *amici's* and interested parties\' submissions.

6 **Issues for Determination**

6.1 Having read counsels' written submissions and heard them in their oral arguments, the issues for determination are anchored on the questions advanced by the Attorney General in his reference for an Advisory Opinion. It is wise to reproduce the questions here:

(a) Whether **Article 81(b**) as read with **Article 27(4)**, **Article 27(6), Article 27(8), Article 96, Article 97, Article 98, Article 177(1)(b), Article 116,** and **Article 125** of the Constitution of the Republic of Kenya require progressive realization of the enforcement of the one third gender rule or if it requires the same to be implemented during the general elections scheduled for 4th March 2013.

(b) Whether an unsuccessful candidate in the first round of presidential election under **Article 136 of the Constitution** or any other person is entitled to petition the Supreme Court to challenge the outcome of the first round of the said election under Article 140 or any other provision of the Constitution?

6.2 Before I make my determination on the questions posed by the Attorney General there is the matter of jurisdiction of this Court to hear the reference which matter was argued upfront as a preliminary objection to the reference. I held I had jurisdiction to hear the reference and I will now give my reasons for so holding.

7 **Jurisdiction**

7.1 I have already stated that this Court has jurisdiction in this matter and it is imperative that I dispose with this before going into a consideration of the submissions by counsel on the substantive issues.

7.2 Counsel for CREAW and CMD argue that there is a failure by the Attorney-General to disclose all facts, site all relevant cases that have been decided by other courts and this, therefore, results in an abuse of the process of the Court. It is important to note that one of the duties of an officer of the Court in the administration of justice is to avail before the Court all relevant facts, including those that may be against the officer\'s case. An intentional nondisclosure may make render the proceedings an abuse of court process, especially where such intent is established. Whether this action denies the officer access to court and the court downs its tools on him/her has to be determined.

7.3 Do the Attorney General's actions constitute an abuse of the court process? This Court has had occasion to pronounce itself on when it may hold there has been an abuse of court in Criminal Appeal No. of 2012, **ICJ V THE ATTORNEY-GENERAL & 2 OTHERS**. In that case Counsel\'s attention had been brought on decided cases on the issues he was raising in his application. Counsel was advised to consider those decisions before arguing his application. Counsel seemed not to consider the advice and the Attorney General argued that failure to do so was an abuse of court, punishable at least by ordering Counsel pay costs. In that application the learned judges considered decided cases on the issue. They clearly identified a clear case of an abuse of court in **Nishith Yogendra Patel v Pascale Miraille Baksh & Anor [2009] eKLR** where pursuing similar remedies in parallel (competent) courts was seen as an abuse of court process leading to the striking out of the application. The learned judges did not find the conduct of the Counsel amounted to an abuse of court and argued:

"Upon a careful reflection, we would not hold this to be a glaring abuse of Court process. The Supreme Court is only now in the process of clarifying its appellate jurisdiction, through interpretation of statute law in the context of varying case scenarios. The appellant by lodging the appeal, has laid before the Court an opportunity to further consolidate the jurisprudential gains in the earlier decisions."

7.4 While it is a principle never in dispute that Counsel should bring to the attention of the Court decisions that support their case and those that do not, the failure to do so only attracts reprimand and never amounts to deny them the opportunity to be heard. In

this Reference the Attorney General simply swore an affidavit where he concisely laid down his arguments for seeking an Advisory Opinion well aware that the time for comprehensive arguments would take place when the Reference came up for hearing. Indeed, this is what happened and in his address in support of his Reference he canvassed all relevant cases and disclosed all facts. I do not think it was necessary to commit all arguments in a skeleton affidavit whose purpose was to give the Court the basis for the Reference for an Advisory Opinion.

7.3 CREAW and CMD still on the issue that the Reference was an abuse of court argued that the Attorney-General has not revealed whether his opinion was sought on this question, what advice he has given or whether that advice was followed by the Government. Given the criteria given on this question these concerns do not amount to an abuse of process of court and cannot be a basis for lack of jurisdiction to entertain the Reference. There is no legal bar in the court\'s Advisory Opinion jurisdiction that buttresses this position. The objection by CREAW that the Attorney General has not proved that he is in a genuine dilemma fails for the same reason.

7.5 At this point I should revisit my pronouncement on this issue of jurisdiction for References seeking Advisory Opinion in this court. In the Reference **Re IEBC** the relevant paragraphs on this issue are as follows:

"[37] The said Article 163(6) requires too that any request for an Advisory Opinion is to be "with respect to any matter concerning county government." In this respect, the relevant question is whether the issue as to "the date of the next general election" relates to county government.

[38] Learned counsel, Mr. Nowrojee was clear, that this is a question of county government: for the elections the due date of which calls for confirmation, are the very device for establishing county assemblies, and county executives – and that is "county government". On this point, other counsel, Ms. Kimani, Professor Ghai and Mr. Njiru, were in agreement.

[39] On the question whether election date is a matter of "county government", I have taken a broader view of the institutional arrangements under the Constitution as a whole; and it is clear to me that an interdependence of national and county governments is provided for – through a devolution-model that rests upon a unitary, rather than a federal system of government. Article 6(2) of the Constitution provides that:

"The governments at the national and county levels are distinct and inter-dependent and shall conduct their mutual relations on the basis of consultation and co-operation."

Many offices established by the Constitution are shared by the two levels of government, as is clear from the terms of the Fourth Schedule which makes a "distribution of functions between the national government and county governments". Article 186(2), for instance, typifies the concurrence of operations, providing thus:

"A function or power that is conferred on more than one level of government is a function or power within the concurrent jurisdiction of each of those levels of government."

I have taken note too that the Senate (which brings together County interests at the national level) and the National Assembly (a typical organ of national government) deal expressly with matters affecting county government; and that certain crucial governance functions at both the national and county level – such as finance, budget and planning, public service, land ownership and management, elections, administration of justice – dovetail into each other and operate in unity.

[40] There is, therefore, in reality, a close connectivity between the functioning of national government and county government: even though the amicus curiae Professor Ghai urged that the term "county government" is not defined in the Constitution; and that the expression "county government" should not be too broadly interpreted. I consider that the expression "any matters touching on county government" should be so interpreted as to incorporate any national-level process bearing a significant impact on the conduct of county government. However, interpretation in this category is to be made cautiously, and on a case-by-case basis, so as to exclude matters such as fall outside this Court's Advisory-Opinion jurisdiction.

[41] Now on the facts of the instant case, I would hold that election date is a question so central to county government, as to lie within the jurisdiction of this Court, in relation to the request for an Advisory Opinion. I am not, on this point, in agreement with counsel for 2nd Interested Party, that the request for an Advisory Opinion is beyond jurisdiction because no county government has as yet been set up, and so no party has locus to seek such an opinion...

[83] With the benefit of the submissions of learned counsel, and of the comparative assessments recorded herein, I am in a position to set out certain broad guidelines for the exercise of the Supreme Court's Advisory-Opinion jurisdiction.

(I) For a reference to qualify for the Supreme Court's Advisory-Opinion discretion, it must fall within the four corners of Article 163(6): it must be

"a matter concerning county government. "The question as to whether a matter is one "concerning county government", will be determined by the Court on a case-by-case basis.

(ii) The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae.

(iii) The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the Court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.

(iv) ***Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial Court process."***

7.6 For the Court to have jurisdiction, the Reference must fall within the four corners elucidated. This request is unaffected by the last two prescriptions, as it is untouched by proceedings from lower Courts. It was, however, argued on behalf of CREAW that since appeals of this issue of two-third gender principle are now before the Court of Appeal a decision on this Reference could render them nugatory. It is true that this courts' decision binds the Court of Appeal, but it is for the Court of Appeal to make such a decision. I have no evidence that the pending appeals are on all issues raised in this Reference. In any event this court has held that it will decide matters that come to us on a case-by-case basis. We have also held we should not subvert the jurisdiction of the courts below. The Court of Appeal will take its golden chance to enrich the jurisprudence in this area. That objection therefore fails. The Attorney General is a Constitutional Office that is capable of seeking an Advisory Opinion. **The only contention that remains is: is this a matter concerning county government?**

7.7 Matters of who are people's representatives in Parliament and the Senate are central to county governments. As pointed out by learned counsel for the IEBC, Mr. Norwojee, national governments even discuss the allocations of resources to county governments through procedures in Articles 110 and 111 of the Constitution. The constitution and validity of these two houses of Parliament therefore will affect their ability to deliver on these key obligations to county governments. The gender question is one that is quintessential to determining their validity.

7.8 The election of the President under Article 138 has been granted further grassroots significance by requiring county representation:

Article 138.

(1)...

(2) ...

(3)...

(4) A candidate shall be declared elected as President if the candidate receives—

(*a*) More than half of all the votes cast in the election; and

(*b*) At least twenty-five per cent of the votes cast in each of more than half of the counties.

7.9 Indeed, the role of the Senate in county governments is its existential purpose. Article 96 makes this clear:

96. (1) The Senate represents the counties, and serves to protect the interests of the counties and their governments.

(2) The Senate participates in the law-making function of Parliament by considering, debating and approving Bills concerning counties, as provided in Articles 109 to 113.

(3) The Senate determines the allocation of national revenue among counties, as provided in Article 217, and exercises oversight over national revenue allocated to the county governments.

(4) The Senate participates in the oversight of State officers by considering and determining any resolution to remove the President or Deputy President from office in accordance with Article 145.

7.10 There cannot be any doubt that the issue of two-third gender principle in the elections to Parliament and the Senate is a matter concerning county government. So is the election of the President. Thus this honourable Court has jurisdiction to hear the Reference by the Attorney General and deliver an Advisory Opinion.

8 **Interpretation of the Constitution**

8.1 Interpreting the various Articles that are in issue here is the fundamental issue in this Reference. Learned Counsels before us have suggested various methods of interpreting the Constitution that should be adopted by this Court. These methods have been used by various jurisdictions, including some prescriptions arising from

Kenyan Courts, both under the repealed and current Constitutions. Fortunately, to interpret the Constitution we need not go further than its specific Articles that give us the necessary guidance into its interpretation.

8.2 It is, therefore, necessary for the Court at this early opportunity to state that no prescriptions are necessary other than those that are within the Constitution itself. The Constitution is complete with its mode of its interpretation, and its various Articles achieve this collective purpose. It is in interpreting the constitution that our robust, patriotic, progressive and indigenous jurisprudence will be nurtured, grown to maturity, exported, and becomes a beacon to other progressive national, African, regional, and global jurisprudence. After all, Kenya correctly prides itself as having the most progressive constitution in the world with the most modern Bill of Rights. In my view this is the development of rich jurisprudence decreed by Section 3 of the Supreme Court Act ?that respects Kenya's history and traditions and facilitates its social, economic and political growth.?

8.3 Let me now look at the relevant Articles of the Constitution that lay critical guidelines to its collective interpretation. I start with Article 10:

Article 10.

(1) The national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them—

(*a*) applies or interprets this Constitution;

(*b*) enacts, applies or interprets any law; or

(c) makes or implements public policy decisions.

(2) The national values and principles of governance include—

(*a*) patriotism, national unity, sharing and devolution of power, the rule of law, democracy and participation of the people;

(*b*) human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized;

(*c*) good governance, integrity, transparency and accountability; and

(d) sustainable development.

8.4 Article 259 further expounds how these values are to be applied in the interpretation of the Constitution:

259. (1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

(2) …

(3) Every provision of this Constitution shall be construed according to the doctrine of interpretation that the law is always speaking ...

8.5 The Constitution then narrows further to the particularly sensitive matter of the Bill of Rights, prescribing how these rights shall be applied in conformity to the general interpretation of the Constitution:

20. (1) The Bill of Rights applies to all law and binds all State organs and all persons.

(2) Every person shall enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom.

(3) In applying a provision of the Bill of Rights, a court shall—

(*a*) develop the law to the extent that it does not give effect to a right or fundamental freedom; and

(*b*) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

(4) In interpreting the Bill of Rights, a court, tribunal or other authority shall promote—

(*a*) the values that underlie an open and democratic society based on human dignity, equality, equity and freedom; and

(*b*) the spirit, purport and objects of the Bill of Rights.

8.6 The Supreme Court must and shall remain the exemplary custodian of the Constitution. It is from these articles that the Supreme Court finds its approach to the interpretation of the Constitution. The approach is to be purposive, promoting the dreams and aspirations of the Kenyan people, and yet not in such a manner as to stray from the letter of the Constitution. The obligation upon this Court to uphold this interpretation is provided for in Section 3 of the Supreme Court Act (Act No …of 2011):

3. The object of this Act is to make further provision with respect to the operation of the Supreme Court as a court of final judicial authority to, among other things —

(a) assert the supremacy of the Constitution and the sovereignty of the people of Kenya;

(b) provide authoritative and impartial interpretation of the Constitution;

(c) develop rich jurisprudence that respects Kenya\'s history and traditions and facilitates its social, economic and political growth;

(d) enable important constitutional and other legal matters, including matters relating to the transition from the former to the present constitutional dispensation, to

be determined having due regard to the circumstances, history and cultures of the people of Kenya;

(e) improve access to justice; and

(f) provide for the administration of the Supreme Court and related matters.

8.7 The obligation of the Supreme Court is, therefore, to cultivate progressive indigenous jurisprudence in the momentous occasions that present themselves to the Court. By indigenous jurisprudence, I do not mean insular and inward looking. The values of the Kenyan Constitution are anything but. We need to learn from other countries and from scholars like the distinguished Counsel who submitted before us in this Court. My concern, when I emphasize indigenous is simply that we should grow our jurisprudence out of our own needs, without unthinking deference to that of our other jurisdictions and courts, however distinguished. This Court, and the Judiciary at large has, therefore, a great opportunity to develop a robust, indigenous, patriotic and progressive jurisprudence that will give our country direction in its democratic development.

8.8 In interpreting the Constitution and developing jurisprudence, the Court will always take a purposive interpretation of the Constitution as guided by the Constitution itself. An example of such purposive interpretation of the Constitution has been articulated by the Supreme Court of Canada in **R v Big Drug Mart**(1985). In paragraph 116 of the ruling, the Court states:

The proper approach to the definition of the rights and freedoms guaranteed by the Charter was a purposive one. The meaning of a right or freedom guaranteed by the Charter was to be ascertained by an analysis of the purpose of such a guarantee; it was to be understood, in other words, in the light of the interests it was meant to protect...to recall the Charter was not enacted in a vacuum, and must therefore... be placed in its proper linguistic, philosophic and historical contexts.

8.9 Furthermore, in **Minister of Home Affairs (Bermuda) v Fisher [1980] AC 319 (PC)**, Lord Wilberforce summarized the justification of this approach by stating that it was ?*a generous interpretation... suitable to give individuals the full measure of the fundamental rights and freedoms referred to.*?

8.10 I further agree with the cited case on **S v Zuma (CCT5/94) (1995),** where the Constitutional Court of South Africa agreed with these decisions and emphasized that in taking this approach, regard must be paid to the legal history, traditions and usages of the country concerned.

8.11 This background is, in my opinion, a sufficient statement on the approach to be taken in interpreting the Constitution, so as to breathe life into all its provisions. It is an approach that should be adopted in interpreting statutes and all decided cases that are to be followed, distinguished and for the purposes of the Supreme Court when it reverses itself.

9 **Immediate and Progressive Realization**

9.1 The Attorney General advances an argument that the word shall used in Article 81 (b) is not instructive on whether implementation of this obligation is immediate or progressive. He rightly states that the use of this word has been interpreted on a case-by-case basis in Kenyan courts and other jurisdictions. Article 260 of the Constitution does not see it as a word requiring interpretation. The broad approach I have given on how the provisions of the constitution are to be interpreted makes it abundantly clear that it is unwise to tie in the interpretation of this Article to a single word. It is this broad approach that is holistic that will help me determine whether either immediate or progressive realization of the right to the gender quota is envisioned.

9.2 Reading Articles 81 (b), 27 (4), 27 (8) leaves me with no ambiguities as to the purpose and direction of these provisions. The ambiguity arises as it has been argued by the Attorney General, when the provisions of these Articles are read against the content of the provisions of Articles 96, 97, 98 and 177 (1) (b).

The Attorney General described this situation as a conundrum, lacunae, inconsistency, and downright contradiction. This is definitely true if the interpretation of these provisions is a narrow one as opposed to the broad approach that is decreed by the constitution. It is true the constitution will present the courts with inconsistencies, grey areas, contradictions, vagueness, bad grammar and syntax, legal jargon, all hallmarks of a negotiated document that took decades to complete. It reflects contested terrains, vested interested that are sought to be harmonized, and a status quo to be mitigated. These features in our constitution should not surprise anybody, not the bench, or the bar or the academia. What cannot be denied, however, is we have a working formula, approach and guidelines to unravel these problems as we interpret the constitution. We owe that interpretative framework of its interpretation to the Constitution itself. In the case of the Supreme Court the Supreme Court Act reinforces this framework.

9.3 The favourite and popular legal argument articulated by Counsel is that if the framers of the constitution intended the implementation of the two-thirds gender principle to be progressive, it would have been easy for them to so provide. This argument always needs serious scrutiny and interrogation because it is always advanced as if it is obvious that would invariably be the case. In this Reference it is reinforced by the quotation of other Articles in the constitution that clearly provide for progressive realization. In my view this argument cannot,

in itself, be conclusive. Nor are the High Court authorities binding on this Court besides them also calling for further interrogation, harmonization and problematization. We need to look elsewhere to resolve this 'conundrum'. In my view we need to look at the arguments around non-discrimination and national values as decreed by the constitution; that political and civil rights demand immediate realization; and a thorough treatment of the historical, social, economic, and political basis of the two-thirds gender principle as decreed by Section 3 of the Supreme Court Act. Before I do that I can quickly depose of the issue raised over the separation of powers.

10 **Separation of Powers**

10.1 Contrary to the position taken by NGEC, I find that there is no violation of the principle of separation of powers in the Supreme Court\'s rendering of this Advisory Opinion under Article 163 (6). This Court\'s role is clearly defined in the Constitution. There is no evidence that this apex Court in exercising its constitutional mandate in this Reference has in any way entered the constitutionally preserved mandates of the Executive and Parliament.

10.2 Furthermore, I am equally persuaded of this Court\'s power to declare Parliament unconstitutionally constituted. It is this Court\'s duty to defend the Constitution, and ensure that all bodies within it are constituted constitutionally and employ all powers donated by the People to it constitutionally. I am similarly guided was the Egyptian Constitutional Court in **Anwar SubhDarwish Mustafa v The Chairman of the Supreme Council of the Armed Forces, Supreme Constitutional Court Case No. 20/24**. In this case, the Supreme Constitutional Court of Egypt declared Parliament unconstitutional in regard to its constitution of 1/3 of its seats, which were to be reserved for independent candidates. The Egyptian Parliament had introduced amendments purporting to introduce competition between political party candidates and independents for the reserved seats. This resulted in independents getting less than the constitutionally required 1/3 membership in Parliament. The Supreme Constitutional Court of Egypt declared that the election of this 1/3 of Parliament was unconstitutional, and directed that elections should be redone to comply with the Constitution. The Supreme Court of Egypt not only looked at the provisions of the Constitution Declaration, but also delved in the history and purpose of the provisions. The Court was persuaded that the framers of the constitution wanted a Parliament that had party members and independents to give Egypt collective intellect and diverse visions that the country needed in its democratic development.

10.3 I am persuaded to take a similar approach to this reference and find, as exemplary custodian of the Constitution that the Supreme Court of Kenya has the power donated it by the People of Kenya to do so. Parliament and Senate that do not reflect the two thirds gender principle shall be unconstitutional.

11 **Discrimination, National Values and the Kenyan Context**

11.1 From article 27, and from CEDAW, it is clear that disenfranchisement of the Kenyan women in the political arena is a form of discrimination. CEDAW applies through the operation of Article 2 (6) of the Constitution of Kenya, having been acceded to by Kenya on 9th March 1984. These provisions collectively call for the immediate removal of this discrimination through the empowerment of women representation in political office, with CEDAW calling for stop-gap measures to be put in place to reverse the negative effects on our society through the operation of this systemic discrimination.

11.2 The history of this disenfranchisement ashamedly started with the birth of this country. There was not a single female MP in the first legislature in 1963. These numbers have only been marginally improving: 4.1% female representation in Parliament in 1997, 8.1% in 2002 and 9.8% in 2007. This is despite the female population being the majority, albeit slightly, at 50.44%. This history must have in the minds of Kenyans, particularly women, when they voted for a new constitution through a referendum and celebrated its promulgation on August 27, 2010.

The Supreme Court Act decrees we take this history into account. In doing so I see very clear progressive realization of gender equity and equality, that was slow, but which was progressively consolidated. The two-thirds gender principle reflects this historical progression.

11.3 The Attorney General properly compared women representation in Parliament to other East African countries that have adopted affirmative action programs for women representation in the legislature. According to the Attorney General\'s submission, Uganda adopted affirmative action procedures in its 1995 Constitution and women\'s representation now ranks at 35% in 2011, up from 18.1% in 1996. The United Republic of Tanzania adopted a distribution of seats through proportional representation of political parties through a Constitutional

Amendment in 1995- women\'s representation has risen in the Tanzanian Assembly from 17.5% in their 1995 elections to 36% in their 2010 elections. Rwanda has the world\'s most documented affirmative action program in its Constitution, has seen representation of women in its lower house (Chamber of Deputies) rise from 17.1% in 1994 to 56.3% in 2008, and representation in its upper house (Senate) now stands at 38.5% as at 2011. Rwanda is the only country in the world with a female majority in parliament. This comparison has no force of law in the instant Reference, but I must observe that Kenya, as an anchor state in the Eastern and Horn of Africa

would demean its status, and that of its Parliament, if the patriotic duty of guaranteeing gender equity and equality was not seen in the region as one of its priorities.

11.4 What is undeniable is Kenyan women have continuously and consistently struggled for their equity and equality in all spheres of life. There is a consistent historical thread of this agitation as documented by the publication **Ed; Ruto, Kameri- Mbote & Muteshi-Strachan, Promises and Realities:**

Taking Stock of the 3rd UN International Women's Conference (Nairobi: ACTS Press, 2009) that is consummated by the majority vote in the 2010 referendum and the subsequent promulgation of the constitution on August 27, 2010. Arguing that the two-thirds gender rule requires progressive realization flies into the face of this history of struggle by Kenyan women. Katiba Institute is definitely right when it argues that the one-third is simply a minimum and that progressive realization must be confined to developments that move the country towards a 50/50% threshold in gender equity and equality.

11.5 One point on the issue of discrimination that has not been taken up by any Counsel in this Reference is obvious from the provisions of Article 177 (1) (b). In deference to Mr. Mwenesi for CMD, he did argue that the Article in question is a clear proof of the submission for immediate realization of the two-thirds gender principle. In my opinion this puts to rest the argument of progressive realization of the principle. I see no reason a constitution that decrees non-discrimination would discriminate against women running for Parliament and the Senate. I see no constitutional basis for discrimination **among** women themselves as the consequence of the progressive realization of the two-thirds gender principle would entail. A constitution does not subvert itself. Deciding that women vying for county representation have rights under constitution while their counterparts vying for Parliament and the Senate are discriminated against would result in that unconstitutional position. This article read with the provisions of Articles 27(4), 27 (8) and 81 (b) make it abundantly clear that the two-thirds gender principle has to be immediately realized.

11.6 I believe the immediate implementation of the two-thirds gender principle is reinforced by **values** of patriotism, equity, social justice, human rights, inclusiveness, equality and protection of the marginalized. Such values would be subverted by an interpretation of the provisions that accepts progressive realization of this principle.

11.7 I am in agreement with Counsel for the Katiba Institute that the Constitution\'s view to equality, as one of the values provided under the constitution, in this case is not the traditional view of providing equality before the law. Equality here is **substantive**, and involves undertaking certain measures, including affirmative action, to reverse negative positions that have been taken by society. Where such negative exclusions pertain to political and civil rights, the measures undertaken are immediate and not progressive. For example, when after struggles for universal suffrage Kenyans succeeded in getting that right enshrined in the Bill of Rights of the 1963 constitution, nobody could be heard to argue that we revert back to the colonial pragmatic progressive realization of the right to vote!

11.8 The requirement that the electoral system shall comply with the principle under Article 81 (b) that not more than 2/3 of members of elective bodies are of the same gender also falls on key players in the electoral system. The key players in the electoral system in Kenya are the State, the IEBC and political parties. The role of political parties in the electoral system and the need for their regulation can be seen in different Articles in the Constitution, in particular Article 90 on Party Lists. Article 90 provides for regulations on how nominations for reserved seats in Parliament, and requires that these lists reflect gender equality and the ethnic diversity of Kenya. The IEBC is tasked with ensuring that the party lists comply with these rules.

11.9 Are political parties in their party lists affected by Article 81 (b)? In my considered view, they are. Parties are an integral part of the electoral system and their party lists must ensure that they comply with the 2/3 rule. Parties are the only vehicles through which candidates for parliamentary seats are established. If party lists do not contain any/insufficient female candidates, no/insufficient female candidates will be elected. As such, it is important for political parties to establish internal mechanisms through which to ensure that not more than 2/3 of the entire list comprises of one gender. The IEBC is mandated by dint of the same provision to ensure that these party lists comply with this provision.

11.10 There were powerful arguments raised by Counsel Thong'ori for CREAW on what is happening here and now in the implementation of the two-thirds gender principle. She argued that the state was, indeed, implementing the principle as a matter of clear policy. Both CIC and CMD argued persuasively that stakeholder convening and discussions on the two-thirds gender principle was always about implementation and not interpretation. There is evidence that this position is correct. At no time did the Attorney General controvert the positions argued by Counsel. There was no argument by Counsel that these activities have given the principle constitutional validity. If the argument had indeed, been made by Counsel I would have held that it was invalid.

11.11 I hold, therefore, in the words of the South African Constitutional Court in **August v The Electoral Commission CCT 8/99** that Parliament by its silence cannot deprive the women of this country the right to

equal representation. I take judicial notice of Parliament having a short period before it is dissolved, but I do not see Parliament refusing to legislate in a matter like this that affects the majority of the voters in this country. I have no reason to doubt the patriotism of the current Parliament that is fully aware of the constitutional consequences of refusing to legislate. In the event that Parliament fails to do so, any of the elected houses that violate this principle will be unconstitutional and the election of that house shall be null and void. Article 3 of the Constitution makes this clear:

3. (1) Every person has an obligation to respect, uphold and defend this Constitution.

(2) ***Any attempt to establish a government otherwise than in compliance with this Constitution is unlawful.***

11.12 It is worthy of note that arguments by Counsel on progressive realization of the two-thirds principle implied that Parliament would be called upon to legislate. Mr. Mwenesi raised the issue of the implications of the timeline of 5 years for Parliament to legislate under the Fifth Schedule of the constitution. He argued that 5 years would expire in the midterm of the new Parliament. It is implied that Parliament would legislate. These scenarios suggest that the best option in my view, an option that avoids the unconstitutionality of the next Parliament, is to legislate here and now and secure the rights of women under the two-thirds gender principle.

It is my opinion, therefore, that the answer to the Attorney General's first question is that the two-thirds gender principle be implemented during the General Election scheduled for March 04, 2013.

DATED and **DELIVERED** at **NAIROBI** this 11th Day of December, 2012

……

W. MUTUNGA

CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT

I certify that this is a true copy of the original

Ag. REGISTRAR

SUPREME COURT OF KENYA

Republic V The Commission of Administrative Justice & Another Exparte John Ndirangu Kariuki [2013] eKLR

REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Judicial Review 452 of 2012

REPUBLIC.....APPLICANT

VERSUS

THE COMMISSION OF ADMINISTRATIVE JUSTICE.....1ST RESPONDENT

INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION.....2ND RESPONDENT

EX PARTE

JOHN NDIRANGU KARIUKI

JUDGEMENT

INTRODUCTION

1. By a Notice of Motion dated 28th December 2012, the *ex parte* applicant herein, **John Ndirangu Kariuki**, seeks the following orders:

1) An order of certiorari to remove into this Honourable Court and quash the recommendation made by the 1st Respondent to the 2nd Respondent on or about the 18th December 2012 to the effect that the applicant be disqualified from, barred from or disallowed to run for an elective public office.

2) An order of prohibition prohibiting the 2nd Respondent from acting on the recommendation of the 1st Respondent made on or about the 18th of December 2012 to the effect that the applicant be disqualified from, barred from or disallowed to run from any elective public office.

3) The cost of this application be provided for.

***EX PARTE* APPLICANT'S CASE**

4)The application is based on the Statutory Statement filed on 20th December 2012 and the verifying affidavit sworn by the *ex parte* applicant on 20th December 2012. The *ex parte* applicant's case as can be gleaned from the said documents is that the Chairperson of the 1st respondent on 18th December 2012 made a statement to the effect that the 1st respondent had recommended to the 2nd respondent that certain persons including the *ex parte* applicant be disqualified from running for elective public posts in the forthcoming general elections. It is his case that before the said recommendation, he was not afforded an opportunity to be heard and that the 1st respondent did not before making the said recommendation supply him with any reasons or notice to that effect. According to the *ex parte* applicant that action flies in the face of sound administrative justice as it violates the principles of legality and natural justice. As there is real and present danger that the 2nd respondent may act on the recommendations of the 1st respondent to his detriment in the process of the ongoing nomination process. According to him the said recommendations are in breach of his legitimate expectations and are highly prejudicial of him. With leave of the Court the *ex parte* applicant on 16th January 2013 filed an affidavit exhibiting a copy of the letter dated 14th December 2012 in which according to him the 1st respondent recommended to the 2nd respondent that he be deemed ineligible to run for any elective office or to hold any public office. According to the said supplementary affidavit, he had also vide a Chamber Summons dated 20th December 2012 sought leave to appeal out of time against the said conviction.

RESPONDENTS' CASE

5) In opposition to the application, **Otiende Amollo**, the Chairperson of the 1st respondent swore an affidavit on 11th January 2013 in which he deposed that the 1st respondent is a Constitutional Commission established by the Commission on Administrative Justice Act, 2011 mandated to promote constitutionalism and fair administrative action by public officers focusing on abuse of power, misbehaviour, improper conduct and unresponsive official conduct within the public sector complimentary to integrity issues under *inter alia* the Constitution and the Public Officers Ethics Act 2003. Pursuant to the foregoing the 1st respondent has come up with a register of persons who are not suitable to hold public office under Article 75(3) of the Constitution based on information obtained from the Ethics and Anti-corruption Commission, the Office of the Director

of Public Prosecutions and the Chief Registrar of the Judiciary. From the information received the *ex parte* applicant was indicated as having been charged and convicted with the offence of abuse of public office and that no appeal was lodged against the said conviction. It is therefore deposed that the *ex parte* applicant is barred by Article 99(2)(g) of the Constitution and the Elections Act from holding any public office. Based on the said information, the 1st respondent wrote to the 2nd respondent forwarding the names of persons disqualified from holding office and reasons therefor. According to the deponent the letter to the 2nd respondent constitutes a recommendation and not a decision which is yet to be made by the 2nd respondent hence cannot form the subject of an order for certiorari. In his view, the 1st respondent only drew the 2nd respondent's attention to factual matters respecting the *ex parte* applicant's conviction and neither undertook any hearing nor sentencing hence the requirements of natural justice are inapplicable. Without a decision and/or proceedings capable of being quashed and as the *ex parte* applicant has neither lodged a copy of the decision sought to be quashed nor accounted for the failure to do so coupled with prematurity of the application, conviction of the applicant and his ineligibility to hold any public office the application is bad in law and ought to be dismissed with costs.

6) On the part of the 2nd respondent, **Mohamud Jabane**, it's Manager, Legal Services swore an affidavit on 14th January 2013 in which he deposed that the 2nd respondent is a Constitutional body established under the Constitution and is independent in the discharge of its functions and obligations and is not subject to direction or control of any person or authority. As part of its mandate the 2nd respondent is responsible for conducting and supervising elections to any elective body or office established by the Constitution and any other elections prescribed by legislation. According to him the criteria for qualification and disqualification for election as a Member of Parliament is provided for under the Constitution and the Elections Act which is the criteria the 2nd respondent shall apply in determining the qualification or disqualification of a candidate as a ,Member of Parliament a determination which the 2nd respondent is yet to make. According to him the decision under inquiry is not the 2nd respondent's and there is no evidence that the 2nd respondent has acted or intends to rely thereon in order to invite the supervisory jurisdiction of the Court. According to hi, in exercising its independent functions aforesaid, the 2nd respondent has not, shall not and has no intention of abdicating the said mandate any other body, person or Commission including the 1st respondent. In the deponent's view the prayers sought herein are based on speculation and conjecture in order to obtain orders aimed at mischievously restraining the 2nd respondent from exercising its constitutional and statutory mandate aforesaid, an act that would be unconstitutional and a gross, unjustified and unlawful violation of the 2nd respondent's independence. It is therefore the deponent's contention that the application is frivolous, vexatious, ill conceived, gravely incompetent and amounts to abuse of the Court process and discloses no cause of action against the 2nd respondent.

SUBMISSIONS IN SUPPORT OF THE *EX PARTE* APPLICANT'S APPLICATION

7) While reiterating the contents of the Motion, the Statement and the affidavits, the *ex parte* applicant submitted that the existing jurisprudence on the subject of natural justice demands that no party should be condemned unheard whenever a decision that is adverse or adversely affects a party is being made which duty is in-built in every statute vesting in any person/ body exercising decision making powers. This is more so in the case of the 1st respondent – a superintendent of this duty. Having taken an issue with the right of, among others, the applicant to contest for an elective office, it is submitted that that was clearly a decision by the 1st respondent and whether or not it is ignored by the 2nd respondent is a different issue since the recommendation is a decision independent of any whether it is acted upon and is hence capable of being quashed if it fails the basic test of sound administrative action. Since the *ex parte* applicant was not given a hearing and was not supplied with the reasons for the decision, it is submitted that the decision ought to be quashed. Since it is a decision upon which the 2nd respondent is asked to act, there is danger that it might be acted upon. Contrary to the contention that the *ex parte* applicant seeks to stop the 2nd respondent from exercising its constitutional mandate, it is the applicant's position that it only seeks to prohibit the 2nd respondent from making such decision based on the impugned decision of the 1st respondent which will be a wrong decision. In support of the submissions the *ex parte* applicant relies on **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No. 266 of 1996 [1997] eKLR**, **Republic vs. Judicial Commission of Inquiry into The Goldenberg Affair, *Ex Parte* George Saitoti [2007] 2 EA 392; [2006] 2 KLR 400**, **David Onyango Oloo Vs. Attorney General Civil Appeal No. 152 of 1986 [1986] KLR 711,** and **Charles Orinda Dullo vs. Kenya Railways Corporation**.

1ST RESPONDENT'S SUBMISSIONS

8) On the part of the 1st respondent, it is submitted that on the basis of its Constitutional and legislative functions, the 1st respondent is empowered to investigate complaints of abuse of office within the public sector and take appropriate remedial action. It is further submitted that whereas the applicant makes reference to recommendations made on or about 18th

December 2012 against the *ex parte* applicant, no such recommendation exists. It is however submitted that what the 1st respondent did vide the letter dated 14th December was to recommend to the 2nd respondent the matter at hand which recommendation based on ***Black's Law Dictionary 6th Edn*** and ***Concise Oxford English Dictionary*** was not a decision. It is further submitted that the 1st respondent in drafting the said letter was exercising its statutory duty or obligation hence the applicant cannot challenge that exercise especially when the 1st respondent duly satisfied itself and performed its duty before forwarding the said names. In the 1st respondent's view, it is like a conveyor belt and has to ensure that the process moves to the next authority. By failing to disclose to court that he was convicted and sentenced, it is submitted that the applicant has come to court with unclean hands. It is the 1st respondent's case that the recommendation was made on the basis of an accurate and verified report obtained from concerned authorities in consonance with the 1st respondent's statutory mandate and obligations. From the information received and gathered by the 1st respondent it is contended that the applicant is in any event ineligible to run for elective office or to hold any other Public Office hence is disqualified from being elected a Member of Parliament. In support of its submissions the 1st respondent relies on **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others** (supra), **Paul Kiplagat Birgen & 25 Others vs. Interim Independent Electoral Commission & 2 Others Nbi High Court Miscellaneous Application 156 of 2011.**

2ND RESPONDENT'S SUBMISSIONS

9) On behalf of the 2nd respondent, it is submitted, while reiterating the contents of the replying affidavit filed on its behalf that the application is based on recommendation made by the 1st respondent and not any decision made by the respondent hence what is sought is a decision based purely on a recommendation made by the 2nd respondent and on conjecture that the 2nd respondent will rely thereon without evidence that the 2nd respondent intends to act thereon. It is reiterated that what the applicant seeks is to pre-empt the 2nd respondent's constitutional and statutory duty. It is submitted that the 2nd respondent has the jurisdiction and is the only statutory body specifically mandated both constitutionally and statutorily to independently discharge its functions more specifically to apply, in an independent manner, the criteria for the qualification or disqualification of election of Member of Parliament. Since the applicant's application is based on speculation, the same is mischievous and an irregular attempt to have the Court, unconstitutionally usurp the constitutional mandate of the 2nd Respondent and irregularly exercise it. To grant the orders would amount to directing the 2nd respondent on how to carry out its mandate for the purposes of achieving self-satisfaction. Since the decision complained of was not made by the 2nd respondent, it is further submitted that it would be inimical to public interest and public policy to intervene in the manner sought and the cases of **Kipkalya Kiprono Kones vs. Republic & Others *Ex parte* Kimani Wanyoike Civil Appeal No. 94 of 2005 [2006] 2 EA 158; [2006] 2 KLR 226** and **The Kenya National Examination Council and Republic, *Ex parte* Regina Ouru Civil Appeal No. 127 of 2009** are cited for this proposition. Since the 2nd respondent has not made any decision certiorari cannot be granted since certiorari can only quash a decision already made. Again prohibition does not lie since the decision making process is yet to be carried out and it is the 2nd respondent's view that the application ought to be dismissed.

DETERMINATIONS

10) In order to understand the real issue in dispute herein it is important to recapitulate the grounds upon which the Motion is grounded. According to the statement which contains the grounds the Motion is based on the breach of the rules of natural justice and legitimate expectation. It is therefore not contended that the respondents are guilty of want of jurisdiction. I have found it necessary to clarify this issue due to the fact that a lot of energy has been expended by the parties in addressing the issue of want of jurisdiction hence it is important to focus the Court's attention to the real issue in dispute before the Court.

11) That what provoked these proceedings is a recommendation made by the 1st respondent to the 2nd respondent is not in doubt. This is made clear from the Motion itself where the applicant is clear in its mind that what is impugned is not a decision but a recommendation. The central issue that the Court is called upon to decide is therefore whether a recommendation as opposed to a decision or proceedings is capable of being quashed. It must be pointed out that a recommendation may take two forms. Where the Commission making the recommendation is acting judicially it must act in accordance with its mandate and if it arrives at a recommendation after an inquiry has been made in which the recommendation is final in nature that would amount to a determination for the purposes of judicial review. That was the position in **Republic vs. Attorney-General *Ex parte* Biwott [2002] 1 KLR 668**, **Republic vs. Judicial Commission of Inquiry into The Goldenberg Affair, *Ex parte* George Saitoti** (supra). However in **Njoya & 6 Others vs. Attorney General & Another [2004] 1 KLR 232** it was held that as regards the justiciability, recommendations or report of any other commission (whether established by an Act of Parliament or administratively) are not justiciable for it is a long standing principle of administrative law that only decisions impacting on the rights of individuals (and not recommendations) are amenable to judicial review if

they do not confer or take away anyone's rights. Dealing with the issue **Warsame, J** (as he then was) in **Paul Kiplagat Birgen & 25 Others vs. Interim Independent Electoral Commission & 2 Others** (supra) expressed himself as follows:

"It is clear that the letter dated 12th July 2011 was written by the 1st respondent in its statutory capacity. It is also clear the letter as rightly pointed out by the applicants was requesting or recommending the revocation of the nomination of the applicants and others not before court. .. It is therefore my decision that there is no decision capable of being challenged and which is amenable to judicial review that was made by the 1st respondent against the applicants herein."

12) Similarly, it is not contended that the 1st respondent had no statutory duty to undertake what it did. The applicant's contention is simply that it was undertaken in breach of the rules of natural justice. It is not disputed that the applicant was convicted and that by the time of the recommendation he had not lodged an appeal. In fact it was only after these proceedings were instituted that the applicant applied to appeal out of time. Based on the material on record I, am not satisfied that the recommendations of the 1st respondent amounted to a determination for the purposes of judicial review. They were simply recommendations and the 2nd respondent was not under any obligation to act upon them since the 2nd respondent is expected to undertake its Constitutional and statutory mandate independently and without any directions from any person. Without the 2nd respondent admitting them as part of the material upon which it would determine the *ex parte* applicant's eligibility, the 1st respondent's views remain just that – recommendations.

13) However, it is expected that when it decides to make determinations which are likely to adversely affect the rights of a person the rules of natural justice would be adhered to. However at the time these proceedings were instituted there is no evidence that the 2nd respondent had commenced the process of determining the eligibility of the applicant to hold public office and that there was imminent danger that the *ex parte* applicant was going to be denied the opportunity of being heard before a determination was made. Courts do not issue orders at large in judicial review applications. Whereas such orders may be granted in declaratory suits, the Court is not expected to go to a fishing expedition in an application for judicial review unless it is shown that the applicant's rights and fair hearing have been or are in imminent danger of being contravened.

14) At the time of the institution of these proceedings there was no such threat hence the occasion had not arisen for the invocation of the Court's supervisory jurisdiction.

ORDER

15) In the result I find no merits in the Notice of Motion dated 28thDecember 2012 which I hereby dismiss with costs to the respondents.

Dated at Nairobi this day 28th of January 2013

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wasia for the applicant

Ms Nungo for the 1st respondent

Mr Murugu for the 2nd respondent

CONSTITUTIONAL COURT OF SOUTH AFRICA

Cases CCT 143/15 and CCT 171/15

In the matter of:

ECONOMIC FREEDOM FIGHTERS Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY First Respondent

PRESIDENT JACOB GEDLEYIHLEKISA ZUMA Second Respondent

PUBLIC PROTECTOR Third Respondent

And in the matter of:

DEMOCRATIC ALLIANCE Applicant

and

SPEAKER OF THE NATIONAL ASSEMBLY First Respondent

PRESIDENT JACOB GEDLEYIHLEKISA ZUMA Second Respondent

MINISTER OF POLICE Third Respondent

PUBLIC PROTECTOR Fourth Respondent

CORRUPTION WATCH (RF) NPC Amicus Curiae

Neutral citation: *Economic Freedom Fighters v Speaker of the National Assembly and Others; Democratic Alliance v Speaker of the National Assembly and Others* [2016] ZACC 11 2

Coram: *Mogoeng CJ, Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J*

Judgment: Mogoeng CJ (unanimous)

Heard on: 9 February 2016

Decided on: 31 March 2016

Summary: Legal Effect of Powers of Public Protector — Appropriate Remedial Action — Conduct of President — National Assembly Obligations — Separation of Powers

Specific Constitutional Obligations — Exclusive Jurisdiction — Compliance with Remedial Action — Oversight and Accountability

ORDER

Applications for the exercise of exclusive jurisdiction and direct access:

In the result the following order is made:

1. This Court has exclusive jurisdiction to hear the application by the Economic Freedom Fighters.

2. The Democratic Alliance's application for direct access is granted.

3. The remedial action taken by the Public Protector against President Jacob Gedleyihlekisa Zuma in terms of section 182(1)(c) of the Constitution is binding.

4. The failure by the President to comply with the remedial action taken against him, by the Public Protector in her report of 19 March 2014, is inconsistent with section 83(b) of the Constitution read with sections 181(3) and 182(1)(c) of the Constitution and is invalid.

5. The National Treasury must determine the reasonable costs of those measures implemented by the Department of Public Works at the President's Nkandla homestead that do not relate to security, namely the visitors' centre, the amphitheatre, the cattle kraal, the chicken run and the swimming pool only.

6. The National Treasury must determine a reasonable percentage of the costs of those measures which ought to be paid personally by the President.

7. The National Treasury must report back to this Court on the outcome of its determination within 60 days of the date of this order.

8. The President must personally pay the amount determined by the National Treasury in terms of paragraphs 5 and 6 above within 45 days of this Court's signification of its approval of the report.

9. The President must reprimand the Ministers involved pursuant to paragraph 11.1.3 of the Public Protector's remedial action.

10. The resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector in terms of section 182(1)(c) of the Constitution is inconsistent with sections 42(3), 55(2)(a) and (b) and 181(3) of the Constitution, is invalid and is set aside.

11. The President, the Minister of Police and the National Assembly must pay costs of the applications including the costs of two counsel.

JUDGMENT

MOGOENG CJ (Moseneke DCJ, Bosielo AJ, Cameron J, Froneman J, Jafta J, Khampepe J, Madlanga J, Mhlantla J, Nkabinde J and Zondo J concurring):

Introduction

[1] One of the crucial elements of our constitutional vision is to make a decisive break from the unchecked abuse of State power and resources that was virtually institutionalised during the apartheid era. To achieve this goal, we adopted accountability, the rule of law and the supremacy of the Constitution as values of our constitutional democracy. For this reason, public office-bearers ignore their constitutional obligations at their peril. This is so because constitutionalism, accountability and the rule of law constitute the sharp and mighty sword that stands ready to chop the ugly head of impunity off its stiffened neck. It is against this backdrop that the following remarks must be understood:

"Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our democracy."

And the role of these foundational values in helping to strengthen and sustain our constitutional democracy sits at the heart of this application.

[2] In terms of her constitutional powers,the Public Protector investigated allegations of improper conduct or irregular expenditure relating to the security upgrades at the Nkandla private residence of the President of the Republic. She concluded that the President failed to act in line with certain of his constitutional and ethical obligations by knowingly deriving undue benefit from the irregular deployment of State resources. Exercising her constitutional powers to take appropriate remedial action she directed that the President, duly assisted by certain State functionaries, should work out and pay a portion fairly proportionate to the undue benefit that had accrued to him and his family. Added to this was that he should reprimand the Ministers involved in that project, for specified improprieties.

[3] The Public Protector's report was submitted not only to the President, but also to the National Assembly presumably to facilitate compliance with the remedial action in line with its constitutional obligations to hold the President accountable. For well over one year, neither the President nor the National Assembly did what they were required to do in terms of the remedial action. Hence these applications by the Economic Freedom Fighters (EFF) and the Democratic Alliance (DA),5 against the National Assembly and the President.

[4] What these applications are really about is that—

(a) based on the supremacy of our Constitution, the rule of law and considerations of accountability, the President should be ordered to comply with the remedial action taken by the Public Protector by paying a reasonable percentage of the reasonable costs expended on non-security features at his private residence;

(b) the President must reprimand the Ministers under whose watch State resources were expended wastefully and unethically on the President's private residence;

(c) this Court must declare that the President failed to fulfil his constitutional obligations, in terms of sections 83, 96, 181 and 182;

(d) the report of the Minister of Police and the resolution of the National Assembly that sought to absolve the President of liability, must be declared inconsistent with the Constitution and invalid and that the adoption of those outcomes amount to a failure by the National Assembly to fulfil its constitutional obligations, in terms of sections 55 and 181, to hold the President accountable to ensure the effectiveness, rather than subversion, of the Public Protector's findings and remedial action;

(e) the Public Protector's constitutional powers to take appropriate remedial action must be clarified or affirmed; and

(f) the State parties, except the Public Protector, are to pay costs to the Applicants.

Background

[5] Several South Africans, including a Member of Parliament, lodged complaints with the Public Protector concerning aspects of the security upgrades that were being effected at the President's Nkandla private residence. This triggered a fairly extensive investigation by the Public Protector into the Nkandla project.

[6] The Public Protector concluded that several improvements were non-security features.6 Since the State was in this instance under an obligation only to provide security for the President at his private residence, any installation that has nothing to do with the President's security amounts to undue benefit or unlawful enrichment to him and his family and must therefore be paid for by him.

[7] In reasoning her way to the findings, the Public Protector said that the President acted in breach of his constitutional obligations in terms of section 96(1), (2)(b) and (c) of the Constitution which provides:

"Conduct of Cabinet members and Deputy Ministers

(1) Members of the Cabinet and Deputy Ministers must act in accordance with a code of ethics prescribed by national legislation.

(2) Members of the Cabinet and Deputy Ministers may not—

. . .

(b) act in any way that is inconsistent with their office, or expose themselves to any situation involving the risk of a conflict between their official responsibilities and private interests; or

(c) use their position or any information entrusted to them, to enrich themselves or improperly benefit any other person."

In the same breath she concluded that the President violated the provisions of the Executive Members' Ethics Act and the Executive Ethics Code. These are the national legislation and the code of ethics contemplated in section 96(1).

[8] The Public Protector's finding on the violation of section 96 was based on the self-evident reality that the features identified as unrelated to the security of the President, checked against the list of what the South African Police Service (SAPS) security experts had themselves determined to be security features, were installed because the people involved knew they were dealing with the President. When some government functionaries find themselves in that position, the inclination to want to please higher authority by doing more than is reasonably required or legally permissible or to accede to a gentle nudge by overzealous and ambitious senior officials to do a "little wrong" here and there, may be irresistible. A person in the position of the President should be alive to this reality and must guard against its eventuation. Failure to do this may constitute an infringement of this provision.

[9] There is thus a direct connection between the position of President and the reasonably foreseeable ease with which the specified non-security features, asked for or not, were installed at the private residence. This naturally extends to the undue enrichment. Also, the mere fact of the President allowing non-security features, about whose construction he was reportedly aware, to be built at his private residence at government expense, exposed him to a "situation involving the risk of a conflict between [his] official responsibilities and private interests". The potential conflict lies here. On the one hand, the President has the duty to ensure that State resources are used only for the advancement of State interests. On the other hand, there is the real risk of him closing an eye to possible wastage, if he is likely to derive personal benefit from indifference. To find oneself on the wrong side of section 96, all that needs to be proven is a risk. It does not even have to materialise.

[10] Having arrived at the conclusion that the President and his family were unduly enriched as a result of the non-security features, the Public Protector took remedial action against him in terms of section 182(1)(c) of the Constitution. The remedial action taken reads:

> "11.1 The President is to:
>
> 11.1.1 Take steps, with the assistance of the National Treasury and the SAPS, to determine the reasonable cost of the measures implemented by the DPW [Department of Public Works] at his private residence that do not relate to security, and which include [the] visitors' centre, the amphitheatre, the cattle kraal and chicken run and the swimming pool.
>
> 11.1.2 Pay a reasonable percentage of the cost of the measures as determined with the assistance of the National Treasury, also considering the DPW apportionment document.
>
> 11.1.3 Reprimand the Ministers involved for the appalling manner in which the Nkandla Project was handled and state funds were abused.
>
> 11.1.4 Report to the National Assembly on his comments and actions on this report within 14 days."

[11] Consistent with this directive, the President submitted his response to the National Assembly within 14 days of receiving the report. It was followed by yet another response about five months later.

[12] For its part, the National Assembly set up two Ad Hoc Committees, comprising its members, to examine

the Public Protector's report as well as other reports including the one compiled, also at its instance, by the Minister of Police. After endorsing the report by the Minister exonerating the President from liability and a report to the same effect by its last Ad Hoc Committee, the National Assembly resolved to absolve the President of all liability. Consequently, the President did not comply with the remedial action taken by the Public Protector.

[13] Dissatisfied with this outcome, the EFF launched this application, claiming that it falls within this Court's exclusive jurisdiction. It, in effect, asked for an order affirming the legally binding effect of the Public Protector's remedial action; directing the President to comply with the Public Protector's remedial action; and declaring that both the President and the National Assembly acted in breach of their constitutional obligations. The DA launched a similar application in the Western Cape Division of the High Court, Cape Town and subsequently to this Court conditional upon the EFF's application being heard by this Court.

[14] It is fitting to mention at this early stage that eight days before this matter was heard, the President circulated a draft order to this Court and the parties. After some parties had expressed views on aspects of that draft, a revised version was circulated on the day of the hearing. The substantial differences between the two drafts are that, unlike the first, the second introduces the undertaking by the President to reprimand certain Ministers in terms of the remedial action and also stipulates the period within which the President would personally pay a reasonable percentage of the reasonable costs of the non-security upgrades after a determination by National Treasury. Also, the Auditor-General has been left out as one of the institutions that were to assist in the determination of the amount payable by the President. Otherwise, the essence of both draft orders is that those aspects of the Public Protector's remedial measures, still capable of enforcement, would be fully complied with. As for costs, the President proposed that they be reserved for future determination.

Exclusive jurisdiction

[15] The exclusive jurisdiction of this Court is governed by section 167(4)(e) of the Constitution which says:

"(4) Only the Constitutional Court may—

…

(e) decide that Parliament or the President has failed to fulfil a constitutional obligation."

[16] Whether this Court has exclusive jurisdiction in a matter involving the President or Parliament is not a superficial function of pleadings merely alleging a failure to fulfil a constitutional obligation. The starting point is the pleadings. But much more is required. First, it must be established that a constitutional obligation that rests on the President or Parliament is the one that allegedly has not been fulfilled. Second, that obligation must be closely examined to determine whether it is of the kind envisaged by section 167(4)(e).

[17] Additional and allied considerations are that section 167(4)(e) must be given a narrow meaning. This is so because whenever a constitutional provision is construed, that must be done with due regard to other constitutional provisions that are materially relevant to the one being interpreted. In this instance, section 172(2)(a) confers jurisdiction on the Supreme Court of Appeal, the High Court and courts of similar status to pronounce on the constitutional validity of laws or conduct of the President. This is the responsibility they share with this Court – a terrain that must undoubtedly be adequately insulated against the inadvertent and inappropriate monopoly of this Court. An interpretation of section 167(4)(e) that is cognisant of the imperative not to unduly deprive these other courts of their constitutional jurisdiction, would be loath to assume that this Court has exclusive jurisdiction even if pleadings state strongly or clearly that the President or Parliament has failed to fulfil constitutional obligations.

[18] An alleged breach of a constitutional obligation must relate to an obligation that is specifically imposed on the President or Parliament. An obligation shared with other organs of State will always fail the section 167(4)(e) test. Even if it is an office-bearer- or institution-specific constitutional obligation, that would not necessarily be enough. Doctors for Life provides useful guidance in this connection. There, Ngcobo J said "obligations that are readily ascertainable and are unlikely to give rise to disputes", do not require a court to deal with "a sensitive aspect of the separation of powers" and may thus be heard by the High Court. This relates, as he said by way of example, to obligations expressly imposed on Parliament where the Constitution provides that a particular legislation would require a two-thirds majority to be passed. But where the Constitution imposes the primary obligation on Parliament and leaves it at large to determine what would be required of it to execute its mandate, then crucial political questions are likely to arise which would entail an intrusion into sensitive areas of separation of powers. When this is the case, then the demands for this Court to exercise its exclusive jurisdiction would have been met.

[19] To determine whether a dispute falls within the exclusive jurisdiction of this Court, section 167(4)(e) must be given a contextual and purposive interpretation with due regard to the special role this apex Court was established to fulfil. As the highest court in constitutional matters and "the ultimate guardian of the Constitution and its values",it has "to adjudicate finally in respect of issues which would inevitably have important political consequences". Also to be factored into this process is

the utmost importance of the highest court in the land being the one to deal with disputes that have crucial and sensitive political implications. This is necessary to preserve the comity between the judicial branch and the executive and legislative branches of government.

[20] That this Court enjoys the exclusive jurisdiction to decide a failure by the President to fulfil his constitutional obligations ought not to be surprising, considering the magnitude and vital importance of his responsibilities. The President is the Head of State and Head of the national Executive. His is indeed the highest calling to the highest office in the land. He is the first citizen of this country and occupies a position indispensable for the effective governance of our democratic country. Only upon him has the constitutional obligation to uphold, defend and respect the Constitution as the supreme law of the Republic been expressly imposed. The promotion of national unity and reconciliation falls squarely on his shoulders. As does the maintenance of orderliness, peace, stability and devotion to the well-being of the Republic and all of its people. Whoever and whatever poses a threat to our sovereignty, peace and prosperity he must fight.To him is the executive authority of the entire Republic primarily entrusted. He initiates and gives the final stamp of approval to all national legislation. And almost all the key role players in the realisation of our constitutional vision and the aspirations of all our people are appointed and may ultimately be removed by him. Unsurprisingly, the nation pins its hopes on him to steer the country in the right direction and accelerate our journey towards a peaceful, just and prosperous destination, that all other progress-driven nations strive towards on a daily basis. He is a constitutional being by design, a national pathfinder, the quintessential commander-in-chief of State affairs and the personification of this nation's constitutional project.

[21] He is required to promise solemnly and sincerely to always connect with the true dictates of his conscience in the execution of his duties. This he is required to do with all his strength, all his talents and to the best of his knowledge and abilities. And, but for the Deputy President, only his affirmation or oath of office requires a gathering of people, presumably that they may hear and bear witness to his irrevocable commitment to serve them well and with integrity. He is after all, the image of South Africa and the first to remember at its mention on any global platform.

[22] Similarly, the National Assembly, and by extension Parliament, is the embodiment of the centuries-old dreams and legitimate aspirations of all our people. It is the voice of all South Africans, especially the poor, the voiceless and the least-remembered. It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people.31 It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed.32 For this reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made33 to the populace through the State of the Nation Address, budget speeches, policies, legislation and the Constitution, duly undergirded by the affirmation or oath of office constitutionally administered to the Executive before assumption of office. Parliament also passes legislation with due regard to the needs and concerns of the broader South African public. The willingness and obligation to do so is reinforced by each member's equally irreversible public declaration of allegiance to the Republic, obedience, respect and vindication of the Constitution and all law of the Republic, to the best of her abilities. In sum, Parliament is the mouthpiece, the eyes and the service-delivery-ensuring machinery of the people. No doubt, it is an irreplaceable feature of good governance in South Africa.

[23] For the EFF to meet the requirements for this Court to exercise its exclusive jurisdiction over the President and the National Assembly, it will have to first rely on what it considers to be a breach of a constitutional obligation that rests squarely on the President as an individual and on the National Assembly as an institution. That obligation must have a demonstrable and inextricable link to the need to ensure compliance with the remedial action taken by the Public Protector. Put differently, it must be apparent from a reading of the constitutional provision the EFF relies on, that it specifically imposes an obligation on the President or the National Assembly, but in a way that keeps focus sharply on or is intimately connected to the need for compliance with the remedial action. If both or one of them bears the obligation merely as one of the many organs of State, then other courts like the High Court and later the Supreme Court of Appeal would in terms of section 172(2)(a) also have jurisdiction in the matter. In the latter case direct access to this Court would have to be applied for and obviously granted only if there are exceptional circumstances and it is in the interests of justice to do so.

[24] Where, as in this case, both the President and the National Assembly are said to have breached their respective constitutional obligations, which could then clothe this Court with jurisdiction, and exclusive jurisdiction is only proven in respect of the one but not the other, there might still be room to entertain the application against both provided it is in the interests of justice to do so. This would be the case, for example, where: (i) the issue(s) involved are of high political importance with potentially far-reaching implications for the governance and stability of our country; (ii) the issue(s) at the heart of the alleged breach of constitutional obligations by both the President and the

National Assembly are inseparable; and (iii) the gravity and nature of the issue(s) at stake are such that they demand an expeditious disposition of the matter in the interests of the nation. This list is not exhaustive.

Exclusive jurisdiction in the application against the President

[25] Beginning with the President, the EFF argued that he breached his obligations in terms of sections 83, 96, 181 and 182 of the Constitution. And it is on the strength of these alleged breaches that this Court is asked to exercise exclusive jurisdiction.

[26] Section 83 does impose certain obligations on the President in particular. It provides:

"The President—

(a) is the Head of State and head of the national executive;

(b) must uphold, defend and respect the Constitution as the supreme law of the Republic; and

(c) promotes the unity of the nation and that which will advance the Republic."

An obligation is expressly imposed on the President to uphold, defend and respect the Constitution as the law that is above all other laws in the Republic. As the Head of State and the Head of the national Executive, the President is uniquely positioned, empowered and resourced to do much more than what other public office-bearers can do. It is, no doubt, for this reason that section 83(b) of the Constitution singles him out to uphold, defend and respect the Constitution. Also, to unite the nation, obviously with particular regard to the painful divisions of the past. This requires the President to do all he can to ensure that our constitutional democracy thrives. He must provide support to all institutions or measures designed to strengthen our constitutional democracy. More directly, he is to ensure that the Constitution is known, treated and related to, as the supreme law of the Republic. It thus ill-behoves him to act in any manner inconsistent with what the Constitution requires him to do under all circumstances. The President is expected to endure graciously and admirably and fulfil all obligations imposed on him, however unpleasant. This imposition of an obligation specifically on the President still raises the question: which obligation specifically imposed by the Constitution on the President has he violated? Put differently, how did he fail to uphold, defend and respect the supreme law of the Republic?

[27] Sections 181(3) and 182(1)(c) in a way impose obligations on the President. But, as one of the many. None of these provisions singles out the President for the imposition of an obligation. This notwithstanding the jurisprudential requirement that an obligation expressly imposed on the President, not Cabinet as a whole or organs of State in general, is required to establish exclusive jurisdiction.

[28] For the purpose of deciding whether this Court has exclusive jurisdiction, it must still be determined whether on its own, section 83(b) imposes on the President an obligation of the kind required by section 167(4)(e). He is said to have failed to "uphold, defend and respect the Constitution as the supreme law of the Republic". This he allegedly did by not complying with the remedial action taken by the Public Protector in terms of section 182(1)(c) thus violating his section 181(3) obligation to assist and protect the Public Protector in order to guarantee her dignity and effectiveness.

[29] If the failure by the President to comply with or enforce the remedial action taken by the Public Protector against a member of the Executive and fulfil his shared obligation to assist and protect the Public Protector so as to ensure her independence, dignity and effectiveness, amounts to a failure envisaged by section 167(4)(e), then the list of matters that would fall under this Court's exclusive jurisdiction would be endless. What this could then mean is that whenever the President is said to have failed to fulfil a shared obligation in any provision of the Constitution, or the Bill of Rights, this Court would readily exercise its exclusive jurisdiction. This would be so because on this logic, all a litigant would have to do to trigger this Court's exclusive jurisdiction, would be to rely on the shared constitutional obligations as in the Bill of Rights, and section 83 which would then confer exclusive jurisdiction on this Court in all applications involving the President.

[30] I reiterate that, this would mean that, any failure to fulfil shared constitutional obligations by any member of the Executive, would thus be attributable to the President as his own failure. After all he appoints them and they are answerable to him. Their infringement, coupled with reliance on section 83, would thus justify the exercise of exclusive jurisdiction by this Court. Such an unbridled elastication of the scope of application of section 83 or 167(4)(e) would potentially marginalise the High Court and the Supreme Court of Appeal in all constitutional matters involving the President.

[31] Section 83 is in truth very broad and potentially extends to just about all the obligations that rest, directly or indirectly, on the shoulders of the President. The President is a constitutional being. In the Constitution the President exists, moves and has his being. Virtually all his obligations are constitutional in nature because they have their origin, in some way, in the Constitution. An overly permissive reliance on section 83 would thus be an ever-present guarantee of direct access to this Court under its exclusive jurisdiction. This does not accord with the overall scheme of the Constitution. And certainly not with the purpose behind the provisions of section

167(4)(e) read with section 172(2)(a) of the Constitution, properly construed.

[32] Section 167(4)(e) must be given a restrictive meaning. This will help arrest litigants' understandable eagerness to have every matter involving the President heard by this Court, as a court of first and last instance. Our High Court, specialist courts of equivalent status and Supreme Court of Appeal also deserve the opportunity to grapple with constitutional matters involving the President so that they too may contribute to the further development and enrichment of our constitutional jurisprudence.

[33] It bears repetition, that section 83(b) does impose an obligation on the President in particular to "uphold, defend and respect the Constitution". But to meet the section 167(4)(e) requirements, conduct by the President himself that tends to show that he personally failed to fulfil a constitutional obligation expressly imposed on him, must still be invoked, to establish the essential link between the more general section 83 obligations and a particular right or definite obligation. It needs to be emphasised though that the stringency of this requirement is significantly attenuated by the applicability of section 83(b) which already imposes a President-specific obligation. The additional constitutional obligation is required only for the purpose of narrowing down or sharpening the focus of the otherwise broad section 83(b) obligation, to a specific and easily identifiable obligation. The demand for President-specificity from the additional constitutional obligation is not as strong as it is required to be where there is not already a more pointed President-specific obligation as in section 83. A constitutionally-sourced and somewhat indirectly imposed obligation complements section 83 for the purpose of meeting the requirement of section 167(4)(e). Although the additional constitutional obligation it imposes on the President would, on its own, be incapable of establishing the required specificity in relation to section 167(4)(e), it is not so in this case because of section 83(b).

[34] I must emphasise that agent-specificity is primarily established by section 83. The somewhat indirectly imposed obligation merely provides reinforcement for it. An indirectly imposed obligation is one that is not derived from section 83(b), but arises from the exercise of a constitutional power, like that conferred on the Public Protector by the Constitution. It nails the obligation down on the President. When an obligation is imposed on the President specifically as a result of the exercise of a constitutional power, for the purpose of meeting the section 167(4)(e) test, the indirectly imposed obligations cannot be dealt with as if the section 83(b) obligations do not exist. For, they impose all-encompassing obligations on the President in relation to the observance of the Constitution. In sum, section 83(b) lays the foundation which is most appropriately complemented by the imposition of an obligation through the exercise of a constitutional power.

[35] In this case, the requirement that the President failed to fulfil a constitutional obligation that is expressly imposed on him is best satisfied by reliance on both sections 83(b) and 182(1)(c) of the Constitution. Very much in line with the narrow or restrictive meaning to be given to section 167(4)(e) and mindful of the role that the other courts must also play in the development of our constitutional law, section 182(1)(c) does in this case, impose an actor-specific obligation. Although section 182 leaves it open to the Public Protector to investigate State functionaries in general, in this case, the essential link is established between this section and section 83 by the remedial action actually taken in terms of section 182(1)(c). In the exercise of that constitutional power, the Public Protector acted, not against the Executive or State organs in general, but against the President himself. Compliance was required only from the President. He was the subject of the investigation and is the primary beneficiary of the non-security upgrades and thus the only one required to meet the demands of the constitutionally-sourced remedial action.

[36] There is a primary obligation, that flows directly from section 182(1)(c), imposed upon only the President to take specific steps in fulfilment of the remedial action. The President's alleged disregard for the remedial action taken against him, does seem to amount to a breach of a constitutional obligation. And this provides the vital connection section 83(b) needs to meet the section 167(4)(e) requirements.

[37] Although section 181(3) is relevant, it does not impose a President-specific obligation. It is relevant but applies to a wide range of potential actors. It was not and could not have been primarily relied on by the Public Protector to impose any constitutionally-sanctioned obligation on the President which could then create the crucial link with section 83(b). A combination of only these two sections would be a far cry from what section 167(4)(e) requires to be applicable. The section 181(3) obligation is a relatively distant and less effective add-on to the potent connection between sections 83(b) and 182(1)(c), necessary to unleash the exclusive jurisdiction. These remarks on section 181(3) apply with equal force to the National Assembly.

[38] This means that it is not open to any litigant who seeks redress for what government has done or failed to do, merely to lump up section 83 with any other constitutional obligation that applies also to the President, as one of the many, so as to bypass all other superior courts and come directly to this Court. Reliance on section 83 coupled with a section that provides a shared constitutional obligation will not, without more, guarantee access to this Court in terms of section 167(4)

(e) in a matter against the President. Section 83 does not have an overly liberal application that would have this Court act readily in terms of its exclusive jurisdiction whenever it is relied on.

[39] President-specific obligations like some of those set out in section 84 of the Constitution or obligations imposed on the President through the exercise of powers expressly conferred by the Constitution on those who then exercise them against the President, on their own or coupled with those in section 83 respectively, are master keys to this Court's exclusive jurisdiction in terms of section 167(4)(e). Remedial action taken against the President is one of those constitutional powers, the exercise of which might justify the activation of this Court's exclusive jurisdiction when combined with section 83(b).

[40] I conclude that the EFF has made out a case that the President's alleged failure to comply with the remedial action coupled with the failure to uphold the Constitution, relate to constitutional obligations imposed specifically on him that are intimately connected to the issue central to this application, which is the obligation for the President to comply with the remedial action. Conditions for the exercise of this Court's exclusive jurisdiction have been met. That does not, however, dispose of the entire application for this Court to exercise its exclusive jurisdiction.

Exclusive jurisdiction in the application against the National Assembly

[41] The National Assembly is also said to have breached its constitutional obligations imposed by sections 55(2) and 181(3) of the Constitution. Section 55(2) provides:

"The National Assembly must provide for mechanisms—

(a) to ensure that all executive organs of state in the national sphere of government are accountable to it; and

(b) to maintain oversight of—

(i) the exercise of national executive authority, including the implementation of legislation; and

(ii) any organ of state."

[42] Skinned to the bone, the contention here is that the National Assembly failed to fulfil its constitutional obligation to hold the President accountable. Just to recap, what triggered the duty to hold the President accountable? The Public Protector furnished the National Assembly with her report which contained unfavourable findings and the remedial action taken against the President. The National Assembly resolved to absolve the President of compliance with the remedial action instead of facilitating its enforcement as was expected by the Public Protector. It is on this basis argued that it failed to fulfil its constitutional obligations to hold him accountable.

Whether this is correct need not be established to conclude that this Court has exclusive jurisdiction.

[43] It is still necessary though, to determine whether the obligation allegedly breached is of the kind contemplated in section 167(4)(e). Holding members of the Executive accountable is indeed a constitutional obligation specifically imposed on the National Assembly. This, however, is not all it takes to meet the requirements of section 167(4)(e). We still need to drill deeper into this jurisdictional question. Is holding the Executive accountable a primary and undefined obligation imposed on the National Assembly? Yes! For the Constitution neither gives details on how the National Assembly is to discharge the duty to hold the Executive accountable nor are the mechanisms for doing so outlined or a hint given as to their nature and operation. To determine whether the National Assembly has fulfilled or breached its obligations will therefore entail a resolution of very crucial political issues. And it is an exercise that trenches sensitive areas of separation of powers. It could at times border on second-guessing the National Assembly's constitutional power or discretion. This is a powerful indication that this Court is entitled to exercise its exclusive jurisdiction in this matter. But that is not all.

[44] As in the case of the President, the National Assembly also has an actor-specific constitutional obligation imposed on it by section 182(1)(b) and (c) read with section 8(2)(b)(iii) of the Public Protector Act. Crucially, the Public Protector's obligation "to report on that conduct" means to report primarily to the National Assembly, in terms of section 182(1)(b) of the Constitution read with section 8 of the Public Protector Act. She reported to the National Assembly for it to do something about that report. Together, these sections bring home into the Chamber of the National Assembly the constitutional obligation to take appropriate remedial action. Although remedial action was not taken against the National Assembly, the report in terms of section 182(1)(b) read with section 8(2)(b)(iii) of the Act was indubitably presented to it for its "urgent attention. . .or. . .intervention". That constitutionally-sourced obligation is not shared, not even with the National Council of Provinces. It is exclusive to the National Assembly. When that report was received by the National Assembly, it effectively operationalised the House's obligations in terms of sections 42(3) and 55(2) of the Constitution. The presentation of that report delivered a constitutionally-derived obligation to the National Assembly for action. And it is alleged that it failed to fulfil these obligations in relation to the remedial action.

[45] This Court, as the highest court in the land and the ultimate guardian of the Constitution and its values, has exclusive jurisdiction also in so far as it relates to the National Assembly. The EFF has thus met the requirements for this Court to exercise its exclusive

jurisdiction in the application against both the President and the National Assembly.

[46] Since the DA's application is conditional upon the EFF's application being heard, the striking similarity between these applications, the extreme sensitivity and high political importance of the issues involved and the fact that these applications traverse essentially the same issues impels us, on interests of justice considerations, to hear the DA application as well.

[47] Why do we have the office of the Public Protector?

The purpose of the office of the Public Protector

[48] The history of the office of the Public Protector, and the evolution of its powers over the years were dealt with in two judgments of the Supreme Court of Appeal. I do not think that much benefit stands to be derived from rehashing that history here.

It suffices to say that a collation of some useful historical data on that office may be gleaned from those judgments.

[49] Like other Chapter Nine institutions, the office of the Public Protector was created to "strengthen constitutional democracy in the Republic". To achieve this crucial objective, it is required to be independent and subject only to the Constitution and the law. It is demanded of it, as is the case with other sister institutions, to be impartial and to exercise the powers and functions vested in it without fear, favour or prejudice.I hasten to say that this would not ordinarily be required of an institution whose powers or decisions are by constitutional design always supposed to be ineffectual. Whether it is impartial or not would be irrelevant if the implementation of the decisions it takes is at the mercy of those against whom they are made. It is also doubtful whether the fairly handsome budget, offices and staff all over the country and the time and energy expended on investigations, findings and remedial actions taken, would ever make any sense if the Public Protector's powers or decisions were meant to be inconsequential. The constitutional safeguards in section 181 would also be meaningless if institutions purportedly established to strengthen our constitutional democracy lacked even the remotest possibility to do so.

[50] We learn from the sum-total of sections 181 and 182 that the institution of the Public Protector is pivotal to the facilitation of good governance in our constitutional dispensation. In appreciation of the high sensitivity and importance of its role, regard being had to the kind of complaints, institutions and personalities likely to be investigated, as with other Chapter Nine institutions, the Constitution guarantees the independence, impartiality, dignity and effectiveness of this institution as indispensable requirements for the proper execution of its mandate. The obligation to keep alive these essential requirements for functionality and the necessary impact is placed on organs of State. And the Public Protector is one of those deserving of this constitutionally-imposed assistance and protection. It is with this understanding that even the fact that the Public Protector was created, not by national legislation but by the supreme law, to strengthen our constitutional democracy, that its role and powers must be understood.

[51] The office of the Public Protector is a new institution – different from its predecessors like the "Advocate General", or the "Ombudsman" and only when we became a constitutional democracy did it become the "Public Protector". That carefully selected nomenclature alone, speaks volumes of the role meant to be fulfilled by the Public Protector. It is supposed to protect the public from any conduct in State affairs or in any sphere of government that could result in any impropriety or prejudice. And of course, the amendments to the Public Protector Act have since added unlawful enrichment and corruption to the list. Among those to be investigated by the Public Protector for alleged ethical breaches, are the President and Members of the Executive at national and provincial levels.

[52] The Public Protector is thus one of the most invaluable constitutional gifts to our nation in the fight against corruption, unlawful enrichment, prejudice and impropriety in State affairs and for the betterment of good governance. The tentacles of poverty run far, wide and deep in our nation. Litigation is prohibitively expensive and therefore not an easily exercisable constitutional option for an average citizen. For this reason, the fathers and mothers of our Constitution conceived of a way to give even to the poor and marginalised a voice, and teeth that would bite corruption and abuse excruciatingly. And that is the Public Protector. She is the embodiment of a biblical David, that the public is, who fights the most powerful and very well-resourced Goliath, that impropriety and corruption by government officials are. The Public Protector is one of the true crusaders and champions of anti-corruption and clean governance.

[53] Hers are indeed very wide powers that leave no lever of government power above scrutiny, coincidental "embarrassment" and censure. This is a necessary service because State resources belong to the public, as does State power. The repositories of these resources and power are to use them, on behalf and for the benefit of the public. When this is suspected or known not to be so, then the public deserves protection and that protection has been constitutionally entrusted to the Public Protector. This finds support in what this Court said in the ***Certification*** case:

"[M]embers of the public aggrieved by the conduct of government officials should be able to lodge complaints with the Public Protector, who will investigate them and take appropriate remedial action."

[54] In the execution of her investigative, reporting or remedial powers, she is not to be inhibited, undermined or sabotaged. When all other essential requirements for the proper exercise of her power are met, she is to take appropriate remedial action. Our constitutional democracy can only be truly strengthened when: there is zero-tolerance for the culture of impunity; the prospects of good governance are duly enhanced by enforced accountability; the observance of the rule of law; and respect for every aspect of our Constitution as the supreme law of the Republic are real. Within the context of breathing life into the remedial powers of the Public Protector, she must have the resources and capacities necessary to effectively execute her mandate so that she can indeed strengthen our constitutional democracy.

[55] Her investigative powers are not supposed to bow down to anybody, not even at the door of the highest chambers of raw State power. The predicament though is that mere allegations and investigation of improper or corrupt conduct against all, especially powerful public office-bearers, are generally bound to attract a very unfriendly response. An unfavourable finding of unethical or corrupt conduct coupled with remedial action, will probably be strongly resisted in an attempt to repair or soften the inescapable reputational damage. It is unlikely that unpleasant findings and a biting remedial action would be readily welcomed by those investigated.

[56] If compliance with remedial action taken were optional, then very few culprits, if any at all, would allow it to have any effect. And if it were, by design, never to have a binding effect, then it is incomprehensible just how the Public Protector could ever be effective in what she does and be able to contribute to the strengthening of our constitutional democracy. The purpose of the office of the Public Protector is therefore to help uproot prejudice, impropriety, abuse of power and corruption in State affairs, all spheres of government and State-controlled institutions. The Public Protector is a critical and indeed indispensable factor in the facilitation of good governance and keeping our constitutional democracy strong and vibrant.

The nature and meaning of "as regulated by" and "additional powers and functions"

[57] Our Constitution is the supreme law of the Republic. It is not subject to any law including national legislation unless otherwise provided by the Constitution itself. The proposition that the force or significance of the investigative, reporting or remedial powers of the Public Protector has somehow been watered down by the provisions of the Public Protector Act, is irreconcilable with the supremacy of the Constitution, which is the primary source of those powers. To put this argument to rest, once and for all, its very bases must be dealt with. The first basis is grounded on section 182(1) in so far as it provides that "the Public Protector has the power, as regulated by national legislation". The second is section 182(2) which says that "the Public Protector has the additional powers and functions prescribed by national legislation".

[58] The constitutional powers of the Public Protector are to investigate irregularities and corrupt conduct or practices in all spheres of government, to report on its investigations and take appropriate remedial action. Section 182(1) and (2) recognises the pre-existing national legislation which does regulate these powers and confer additional powers and functions on the Public Protector. This obviously means that since our Constitution is the supreme law, national legislation cannot have the effect of watering down or effectively nullifying the powers already conferred by the Constitution on the Public Protector. That national legislation is the Public Protector Act and would, like all other laws, be invalid if inconsistent with the Constitution. In any event section 182(1) alludes to national legislation that "regulates" the Public Protector's three-dimensional powers.

[59] That most of the powers provided for by the Public Protector Act were already in place when the Constitution came into operation does not affect the constitutionally prescribed regulatory and supplementary role of the Act. The drafters of the Constitution must have been aware of the provisions of the Act. This is apparent from the words "as regulated" in section 182(1). If the legislation that was to regulate were not yet in place, words like "to be regulated" or similar expressions that point to the future, would in all likelihood have been employed. Notably, the Public Protector Act was amended no fewer than five times since the coming into operation of the Constitution. Furthermore, its long title, substituted in 1998, reads: "To provide for matters incidental to the office of the Public Protector as contemplated in the Constitution of the Republic of South Africa, 1996; and to provide for matters connected therewith". This buries the proposition that Parliament has not yet enacted legislation that would regulate the constitutional powers of the Public Protector and provide for additional powers and functions. If it were to be amended again that would, as with all other legislation, simply be for the purpose of improving on what the Public Protector Act has already done.

[60] "Regulate power" in this context and in terms of its ordinary grammatical meaning connotes an enablement of the correct exercise of the constitutional power. The Constitution points to a functional aid that would simplify and provide details with respect to how the power in its different facets is to be exercised. For example, the Public Protector Act provides somewhat elaborate guidelines on how the power to investigate, report and take remedial action is to be exercised.

[61] Section 182(2) envisages "additional" but certainly not "substitutionary" powers. It contemplates "additional powers and functions". Giving the word "additional" its ordinary grammatical meaning, it means "extra" or "more" or "over and above". Nothing about "additional" in this context could ever be reasonably understood to suggest the removal or limitation of the constitutional powers. A reading of section 6 of the Public Protector Act bears this out. The Public Protector Act did not purport to nor could it validly denude the Public Protector of her constitutional powers. On the contrary and by way of example, section 6(4)(a)(iii) and (iv) adds expressly, unlawful enrichment or corruption to the powers and functions she already had. The power to investigate institutions in which the State is the majority or controlling shareholder, undue delay, unfair and discourteous conduct have also been added to the investigative powers of the Public Protector.

[62] A useful regulatory framework for the fruitful exercise of the Public Protector's powers does, as promised, exist. And by reference in the Constitution and subsequent statutory amendments, more powers and functions were indeed added to those already listed in section 182(1) of the Constitution. The remedial action that could be resorted to under different circumstances, is also detailed in the Public Protector Act, for greater clarity and effectiveness. Likewise, the circumstances and manner in which reports on the investigations are to be presented, and to whom, all reinforce the harmonious correlation between the relevant provisions of the supreme law and the Public Protector Act.

Legal effect of remedial action

[63] Section 182(1)(c) of the Constitution provides that the "Public Protector has the power, as regulated by national legislation. . .to take appropriate remedial action". This remedial action is also provided for in somewhat elaborate terms in section 6 of the Public Protector Act. What then is the legal status or effect of the totality of the remedial powers vested in the Public Protector?

[64] The power to take remedial action is primarily sourced from the supreme law itself. And the powers and functions conferred on the Public Protector by the Act owe their very existence or significance to the Constitution. Just as roots do not owe their life to branches, so are the powers provided by national legislation incapable of eviscerating their constitutional forebears into operational obscurity. The contention that regard must only be had to the remedial powers of the Public Protector in the Act and that her powers in the Constitution have somehow been mortified or are subsumed under the Public Protector Act, lacks merit. To uphold it would have the same effect as "the tail wagging the dog".

[65] Complaints are lodged with the Public Protector to cure incidents of impropriety, prejudice, unlawful enrichment or corruption in government circles. This is done not only to observe the constitutional values and principles necessary to ensure that the "efficient, economic and effective use of resources [is] promoted",that accountability finds expression, but also that high standards of professional ethics are promoted and maintained. To achieve this requires a difference-making and responsive remedial action. Besides, one cannot really talk about remedial action unless a remedy in the true sense is provided to address a complaint in a meaningful way.

[66] The language, context and purpose of sections 181 and 182 of the Constitution give reliable pointers to the legal status or effect of the Public Protector's power to take remedial action. That the Public Protector is required to be independent and subject only to the Constitution and the law, to be impartial and exercise her powers and perform her functions without fear, favour or prejudice, is quite telling. And the fact that her investigative and remedial powers target even those in the throne-room of executive raw power, is just as revealing. That the Constitution requires the Public Protector to be effective and identifies the need for her to be assisted and protected, to create a climate conducive to independence, impartiality, dignity and effectiveness, shows just how potentially intrusive her investigative powers are and how deep the remedial powers are expected to cut.

[67] The obligation to assist and protect the Public Protector so as to ensure her dignity and effectiveness is relevant to the enforcement of her remedial action. The Public Protector would arguably have no dignity and be ineffective if her directives could be ignored willy-nilly. The power to take remedial action that is so inconsequential that anybody, against whom it is taken, is free to ignore or second-guess, is irreconcilable with the need for an independent, impartial and dignified Public Protector and the possibility to effectively strengthen our constitutional democracy. The words "take appropriate remedial action" do point to a realistic expectation that binding and enforceable remedial steps might frequently be the route open to the Public Protector to take. "Take appropriate remedial action" and "effectiveness", are operative words essential for the fulfilment of the Public Protector's constitutional mandate. Admittedly in a different context, this Court said in ***Fose:'***

> "An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced. Particularly in a country where so few have the means to enforce their rights through the courts, it is essential that on those occasions when the legal process does establish that an

> infringement of an entrenched right has occurred, it be effectively vindicated."

[68] Taking appropriate remedial action is much more significant than making a mere endeavour to address complaints as the most the Public Protector could do in terms of the Interim Constitution. It connotes providing a proper, fitting, suitable and effective remedy for whatever complaint and against whomsoever the Public Protector is called upon to investigate. However sensitive, embarrassing and far-reaching the implications of her report and findings, she is constitutionally empowered to take action that has that effect, if it is the best attempt at curing the root cause of the complaint. Remedial action must therefore be suitable and effective. For it to be effective in addressing the investigated complaint, it often has to be binding. In SABC v DA the Supreme Court of Appeal correctly observed:

> "The Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations. Section 182(1)(c) must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct the implementation. It follows that the language, history and purpose of section 182(1)(c) make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation."

[69] But, what legal effect the appropriate remedial action has in a particular case, depends on the nature of the issues under investigation and the findings made. As common sense and section 6 of the Public Protector Act suggest, mediation, conciliation or negotiation may at times be the way to go. Advice considered appropriate to secure a suitable remedy might, occasionally, be the only real option. And so might recommending litigation or a referral of the matter to the relevant public authority or any other suitable recommendation, as the case might be. The legal effect of these remedial measures may simply be that those to whom they are directed are to consider them properly, with due regard to their nature, context and language, to determine what course to follow.

[70] It is however inconsistent with the language, context and purpose of sections 181 and 182 of the Constitution to conclude that the Public Protector enjoys the power to make only recommendations that may be disregarded provided there is a rational basis for doing so. Every complaint requires a practical or effective remedy that is in sync with its own peculiarities and merits. It needs to be restated that, it is the nature of the issue under investigation, the findings made and the particular kind of remedial action taken, based on the demands of the time, that would determine the legal effect it has on the person, body or institution it is addressed to.

[71] In sum, the Public Protector's power to take appropriate remedial action is wide but certainly not unfettered. Moreover, the remedial action is always open to judicial scrutiny. It is also not inflexible in its application, but situational. What remedial action to take in a particular case, will be informed by the subject-matter of investigation and the type of findings made. Of cardinal significance about the nature, exercise and legal effect of the remedial power is the following:

> (a) The primary source of the power to take appropriate remedial action is the supreme law itself, whereas the Public Protector Act is but a secondary source;
>
> (b) It is exercisable only against those that she is constitutionally and statutorily empowered to investigate;
>
> (c) Implicit in the words "take action" is that the Public Protector is herself empowered to decide on and determine the appropriate remedial measure. And "action" presupposes, obviously where appropriate, concrete or meaningful steps. Nothing in these words suggests that she necessarily has to leave the exercise of the power to take remedial action to other institutions or that it is power that is by its nature of no consequence;
>
> (d) She has the power to determine the appropriate remedy and prescribe the manner of its implementation;
>
> (e) "Appropriate" means nothing less than effective, suitable, proper or fitting to redress or undo the prejudice, impropriety, unlawful enrichment or corruption, in a particular case;
>
> (f) Only when it is appropriate and practicable to effectively remedy or undo the complaint would a legally binding remedial action be taken;
>
> (g) Also informed by the appropriateness of the remedial measure to deal properly with the subject-matter of investigation, and in line with the findings made would a non-binding recommendation be made or measure be taken; and
>
> (h) Whether a particular action taken or measure employed by the Public Protector in terms of her constitutionally allocated remedial power is binding or not or what its legal effect is, would be a matter of interpretation aided by context, nature and language.

May remedial action be ignored?

[72] It has been suggested, initially by both the President and the National Assembly, that since the Public Protector does not enjoy the same status as a Judicial Officer, the remedial action she takes cannot have a binding effect. The President has since changed his position but it appears, only in relation to this case, not necessarily as a general proposition. By implication, whomsoever she takes remedial action against, may justifiably and in law, disregard that remedy, either out of hand or after own investigation. This very much accords with the High Court decision in DA v SABC to the effect that:

> *"For these reasons I have come to the conclusion that the findings of the Public Protector are not binding and enforceable. However, when an organ of state rejects those findings or the remedial action, that decision itself must not be irrational."*

It is, of course, not clear from this conclusion who is supposed to make a judgement call whether the decision to reject the findings or remedial action is itself irrational. A closer reading of this statement seems to suggest that it is the person against whom the remedial action was made who may reject it by reason of its perceived irrationality. And that conclusion is not only worrisome but also at odds with the rule of law.

[73] The judgment of the Supreme Court of Appeal is correct in recognising that the Public Protector's remedial action might at times have a binding effect. When remedial action is binding, compliance is not optional, whatever reservations the affected party might have about its fairness, appropriateness or lawfulness. For this reason, the remedial action taken against those under investigation cannot be ignored without any legal consequences.

[74] This is so, because our constitutional order hinges also on the rule of law. No decision grounded on the Constitution or law may be disregarded without recourse to a court of law. To do otherwise would "amount to a licence to self-help". Whether the Public Protector's decisions amount to administrative action or not, the disregard for remedial action by those adversely affected by it, amounts to taking the law into their own hands and is illegal. No binding and constitutionally or statutorily sourced decision may be disregarded willy-nilly. It has legal consequences and must be complied with or acted upon. To achieve the opposite outcome lawfully, an order of court would have to be obtained. This was aptly summed up by Cameron J in Kirland as follows:

> *"The fundamental notion – that official conduct that is vulnerable to challenge may have legal consequences and may not be ignored until properly set aside – springs deeply from the rule of law. The courts alone, and not public officials, are the arbiters of legality. As Khampepe J stated in Welkom. . .'(t)he rule of law obliges an organ of state to use the correct legal process.' For a public official to ignore irregular administrative action on the basis that it is a nullity amounts to self-help. And it invites a vortex of uncertainty, unpredictability and irrationality."(Footnotes omitted.)*

[75] The rule of law requires that no power be exercised unless it is sanctioned by law and no decision or step sanctioned by law may be ignored based purely on a contrary view we hold. It is not open to any of us to pick and choose which of the otherwise effectual consequences of the exercise of constitutional or statutory power will be disregarded and which given heed to. Our foundational value of the rule of law demands of us, as a law-abiding people, to obey decisions made by those clothed with the legal authority to make them or else approach courts of law to set them aside, so we may validly escape their binding force.

Remedial action taken against the President

[76] The remedial action that was taken against the President has a binding effect. This flows from the fact that the cattle kraal, chicken run, swimming pool, visitors' centre and the amphitheatre were identified by the Public Protector as non-security features for which the President had to reimburse the State. He was directed to first determine, with the assistance of the SAPS and National Treasury, the reasonable costs expended on those installations and then determine a reasonable percentage of the costs so determined, that he is to pay. The President was required to provide the National Assembly with his comments and the actions he was to take on the Public Protector's report within 14 days of receipt of that report and to reprimand the Ministers involved, for the misappropriation of State resources under their watch.

[77] Concrete and specific steps were therefore to be taken by the President. Barring the need to ascertain and challenge the correctness of the report, it was not really necessary to investigate whether the specified non-security features were in fact non-security features. Features bearing no relationship to the President's security had already been identified. The President was enjoined to take definite steps to determine how much he was supposed to pay for the listed non-security features. If any investigation were to be embarked upon, to determine whether some installations were non-security in nature, it was to be in relation to those additional to the list of five for which some payment was certainly required. The reporting to the National Assembly and the reprimand of the affected Ministers also required no further investigation.

[78] This does not mean that there is an absolute bar to what some see as a "parallel" investigative process regardless of its intended end-use. For it cannot be correct that upon receipt of the Public Protector's report with its unfavourable findings and remedial measures, all the President was in law entitled to do was comply even if he had reason to doubt its correctness. That mechanical response is irreconcilable with logic and the rights exercisable by anybody adversely affected by any unpleasant determination. The President was, like all of us and for the reasons set out in some detail earlier, entitled to inquire into the correctness of those aspects of the report he disagreed with. That inquiry could well lead to a conclusion different from that of the Public Protector. And such a contrary outcome is legally permissible. The question would then be how the President responds to the Public Protector's report and the remedial action taken, in the light of other reports sanctioned or commissioned by him.

[79] Incidentally, the President mandated the Minister of Police to investigate and report on—

"whether the President is liable for any contribution in respect of the security upgrades having regard to the legislation, past practices, culture and findings contained in the respective reports."

[80] The National Assembly also commissioned the Minister's report. The upshot was a finding that elements of the upgrades identified by the Public Protector as non-security features, were in fact security features for which the President was not to pay. Consequently the Minister of Police "exonerated" the President from the already determined liability. Although the remedial action authorised the President's involvement of the SAPS and arguably the Minister, it was not for the purpose of verifying the correctness of the remedial action taken against him by the Public Protector. It was primarily to help him determine what other non-security features could be added to the list of five, and then to assist in the determination of the reasonable monetary value of those upgrades in collaboration with National Treasury. But again, the President was at large to commission any suitably qualified Minister to conduct that investigation into the correctness of the Public Protector's findings.

[81] The end-results of the two streams of investigative processes were mutually destructive. The President should then have decided whether to comply with the Public Protector's remedial action or not. If not, then much more than his mere contentment with the correctness of his own report was called for. A branch of government vested with the authority to resolve disputes by the application of the law should have been approached. And that is the Judiciary. Only after a court of law had set aside the findings and remedial action taken by the Public Protector would it have been open to the President to disregard the Public Protector's report. His difficulty here is that, on the papers before us, he did not challenge the report through a judicial process. He appears to have been content with the apparent vindication of his position by the Minister's favourable recommendations and considered himself to have been lawfully absolved of liability.

[82] Emboldened by the Minister's conclusion, and a subsequent resolution by the National Assembly to the same effect, the President neither paid for the non-security installations nor reprimanded the Ministers involved in the Nkandla project. This non-compliance persisted until these applications were launched and the matter was set down for hearing. And this is where and how the Public Protector's remedial action was second-guessed in a manner that is not sanctioned by the rule of law. Absent a court challenge to the Public Protector's report, all the President was required to do was to comply. Arguably, he did, but only with the directive to report to the National Assembly.

[83] The President thus failed to uphold, defend and respect the Constitution as the supreme law of the land. This failure is manifest from the substantial disregard for the remedial action taken against him by the Public Protector in terms of her constitutional powers. The second respect in which he failed relates to his shared section 181(3) obligations. He was duty-bound to, but did not, assist and protect the Public Protector so as to ensure her independence, impartiality, dignity and effectiveness by complying with her remedial action. He might have been following wrong legal advice and therefore acting in good faith. But that does not detract from the illegality of his conduct regard being had to its inconsistency with his constitutional obligations in terms of sections 182(1)(c) and 181(3) read with 83(b).

National Assembly's obligation to hold the Executive accountable

[84] The Public Protector submitted her report, including findings and the remedial action taken against the President, to the National Assembly. For the purpose of this case it matters not whether it was submitted directly or indirectly through the President. The reality is that it was at her behest that it reached the National Assembly for a purpose. That purpose was to ensure that the President is held accountable and his compliance with the remedial action taken, is enabled.

[85] The National Assembly's attitude is that it was not required to act on or facilitate compliance with the report since the Public Protector cannot prescribe to it what to do or what not to do. For this reason, so it says, it took steps in terms of section 42(3)of the Constitution after receipt of the report. Those steps were intended to ascertain the correctness of the conclusion reached and the remedial action taken by the Public Protector, since

more was required of the National Assembly than merely rubber-stamp her report. Broadly speaking, this is correct because "scrutinise" means subject to scrutiny. And "scrutiny" implies a careful and thorough examination or a penetrating or searching reflection. The Public Protector's report relates to executive action or conduct that had to be subjected to scrutiny, so understood.

[86] Besides, even findings by and an order of a court of law may themselves be subjected to further interrogation or research, at the instance of the affected party, that may culminate in the conclusion that the court was wrong. But when the conclusion is reached, the question is: how then is it acted upon? This would explain the reviews of tribunal or Magistrates' Court decisions and appeals from all our courts all the way up to the apex Court. In principle there is nothing wrong with wondering whether any unpleasant finding or outcome is correct and deploying all the resources at one's command to test its correctness.

[87] The National Assembly was indeed entitled to seek to satisfy itself about the correctness of the Public Protector's findings and remedial action before it could hold the President accountable in terms of its sections 42(3) and 55(2) obligations. These sections impose responsibilities so important that the National Assembly would be failing in its duty if it were to blindly or unquestioningly implement every important report that comes its way from any institution. Both sections 42(3) and 55(2) do not define the strictures within which the National Assembly is to operate in its endeavour to fulfil its obligations. It has been given the leeway to determine how best to carry out its constitutional mandate. Additionally, section 182(1)(b) read with section 8(2)(b)(iii) does not state how exactly the National Assembly is to "attend urgently" to or "intervene" in relation to the Public Protector's report. How to go about this is all left to the discretion of the National Assembly but obviously in a way that does not undermine or trump the mandate of the Public Protector.

[88] People and bodies with a material interest in a matter have been routinely allowed by our courts to challenge the constitutional validity of a law or conduct of the President, constitutional institutions or Parliament. The appointment of the National Director of Public Prosecutions is one such example, as is the extension of the term of office of the Chief Justice, the constitutional validity of the proceedings of the Judicial Service Commission90 and of rules and processes of Parliament. The National Assembly and the President were in like manner entitled to challenge the findings and remedial action of the Public Protector. It would be incorrect to suggest that a mere investigation by the National Assembly into the findings of the Public Protector is impermissible on the basis that it trumps the findings of the Public Protector. Rhetorically, on what would they then base their decision to challenge the report? Certainly not an ill-considered viewpoint or a knee-jerk reaction.

[89] There is a need to touch on separation of powers.

[90] The Executive led by the President and Parliament bear very important responsibilities and each play a crucial role in the affairs of our country. They deserve the space to discharge their constitutional obligations unimpeded by the Judiciary, save where the Constitution otherwise permits. This accords with the dictates of Constitutional Principle VI, which is one of the principles that guided our Constitution drafting process in these terms:

> *"There shall be a separation of powers between the legislature, the executive and judiciary, with appropriate checks and balances to ensure accountability, responsiveness and openness."*

[91] And this was elaborated on in the Certification case as follows:

> *"The principle of separation of powers, on the one hand, recognises the functional independence of branches of government. On the other hand, the principle of checks and balances focuses on the desirability of ensuring that the constitutional order, as a totality, prevents the branches of government from usurping power from one another. In this sense it anticipates the necessary or unavoidable intrusion of one branch on the terrain of another. No constitutional scheme can reflect a complete separation of powers: the scheme is always one of partial separation."*

[92] The Judiciary is but one of the three branches of government. It does not have unlimited powers and must always be sensitive to the need to refrain from undue interference with the functional independence of other branches of government. It was with this in mind that this Court noted:

"Courts must be conscious of the vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government. They too must observe the constitutional limits of their authority. This means that the judiciary should not interfere in the processes of other branches of government unless to do so is mandated by the Constitution.

But under our constitutional democracy, the Constitution is the supreme law. It is binding on all branches of government and no less on Parliament.. . .Parliament 'must act in accordance with, and within the limits of, the Constitution', and the supremacy of the Constitution requires that 'the obligations imposed by it must be fulfilled'. Courts are required by the Constitution 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court

'has been given the responsibility of being the ultimate guardian of the Constitution and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations.. . .It would therefore require clear language of the Constitution to deprive this Court of its jurisdiction to enforce the Constitution." (Footnotes omitted.)

[93] It falls outside the parameters of judicial authority to prescribe to the National Assembly how to scrutinise executive action, what mechanisms to establish and which mandate to give them, for the purpose of holding the Executive accountable and fulfilling its oversight role of the Executive or organs of State in general. The mechanics of how to go about fulfilling these constitutional obligations is a discretionary matter best left to the National Assembly. Ours is a much broader and less intrusive role. And that is to determine whether what the National Assembly did does in substance and in reality amount to fulfilment of its constitutional obligations. That is the sum-total of the constitutionally permissible judicial enquiry to be embarked upon. And these are some of the "vital limits on judicial authority and the Constitution's design to leave certain matters to other branches of government". Courts should not interfere in the processes of other branches of government unless otherwise authorised by the Constitution. It is therefore not for this Court to prescribe to Parliament what structures or measures to establish or employ respectively in order to fulfil responsibilities primarily entrusted to it. Courts ought not to blink at the thought of asserting their authority, whenever it is constitutionally permissible to do so, irrespective of the issues or who is involved. At the same time, and mindful of the vital strictures of their powers, they must be on high alert against impermissible encroachment on the powers of the other arms of government.

[94] That said, the National Assembly chose not to challenge the Public Protector's report on the basis of the findings made by the Minister of Police and its last Ad Hoc Committee. Instead it purported to effectively set aside her findings and remedial action, thus usurping the authority vested only in the Judiciary. Having chosen the President to ensure government by the people under the Constitution, and the Public Protector Act which, read with the Constitution, provides for the submission of the Public Protector's report to the National Assembly, it had another equally profound obligation to fulfil. And that was to scrutinise the President's conduct as demanded by section 42(3) and reported to it by the Public Protector in terms of section 182(1)(b) of the Constitution read with section 8(2)(b)(i), (ii) and (iii) of the Public Protector Act. Section 8(2) provides in relevant part:

"(b) The Public Protector shall, at any time, submit a report to the National Assembly on the findings of a particular investigation if—

(i) he or she deems it necessary;

(ii) he or she deems it in the public interest;

(iii) it requires the urgent attention of, or an intervention by, the National Assembly;

(iv) he or she is requested to do so by the Speaker of the National Assembly; or

(v) he or she is requested to do so by the Chairperson of the National Council of Provinces."

[95] The Public Protector could not have submitted her report to the National Assembly merely because she deemed it necessary or in the public interest to do so. In all likelihood she also did not submit it just because either the Speaker of the National Assembly or Chairperson of the National Council of Provinces asked her to do so. The high importance, sensitivity and potentially far-reaching implications of the report, considering that the Head of State and the Head of the Executive is himself implicated, point but only to one conclusion. That report was a high priority matter that required the urgent attention of or an intervention by the National Assembly. It ought therefore to have triggered into operation the National Assembly's obligation to scrutinise and oversee executive action and to hold the President accountable, as a member of the Executive. Also implicated was its obligation to give urgent attention to the report, its findings and remedial action taken and intervene appropriately in that matter.

[96] Mechanisms that were established by the National Assembly, flowing from the Minister's report, may have accorded with its power to scrutinise before it could hold accountable. As will appear later, what will always be important is what the National Assembly does in consequence of those interventions. The Public Protector, acting in terms of section 182 of the Constitution read with sections 1, 3 and 4 of the Executive Members' Ethics Act, had already investigated the alleged impropriety or relevant executive action and concluded, as she was empowered to do, that the President be held liable for specific elements of the security upgrades.

[97] On a proper construction of its constitutional obligations, the National Assembly was duty-bound to hold the President accountable by facilitating and ensuring compliance with the decision of the Public Protector. The exception would be where the findings and remedial action are challenged and set aside by a court, which was of course not done in this case. Like the President, the National Assembly may, relying for example on the High Court decision in DA v SABC, have been genuinely led to believe that it was entitled to second-guess the remedial action through its resolution absolving the President of liability. But, that still does not affect the unlawfulness of its preferred course of action.

[98] Second-guessing the findings and remedial action does not lie in the mere fact of the exculpatory reports of the Minister of Police and the last Ad Hoc Committee. In principle, there may have been nothing wrong with those "parallel" processes. But, there was everything wrong with the National Assembly stepping into the shoes of the Public Protector, by passing a resolution that purported effectively to nullify the findings made and remedial action taken by the Public Protector and replacing them with its own findings and "remedial action". This, the rule of law is dead against. It is another way of taking the law into one's hands and thus constitutes self-help.

[99] By passing that resolution the National Assembly effectively flouted its obligations.Neither the President nor the National Assembly was entitled to respond to the binding remedial action taken by the Public Protector as if it is of no force or effect or has been set aside through a proper judicial process. The ineluctable conclusion is therefore, that the National Assembly's resolution based on the Minister's findings exonerating the President from liability is inconsistent with the Constitution and unlawful.

Remedy

[100] All parties, barring the National Assembly and the Minister of Police, appear to be essentially in agreement on the order that would ensure compliance with the Public Protector's remedial action. The President's ultimate draft order, following on the one circulated eight days before the hearing,106 is virtually on all fours with the remedial action taken by the Public Protector. The effect of this draft and the oral submissions by his counsel is that he accepts that the remedial action taken against him is binding and that National Treasury is to determine the reasonable costs, of the non-security upgrades, on the basis of which to determine a reasonable percentage of those costs that he must pay. The President is also willing to reprimand the Ministers in line with the remedial action. In response to that draft's predecessor, the Public Protector only expressed the desire to have the nature and ambit of her powers and the legal effect of her remedial action addressed if, as it turned out, no agreement was secured on the basis of the President's draft order and oral submissions were made.

[101] The only real disagreement amongst the parties about the draft order relates to the unqualified binding effect of the Public Protector's remedial action and whether a declaratory order should be granted to the effect that the President failed to fulfil his constitutional obligations in terms of sections 83, 96 and 181(3) of the Constitution and violated his oath of office. Also that the National Assembly breached its constitutional obligations in terms of sections 55(2) and 182(1)(c) of the Constitution. These are the orders cumulatively prayed for by both the EFF and the DA.

[102] This Court's power to decide and make orders in constitutional matters is set out in section 172 of the Constitution. Section 172(1):

"When deciding a constitutional matter within its power, a court—

> (a) must declare that any law or conduct that is inconsistent with the Constitution is invalid to the extent of its inconsistency; and
>
> (b) may make any order that is just and equitable, including—
>
> > (i) an order limiting the retrospective effect of the declaration of invalidity; and
> >
> > (ii) an order suspending the declaration of invalidity for any period and on any conditions, to allow the competent authority to correct the defect."

[103] Declaring law or conduct inconsistent with the Constitution and invalid is plainly an obligatory power vested in this Court as borne out by the word "must". Unlike the discretionary power to make a declaratory order in terms of section 38 of the Constitution, this Court has no choice but to make a declaratory order where section 172(1)(a) applies.Section 172(1)(a) impels this Court, to pronounce on the inconsistency and invalidity of, in this case, the President's conduct and that of the National Assembly. This we do routinely whenever any law or conduct is held to be inconsistent with the Constitution. It is not reserved for special cases of constitutional invalidity. Consistent with this constitutional injunction, an order will thus be made that the President's failure to comply with the remedial action taken against him by the Public Protector is inconsistent with his obligations to uphold, defend and respect the Constitution as the supreme law of the Republic; to comply with the remedial action taken by the Public Protector; and the duty to assist and protect the office of the Public Protector to ensure its independence, impartiality, dignity and effectiveness.

[104] Similarly, the failure by the National Assembly to hold the President accountable by ensuring that he complies with the remedial action taken against him, is inconsistent with its obligations to scrutinise and oversee executive action and to maintain oversight of the exercise of executive powers by the President. And in particular, to give urgent attention to or intervene by facilitating his compliance with the remedial action.

Order

[105] In the result the following order is made:

> 1. This Court has exclusive jurisdiction to hear the application by the Economic Freedom Fighters.

2. The Democratic Alliance's application for direct access is granted.

3. The remedial action taken by the Public Protector against President Jacob Gedleyihlekisa Zuma in terms of section 182(1)(c) of the Constitution is binding.

4. The failure by the President to comply with the remedial action taken against him, by the Public Protector in her report of 19 March 2014, is inconsistent with section 83(b) of the Constitution read with sections 181(3) and 182(1)(c) of the Constitution and is invalid.

5. The National Treasury must determine the reasonable costs of those measures implemented by the Department of Public Works at the President's Nkandla homestead that do not relate to security, namely the visitors' centre, the amphitheatre, the cattle kraal, the chicken run and the swimming pool only.

6. The National Treasury must determine a reasonable percentage of the costs of those measures which ought to be paid personally by the President.

7. The National Treasury must report back to this Court on the outcome of its determination within 60 days of the date of this order.

8. The President must personally pay the amount determined by the National Treasury in terms of paragraphs 5 and 6 above within 45 days of this Court's signification of its approval of the report.

9. The President must reprimand the Ministers involved pursuant to paragraph 11.1.3 of the Public Protector's remedial action.

10. The resolution passed by the National Assembly absolving the President from compliance with the remedial action taken by the Public Protector in terms of section 182(1)(c) of the Constitution is inconsistent with sections 42(3), 55(2)(a) and (b) and 181(3) of the Constitution, is invalid and is set aside.

11. The President, the Minister of Police and the National Assembly must pay costs of the applications including the costs of two counsel.

For the Economic Freedom Fighters:

W Trengove SC

D Mpofu SC

T Ngcukaitobi

J Mitchell

N Muvangua

Instructed by Godla and Partners Attorneys

For the Democratic Alliance:

A Katz SC

J De Waal

J Bleazard

T Mayosi

Instructed by Minde Schapiro & Smith Inc

For the Speaker of the National Assembly:

L G Nkosi-Thomas SC

G D Ngcangisa

M Musandiwa

Instructed by the State Attorney

For the President:

J J Gauntlett SC

K J Kemp SC

M du Plessis

S Mahabeer

S Pudifin-Jones

Instructed by the State Attorney

For the Minister of Police:

W R Mokhari SC

H Slingers

M Kgatla

Instructed by the State Attorney

For the Public Protector:

G Marcus SC

M Stubbs

Instructed by Adams & Adams

For Corruption Watch:

C Steinberg

L Kelly

Instructed by Webber Wentzel

THE SUPREME COURT OF APPEAL OF SOUTH AFRICA

JUDGMENT

Reportable

Case No: 393/2015

In the matter between:

THE SOUTH AFRICAN BROADCASTING

CORPORATION SOC LIMITED **FIRST APPELLANT**

THE MINISTER OF COMMUNICATIONS **SECOND APPELLANT**
HLAUDI MOTSOENENG: THE CHIEF OPERATING

OFFICER OF THE SOUTH AFRICAN BROADCASTING

CORPORATION SOC LIMITED **THIRD APPELLANT**

and

DEMOCRATIC ALLIANCE FIRST RESPONDENT THE BOARD OF DIRECTORS OF THE SOUTH AFRICAN

BROADCASTING CORPORATION SOC LIMITED **SECOND RESPONDENT**

THE CHAIRPERSON OF THE BOARD OF DIRECTORS OF THE SOUTH AFRICAN BROADCASTING

CORPORATION SOC LIMITED **THIRD RESPONDENT THE**
PRESIDENT OF THE REPUBLIC OF SOUTH AFRICA **FOURTH RESPONDENT**
SPEAKER OF THE NATIONAL ASSEMBLY **FIFTH RESPONDENT**

THE PORTFOLIO COMMITTEE FOR COMMUNICATIONS

OF THE NATIONAL ASSEMBLY **SIXTH RESPONDENT**

THE PUBLIC PROTECTORSEVENTH RESPONDENT

and

CORRUPTION WATCH **AMICUS CURIAE**

Neutral Citation: *SABC v DA* (393/2015) [2015] ZASCA 156 (8 October 2015).

Coram: Mpati P, Navsa, Ponnan, Swain and Dambuza JJA

Heard: 18 September 2015

Delivered: 8 October 2015

Summary: Remedial action by Public Protector – has legal effect – absent review – cannot be ignored by State and public institutions – discussion of constitutional and legislative scheme regulating powers of Public Protector – order suspending Chief Operating Officer of the South African Broadcasting Corporation – held not to offend against separation of powers doctrine – reiteration of caveat against piecemeal litigation.

ORDER

On appeal from: Western Cape Division of the High Court, Cape Town (Schippers J sitting as court of first instance), judgment reported *sub nom Democratic Alliance v South African Broadcasting Corporation Ltd & others* 2015 (1) SA 551 (WCC).

The appeal is dismissed with costs including the costs attendant upon the employment of two counsel.

JUDGMENT

Navsa and Ponnan JJA (Mpati P, Swain and Dambuza JJA concurring):

[1] *Sed quis custodiet ipsos custodes?*'[1] In posing that question, the Roman Poet Juvenal (*Satura VI* lines 347-8) was suggesting that wives could not be trusted and that keeping them under guard was no solution because guards could not themselves be trusted. Leonid Hurwicz, in accepting the Nobel Prize in Economic Sciences, stated: 'Yes, it would be absurd that a guardian should need a guard.'[2]

[2] In constitutional democracies, public administrators and State institutions are guardians of the public weal.[3] In South Africa that principle applies to administration in every sphere of government, organs of State and public enterprises.4 Section 41 of the Constitution requires all spheres of government and all organs of State to, amongst other things, 'secure the wellbeing of the people of the Republic', to 'provide effective, transparent, accountable and coherent government', to 'respect the constitutional status, institutions, powers and functions of government in the other spheres' and not to exercise their powers and functions in a manner that encroaches upon the institutional integrity of government in another sphere. Significantly, s 41 of the Constitution dictates that all spheres of government and all organs of State must co-operate with one another and must assist and support one another. They are required to co-ordinate their actions, to adhere to agreed procedures and to avoid legal proceedings against one another. In constitutional States there are checks and balances to ensure that when any sphere of government behaves aberrantly, measures can be implemented and steps taken to ensure compliance with constitutional prescripts. In our country, the office of the Public Protector, like the Ombud in comparable jurisdictions, is one important defence against maladministration and corruption. Bishop and Woolman state the following:5

'The Public Protector's brief, as initially adumbrated in the Interim Constitution, and as now determined by the Final Constitution and the Public Protector Act.... is to watch the watchers and to guarantee that the government discharges its responsibilities without fear, favour or prejudice.' (Footnotes omitted.)

1 But who will guard the guards themselves?'

2 Leonid Hurwicz _But who will guard the guardians?' Nobel Prize Lecture delivered on 8 December 2007, available at *http://www.nobelprize.org/nobel_prizes/economic-sciences/laureates/2007/hurwicz_lecture.pdf*, accessed on 1 October 2015.

3 So, for example s 195(1) of the Constitution provides:

'Public administration must be governed by the democratic values and principles enshrined in the Constitution, including the following principles:

(a) A high standard of professional ethics must be promoted and maintained.

(b) Efficient, economic and effective use of resources must be promoted.

(c) Public administration must be development-oriented.

(d) Services must be provided impartially, fairly, equitably and without bias.

(e) People's needs must be responded to, and the public must be encouraged to participate in policy- making.

(f) Public administration must be accountable.

(g) Transparency must be fostered by providing the public with timely, accessible and accurate information.

(h) Good human-resource management and career-development practices, to maximise human potential, must be cultivated.

(i) Public administration must be broadly representative of the South African People, with employment and personnel management practices based on ability, objectivity, fairness, and the need to redress the imbalances of the past to achieve broad representation.'

4 Section 195(2) of the Constitution reads:

The above principles [see footnote 3 above] apply to –

(a) administration in every sphere of government;

(b) organs of State; and

(c) public enterprises.'

5 See the chapter entitled _Public Protector' by Michael Bishop and Stuart Woolman, in Stuart Woolman and Michael Bishop (eds) *Constitutional Law of South Africa* 2 ed (Service 6, 2014), at 24A-

[3] In modern democratic constitutional States, in order to ensure governmental accountability, it has become necessary for the guards to require a guard. And in terms of our constitutional scheme, it is the Public Protector who guards the guards. That fundamental tenet lies at the heart of this appeal, in which we consider the Public Protector's powers and examine the constitutional and legislative architecture to determine how State institutions and officials are required to deal with remedial action taken by the Public Protector.

[4] The litigation culminating in the present appeal arose, so it is alleged, because of the failure by the first appellant, the South African Broadcasting Corporation (the SABC), a national public broadcaster, regulated by the Broadcasting Act 4 of 1999 (the BA) and the second appellant, the Minister of Communications (the Minister), to implement remedial action directed by the Public Protector, a Chapter Nine institution established by s 181(1)*(a)* of the Constitution, in a damning report compiled by her. At the outset it is necessary to record that the State, in terms of s 8A(2) of the BA, is the sole shareholder in the SABC. Section 3(1) of the BA provides, inter alia, that the South African broadcasting system:

'*(a)* serves to safeguard, enrich and strengthen the cultural, political, social and economic fabric of South Africa;

(b) operates in the public interest and strengthens the spiritual and moral fibre of society;

. . .'

[5] Between November 2011 and February 2012 the Public Protector received complaints from three former employees of the SABC. Those complaints in essence related to the alleged irregular appointment of the third appellant, Mr Hlaudi Motsoeneng, as the Acting Chief Operations Officer (the Acting COO) as well as systemic maladministration relating, inter alia, to human resources, financial management, governance failure and the irregular interference by the then Minister of Communications,[6] Ms Dina Pule, in the affairs of the SABC. On 17 February 2014 and following upon a fairly detailed investigation of those allegations, the Public Protector released a report relating to her investigation entitled 'When Governance and Ethics Fail'.[7]

[6] The Public Protector concluded that there were 'pathological corporate governance deficiencies at the SABC' and that Mr Motsoeneng had been allowed 'by successive [b]oards to operate above the law'. Her key findings in respect of Mr Motsoeneng, who she singled out for particularly scathing criticism, were that:

(i) his appointment as Acting COO was irregular;

(ii) the former Chairperson of the SABC Board, Dr Ben Ngubane, had acted irregularly when he ordered that the qualification requirements for the appointment to the position of COO be altered to suit Mr Motsoeneng's circumstances;

(iii) his salary progression from R1.5 million to R2.4 million in one fiscal year was irregular;

(iv) he had abused his power and position to unduly benefit himself;

(v) he had fraudulently misrepresented, when completing his job application form in 1995 and thereafter in 2003 when applying for the post of Executive Producer: Current Affairs, that he had matriculated;

(vi) he had been appointed to several posts at the SABC despite not having the appropriate qualifications for those posts;

(vii) he was responsible, as part of the SABC management, for the irregular appointment of the SABC's Chief Financial Officer;

(viii) he was involved in the irregular termination of the employment of several senior staff members resulting in a substantial loss to the SABC;

(ix) he had unilaterally and irregularly increased the salaries of various staff members which resulted in a salary bill escalation of R29 million.

6 The Minister of Communications is the Minister charged with the administration of the Broadcasting Act.

7 Public Protector's Report No 23 of 2013/2014. The full title of the Report, filed by the Public Protector in terms of s 182(1)(b) of the Constitution and s 8(1) of the Public Protector Act, reads: 'A report on an investigation into allegations of maladministration, systemic corporate governance deficiencies, abuse of power and the irregular appointment of Mr Hlaudi Motsoeneng by the South African Broadcasting Corporation (SABC).'

The Public Protector borrowed from a former member of the SABC Board, who had stated: 'When governance and ethics fail, you get a dysfunctional organization. Sadly those in charge cannot see that their situation is abnormal. That has been the case at the SABC for a long time . . . ' A copy of the report is available at: http://www.pprotect.org/library/investigation_report/2013-14/SABC%20FINAL% 20REPORT%2017%20FEBRUARY%202014.pdf, accessed 1 October 2015.

Moreover, the Public Protector found that the Department of Communications and the then Minister Pule, aided and abetted by Mr Motsoeneng, had unduly interfered in the affairs of the SABC. Such conduct, so she stated, 'was unlawful and had a corrupting effect on the SABC Human Resources' practices' and 'was grossly improper and constitutes maladministration'.

[7] As regards the Minister, the Public Protector, purportedly in terms of s 182 of the Constitution, directed the following to the Minister of Communications at the time of the report, Mr Yunus Carrim (who had since replaced Ms Dina Pule):

'**11.2 The current Minister of the Department of communications: Hon. Yunus Carrim**

11.2.1 To institute disciplinary proceedings against Mr Themba Phiri in respect of his conduct with regard to his role in the irregular appointment of Ms Duda as the SABC CFO.

11.2.2 To take urgent steps to fill the long outstanding vacant position of the Chief Operations Officer with a suitably qualified permanent incumbent within 90 days of this report and to establish why GCEO's cannot function at the SABC and leave prematurely, causing operational and financial strains.

11.2.3 To define the role and authority of the COO in relation to the GCEO and ensure that overlaps in authority are identified and eliminated.

11.2.4 To expedite finalization of all pending disciplinary proceedings against the suspended CFO, Ms Duda within 60 days of this report.'

[8] The Public Protector directed the Board of the SABC to ensure that:

(i) all monies are recovered which were irregularly expended through unlawful and improper actions from the appropriate persons;

(ii) appropriate disciplinary action was taken against Mr Motsoeneng for his dishonesty relating to the misrepresentation of his qualifications, abuse of power and improper conduct in the appointments and salary increments of certain staff and for his role in the purging of senior staff members resulting in numerous labour disputes and settlement awards against the SABC;

(iii) any fruitless and wasteful expenditure that had been incurred as a result of irregular salary increments to Mr Motsoeneng is recovered from him.

The Public Protector also required each of the Minister and the SABC Board to submit an implementation plan within 30 days indicating how the remedial action would be implemented and for all such actions to be finalised within six months.

[9] On 7 July 2014, instead of implementing the Public Protector's remedial action and without notice to her, the SABC Board resolved that Mr Motsoeneng be appointed the permanent COO of the SABC. This was accepted by the new Minister (who had by that stage replaced Mr Yunus Carrim), Ms Faith Muthambi, who approved and formally announced his appointment the next day. Both the Board and the Minister acted as they did without reference to the Public Protector. Aggrieved, the Democratic Alliance (DA), the official opposition political party in the National Assembly, applied to the Western Cape Division of the High Court, Cape Town (the High Court), to first suspend and then set aside Mr Motsoeneng's appointment. It contended that in the light of the damning findings of the Public Protector in relation to Mr Motsoeneng and the clear requirements for the appointment of the COO, his appointment to that position was irrational and unlawful.

[10] The application was brought in two parts. Part A was an urgent application seeking, inter alia, the following relief:

'2. Directing that the Seventh Respondent ("Motsoeneng") is suspended with immediate effect from his position as Chief Operating Officer ("COO") of the First Respondent ("SABC"), and shall remain suspended at least until the finalization of the disciplinary proceedings to be brought against him in terms of para 3 and the determination of the review relief sought in Part B;

3. Directing the Second Respondent ("the Board") to institute disciplinary proceedings against Motsoeneng within five (5) days of the date of this court's order;

4. Directing the Board, within five (5) days of the date of this court's order, to appoint a suitably qualified person as acting COO to fill the position pending the appointment of a suitably qualified permanent COO;

5. Ordering that the members of the Board who voted in favour of the appointment of Motsoeneng as COO, and the Fourth Respondent ("the Minister") in their personal capacities pay the Applicant's costs on an attorney and client scale;

. . . . '

[11] Part B sought relief as follows:

'7. Reviewing and setting aside the decision taken by the Board, on or about 7 July 2014, to recommend the appointment of Motsoeneng as COO;

8. Reviewing and setting aside the decision taken by the Minister, on or about 7 July 2014, to approve the recommendation made by the Board to appoint Motsoeneng as COO;

9. Directing the Board to recommend the appointment of, and the Minister to appoint, a suitably qualified COO within 60 days of the date of the court's order;

10. Directing that, if the Board and/or the Minister fail to comply with the terms of paragraph 9, the Third Respondent ("the Chairperson"), and the Minister, shall file affidavits within 70 days of the date of this court's order giving reasons why all the members of the Board and the Minister should not be held in contempt of court;

11. Declaring that, the decisions to recommend and appoint Motsoeneng as COO before responding to the report of the Ninth Respondent [the Public Protector] dated 17 February 2014 and titled *'When Governance and Ethics Fail',* the Board and the Minister respectively were inconsistent with the Constitution, particularly section 181(3) of the Constitution, and invalid;

12. Ordering that the members of the Board who voted in favour of the appointment of Motsoeneng as COO, and the Minister in their personal capacities pay the Applicant's costs on an attorney and client scale;

. . . .'

[12] The application cited the SABC, the Board of Directors of the SABC and the Chairperson of the Board of Directors of the SABC (collectively referred to as the SABC) as the first to third respondents. The Minister of Communications, the President of the Republic of South Africa, the Speaker of the National Assembly, the Portfolio Committee for Communications of the National Assembly, Mr Motsoeneng and the Public Protector were cited as the fourth to ninth respondents respectively. No relief was sought against the President, the Speaker and the Portfolio Committee. They accordingly took no part in the proceedings either in this court or the one below. The SABC opposed the application as did the Minister and Mr Motsoeneng. We turn presently to the role played by the Public Protector in the preceding litigation and the present appeal.

[13] In support of the application, Mr James Selfe, the chairperson of the Federal Executive of the DA, relying principally on the Public Protector's report, stated in the founding affidavit:

'34. *First*, the Public Protector concluded that Motsoeneng had *lied about his qualifications* when applying for the COO position, and when applying for his earlier positions at the SABC. Motsoeneng lied about having obtained a matric certificate and made up imaginary grades on his application form. It appears that the SABC Board may have been aware of this misrepresentation and appointed Motsoeneng nonetheless. As the Public Protector notes, Motsoeneng's attempt to rely on this connivance only exacerbates his crime as he showed no remorse for his unethical conduct. The lie was necessary as a matric was a minimum requirement for the position (as it had been for his earlier positions). The Public Protector described this as fraudulent.

35. Importantly, Motsoeneng admitted in his interview that he had lied in his application form. In addition, his fraudulent misrepresentation was known to the SABC from at least 2003 when a Group Internal Audit into the allegation that found he had indeed misrepresented himself by stating that he passed matric in 1991. The audit recommended that action should be instituted against Motsoeneng for his misrepresentation. This did not occur.

. . .

51. Appointing Motsoeneng in a permanent position would have been unlawful and irrational even if all the correct procedures had been followed. However, not only did the Board and the Minister appoint an admitted fraudster who had single-handedly cost the SABC tens of millions of rand and completely undermined public confidence and good corporate governance, it completely ignored the relevant legal provisions when it did so.

52. The DA was not privy to the details of the appointment of Motsoeneng, but those details have been widely exposed in the press. I rely on several of those media reports for the facts contained [in this] section. I attach several of them as annexures . . . . Rather than refer to the media reports for each allegation, I tell the sordid story with reference to all the media reports together as the source. Except where I note otherwise, none of the key allegations have been denied by the Board or the Minister.

53. One of the obstacles to filling the post of COO – and part of the reason Motsoeneng served in an acting capacity for so long – was that Mr Mvuzo Mbebe had obtained an interdict preventing the post from being filled on a permanent basis. Mbebe had been recommended as COO in 2007 by the Board, but his recommendation was overturned when a new chairperson – Ms Khanyi Mkhonza – took office. The interdict prevented the Board from permanently filling the post pending Mbebe's review of the Board's reversal.

54. This matter was close to being resolved by the previous Minister, Mr [Yunus] Carrim. It appears that the matter may have been finally settled by the current Minister [Ms Faith Muthambi] sometime in early July. The Minister arrived at a Board meeting on 7 July 2014 in possession of a note of settlement of the Mbebe dispute. If valid this would open the way for the

appointing a new COO. However, Mbebe had denied that there has been a final settlement.

55. Even if the matter had been settled, it would merely start the process of advertising, shortlisting and interviewing candidates. That process had not yet started because it was believed Mbebe's interdict prevented any fresh appointment. In addition, the question of filling the new post of the COO was not on the agenda of the 7 July Board meeting.

56. However, it appears that when the Minister arrived at the SABC at 19:00 on 7 July 2014, she entered into a private conference with the Chairperson. When the Chairperson emerged from that conference at about 21:00, she proposed to the Board that it immediately appoint Motsoeneng as the permanent COO.

57. It appears that, in addition to the fact that the Mbebe issue had been resolved, the Chairperson informed the Board that it was necessary to appoint Motsoeneng because of a threat from his lawyers. Motsoeneng's attorneys had written stating that he was entitled to be appointed based on a 'legitimate expectation', as he had been acting in the position for so long. The Chairperson relied on this document, and his assertion that Motsoeneng was performing well in his position to justify the appointment. The Chairperson also read out a letter from Motsoeneng that one Board member described 'saying what a great person he is. In the letter, Hlaudi attributes all the success of the SABC to himself . . . like there is no one else working there'.

58. Understandably, several board members objected. They claimed that the proper process 'which, as I explain below, requires that the position be advertised, candidates shortlisted and interviewed 'had not been followed. It is unclear whether they also raised the Public Protector's Report. Five of the eleven board members did not support his appointment: two abstained (Prof Bongani Khumalo and Vusumuzi Mavuso) and three voted against (Ronnie Lubisi, Krish Naidoo and Rachel Kalidass). The remaining six board members voted in favour (The Chairperson, Prof Mbulaheni, Obert Maghuve, Nomvuyo Mhlakaza, Ndivhoniswani Tshidzumba, Leah Khumalo and Hope Zinde).

59. After resolving to appoint Motsoeneng, the Board passed its recommendation on to the Minister for her approval at around 23:30 on 7 July 2014. The Minister informed the Board that she would 'apply her mind' to the issue. She applied it extremely quickly as, the next day, 8 July 2014, she announced the appointment of Motsoeneng.

60. At no point did the Board or the Minister explain to the Public Protector why they were ignoring her findings and appointing Motsoeneng in a permanent position. Indeed, when responding to queries about how Motsoeneng could possibly be appointed in light of the PP Report, the SABC's spokesperson Kaizer Kganyago replied: 'The Public Protector has nothing to do with [the permanent appointment of Motsoeneng]. The two are not together . . . I don't know how the two are related."

61. However, at a press briefing on 10 July 2014, the Minister indicated that the SABC Board had obtained the opinion of an independent law firm 'to investigate all the issues raised by the Public Protector". The Minister stated that she and the Board were 'satisfied that the report . . . cleared Mr Motsoeneng of any wrongdoing". The Minister provided no details about the contents of the law firm's report.' (Emphasis in original, formatting altered slightly.)

[14] In opposing the application, both Ms Tshabalala, the then Chairperson of the SABC Board and Minister Muthambi denied that the Public Protector's findings and remedial action had been ignored or that Mr Motsoeneng's permanent appointment was irregular. In that regard the former said:

'49. Reasonably soon after receipt of the Public Protector's Report, and in addition to internal considerations of the Public Protector's Report and its findings and recommendations, the Board procured the services of Mchunu Attorneys, a firm of attorneys, to assist it in considering and investigating the veracity of the findings and recommendations by the Public Protector, as well as to assist the Board and management to respond to the Public Protector. Mchunu Attorneys reviewed the Public Protector's Report and investigated its findings and recommendations for purposes of advising the Board. Mchunu Attorneys prepared a report in respect of its task and gave advice to the Board.'

[15] Ms Tshabalala did not annex a copy of the report from the firm of attorneys to her affidavit, stating that it was privileged. She added that the Board did not disregard the report of the Public Protector. According to her, a Committee of Chairs had been established to deal with it. She asserted that the Board had been in constant communication with the Public Protector regarding her implementation plan and the Board's difficulties therewith. And later on in her affidavit, she stated quite emphatically:

'125.2. I deny what may be defamatory statements that Mr Motsoeneng is a fraudster as alleged in paragraph 51 [of the founding affidavit], based on the findings of the Public Protector, *which have been demonstrated to be false in this regard.*

125.3 The allegations contained in paragraphs 53 to 64 [of the founding affidavit] are based on media reports. They constitute hearsay evidence. Once the review record has been filed, reliable evidence will be before the Court and the Board will deal with the allegations in full in response to Part B of the notice of motion. *Suffice to state that the allegations are denied to the extent that they suggest that the appointment of Mr Motsoeneng is unlawful and irrational. . .*

125.4. The Minister was empowered to accept the recommendation of the Board and to appoint Mr Motsoeneng as the COO of the SABC. Any alleged failure by the Board to follow procedures set out in the Articles of Association did not preclude the 100% shareholder, empowered under the Broadcasting Act read with the Articles of Association to appoint a COO, to approve the appointment of Mr Motsoeneng. The legal basis for this contention, as well as the relevant facts, will be fully set out in the answering affidavit to Part B of the notice of motion. The outcome of Part A does not depend on this. I am advised and respectfully submit that this is not a case of an applicant seeking interim relief that is linked directly to the final relief sought 'as in Part A (allegedly interim) and Part B of the notice of motion (final).' (Our emphasis.)

[16] In opposing the DA's application the Minister stated in her answering affidavit:

'14. [At the meeting with the chairperson of the Board on 7 July 2014] I then raised my concerns with the Chairperson of the board of the [SABC] who then provided to me the transcript of the interview between the Public Protector and [Mr Motsoeneng]. After reading such transcript, I was satisfied that the [Mr Motsoeneng] did not lie to the first respondent about the Matric qualification. I was then satisfied that the [Mr Motsoeneng] is competent and has the necessary expertise to be appointed as the Chief Operations Officer.

15. I considered in that regard the further qualifications which [Mr Motsoeneng] had obtained throughout his employment with the [SABC] which are mentioned in the report of Mchunu Attorneys. I also considered the fact that [Mr Motsoeneng] had gained the necessary experience and acquitted himself exceptionally well for a period of almost three years when he was acting as the Chief Operations Officer.

. . .

33.2 The report of Mchunu Attorneys shows that the [SABC Board] has not ignored the findings of the Public Protector. That report shows that the [SABC Board] sought advice on how to deal with that report. Based on the advice it received the [SABC Board] considered it appropriate to conclude that the [Mr Motsoeneng] did not mislead the [SABC] about his qualifications.

. . .

41.4 However, I intend to engage the Public Protector on her findings, and bring to her attention facts which were uncovered by Mchunu Attorneys which could well affect her findings.

42. I have already indicated that I intend to engage the Public Protector in the light of facts which were established by Mchunu Attorneys, in their investigation. I have prepared the response of my office to the Public Protector of which such report will reach the Public Protector's office in time, I will also meet the portfolio committee on communications on the 26 August 2014 to take them through my reply to the Public Protector.

43.1 Once again, I point out that the findings contained in the report of the Public Protector should be considered in the light of the report by Mchunu Attorneys and the transcript of the interview between [the] Public Protector and [Mr Motsoeneng], which I meant to believe that the [SABC] will bring it to the attention of this court.'

. . .

45.2. I have been advised that the [DA] is not entitled to rely on newspaper reports referred in this paragraph. I object to the admissibility of annexure[s] . . . on the grounds that they constitute inadmissible hearsay evidence.

. . .

46.3. I deny that I arrived at the board meeting of the 7 July 2014 with a so called note of settlement on Mbebe's matter. It is further not true that I had a two hours meeting with the [SABC Board Chairperson] upon my arrival to the said board meeting. As a matter of protocol it is the duty of the [SABC Board Chairperson] to give me a brief of the issues.

. . .

a.1. I admit that I was present at the offices of the [SABC] on 7 July 2014. I went to those offices upon the invitation of the chair of the [SABC].

a.2. I only entered the meeting room after the [SABC Board] had concluded deliberations as per invitation of its chair.

a.3. I did not propose to the [SABC Board] that its members should appoint [Mr Motsoeneng] in a permanent capacity or in any capacity at all. I could not have done so, having regard to the independence of the [SABC Board], and the decision-making process that must be followed in making such appointments.

. . .

a.2. I informed the chair of the [SABC Board] that I can only act upon the decision of the [SABC Board] once I received a recommendation from the [SABC Board] which motivated its decision to recommend the appointment of the [Mr Motsoeneng].

a.3. On 8 July 2014 I received recommendation from the [SABC Board], together with several documents, including the report of Mchunu Attorneys which deal with their advice on the findings and remedial action of the Public Protector.

a.4. I did consider that recommendation and supporting documents, and thereafter decided to accept the recommendation on 8 July 2014.

a.5. I considered it my duty to make the decision on the recommendation of the [SABC Board] as expeditiously as was possible because the matter was urgent, and I had the constitutional duty to make a decision on that recommendation diligently and without delay.

. . .

51.3. I will continue to engage the Public Protector on her findings and remedial action relating to [Mr Motsoeneg]. I will, in that regard, make available to her the findings of Mchunu Attorneys, and ask her to consider whether that report impacts on her findings, and if so, to what extent.'

[17] After initially intimating that she would abide the decision of the High Court, the Public Protector felt constrained to file an affidavit with that court because, as she put it:

'No relief is sought by the Applicant against me. Nor do any of the Respondents seek to launch a counter-application to review the Report and set aside my findings contained therein. Therefore, when I originally received the application, I did not file a notice of intention to oppose the application. However, when I read the answering affidavits filed on behalf of the First – Third Respondents [the SABC, the SABC Board, and the SABC Board Chairperson] and the Eighth Respondents [Mr Motsoeneng], it became clear that the main thrust of their case was to discredit the Public Protector's reports and the findings and remedial action taken therein. The First – Third and Eighth Respondents seek to do this in circumstances where no Respondent had brought a counter-application to review and set aside the Report and its contents. Moreover, the answering affidavits filed by those Respondents are replete with inaccuracies with respect to the Report and its contents. It therefore became clear to me, that I need to place certain facts and considerations before this Court in an effort to assist the Court in its adjudication of this matter and in order to clarify the role of the Public Protector and the status of the findings and remedial action taken in my Report.'

[18] The Public Protector expressed the view that the principles of co-operative governance contemplated in the Constitution required the Minister and the SABC to have submitted an implementation plan to her, which they had failed to do. She therefore suggested that she was obliged to ventilate the issues in the current proceedings, rather than through co-operative governance processes. According to the Public Protector, Mr Yunus Carrim, undertook in Parliament to implement the remedial action. However, this was not done. Also the Board of the SABC, on more than one occasion, had indicated that it was engaging with the report and sought extensions from her in order to comply. The extensions were granted and notwithstanding indications by the Chairperson of the Board that the report was being given due consideration and that an implementation plan would be furnished, her remedial action was ignored.

[19] The court below (Schippers J), formulated the primary question for adjudication as follows: Are the findings of the Public Protector binding and enforceable? He examined the relevant provisions of the Constitution and the Public Protector Act 23 of 1994 (the Act) and reasoned:

'50. . . . The powers and functions of the Public Protector are not adjudicative. Unlike courts, the Public Protector does not hear and determine causes. The Report itself states that in the enquiry as to what happened the Public Protector relies primarily on official documents such as memoranda and minutes, and less on oral evidence. In the enquiry as to what should have happened the Public Protector assesses the conduct in question in the light of the standards laid down in the Constitution, legislation, and policies and guidelines.

51. Further, unlike an order or decision of a court, a finding by the Public Protector is not binding on persons and organs of State.[8] If it were intended that the findings of the Public Protector should be binding and enforceable, the Constitution would have said so. Instead, the power to take remedial action in s 182(1)*(c)* of the Constitution is inextricably linked to the Public Protector's investigatory powers in s 182(1)*(a)*. Having regard to the plain wording and context of s 182(1), the power to take appropriate remedial action, in my view, means no more than that the Public Protector may take steps to redress improper or prejudicial conduct. But that is not to say that the findings of the Public Protector are binding and enforceable, or that the institution is ineffective without such powers.'

Then, somewhat contradictorily, he stated:

'59. However, the fact that the findings of and remedial action taken by the Public Protector are not binding decisions does not mean that these findings and remedial action are mere recommendations, which an organ of State may accept or reject.'[9]

[20] Schippers J concluded:

'74. For these reasons I have come to the conclusion that the findings of the Public Protector are not binding and enforceable.[10] However, when an organ of State rejects those findings or the remedial action, that decision itself must not be irrational.'

He thus proceeded to consider whether the decision by the SABC to recommend - and the Minister's decision to appoint - Mr Motsoeneng as the permanent COO was rational. On that score the learned judge held:

'83. The conduct of the board and the minister in rejecting the findings and remedial action of the Public Protector was arbitrary and irrational and, consequently, constitutionally unlawful. They have not provided cogent reasons to justify their rejection of the findings by the Public Protector of dishonesty, maladministration, improper conduct and abuse of power on the part of Motsoeneng.'

[21] The learned judge accordingly issued the following order:

'1. The Board of the South African Broadcasting Corporation Ltd (SABC) shall, within 14 calendar days of the date of this order, commence, by way of serving on him a notice of charges, disciplinary proceedings against the eighth respondent, the chief operations officer (COO), Mr George Hlaudi Motsoeneng, for his alleged dishonesty relating to the alleged misrepresentation of his qualifications, abuse of power and improper conduct in the appointments and salary increases of Ms Sully Motsweni; and for his role in the alleged suspension and dismissal of senior members of staff, resulting in numerous labour disputes and settlement awards against the SABC, referred to in para 11.3.2.1 of the report of the Public Protector dated 17 February 2014.

2. An independent person shall preside over the disciplinary proceedings.

3. The disciplinary proceedings referred to in para 1 above shall be completed within a period of 60 calendar days after they have been commenced. If the proceedings are not completed within that time, the chairperson of the board of the SABC shall deliver an affidavit to this court:

a. explaining why the proceedings have not been completed; and

b. stating when they are likely to be completed. The applicant shall be entitled, within five calendar days of delivery of the affidavit by the Chairperson, to deliver an answering affidavit.

4. Pending the finalisation of the disciplinary proceedings referred to in para 1, and for the period referred to in para 3 above, the eighth respondent shall be suspended on full pay'.

[22] With the leave of the court below, the SABC, as the first appellant, the Minister, as the second, and Mr Motsoeneng, as the third, appeal to this court against the judgment of the court below. The DA opposes the appeal. The Public Protector instructed counsel to file heads of argument and address us from the bar on the status and effect of her findings and remedial action. Corruption Watch, a civil society organisation, who was granted leave by the President of this court to intervene as an amicus curiae in the appeal, endorses the Public Protector's contention that on a proper interpretation of s 182 of the Constitution, read with the Act, she has the power to take remedial action which cannot be ignored by organs of State.

[23] For a proper understanding, it is necessary to contextualise the position and purpose of the Public Protector within our Constitutional framework, and to consider her powers. As our interpretation differs from that of the court below, it is necessary that we do so in some detail. South Africa's Chapter Nine institutions were established as independent watchdogs to strengthen constitutional democracy in the Republic. Section 181(1) of the Constitution lists the institutions supporting constitutional democracy as:

8 And in a footnote, the court below refers to section 165(5) of the Constitution, which reads:

'An order or decision issued by a court binds all persons to whom and organs of State to which it applies.'

9 Note that where we have quoted from other judgments, we have omitted the square brackets around the relevant paragraph numbers so as to avoid confusion.

10 We note that some support for the approach of Schippers J is to be found in Bishop & Woolman (op cit), who opine that one of the most common criticisms levelled at the Public Protector or ombudsmen generally is that the institution lacks the power to make 'binding decisions'. According to them, the real strength of the office lies in the power to investigate and report effectively. In this regard they refer (at 24A-3) to the following from Stephen Owen (S Owen 'The Ombudsman: Essential Elements and Common Challenges' in Linda C Reif (ed) The International Ombudsman Anthology (1999) at 51, 54–5):

'Through the application of reason the results are infinitely more powerful than through the application of coercion. While a coercive approach may cause a reluctant change in a single decision or action, by definition it creates a loser who will be unlikely to accommodate the recommendations in future actions. By contrast when change results from a reasoning process it changes a way of thinking and the result endures for the benefit of potential complainants in the future.'

'. . .

(a) The Public Protector.

(b) The South African Human Rights Commission.

(c) The Commission for the Promotion and Protection of the Rights of Cultural, Religious and Linguistic Communities.

(d) The Commissioner for Gender Equality.

(e) The Auditor-General.

(f) The Electoral Commission.'

[24] Section 181(2) of the Constitution states that '[t]hese institutions are independent, and subject only to the Constitution and the law'. For their part, 'they must be impartial and must exercise their powers and perform their functions without fear, favour or prejudice'. Section 181(3) imposes a positive obligation on other organs of State, who 'through legislative and other measures, must assist and protect these institutions' to ensure their 'independence, impartiality, dignity and effectiveness'. Section 181(4) specifically prohibits any 'person or organ of the State' from interfering with the functioning of these institutions. However, our Constitution does attempt to strike a balance between their independence, on the one hand, and accountability, on the other. To that end, s 181(5) provides that: '[t]hese institutions are accountable to the National Assembly, and must report on their activities and the performance of their functions to the Assembly at least once a year.' But as the Constitutional Court pointed out in *Independent Electoral Commission v Langeberg Municipality* [2001] ZACC 23; 2001 (3) SA 925 (CC) para 27: the Constitution, in effect, describes Chapter Nine institutions as State institutions that strengthen constitutional democracy; Chapter Nine institutions are independent and subject only to the Constitution and the law; it is a contradiction in terms to regard an independent institution as part of a sphere of government that is functionally interdependent and interrelated in relation to all other spheres of government'; and independence cannot exist in the air and it is thus clear that independence is intended to refer to independence from the government.

[25] Thus even though these institutions perform their functions in terms of national legislation they are not organs of State within the national sphere of government. Nor are they subject to national executive control. Accordingly, they should be, and must manifestly be seen to be, outside government.[11] In *New National Party v Government of the Republic of South Africa & others* [1999] ZACC

5; 1999 (3) SA 191 (CC) para 98 and 99, it was stated by Langa DP, writing in a separate concurring majority judgment:

'In dealing with the independence of the [Independent Electoral] Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to "independence". The first is "financial independence". This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the Executive arm of Government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must, accordingly, be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.

The second factor, "administrative independence", implies that there will be [no] control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The Executive must provide the assistance that the Commission requires "to ensure (its) independence, impartiality, dignity and effectiveness".'

Langa DP was elaborating there on the independence of the Independent Electoral Commission but those considerations apply with equal force to the office of the Public Protector.

[26] The Public Protector, which is the first on the list of Chapter Nine institutions, has its historical roots in the institution of the Swedish Parliamentary Ombud.[12] That office was established with the adoption of the Swedish Constitution Act of 1809 and is said to have been a response to the King's authoritarian rule. The task assigned to the Swedish Ombud, which had been conceived as far back as 1713, was to ensure

11 See also Independent Electoral Commission v Langeberg Municipality para 31.

12 See Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa, 1996 [1996] ZACC 26; 1996 (4) SA 744 (CC) (the First Certification Judgment) para 161.

13 See The Swedish Parliamentary Ombudsman "History', available at http://www.jo.se/en/About-

JO/History/, accessed 5 October 2015.

14 See also Stig Jagerskiöld "The Swedish Ombudsman' (1961) 109 University of Pennsylvania Law Review 1077 for a general historical background of the Swedish ombudsman.

15 Finland, Denmark, Norway, New Zealand, Spain and countries in South America are the examples provided by Bishop & Woolman (op cit) at 24A-1.

that public officials acted in accordance with the law and discharged their duties satisfactorily in other respects.[13] If the Ombud found this not to be the case he was empowered to institute legal proceedings for dereliction of duty.[14] Like similar institutions around the globe,[15] the purpose of the office of the Public Protector is to ensure that there is an effective public service which maintains a high standard of professional ethics and that government officials carry out their tasks effectively, fairly and without corruption or prejudice.[16] The term *'Defenser del Pueblo'* employed in Spain and some South American countries translates into "Public Defender'. This emphasises the protection of the people' and "the public good'.[17]

[27] When the office of an Ombud or Public Protector in the new constitutional dispensation was first mooted in this country, the African National Congress, the current ruling political party in Parliament, in a document entitled 'Ready to Govern: Policy Guidelines on a Democratic South Africa',[18] said the following:

'The ANC proposes that a full-time independent office of the Ombud should be created with wide powers to investigate complaints against members of the public service and other holders of public office and to investigate allegations of corruption, abuse of their powers, rudeness and maladministration. The Ombud shall have the power to provide adequate remedies. He shall be appointed by and answerable to Parliament.'

This predated the adoption of our Interim Constitution.

[28] The most significant constitutional provision is s 182, which reads:

'(1) The Public Protector has the power, as regulated by national legislation –

(a) to investigate any conduct in State affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to result in any impropriety or prejudice;

(b) to report on that conduct; and

(c) to take appropriate remedial action.

(2) The Public Protector has the additional powers and functions prescribed by national legislation.

(3) The Public Protector may not investigate court decisions.

(4) The Public Protector must be accessible to all persons and communities.

(5) Any report issued by the Public Protector must be open to the public unless exceptional circumstances, to be determined in terms of national legislation, require that a report be kept confidential.'

[29] The independence, impartiality and effectiveness of the Public Protector are vital to ensuring accountable and responsible government. The office inherently

entails investigation of sensitive and potentially embarrassing affairs of government.19 In terms of s 182(2) of the Constitution the Public Protector also 'has the additional powers and functions' prescribed by national legislation. The national legislation that is referred to in s 182 is the Act, which makes it clear that, while the functions of the Public Protector include those that are ordinarily associated with an ombudsman, they also go much beyond that.20 The office of the Public Protector provides '. . . what will often be a last defence against bureaucratic oppression, and against corruption and malfeasance in public office that are capable of insidiously destroying the nation.'21 It follows that in fulfilling its constitutional mandate that office will have to act with courage and vigilance.22

[30] Sections 193 and 194 of the Constitution provide for the appointment and removal of the Public Protector. The Public Protector is appointed by the President on the recommendation of the National Assembly. The National Assembly must recommend persons: (i) nominated by a committee of the Assembly proportionally composed of members of all political parties represented in the Assembly; and

(ii) approved by the Assembly by a resolution adopted with a supporting vote of at least 60 per cent of the members of the Assembly. In addition to being a South African citizen and a fit and proper person,23 the Public Protector must have at least ten years' relevant experience or be a judge of the High Court.24 This obviously suggests that the incumbent must be someone who is beyond reproach, a person of stature and suitably qualified. Section 183 of the Constitution provides for a non- renewable tenure of seven years. The Public Protector may be removed from office only on: (a) the ground of misconduct, incapacity or incompetence; (b) a finding to that effect by a committee of the National Assembly; and (c) the adoption by the

19 First Certification Judgment para 163.

20 See Public Protector v Mail & Guardian Ltd & others [2011] ZASCA 108; 2011 (4) SA 420 (SCA) para 9.

21 Public Protector v Mail & Guardian para 6.

22 See Public Protector v Mail & Guardian para 8.

23 See section 193(1) of the Constitution and s 1A of the Act.

24 See s 1A(3) of the Act.

Assembly of a resolution calling for her removal from office. A resolution of the National Assembly concerning the removal of the Public Protector from office must be adopted with a supporting vote of at least two thirds of the members of the Assembly. Upon the adoption of such a resolution the President must remove the Public Protector from office. The Public Protector is thus well protected and a high threshold is set for her removal. Significantly, in the First Certification Judgment, the Constitutional Court found that the provisions in the Interim Constitution governing the removal of the Public Protector from office did not pass constitutional muster.25

[31] The predecessors of the Public Protector are the Advocate-General and the Ombudsman. The office of the Ombudsman, like the Advocate-General that came before it, had the power under the (now repealed) Ombudsman Act 118 of 1979 to investigate reports of maladministration, but not to take remedial action directly. In other words, the Legislature expressly limited the Ombudsman's remedial powers.

She had to refer her findings to other institutions for remedial action.26 The office of the Public Protector was established by s 110 of the Interim Constitution. Section 112 of the Interim Constitution, which set out the powers and functions of the Public Protector, echoing the Ombudsman Act and the Attorney-General Act 92 of 1992 before it, merely stated that it was competent for the Public Protector, pursuant to an investigation:

'. . . to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by –

mediation, conciliation or negotiation;

advising, where necessary, any complainant regarding appropriate remedies; or any other means that may be expedient in the circumstances.'

[32] It is necessary to have regard to the relevant provisions of the Act to see how action by the Public Protector is triggered as well as to examine the range of statutory measures available to that office. But before we do that it is worth noting the material parts of the Preamble to the Act:

'Whereas sections 181 to 183 of the Constitution of the Republic of South Africa, 1996 (Act 108 of 1996),[27] provide for the establishment of the office of Public Protector and that the Public Protector has the power, as regulated by national legislation, to investigate any conduct in State affairs, or in the public administration in any sphere of government, that is alleged or suspected to be improper or to have resulted in any impropriety or prejudice, to report on that conduct and to take appropriate remedial action, in order to strengthen and support constitutional democracy in the Republic; . . . .'

[33] Importantly, s 6 of the Act is entitled 'Reporting matters to and additional powers of Public Protector'. Section 6(1) provides that any person may, in any matter over which the Public Protector has jurisdiction, report a complaint to that office. The Public Protector, may, in terms of s 6(3), refuse to investigate a matter reported, if the person ostensibly prejudiced is a State official or employee and that person has not exhausted remedies conferred in terms of the provisions of the Public Service Act, 199428 or if the affected person has not taken all reasonable steps to exhaust available legal remedies.

[34] Section 6(4)(a) of the Act deals with the Public Protector's additional competencies and provides that she is entitled to act on her own initiative. It provides:

'The Public Protector shall, be competent-

To investigate, on his or her own initiative or on receipt of a complaint, any alleged–

(i) maladministration in connection with the affairs of government at any level;

(ii) abuse or unjustifiable exercise of power or unfair, capricious, discourteous or other improper conduct or undue delay by a person performing a public function;

(iii) improper or dishonest act, or omission or offences referred to in Part 1 to 4, or section 17, 20 or 21…of Chapter 2 of the Prevention and Combating of Corrupt Activities Act, 2004 with respect to public money;

(iv) improper or unlawful enrichment, or receipt of any improper advantage, or promise of such enrichment or advantage, by a person as a result of an act or omission in the public administration or in connection with the affairs of government at any level or of a person performing a public function, or;

25 See the First Certification Judgment para 163.

26 Section 5(4) provided that the Ombudsman could, whether or not he or she held an inquiry, and at any time before, during or after such inquiry:

'(a) if he is of the opinion that the facts disclose the commission of an offence by any person, bring the matter to the notice of the relevant authority charged with prosecutions;

(b) if he deems it advisable, refer any matter which has a bearing on mismanagement to the institution, body, association or organization affected by it or make an appropriate recommendation regarding the redress of the prejudice referred to in section 4(1)(d) or make any other recommendation which he deems expedient to the institution, body, association or organisation concerned.'

27 Note that the Act came into force during the time of the Interim Constitution, and the reference here to the Final Constitution is as a result of an amendment to the Act by the Public Protector Amendment Act 113 of 1998.

28 Public Service Act, 1994 (Proclamation 103 of 1994, published in GG 15791, 3 June 1994).

(v) act or omission by a person in the employ of government at any level, or a person performing a public function, which results in unlawful or improper prejudice to any other person'.

[35] Section 6(4)*(b)* of the Act gives the Public Protector resort to what might, in broad terms, be described as alternative dispute resolution measures. It provides that the Public Protector shall be competent:

'*(b)* to endeavour, in his or her sole discretion, to resolve any dispute or rectify any act or omission by–

(i) mediation, or conciliation or negotiation;

(ii) advising, where necessary, any complainant regarding appropriate remedies; or

(iii) any other means that may be expedient in the circumstances'.

[36] Section 6(4)*(c)*(i) states that if the Public Protector is of the opinion that the facts presented to her disclose the commission of an offence she is entitled to refer it to the authority charged with prosecutions. Section 6(4)*(c)*(ii) provides that if the Public Protector deems it advisable she may refer:

'. . . any matter which has a bearing on an investigation, to the appropriate public body or authority affected by it or to make an appropriate recommendation regarding the redress of the prejudice resulting therefrom or make any other appropriate recommendation he or she deems expedient to the affected public body or authority.'

[37] Section 6(5)*(a)* of the Act is especially pertinent to this matter. It provides that the Public Protector has the same powers referred to in s 6(4) set out above in relation to the affairs of an institution in which the State is the majority or controlling shareholder or in relation to any public entity as defined in s 1 of the Public Finance Management Act 1 of 1999 (the PFMA). This subsection of course encompasses the SABC.

[38] Section 7 of the Act gives the Public Protector extensive powers of investigation. She is entitled to subpoena persons and require them to give evidence. Persons being investigated have the right to be heard. Section 7A gives the Public Protector search and seizure powers.

[39] Section 8(1) of the Act provides:

'The Public Protector may, subject to the provisions of subsection (3), in the manner he or she deems fit, make known to any person any finding, point of view or recommendation in respect of a matter investigated by him or her.'

Section 8(3) reads as follows:

'The findings of an investigation by the Public Protector shall, when he or she deems it fit but as soon as possible, be made available to the complainant and to any person implicated thereby.'

[40] Section 11 of the Act makes it an offence for anyone to interfere with the functioning of the office of the Public Protector 'as contemplated in section 181(4) of the Constitution'.[29]

[41] As can be seen Parliament took very seriously its constitutional mandate to legislate the additional powers of the Public Protector. In that regard, conscious of the importance of the office, the Legislature was thorough and thoughtful.

[42] Subsections 6(4)*(b)*, *(c)* and *(d)* of the Act, which was enacted pursuant to the Interim Constitution, appear to mirror the language of s 112(1)*(b)* of the Interim Constitution.[30] The Final Constitution, however, in a significant shift in language, conferred an express further power on the Public Protector. Instead of empowering the Public Protector to 'endeavour' to resolve a dispute, or 'rectify any act or

omission' by simply 'advising' a complainant of an appropriate remedy as under the Interim Constitution, the Final Constitution empowers the Public Protector to 'take appropriate remedial action'.[31] Significantly, the Constitution itself directly confers powers on the Public Protector. Section 182(1) confers the power on the Public Protector to: (a) investigate; (b) report*; and* (c) take appropriate remedial action. Those powers are complementary. If, of course, a complaint, or an investigation on her own initiative yields no indication of maladministration or corruption there will be no need to take remedial steps or utilise any of the other measures available to her.

Once the Public Protector establishes State misconduct, however, she has the vast array of measures available to her as provided in the Constitution and the Act.

[43] Before us, all counsel accepted that the powers conferred on the Public Protector in terms of s 182(1) *(c)* of the Constitution far exceeded those of similar institutions in comparable jurisdictions. There was, however, a faint suggestion by counsel on behalf of the Minister, that the powers of the Public Protector ought rightly to be sourced from the Act, being the

29 It will be recalled that that section of the Constitution provides that no person or institution of State may interfere with the functioning of a Chapter Nine institution.

30 The Interim Constitution was enacted on 25 January 1994. The Public Protector Act was enacted on 16 November 1994.

31 See, in this regard, the Public Protector Amendment Act 113 of 1998. The Public Protector Act was also later amended by the Public Protector Amendment Act 22 of 2003. However, the Public

Protector Amendment Acts did not amend s 6(4) at all.

legislation envisaged by the Constitution rather than from the Constitution itself. The problem with that suggestion is that the Constitution is the primary source and it stipulates and refers to 'additional' powers to be prescribed by national legislation.[32] The proposition on behalf of the Minister is contrary to the constitutional and legislative scheme outlined above and would have the effect of the tail wagging the dog.

[44] Our Constitution sets high standards for the exercise of public power by State institutions and officials.[33] However, those standards are not always lived up to, and it would be naïve to assume that organs of State and public officials, found by the Public Protector to have been guilty of corruption and malfeasance in public office, will meekly accept her findings and implement her remedial measures. That is not how guilty bureaucrats in society generally respond. The objective of policing State officials to guard against corruption and malfeasance in public office forms part of the constitutional imperative to combat corruption. The Constitutional Court in *Glenister v President of the Republic of South Africa & others* [2011] ZACC 6; 2011 (3) SA 347

(CC) noted (paras 176 and 177):

'Endemic corruption threatens the injunction that government must be accountable, responsive and open; that public administration must not only be held to account, but must also be governed by high standards of ethics, efficiency and must use public resources in an economic and effective manner. As it serves the public, it must seek to advance

development and service to the public. In relation to public finance, the Constitution demands budgetary and expenditure processes underpinned by openness, accountability and effective financial management of the economy. Similar requirements apply to public procurement, when organs of State contract for goods and services. . .

. . . Section 7(2) [of the Constitution] casts an especial duty upon the State. It requires the State to —respect, protect, promote and fulfil the rights in the Bill of Rights.‖ It is incontestable that corruption undermines the rights in the Bill of Rights, and imperils democracy. To combat it requires an integrated and comprehensive response. The State's obligation to

'respect, protect, promote and fulfil' the rights in the Bill of Rights thus inevitably, in the modern State, creates a duty to create efficient anti-corruption mechanisms.‖'

(Footnotes omitted.)

The Public Protector, in her answering affidavit, expressed concern that:

'This matter represents yet another example of what would appear to have become a trend amongst politicians and organs of State to simply disregard reports issued and remedial actions taken by the Public Protector'.

[45] Two considerations appear to have weighed with the High Court in its conclusion that the findings of the Public Protector were not _binding and enforceable'. First, it appears to have compared the powers of the Public Protector with that of a court and, second, it relied on a judgment of the English Court of Appeal in *R (on the application of Bradley & others) v Secretary of State for Work and Pensions* [2008] EWCA Civ 36; [2009] QB 114 (CA). Regarding the first consideration, it is so that section 165(5) of the Constitution provides: 'An order or decision *by a court* binds all persons to whom and organs of state to which it applies' (our emphasis). But a court is an inaccurate comparator and the phrase 'binding and enforceable' is terminologically inapt and in this context conduces to confusion. For, it is well settled in our law that until a decision is set aside by a court in proceedings for judicial review it exists in fact and it has legal consequences that cannot simply be overlooked (*Oudekraal Estates (Pty) Ltd v City of Cape Town & others* [2004] ZASCA 48; 2004 (6) SA 222 (SCA) para 26). It was submitted, however, that that principle applies only to the decision of an administrative functionary or body, which the Public Protector is not. It suffices for present purposes to state that if such a principle finds application to the decisions of an administrative functionary then, given the unique position that the Public Protector occupies in our constitutional order, it must apply with at least equal or perhaps even greater force to the decisions finally arrived at by that institution. After all, the rationale for the principle in the administrative law context (namely, that the proper functioning of a modern State would be considerably compromised if an administrative act could be given effect to or ignored depending upon the view the subject takes

of the validity of the act in question (*Oudekraal* para 26)), would at least apply as much to the institution of the Public Protector and to the conclusions contained in her published reports.

[46] Regarding the second consideration, *Bradley*

32 In this regard, see the title on _Constitutional Law: Government Structures' in 5(3) Lawsa 2 ed replacement volume by D W Freedman, para 265.

33 The Constitution's founding values include accountability, responsiveness and openness in government (s 1(d)). Section 7(2) obliges the State to respect, protect, promote and fulfil the rights in

the Bill of Rights. Section 33(1) requires administrative action to be lawful, reasonable and procedurally fair. Section 41 requires all organs of State to respect and co-operate with one another and inter alia to _provide effective, transparent, accountable and coherent government for the Republic as a whole'. Section 195 requires all organs of State and public officials to adhere to high standards of ethical and professional conduct.

held as follows (para 51):

> 'It follows that, unless compelled by authority to hold otherwise, I would conclude that
>
> . . . the Secretary of State, acting rationally, is entitled to reject the finding of maladministration and prefer his own view. But, as I shall explain, it is not enough that the Secretary of State has reached his own view on rational grounds: it is necessary that his decision to reject the Ombudsman's findings in favour of his own view is, itself, not irrational having regard to the legislative intention which underlies the 1967 Act [the Parliamentary Commissioner Act]. To put the point another way, it is not enough for a Minister who decides to reject the Ombudsman's finding of maladministration simply to assert that he had a choice: he must have a reason for rejecting a finding which the Ombudsman has made after an investigation under the powers conferred by the Act.'

With reference to *Bradley*, Schippers J held:

> '66. It seems to me that before rejecting the findings or remedial action of the Public Protector, the relevant organ of State must have cogent reasons for doing so, that is for reasons other than merely a preference for its own view. In this regard, *Bradley* is instructive.' (Footnote omitted.)

Bradley does not in any way assist in the interpretation of our Public Protector's constitutional power '=to take appropriate remedial action'. It concerned a different institution with different powers, namely, the powers of the Parliamentary Commissioner under the Parliamentary Commissioner Act, 1967, who undertakes investigations at the request of Members of Parliament. She does not have any remedial powers. Section 10 of the Parliamentary Commissioner Act merely requires her to report on her investigation to the Member of Parliament who laid the complaint, the Department of State against whom the complaint was laid and, if any injustice has been done, to the Houses of Parliament. The function of the Parliamentary Commissioner appears, in other words, to be confined to a reporting function, which is merely one of the functions of our Public Protector, and is specified under s 182(1)*(b)* of the Constitution. The Parliamentary Commissioner does not have any equivalent of our Public Protector's power to 'take appropriate remedial action'. *Bradley* is consequently not of any assistance in the interpretation and understanding of our Public Protector's remedial powers. Schippers J's reliance on *Bradley* was therefore misplaced.

[47] Here, there is no suggestion that the Public Protector exceeded her powers or that she acted corruptly. Nor have any of the other traditional grounds for a review been raised. The principal reason advanced by both the SABC and the Minister for ignoring the Public Protector's remedial action is that the former had appointed Mchunu Attorneys to 'investigate the veracity of the findings and recommendations of the Public Protector'. That, in our view, was impermissible. Whilst it may have been permissible for the SABC to have appointed a firm of attorneys to assist it with the implementation of the Public Protector's findings and remedial measures, it was quite impermissible for it to have established a parallel process to that already undertaken by the Public Protector and to thereafter assert privilege in respect thereof. The assertion of privilege in the context of this case is in any event incomprehensible.[34] If indeed it was aggrieved by any aspect of the Public Protector's report, its remedy was to challenge that by way of a review. It was not for it to set up a parallel process and then to adopt the stance that it preferred the outcome of that process and was thus free to ignore that of the Public Protector. Nor was it for the Minister to prefer the Mchunu report to that of the Public Protector. It bears noting that the Public Protector is plainly better suited to determine issues of maladministration within the SABC than the SABC itself. That, after all, is why the office of the Public Protector exists. The Public Protector is independent and impartial. Mchunu Attorneys, who had already represented the SABC during the course of the Public Protector's investigation, was not. The Public Protector conducted a detailed investigation in which she interviewed all the relevant role players, considered all relevant documents, and gave all affected parties an opportunity to comment on her provisional report. Only after following that process, did she make her findings and take remedial action. That cannot simply be displaced by the SABC's own internal investigation. Thus, absent a review, once the Public Protector had finally spoken, the SABC was obliged to implement her findings and remedial measures.

[48] Both the Minister and the SABC complain that they were still intent on engaging with the Public Protector about her report. But, once she has finally spoken, following upon a full investigation, where those affected have been afforded a proper hearing, as happened here, there should have been

34 It is unclear on what basis the SABC asserts privilege in respect of the Mchunu report. First, the report appears to have been procured by the SABC with the aim of investigating and assessing the veracity of the Public Protector's findings. Thus notwithstanding the fact that the relationship between Mchunu Attorneys and the SABC appears facially at least to have been that of an attorney and client, it is doubtful whether, properly construed, the Mchunu Report is in the nature of a communication between an attorney and client in respect of which privilege from disclosure can rightly be asserted.

Second, the Mchunu report was furnished by the SABC to the Minister, who in turn stated in her answering affidavit: '=I will ensure that the findings of Mchunu Attorneys are made available to the Public Protector for her consideration'. It is contradictory to assert privilege and then at the same time to offer to make it available to another party.

compliance. However, as the Public Protector pointed out in her affidavit _[t]he deadline for compliance . . . is 17 August 2014. At the time of filing this affidavit, on 14 August 2014, no compliance has been effected.'[35] In addition, as pointed out in paras 14 and 16 above, it is clear that the SABC adopted an intransigent approach to the remedial action and the Minister followed suit. Moreover, on the evidence, the claim that they were intent on engaging the Public Protector rings hollow. The permanent appointment of Mr Motsoeneng as the COO in the face of the extremely serious findings made by the Public Protector against him is inconsistent with that claim. It appears to be undisputed that: (i) the position of COO was not formally advertised and, accordingly, no other candidates were considered for what, after all, was a very senior position at a public broadcaster; (ii) the filling of that position did not appear on the agenda for the meeting at which the decision of the Board to recommend the appointment was taken; and (iii) no interviews were held, not even with the single candidate that the Board chose to recommend. All of that despite the SABC's own Articles of Association that required the Board to interview other candidates and prepare a shortlist. What is more is that Mr Motsoeneng's appointment appears to have taken place in the face of an interdict granted in Mr Mbebe's favour. It thus appears that despite the Public Protector's damning findings, both the SABC and Minister were dead set on Mr Motsoeneng's appointment and had no genuine intention of engaging with the Public Protector.

[49] It is important to emphasise that this case is about a public broadcaster that millions of South Africans rely on for news and information about their country and the world at large and for as long as it remains dysfunctional, it will be unable to fulfil its statutory mandate.[36] The public interest should thus be its overarching theme and objective. Sadly, that has not always been the case. Its Board has had to be dissolved more than once and its financial position was once so parlous that a loan of R1 billion, which was guaranteed by the National Treasury, had to be raised to rescue it. Here as well, the public interest appears not to have weighed with the Board of the SABC. The Public Protector observes in her report:

'. . . I found it rather discouraging that the current SABC Board appears to have blindly sprung to Mr Motsoeneng's defence on matters that preceded it and which, in my considered view, require a Board that is serious about ethical governance to raise questions with him.' That approach by the Board appears to have carried through in this litigation. By way of example, the Public Protector pointed out in her report that:

'. . . Mr Motsoeneng admitted, during his recorded interview, that he had falsified his matric qualifications'.

She added that:

'Mr Motsoeneng indicated that he had passed Standard 10 ("matric") in 1991 at the age of 23 years and indicated five (5) symbols he had purported to have obtained in this regard.'

In his written response to the Public Protector's provisional report, Mr Motsoeneng accepted that the information furnished on the form when he first sought employment at the SABC 'was clearly inaccurate' and that his assertion that he had passed standard ten was 'inaccurate and false'. That notwithstanding, Ms Tshabalala, who had been appointed Chairperson of the SABC Board shortly before the application was launched in the court below stated: 'The objective facts contradict the finding by the Public Protector that Mr Motsoeneng misrepresented his qualifications . . .' and

the findings of the Public Protector . . . have been demonstrated to be false in this regard'. Likewise, the Minister's assertion that after reading the transcript of the interview between the Public Protector and Mr Motsoeneng she was satisfied that he did not _lie to the [SABC] about the matric qualification' can hardly withstand scrutiny.

[50] The following parts of a transcript of the interview conducted on 19 July 2013 by the Public Protector with Mr Motsoeneng, concerning his matric qualification, appear to support that part of the Public Protector's report referred to in the preceding paragraph:

'Adv Madonsela: But you knew . . . you are saying to me you knew that you had failed, so you . . . because when you put these symbols you knew you hadn't found . . . never seen them anywhere, you were making them up. So I'm asking you that in retrospect do you think you should have made up these symbols, now that you are older and you are not twenty- three?

Mr Motsoeneng: From me . . . for now because I do understand all these issues, I was not supposed, to be honest. If I was . . . now I was clear in my mind, like now I know what is wrong, what is right, I was not supposed to even put it, but there they said —No, put it ‖, but what is important for me Public Protector, is everybody knew and even when I put there I said to

35 From the explanation of the Public Protector, it seems that she had given a number of extensions to the deadline originally specified in her report, and so at the time that she deposed to the affidavit on 14 August 2014, the extended deadline was 17 August 2014. And although she deposed to the affidavit before the deadline had arrived, she took the view that the actions of the SABC and the Minister made it clear that they were in any event not going to meet it.

the lady —I'm not sure about my symbolsll and why I was not sure Public Protector, because I got a sub, you know I remember okay in English I think it was an —Ell, because you know after . . . it was 1995.

If you check there we are talking about 1991, now it was 1995 and for me I had even to go to . . . I was supposed to go to school to check. Someone said —No, no, no, you know what you need to do? Just go to Pretoria.ll At that time Public Protector, taxi, go and check, they said, —No, you faillll, I went and. . . . That one is . . . and people who are putting this, Public Protector . . . and I'm going to give you. . . I know it is Phumemele and Charlotte and this people when SABC were charging me, they were my witness.

Mr Madiba: I think if. . . I want to understand you correctly. You say you were asked by the SABC to put in those forms. . . I mean to put in those. . .

Adv Madonsela: To make up the symbols.

Mr Madiba: To make up the symbols. Do you recall who said that to you? Mr Motsoeneng: Marie Swanepoel.'

This explanation by Mr Motsoeneng is muddled and unclear. Even after the passage of a considerable period of time and sufficient opportunity for reflection on his part, it does reveal an alarming lack of insight. He appears not to fully appreciate that this was an admitted deliberate falsehood and that in that sense his explanation lacks contrition and honesty. But his explanation evidently satisfied both the Board and the Minister that he did not lie about his matric qualification. It is not clear how they could have come to that conclusion because it is not in dispute that: (a) he did not have a matric qualification; and (b) when he first sought employment with the SABC he misrepresented that he did. It matters not, as he suggests in seeking to justify his behaviour, that certain persons at the SABC might have known that he did not in fact have a matric. That others may have known the truth simply makes them complicit in the lie. It does not excuse his lie. Mr Motsoeneng's more recent lack of candour and contrition is also cause for concern. He does not furnish a confirmatory affidavit from Ms Swanepoel. In his answering affidavit Mr Motsoeneng states 'I have been unable to trace Swanepoel again'. But it would seem that she did depose to an affidavit in which she disputes his version. That affidavit, for some inexplicable reason, does not form part of the appeal record. In his judgment on the application for leave to appeal, Schippers J records:

'25. The need to implement the order is further strengthened by the evidence disclosed in the affidavit of Ms Mari Swanepoel, which she made in this application. Mr Motsoeneng's evidence in this court is that when he applied for a job at the SABC, he told Ms Swanepoel that he had attempted but not passed standard 10, but that she had indicated that he should fill in "10" under the heading, 'highest standard passed. " Then he said he was unable to trace Ms Swanepoel again.

26. Ms Swanepoel refutes this evidence. She says that she made it clear to Mr Motsoeneng that he must not fill in a qualification which he had not yet finished; that he would have to provide an original certificate to prove whatever he filled in on the application form; and that after he had completed the form she repeatedly contacted Mr Motsoeneng to produce his matric certificate which he promised to do, but never did. Ms Swanepoel says that she also repeatedly followed up Mr Motsoeneng's failure to produce a matric certificate with her superiors, including Mr Paul Tati. It will be recalled that Mr Tati insisted that Mr Motsoeneng produce his matric certificate by no later than 12 May 2000. Mr Motsoeneng replied that he would furnish the certificate as soon as he received it.

27. Ms Swanepoel left the SABC in 2006. In late 2012 Mr Motsoeneng telephoned her. He told her that the SABC was trying to fire him and he wanted to keep his job. He said that his attorneys wanted her to make an affidavit about his matric certificate and the form he had completed. He indicated to Ms Swanepoel that she should say that he had told her that he did not have matric when he filled in the form. She refused. She also told Mr Motsoeneng that she did not wish to speak to him as she had a sexual harassment suit pending against the SABC at the time. He knew about the case and asked what she wanted from the SABC. She said she wanted R2 million in compensation. Mr Motsoeneng, then the Acting COO, replied, in Ms Swanepoel's words that, —he could organise for the SABC to pay me the R2 million, if I was willing to depose to the affidavit about the

[36] In terms of s 6(4) of the BA, the SABC must:

'encourage the development of South African expression by providing, in South African official languages, a wide range of programming that –

(a) reflects South African attitudes, opinions, ideas, values and artistic creativity;

(b) displays South African talent in education and entertainment programmes;

(c) offers a plurality of views and a variety of news, information and analysis from a South African point of view;

(d) advances the national and public interest.

> certificate.‖ She again refused. Ms Swanepoel says that for some four weeks thereafter Mr Motsoeneng phoned her repeatedly, but she generally ignored his calls. On the occasions that she did answer, Mr Motsoeneng asked her if they could meet just to talk or if his attorney could speak to her about the matter. She replied that she would talk to him but that she would not lie in an affidavit for him.' (Footnotes omitted.)

[51] There is yet a further context in which the public interest does not appear to have been well served. The affidavits filed on behalf of the Minister and the SABC treat with disdain the allegation that Mr Motsoeneng's appointment was irrational and unlawful because those allegations are pieced together from media reports and thus constitute hearsay evidence. But that may well be to misconceive the position, because, as Nugent JA, albeit in a different context, put it in *Mail & Guardian* (above) (para 26), '[a] newspaper that publishes a series of articles on matters of great public concern can only be seriously damaged by a finding that much of what was published is not correct or cannot be substantiated.' Moreover, it is no less important for the public as it is for the court to be reassured that there has been no impropriety in public life. There is no justification for saying to either that they must simply accept that there has not been conduct of that kind. The Minister and chairperson of SABC Board are senior public office bearers, whose function it is to inspire confidence that all is well in public life. In those circumstances we think it is unfortunate that they should have chosen to respond to the evidence as they did. Unlike the DA, they were present and intimately involved in what had transpired. In those circumstances they owed not just the court but also their fellow citizens an explanation. In our view the overriding public interest obliged them to make full and frank disclosure rather than shield themselves from scrutiny by resorting to technical points in opposition. After all, the information pertaining to Mr Motsoeneng's appointment was peculiarly within their knowledge.

[52] The Public Protector cannot realise the constitutional purpose of her office if other organs of State may second-guess her findings and ignore her recommendations. Section 182(1)*(c)* must accordingly be taken to mean what it says. The Public Protector may take remedial action herself. She may determine the remedy and direct its implementation. It follows that the language, history and purpose of s 182(1)*(c)* make it clear that the Constitution intends for the Public Protector to have the power to provide an effective remedy for State misconduct, which includes the power to determine the remedy and direct its implementation. All counsel before us rightly accepted that the Public Protector's report, findings and remedial measures could not be ignored.

[53] To sum up, the office of the Public Protector, like all Chapter Nine institutions, is a venerable one. Our constitutional compact demands that remedial action taken by the Public Protector should not be ignored. State institutions are obliged to heed the principles of co-operative governance as prescribed by s 41 of the Constitution. Any affected person or institution aggrieved by a finding, decision or action taken by the Public Protector might, in appropriate circumstances, challenge that by way of a review application. Absent a review application, however, such person is not entitled to simply ignore the findings, decision or remedial action taken by the Public Protector. Moreover, an individual or body affected by any finding, decision or remedial action taken by the Public Protector is not entitled to embark on a parallel investigation process to that of the Public Protector, and adopt the position that the outcome of that parallel process trumps the findings, decision or remedial action taken by the Public Protector. A mere power of recommendation of the kind suggested by the High Court appears to be more consistent with the language of the Interim Constitution and is neither fitting nor effective, denudes the office of the Public Protector of any meaningful content, and defeats its purpose. The effect of the High Court's judgment is that, if the organ of State or State official concerned simply ignores the Public Protector's remedial measures, it would fall to a private litigant or the Public Protector herself to institute court proceedings to vindicate her office. Before us, all the parties were agreed that a useful metaphor for the Public Protector was that of a watchdog. As is evident from what is set out above, this watchdog should not be muzzled.

[54] After lengthy debate in this court all counsel were agreed that the Public Protector's directive that Mr Motsoeneng be subjected to a disciplinary enquiry must be respected and consequently had to be implemented. Counsel on behalf of Mr Motsoeneng insisted that he was eager to clear his name through that process and thus welcomed it. For all the aforesaid reasons it was rightly conceded that the order by the court below that disciplinary proceedings should be instituted was unassailable.

[55] What occupied a greater part of the debate in this court was an attack on the correctness of the order of the High Court suspending Mr Motsoeneng. It was submitted on behalf of all three appellants that in her determination of an appropriate remedy as contemplated by s 182(1)*(c)* of the Constitution, the Public Protector had not seen fit to order Mr Motsoeneng's suspension. Accordingly, so the submission went, it was not competent for Schippers J to do so. It is so that in ordering the SABC to commence disciplinary proceedings against Mr Motsoeneng, the High Court primarily sought to vindicate the Public Protector. But sight cannot be lost of the fact that matters did not end with the report of the Public Protector. The Public Protector observed quite correctly in her report that the Board 'appears to have blindly sprung to Motsoeneng's defence' and 'at

times . . . appeared more defensive on his behalf' than Mr Motsoeneng himself. In earlier correspondence with Ms Tshabalala, the Public Protector observed:

'. . . unlike the outgoing Board, Mr Hlaudi Motsoeneng and the GCEO, you appear to deny any governance failure on the part of the erstwhile Board. Even more concerning, is how the Board whose role is to guide the SABC's ethical conduct reacts to my intended findings regarding Mr Hlaudi Motsoeneng's dishonesty'.

We know how the Board reacted to the Public Protector's findings: In the face of her serious findings of dishonesty, abuse of power and maladministration against Mr Motsoeneng, the SABC purported to recommend him for appointment as the permanent COO. And the Minister, on the strength of that recommendation, purported to appoint him.

[56] On the undisputed evidence it would appear that the Minister was able to apply her mind to the Mchunu Report, the recommendation of the Board and the transcript of Mr Motsoeneng's interview before acting on the recommendation of the SABC Board. She had to then weigh that against the 150 page Public Protector Report, which she already had in her possession. She did all of that within a single day. As this court has previously pointed out: '_Promptitude by public functionaries is ordinarily meritorious, but not where that is at the cost of neglecting the task.'[37] Moreover, the Minister seems to have restricted herself to a consideration of only one of the several negative findings against Mr Motsoeneng, namely, the allegation of dishonesty concerning his matric qualification. She does not state that she considered the findings of abuse of power, waste of public money, purging of senior staff and the disregard for principles of good corporate governance, all of which were plainly relevant to her decision. She also says nothing about the failure of the Board to advertise the post, consider other candidates or hold interviews before recommending Mr Motsoeneng for appointment in circumstances where, had she properly considered the Public Protector's Report, she would have known that the Public Protector had found that he had '_been allowed by successive Boards to operate above the law'. Armed with that knowledge, she ought to have considered that greater vigilance was required of her in acting on the recommendation of the Board. Thus, despite the appellants' protestations to the contrary, the permanent appointment of Mr Motsoeneng is inconsistent with the Public Protector's findings and remedial action and is inconsistent with the principles of co-operative governance.

[57] The principal attack on the suspension order on behalf of both the Minister and the SABC was that such an order had the effect of offending the separation of powers doctrine. In that regard reliance was placed on *National Treasury & others v Opposition to Urban Tolling Alliance & others* [2012] ZACC 18; 2012 (6) SA 223 (CC) (*OUTA*), para 71 in which the Constitutional Court stated:

'71. The high court does not mention a word about the submission of the government applicants on separations of powers. As a result we do not have the benefit of its attitude to the submissions. It is equally unclear whether the high court had considered the submissions at all. Before granting interdictory relief pending a review a court must, in the absence of mala fides, fraud or corruption, examine carefully whether its order will trespass upon the terrain of another arm of government in a manner inconsistent with the doctrine of separation of powers. That would ordinarily be so, if, as in the present case, a

state functionary is restrained from exercising statutory or constitutionally authorised powers. In that event, a court should caution itself not to stall the exercise unless a compelling case has been made out for a temporary interdict. Even so, it should be done only in the clearest of cases. This is so because in the ordinary course valid law must be given effect to or implemented, except when the resultant harm and balance of convenience warrant otherwise.'

[58] It was submitted that the power to remove the COO was one vested in the President and that it was not competent for a court to usurp that function. We were referred to s 15 of the BA which deals with the removal from office of a '_member'. In s 1 of the BA, a '_member' is defined to include executive members of the SABC Board, which in turn includes the COO, in terms of s 12*(b)*.

Section 15(1) of the BA provides:

'(1) The appointing body –

(a) may remove a member from office on account of misconduct or inability to perform his or her duties efficiently after due inquiry and upon recommendation by the Board; or

(b) must remove a member from office after a finding to that effect by a committee of the National Assembly and the adoption by the National Assembly of a resolution calling for that member's removal from office in terms of section of 15A.'

The appointing body in terms of s 1 read with s 13 of the BA is the President acting on the advice of the National Assembly. The submission on behalf of the Minister and the SABC was that it was for the President to suspend or remove permanently and not for a court to direct a suspension.

[37] *Public Protector v Mail & Guardian* (above) para 3.

[59] In the present case the Minister and the SABC both erred in their approach to the task that confronted them. In this regard it is important to emphasise that the Constitution requires that public power vested in the Executive and other functionaries be exercised in an objectively rational manner.[38] The exercise of public power must therefore comply with the Constitution, which is the supreme law, and the principle of legality, which is part of that law. The principle of legality, which is an incident of the rule of law, is one of the constitutional controls through which the exercise of public power is regulated by the Constitution. It entails that both the Legislature and the Executive are constrained by the principle that they may exercise no power and perform no function beyond that conferred upon them by law. In this sense the Constitution entrenches the principle of legality and provides the foundation for the control of public power.[39] Thus, although the common law remains relevant to this process,[40] the nature and characterisation of the public power exercised, namely, whether executive or administrative, matters less now than it did under the common law, pre-Constitution.[41] As Nugent JA pointed out in *Minister of Home Affairs & others v Scalabrini Centre & others* [2013] ZASCA 134; 2013 (6) SA 421 (SCA), para 61:

'Professor Hoexter has observed that the doctrine [of legality] is in the process of evolution, and will continue to evolve —

—quite possibly to the extent that it eventually encompasses all the grounds of review associated with regular administrative law. Meanwhile, the principle fairly easily covers all the grounds ordinarily associated with authority, jurisdiction and abuse of discretion: . . . Here at least, the principle of legality is a mirror image of administrative law. It is administrative law under another name.ll' (Footnote omitted.)

As this court has previously explained:

'To ensure a functional, accountable constitutional democracy, the drafters of our Constitution placed limits on the exercise of power. Institutions and office bearers must work within the law and must be accountable. Put simply, ours is a government of laws and not of men or women.'[42]

[60] The question, whether the Minister and the SABC have to give effect to remedial action by the Public Protector is one eminently for a court to decide. In any event, according to the Public Protector, the Executive through Minister Carrim had undertaken in Parliament to give effect to the remedial action taken by her. In that regard the Portfolio Committee on Communications held a meeting on 18 February 2014, with the purpose of allowing the Minister and Deputy Minister of Communications to present a progress report on the commitments made to the Portfolio Committee covering the period November 2013 to January 2014. The Parliamentary Monitoring Group's report of this meeting records the then Minister Carrim as suggesting that:

'. . . if it was legally tenable:

- he would commit to giving a report, by end March [2014], or at least prior to the election

- if necessary, there could be teleconferences arranged to discuss the matter

- *whatever the [Department of Communication] and Ministry must legally do, they would*

- an exit report would be written telling the incoming executive to proceed with whatever was outstanding'. (Our emphasis.)

What is more, is that on 4 July 2014, the new Minister, Ms Faith Muthambi, appeared before a joint sitting of the Portfolio Committees on Communications, and on Telecommunications and Postal Services, and the Parliamentary Monitoring Group's report of this meeting records that:

'Minister Muthambi said the SABC matters were not new, and she was paying urgent attention to ensuring that SABC served the interests of the nation as a whole. SABC would submit a report to her, on issues raised by the Public Protector, on 28 July 2014. She was equally upset with some of the matters at SABC and this was in the public domain. *SABC must comply with the Public Protector's recommendations.* Human resource issues raised by the Public Protector were also being addressed.' (Our emphasis.)

The SABC and the Minister appear to have vacillated between resisting the Public Protector's remedial action and undertaking to comply therewith. Unlike in

[38] *Pharmaceutical Manufacturers Association of SA & another: In re ex parte President of the Republic of South Africa & others* [2000] ZACC 1; 2000 (2) SA 674 (CC) para 89.

[40] See *MEC for Environmental Affairs and Development Planning v Clairison's CC* [2013] ZASCA 82; 2013 (6) SA 235 (SCA) para 19.

[41] *Democratic Alliance & others v Acting National Director of Public Prosecutions & others* [2012] ZASCA 15; 2012 (3) SA 486 (SCA) para 29.

[42] *Democratic Alliance v President of the Republic of South Africa & others* [2011] ZASCA 241; 2012 (1) SA 417 (SCA) para 66.

OUTA, here the Minister and the SABC were afforded every opportunity to discharge their constitutional duty. In fact, they were directed to do so by the Public Protector. They declined to do so because, as we have shown, they misconceived the import of the Public Protector's powers and acted irrationally in their response to it. This is thus a case of both the SABC and the Minister failing to understand the effect of the Public Protector's remedial action as well as failing in their obligation to the SABC and the country at large. That is a matter pre-eminently for a court.

[61] In light of the Public Protector's findings and the events subsequent to her report, the High Court was rightly concerned that Mr Motsoeneng should not continue to be in office with serious allegations concerning maladministration and the integrity of the SABC hanging over him. The High Court approached the enquiry thus:

'95. The allegations of misconduct against Motsoeneng are serious. He is the COO of the SABC. He is an executive member of the Board. He has virtually unlimited authority over his subordinates and access to all the documentation in relation to the charges of misconduct that will be preferred against him. Given the nature of the allegations and the persons involved, referred to in the report, Motsoeneng's fellow Board members and his subordinates would have to be interviewed, and documents produced.

96. What this shows is that unless he is suspended, Motsoeneng poses a real risk not only to the integrity of the investigation concerning the allegations of his misconduct, but to the disciplinary enquiry itself. It is untenable that he should remain in office while disciplinary proceedings are brought against him.

97. In these circumstances, and in the light of the allegations of abuse of power in the Report, in my opinion there can be no doubt that it is just and equitable that Motsoeneng should be suspended, pending finalisation of disciplinary proceedings to be brought against him. Good administration of the SABC, and openness and accountability, demand his suspension.'

The approach of the High Court cannot be faulted.

[62] In addition, in arriving at its conclusion that a suspension was appropriate, the high court exercised a narrow discretion. The test for interference in a discretion of that sort is that formulated in *Ex parte Neethling & others* 1951 (4) SA 331 (A) at 335C-F. Here it has not been shown that Schippers J exercised his discretion capriciously or upon a wrong principle or upon any other ground justifying interference. See also *Ferris & another v Firstrand Bank Ltd* [2013] ZACC 46; 2014

(3) SA 39 (CC) para 28.

[63] Further, it bears noting that a judicial decision is only appealable if it has the following three attributes: first, it must be final in effect and not susceptible of alteration by the court of first instance; second, it must be definitive of the rights of the parties; and third, it must have the effect of disposing of at least a substantial portion of the relief claimed (see *Zweni v Minister of Law and Order* [1992] ZASCA 197; 1993 (1) SA 523 (A) at 532I - 533B, cited with approval by the Constitutional Court in *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* [2010] ZACC 6; 2012 (4) SA 618 (CC) para 49). The suspension of Mr Motsoeneng pending finalisation of his disciplinary proceedings, appears to have neither the second nor third of the required attributes. That would be enough to disqualify it as an appealable decision, because the first attribute – assuming it to be present – cannot on its own confer appealability. Mr Motsoeneng has been suspended pending finalisation of his disciplinary proceedings. That does not, one would imagine, in and of itself dispose of even a portion of the relief claimed. It is thus also distinctly questionable at this stage whether the order suspending Mr Motsoeneng will have any final effect.[43] The facts of this case thus distinguish it from those dealt with by the Constitutional Court in *OUTA.*

[64] As the excerpts from the affidavits of both the Minister and Ms Tshabalala show, they express themselves in strong language. Both appear to have already exonerated Mr Motsoeneng of any wrongdoing. For it seems to be inconsistent to promote a person to one of the most senior positions at the public broadcaster if there had been any genuine intention of instituting disciplinary proceedings against him. Rationally, implicit in his promotion has to be a rejection of the rather damning findings by the Public Protector. Not only does all of that render their assertion that they were still intent on engaging with the Public Protector contrived and disingenuous, but it strongly dispels the notion that they can still bring an open and impartial mind to bear on the matter. The appeal against the suspension order must therefore also fail.

[65] One further aspect requires further brief consideration. As set out earlier in this judgment, relief was sought in two parts. Schippers J rightly held that on a proper construction of the relief

[43] See, inter alia, *African Wanderers Football Club (Pty) Ltd v Wanderers Football Club* 1977 (2) SA 38 (A) 47C–D; *Cronshaw & another v Fidelity Guards Holdings Pty Ltd* [1996] ZASCA 38; 1996 (3) SA 686 (A); and *International Trade Administration Commission v SCAW South Africa (Pty) Ltd* para 49, where the above two cases are cited with approval.

sought in Part A of the notice of motion, namely that disciplinary proceedings be instituted, the claim was one for final relief. The suspension order, as outlined above, is an interim order pending the outcome of review proceedings. We were informed by counsel on behalf of all the parties that the contemplated review application has been allocated a preferential date and will be heard during the first week of October 2015.

[66] At the outset of the hearing of the appeal, we were occupied with some debate as to whether it was desirable that this court consider the appeal in respect of Part A at this stage given that: (a) the proceedings in the High Court are un- terminated inasmuch as Part B has yet to be determined by the High Court; and (b) entertaining the appeal now would result in a proliferation of piecemeal hearings and appeals. See *Walhaus & others v Additional Magistrate, Johannesburg & another* 1959 (3) SA 113 (A) at 119H-120C. In *Guardian National Insurance Co Ltd v Searle NO* [1999] ZASCA 3; 1999 (3) SA 296 (SCA) at 301A-C, the following was stated:

'As previous decisions of this Court indicate, there are still sound grounds for a basic approach which avoids the piecemeal appellate disposal of the issues in litigation. It is unnecessarily expensive and generally it is desirable, for obvious reasons, that such issues be resolved by the same Court and at one and the same time.'

[67] In *Consolidated News Agencies (Pty) Ltd (in liquidation) v Mobile Telephone Networks (Pty) Ltd & another* [2009] ZASCA 130; 2010 (3) SA 382 (SCA), this court said the following (paras 89 and 90):

'89. Before concluding we are constrained to make the comments that follow. Piecemeal litigation is not to be encouraged. Sometimes it is desirable to have a single issue decided separately, either by way of a stated case or otherwise. If a decision on a discrete issue disposes of a major part of a case, or will in some way lead to expedition, it might well be desirable to have that issue decided first.

90. This court has warned that in many cases, once properly considered, issues initially thought to be discrete are found to be inextricably linked. And even where the issues are discrete, the expeditious disposal of the litigation is often best served by ventilating all the issues at one hearing. A trial court must be satisfied that it is convenient and proper to try an issue separately.' (Footnotes omitted.)

[68] The course followed by the litigants and the court below will no doubt result in protracted and cross-cutting litigation. So, for example, this judgment might be appealed to the Constitutional Court. The review application, if decided in favour of the DA, might result in Mr Motsoeneng no longer holding office, but that judgment might also be appealed, first to this court and then to the Constitutional Court. It might well have been in the interest of justice for the review application to have been heard expeditiously with that decision being determinative, either at High Court level or, ultimately, one of the appellate courts. The manner in which the matter was dealt with will lead to protraction and all the while the institution will have to endure the uncertainty that will follow.

[69] We appreciate that we were called upon to adjudicate only that part of the relief sought in part A of the notice of motion. However, part A is not a hermetically sealed enquiry and because of the manner in which the litigation was conducted we were obliged to range beyond it to a consideration of some matters upon which the High Court is yet to finally pronounce. In determining whether a suspension order was apt, it was necessary for us to consider, at least on a prima facie basis, as was done by the court below, matters pertaining to part B of the notice of motion. For, it must be accepted that the suspension order could only issue if there were prospects of success in relation to part B. That is not to suggest that we have made any final decisions in relation to the review application nor have we pre-empted any decision that the High Court might in due course be called upon to make, including those that relate to relevant Ministerial decisions and their proper classification.[44]

[70] It follows for all of the aforesaid reasons that the appeal must fail.

The appeal is accordingly dismissed with costs including the costs attendant upon the employment of two counsel.

M S Navsa

Judge of Appeal

V M Ponnan

Judge of Appeal

Appearances:

For First Appellant:
N H Maenetje SC (with him H Rajah)

Instructed by:

Mchunu Attorneys, Cape Town
Bokwa Attorneys, Bloemfontein

[44] See in this regard *Minister of Defence and Military Veterans v Motau & others* [2014] ZACC 18; 2014 (5) SA 69 (CC).

For Second Appellant:
V Maleka SC (with him K Pillay)

Instructed by:

State Attorney, Cape Town State Attorney, Bloemfontein

For Third Appellant:
N M Arendse SC (with him S Fergus)

Instructed by:

Majavu Inc, Johannesburg Rampai Attorneys, Bloemfontein

For First Respondent:
A Katz SC (with him N Mayosi and M Bishop)

Instructed by:

Minde Schapiro & Smith, Cape Town Symington & de Kok, Bloemfontein

For Seventh Respondent:

G Marcus SC (with him E Labuschagne SC and N Rajab-Budlender)

Instructed by:

Adams & Adams, Pretoria Honey Attorneys, Bloemfontein

For Amicus Curiae:

C Steinberg (with her L Kelly) (Heads of argument prepared by W Trengove SC and C Steinberg and L Kelly)

Instructed by:

Cliffe Dekker Hofmeyr, Johannesburg Matsepes Inc, Bloemfo

THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CONSTITUTIONAL PETITION NO. 10 OF 2012

KIKONDA BUTEMA FARM LTD========== PETITIONER

VERSUS

ATTORNEY GENERAL========== RESPONDENT

CORAM: HON MR. JUSTICE REMMY KASULE, JA

HON.MR.ELDAD MWANGUSYA, JA

HON. LADY JUSTICE FAITH MWONDHA, JA

HON. MR. JUSTICE KENNETH KAKURU, JA

HON. MR. JUSTICE GEOFREY KIRYABWIRE, JA.

JUDGEMENT OF THE COURT

This petition is stated to have been brought under **Articles 50 (1)** and **(2)** and 137 of the Constitution and the Constitutional Court (Petitions and References) Rules 2005 Statutory Instrument No. 91 of 2005.

At the hearing of this petition Mr. Peter Mulira appeared for the petitioner while Mr. Elisha Bafirawala Senior State Attorney appeared for the respondent. This petition has a long and checkered history, which we have endeavored to summarize as follows:

The petitioner is a limited liability company that was incorporated in Uganda on 4th December, 1967 as Kikonda Butema Tobacco Farm Ltd. The name was changed on the 30th August 1969 to Kikonda Butema Farm Ltd. It was incorporated with a nominal share capital of Sh. 100,000/= divided into 1000 nominal shares. It had 18 shareholders all of them it appears at least from their names were of Asian origin or decent, save for one Saulo Mahon Lubega, who held 180 shares. He was the largest single shareholder in the company. The said Mr. Saulo Mohan Lubega passed away in 1968, and his shares were inherited by his widow Mrs. Florence Lubega in accordance with his will.

When the Asians were expelled by the Military Government in 1972-1973, the government took over the farm and handed it over to the Ministry of Agriculture, to manage it. The land on which the company carried its activities did not belong to it, but to Mr. Saulo Mahon Lubega, on a 40 year lease from one Mr. Wamala, the mailo land owner, with effect from 1968. It is registered as Leasehold Register Volume 679, Folio 13 Plot 3 Singo.

This farm remained in the hands of the government until 3rd November 1989 when it was handed over to Mrs. Lubega, through the District Executive Secretary, Mubende. That same year Mrs. Lubega lodged a claim for compensation to government for the value of agricultural equipment and vehicles which were allegedly at the farm at the time of takeover of the farm by the Military Government.

In 1983, the Asian shareholders, or at least some of them had also submitted their claims for compensation for their shareholding in the company to the government through the Departed Asian's Property Custodian Board.

Mrs. Lubega's claim was for Shs. 1,084,787,837/=. The claim was submitted to the Secretary to the Treasury, which was then forwarded to the Solicitor General for verification and approval.

The claim was appraised and the Attorney General approved an *ex-gratia* payment of Shs. 100 Million which amount was based on a recommendation by the then Ministry of Finance, Planning and Economic Development. It was communicated to the Solicitor General by the Secretary to the Treasury that the payment was in full and final settlement of the claim, by a letter dated 1st August 1994. She was duly paid sometime thereafter.

On 11th February 2000, Mrs. Florence Lubega submitted another claim through M/s Mulira & Co Advocates for the "full value of the farm's equipment". The claim was for Ss. 2,325,406,727/= being the value of equipment, vehicles and interest.

Interestingly one Mr. Joseph Matsiko, a senior State Attorney at the Attorney General's chambers recommended another *ex-gratia* payment of Shs.1,084,707,837/= to be paid to Mrs. Lubega. The then Ag. Solicitor General Mr. Tibaruha went ahead to recommend Shs.1,084,564,637/= as compensation to Mrs. Lubega. The Attorney General approved the payment. He however recommended that the payment be made to the petitioner and NOT to Mrs. Lubega as an individual.

The above decision was communicated to M/s Mulira & Company Advocates counsel for both Mrs. Lubega and the petitioner, this was on 12th July 2001. By then a voucher of Shs. 500Million had already been approved as part payment of Shs. 1,084,564,637/=, approved claim.

Apparently someone, tipped the Inspectorate of Government about the impending payment, which that person indicated was doubtful.

On 20th July 2001, the Inspector General of Government under his own hand countermanded the said payment of Shs. 500 Million to the petitioner or Mrs. Lubega. The reason given in that letter, for the countermand was that the Inspectorate of Government had received a complaint in respect of the same. The letter was addressed to the Secretary to the Treasury and copied to the Director Banking, Bank of Uganda and also to the General Manager Orient Bank.

Following the countermand no payment was made. The Inspectorate of Government went ahead and investigated the matter. The findings are contained in a report which was communicated to the Attorney General in a letter dated 2nd November, 2011. The Attorney General re-considered the matter, following that report and in letter to the Inspector General of Government dated 19th February 2002, he rescinded the decision to pay the petitioner or Mrs. Lubega the claim of Shs.1,084,707,837/=.

The petitioner, then filed a suit at the High Court *vide* **Miscellaneous Application No. 593 of 2003 Kikonda Butema Farms Ltd vs. The Inspector General of Government**. The application sought to quash by way of *certiorari* the decision of the Inspector General of Government countermanding payment of Shs.500 Million to the petitioner. It also sought another such order of *certiorari* quashing the Inspector General of Government report on the matter.

In a lengthy, but well written and well reasoned judgment, His Lordship Justice Rubby Opio Aweri (J) (as he then was) dismissed the application on 15th December 2003. The learned judge upheld the IGG's report and its findings.

The petitioner then filed a suit at the High Court of Uganda at Nakawa, *vide* **High court Civil Suit No. 0250 of 2002, Kikonda Butema Farm Ltd vs. The Attorney General**. The claim in the suit was "for Shs. 1,015,437,537, being the value of the plaintiff's farm, machinery and equipment that were converted by the government" the suit was heard by Hon. Justice C.A Okello (J).

The High Court dismissed the suit after a full trial in a judgment dated 4th June 2003, which was delivered by a Deputy Registrar on 31st August 2004. Apparently, from the remarks made by the judge, the petitioner had in 2001 filed an application for leave to apply for prerogative orders, *vide* **High Court Miscellaneous Application No. 130 of 2001**, which was heard exparte and dismissed by Hon. Justice Katutsi. The petitioner then appealed to the Court of Appeal; *vide* **Court of Appeal Civil Appeal No. 35 of 2002**. The Court of Appeal allowed the application and sent back the matter for hearing *de novo*. It appears that this was the application that was heard and dismissed by Justice Opio-Aweri (J) (as he then was).

The petitioner then sought to appeal against the said judgment of Judge **C.A Okello** in **H.C.C.S No. 250 of 2002** referred to earlier. He was out of time. The petitioner then filed an application to the Court of Appeal seeking for extension of time within which to appeal *vide* **Court of Appeal Civil Application No. 86 of 2005**. This application was also dismissed on 21st February 2006. The petitioner later filed this petition on 12th February 2012.

This petition was brought under both **Articles 50** and **137** of the Constitution.

Article 50 is not applicable in petitions such as this one that seek Constitutional Interpretation. It deals exclusively with matters of enforcement of rights.

This petition can only be considered under the provision of **Article 137(1), (2)** and **(3)**.

The principles of constitutional interpretation are now well settled and we shall not belabor to reproduce them here. They are set out in detail in several judgments of this Court. We shall only reproduce them as they are summerised by Hon. Justice L.E.M. Kikonyogo, DCJ (as she then was) in the – **Foundation for Human Rights Initiatives vs. The Attorney General Constitutional Petition No. 20 of 2006**.

"In matters involving interpretation of the Constitution or determination of the Constitutionality of Acts of Parliament Courts are guided by well settled principles. One of the Cardinal principles in the interpretation of constitutional provisions and Acts of Parliament is that the entire Constitution must be read as an integrated whole and no one particular provision should destroy the other but sustain the other (See Tinyefuza vs. Attorney General Constitutional Petition No.1 of 1996"

Another important principle is that all the provisions concerning an issue should be considered together to give effect to the purpose of the instrument see ***SOUTH DAKOTA VS. NORTH CAROLINA 192, US 268, 1940 PED 448****.*

Thirdly the purpose and effect principles apply where the Court considers the purpose and effect of an Act of Parliament so as to determine its constitutionality ***The Queen vs. Big Drug Mark Ltd (1966) LRC (Const.) 332. Attorney General vs. Abuki, Constitutional Petition No. 1 of 1998****.*

Following the Constitution and in particular that part, which protects and entrenches Fundamental Rights and Freedoms, must be given a generous and purposive interpretation. ***Attorney General vs. Modern Jobe (1984) 689; Unity Dow vs. Attorney General of Botswana 1992 (L RC 662).****"*

In resolving this petition we have kept the above principles in mind. We have carefully listened and considered the address of both learned counsel and noted arguments, they have both advanced. We have also carefully perused the petition together with the accompanying affidavits and all the annextures thereto. We have noted with appreciation the authorities submitted by both counsel.

Both counsel submitted written conferencing notes which we have also carefully perused. We note however, that the parties did not file a joint conferencing memorandum.

The issues set out in the petitioner's conferencing notes, differ from the grounds set out in the petition. The petitioner attempted in the conferencing notes to bring up issues that do not arise from the petition. Issues for resolution should always arise from the grounds set forth in the petition itself. Otherwise such issues would have no basis.

The issues set out by the respondent in this conferencing notes also differ from those set out by the petitioner and do not address all grounds in the petition.

We shall therefore proceed to resolve this petition following the grounds that are set out in the petition and the respondent's reply thereto.

Mr. Peter Mulira learned counsel for the petitioner argued that under **Article 119(a)** of the Constitution the Attorney General is enjoined to represent the Government in Courts of law and any other legal proceedings to which government is a party.

That the Inspectorate of Government is a government department and not an autonomous legal entity following the judgment of the Supreme Court in the case of **Gordon Sentiba vs. The Inspectorate of Government**. That **Article 119(3)** makes the Attorney General the principal legal adviser of the Government and its advice is binding on all government departments including the Inspector General of Government. That the Attorney General having advised government to pay compensation to the petitioner the act of the Inspector General of Government (hereinafter referred to as the IGG) stopping or countermanding that payment was unconstitutional.

He argued that Article 230 of the Constitution does not give the IGG general powers in form of an injunction against government, that the IGG is not a fire fighter or a Policeman, he is an official who is there to preserve public interest against corrupt government officials. He concluded that the power granted to the IGG under Article 231 are only in respect of corruption and abuse of office and that there was no alleged corruption or abuse of office involving the petitioner or its claim. Mr. Mulira went on to submit that once the Attorney General has given his opinion no other government department can go against that opinion, including the IGG since the Inspectorate of Government is also a government department. He referred us to the public service standing orders which he argued are to the effect that Attorney General's decision is final. That the report of the IGG is void in as far as it seeks to nullify the opinion of the Attorney General, in a matter where there was no allegation of corruption, abuse of authority or abuse of public office. Such an act by the IGG he contended contravened Article 230 of the Constitution.

Mr. Bafirawala in response submitted that the petition was incompetent and an abuse of Court process. That the matters raised in the Petition were

res judicata. That they had been adjudicated upon in a number of other suits and determined. That the petitioner was trying to re-open the case by disguising it as a constitutional petition.

He submitted that stopping of the payment of Shs. 500 Million to the petitioner was done by the IGG to as mandated under **Article 225(1) (e)** of the constitution which gives him a duty and authority to investigate any

act, omission or advice or recommendation by a public officer or any authority to which that Article applies.

That the IGG had received a complaint in which it was alleged that the respondent had been paid Shs.100Million *ex-gratia* upon the advice of the Attorney General as full and final settlement of its claim. Subsequent to that the Shs.500Million had been authorized by same office of the Attorney General and was about to be paid to the petitioner. He argues that the Constitution grants power to the IGG to investigate "*any acts, omissions and or advice"* and that is what the IGG did. That the IGG could not just have sat back and waited for public funds to be paid out under unclear circumstances. He had to countermand the payment and commence investigations.

He asserted that the IGG was justified in countermanding the payment. He referred us to the opinion of the late Ayume the former Attorney General which reversed the earlier opinion of the Attorney General to pay the petitioner and to the affidavit of Mr. Nyombi the current Attorney General which also agrees with that of late Ayume that there was no basis for paying the petitioner any more money.

He then submitted that the IGG is mandated to issue statutory biannual reports to Parliament but also has a duty to make routine reports on other matters under investigation, by his office.

The petition set out five grounds and we shall have them resolved in the order they are set out in the petition.

Ground one states as follows:-

> *1(a) That the act of the Inspector General of Government in stopping payment to the petitioner of Shs. 1,084,707,837 after the Attorney General had advised the Ministry of Finance to pay the said compensations was inconsistent with Article 26(2) (b) of the Constitution in that it contravened the petitioner's right to adequate compensation.*

We do not find anything in the above ground that requires the interpretation of the Constitution by this court. The petitioners seem to be complaining of an infringement of a right to adequate compensation. Enforcement of rights is provided for under **Article 50** of the Constitution which stipulates as follows:-

> *50(1) Any person who claims that a fundamental right or other right or freedom guaranteed under this Constitution has been infringed or threatened is entitled to apply to a competent Court for redress which may include compensation.*

We agree with the reasoning of Hon. S.W.W. Wambuzi, CJ (as he then was) in **Ismail Serugo vs. Kampala City Council and The Attorney General Constitutional Appeal No. 2 of 1998** where he stated as follows:-

> *"In my view for the constitutional court to have jurisdiction the petition must show on the face of it that interpretation of the Constitution is required. It is not enough to allege merely that a constitutional provision has been violated. If therefore any rights have been violated as claimed, they are enforceable under Article 50 of the Constitution by another competent court".*

This court has held that a competent court for the purpose of Article 50 is the High Court. This Court may also enforce rights under **Article 137** of the Constitution, however in that case there must first exist an issue for the interpretation of the constitution.

This is how this issue was ably explained by Hon. S.W.W. Wambuzi, CJ in the **Serugo case** (supra).

> *"Here the appellant alleges his rights were being violated and claims compensation. One cannot rule out malicious prosecution, wrongful detention or false imprisonment. There are matters dealt with under specific laws. They can be enforced by a competent court and should a question of interpretation of a provision of the Constitution arise that question can always be referred to the Constitutional Court. I am aware that the constitutional court is also a competent court under Article 50 but this court has already held that the constitutional court has no jurisdiction in any matter which does not involve the interpretation of the Constitution. See Attorney General vs. David Tinyefuza, Constitutional Appeal No. 1 of 1997"*

We agree entirely with the above proposition of the law, in any event we are bound to follow it. The issues raised in ground one should have been resolved by a suit instituted in a competent court. Indeed that is what exactly happened, when the petitioner filed **High court Civil Suit No. 0250 of 2002 Kikonda Butema Farm Ltd vs. The Attorney General**.

In this suit the petitioner was claiming "Shs. 1,015,437,537 being the value of the plaintiffs farm, machinery and equipment that were converted by the government". All the issues raised in this petition and specifically those raised in ground one were raised in the suit. The suit was heard interparties evidence was adduced, and the claim was dismissed.

The petitioner had also made another attempt to have the decision of the IGG complained of in ground one quashed by way of certiorari *vide* **High Court Miscellaneous Application No. 593 of 2003 , Kikonda Butema Farm Ltd vs. The Inspector General of Government.** The application was dismissed. We find that ground one does

not raise any question for Constitutional Interpretation by this Court. We also find that the issues raised in that ground have already been determined by the High court.

Accordingly this ground must fail.

GROUND 2: This ground is set out in the petition as follows:-

> (b) *That the act of the Inspector of Government in stopping the said payment was inconsistent with Article 230 (2) of the Constitution in that it did not result from an investigation within the meaning of Article 230 (1) of the constitution.*

The argument of Mr. Mulira, learned counsel for the petitioner, as we understood it, is that the IGG's power set out in **Article 230 (1)** must result from investigations of cases involving corruption, abuse of authority or of public office. That the act of the IGG stopping the payment was not resulting from any investigations and as such contravened **Article 230 (1)** of the Constitution.

An investigation is not a single event, but a series of invents and transactions that often last a long period of time. The stopping of payment is such a one event in a series of many others that constitute investigations.

In any event this was one of the issues in the case that were instituted at the High Court above mentioned. We find that the act of the IGG complained of in ground 2 did not in any way contravene **Article 230 (2)** nor was his action of stopping the payment to the petitioner inconsistent with the Constitution. That act complained of by the petitioner was clearly envisaged under **Article 230(1)** and 230 (2) of the Constitution. The very reason why the Constitution granted the IGG special power under **Article 230** was to enable him do exactly what he did in this case.

The IGG is not an ordinary ombudsman as Mr. Mulira seems to suggest. The authorities submitted are distinguishable. They relate to the ordinary and general powers of an ombudsman. Under the Constitution of Uganda the IGG is not an ordinary ombudsman. The Constitution itself clearly sets out general functions of the IGG under **Article 225**. However the Inspectorate of Government is granted special jurisdiction under **Article 226** as an independent body not subject to the direction or control of any person or authority and only responsible to Parliament under **Article 227**.

We hasten to add here that **Article 227** makes it independent of the office of Attorney General.

Article 230 the Constitution grants the Inspectorate of Government special powers, to investigate, cause investigation, arrest, cause arrest, prosecute or cause prosecution of cases involving corruption, abuse of authority or of public office. It is this special power that the IGG invoked to countermand the payment to the petitioner. We find that in doing so the IGG did not contravene any provision of the constitution.

Ground two must also fail, as it is devoid of any merit.

GROUND 3 states as follows:-

> *"That a report by the Inspector General of Government to the Attorney General and to the petitioner was inconsistent with Article 231 of the Constitution".*

We are at loss as to what the petitioner seeks this court to interpret under the ground 3 as framed above. Clearly there is nothing that requires interpretation here.

Mr. Mulira, submitted that under **Articles 231** the IGG is required to submit a report only to Parliament. And that it is the only report he can make and submit under the Constitution. That the report complained of in this petition was not such a report as envisaged under **Article 231** and therefore it was inconsistent with that Article.

We cannot agree with that argument at all. The functions of the IGG under **Articles 225, 226 and 230** all envisage and entail writing of various reports. Suffice it to say the work of the IGG requires and involves report writing. The report to parliament is one of such reports, but certainly not the only one.

This ground has no merit and it must fail.

Ground 4, states as follows:-

> *(d) That the review by the Inspector General of government of a legal opinion given by the Attorney General to a Government department in his constitutional capacity as Chief Legal Advisor to government contravened Articles 119(3), 225(1) (e) and 226 (2) (b) of the Constitution.*

We shall resolve the above ground together with ground 5 which states as follows:-

> *(e) That the purported review by the Inspector General of Government of his predecessor's decision after it had been acted upon by a department of government was inconsistent with Articles 119(3) of the Constitution.*

Mr. Mulira's argument is, that under **Article 119 (3)** of the Constitution the Attorney General is the principal legal advisor of the Government. That the Inspectorate of Government is not an autonomous body but it is a government department and as such it is bound to follow and implement the legal advice of the Attorney General in all matters. That the letter of the IGG countermanding the cheque to the petitioner and the subsequent report on the matter, amount to review or reversal of the Attorney General's advice and therefore to that extent those acts contravened **Articles 119 (3), 225 (1) (e)** and **226 (2) (b)** of the Constitution.

For clarity we have reproduced the above mentioned Articles of the Constitution:-

"119 (3) The Attorney General shall be the principal legal advisor of the government.

225 (1) The functions of the Inspectorate of Government shall be prescribed by Parliament and shall include the following:-

(e) to investigate any act, omission, advice, decision or recommendation by a public officer or any other authority to which this article applies, taken, made, given or done in exercise of administrative functions;"

There is no such an Article as **226(b)** mentioned in ground 5 of the petition above in the Constitution. It could have been a slip of the pen. The conferencing notes were not helpful in this regard as no mention is made therein of any such article of the Constitution. We are left with no option but to ignore it.

In support of the above grounds Mr. Mulira relied on the authority of **Bank of Uganda vs. Banco Arabe Espanol SCCA No. of 2001** in which Hon. G.W. Kanyeihamba JSC (as he then was) held as follows:

> *"In my view, the opinion of the Attorney General as authenticated by his own hand and signature regarding the laws of Uganda and their effect or binding nature on any agreement, contract or other legal transaction should be accorded the highest respect by government and public institutions and their agents. Unless there are other agreed conditions, third parties are entitled to believe and act on that opinion without any further inquiries or verifications. It is also my view that it is improper and untenable for the government, the Bank of Uganda or any other public institution or body in which the Government of Uganda has an interest, to question the correctness or validity of that opinion in so far as it affects the rights and interests of third parties"*

With all due respect to learned counsel for the petitioner we are unable to agree that this authority applies in this particular case. The circumstances of this case are very different.

First and foremost the opinion of Attorney General which was reviewed by the IGG as set out is ground 4 was itself later reviewed and reversed by the Attorney General himself. The affidavit of the Hon. The Attorney General Hon. Peter Nyombi sworn in support of the respondent's answer to the petition on 27th March 2012 clarifies on this matter.

The Attorney General states in paragraph 8 of his affidavit that

> *"the second claim was surprisingly considered by the Attorney General's chambers, contrary to Attorney General's decision of 4th August 1994".*

The Hon the Attorney General had reversed the earlier decision based on the IGG's report following investigations on the matter. The Attorney General's letter was addressed to the IGG. It was copied to the Ministry of Finance, The Minister of Justice, The Minister in charge of the Presidency, The Minister of ethics and Integrity, among others.

If the argument is that a government department should comply with the Attorney General's opinion then it is this opinion contained in the letter of 4th August 1994 they should have complied with. And they did comply by stopping the payment.

It is indeed a curious proposition of the law that the IGG cannot question the Attorney General's opinion. Mr. Mulira relied on the provision of the Public Service Act and standing orders issued by the Minister under the act, which are to the effect that "The Attorney General's Opinion expressed personally or through the Solicitor General is final".

It is important to note that the Public Service Act is 1969 Act. The IGG's office was only created as a constitutional office in the 1995 Constitution. The Public Service Act must therefore be construed in conformity with the Constitution as provided for under **Article 274**.

Mr. Mulira cited **H.W.R. Wade an Administrative Law 8th Edition P.88** where the learned author states as follows:

> *"An ombudsman requires no legal powers except powers of inquiry. In particular he is in no sense a Court of Appeal and he cannot alter or reverse any government decision. His effectiveness derives entirely from his power to focus on public and Parliamentary attention upon citizen's grievances*"

This is true of the powers of an ombudsman in England and may be other common law jurisdictions, but not in Uganda. In Uganda the ombudsman was elevated by the 1995 Constitution to a Constitutional Office with special powers. The functions of the IGG as set out in the Constitution go far beyond the ordinary common law functions of ombudsman. The authority cited is therefore not applicable in Uganda.

Article 230 which sets out the special powers of IGG stipulates as follows:-

"230

1). ***The Inspectorate of Government shall have power to investigate cause investigation, arrest, cause arrest, prosecute or cause prosecution in respect of cases involving corruption, abuse of authority or of public office.***

2). The Inspector General of Government may, during the course of his or her duties or as a consequence of his of her findings, make such orders and give such directions as are necessary and appropriate in the circumstances.

3). Subject to the provisions of any law, the Inspectorate of Government shall have power to enter and inspect the premises or property of any department of Government, persons or of any authority, to call for examine and where necessary, retain any document or item in connection with the case being investigated, found on the premises; and may in those premises, carry out any investigation for the purpose of its functions.

4). The Inspectorate of Government shall when enforcing the leadership Code of Conduct, have all the powers conferred on it by this Chapter in addition to any other powers conferred by law.

5). Subject to this Constitution, Parliament shall enact any law necessary for enabling the Inspectorate of Government to discharge its functions effectively and efficiently and, in particular, to ensure that the discharge of those functions is not frustrated by any person or authority."

Clearly from the above provisions of the Constitution the IGG has powers to review or reverse any opinion including that of the Attorney General where he finds it necessary to do so, or where the circumstances of the case so require. In this particular case however, IGG did not review the decision of the Attorney General. He directed the Secretary to the treasury to stop a questioned payment until he had investigated the matter. This was well within his powers, as set out in **Article 230** of the Constitution.

Indeed when the matter was investigated and a report made, the Attorney General did reverse his own decision upon reading the IGG's report on the matter.

Mr. Mulira argued that the purported review by the Inspector General of Government of his predecessor's decision after it and been acted upon by a department of government was inconsistent with **Articles 119 (3)** of the Constitution.

We have found nothing in the petition or the accompanying affidavit to suggest that the Inspector General of Government ever reviewed his predecessor's decision, as alleged in that ground.

We find this ground to be misconceived. Even if the ground had referred to the Attorney General and not the IGG, we would still have held that the Attorney General can review his decision or even reverse it even if third parties had acted on it. To hold otherwise would be to create an absurdity, where opinions of Government once made and acted upon cannot be reversed. If a party is aggrieved by the review of any decision, we think it would be well within that party's right to seek legal redress in any competent Court of Law to enforce him or her rights but not to seek an interpretation of the constitution. There is nothing requiring constitutional interpretation.

Both grounds 4 and 5 must therefore fail as they are misconceived and devoid of any merit.

The respondent had raised in defence the issue of *res-judicata*. That all the matters raised in this petition had been litigated upon before and determined by Courts of Competent Jurisdiction. We agree that in ordinary cases this matter would have been *res judicata*.

However since the constitutionality of this matter had not been raised in any of the said cases and since it is only this court that is seized with the original jurisdiction over the interpretation of the Constitution, we find that *res judicata* does not apply in this case.

The only aspect of this claim that had not been determined was the constitutionality of the acts of the IGG. This has now been settled.

This petition therefore fails and is accordingly dismissed with costs.

Dated at Kampala this.....08th ..... day of..... November..... 2013.

.....

HON. MR. JUSTICE REMMY KASULE

JUSTICE OF APPEAL/CC.

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HON. MR.JUSTICE ELDAD MWANGUSYA

JUSTICE OF APPEAL/CC.

.....

HON. LADY JUSTICE FAITH E.K. MWONDHA

JUSTICE OF APPEAL/CC.

.....

HON. MR. JUSTICE KENNETH KAKURU

JUSTICE OF APPEAL/CC.

.....

HON. MR. JUSTICE GEOFREY KIRYABWIRE

JUSTICE OF APPEAL/CC.

RELEVANT STATUTES

Relevant Statutes Contents

LAWS OF KENYA

THE COMMISSION ON ADMINISTRATIVE JUSTICE ACT

No. 23 OF 2011

Published by the National Council for Law Reporting

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THE COMMISSION ON ADMINISTRATIVE JUSTICE ACT, 2011

No. 23 of 2011

Date of Assent: 27th August, 2011

Commencement: 5th September, 2011

ARRANGEMENT OF SECTIONS

Section

THE COMMISSION ON ADMINISTRATIVE JUSTICE ACT, 2011

AN ACT of Parliament to restructure the Kenya National Human Rights and Equality Commission and to establish the Commission on Administrative Justice pursuant to Article 59(4) of the Constitution; to provide for the membership, powers and functions of the Commission on Administrative Justice, and for connected purposes.

ENACTED by the Parliament of Kenya, as follows—

PART I—PRELIMINARY

Short title.

1. This Act may be cited as the Commission on Administrative Justice Act, 2011.

Interpretation.

2. (1) In this Act, unless the context otherwise requires—

"administrative action" means any action relating to matters of administration and includes –

(*a*) a decision made or an act carried out in the public service;

(*b*) a failure to act in discharge of a public duty required of an officer in public service ;

(*c*) the making of a recommendation to a Cabinet Secretary; or

(*d*) an action taken pursuant to a recommendation made to a Cabinet Secretary;

"Cabinet Secretary" means the Cabinet Secretary for the time being responsible for matters relating to public service;

"chairperson" means the chairperson appointed in accordance with section 11;

"Commission" means the Commission on Administrative Justice established under section 3;

"Public Complaints Standing Committee" means the public Complaints Standing Committee established by Gazette Notice No.5826 of 29th June 2007;

"public office" has the meaning assigned to it under Article 260 of the Constitution;

"public officer" has the meaning assigned to it under Article 260 of the Constitution;

"secretary" means the secretary to the Commission appointed by the Commission under Article 250(12) of the Constitution in accordance with the procedure set out in section 22;

(2) Despite subsection (1), until after the first elections under the Constitution, references in this Act to the expression "Cabinet Secretary" shall be construed to mean "Minister.

PART II—ESTABLISHMENT AND STATUS OF COMMISSION

Establishment of the Commission.

3. (1) There is established a Commission to be known as the Commission on Administrative Justice.

(2) The Commission shall be the successor to the Public Complaints Standing Committee existing immediately before the coming into force of this Act.

Status of successor Commission.

4. For the avoidance of doubt, the Commission shall be a Commission within the meaning of Chapter Fifteen of the Constitution and shall have the status and powers of a Commission under that Chapter.

Powers of Commission as a body corporate.

5. In addition to the powers of a Commission under Article 253 of the Constitution, the Commission shall have power to—

(*a*) acquire, hold, charge and dispose of movable and immovable property; and

(*b*) do or perform all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may lawfully be done or performed by a body corporate.

Headquarters.

6. The headquarters of the Commission shall be in the capital city, but the Commission may establish branches at any place in Kenya.

Guiding principles of Commission.

7. In fulfilling its mandate, the Commission shall act in accordance with the values and principles set out in the Constitution and the laws of Kenya, and shall observe and respect-

(a) the diversity of the people of Kenya;

(b) impartiality and gender equity;

(c) all treaties and conventions which have been ratified by Kenya and in particular the fact that human rights are indivisible, interdependent, interrelated and of equal importance for the dignity of all human beings; and

(d) the rules of natural justice.

Functions of the Commission.

8. The functions of the Commission shall be to—

a. investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;

b. investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;

c. report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;

d. inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehavior, inefficiency or ineptitude within the public service;

e. facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;

f. work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;

g. (g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;

h. (h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;

i. (i) publish periodic reports on the status of administrative justice in Kenya;

j. (j) promote public awareness of policies and administrative procedures on matters relating to administrative justice;

k. take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;

l. work with the Kenya National Commission on Human Rights to ensure efficiency, effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and

m. perform such other functions as may be prescribed by the Constitution and any other written law.

Membership of Commission.

9. The Commission shall consist of a chairperson and two other members appointed in accordance with the Constitution and the provisions of this Act.

Qualifications for appointment of chairperson and members.

10. (1) A person shall be qualified for appointment as the chairperson of the Commission if the person-

a. has knowledge and at least fifteen years experience in matters relating to human rights, law, conflict resolution, arbitration or administrative justice;

b. holds a degree from a university recognized in Kenya; and

c. meets the requirements of Chapter Six of the Constitution.

(2) A person shall be qualified for appointment as a member of the Commission if the person-

a. holds a degree from a university recognized in Kenya;

b. has knowledge and at least ten years' experience in matters relating to any of the following fields-

(i) law;

(ii) public administration;

(iii) economics or finance;

(iv) gender and social development;

(v) human rights;

(vi) conflict resolution;

(vii) management; or

(viii) social sciences;

c. has had a distinguished career in their respective fields; and

d. meets the requirements of Chapter Six of the Constitution.

(3) A person shall not be qualified for appointment as the chairperson or a member of the Commission if such person—

a. is a member of Parliament or a County Assembly;

b. is a member of the governing body of a political party;

c. is a member of a local authority;

d. is an undischarged bankrupt; or

e. has been removed from office for contravening the provisions of the Constitution or any other law.

Procedure for appointment of chairperson and members.

11. (1) The President shall, within fourteen days of the commencement of this Act convene a selection panel for the purpose of selecting suitable candidates for appointment as the chairperson or member of the Commission.

(2) The selection panel convened under subsection (1) shall consist of one person from each of the following bodies representatively—

a. Office of the President;

b. Office of the Prime Minister;

c. Ministry responsible for matters relating to justice;

d. Public Service Commission;

e. the Association of Professional Societies in East Africa; and

f. the National Council for Persons with Disabilities.

(3) The selection panel shall, subject to this section, determine its own procedure and the Ministry responsible for Public Service shall provide it with such facilities and other support as it may require for the discharge of its functions.

(4) The selection panel shall, within seven days of its convening, invite applications from qualified persons and publish the names and qualifications of all applicants in the Gazette and two daily newspapers of national circulation.

(5) The selection panel shall, within seven days of receipt of applications under subsection (4), consider the applications, interview and shortlist at least three persons qualified for appointment as chairperson and five persons qualified for appointment as members of the Commission, and shall forward the names of the selected candidates to the President for nomination.

(6) Until after the first general election after the commencement of this Act, the President in consultation with the Prime Minister shall, within seven days of receipt of the names forwarded under subsection (5), nominate one person for appointment as chairperson and two persons for appointment as members of the Commission, and shall forward the names of the persons nominated to the National Assembly.

(7) The National Assembly shall, within twenty-one days of the day it next sits after receipt of the names of the nominees under subsection (6), consider all the nominations received and approve or reject any nomination.

(8) Where the National Assembly approves the nominees, the Speaker shall, forward the names of the approved persons to the President for appointment.

(9) The President shall, within seven days of the receipt of the approved nominees from the National Assembly, by notice in the Gazette, appoint the chairperson and members approved by the National Assembly.

(10) Where the National Assembly rejects any nomination, the Speaker shall, within three days, communicate the decision of the National Assembly to the President to submit fresh nominations.

(11) Where a nominee is rejected by Parliament under subsection (10), the President in consultation with the Prime Minister shall, within seven days, submit to the National Assembly a fresh nomination from amongst the persons shortlisted and forwarded by the selection panel under subsection (5).

(12) If Parliament rejects all or any subsequent nominee submitted by the President for approval under subsection (11), the provisions of subsections (5) and (6) shall apply.

(13) In short listing, nominating or appointing persons as chairperson and members of the Commission, the selection panel the National Assembly and the President shall ensure that not more than two-thirds of the members are of the same gender, shall observe the principle of gender equity, regional and ethnic balance and shall have due regard to the principle of equal opportunities for persons with disabilities.

(14) After the first elections after the commencement of this Act, the member of the selection panel specified under subsection (2) (b) shall be replaced by a representative of the Public Service Commission.

(15) Despite the foregoing provisions of this section, the President, in consultation with the Prime Minister may, by notice in the Gazette, extend the period specified in respect of any matter under this section by a period not exceeding twenty-one days.

Oath of office.

12. The chairperson, members and the secretary shall each make and subscribe, before the Chief Justice, the oath or affirmation set out in the First Schedule.

Powers of the chairperson.

13.(1) The chairperson shall, within seven days of the appointment of the members, convene the first meeting of the Commission at which the members shall elect the vice-chairperson of the Commission from amongst the members.

(2) The chairperson shall—

(*a*) preside over all meetings of the Commission;

(*b*) be the spokesperson for the Commission; and

(*c*) supervise and direct the work of the Commission.

(3) If the office of chairperson become vacant or if the chairperson is unable to exercise the powers or perform the functions of his office owing to absence, illness or any other cause, the vice-chairperson shall exercise those powers or perform those functions**.**

Tenure of office.

14. (1) The chairperson and members of the Commission shall be appointed for a single term of six years and are not eligible for re-appointmen**t.**

(2) The chairperson and members of the Commission shall serve on a full-time basis.

Vacancy of office of chairperson and members.

15. (1) The office of the chairperson or a member of the Commission shall become vacant if the holder—

(*a*) dies;

(*b*) by notice in writing addressed to the President resigns from office;

(c*)* is removed from office under any of the circumstances specified in Article 251 and Chapter Six of the Constitution.

(2) The President shall notify every resignation, vacancy or termination in the Gazette within seven days.

Removal from office.

16. The chairperson or member of the Commission may be removed from office in accordance with Article 251 of the Constitution.

Filling of vacancy.

17. (1) Where a vacancy occurs in the membership of the Commission under section 15 or 16, the appointment procedure provided for under this Act shall apply.

(2) A member appointed under subsection (1) to fill a vacancy shall serve for a term of six years but shall not be eligible for reappointment.

Committees of the Commission.

18. (1) The Commission may, from time to time establish, committees for the better carrying out of its functions.

(2) The Commission may—

(*a*) co-opt into the membership of a committee established under subsection (1), other persons whose knowledge and skills are necessary for the functions of the Commission;

(*b*) hire such experts or consultants as are necessary for the functions of the Commission.

Procedures of the Commission.

19. (1) The business and affairs of the Commission shall be conducted in accordance with the Second Schedule.

(2) Except as provided in the Second Schedule, the Commission may regulate its own procedure.

Terms and conditions of service.

20. The salaries and allowances payable to, and other terms and conditions of service of the chairperson and members of the Commission shall be determined by the Salaries and Remuneration Commission.

Appointment of secretary.

21. (1) The appointment of the secretary to the Commission under Article 250 (12) of the Constitution shall be through a competitive recruitment process.

(2) A person shall be qualified for appointment as a secretary to the Commission if the person –

(*a*) is a citizen of Kenya;

(*b*) holds a degree from a university recognized in Kenya;

(*c*) has had at least ten years proven experience at management level; and

(*d*) meets the requirements of Chapter Six of the Constitution.

(3) The secretary shall be the chief executive officer of the Commission and head of the secretariat and shall be responsible to the Commission.

(4) The secretary shall hold office for a term of five years and shall be eligible for re-appointment for a further term of five years.

Removal of secretary.

22. (1) The secretary may be removed from office by the Commission in accordance with the terms and conditions of service for—

(*a*) inability to perform the functions of the office of secretary arising out of physical or mental incapacity;

(*b*) gross misconduct or misbehavior;

(*c*) incompetence or neglect of duty;

(*d*) violation of the Constitution; or

(*e*) any other ground that would justify removal from office under the terms and conditions of service.

(2) Before the secretary is removed under subsection (1), the secretary shall be given—

(*a*) sufficient notice of the allegations made against him or her; and

(*b*) an opportunity to present his or her defence against the allegations.

Appointment of staff.

23. (1) The Commission may appoint such staff as may be necessary for the proper discharge of its functions under this Act, and upon such terms and conditions of service as the Commission may determine.

(2) The staff appointed under subsection (1) shall serve on such terms and conditions as the Commission, in consultation with the Salaries and Remuneration Commission, may determine.

(3) The Government may, upon request by the Commission, second to the Commission such number of public officers as may be necessary for the proper performance of the functions of the Commission.

(4) A public officer seconded to the Commission shall, during the period of secondment, be deemed to be an officer of the Commission and shall be subject only to the direction and control of the Commission.

The common seal of the Commission.

24. (1) The Common seal of the Commission shall be kept in such custody as the Commission shall direct and shall not be used except on the order of the Commission.

(2) The common seal of the Commission when affixed to a document and duly authenticated shall be judicially and officially noticed and, unless the contrary is proved, any necessary order or authorization of the Commission under this section shall be presumed to have been duly given.

Protection from personal liability.

25. No matter or thing done by a member of the Commission or any officer, employee or agent of the Commission shall, if the matter or thing is done in good faith while executing the functions, powers or duties of the Commission, render the member, officer, employee or agent personally liable for any action, claim or demand whatsoever.

General powers of Commission.

26. In addition to the powers conferred in Article 252 of the Constitution, the Commission shall have power to -

(*a*)issue summons as it deems necessary for the fulfillment of its mandate;

(*b*) require that statements be given under oath or affirmation and to administer such oath or affirmation;

(*c*) adjudicate on matters relating to administrative justice;

(*d*) obtain, by any lawful means, any information it considers relevant, including requisition of reports, records, documents and any information from any person, including governmental authorities, and to compel the production of such information for the proper discharge of its functions;

(*e*)by order of the court, enter upon any establishment or premises, and to enter upon any land or premises for any purpose material to the fulfillment of the mandate of the Commission and in particular, for the purpose of obtaining information , inspecting any property or taking copies of any documents, and for safeguarding any such property or document;

(*f*) interview any person or group of persons;

(*g*) subject to adequate provision being made to meet his expenses for the purpose, call upon any person to meet with the Commission or its staff, or to attend a session or hearing of the Commission, and to compel the attendance of any person who fails to respond to a request of the Commission to appear and to answer questions relevant to the subject matter of the session or hearing.

Powers of a court.

27. In the performance of its functions under this Act, the Commission shall have the powers of a court to—

(*a*) issue summonses or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;

(*b*) question any person in respect of any subject matter under investigation before the Commission; and

(*c*) require any person to disclose any information within the person's knowledge relevant to any investigation by the Commission.

PART III— INVESTIGATIONS BY THE COMMISSION

Powers relating to investigations.

28. (1) The Commission may, for the purpose of conducting any investigation pertaining to an inquiry, employ the services of any public officer or investigation agency of the Government at the expense of the Commission.

(2) For the purpose of investigating any matter pertaining to an inquiry, a public officer or agency whose services are employed under subsection (1) may, subject to the direction and control of the Commission—

(*a*) summon and enforce the attendance of any person for examination;

(*b*) require the discovery and production of any document; and

(*c*) subject to the Constitution and any written law requisition any public records or copy thereof from any public officer.

(3) The provisions of section 40 shall apply in relation to any statement made by a person before any public officer or agency whose services are employed under subsection (1) as they apply in relation to any statement made by a person in the course of giving evidence before the Commission.

(4) The public officer or agency whose services are employed under subsection (1) shall investigate any matter pertaining to the inquiry and submit a report thereon to the Commission in that behalf.

(5) The Commission shall satisfy itself on the correctness of the facts stated and the conclusion, if any, arrived at in the report submitted to it under subsection (4) and for that purpose, the Commission may make such inquiry (including the examination of any person or persons who conducts or assists in the investigation) as it deems fit.

Jurisdiction in investigations.

29. (1) The Commission shall investigate any complaint, or on its own initiative, investigate any matter arising from the carrying out of an administrative action of—

(*a*) a public office;

(*b*) a state corporation within the meaning of the State Corporations Act(Cap. 446); or

(*c*) any other body or agency of the State.

(2) The Commission shall endeavor to resolve any matter brought before it by conciliation, mediation or negotiation.

(3) If the matter referred to under subsection (2) cannot be resolved by conciliation, mediation or negotiation and the Commission determines that the administrative action was carried out unjustly or unreasonably, the Commission shall make such recommendations as it deems fit.

Limitation of jurisdiction.

30. The Commission shall not investigate—

(*a*) proceedings or a decision of the Cabinet or a committee of the Cabinet;

(*b*) a criminal offence;

(*c*) a matter pending before any court or judicial tribunal;

(*d*) the commencement or conduct of criminal or civil proceedings before a court or other body carrying out judicial functions;

(*e*) the grant of Honours or Awards by the President;

(*f*) a matter relating to the relations between the State and any foreign State or international organization recognized as such under international law;

(*g*) anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to; or

(*h*) any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.

Power not limited by other provisions.

31. The Commission may investigate an administrative action despite a provision in any written law to the effect that the action is final or cannot be appealed, challenged, reviewed, questioned or called in question.

Complaints.

32. (1) A complaint to the Commission may only be made by the person aggrieved by the matter complained of or on his behalf as specified under subsection (2).

(2) A complaint may be made on behalf of an aggrieved person –

(*a*) if the aggrieved person is dead or otherwise not able to act for himself or herself, by a member of his or her family or other person suitable to represent the aggrieved person; or

(*b*) by a member of the National Assembly with the consent of the aggrieved person or other person who, under paragraph (*a*), is entitled to make the complaint on behalf of the aggrieved person.

Form of complaint.

33. (1) A person wishing to lodge a complaint under this Act may do so orally or in writing addressed to the secretary or such other person as may be duly authorised by the Commission for that purpose.

(2) Where a complaint under subsection (1) is made orally, the Commission shall cause the complaint to be recorded in writing.

(3) A complaint under subsection (1) shall be in such form and contain such particulars as the Commission may prescribe.

(4) Upon receipt of a complaint under subsection (1), the Commission may—

(*a*) call for information or a report regarding such complaint from any person within such reasonable time as may be specified by the Commission; and

(*b*) without prejudice to paragraph (*a*), initiate such inquiry as it considers necessary, having regard to the nature of the complaint.

(5) If the information or report called for under subsection 4(*a*) is not received within the time stipulated by the Commission, the Commission may proceed to inquire into the complaint without such information or report.

(6) If on receipt of the information or report the Commission is satisfied either that no further action is required or that the required action has been initiated by a State organ or other body responsible for the matters complained of, the Commission shall, in writing, inform the complainant accordingly and take no further action.

Discretion not to investigate.

34. The Commission may decline to investigate a complaint if the Commission considers that –

(*a*) there are in existence adequate remedies under any written law or administrative practice ; or

(*b*) the complaint is trivial, frivolous, vexatious or is not made in good faith.

Notice if complaint not investigated.

35. If the Commission decides not to investigate a complaint or to discontinue the investigation of a complaint, the Commission shall inform the complainant in writing of that decision and the reasons for the decision as soon as reasonably practicable.

Representations if adverse findings, etc.

36. The Commission shall give any person, State organ, public office or organization against whom an adverse finding or recommendation is made, an opportunity to make representations concerning the finding or recommendation before the Commission includes the finding in its report.

Notice of investigation to organization.

37. Before commencing an investigation under this Act, the Commission shall give notice of the intended investigation to the administrative head of the State organ, public office or organization to which the investigation relates.

Hearings of Commission.

38. The hearings of the Commission during an inquiry shall be open to the public, except where the Commission otherwise decides.

Persons likely to be prejudiced or affected to be heard.

39. (1) Subject to subsection (2),if at any stage of an inquiry the Commission—

(*a*) considers it necessary to inquire into the conduct of any person; or

(*b*) is of the opinion that the reputation of any person is likely to be prejudiced by the inquiry, it shall give that person an opportunity to appear before the Commission by himself or by an advocate to give evidence in his own defence.

(2) This section shall not apply where the credibility of a witness is being impeached.

Statements made by persons to the Commission.

40. No statement made by a person in the course of giving evidence before the Commission shall subject such person to any civil or criminal proceedings except for giving false evidence by such statement.

Action after inquiry.

41. The Commission may, upon inquiry into a complaint under this Act take any of the following steps–

(*a*) where the inquiry discloses a criminal offence, refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons;

(*b*) recommend to the complainant a course of other judicial redress which does not warrant an application under Article 22 of the Constitution;

(*c*) recommend to the complainant and to the relevant governmental agency or other body concerned in the alleged violation, other appropriate methods of settling the complaint or to obtain relief;

(*d*) provide a copy of the inquiry report to all interested parties; and

(*e*) submit summonses as it deems necessary in fulfillment of its mandate.

PART IV—REPORT AND RECOMMENDATIONS

Report to organization.

42. (1) After concluding an investigation or an inquiry under this Act, the Commission shall make a report to the State organ, public office or organization to which the investigation relates.

(2) The report shall include—

(*a*) the findings of the investigation and any recommendations made by the Commission;

(*b*) the action the Commission considers should be taken and the reasons for the action; and

(*c*) any recommendation the Commission considers appropriate.

(3) The Commission may require the State organ, public office or organization that was the subject of the investigation to submit a report to the Commission within a specified period on the steps, if any, taken to implement the recommendations of the Commission.

(4) If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure or refusal to implement its recommendations and the National Assembly shall take appropriate action.

Report to the complainant.

43. The Commission shall inform the complainant on the results of the investigation in writing.

Report of misconduct to appropriate authority.

44. If, after an investigation, the Commission is of the opinion that there is evidence that a person, an officer or employee of the State organ, public office or organization which was investigated under this Act is guilty of misconduct, the Commission shall report the matter to the appropriate authority.

PART V— FINANCIAL PROVISIONS.

Funds of the Commission.

45. The funds of the Commission shall consist of—

(*a*) monies allocated by Parliament for the purposes of the Commission;

(*b*) such monies or assets as may accrue to the Commission in the course of the exercise of its powers or in the performance of its functions under this Act; and

(*c*) all monies from any other source provided, donated or lent to the Commission.

Financial year.

46. The financial year of the Commission shall be the period of twelve months ending on the thirtieth of June in each year.

Annual estimates.

47. (1) Before the commencement of each financial year, the Commission shall cause to be prepared estimates of the revenue and expenditure of the Commission for that year.

(2) The annual estimates shall make provision for all the estimated expenditure of the Commission for the financial year concerned and, in particular, shall provide for the—

(*a*) payment of the salaries, allowances and other charges in respect of the staff of the Commission;

(*b*) payment of pensions, gratuities and other charges and in respect of benefits which are payable out of the funds of the Commission;

(*c*) maintenance of the buildings and grounds of the Commission;

(*d*) funding of training, research and development of activities of the Commission;

(*e*) creation of such funds to meet future or contingent liabilities in respect of benefits, insurance or replacement of buildings or installations, equipment and in respect of such other matters as the Commission may think fit.

(3) The annual estimates shall be approved by the Commission before the commencement of the financial year to which they relate and shall be submitted to the Cabinet Secretary for tabling in the National Assembly.

(4) No expenditure shall be incurred for the purposes of the Commission except in accordance with the annual estimates approved under subsection (3).

Accounts and audit.

48. (1) The Commission shall cause to be kept all proper books and records of account of the income, expenditure, assets and liabilities of the Commission.

(2) Within a period of three months after the end of each financial year, the Commission shall submit to the Auditor-General the accounts of the Commission in respect of that year together with a—

(*a*) statement of the income and expenditure of the Commission during that year; and

(*b*) statement of the assets and liabilities of the Commission on the last day of that financial year.

(3) The annual accounts of the Commission shall be prepared, audited and reported upon in accordance with the provisions of Articles 226 and 229 of the Constitution and the Public Audit Act (No. 12 of 2003).

Bank accounts.

49. The Commission shall open and maintain such bank accounts as shall be necessary for the performance of its functions.

PART VI—MISCELLANEOUS PROVISIONS

Management of information.

50. (1) The Commission and the staff of the Commission shall maintain confidence in respect of all matters that come to their knowledge in the exercise of their duties.

(2) Subject to the provisions of Article 35 of the Constitution, the Commission and the staff of the Commission shall not be called to give evidence in respect of any matter that comes to their knowledge in the exercise of their duties.

(3) Notwithstanding subsection (1), the Commission may disclose in any report made by the Commission under this Act, any matter that in the opinion of the Commission may be disclosed in order to establish grounds for the Commission's findings and recommendations of the Commission.

Correspondence from persons in custody, etc

51. Every person in charge of a prison, remand or mental institution where a person is held in custody, or of any institution where a person is a patient or inmate shall ensure, notwithstanding the provisions of any other written law, that any correspondence from such person to the Commission is transmitted in confidence and any written communication in that regard shall remain sealed.

Offences.

52. A person who—

(*a*) without justification or lawful excuse, obstructs, hinders or threatens the Commission or a member of staff acting under this Act;

(*b*) submits false or misleading information;

(*c*) fails to honour summons; or

(*d*)misrepresents to or knowingly misleads the Commission or a member of staff of the Commission acting under this Act,

commits an offence and is liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two years or to both.

Report of the Commission.

53. (1) The report of the Commission under Article 254 of the Constitution shall, in respect of the financial year to which it relates, contain-

(*a*) the financial statements of the Commission;

(*b*) a description of the activities the Commission;

(*c*) recommendations on specific actions to be taken in furtherance of the findings of the Commission;

(*d*) recommendations on legal and administrative measures to address specific concerns identified by the Commission; and

(*e*) any other information relating to its functions that the Commission considers relevant.

(2) The Commission shall publish the report in the Gazette and in at least one newspaper with national circulation.

(3) The President, the National Assembly or the Senate may at any time require the Commission to submit a report on a particular issue.

Report to Parliament on the implementation of report.

54. (1) The Cabinet Secretary shall, prepare an annual report and submit the report to Parliament in accordance with Article 153(4)(*b*) of the Constitution.

(2) Where any of the recommendations contained in a report submitted under subsection (1) have not been implemented, the Cabinet Secretary shall report to Parliament the reasons therefor.

Review of mandate.

55. Parliament shall, upon expiry of five years from the date of commencement of this Act, and pursuant to Article 59(4) of the Constitution, review the mandate of the Commission with a view to amalgamating the Commission with the commission responsible for human rights.

Regulations.

56. The Commission may make regulations for the better carrying into effect of the provisions of this Act.

PART VII—SAVINGS AND TRANSITIONAL PROVISIONS

Transfer of complaints to the Commission.

57. All complaints relating to maladministration, which immediately before the commencement of this Act were made to the Kenya National Human Rights and Equality Commission and the former Public Complaints Standing Committee at the commencement of this Act, shall be deemed to have been made to the Commission.

Contracts.

58. The Commission shall be bound in all contracts, including contracts of service, if any, subsisting at the commencement of this Act and to which the Public Complaints Standing Committee was party.

Savings.

59. (1) Notwithstanding the provisions of this Act—

(*a*) any order or notice made or issued by the Kenya National Human Rights and Equality Commission and the former Public Complaints Standing Committee shall be deemed to have been made or issued under this Act;

(*b*) any function carried out by the Kenya National Human Rights and Equality Commission and the former Public Complaints Standing Committee during the transition period shall be deemed to have been carried out under this Act;

(*c*) all rights, powers and duties, whether arising under any written law or otherwise which immediately before the coming into operation of this Act were vested in the Public Complaints Standing Committee shall be transferred to, vested imposed on, or be enforceable by or against the Commission;

(*d*) all actions, suits or legal proceedings by or against the Public Complaints Standing Committee shall be carried out on, prosecuted by or against the Commission and no such suit, action or legal proceedings shall abate or be affected by the coming into operation of this Act; and

(*e*) all assets and liabilities which immediately before the commencement of this Act were vested in, or enforced against, the Public Complaints Standing Committee shall, by virtue of this paragraph, vest in the Commission.

FIRST SCHEDULE (s.12)

OATH/AFFIRMATION OF THE OFFICE OF CHAIRPERSON/A MEMBER/SECRETARY

1 ..... having been appointed (the chairperson/member of /Secretary to) the Commission on Administrative Justice, do solemnly (swear/ declare and affirm) that I will at all times obey, respect and uphold the Constitution of Kenya and all other laws of the Republic; that I will faithfully and fully, impartially and to the best of my ability, discharge the trust and perform the functions and exercise the powers devolving upon me by virtue of this appointment without fear, favour, bias, affection, ill-will or prejudice. (SO HELP ME GOD).

Sworn/Declared by the said.....

.....

.....

Before me this ..... Day

Of .....

.....

Chief Justice.

SECOND SCHEDULE (s. 19)

MEETINGS AND PROCEDURE OF THE COMMISSION

Meetings.

1. (1) The Commission shall decide when and where it meets and the meetings shall be convened by the chairperson.

(2) The Commission shall have at least four meetings in every financial year and not more than four months shall elapse between one meeting and the next meeting.

(3) Unless three quarters of the members otherwise agree, at least seven days' notice in writing of a meeting shall be given to every member.

(4) A meeting shall be presided over by the chairperson or in his or her absence by the vice-chairperson.

(5) The members of the Commission shall elect a vice-chairperson from among themselves-

(*a*) at the first sitting of the Commission; and

(*b*) whenever it is necessary to fill the vacancy in the office of the vice-chairperson.

(6) The chairperson and vice-chairperson shall not be of the same gender.

(7) The Commission may invite any person to attend any of its meetings and to participate in its deliberations, but such person shall not have a vote in any decision of the Commission.

Conflict of interest.

2. (1) If any person has a personal or fiduciary interest in any matter before the Commission, and is present at a meeting of the Commission or any committee at which any matter is the subject of consideration, that person shall as soon as is practicable after the commencement of the meeting, declare such interest and shall not take part in any consideration or discussion of, or vote on any question touching such matter.

(2) A disclosure of interest made under sub-paragraph (1) shall be recorded in the minutes of the meeting at which it is made.

(3) A person who contravenes sub-paragraph (1) commits an offence and is liable, upon conviction, to a fine not exceeding three million shillings, or to imprisonment for a term not exceeding seven years, or to both such fine and imprisonment.

(4) No member or staff of the Commission shall transact any business or trade with the Commission directly or indirectly.

Quorum.

3. (1) Subject to sub-paragraph (2), the quorum of the meeting shall not be less than half of the appointed members.

(2) Where there is a vacancy in the Commission, the quorum of the meeting shall not be less than three appointed members.

Voting.

4. A question before the Commission shall be decided with a supporting vote of at least two thirds of the members present.

Rules of procedure and minutes.

5. The Commission shall—

(*a*) determine rules of procedure for the conduct of its business; and

(*b*) keep minutes of its proceedings and decisions.

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Kenya Gazette Supplement No. 54 12th April, 2013

(Legislative Supplement No. 23)

LEGAL NOTICE NO. 64

THE COMMISSION ON ADMINISTRATIVE JUSTICE ACT

(No. 23 of 2011)

IN EXERCISE of the powers conferred by section 56 of the Commission on Administrative Justice Act, 2011, the Commission on Administrative Justice makes the following Regulations:—

THE COMMISSION ON ADMINISTRATIVE JUSTICE REGULATIONS, 2013

PART I—PRELIMINARY

Citation

1. These Regulations may be cited as the Commission on Administrative Justice Regulations, 2013.

Interpretation

2. In these Regulations, unless the context otherwise requires—

"Act" means the Commission on Administrative Justice Act, 2013; No. 23 of 2011;

"admission" means the process by which the eligibility of a complaint to determination by the Commission is done;

"Chairperson" means the Chairperson of the Commission appointed in accordance with section 11 of the Act;

"Commission" means the Commission on Administrative Justice established under section 3 of the Act;

"Commissioner" means a member of the Commission appointed under section 11 of the Act;

"Complainant" means a person or institution alleging breach of any matter under the mandate of the Commission;

"Complaint" means an oral, written or any other communication made or addressed to the Commission or taken up by the Commission against a State Office or State Officer or Public Officer or Public Office;

"hearing" means a sitting of a hearing panel for the purpose of enabling it to reach or announce a decision on a complaint under adjudication;

"investigation" includes the formal process following a preliminary inquiry or on the Commission's own motion of establishing the facts in a matter, by an investigator, upon a decision of the Commission;

"mediation" means the process by which the Commission assists a complainant and the respondent to reach a fair settlement regarding the complaint and may include, the process of conciliation or negotiation;

"respondent" means a person or institution against whom or who the complaint is made;

"State office" has the meaning assigned to it under Article 260 of the Constitution; and

"State officer" has the meaning assigned to it under Article 260 of the Constitution.

PART II—LODGING AND HANDLING PROCEDURE OF A COMPLAINT

Lodging of Complaints

3. A complaint may be lodged at the offices of the Commission or at such place or places and in such form as the Commission may from time to time determine.

Parties to a Complaint.

4. A complaint may be lodged by the complainant in person or by a person acting on behalf of the complainant or by any other person authorized by law to act for the complainant, provided that the Commission may admit anonymous complaints.

Form of a Complaint.

5. (1) Where the complaint is made orally, or otherwise, or the complainant cannot read or write, the complaint may be reduced to writing by a designated officer of the Commission.

(2) A written complaint shall be in such form as the Commission may determine and shall include –

(a) the name and contact details of the complainant;

(b) the particulars of the respondent;

(c) the substance of the complaint in sufficient detail to enable the Commission to act.

(3) The complainant may attach or provide any documents necessary to support the complaint.

(4) Despite the foregoing, a complaint may be made anonymously, or treated in such a manner as to protect the identity of, or particulars of, the complainant where necessary, as may be directed by the Chairperson.

Principles of natural justice

6. In the determination of complaints under these Regulations, the Commission shall have due regard to the principles of natural justice and shall not be bound by any legal or technical rules of evidence applicable to proceedings before a court of law.

Fees

7. The Commission shall not charge any fee in the lodging and determination of complaints.

Service of process

8. (1) Any document required or authorized to be served under these Regulations shall, where practicable, be served personally on the person by delivering or tendering the document to that person.

(2) Where it is not possible to effect personal service, the document may be served in such manner as the Commission may determine.

(3) Any document requiring service under these Regulations shall be served by an officer of the Commission or any other person authorized to do so by the Commission.

Screening of Complaints

9. (1) A Complaint shall, upon being entered into the register under regulation 16, be forwarded to the appropriate Department in the Commission for screening.

(2) The Commission, upon screening the complaint, may-

(a) admit the complaint;

(b) where appropriate, advise the complainant in writing that the matter is not within the mandate of the Commission; or

(c) advise the complainant that the matter lies for determination by another body or institution and refer the same to the said body or institution.

Discontinuation of a Complaint

10. Where, in the opinion of the Commission, a complaint does not merit further consideration, it may discontinue further proceedings on the complaint, record its reasons and notify the complainant accordingly.

Appeal

11. (1) Where a complaint has been discontinued under regulation 10, the complainant may, in writing, appeal to the Chairperson against the discontinuation.

(2) Where an appeal is disallowed, the complaint shall be closed and the appellant notified appropriately.

(3) For purposes of this regulation, a letter under the hand of the Chairperson notifying the complainant of the decision of the Commission shall be considered as notice for the purposes of this regulation.

Withdrawal and lapse of a complaint

12. (1) A complainant may, in writing, withdraw a complaint pending before the Commission at any stage during its consideration.

(2) Where a complainant unjustifiably fails or neglects to respond to communication from the Commission within three months from the date of the last communication, the Commission may deem the complaint to have lapsed.

(3) Despite the provisions of paragraphs (1) and (2), the Commission may, in its discretion, proceed to deal with a complaint in the public interest.

(4) Where a complaint has lapsed, the complainant may apply to the Chairperson for re-admission of the complaint and give reasons in support of the application for re-admission to the satisfaction of the Chairperson.

Joint consideration of complaint

13. (1) Where two or more complaints are lodged in which the same or similar allegations are raised against a respondent or respondents, the Commission may –

(a) consolidate the complaints; or

(b) treat one complaint as a test complaint and stay further action on the other complaints pending resolution of the test complaint.

(2) The decision on a test complaint shall apply, mutatis mutandis, to all other complaints with which the test complaint was consolidated.

Judicial notice

14. The Commission may take judicial notice of facts that are publicly known.

Language

15. Proceedings before the Commission shall be conducted in the English or Swahili languages.

(2) The Commission shall endeavour to ensure that a party who cannot speak or understand the language of proceedings is entitled to the services of an interpreter to be provided by the Commission.

(3) For purposes of paragraph (2), interpretation shall include interpretation for braille, sign-language or such other interpretation as may be deemed necessary.

Register of Complaints

16. The Commission shall keep a register of complaints in which all complaints shall, upon receipt, be entered.

PART III—ADMISSION AND RESOLUTION OF A COMPLAINT

Action on Complaint

17. (1) Upon admission of a complaint, the Commission shall draft a communication in form CAJ 1-1 or CAJ 2-1, as applicable, set out in the First Schedule, to the respondent.

(2) Upon the expiry of fourteen working days, if there is no response after receipt, a reminder giving seven days to comply in form CAJ3-1 set out in the Second Schedule shall be communicated to the respondent.

(3) If there is still no response under paragraph (2), a further and final reminder giving seven days to comply in form CAJ3-1 set out in the Second Schedule, shall be send to the respondent.

(4) If upon the expiry of twenty-eight days there is still no response, the Commission shall issue summons or make such other orders to attend to the respondent in a form to be determined by the Commission.

18. If a respondent fails to respond to the summonses or other orders referred to in regulation 17, the Commission may proceed to –

(a) determine the complaint in the absence of the respondent;

(b) institute legal proceedings against the respondent under to section 52 (c) of the Act;

(c) cite the respondent as an unresponsive State or Public Office or Officer or declare such State or Public Officer to be unfit to serve in the Public Service;

(d) take appropriate action against the unresponsive State or Public Office or Officer through Performance Contracting; or

(e) report the respondent in the Commission's Statutory Reports.

Failure to respond sermon

19. In resolving a complaint, the Commission may—

(a) conduct investigations;

(b) requisite and obtain information or documents;

(c) conduct an inquiry;

(d) undertake mediation, negotiation and conciliation;

(e) constitute a hearing panel;

(f) invite or summon any person or persons to attend to the Commission;

(g) obtain warrants of arrest for breach of any summons or orders of the Commission; or

(h) obtain orders from court authorizing search or seizure.

Resolution of Complaint

20. After adopting any of the options stated in regulation 19, the Commission may determine the complaint and—

(a) make a formal determination that the respondent is in breach of the Constitution, the Act or any other legislation;

(b) declare the respondent to be a person ineligible to hold a state or public office;

(c) enter the name of the respondent in the Commission's Citation Register which shall be signed and sealed by the Chairperson and which shall include the nature of the complaint and the determination made; or

(d) make any other adverse finding against the respondent.

Action against respondent

21. In determining the complaint, the Commission may–

(a) recommend an appropriate remedy;

(b) award appropriate compensation to the complainant;

(c) recommend the removal of the respondent from State or Public office;

(d) issue a formal caution or warning to the respondent; or

(e) publish the action taken in the Commission's Statutory Report.

Determination of complaint

PART IV—INVESTIGATIONS

22. (1) Where the complaint has been admitted, or where the commission has taken up a matter on its own initiative, the Chairperson may commission an investigation by an officer of the Commission or any public office or investigation agency.

Investigations

(2) The investigator may, subject to the direction and control of the Commission—

(a) issue summonses or requisition information in form to be determined by the Commission;

(b) administer an Oath or Affirmation;

(c) requisite any document or information from any person or institution; and

(d) by order of court, enter into any establishment or premises, conduct inspections or collect documents.

(3) Upon completion of the investigation, the investigator shall prepare a report and submit it to the Chairperson of the Commission.

(4) Upon review of the report, the Commission may—

(a) conduct a formal hearing;

(b) undertake a mediation or a conciliation;

(c) refer the complaint to the appropriate public body for further action; or

(d) determine the complaint appropriately.

(5) The Commission shall keep a record of each investigation and may publish the findings and recommendations, pursuant to an investigation, and may include these in its Statutory Report.

PART V—MEDIATION, CONCILIATION AND NEGOTIATION

Mediation Procedure

23. (1) The Commission may, in writing, advise the parties to a complaint that the dispute may be best resolved through mediation and conciliation.

(2) Where both parties to a complaint consent to mediation and conciliation, the Commission shall, in consultation with the parties, fix an appropriate date for a meeting.

(3) The Commission shall issue a mediation notice which shall include—

(a) the names of the parties to the complaint; and

(b) the date, time and venue of the mediation meeting.

(4) Upon the issuance of a mediation notice, but before the date of the meeting, the Chairperson shall constitute a mediation panel consisting of at least one Commissioner and such number of other persons as the Chairperson may consider necessary.

Procedures at conciliation meeting

24. During the mediation or meeting, the panel appointed under regulation 23(4) may apply such procedures as it may, in the interests of the parties, deem appropriate in the circumstances.

Conciliation Agreement

25. (1) At the conclusion of the mediation process, both parties shall sign a mediation and conciliation agreement bearing the common seal of the Commission and signed by the designated Commissioner.

(2) A mediation or conciliation agreement signed under this regulation, shall be deemed to be a determination of the Commission, and shall be enforceable as such.

(3) Despite provisions of this regulation, the Commission may make awards for compensation under this Part.

PART VI—COMMISSION HEARINGS

Hearings

26. (1) The Commission may conduct a hearing on any complaint or matter under its jurisdiction where it considers desirable or appropriate to do so.

(2) A hearing panel shall consist of such persons as the Chairperson may appoint.

(3) Unless the circumstances otherwise require, for reasons stated, the Commission shall conduct its hearings in public.

Hearing procedure

27. (1) Upon determination that a complaint should be addressed through a hearing, the Commission shall issue a notice to the concerned parties on the constitution of a hearing panel and require them to enter appearance.

(2) The notice referred to in paragraph (1) shall be in the form to be determined by the

Commission and shall include—

(a) the names of the parties;

(b) the date, place and time of the hearing;

(c) the penalty for non-compliance;

(d) the duration within which appearance is required; and

(e) a notice that a party may appear in person or with an advocate, representative or intermediary.

(3) An appearance before the hearing panel shall be made within fourteen days from the date of service of the notice to the parties under paragraph (2).

(4) Where a party has entered appearance under to paragraph (3), the Commission shall give directions and fix a hearing date.

(5) For purpose of this regulation, a letter or any other sufficient indication in writing, by a party, informing the Commission that the party shall appear on the date and place of hearing, shall be considered as notice of appearance by that party.

(6) Upon fixing a hearing date, a hearing notice in form to be determined by the Commission, shall be served on all the parties.

Default in appearance

28. (1) Where a party to a complaint has been duly served and fails to appear as required, the hearing panel may proceed to hear the respondent and make orders in default of appearance as it may deem fit.

(2) If, on the day fixed for the hearing of a complaint, the respondent appears in answer to the summons but the complainant does not appear, or vice-versa, the hearing panel may, if satisfied that a hearing notice was duly served, proceed to dispense with the complaint on the basis of the evidence before it.

(3) Where a complaint is determined under paragraphs (1) and (2), the party in default may move the Commission to set aside the decision and reinstate the complaint subject to satisfying the Commission that there were satisfactory grounds and reasons for non-attendance at the hearing.

(4) The hearing panel may, upon consideration of the motion under paragraph (3), set aside the decision and fix a new date for the hearing of the complaint with notice to both parties, and upon such terms and conditions as it deems fit.

Procedure at hearing

29. (1) Despite the provisions of this regulation, a hearing panel may adopt a suitable procedure for the purpose of resolving the matter while avoiding unnecessary legal technicalities and formalities.

(2) The parties shall be heard in such order as the hearing panel shall determine and shall be entitled to give evidence, call witnesses, question any witnesses and address the hearing panel both on the evidence and generally on the subject matter of the complaint.

(3) The hearing panel may, at any time, put questions to either party or any witnesses and may, at its discretion, call such additional evidence or expert testimony as it considers necessary.

(4) The hearing panel shall enter an appropriate decision on part or all of the complaint.

(5) The hearing panel may, for sufficient reason, at any time before or after the beginning of the hearing, adjourn the proceedings and in every such case the Commission shall fix a date for further hearing of the complaint.

(6) In the course of the proceedings, the hearing panel may make such preservatory or interim orders, as it may deem fit and just in the circumstances.

(7) Evidence before the hearing panel may be given orally, or if the hearing panel so orders, by affidavit or written statement, but the hearing panel may at any stage require the personal attendance of any witness, deponent or author of a written statement or document.

(8) At any hearing, the hearing panel may, if it is satisfied that it is just and reasonable to do so with no resulting prejudice to the respondent, permit a party to rely on grounds not stated in his complaint, or as the case may be, his reply, and adduce any evidence not initially presented to the Commission.

(9) Evidence before the hearing panel shall be given on oath or affirmation and for that purpose, the hearing panel shall administer such oath or affirmation.

(10) The evidence of the parties and that of each witness shall be recorded by the hearing panel or by any person authorized to do so by the Commission.

30. An advocate who appears for a party at any stage shall be deemed to be that party's advocate throughout the proceedings unless—

(a) the party to the complaint files a written revocation of the advocate's authority with the Commission;

Change of Advocate

(b) the advocate files a written notice of withdrawal from the matter with the Commission.

Panel Decisions

31. After concluding the hearing of the matter, the hearing panel shall render a decision reflecting substantive justice.

(2) A decision under paragraph (1) shall be in writing and shall state—

(a) the nature of the complaint;

(b) a summary of the relevant facts and evidence adduced before the panel;

(c) the determination and reasons supporting the panel's decision;

(d) the remedy to which the complaint is entitled; and

(e) the order of the panel necessary to enforce the remedy.

(3) Where the decision of the hearing panel is not given immediately after the hearing of the complaint, the panel shall deliver the decision on notice.

(4) After the decision is rendered, the Commission may correct typographical errors without prejudice to the substance of its findings.

Orders

32. (1) The orders made in a decision of the hearing panel shall be extracted, sealed and authenticated as orders of the Commission and shall be signed by the Chairperson.

(2) Orders of the Commission shall be enforced in similar manner as Orders of Court.

Copies of proceedings

33. Parties may obtain a copy of the Commission's decision free of charge. Copies of proceedings.

PART VII—MISCELLANEOUS

Amicus curiae

34. The Commission may, on its own motion or upon invitation, seek to join legal proceedings in a court of law or judicial tribunal as interested party, interveners or amicus curiae, provided that when the Commission is requested to do so it may, upon giving written reasons, decline to be enjoined in such proceedings.

(2) In determining whether to join proceedings as interested parties, interveners or amicus curiae, the Commission shall satisfy itself that the issues before the court—

(a) are matters of broad public interest;

(b) are matters raising substantial policy implications;

(c) are matters affecting public administration;

(d) are matters relating to administrative justice;

(e) are matters concerning leadership and integrity; or

(f) are matters of interest to the Commission in light of its mandate.

Forms

35. The Commission may from time to time determine any other forms for the better carrying out of the provisions of the Act and these Regulations.

Cases not covered by Regulations.

36. Any case not covered by these Regulations shall be dealt with in accordance with such instructions as the Commission may issue from time to time.

FIRST SCHEDULE

FORM: CAJ 1-1 (r. 17 (1))

COMPLAINT

1. CAJ Reference: .....

2. Complainant's Name/Anonymous [ss.32 & 33]: .....

3. Complainant's ID Number [ss.32 & 33]: .....

4. Subject of Complaint: .....

5. Public Officer/Institution complained against: .....

6. Screening/Categorisation: Within CAJ Mandate? YES:_____ NO:_____

7. Reasons: .....

.....

8. Certification: .....

9. Action taken: .....

_____

FORM CAJ 2-1 r. 17 (1))

NOTICE OF COMPLAINT & CALL FOR INFORMATION

1. CAJ Reference: .....

2. Addressee: .....

3. Complainant's Identity: .....

4. Summary of Complaint: .....

5. Recommendation/Call for Information/ Direction/Mediation/Review of legislation, Processes & Procedures:

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6. Time- frame: .....

7. Certification:.....

SECOND SCHEDULE

FORM CAJ 3-1 (r. 17 (2), (3))

SUMMONS TO ATTEND THE COMMISSION

1. CAJ Reference: .....

2. Addressee:.....

3. Reasons for Summons: .....

"TAKE NOTICE that a Summons has been issued to secure your attendance before the Commission on Administrative Justice pursuant to *Article 252(3)* of the Constitution as read with *sections 27 & 28* of *The Commission on Administrative Justice Act 2011* for the purpose/s of production of documents/discovery of documents/examination, particulars of which are set out below:

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4. Time-frame and Penal Notice:

"You have 7 working days from the day following service of this Summons to attend to this Summons, otherwise you will be personally liable on conviction to a fine not exceeding five hundred thousand shillings or to imprisonment for a term not exceeding two years or to both".

5. Certification:

Made on the 8th April, 2013.

OTIENDE AMOLLO,

Chairperson, the Commission

on Administrative Justice

SPECIAL ISSUE

Kenya Gazette Supplement No. 59 (Acts No. 1A)

KENYA GAZETTE SUPPLEMENT

ACTS, 2015

NAIROBI, 21ST May 2015

CONTENT

THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT

No. 1A of 2015

Date of Assent: 14th May 2015

Date of Commencement: 4th June 2015

ARRANGEMENT OF SECTIONS

PART V – GENERAL PROVISIONS

17 – Regulations.

No. 1A Public Service (Values and Principles) 2015

THE PUBLIC SERVICE (VALUES AND PRINCIPLES) ACT, 2015

AN ACT of Parliament to give effect to the provisions of Article 232 of the Constitution regarding the value and principles of public service and for connected purposes

ENACTED by the Parliament of Kenya, as follows –

PART I – PRELIMINARY

1. This Act may be cited as the Public Service (Values and Principles) Act, 2015. Short title

2. In this Act, unless the context otherwise requires – Interpretation

"code of ethics" means a code of practice adopted by a profession to regulate that profession;

"continuing professional development" means the means by which a professional maintains their knowledge and skills related to their professional lives;

"professional association" means a non-profit organization seeking to further a particular profession, the interests of individuals engaged in that profession, and the public interest;

"professional in good standing" means a member of a professional association who has no pending matter of professional misconduct against them;

"professional in the public service" means a public officer who is or should be a member of a professional association;

"professional misconduct" means a violation of the code of ethics of a professional association by a member of that professional association;

"public officer" has the meaning assigned to it in Article 260 of the Constitution;

"public service" has the meaning assigned to it in Article 260 of the Constitution; and

"service Commission" means a Constitutional Commission or independent office provided for in Chapter Fifteen of the Constitution, and includes –

- a County Public Service Board; and
- a County Assembly Service Board

3. The objects of this Act are to provide for – Objects of the Act

- a general code on the values and principles of public service;
- public participation in the promotion of the values and principles of, and policy making by, the public service; and
- reporting on the status of the promotion of values and principles of public service.

4. This Act applies to the public service in – Application of the Act

- all State organs in the national and county governments ; and
- all State corporations.

PART II – VALUES AND PRINCIPLES OF PUBLIC SERVICE

5. **(1)** Every public officer shall maintain high standards of professional ethics. High standards of professional ethics

(2) For the purposes of subsection (1), a public officer maintains high standards of professional ethics if that public officer –

- is honest;
- displays high standards of integrity in that officer's dealings;
- is transparent when executing that officer's functions;
- can account for that officer's actions;
- is respectful towards others;
- is objective;
- is patriotic; and
- observes the rule of law.

(3) Despite the provisions of this section, a professional in the public service shall–

(a) comply with the provisions of the relevant professional association regarding registration and continuing professional development;

(b) be bound by the code of ethics of the relevant professional association

and

(c) undergo such disciplinary action of the relevant professional association for any act of professional misconduct in addition to undergoing any disciplinary action of the public service for such act of professional misconduct.

(4) Where necessary, the public service, a public institution or an authorized officer may require a professional association to inform the public service, public institution or authorized officer whether or not a professional in the public service has committed an act of professional misconduct.

6. (1) A public officer shall use public resources in an efficient, effective and economic manner. Efficient, effective and economic use of resources.

(2) For the purposes of subsection (1), a public officer fails to use public resources in an efficient, effective and economic manner if , in the process of their usage –

(a) the public officer has used the public resources in a manner that is not prudent;

(b) there is unreasonable loss;

(c) there is deliberate destruction; or

(d) the effect is to reduce the effectiveness of the public service

7. (1) The public service shall ensure that public services are provided – Responsive, prompt effective, impartial and equitable provision of services

- promptly
- effectively;
- impartially; and
- equitably.

(2) The provision of public services is not prompt where there is unreasonable delay.

(3) For the purposes of this section, "unreasonable delay" includes failure by a public officer to provide a public service within the period that may be provided for in the service charter of the public institution in which he or she is serving.

(4) The provision of public services is ineffective if –

(a) there is unreasonable loss;

(b) public complaints against a public officer are made regarding the provision of public services;

or

(c) public grievances against a public institution are made regarding the quality of its services,

and a public officer is found culpable of the loss, or the complaints or grievance against the officer is found valid, upon complaint pursuant to section 13 of this Act.

(5) The provision of public services is not impartial or equitable if –

(a) a public officer discriminates against a person or a community during the provision of public services; or

(b) a public officer refuses or fails to give accurate information during the provision of public services.

(6) Every public institution shall –

(a) develop standards for the responsive, prompt, effective, impartial and equitable provision of services;

(b) facilitate the introduction of modern and innovative procedures, technologies and systems for the delivery of its services;

(c) simplify its procedures and ease formalities related to access and delivery of its services;

(d) ensure the adaptability of public services to the needs of the public;

(e) ensure that its services are delivered closer to the users of the services; and

(f) develop mechanism for monitoring and evaluating the effectiveness of public service delivery.

Transparency and provision to the public of timely, accurate information

8. (1) A public officer shall not –

(a) give information that the public officer knows or ought to know to be inaccurate; or

(b) unduly delay the provision of any information where required to provide that information .

(2) The public service, a public institution or, where permitted, an authorized officer shall develop guidelines for the provision to the public of timely and accurate information, and the promotion of transparency and accountability.

(3) For the purposes of this section, " undue delay" includes a failure by a public officer to provide information within the time required in accordance with the guidelines of the public institution in which he or she serves.

Accountability for administrative acts

9. (1) Every public officer shall be accountable for his or her administrative acts.

(2) The public service, a public institution or an authorized officer shall ensure the accountability of a public officer by –

(a) keeping an accurate record of administrative acts of public servants in each public institution;

(b) requiring every public officer to maintain an accurate record of their administrative acts;

(c) maintaining a record of relevant documents prepared by a public officer; and

(d) establishing a mechanism to address complaints arising out of the administrative acts of a public officer.

Fair competition and nerit as the basis of appointments and promotions

10. (1) The public service, a public institution or an authorized officer shall ensure that public officers are appointed and promoted on the basis of fair competition and merit.

(2) Despite subsection (1), the public service may appoint or promote public officers without undue reliance on fair competition or merit if –

(a) a community in Kenya is not adequately represented in appointments to or promotions in the public service or in a public institution;

(b) the balance of gender in the public service or in a public institution is biased towards one gender;

(c) an ethnic group is disproportionately represented in the public service or in a public institution; or

(d) persons with disabilities are not adequately represented in the public service or in a public institution.

(3) Each public institution or each authorized officer shall develop a system for the provision of relevant information that promotes fairness and merit in appointments and promotions.

PART III – PUBLIC PARTICIPATION, COMPLAINTS, REGISTER AND REPORTING

11. (1) The public service shall facilitate public participation and involvement in the promotion of values and principles of public service.

(2) Public participation and involvement may be through –

(a) citizens' fora;

(b) the village councils established under section 53 of the County Governments Act, 2012; or

(c) elected leaders

(3) The citizens' fora referred to in subsection (2) shall include –

(a) faith-based organizations' or groups;

(b) boards of management of learning institutions, however organized;

(c) welfare associations;

(d) residents' associations;

(e) market-users' committees;

(f) self-help groups; and

(g) such other registered or unregistered groups organized at the sub-county level.

(4) Despite the provisions of this section, the rights and duties of residents specified in the Second Schedule to the Urban Areas and Cities Act, 2011, shall be applicable for the purposes of this Act with the necessary modifications.

12. (1) The public service shall develop guidelines for the involvement of the people in policy-making.

(2) The guidelines developed under subsection (1) shall ensure that the public is given –

(a) adequate opportunity to review a draft policy;

(b) adequate opportunity to make comments on a draft policy;

(c) an opportunity to be heard by the makers of a policy; and

(d) notification of the final draft of the policy and whether or not it incorporates their views.

Complaints

13. (1) Where a person alleges the violation of the values and principles of public service by a public officer, that person may complain to –

(a) the supervisor of that public officer;

(b) the head of the department or institution in which that public officer serves;

(c) the department in charge of public complaints of the relevant service Commission;

(d) the department in charge of public complaints of the relevant commission; or

(e) the person in charge of the values and principles committee of the public institution, where established.

(2) A person who makes a complaint under this section against a public officer may do so –

(a) in person;

(b) through a relative or personal representative;

(c) through a legal representative;

(d) through a citizen's forum;

(e) through a village council;

(f) through the relevant member of a county assembly; or

(g) through the relevant member of Parliament

(3) Where a person makes a complaint to a service Commission, that service Commission shall –

(a) receive and record in a register the details of the complaint;

(b) investigate and determine the complaint expeditiously but in any case in not more than three months from the date of receipt of the complaint; and

(c) set down the reasons for its determination in writing and provide it to the complainant, the public officer concerned and to that public officer's supervisor, head of department or head of the institution.

(4) If after three months a service commission has not investigated and determined a complaint, the officer responsible for handling the complaint shall give the complaint satisfactory reasons, in writing, for non-compliance.

(5) Appropriate disciplinary action shall be taken against any officer who is found to have unreasonably delayed in handling a complaint made to the service commission.

(6) A person aggrieved by the decision of a service Commission may seek judicial redress.

Maintenance of register

14. (1) Each service Commission shall keep and maintain a register of complaints made against public officers and shall, upon request by a complainant, allow the complainant to inspect the register to verify details relating to his or her complaint.

(2) A register of complaints shall contain the details of the complaint including the name and designation of the officer complained against and the action taken by the responsible commission.

(3) The service Commission may, on the request of a complainant, omit the identity of the complainant from the register of complaints.

Compliments, commendations, honours, rewards etc.

15. (1) Where a person considers the quality of public service offered by a public officer to be exemplary, outstanding, or innovative, that person may inform the public officer's supervisor or head of the institution.

(2) For the purposes of subsection (1), each public institution shall make guidelines to provide for –

(a) the receiving and recording of information; and

(b) recognizing, commending and rewarding public officers who offer exemplary, outstanding or innovative services or who perform their duties exceptionally well.

Reports

16. (1) Once in every year, each service Commission shall prepare a report on the status of the promotion of the values and principles of public service.

(2) Each service Commission shall submit the report prepared under subsection (1) to the President and Parliament, and the Governor and county assembly, where relevant, by 31st December of each year.

(3) The report under this section shall provide information on –

(a) the measures taken to promote the values and principles of public service;

(b) the progress achieved in the promotion of values and principles of public service;

(c) the challenges faced in the promotion of values and principles of public service;

(d) any recommendations for the progressive realization of values and principles of public service; and

(e) any other matter that may be relevant to the realization of the values and principles of public service.

PART VII – GENERAL PROVISIONS

17. (1) Each service Commission may make regulations for the better carrying into effect of this Act.

(2)Despite the generality of subsection (1), a service Commission may make regulations regarding –

(a) high standards of professional ethics;

(b) determination of any disciplinary matter in relation to a violation of a value or principle under this Act;

(c) the responsive, prompt, effective, impartial or equitable of public services;

(d) the efficient, effective and economic use of public resources;

(e) transparency;

(f) the provision to the public of timely and accurate information;

(g) public participation;

(h) accountability of public officers;

(i) the application of fair competition or merit in appointments or promotions;

(j) service delivery;

(k) performance management;

(l) access to information by the public and

(m) the provision of adequate and equal training opportunities for training.

LAWS OF KENYA

FAIR ADMINISTRATIVE ACTION ACT

NO. 4 OF 2015

FAIR ADMINISTRATIVE ACTION ACT

ARRANGEMENT OF SECTIONS

Section

FAIR ADMINISTRATIVE ACTION ACT

[*Date of assent: 27th May, 2015.*]

[*Date of commencement: 17th June, 2015.*]

AN ACT of Parliament to give effect to Article 47 of the Constitution, and for

connected purposes

PART I — PRELIMINARY

1. Short title

This Act may be cited as the Fair Administrative Action Act, 2015.

2. Interpretation

In this Act, unless the context otherwise requires—

"administrative action" includes—

(i) the powers, functions and duties exercised by authorities or quasijudicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that

affects the legal rights or interests of any person to whom such action relates;

"administrator"means a person who takes an administrative action or who

makes an administrative decision;

"Cabinet Secretary" means the Cabinet Secretary for the time being

responsible for the administration of justice;

"decision"means any administrative or quasi-judicial decision made,

proposed to be made, or required to be made, as the case may be;

"empowering provision"means a law, a rule of common law, customary

law, or an agreement, instrument or other document in terms of which an

administrative action is taken or purportedly taken;

"failure"in relation to the taking of a decision, includes a refusal to take the

decision;

"state organ"has the meaning assigned to it under Article 260 of the

Constitution; and

"tribunal"means a tribunal established under any written law.

PART II —FAIR ADMINISTRATIVE ACTION

3. Application.

(1) This Act applies to all state and non-state Application agencies, including any person-

(a) exercising administrative authority;

(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or

(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.

4. Administrative action to be taken expeditiously, efficiently, lawfully etc.

(1) Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-

(a) attend proceedings, in person or in the company of an expert of his choice;

(b) be heard;

(c) cross-examine persons who give adverse evidence against him; and

(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.

(5) Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.

(6) Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

5. Administrative action affecting the public.

(1) In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall-

(a) issue a public notice of the proposed administrative action inviting public views in that regard;

(b) consider all views submitted in relation to the matter before taking the administrative action;

(c) consider all relevant and materials facts; and

(d) where the administrator proceeds to take the administrative action proposed in the notice-

(i) give reasons for the decision of administrative action as taken;

(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and

(iii) specify the manner and period within the which such appeal shall be lodged.

(2) Nothing in this section shall limit the power of any person to-

(a) challenge any administrative action or decision in accordance with the procedure set out under the Commission on Administrative Justice Act, 2011 or any successor to the Commission on Administrative Justice under section 55 of the Commission on Administrative Justice Act;

(b) apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under the Constitution or any written law; or

(c) institute such legal proceedings for such remedies as may be available under any written law.

6. Request for reasons for administrative action.

(1) Every person materially or adversely affected by any administrative action has a right to be supplied with such information as may be necessary to facilitate his or her application for an appeal or review in accordance with section 5.

(2) The information referred to in subsection (1), may include-

(a) the reasons for which the action was taken; and

(b) any relevant documents relating to the matter.

(3) The administrator to whom a request is made under subsection (1) shall,

within thirty after receiving the request, furnish the applicant, in writing, the reasons for the administrative action.

(4) Subject to subsection (5), if an administrator fails to furnish the applicant with the reasons for the administrative decision or action, the administrative action or decision shall, in any proceedings for review of such action or decision and in the absence of proof to the contrary, be presumed to have been taken without good reason.

(5) An administrator may depart from the requirement to furnish adequate reasons if it is reasonable and justifiable in the circumstances, and shall inform the person making the request of such departure.

PART III —JUDICIAL REVIEW

7. Institution of proceedings.

(1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-

(a) a court in accordance with section 8; or

(b) a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to-

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of

power.

(3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that-

(a) the administrator is under duty to act in relation to the matter in issue;

(b) the action is required to be undertaken within a period specified under such law;

(c) the administrator has refused, failed or neglected to take action within the prescribed period.

8. Period for determination of applications and appeals.

An application for the review of an administrative action or an appeal under this Act shall be determined within ninety days of filing the application.

9. Procedure for judicial review.

(1) Subject to subsection (2), a person who is aggrieved by an administrative action may, without unreasonable delay, apply for judicial review of any administrative action to the High Court or to a subordinate court upon which original jurisdiction is conferred pursuant to Article 22(3) of the Constitution.

(2) 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.

(3) The High Court or a subordinate Court shall, if it is not satisfied that the remedies referred to in subsection (2) have been exhausted, direct that applicant shall first exhaust such remedy before instituting proceedings under sub-section

(1).

(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.

(5) A person aggrieved by an order made in the exercise of the judicial review jurisdiction of the High Court may appeal to the Court of Appeal.

10. Rules.

(1) An application for judicial review shall be heard and determined without nundue regard to procedural technicalities.

(2) The Chief Justice may make rules of practice for regulating the procedure and practice in matters relating to judicial review of administrative action.

11. Orders in proceedings for judicial review.

(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-

(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;

(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;

(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;

(d) prohibiting the administrator from acting in particular manner;

(e) setting aside the administrative action or decision and remitting

the matter for reconsideration by the administrator, with or without directions;

(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;

(g) prohibiting the administrator from acting in a particular manner;

(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;

(i) granting a temporary interdict or other temporary relief; or

(j) for the award of costs or other pecuniary compensation in appropriate cases.

(2) In proceedings for judicial review relating to failure to take an administrative action, the court may grant any order that is just and equitable, including an order-

(a) directing the taking of the decision;

(b) declaring the rights of the parties in relation to the taking of the decision;

(c) directing any of the parties to do, or to refrain from doing, any act or thing the doing, or the refraining from the doing, of which the court or tribunal considers necessary to do justice between the parties; or

(d) as to costs and other monetary compensation.

PART IV— MISCELLENEOUS

12. Principles of common law and rules of natural justice.

This Act is in addition to and not in derogation from the general principles of common law and the rules of natural justice.

13. Regulations.

(1) The Cabinet Secretary may, in consultation with the Commission on Administrative Justice, make regulations for the better carrying out of the provisions of this Act.

(2) Regulations made under subsection (5) shall, before publication in the Gazette, be approved by Parliament.

14. Transition provisions.

(1) In all proceedings pending whether preparatory or incidental to, or consequential upon any proceedings in court at the time of the coming into force of this Act, the provisions of this Act shall apply, but without prejudice to the validity of anything previously done.

(2) Despite subsection (1)-

(a) if, and in so far as it is impracticable in any proceedings to apply the provisions of this Act, the practice and procedure obtaining before the enactment of this Act shall be followed; and

(b) in any case of difficulty or doubt the Chief Justice may issue practice notes or directions as to the procedure to be adopted.

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