



**REPUBLIC OF KENYA**

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

**JUDICIAL REVIEW DIVISION**

**MISC CIVIL APPLICATION NO. 159"B" OF 2018**

**IN THE MATTER OF APPLICATION BY THE LAW SOCIETY OF KENYA FOR JUDICIAL REVIEW ORDERS OF  
CERTIORARI, MANDAMUS AND PROHIBITION AND DECLARATION**

**AND**

**IN THE MATTER OF THE NATIONAL SOCIAL HOSPITAL INSURANCE FUND, CAP 255, LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE LAW SOCIETY OF KENYA ACT, 2012.**

**AND**

**IN THE MATTER OF THE OATHS AND STATUTORY DECLARATION ACT, CAP 15, LAWS OF KENYA**

**AND**

**IN THE MATTER OF THE OATHS FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF THE CIVIL PROCEDURE RULES, 2010, ORDER 53**

**BETWEEN**

**REPUBLIC.....APPLICANT**

**VERSUS**

**THE NATIONAL HOSPITAL INSURANCE**

**FUND BOARD OF MANAGEMENT.....1<sup>ST</sup> RESPONDENT**

**CHIEF EXECUTIVE OFFICER/ SECRETARY,**

**NATIONAL HOSPITAL INSURANCE FUND.....2<sup>ND</sup> RESPONDENT**

**AND**

**THE LAW SOCIETY OF KENYA.....EX PARTE APPLICANT**

**JUDGMENT**

The parties.

1. The *ex parte* applicant is a body corporate established under section 3 of the Law Society of Kenya Act.<sup>[1]</sup> Its functions include *inter alia* to represent, protect and assist members of the legal profession in Kenya in respect of conditions of practice and otherwise; and to protect and assist the public in Kenya in all matters touching, ancillary or incidental to the law.<sup>[2]</sup>
2. The first Respondent is a body corporate with perpetual succession and common seal established under section 4(3) of the National Hospital Insurance Fund Act.<sup>[3]</sup>
3. The second Respondent is the first Respondent's Chief Executive Officer responsible for the day to day management of the Fund and Secretary to the Board.

#### **The application.**

4. By way of a Notice of Motion dated 30<sup>th</sup> April 2018, the *ex parte* applicant seeks (a) An order of *Certiorari* to quash the first Respondent's directive dated 22<sup>nd</sup> February 2018 disregarding marriage certificates commissioned by Advocates; (b) An order of *Mandamus* compelling the first Respondent to accept affidavits of marriage commissioned by Advocates.
5. The application is supported by the Affidavit of **Mercy Wambua**, the *ex parte* applicant's Chief Executive Officer, the Statutory Statement annexed thereto and the grounds enumerated on the face of the application. The core grounds are that on 21<sup>st</sup> February 2018, the first Respondent issued a directive/notice vide the Daily Nation entitled "NHIF Demands Proof of Marriage from couples" stating *inter alia* that the first Respondent would only require Affidavits showing proof of Marriage from Magistrates and not qualified Advocates.
6. The contestation is that the Notice violates the provisions of Article 47 of the Constitution as read with sections 7(2)(a)(v)(c)(d)(e)(f)(h)(k)(m)(n) of the Fair Administrative Action Act<sup>[4]</sup> (herein after referred to as the FAA). It is contended that the impugned decision is unreasonable in that it offends the law and logic. It is the *ex parte* applicant's case that sections 2(1)(3), 4(1), 8 and 12 of the Oaths and Statutory Declarations Act<sup>[5]</sup> grants all Commissioners for Oaths including qualified Advocates the power to administer oaths throughout the country without exceptions.
7. Additionally, the *ex parte* applicant states that the impugned directive is tainted with bias because the Respondents chose to selectively approve Affidavits commissioned by a class of Commissioners of Oaths to the exclusion of others. It is complained that the Respondents did not provide reasons why Affidavits commissioned by Advocates were rejected nor did they consult or involve the *ex parte* applicant before issuing the impugned directive contrary to the principle of public participation enshrined in Article 10 of the Constitution.
8. Further, the *ex parte* applicant contends that the impugned decision was influenced by an error of the law because it offends sections 2(1), 3, 4(1), 8 and 12 of the Oaths and Statutory Declarations Act,<sup>[6]</sup> and, that, it is not founded on any provisions of the law. It is contended that the decision is indicative of ulterior motives and is calculated to prejudice the rights of the *ex parte* applicant. It is also stated that it flies in the face of logic and the law.
9. It is also the *ex parte* applicant's contention that the impugned decision failed to take into account relevant considerations such as members of the *ex parte* applicant have not conferred upon themselves the powers to commission Affidavits, but, such powers are conferred by statute upon appointment by the Hon. The Chief Justice. Also, it is contended that the Respondents cannot arrogate themselves the powers to amend statute to read according to its needs and desires, and, that, Advocates, just like other Commissioners for Oaths make a living from exercising their powers as Commissioners for Oaths, hence, they are equally entitled to earn fees from the same as provided under section 4(2) of the Oaths and Statutory Declarations Act.<sup>[7]</sup>
10. Lastly, the *ex parte* applicant contends that the directive is made in bad faith, it is unfair and was made in abuse of the first Respondent's discretionary powers, and, that, it is an impediment to access to justice to citizens contrary to Article 48 of the Constitution since it imposes an unnecessary burden upon Magistrates who have a duty to ensure delivery of justice in court rooms because there are not enough Magistrates spread out effectively across the country to ensure that citizens are able to have their Affidavits commissioned. Lastly, it is contended that the Respondents acted contrary to the rules of natural justice.

#### **Respondent's Replying Affidavit.**

11. The application is opposed. On record is the Replying Affidavit of **Grace Kimani**, the first Respondent's Principal Officer, Legal Services, sworn on 17<sup>th</sup> July 2018. She averred that the Respondent performs its mandate in a uniform and transparent manner, in accordance with laid down lawful requirements as "set out in the applicable forms." She also averred that the process of identification is necessary to avoid fraud or extending benefits to unqualified persons, resulting in loss of public funds. In her view, the orders of *certiorari* and *mandamus* are unfounded and not available.

#### **Issues for determination.**

12. I find that the following issues distil themselves for determination:-

- a. Whether the impugned decision violates the *ex parte* applicant's right to a fair administrative action.
- b. Whether the impugned decision is tainted with illegality.
- c. Whether the decision is unreasonable.

d. Whether the impugned decision was tainted by procedural impropriety.

e. Whether the decision is tainted with bias.

f. Whether the Respondent failed to take into account relevant considerations.

g. Whether the Respondents acted in bad faith.

h. Whether this court has jurisdiction to entertain this case.

**a. Whether the impugned decision violates the ex parte applicant's right to a fair administrative action.**

13. The *ex parte* applicant's counsel submitted that the impugned directive is unlawful and unconstitutional for offending Article 47 of the Constitution as read with sections 7(2)(a)(v)(c)(d)(e)(f)(h)(k)(m)(n) of the FAA Act. He argued that the right to a fair administrative action as a constitutional right is meant to act as a check and balance over the exercise of administrative actions by public bodies, hence, administrative actions ought to be lawful and founded on the law, but must not be capricious or whimsical. He cited *President of the Republic of South Africa and Others v South Africa Rugby Football Union and Others*[8] where it was held *inter alia* that the right to just administrative action is now entrenched as a constitutional control over the exercise of power. He also relied on *Judicial Service Commission v Mbalu Mutava & Another*.<sup>[9]</sup> Additionally, he argued that Article 47 stipulates in mandatory terms that every person has a right to an administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Also, counsel argued that Article 47(2) provides that if a fundamental freedom of a person has been or is likely to be adversely affected by an administrative action, the person has the right to be given written reasons for the action.

14. The Respondent's counsels submission on the above issue is that the application does not meet the constitutional threshold on violation of the Constitution. He contended that the applicant has not pleaded with precision the alleged rights that have been violated. To buttress his argument, he relied on *Anarita Karimi Njeru v Attorney General*,<sup>[10]</sup> *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others*,<sup>[11]</sup> *Boniface Mwangi v Resident Magistrate's Court at Milimani & 2 Others*<sup>[12]</sup> and *A M v Premier Academy*.<sup>[13]</sup> He argued that the *ex parte* applicant failed to demonstrate violation of rights.<sup>[14]</sup>

15. It is convenient to start by citing Article 47(1) of the Constitution which provides that "Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair." Briefly, the Article means that every citizen has a right to fair and reasonable administrative action that is allowed by the law; and to be given reasons for administrative action that affects them in a negative way.

16. Lawful means that administrators must obey the law and must be authorized by law for the decisions they make. Reasonable means that the decision taken must be justifiable - there must be a good reason for the decision. Fair procedures means that decisions should not be taken that have a negative effect on people without consulting them first. Also, administrators must make decisions impartially. To ensure fairness, the FAA Act sets out procedures that administrators must follow before they make decisions.

17. The FAA Act was enacted to give effect to the right to just administrative action guaranteed under Article 47. The Act defines Administrative Action to include the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or 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.<sup>[15]</sup>

18. To be an administrative action, the decision taken must adversely affect rights. What does this mean? Adversely means that the decision must impose a burden or have a negative effect. This includes decisions that; Require someone to do something, to tolerate something or not to do something; Limit or remove someone's rights; or Decide someone does not have a right to something. This is called an "adverse determination of a person's rights. It is not in dispute that the impugned decision imposed adverse sanctions against members of the *ex parte* applicant, hence it fits the above definitions. What is in dispute is whether it was arrived at in a manner that is consistent with the dictates of Article 47.

19. I find it fitting to recall the words of the Supreme Court of Appeal of South Africa<sup>[16]</sup> that "*All statutes must be interpreted through the prism of the Bill of Rights.*" This statement is true of decisions made by statutory bodies. The governing statute and the resultant decision must be interpreted through the prism of Article 47. Article 47 codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.<sup>[17]</sup> It is common ground that these are the elements an applicant is required to establish in a case of this nature. In fact absence of one would be sufficient to invalidate the decision. Further there is a right to be given reasons to any person who has been or is likely to be adversely affected by administrative action.<sup>[18]</sup>

20. Section 4 of the FAA Act echoes Article 47 and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person's rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

21. Subsection 4 further obliges the administrator to accord affected persons an opportunity:- to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against hearing.

22. Section 7 (2) of the FAA Act provides for grounds of review which include bias, procedural impropriety, ulterior motive, failure to take

into account relevant matters, abuse or discretion, unreasonableness, violation of legitimate expectation or abuse of power. Thus, for the Court to review an administrative decision, an applicant must demonstrate the above grounds. In fact, not all of them must be proved. Even prove of one of the above is sufficient to invalidate the decision.

23. The decision complained of must affect a person's rights. There are two ways that a decision can affect a person's rights:- **(i)**The decision could deprive a person of their existing rights, or **(ii)** It could affect a person's right by determining what those rights are. In other words, decisions that deprive someone of rights, and those that determine what that person's rights will be, are both "administrative action." Rights are understood in law as when one person has a right to claim something against another person and that other person has a duty to do something. Rights can be the rights granted by the Bill of Rights, by contract or by legislation. Rights can even be created by a promise of an administrator.

24. The impugned decision must have a legal effect, the effect must be direct. This is another way of saying that to qualify as administrative action, decisions must have a real impact on a person's rights. Legal effect means that a decision must be a legally binding determination of someone's rights or obligations. In other words, a decision must establish what someone's rights or obligations are, or must change or withdraw them.

25. The Constitution dictates that an administrative action must be lawful, reasonable and procedurally fair and that reasons must be given for administrative action that adversely affects rights. There are two parts to the idea of procedural fairness:- The first part is that it is unfair for an administrator to make a decision that adversely affects someone without consulting them first. Similarly, an administrator should not make a decision affecting someone without first hearing what they have to say. This idea is covered by the Latin phrase '*audi alteram partem*' – which means one should hear what the person who will be affected by the decision has to say before deciding. The second part is that the decision-making process must be free from any real or apparent partiality, bias or prejudice. When making a decision, administrators must be seen by everyone to be making the decision fairly and impartially. These two elements or at least one of them would be sufficient to invalidate an administrative decision.

26. Flowing from the above, there are five mandatory procedures that must be followed when performing an administrative action that has a particular impact on a person or persons. These are that the affected person must be given, before the decision is taken, Adequate notice of the nature and purpose of the proposed administrative action, A reasonable opportunity to make representations; After the decision is taken, A clear statement of the administrative action; Adequate notice of any right of review or internal appeal; and Adequate notice of the right to request reasons.<sup>[19]</sup>

27. "Adequate notice" means more than just informing a person that an administrative action is being proposed. The person must be given enough time to respond to the planned administrative action. The person also needs to know enough information about the proposed administrative action to be able to work out how to respond to the proposed action. They need to know the nature of the action (what is being proposed) and the purpose (why is the action being proposed).

28. A reasonable opportunity to make representations is a key requirement. The length of time a person should be given to make representations will be different in different circumstances. This should include an opportunity to raise objections, provide new information, or answer charges. A "reasonable opportunity to make representations" can sometimes mean that a person affected by administrative action must be given a hearing where that person can make a verbal input. At other times, it may only mean that a person should be allowed to submit written representations to an administrator who must read and think about them.

29. An administrator must clearly state what the administrative action is that will be taken. A person affected by the administrative action must understand what is likely to happen. This will assist the person affected to respond to the action. Using plain and straightforward language will help people to understand exactly what is being planned.

30. Two critical issues flow from the foregoing analysis. *First*, whether the impugned decision can be read in a manner consistent with the provisions of law. *Second*, judicial oversight is necessary to ensure that decisions are taken in a manner which is lawful, reasonable, rational and procedurally fair.<sup>[20]</sup> What matters is to establish whether the decision was taken in a manner which is lawful, reasonable, rational and procedurally fair.

31. Applying the facts of this case to the law as analysed above, I find that there is nothing before me to demonstrate that the *ex parte* applicant was given notice of the proposed action or an opportunity to present its case. The decisions as made arbitrarily. No reasons were provided for the decision. Put differently, the impugned decision was undertaken and or arrived at in total violation of the provisions of Article 47 and sections 7(2)(a)(v)(c)(d)(e)(f)(h)(k)(m)(n) of the FAA Act.

***b. Whether the impugned decision is tainted with illegality.***

32. It was the *ex parte* applicant's counsel's submission that the section 2 of the Oaths and Statutory Declarations Act<sup>[21]</sup> grants the Hon. The Chief Justice power to appoint persons practising as advocates to be Commissioners for Oaths, and, that, it is only the Hon. The Chief Justice who can revoke such appointment. Further, he submitted that every Commissioner for Oaths, by virtue of his commission, shall, on appointment have authority to administer any oath or take any affidavit for the purpose of any court or matter in Kenya, subject, however, to the only rider that advocates cannot commission documents in matters in which they act for the party or in which they have any other interest as stipulated in section 4 of the Oaths and Statutory Declarations Act.<sup>[22]</sup>

33. Additionally, counsel argued that the decision is *ultra vires* in that only Parliament has powers to make laws,<sup>[23]</sup> hence, the Respondents cannot amend statutory provisions, and, that, the Respondent acted beyond its powers by issuing the impugned decision.

34. It was the *ex parte* applicant's counsel's contention that the Respondent's directive has no legal basis, and, it is inconsistent with the provisions of the Oaths and Statutory Declarations Act.<sup>[24]</sup> He submitted that the decision is unlawful, procedurally unfair, and, that, it takes away the powers of the members of the *ex parte* applicant to act as commissioners for oaths. He also argued that the impugned decision is

unconstitutional in that it offends Article 47(2) as read with the provision of the FAA Act discussed above.

35. He also submitted that the decision was influenced by an error of the law because sections 2(1), 3, 4(1), 8 and 12 of the Oaths Statutory Declarations Act<sup>[25]</sup> provides that Advocates upon making an application to the Hon. The Chief Justice can serve in the capacity of a Commissioners for Oaths to commission any Affidavit or Statutory Declaration. Lastly, he argued that the decision is indicative of ulterior motives and or is calculated to prejudice the rights of the *ex parte* Applicant.

36. The Respondent's counsel's submission was that the impugned decision has been in existence and is in accordance with the laid down statutory requirements as set out in the forms annexed to the Respondent's Replying Affidavit. He submitted the Respondent acted within its statutory powers, and, that, the *ex parte* applicant has not demonstrated that the Respondent violated the provisions of the National Health Insurance Fund.<sup>[26]</sup>

37. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be a statute. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative or government bodies to act within the "four corners" of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. Where discretion is conferred on the decision-maker the courts have to determine the scope of that discretion and therefore need to construe the statute purposefully.<sup>[27]</sup> One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

38. Safeguarding legality is the most important purpose for the judicial review of administrative actions. Thus, in most administrative law systems, a person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the legality of the administrative decision to be judicially challenged. In one sense, there must always be the premise of "want of legality."

39. In response to a challenge to the legality of administrative action, courts generally need to consider the compliance of administrators with both substantive and procedural legal rules. This is because any administrative decision making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures.

40. The most basic rules of administrative law are first that decision makers may exercise only those powers which are conferred on them by law, and, second, that they may exercise those powers only after compliance with such procedural prerequisites. So long as administrators comply with these two rules, their decisions are safe. From the perspective of administrators and statutory bodies, this fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision can be judicially challenged on grounds that the administrative decision does not comply with the above mentioned basic requirements of legality.

41. The most obvious example of illegality is where a body or a government official acts beyond the powers which are prescribed for it. In other words, it acts *ultra vires*. Decisions taken for improper purposes may also be illegal. Illegality also extends to circumstances where the decision-maker misdirects itself in law. When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. If the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally find that the power had been exercised illegally.

42. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second issue that can be argued under illegality is fettering discretion. This heading for judicial review entails considering whether an administrative body actually exercised the power it has, or whether because of some policy it has adopted, it has in effect failed to exercise its powers as required. In general terms the courts accept that it is legitimate for public authorities to formulate policies that are 'legally relevant of [their] powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust.' An illegality can also occur where a body exercised a power which was within its functions but exceeded the scope of power that is legally conferred to it.

43. The exercise of discretionary powers, as the rule of law requires, must be consistent with a variety of legal requirements and subject to judicial control. Consequently, the legality of an administrative decision or a decision can be challenged on the grounds that discretion is abused or improperly exercised. Also relevant is the concept of 'error of law' which is mainly concerned with the erroneous applications of the law.

44. Two critical issues flow from the foregoing. *First*, whether the impugned decision can be read in a manner consistent with the provisions of law conferring the power to the Respondents. This question does not warrant a deep analysis. My reading of the Respondents enabling statute, that is, National Hospital Insurance Fund Act<sup>[28]</sup> leaves me with no doubt that it does not grant power to the Respondents to make the impugned decision. In fact, the Respondent's counsel did not cite any enabling provisions of the law to support the decision. Counsel only cited the entire act.

45. *Second*, judicial oversight is necessary to ensure that decisions are taken in a manner that is lawful, reasonable, rational and procedurally fair.<sup>[29]</sup> The provisions of the Oaths and Statutory Declarations Act<sup>[30]</sup> cited by the *ex parte* applicant represent the correct legal position. Section 2(1) of the act provides in clear terms the Hon. The Chief Justice may, by commission signed by him, appoint persons being practicing advocates to be commissioners for oaths, and may revoke any such appointment. The Respondents have no basis in law to purport to determine who is qualified to commission documents presented to them. The decision is out rightly illegal and flies on the face of the foregoing provisions.

46. To buttress my view I recall the celebrated case of *Council of Civil Service Union v. Minister for the Civil Service*<sup>[31]</sup> where Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality, irrationality and procedural impropriety*. Later judicial decisions have incorporated a

fourth ground to Lord Diplock's classification, namely; *proportionality*.<sup>[32]</sup> What Lord Diplock meant by "Illegality" as a ground of Judicial Review was that the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it. His Lordship explained the term "Irrationality" by succinctly referring to "unreasonableness" in *Wednesbury Case*.<sup>[33]</sup> By "Procedural Impropriety" His Lordship sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

47. Judicial intervention is posited on the idea that the objective is to ensure that the agency did remain within the area assigned to it by Parliament. A decision which falls outside that area can therefore be described, interchangeably, as: a decision to which no reasonable decision-maker could have come; or a decision which was not reasonably open in the circumstances.

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

49. The *ultra vires* principle is based on the assumption that Judicial Review is legitimated on the ground that the courts are applying the intent of the legislature. Parliament has found it necessary to accord power to ministers, statutory bodies, administrative agencies, local authorities and the like. Such power will always be subject to certain conditions contained in the enabling legislation. The courts' function is to police the boundaries stipulated by Parliament. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense it captured the idea that the relevant agency must have the legal capacity to act in relation to the topic in question. In a broader sense the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the agency has been exercised: it must comply with rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and also established its limits.

50. The power of the court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where **illegality, irrationality** or **procedural impropriety** has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be *lawful, reasonable and procedurally fair*.<sup>[34]</sup>

51. No serious argument was advanced before me to bring the impugned decision within the four corners of the Respondent's enabling statute. I find no contest at all to the truism that under the Oaths and Statutory Declarations Act,<sup>[35]</sup> the power to appoint commissioners for oaths or divest them the power to commission documents is vested in the Hon. The Chief Justice. The Respondents have no legal mandate to prescribe which documents an advocate once appointed under the act can commission. The impugned decision is not supported by the law. Differently stated, the Respondents acted outside their legal mandate. A proper construction of the impugned decision, and the Respondents' enabling statute as read with the clear provisions of Oaths and Statutory Declarations Act<sup>[36]</sup> leave me with no doubt that the impugned decision is *ultra vires*, it is tainted with illegality and, that, it cannot be read in a manner that is consistent with the enabling statute.

### ***c. Whether the decision is unreasonable.***

52. The *ex parte* applicant's counsel argued that impugned decision is unreasonable and defies logic in that it offends sections **2(1), 3, 4(1), 8** and **12** of the Oaths and Statutory Act<sup>[37]</sup> which grant qualified Advocates the power to administer oaths throughout the country without exceptions.

53. Save for maintaining that the decision was lawful, the Respondents' counsel did not specifically address this issue.

54. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the FAA Act. A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. The simple test used throughout is whether the decision in question is one which a reasonable authority could reach. The converse was described by Lord Diplock<sup>[38]</sup> as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.'

55. Review by a court of the reasonableness of a decision is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Differently stated, the following propositions can offer guidance on what constitutes unreasonableness:- (i) *Wednesbury* unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably; (ii) this ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ; (iii) the test of unreasonableness is whether the decision was reasonably open to the decision-maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it.

56. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused. Legal unreasonableness comprises of any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.<sup>[39]</sup>

57. The court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the statute conferring the power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the court to overturn the decision simply on the basis that it would have decided the matter differently.

58. As concluded above, the decision lacks legal basis. It offends the law. It defies logic. It falls outside the range of possible justifiable outcomes a decision maker properly directing his mind to law and facts can reasonably arrive at. The decision is grossly unreasonable. There is nothing to show that a reasonable body or person, faced with the same set of facts and circumstances and properly directing his mind to the law would have arrived at the same decision. In other words, applying the above tests of unreasonableness and irrationality, I find that the *ex parte* applicant has demonstrated that the decision was tainted with unreasonableness and or irrationality. The decision not only violates the law, but, it also offends logic. No sensible authority acting with due appreciation of its responsibilities would have decided to adopt such a decision.

**d. Whether the impugned decision was tainted by procedural impropriety.**

59. Even though some aspects of this issue were covered while discussing the first issue, and, appreciating that that some arguments touching on the two issues do inevitably overlap, at the risk of repeating myself, I will address procedural impropriety as a distinct issue.

60. It was the *ex parte* applicant' counsels submission that the impugned decision violates the rules of Natural Justice in that the *ex parte* applicant was not afforded an opportunity to be heard. Counsel argued that a court of law will intervene where a public body acts unlawfully. [40]

61. Counsel for the Respondents argued that the *ex parte* applicant failed to demonstrate impropriety of the decision making process. [41]

62. A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not followed or if the "rules of natural justice" are not adhered to. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached. *The law places a heavy premium on fair process. This is constitutionally anchored in Article 47.*

63. There are three broad bases on which a decision maker may owe a duty to exercise its functions in accordance with fair procedures. *First*, legislation or a legal instrument which gives a decision making power may impose a duty to follow specific procedures. The requirements relating to procedure contained in the statute or other instrument must be complied with. However, failure to comply with required procedures does not automatically mean that the decision which follows is invalid. The courts take a range of factors into account in deciding whether or not to nullify a decision.

64. *Second*, no-one may be the judge in his or her own cause. This strikes at decision making where the decision maker is connected with the party to the dispute or the subject matter. In this context, justice should not only be done, but should be seen to be done. Consequently, appearance of bias may be as relevant as actual bias.

65. *Third*, no person against whom an adverse decision might be taken should be denied a fair hearing to allow them to put their side of the case. What constitutes a fair hearing depends on the particular circumstances of the case. These include the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it has to work.

66. *Fourth*, statutes often require that decisions made under them to be supported by reasons.

67. The term *procedural impropriety* was used by Lord Diplock in the House of Lords decision of *Council of Civil Service Unions v. Minister for the Civil Service* [42] to explain that a public authority could be acting *ultra vires* if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of *judicial review*, the other two being *illegality* and *irrationality*. [43]

68. Procedural impropriety generally encompasses two things: procedural *ultra vires*, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and *common law* rules of *natural justice* and fairness. [44] Lord Diplock noted that "failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice," is a form of procedural impropriety. [45]

69. The common law rules of natural justice consist of two pillars: impartiality (the *rule against bias*, or *nemo iudex in causa sua* – "no one should be a judge in his own cause") and fair hearing (the right to be heard, or *audi alteram partem* – "hear the other side"). [46] The rule against bias divides bias into three categories: actual bias, imputed bias and apparent bias. More recent case law from the UK tends to refer to a duty of public authorities to act fairly rather than to natural justice. One aspect of such a duty is the obligation on authorities in some cases to give effect to *procedural legitimate expectations*. These are underpinned by the notion that a party that is or will be affected by a decision can expect that he or she will be consulted by the decision-maker before the decision is taken. [47]

70. The first issue is whether the manner in which the Respondent made the impugned decision amounted to breach of the rules of natural justice. Natural Justice has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement. It ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals.

In *Local Government Board v. Arlidge*,<sup>[48]</sup> Viscount Haldane observed, "...those whose duty it is to decide must act Judicially. 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 to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice." (Emphasis added)

71. In *Snyder v. Massachussets*,<sup>[49]</sup> the Supreme Court of the United States observed that there was a violation of due process whenever there was a breach of a "principle of Justice so rooted in the traditions and conscience of our people as to be ranked as fundamental."

72. It is important to note that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action*,<sup>[50]</sup> observed, "Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice." **Wade** in *Administrative Law*<sup>[51]</sup> says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

73. As Sir William Wade in his *Administrative Law* put it "Natural justice is concerned with the exercise of power, that is to say, with the acts and orders which produce legal results and in some way alter someone's legal position to his disadvantage. But preliminary steps, which in themselves may not involve immediate legal consequences, may lead to acts or orders which do so. In this case the protection of fair procedure may be needed throughout, and the successive steps must be considered not only separately but also as a whole. The question must always be whether, looking at the statutory procedure as a whole, each separate step is fair to the person affected."<sup>[52]</sup>

74. The Constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it.<sup>[53]</sup> Section 4 of the FAA Act re-echoes Article 47 and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. As **Sedley J** put it<sup>[54]</sup>:- "Public law is not about rights, even though abuse of power may and often do invade private rights; it is about wrongs-that is to say misuse of public power."

75. 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.<sup>[55]</sup>

76. Procedural fairness contemplated by Article 47 and the FAA Act demands a right to be heard before a decision affecting ones right is made. Whether or not a person was given a fair hearing of his case will depend on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. In the most recent edition of De Smith's *Judicial Review of Administrative Action*, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."<sup>[56]</sup>

77. From the facts presented in this case, it is evident that the *ex parte* applicant was not notified about the intended decision nor was it afforded an opportunity to be heard before making the decision, yet the decision affects it members. Differently stated, the decision was arrived at arbitrarily, unilaterally and in total violation of Article 47 rights. It was arrived at in breach of the express provisions of the FAA Act. The Respondents acted contrary to the rules of Natural Justice. I find that the *ex parte* applicant has demonstrated that the impugned decision is tainted with procedural impropriety.

#### ***e. Whether the decision is tainted with bias.***

78. Counsel for the *ex parte* applicant assaulted the impugned decision on grounds that it "is indicative of bias" because the Respondents chose to selectively approve Affidavits commissioned by a class of Commissioners for Oaths to the exclusion of others, and, that, no reasons were provided nor did that they consult the *ex parte* applicant.

79. The Respondents' counsel did not address this particular issue.

80. Bias, whether actual or apparent, connotes the absence of impartiality. Bias may take many different forms but the main distinction is between actual and apprehended bias. A claim of actual bias requires proof that the decision-maker approached the issues with a closed mind or had prejudged the matter, and, for reasons of either partiality in favour of a party or some form of prejudice affecting the decision, could not be swayed by the evidence in the case at hand.<sup>[57]</sup>

81. A claim of apprehended bias requires a finding that a fair minded and reasonably well informed observer might conclude that the decision-maker did not approach the issue with an open mind. Apprehended bias has been variously referred to as "apparent," "imputed", "suspected" or "presumptive" bias. <sup>[58]</sup>

82. These differences between actual and apprehended bias have several important consequences. Each form of bias is assessed from a different perspective. Actual bias is assessed by reference to conclusions that may be reasonably drawn from evidence about the *actual* views and behavior of the decision-maker. Apprehended bias is assessed objectively, by reference to conclusions that may be reasonably drawn about what an observer might conclude about the *possible* views and behavior of the decision-maker.<sup>[59]</sup> Each form of bias requires differing standards of evidence.<sup>[60]</sup> A claim of actual bias requires clear and direct evidence that the decision-maker was in fact biased.

Actual bias will not be made out by suspicions, possibilities or other such equivocal evidence. A court need only be satisfied that a fair minded and informed observer *might* conclude there was a real *possibility* that the decision-maker was not impartial.<sup>[61]</sup>

83. As the House of Lords stated, in formulating the appropriate test, the court should look at the matter through the eyes of the reasonable man, because the court personifies the reasonable man."<sup>[62]</sup>The Lords also made it clear that the standard was one of a "real danger" as opposed to a "real likelihood" or "real suspicion." In a subsequent decision, the House of Lords also affirmed that the fair minded observer would take account of the circumstances of the case at hand.<sup>[63]</sup>

84. It is of course a well settled principle of law that before a court can nullify a decision on the ground of bias, there must be proved, to the satisfaction of the court that there was in the case such a real likelihood of bias as would be sufficient to vitiate the proceedings or adjudication. As to what real likelihood of bias will suffice in this regard, one has to be guided by common sense and by certain legal principles which the courts have from time to time laid down as applicable in this type of case.

85. I find useful guidance in *R v Justices of Queen's court*<sup>[64]</sup> where it was held: "By 'bias' I understand a real likelihood of an operative prejudice, whether conscious or unconscious. There must in my opinion be reasonable evidence to satisfy the court that there was real likelihood of bias. I do not think that the mere vague suspicion of whimsical, capricious and unreasonable people should be made a standard to regulate our action here. It might be a different matter if suspicion rested on reasonable grounds - was reasonably generated but certainly mere flimsy, elusive, morbid suspicion should not be permitted to form a ground of "decision."

86. The onus rests upon the person alleging bias to establish this allegation on review. He can do so either by showing—that bias was clearly actually displayed; or that, in the circumstances, there was a real possibility of bias. The danger of bias or the suspicion of bias must be a real one and must not be remote, fanciful, flimsy, far-fetched or entirely speculative. There is a need to establish a link between the conduct alleged to form the basis of the allegation of bias and one of the parties to the litigation.

87. In applying this test, the courts must take into account both particular facts suggestive of bias and the cumulative effect of factors such as the way in which the entire proceedings were handled.<sup>[65]</sup> The *ex parte* applicant's basis for the alleged bias is premised on its allegation that other commissioners for oaths were not affected by the decision. No effort was made to substantiate this said allegation and show that it was influenced by bias whether actual or apparent. Again, there is nothing to show that the Respondents did not approach the issue with an open mind. Mere illegality of a decision is not sufficient to establish bias. The law as I understand it is that the *ex parte* applicant must demonstrate that the Respondent was biased. It cannot suffice to allege bias just because the decision is illegal. The allegation of bias raised in this case does not satisfy the tests for bias discussed above. I find and hold that the alleged bias has not been proved at all.

#### ***f. Whether the Respondent failed to take into account relevant considerations.***

88. The *ex parte* applicant's counsel argued that the Respondents failed to consider relevant considerations such as the power to commission Affidavits is conferred by the law. Also, he argued that the Respondents cannot arrogate upon themselves the power to amend the law to suit its needs. Additionally, it was contended that Advocates, just like other Commissioners for Oaths earn a living from exercising their powers as Commissioners for Oaths and are therefore entitled to obtain fees as provided under section 4(2) of the Oaths and Statutory Declarations Act.<sup>[66]</sup>

89. Additionally, it was submitted that the decision offends public interest as it offends access to justice provided under Article 48. He argued that the decision imposes a burden upon the Magistrates yet they are also required to perform judicial functions, yet, there are not enough magistrates across the country to perform the said functions.

90. The Respondents counsel did not address this issue.

91. Reaching at a decision on the basis of irrelevant considerations, or by disregarding relevant considerations, is one of the manifestations of irrationality. So, as stated in the case *R v Secretary of State for Social Services, ex parte Wellcome Foundation Ltd.*<sup>[67]</sup> it is a reviewable error either to take account of irrelevant considerations or to ignore relevant ones, provided that if the relevant matter has been considered or the irrelevant one is ignored, a different decision or rule might (but not necessarily would) have been made. Many errors of law and fact involve ignoring relevant matters or taking in to account of irrelevant ones. Ignoring relevant considerations or taking account of irrelevant ones may make a decision, or rule unreasonable.

92. As Cooke J pointed out in the case *Ashby v. Minister of Immigration*<sup>[68]</sup> considerations may be obligatory i.e. those which the Act expressly or impliedly requires the Tribunal to take into account and permissible considerations i.e. those which can properly be taken into account, but do not have to be.<sup>[69]</sup> Where the decision-maker fails to consider those obligatory considerations expressed or implied in the Act, the decision has to be invalidated. Whereas, in the case of permissive considerations, the decision-maker is not required to strictly abide to such considerations. Rather, the decision-maker is left at discretion to take the relevant considerations having regard to the particular circumstances of the case by ignoring those irrelevant ones from consideration. The number and scope of the considerations relevant to any particular decision or rule will depend very much on the nature of the decision or rule.

93. All that the courts do is to decide whether the particular consideration(s) specified by the complainant ought or ought not to have been taken into account.<sup>[70]</sup> In effect, under this head the courts only require the decision-maker to show that specified considerations were or were not adverted to. In technical terms, the burden of proof is on the applicant, but the respondent will have to provide a greater or less amount of evidence as to what factors were or were not considered and how they affected the decision. A mere catalogue of factors ignored or considered may not be enough.<sup>[71]</sup> It suffices to say that where the decision-maker fails to take relevant considerations into account but takes those irrelevant ones, there is high probability that the outcome of the decision may be affected by defects than not. So, the interference of the court to review such kind of decisions seems justifiable.

94. If, in the exercise of its discretion on a public duty, an authority takes into account considerations which the courts consider not to be proper, then in the eyes of the law it has not exercised its discretion legally. On the other hand, considerations that are relevant to a public

authority's decision are of two kinds: there are mandatory relevant considerations (that is, considerations that the statute empowering the authority expressly or impliedly identifies as those that must be taken into account), and discretionary relevant considerations (those which the authority may take into account if it regards them as appropriate). If a decision-maker has determined that a particular consideration is relevant to its decision, it is entitled to attribute to it whatever weight it thinks fit, and the courts will not interfere unless it has acted in a [Wednesbury-unreasonable](#) manner. This is consistent with the principle that the courts are generally only concerned with the legality of decisions and not their merits.

95. When determining if a decision-maker has failed to take into account mandatory relevant considerations, the courts tend to inquire into the manner in which the decision-maker balances the considerations. However, once the decision-maker has taken into account the relevant considerations, the courts are reluctant to scrutinize the manner in which the decision-maker balances the considerations. This can be gleaned from the case of *R. v. Boundary Commission for England, ex parte Foot* (1983),<sup>[72]</sup> where the Court of Appeal of England and Wales was unwilling to overrule certain recommendations of the Commission as it had rightfully taken all the correct considerations laid down in the relevant statute. The court emphasized that the weighing of those relevant considerations was a matter for the decision maker, not the courts.<sup>[73]</sup>

96. The above statement of law was endorsed in *Tesco Stores Ltd. v. Secretary of State for the Environment* (1995),<sup>[74]</sup> a [planning law](#) case. [Lord Hoffmann](#) discussed the "distinction between the question of whether something is a material consideration and the weight which it should be given. The former is a question of law and the latter is a question of planning judgment, which is entirely a matter for the planning authority".<sup>[75]</sup> His Lordship stated:-

*"Provided that the planning authority has regard to all material considerations, it is at liberty (provided that it does not lapse into Wednesbury irrationality) to give them whatever weight the planning authority thinks fit or no weight at all."*

97. When exercising a discretionary power a decision-maker may take into account a range of lawful considerations. Some of these are specified in the statute as matters to which regard may be had. Others are specified as matters to which regard may not be had. There are other considerations which are not specified but which the decision-maker may or may not lawfully take into account.<sup>[76]</sup> If the exercise of a discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account (expressly or impliedly), a court will normally hold that the power has not been validly exercised.

98. It may be immaterial that an authority has considered irrelevant matters in arriving at its decision if it has not allowed itself to be influenced by those matters<sup>[77]</sup> and it may be right to overlook a minor error of this kind even if it has affected an aspect of the decision.<sup>[78]</sup> However, if the influence of irrelevant factors is established, it does not appear to be necessary to prove that they were the sole or even the dominant influence. As a general rule it is enough to prove that their influence was material or substantial. For this reason there may be a practical advantage in founding a challenge to the validity of a discretionary act on the basis of irrelevant considerations rather than extraneous purpose, though the line of demarcation between the two grounds of invalidity is often imperceptible.<sup>[79]</sup>

99. If the ground of challenge is that relevant considerations have not been taken into account, the court will normally try to assess the actual or potential importance of the factor that was overlooked,<sup>[80]</sup> even though this may entail a degree of speculation. The question is whether the validity of the decision is contingent on strict observance of antecedent requirements. In determining what factors may or must be taken into account by the authority, the courts are again faced with problems of statutory interpretation. If relevant factors are specified in the enabling act it is for the courts to determine whether they are factors to which the authority is compelled to have regard.<sup>[81]</sup> If so, may other, non-specified considerations be taken into account or are the specified, considerations to be construed as being exhaustive?

100. A decision may be invalid (where an irrelevant consideration has been taken into account by a decision-maker. Two issues commonly arise in applying this criterion; one what matters were taken into account by a decision-maker? This is primarily an issue of fact, to be answered by analysis of evidence; and, two, were any of the matters that were taken into account an irrelevant consideration? This is commonly an issue of law, resolved by construction of the statute that confers a power. A criteria of relevance may also be found outside a statute, by reference to other aspects of the legal framework within which decision-making occurs.

101. A court will be **cautious** in deciding that an issue that was taken into account was irrelevant. In the simplest scenario, the legislation will exhaustively list the considerations or factors that can be taken into account. However, more often it will be necessary to draw inferences from other features of the legislation, including; Language of the statute, Purpose or object, The subject matter of the statute, The nature of the power being exercised and the nature of the office held by the decision-maker.

102. The principal focus will always be the words of the statute but other legal assumptions may be taken into account by the court, such as: A general legal presumption that legislation can never be administered to advance the personal interests of the decision-maker; International conventions; Humanitarian considerations; Racial and sexual bias would be an irrelevant consideration as a result of anti-discrimination legislation and Serious factual errors may be equated with irrelevant considerations.

103. A conclusion that a particular matter was considered can often be drawn from such evidence as:-A statement of reasons; Contemporaneous administrative decisions; Reliance by the decision maker upon an irrelevant policy statement.

104. Judicial review is not the re-hearing of the merits of a particular case. Rather, it is where a court reviews a decision to make sure that the decision-maker used the correct legal reasoning or followed the correct legal procedures. Judicial review is a more limited right than a right of appeal. The limited role of a court reviewing the exercise of an administrative discretion must constantly be borne in mind. It is not the function of the court to substitute its own decision for that of the administrator by exercising a discretion, which the legislator has vested in the administrator. Its role is to set limits on the exercise of that discretion, and a decision made within those boundaries cannot be impugned.<sup>[82]</sup>

105. The court will merely require the decision-maker to take the relevant considerations into account; it will not prescribe the weight that

must be accorded to each consideration, for to do so could constitute a usurpation of the decision-maker's discretion. [83] The law remains, as I see it, that when a functionary is entrusted with a discretion, the weight to be attached to particular factors, or how far a particular factor affects the eventual determination of the issue, is a matter for the functionary to decide, and as he/it acts in good faith (and reasonably and rationally) a court of law cannot interfere.

106. Parliament in its wisdom enacted legislation to govern Affidavits. The law provides for affidavits to be commissioned by commissioners for oaths. The court will normally try to assess the actual or potential importance of the factor that was overlooked. [84] The question is whether the validity of the decision is contingent on strict observance of antecedent requirements. In my view, the nature of the decision was that it was a relevant consideration for the Respondents to take into account the relevant law. This could have influenced the decision.

**g. Whether the Respondents acted in bad faith.**

107. Counsel for the *ex parte* applicant argued that the directive was made in bad faith, is unfair and an abuse of the first Respondents' discretionary powers. The Respondents' counsel did not counter this argument.

108. A decision maker must not seek to achieve a purpose other than the purpose for which the power to make the decision has been granted by Parliament. Bad faith can be inferred where there is a deliberate breach of due process or where the decision maker appears to have been influenced by irrelevant considerations. Upon proof of these requirements the presence of willfulness and bad faith on the part of the Respondent would normally be inferred, but the Respondent could rebut this inference by contrary proof on a balance of probabilities. [85] It is this contrary proof on the part of the Respondents that is lacking in the circumstances of this case, hence, I find that in the circumstances of this case and taking into account the above grounds commonly used to infer bad faith, the *ex parte* applicant has established reasonable grounds for this court to infer bad faith.

**h. Whether this court has jurisdiction to entertain this case.**

109. The Respondent's counsel submitted that this court lacks jurisdiction to entertain this matter since it cites violation of constitutional rights. [86]

110. Interestingly, the *ex parte* applicant's advocate did not address this issue in his submissions.

111. Jurisdiction is the very basis on which any Tribunal or Court tries a case; it is the lifeline of all trials. In other words, a trial without jurisdiction is a nullity. The importance of jurisdiction is the reason why it can be raised at any stage of a case, be it at the trial, on appeal to Court of Appeal or to the Court; *a fortiori* the Court *can suo motu* raise it.

112. By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter, or commission under which the Court is constituted, and may be extended or restricted by like means. If no restriction or limit is imposed the jurisdiction is said to be unlimited.

113. A limitation may be either as to the kind and nature of the actions and matters of which the particular Court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If the jurisdiction of an inferior Court or Tribunal (including an arbitrator) depends on the existence of a particular state of facts, the Court or Tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction; but, except where the Court or Tribunal has been given power to determine conclusively whether the fact exist.

114. Where a Court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given. [87] A Court's jurisdiction flows from either the Constitution, legislation or both or by principles laid out in judicial precedent. [88]

115. In general, a Court is bound to entertain proceedings that fall within its jurisdiction. Put differently, a court has no inherent jurisdiction to decline to entertain a matter within its jurisdiction. Jurisdiction is determined on the basis of pleadings and not the substantive merits of the case. *The South African Constitutional Court* [89] had this to say:-

*"Jurisdiction is determined on the basis of the pleadings, [90]... and not the substantive merits of the case... In the event of the Court's jurisdiction being challenged at the outset (in limine), the applicant's pleadings are the determining factor. They contain the legal basis of the claim under which the applicant has chosen to invoke the court's competence. While the pleadings – including in motion proceedings, not only the formal terminology of the notice of motion, but also the contents of the supporting affidavits – must be interpreted to establish what the legal basis of the applicant's claim is, it is not for the court to say that the facts asserted by the applicant would also sustain another claim, cognizable only in another court. If however the pleadings, properly interpreted, establish that the applicant is asserting a claim ..., one that is to be determined exclusively by.....{another court}, the High Court would lack jurisdiction..."*

116. Before me is a Judicial Review application seeking to review an administrative action. The application seeking leave was expressed under Order 53 Rules 1 (1)(2)(3) and (4) of the Civil Procedures, 2010, section 7(1) and (2) of the FAA Act, sections 8 & 9 of the Law Reform Act. [91] The substantive application is expressed under Order 53 Rule 3(1) of the Civil Procedure Rules, 2010.

117. I find it rather curious that the Respondent's counsel is assaulting these proceedings on grounds of jurisdiction implying that the matter ought to have instituted as a constitutional Petition since it cites violation of rights. Counsel however did not contest the truism that the impugned decision is an administrative decision within the definition discussed earlier contained in section 2 of the FAA Act.

118. Judicial Review is now entrenched in the Constitution. The concept of Judicial Review under the Constitution is similar to that under the Constitution of South Africa where the South African Court held in *Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others*<sup>[92]</sup> that “the common law principles that previously provided the grounds for Judicial Review of public power have been subsumed under the Constitution and, insofar as they might continue to be relevant to Judicial Review, they gain their force from the Constitution. In the Judicial Review of public power, the two are intertwined and do not constitute separate concepts.” The court went further to say that there are not two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. Rather, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.

119. The entrenchment of the power of Judicial Review, as a constitutional principle should of necessity expand the scope of the remedy. *First*, parties, who were once denied Judicial Review on the basis of the public-private power dichotomy, should now access Judicial Review if the person, body or authority against whom it is claimed exercised a quasi-judicial function or a function that is likely to affect his rights. *Second*, the right to access the court is now constitutionally guaranteed. This makes the requirement for the existence of a decision, order or proceedings should be read to include any administrative action as defined in section 2 of the FAA Act.

120. *Third*, and more important, an order of Judicial Review is one of the reliefs for violation of fundamental rights and freedoms under Article 23(3)(f). On this ground alone, the Respondents' counsel's argument that the *ex parte* applicant cites violation of rights implying that a constitutional Petition was the correct approach is fundamentally flawed, lacks substance either in law or in fact and must fail.

121. *Fourth*, section 7 of the FAA Act provides that any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to a court in accordance with section 8; or a tribunal in exercise of its jurisdiction conferred in that regard under any written law. Section 7 (2) of the act provides for grounds for applying for Judicial Review. By now it is trite that the Respondents' counsel's argument under discussion is misleading and unsustainable in law.

122. To further buttress my argument, I add that court decisions should boldly recognize the Constitution as the basis for Judicial Review. Judicial review is now a *constitutional supervision* of public authorities involving a challenge to the legal validity of the decision.<sup>[93]</sup> *Before me is a challenge to a decision by a public official. The challenge before me is proper and well grounded on the above cited provisions of the Constitution and the FAA Act.* Time has come for our Courts to fully explore and develop the concept of Judicial Review in Kenya as a constitutional supervision of power and develop the law on this front. Courts must develop Judicial Review jurisprudence alongside the mainstreamed “theory of a holistic interpretation of the Constitution.

123. Judicial Review is no longer a common law prerogative. It is now a tool to safeguard the constitutional principles, values and purposes. The Judicial Review powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution.

124. It is my conclusion that all that an applicant is required to do is to demonstrate that the impugned decision violates or threatens to violate the Bill of Rights or violation of the Constitution. The decision complained of falls within the ambit of an administrative decision as defined section 2 of the FAA Act, a legislation that was enacted to give effect to Article 47. The application before me is well grounded on the law. This court is properly seized of this matter.

### **Conclusion and final orders.**

125. The Respondent's counsel contended that the application does not meet Judicial Review threshold as set out in *Republic v Kenya National Examinations Council ex parte Gathenji & Others*<sup>[94]</sup> hence, the orders of *certiorari* and *mandamus* cannot issue.

126. *The above submission presents an opportunity to this court to restate the function, scope and nature of Judicial Review remedies and the test for granting such remedies.* In Judicial Review, the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects. The role of the court in Judicial Review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach'.

127. Judicial Review is about the decision making process, not the decision itself. The role of the court in Judicial Review is supervisory. Judicial Review is the review by a judge of the High Court of a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

128. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:- *the person or body is under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.*

129. The *ex parte* applicant seeks an order of *Certiorari* to quash the impugned decision. *Certiorari* issues to quash a decision that is *ultra vires*.<sup>[95]</sup> I have already concluded that the Respondents acted illegally and in violation of the law by purporting to pass the impugned decision. Review on a writ of *certiorari* is not a matter of right, but of judicial discretion. A petition for a writ of *certiorari* will be granted only for compelling reasons. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. Talking about sound legal principles, it is my conclusion that the decision offends the Oaths and Statutory Declarations Act,<sup>[96]</sup> hence, it is illegal/*ultra vires* and ought to be quashed.

130. The *ex parte* applicant also seeks an order of *Mandamus* to compel the first Respondent to accept Affidavits of Marriage commissioned

by Advocates. It is common ground that an order of *Mandamus* will issue to compel a person or body of persons who has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed.<sup>[97]</sup> It is common ground that the *ex parte* applicant has a legal right to have Affidavits commissioned by its members accepted since the powers to commission Affidavits are donated by the law. *Mandamus* is a judicial command requiring the performance of a specified duty which has **not been** performed or where a party refuses to perform. The Respondents have a legal duty to accept and honour the Affidavits.

131. *Mandamus* is employed to compel the performance, when refused, of a Ministerial duty, this being its chief use. It is also employed to compel action, when refused, in matters involving judgment and discretion, **but not to direct** the exercise of judgment or discretion in a particular way, nor to **direct the retraction or reversal of action already taken in the exercise of either.**<sup>[98]</sup>

132. *Mandamus* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. The circumstances of this case leaves me with no doubt that *Mandamus* is the most efficacious remedy in the circumstances.

133. *Mandamus* is an equitable remedy that serves to compel a public authority to perform its public legal duty and it is a remedy that controls procedural delays. The test for *mandamus* is set out in *Apotex Inc. vs. Canada (Attorney General)*,<sup>[99]</sup> and, was also discussed in *Dragan vs. Canada (Minister of Citizenship and Immigration)*.<sup>[100]</sup> The eight factors that must be present for the writ to issue are:-

- (i) *There must be a public legal duty to act;*
- (ii) *The duty must be owed to the Applicants;*
- (iii) *There must be a clear right to the performance of that duty, meaning that:*
  - a. *The Applicants have satisfied all conditions precedent; and*
  - b. *There must have been:*
    - I. *A prior demand for performance;*
    - II. *A reasonable time to comply with the demand, unless there was outright refusal; and*
    - III. *An express refusal, or an implied refusal through unreasonable delay;*
- (iv) *No other adequate remedy is available to the Applicants;*
- (v) *The Order sought must be of some practical value or effect;*
- (vi) *There is no equitable bar to the relief sought;*
- (vii) *On a balance of convenience, mandamus should lie.*

134. It is not disputed that the decision complained of if implemented will effectively disqualify Affidavits of Marriage commissioned by advocates in exercise of their powers to commission donated to them by the law. Differently stated, unless compelled by this court, the Respondents seek to prescribe who should commission Affidavits presented to them, a decision that has no basis in law. The Respondents have overstretched their discretion. Discretion must be founded on the law.

135. The grant of the orders of *Certiorari*, *Mandamus* and *Prohibition* is discretionary. The court is entitled to take into account the nature of the process against which Judicial Review is sought and satisfy itself that there is reasonable basis to justify the orders sought. In this regard, it is important to mention that the impugned decision is not founded on law. Further, allowing its implementation is tantamount to permitting an illegality. Applying the above tests to the facts and circumstances of this case, I find and hold that the *ex parte* applicant has satisfied the conditions for granting the orders sought. It follows that there is sound basis for the court to grant the Judicial Review orders of *Certiorari* and *Mandamus*.

136. I find and hold that the *ex parte* applicant's application succeeds. The upshot is that the *ex parte* applicant's application dated 30<sup>th</sup> April 2018 is hereby allowed. Consequently, I grant the following orders:-

- a. *An order of *Certiorari* be and is hereby issued quashing the first Respondent's directive dated 22<sup>nd</sup> February 2018 disregarding marriage certificates commissioned by Advocates;*
- b. *An order of *Mandamus* be and is hereby issued compelling the first Respondents to accept affidavits of marriage commissioned by Advocates.*
- c. *No orders as to costs.*

Orders accordingly

Signed, Dated and Delivered at **Nairobi** this **25<sup>th</sup>** day of **February** 2019.

**John M. Mativo**

**Judge.**

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[1] Act No. 21 of 2014.

[2] under section **4(d)** and **(e)** of the Law Society of Kenya Act, Act No. 21 of 2014.

[3] Act No. 9 of 1988

[4] Act No. 4 of 2015.

[5] Cap 15, Laws of Kenya.

[6] Ibid.

[7] Cap 15, Laws of Kenya.

[8] (CCT16/98) 2000 (1) SA 1.

[9] {2014}eKLR.

[10] {1979} KLR 154.

[11] {2013} eKLR.

[12] {2015} eKLR.

[13] {2017} eKLR.

[14] Citing *Daniel N. Otieno & Another v Technical University of Mombasa* {2017}eKLR.

[15] Ibid, Section 2

[16] *Serious Economic Offences vs Hyundai Motor Distributors (Pty) Ltd; In re Hyundai Motor Distributors (Pty) Ltd v Smit NO and* [2000]

[17] Article 47(1) of the Constitution of Kenya, 2010

[18] Article 47(2) of the Constitution of Kenya, 2010

[19] Section 6 of the Act.

[20] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11

[21] Cap 15, Laws of Kenya.

[22] Cap 15, Laws of Kenya.

[23] Citing Article 94(5) of the Constitution.

[24] Ibid.

[25] Ibid.

[26] Cap 255, Laws of Kenya.

[27] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, *Statute Law in New Zealand*, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[28] Act No. 9 of 1988

[29] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11

[30] Cap 15, Laws of Kenya.

[31] {1985} AC 374.

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

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

[34] See *Gauteng Gambling Board vs Silverstar Development* 2005 (4) SA 67 (SCA) paras 28-29

[35] Cap 15, Laws of Kenya.

[36] Cap 15, Laws of Kenya.

[37] Cap 15, Laws of Kenya.

[38] {1976} UKHL 6; {1976} 3 All ER 665 at 697; {1976} UKHL 6; , {1977} AC 1014 at 1064.

[39] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) *Administrative Justice and its Availability* (Federation Press, 2015) 37.

[40] Citing *Republic v Kenya School of Law ex parte Thomas Otieno Oriwa* {2015}eKLR.

[41] Citing *Northern Nomadic Disabled Person's Organization (NONDO) v Governor County Government of Garissa & Another* {2013}eKLR.

[42] *Council of Civil Service Unions v. Minister for the Civil Service* [1984] UKHL 9, [1985] 1 A.C. 374, [House of Lords](#) (UK).

[43] *Ibid.*

[44] *Peter Leyland; Gordon Anthony* (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", *Textbook on Administrative Law* (6th ed.), Oxford: [Oxford University Press](#), pp. 342–360 at 331, [ISBN 978-0-19-921776-2](#).

[45] *Supra*, note 18.

[46] *Supra*, Note 20, at p 342.

[47] *Ibid*, page 313.

[48] {1915} AC 120 (138) HL

[49] {1934} 291 US 97(105)

[50] (1980), at page 161.

[51] (1977) at page 395.

[52] 6<sup>th</sup> Ed at pages 570.

[53] *Kioa v West* (1985), Mason J.

[54]in *R vs Somerset CC Ex parte Dixon*(COD){1997} Q.B.D. 323.

[55] In the South African Case *Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others*, Chaskalson, J (CCT) 31/99 [2000] ZACC 1; 2000 (2) ZA 674.

[56] See S. De Smith, *Judicial Review of Administrative Action*, 4th ed. J. Evans (1980), 352- 4.

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

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

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

[60] Ibid

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

[62] [1993] UKHL 1; [1993] AC 646 at 670.

[63] *Porter v Magill* [2001] UKHL 67; [2002] 2 AC 357.

[64] {1908} 1 I.R. 285 294

[65] see *R v Foya* 1963(3) SA 459 (FS); *Crow v Detained Mental Patients Special Board* 1985(1) ZLR 202 (H) and *Austin & Anor v Chairman, Detainees' Review Tribunal & Anor* 1986 (4) SA 281 (ZS).

[66] Cap 15, Laws of Kenya.

[67] {1987} 1 WLR 1166.

[68] {1981} 1 NZLR 222 at 224.

[69] See Wade & Forsyth, p.381.

[70] See *Cannock Chase DC v Kelly* [1978] 1 All ER 152.

[71] *R v Lancashire CC, ex parte Huddleston* [1986] 2 All ER 941

[72] *R. v. Boundary Commission for England, ex parte Foot* [1983] EWCA Civ 10, [1983] Q.B. 600, C.A. (England and Wales).

[73] Ibid.

[74] *Tesco Stores Ltd. v. Secretary of State for the Environment* [1995] UKHL 22, [1995] 1 W.L.R. 759, H.L. (UK).

[75] Ibid.

[76] These three considerations were set out by Simon Brown L.J. in *R. v Somerset CC Ex p. Fewings* [1995] 1 W.L.R. 1037, at 1049.

[77] *R. v London (Bishop)* (1890) 24 Q.B.D. 213 at 226–227 (affd. on grounds not identical, sub nom. *Allcroft v Bishop of London* [1891] A.C. 666); *Ex p. Rice*; *Re Hawkins* (1957) 74 W.N. (N.S.W) 7, 14; *Hanks v Minister of Housing and Local Government* [1963] 1 Q.B. 999 at 1018–1020; *Re Hurle-Hobbs' Decision* [1944] 1 All E.R. 249

[78] *Hounslow LBC v Twickenham Garden Developments Ltd* [1971] Ch. 233, 271; *R. v Barnet & Camden Rent Tribunal Ex p. Frey Investments Ltd* [1972] 2 Q.B. 342; *Bristol DC v Clark* [1975] 1 W.L.R. 1443 at 1449–1450 (Lawton L.J.); *Asher v Secretary of State for the Environment* [1974] Ch. 208 at 221, 227.

[79] *Marshall v Blackpool Corp* [1935] A.C. 16; *Padfield v Minister of Agriculture, Fisheries and Food* [1968] A.C. 997; *R. v Rochdale MBC Ex p. Cromer Ring Mill Ltd* [1992] 2 All E.R. 761.

[80] *R. v London (Bishop)* (1890) 24 Q.B.D. at 266–227, 237, 244; *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] A.C. 663 at 693 (Lord Denning); *R. v Paddington Valuation Officer Ex p. Peachey Property Corp Ltd* [1966] 1 Q.B. 380.

[81] On mandatory and directory considerations, see 5–049; e.g. *Yorkshire Copper Works Ltd v Registrar of Trade Marks* [1954] 1 W.L.R. 554 (HL held that the Registrar was bound to have regard to specific factors to which he was prima facie empowered to have regard); *R. v Shadow Education Committee of Greenwich BC Ex p. Governors of John Ball Primary School* (1989) 88 L.G.R. 589 (failure to have regard to parental preferences).

[82] As noted by Mason J (as he then was) in *Minister for Aboriginal Affairs v Peko-Wallsend Ltd*, {1986} 162 CLR 24, 40-41 citing *Wednesbury Corporation* [1948] 1 KB, 228.

[83] Lawrence Baxter *Administrative Law* 1ed (1984) at 505.

[84] *R. v London (Bishop)* (1890) 24 Q.B.D. at 266–227, 237, 244; *Baldwin & Francis Ltd v Patents Appeal Tribunal* [1959] A.C. 663 at 693 (Lord Denning); *R. v Paddington Valuation Officer Ex p. Peachey Property Corp Ltd* [1966] 1 Q.B. 380.

[85] *Ibid*, at page 4

[86] Citing *Republic v National Land Commission & Another ex parte Pinnacle Development* {2018}eKLR in which the court cited *Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd* {1989}KLR1, *Republic v National Land Commission & Another ex parte Ceilia Chepkoech Leting & 2 Others and Republic v Karisa Chengo & 2 Others* Petition No. 5 of 2015.

[87] John Beecroft, *Words and Phrases Legally Defined*, Volume 3:1-N, at Page 113.

[88] The Supreme Court in *the matter of the Interim Independent Electoral Commission*, Constitutional Application No. 2 of 2011 (unreported).

[89] *In the matter between Vuyile Jackson Gcaba vs Minister for Safety and Security First & Others* Case CCT 64/08 [2009] ZACC 26.

[90] *Fraser vs ABSA Bank Ltd* {2006} ZACC 24; 2007 (3) BCLR 219 (CC); 2007 (3) SA 484 (CC) at para 40.

[91] Cap 26, Laws of Kenya.

[92] *2000 (2) SA 674 (CC)* at 33.

[93] See *Republic vs Commissioner of Customs Services Ex parte Imperial Bank Limited* {2015} eKLR.

[94] Civil Appeal No. 266 of 1996.

[95] See *Paul Kiplagat Birgen & 25 Others v Interim Independent Electoral Commission & 2 Others* {2011} eKLR.

[96] Cap 15, Laws of Kenya.

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

[98] *Wilbur vs. United States ex rel. Kadrie*, 281 U.S. 206, 218 (1930). See also Jacoby, *The Effect of Recent Changes in the Law of "Non-statutory" Judicial Review*, 53 GEO. IJ. 19, 25-26 (1964).

[99] *1993 Can LII 3004 (F.C.A.)*, [1994] 1 F.C. 742 (C.A.), aff'd *1994 CanLII 47 (S.C.C.)*, [1994] 3 S.C.R. 1100.

[100] *2003 FCT 211 (CanLII)*, [2003] 4 F.C. 189 (T.D.), aff'd *2003 FCA 233 (CanLII)*, 2003 FCA 233).