REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND JUDICIAL REVIEW DIVISION

MISC CIVIL CAUSE NO. 14 OF 2016

REPUBLIC .....APPLICANT

VERSUS

THE COMMISSION ON

ADMINISTRATIVE JUSTICE……RESPONDENT

EX PARTE: JUSTUS MWENDWA KATHENGE

JUDGEMENT

Introduction

1. By a Notice of Motion filed 27th January, 2016, the *ex parte* applicant herein, **Justus Mwendwa Kathenge**, the Director of Planning, Compliance and Enforcement for the Nairobi City County Government seeks the following orders:

> **a) An order of Certiorari be and is hereby issued to remove to this Honourable Court to be quashed the decision of the Commission on Administrative Justice (hereinafter referred to as the Commission) the Respondent herein, to publish the "Huruma Tragedy Report" published on 2nd December, 2015 recommending that the Office of the Director of Public Prosecution herein investigate the criminality conduct of the Applicant and prosecute him for negligence of duty.**
>
> **b) An order of Prohibition be and is hereby issued prohibiting the Respondent herein from by themselves, their agents/and or assigns acting jointly and/or severally from proceeding with any investigations into the criminal conduct if any of the Applicant or any intended prosecution arising from the investigations and/or any other disciplinary action as against the Applicant.**
>
> **c) An order of mandamus be and is hereby issued compelling the Respondent to expunge the Applicant's name from the Report forthwith.**
>
> **d) The costs of this application be provided for.**

***Ex Parte* Applicant's Case**

2. According to the applicant, on or about the 4th day of January, 2015 a seven-storey (7) residential building (herein referred to as the Building) under construction in Huruma Ngeii II estate in Nairobi collapsed at around 9.00pm killing five tenants and injuring Thirty Two (32) others. Subsequent to the said collapse, the Director of Criminal investigations, as mandated under the ***Police Service Act***, instituted criminal investigations into the circumstances surrounding the said collapse concluding in order to prefer charges being preferred against certain individuals who were found to be culpable.

3. The applicant averred that the collapse of the said building was attributed to poor workmanship, very shallow foundation on black cotton soil, structural defects due to poor concrete mix, use of sub-standard bars, lack of adequate reinforcements and lack of building supervision.

4. It was the applicant's case that the ***Commission on Administrative Justice Act*** (Cap 102A, Laws of Kenya) (hereinafter referred to as "the Act) provides in section 30(h) that the Commission on Administrative Justice (herein after referred to as the Commission) shall not investigate any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law. In addition, section 30(b) of the said Act provides that the Commission shall not investigate a criminal offence.

5. It was the applicant's case that despite the foregoing, the Respondent herein arrogated itself the mandate to investigate the reason for the collapse of the said building irrespective of the fact that the said investigations were criminal in nature and that the same had already been investigated by the body constitutionally mandated to do so. To the applicant, in purporting to carry out criminal investigations into the collapsed building which resulted in the death of five tenants, the Respondent herein acted in excess of its powers and in stark contravention of applicable statue, specifically section 30(b) of the Act.

6. It was disclosed that during the conduct of the criminal investigations above stated by the Director of Criminal Investigations, Nairobi City County Government, being the relevant body charged with the approval of building plans, took the decision to suspend several public officers inclusive of the Applicant, from office pending the outcome of investigations as to who was culpable for abetting irregular constructions within the County. However, the applicant's suspension was subsequently lifted on 16th February, 2015 after thorough investigations by the appropriate arm of government had been concluded thereby discharging him of any criminal culpability. The reason for absolving the applicant, it was contended was due to the reason that enforcement notices within the County Government could be issued by different departments and that specifically, the Enforcement Notice dated 31st January, 2012 had been issued by the Housing Development Department, which was a department particularly different from his. Further, the said Enforcement Notice had clearly indicated the persons who were to enforce the said notice and the applicant was never among them neither was he made aware that an enforcement notice had been issued by the Housing Department and that the same was in need of being executed.

7. According to the applicant, despite the foregoing, the Respondent herein purported to prepare a report titled *"The Huruma Tragedy"* (herein after referred to as the Report) recommending that the Office of the Director of Public Prosecution should investigate the criminal conduct of the Applicant together with the other suspended public officers as regards the collapse of the ill-fated Building and prosecute the said public officers for negligence of duty.

8. It was contended that the Constitution of Kenya Article 245(4) clearly states that no person may give direction to the Inspector-General with respect to the investigation of any particular offence or offences and/or the enforcement of the law against any particular person or persons. In addition the Act does not confer upon the Respondent herein supervisory powers over the office of the Inspector General under which the Directorate of Criminal Investigations lies, so as to allow the Respondent to monitor whether proper investigations were carried out or not.

9. It was therefore averred that the Respondent acted *ultra vires* and in excess of its jurisdiction as it does not have the mandate to give directions to the Inspector-General to investigate any particular offence or

offences.

10. The applicant disclosed that two public officers of Nairobi City County, particularly **Jane Wanjiru Ndonga**, the then Director of the Housing Development Department and **Francis Gikonyo Kamau** the Building Inspector from Housing Development Department were actually held to be criminally culpable and charged with the offence of neglect of duty contrary to section 36 of the ***Penal Code*** before the Makadara Law Courts, proceedings of which are still on-going.

11. It was therefore the applicant's case that by making recommendations touching on a matter duly investigated and pending before court, the Commission acted contrary and beyond the powers conferred on it by the legal instrument from which it derives its powers to wit section 30 sub-headed "Limitation of jurisdiction" which provide in section 30(2)(c) that the commission shall not investigate a matter pending before any court or judicial tribunal. Further to the foregoing, the Commission in purporting to direct the Inspector General on whom it should investigate even after the Office of the Inspector General had already invoked its constitutional mandate, acted *ultra vires* its statutory powers and contrary to clear and mandatory provisions of the Constitution.

12. Based on legal advice, it was contended that once the Office of the Inspector General has investigated a criminal matter and made a decision on whom to recommend for prosecution and the Director of Public Prosecution has accepted the said recommendation by instituting the relevant criminal charges, the only remedy that remains available for the Commission is to seek an order of *mandamus* from a court of law, if at all, directing the Inspector General of Police to undertake further investigations in any other way. It was therefore the applicant's position that the Respondent's actions are tantamount to trying to override/compel the Inspector General of police on how to carry out investigations and whom to charge and/or reviewing the decision of the Inspector General of Police, an action which is outrightly unconstitutional.

13. It was further averred that section 36 of the Act clearly states that the Commission shall give any person, State organ, public office or organization against whom an adverse finding or recommendation is made, an opportunity to make representations concerning the finding or recommendation before the Commission includes the finding in its report. However, in this particular instance, the Applicant was never given an opportunity to respond to allegations made against him as the letter dated 24th November, 2015 alleged to have been sent to the Applicant for purposes of a response was never served upon the Applicant but instead served upon the County Secretary of Nairobi City County who never transmitted the same. In his view, in matters with serious ramifications as the ones alluded to in the Report, service upon the affected party should have been effected directly and in person and it was upon the Respondent to ensure that service was actually effected. The applicant therefore contended that he was condemned unheard never having been given an opportunity to respond to the findings of the Commissions.

14. It was reiterated that due to the foregoing, the Commission's Report recommending that the applicant together with the other named individuals be investigated and prosecuted for negligence of duty was thus a breach of section 36 of the Act and Article 245(4) of the Constitution and is thus *ultra vires* and fraught with malice.

15. The applicant further asserted that the publication of the report was evidently anchored upon a perversion of pertinent facts which were excluded as the investigations were not conducted with due diligence and reasonable and/or probable deduction of the information readily available.

16. In a rejoinder to the replying affidavit, the ex parte applicant averred that the duty of enforcing compliance with an "Enforcement Notice" issued by the County Government of Nairobi does not lie strictly within the ex parte Applicant's directorate but with the Directorate that issued the said Notice in the first place and that in this particular instance, the Enforcement Notice dated 31st January 2012 in regard to the ill-fated Huruma Building was issued by the Housing Development Department in Dandora, a department completely autonomous from the applicant's, and copied to the Inspectorate Department and the Public Health Department. The said notice was never brought to the attention of the Directorate of Planning, Compliance and Enforcement. It was further averred that as at the time the Enforcement Notice

dated 31st January 2012 was being issued by the Housing Development Department, the Ex parte Applicant herein was not the Director of Planning, Compliance and Enforcement but instead the Assistant Director of city planning department with limited powers which did not cover operations of the Housing Development Department.

17. The applicant contended that in addition to the foregoing, the central theme of the investigations in this matter was the collapse of the Residential building in Huruma Estate on 4th January 2015 as even the report is ably titled "The Huruma Tragedy". It is therefore a misconception for the Respondent to aver that their investigation were general in nature on the collapse of 'buildings' within the County 'including' the Huruma Ngei II estate building. To the applicant, the Respondent herein cannot aver that it was only investigating the administrative aspects of the collapse independent of the criminal aspects thereto, given that the investigations conducted by the Director of Criminal Investigation encompassed even the 'administrative point of view' since certain individuals were charged "with neglect for official duty contrary to section 128 as read together with section 36 of the ***Penal Code***."

18. In the applicant's view, no law mandates the County Secretary to act as an agent of any public officers working in a County Government in investigations of a similar nature. The applicant asserted that there was no evidence that numerous attempts to locate him had proved futile and in his view, the essence of the Respondent's averments is that the same bolsters the Applicant's contention that he was never given an opportunity to be heard contrary to the rules of Natural justice.

19. The applicant disclosed that immediately he received a copy of the Report titled "The Huruma Tragedy" from the Respondent, he duly replied to the said report vide a letter dated 9th December 2015 setting out the true facts of the case and which letter he personally presented at the offices of the Respondent herein but to date, no attempt has been made by the Respondent to respond to the critical issues raised in the said letter.

20. It was submitted on behalf of the applicant that office of the Inspector General, who exercises independent command over the National Police Service and that of the Director of Public Prosecutions are creatures of the Constitution of Kenya, collectively referred to as independent offices purposefully because the spirit of the law intends that the said officers should carry out their duties free from any form of manipulation, direction and/or control by any other organ of the state and in this respect the applicant relied on Articles 245 and 157 of the Constitution of Kenya 2010.

21. It was submitted that the Inspector-General, through the Director of Criminal investigations having duly conducted criminal investigations into the circumstances surrounding the collapsed building as mandated under the ***Police Service Act***, Cap 84, Laws of Kenya and made recommendations that four persons, inclusive of two officers from the County Government of Nairobi should be prosecuted and in fact criminal charges were duly brought by the Director of Public Prosecution against four individuals namely **Margaret Magiri, Jane Wanjiru, Patrick Githinji** and **Francis Gikonyo** vide **Makadara Criminal Case No. 126/40/2015,** the Respondent had no mandate to purport to carry out parallel investigations as to the reasons surrounding the collapse of the aforestated building corollary to which a report titled "the Huruma Tragedy" was published.

22. On the question whether the Commission on Administrative Justice has the power to direct either the Office of the Inspector General and/or Director of Public Prosecution to conduct fresh investigations and/or prosecution into a matter that the two officers have already exercised their discretion, the applicant relied on **Titus Barasa Makhanu vs. Police Constable Simon Kinuthia Gitau No. 83653 & 3 Others [2016] eKLR** and **David Ndolo Ngiali & 2 Others vs. Director of Criminal Investigations & 4 others [2014] eKLR.**

23. It was further submitted that the Respondent herein is a Constitutional Commission established under Article 59(4) of the Constitution of Kenya, 2010 and section 3 of the ***Commission on Administrative Justice Act*** (Cap 102A of the Laws of Kenya) whose mandate as enunciated under section 7 of the said Act includes *inter-alia* to investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is

alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice. However, based on section 30 of the ***Commission on Administrative Justice Act*** it was submitted that as at the time when the Respondent herein purported to carry out independent investigations in the foregoing matter, investigations by the Directorate of Criminal Investigation, the relevant state organ empowered to carry out such investigations, were still ongoing a fact which has not been rebutted by the Respondents. In this regard, the Respondent herein was fully aware that they were acting in excess of their jurisdiction, but instead purported to ignore the provisions of the law and thus proceeded to act *ultra vires*. In this respect the applicant relied on **Republic vs. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR**.

24. The *ex parte* applicant thus submitted that the Respondents acted beyond the scope of their powers as stipulated under section 30(g) of the ***Commission on Administrative Justice Act*** by investigating a matter that was already under investigation by another organ of the state appropriately seized of the relevant jurisdiction.

25. With respect to the Respondent's power with respect to criminal offences, the Respondent relied on section 30(b) of the said Act, that bars the Commission from investigating a criminal offence and cited section 41**.**

26. It was the applicant's case that from the title of the report, it is glaringly visible that the administrative commissions and omissions, if any, by officers of the County Government in regard to the collapse of the said building could only have been criminal in nature. In this regard, investigations by the Director of Criminal Investigation encompassed even the 'administrative point of view' since the two individuals who are employees of the County Government of Nairobi were charged "with neglect for official duty contrary to section contrary to section 128 as read together with section 36 of the ***Penal Code***," as per the charge sheet adduced in evidence before this honourable court. Secondly, the recommendations by the Respondent herein against the Ex parte Applicant was of a criminal nature, which jurisdiction the Respondent was not seized of in the first instance. In this regard, the Applicant submitted that the Respondent without any colour of right ventured into an area that it was strictly prohibited by law and thus contravened the express provisions of section 30(b) of the Act.

27. It was further submitted that pursuant to section 30(c) of the Act, the Commission shall not investigate a matter pending before any court or judicial tribunal hence the Respondent had no jurisdiction to enquire and/or investigate into the matter of the collapsed building in Huruma Estate since there were cases pending in court on the same facts. To support this line of submission, the applicant relied on **Republic vs. Commission on Administrative Justice & Another Ex Parte Samson Kegengo Ongeri [2015] eKLR**.

28. According to the applicant, it is now trite law that an outright refusal to consider relevant facts and/or the consideration of irrelevant facts forms a ground for judicial review. In this particular instance, the Respondent's investigations into officers of Nairobi County Government in relation to the collapsed building in Huruma estate was in regard to the dereliction of duty by the said officers in enforcement of the law. At the centre of the said investigations was the Enforcement Notice dated 31st January, 2012 in regard to the ill fated building which notice was never enforced. It was the Ex parte applicant's contention that while conducting their investigation, the Respondent herein wilfully declined to take into consideration several pertinent facts as follows: In the first instance, the Enforcement Notice dated 31st January, 2012 had been issued by the Housing Development Department in Dandora to the owners of the ill fated building, and copied to the Department of City Inspectorate to assist in halting further construction and the Public Health Department for purposes of condemning the said building. The said Notice had never been brought to the attention of the then City Planning Department.

29. Secondly, the Respondent herein did not take into consideration that as at the time the enforcement notice dated 31st January 2012 was being issued, the Directorate of Planning, Compliance and Enforcement for which the Ex parte Applicant is currently the Director, did not exist as it was still a section within the City Planning Department. Thirdly, the Respondent herein failed to take into consideration that each and every department within the Nairobi City County is autonomous in their

operation and as such none could supervise the operations of the other. The City Planning Department thus, despite not being aware of the existence of the enforcement notice dated 31st January 2012, did not have supervisory jurisdiction over the Housing Development Department. Finally, as at the time the enforcement notice dated 31st January 2012 was being issued, the Ex parte Applicant herein was the Assistant Director of the City Planning Department and as such was not the final decision maker in regard to decisions affecting the Directorate.

30. In regard to the foregoing, the *ex parte* applicant herein avers that the conclusions reached by the Respondent were anchored upon a perversion of relevant facts to which this court has the power to remedy. In this respect the applicant relied on **Republic v Attorney General & another Exparte Salome Nyambura Nyagah [2014] eKLR**.

31. It was the applicant's case that he was not afforded an opportunity to be heard by the Respondents who did not give him any notice or reasons concerning their investigations, and therefore the Ex parte was condemned unheard. He relied on section 39 of the Act, which states that:

> ***(1) Subject to subsection (2), if at any stage of an inquiry the Commission—***
>
> ***(a) considers it necessary to inquire into the conduct of any person; or***
>
> ***(b) is of the opinion that the reputation of any person is likely to be prejudiced by the inquiry, it shall give that person an opportunity to appear before the Commission by himself or by an advocate to give evidence in his own defence.***
>
> ***(2) This section shall not apply where the credibility of a witness is being impeached.***

32. He also relied on section 36 of the same Act which provides that:

> ***"The Commission shall give any person, State organ, public office or organization against whom an adverse finding or recommendation is made, an opportunity to make representations concerning the finding or recommendation before the Commission includes the finding in its report."***

33. It was submitted that in this particular instance, no proof whatsoever, not even an Affidavit of Service has been adduced by the Respondent to prove that attempts had been made towards soliciting for the *ex parte* applicant's appearance, which appearance was not forthcoming. Further, no correspondence whatsoever had been left at the ex parte Applicant's office, to the effect that investigations against him were being carried out and that he had the right to reply neither did the Respondent show that they had made efforts to follow up with the office of the County Secretary to confirm whether the said letter had been transmitted to the *ex parte* Applicant. To date, the ex parte applicant is yet to have been served with a copy of the said letter dated 24th November 2015.

34. The Applicant submitted that the Respondents had a statutory duty to notify him that they were instituting investigations against him in his official capacity the effect of which is that his reputation might be prejudiced. It has not been shown that the Ex Parte Applicant did by any means whatsoever evade or refuse to embrace the opportunity of being notified by the Respondent's officials. Despite his personal number also being readily available, the Respondent still never tried to reach him for purposes of the investigations.

35. This submission was based on **Republic vs. Commission on Administrative Justice & Another Ex Parte Samson Kegengo Ongeri [2015] eKLR** where it was held that:

> **"Therefore even without the benefit of case law, the Act itself imports the elements of a hearing before the Commission's findings are included in the report. On this issue Halsbury's Laws of England, (supra) states:**

> **"Where however a general duty to act judicially is cast on the competent authority, only clear language will be interpreted as conferring a power to exclude the operation of the rule, and even in the absence of express procedural requirements fairness may still dictate that prior notice and an opportunity to be heard be afforded."**

36. The ex parte Applicant therefore contended that failure to notify him of the commission's decision to investigate him and inform him of the Commission's findings after its investigation breached his constitutional rights and the rules of natural justice.

37. It was the applicant's case that where a public body, herein the Commission on Administrative Justice, deliberately and consciously embarks on a tangent which is contrary to the law the effect of which is that judicial proceedings are instituted, it is only proper in law that such a body should bear the costs of any suit ensuing and relied on **Republic vs. Communication Authority of Kenya & another Ex-Parte Legal Advice Centre Aka Kituo Cha Sheria [2015] eKLR** where the court expressed itself at paragraph 20 as follows;

> **"In determining the issue of costs, the Court is entitled to look at the conduct of the parties, the subject of litigation and the circumstances which led to the institution of the legal proceedings and the events which eventually led to their termination. In other words the court may not only consider the conduct of the party in the actual litigation, but the matters which led up to litigation..."**

38. It was the applicants case that whereas the Respondent has a duty to protect and safeguard the public it has no right and authority to do so unlawfully and should therefore be condemned to pay the costs of the suit.

Respondent's Case

39. On behalf of the Respondent Commission it was averred that a building at Huruma Ngei II estate collapsed on 4th January 2015 but that case was not an excluded one but a common occurrence within the Nairobi City County leading to loss of many lives and destruction to property in the County. That incident, it was contended led to the important question as to whether legal requirements and building standards were being observed in the building and construction sector within the Nairobi City County which has statutory duties and obligations as a public body bestowed upon it to prohibit or control the use and development of land and buildings in the interests of proper and orderly development of its area. Pursuant to the foregoing, the Nairobi City County Government has obligations to consider and approve all development applications and grant all development permissions as provided under sections 29, 30 and 33 of the ***Physical Planning Act*** Cap. 286 Laws of Kenya.

40. According to the Respondent, in order to ensure that the foregoing obligations are fully complied with, the law requires the Nairobi City County to issue an Enforcement Notice under section 38 of the ***Physical Planning Act*** to the owner, occupier or developer of any concerned building and further to ensure that such a notice is strictly complied with to the latter. It was averred that the Nairobi City County Government had a duty to ensure the proper execution and implementation of approved physical development plans, a duty which had been bestowed upon its officers including the Ex-Parte Applicant herein, a public officer working with the Nairobi City County Government as the Director of Planning, Compliance and Enforcement. Accordingly, the duty of enforcing the compliance with an "Enforcement Notice" issued under section 38 of the ***Physical Planning Act*** lies strictly within the Applicant's Directorate as stated by the Applicant in his witness statement to the Respondent.

41. It reiterated that the Applicant who was at the material times the Director in charge of the Planning, Compliance and Enforcement Directorate had a duty to carry out his duties to the best of his ability and ensure that such duties provided are efficient and effective as provided by section 9 of the ***Public Officers Ethics Act***.

42. As appreciated by the ex parte applicant, among the reasons indicated by the Ex-Parte Applicant as

contributing to the collapse of the building included poor workmanship, very shallow foundation on black cotton soil, structural defects due to poor concrete mix, use of sub-standard bars, lack of reinforcement and lack of building supervision which reasons point to a wider systemic problem traversing from authorization, standardization, supervision, compliance with legal requirements as well as lack of enforcement in the building and construction sector within the Nairobi City County Government.

43. It was averred that based on the foregoing and in line with the Respondent's mandate of investigating issues of maladministration in any State organ, State or public office in National and County Governments, the need to establish the root cause of the frequent collapse of buildings within Nairobi City County ensued and hence the investigations into the conduct of public affairs in the relevant departments within the Nairobi City County Government. It was clarified that the Respondent was investigating the administrative aspects including acts of commissions or omissions within the Nairobi City County Government which may have directly or indirectly contributed to the collapse of buildings within the County including the Huruma Ngei II estate building. It therefore denied that the Respondent was investigating a criminal offence or a matter which was being investigated by any other person or commission as the matters which the Respondent was investigating were distinct and separate from what the National Police Service was investigating.

44. In the Respondent's view, the fact that an issue subject to an investigation has both criminal and administrative elements does not exclude the Respondent's Commission from investigating it especially from the administrative point of view. To the Respondent, the commencement of such an investigation by the Respondent is not depended on the outcomes thereof as such investigation can result to recommendations on further criminal investigations, administrative actions, civil remedies or policy/legal reforms.

45. The Respondent averred that it was not informed by either the Ex-Parte Applicant or his employer on the alleged lifting of his suspension during the Respondent's investigative process. In any event, the letter dated 16th February 2015 from the County Secretary to the Applicant lifting his suspension to enable him carry out reforms in his sector; a future event which was not and cannot be construed to constitute a criminal investigation finding on his past conduct in his work as public officer. It was averred that in the conduct of its investigations, the Respondent was able to find an Enforcement Notice dated 31st January 2012 directed to Developer/ Occupier of Plot No. 17 Huruma Ngei II Estate and which was the building which collapsed on 4th January 2015. The said Enforcement Notice dated 31st January 2012 listed several aspects including illegal construction of a building with four floors more than those which had been approved, failure to have the building inspected, allowing occupation of the building without occupation clearance and extending the building contrary to the approved plans.

46. The Respondent disclosed that according to the Enforcement Notice, the Developer/Occupier or owner of the building was required to stop any further construction, to have all the occupants of the building moved/evicted from it and to demolish the extra floors and extensions within seven days from the date of the Notice. Despite the clear and expression requirements of the Enforcement Notice dated 31st January 2012, the same were not complied with within the stipulated seven days or thereafter. To the Respondent, the failure to have the Enforcement Notice dated 31st January 2012 fully enforced and complied with led to loss of five people's lives, injuries and destruction of properties when the building finally collapsed on 4th January 2015, two years and eleven months after the Enforcement Notice was issued.

47. The Respondent averred that whereas it may be true that the Enforcement Notice dated 31st January 2012 might have been issued by the Housing Development Department, the responsibility of ensuring enforcement and compliance with the said Notice laid squarely with the Planning, Compliance and Enforcement Directorate. Further, the Applicant had the obligation to ensure the full compliance of the Enforcement Notice as he was the Director of the Directorate charged with the obligation of ensuring compliance and enforcement duties; but he neglected his official public duty bestowed upon him by failing to enforce building regulations and further failed to oversee the demolition of the unsafe building.

48. It was averred that accordingly, the Nairobi City County Government issued a notice to show cause/suspension upon the Ex-Parte Applicant on 6th January 2015. In the Respondent's view, had the Enforcement Notice dated 31st January 2012 been enforced to the letter, no deaths, injuries or destruction of property would have resulted as witnessed on 4th January 2015 and thus a case of culpability in neglect of public duty entrusted to the Nairobi City County Government officers including the Ex-Parte Applicant herein.

49. It was the Respondent's case that after its investigations, it recommended to the Director of Public Prosecution and Director of Criminal Investigations to investigate the criminality in the conduct of several Nairobi City County Government officers including the Applicant herein with a view of prosecuting them for negligence of duty. In the Respondent's view, its recommendations to the Director of Public Prosecution and the Directorate of Criminal Investigations are a means to catalyse appropriate actions or investigations by the Directorates but not to direct or supervise the respective offices thereof since recommendation from one agency of the Government to another are a normal way of transacting government business to ensure appropriate consultation and collaboration aimed at achieving efficiency and effectiveness in service delivery to the public.

50. It was disclosed that the mere fact that two officers within the Nairobi County Government had been charged with offence of neglect of duty contrary to section 36 of the ***Penal Code*** does not by itself absolve the Applicant from any alleged neglect of duty in the course of his duty as the discharge of or failure to discharge a duty bestowed upon any officer was an individual responsibility to which one or many officers may be culpable. In any event, the Ex-Parte Applicant as the head of the Planning, Compliance and Enforcement Directorate had the overall responsibility in terms of making important decisions and directions on planning, compliance and enforcement issues a responsibility which could not be shifted to his juniors or other persons in other Departments.

51. The Respondent asserted that the Applicant was duly given notice of his right to make representation concerning the Respondent's findings vide a letter dated 24th November 2015 which was addressed specifically to the Applicant but channelled through the County Secretary as the head of the County Public Service as provided by section 44 of the ***County Government Act***. It was disclosed that the County Secretary who duly received the letter dated 24th November 2015 on 25th November 2015 had a duty to transmit the same to the Applicant.

52. In any event and before the letter dated 24th November 2015, the Respondent had made various attempts to have the Ex-Parte Applicant served but the Respondent officer's numerous visits to the Applicant office did not bear fruits as he was always unavailable and thus resulting to serving him through the County Secretary' office. In the foregoing, the Respondent had acted within the full precincts of the law to investigate a matter in which it was constitutionally and statutory mandated to investigate in public interest.

53. It was therefore averred based on legal advice that the present application is misconceived, bad in law and an abuse of this Honourable Court's process.

54. It was submitted on behalf of the Respondent that the Applicant seems to have formed a mistaken opinion that the Respondent by its Report entitled *'The Huruma Tragedy'* directed the offices of the Inspector General and that of Director of Public Prosecutions to investigate the criminal culpability of the Applicant. The truth of the matter is that the Respondent by its Report **recommended** action points to several government offices including that of the Director of Public Prosecutions and Director of Criminal Investigations as indicated in part 5.0 of the report entitled *'Recommendations' (page 22 of the Report)*. The Respondent relied on ***Black's Henry Campbell, 1968. Black's Law Dictionary, Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern,*** (4th ed) West Publishing Co., St Paul, MINN. which defines the words ***'recommend'*** as ***"to advise or counsel***" and ***'direct'*** as ***"to point to; guide; order; command; instruct."*** The two words hence have different meaning with recommendation denoting the aspect of persuasion and direction denoting a sense of command or an order. It was therefore submitted that the correct position is that the Respondent's recommendations were

meant to **advice** on necessary actions which needed to be undertaken by such offices to ensure appropriate remedial measures to address the issues investigated. This is in line with section 8(c) of the ***Commission on Administrative Justice Act*** *(CAJ Act)* which requires the Respondent to *"report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon."* Some of the remedial actions which the Respondent can undertake after investigations include *'recommendations'* to different government offices for actions to be taken by such offices as stipulated under sections 41 and 44 of the ***CAJ Act.***

55. It was submitted that it was after the Respondent's investigations revealed the existence of a matter which needed to be further investigated by the Director of Criminal Investigations that such recommendation was made to the said office and which action is anchored on Article 59(2)(j) of the Constitution and section 41 (a) ***CAJ Act*** and further can properly be construed as a referral as provided under section 41(a) of the said Act.

56. While appreciating the independence of the DPP's and DCI's offices it was contended that this does not mean that recommendations cannot be forwarded to them for actions based on the Constitution and the law. It is common knowledge that government departments and agencies work smoothly though collaborations and engagements and one way to achieve this is through recommendations from one office to another. In any event, recommendations to National Police Service and/or the Director of Public Prosecutions is one of the ways in which the Respondent works in conjunction with other state organs to ensure promotion and protection of human rights as required by the law. This is in line with section 8 (k) of ***CAJ Act***.

57. In support of its case the Respondent relied on the Supreme Court in the case of **In Re the Matter of the Interim Independent Electoral Commission [2011] eKLR**, as quoted in the case of **Republic v Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR Nairobi High Court JR Case No. 304 of 2014 at para. 48.**

58. With respect to the allegation that the DCI' office had investigated the issue and made a decision to charge four persons, it was submitted that there is no documentary evidence or an investigation report which has been produced before this court showing the outcomes of the investigations by the Director of Criminal Investigations. The Charge Sheet attached to the Applicant's supporting Affidavit is not evidence on the outcome of the investigations by DCI. The Applicant has annexed to his Supporting Affidavit a letter by the Nairobi City County Government dated16th February 2015 lifting his suspension to support his position that the lifting of his employment suspension was done on the strength of him being cleared by DCI. The said letter, however, does not assist the Applicant's case as the same does not refer to any investigations by DCI's office, but rather states that the suspension was lifted to enable the Applicant to "…*carry out reforms in [his] sector…*" It was therefore the Respondent's that it is not clear as to what issues were investigated by the DCI, whether the Applicant herein was investigated by the DCI or not and further whether the Applicant, if at all, he was investigated and cleared from culpability in neglect of duty. The fact that two officers from the Nairobi City County Government were charged with neglect of official duty does not by itself absolve the Applicant from any culpability for negligence as such negligence is a personal and cannot be shifted to other officers. Hence and in the foregoing, the Respondent's recommendations to the Director of Criminal Investigations and Director of Public Prosecutions cannot be faulted.

59. According to the Respondent, since the Respondent wrote a letter to the Governor, Nairobi City County Government dated 6th January 2015 informing the Nairobi City County Government that the Respondent was undertaking investigations into the *"Huruma Incident with a view to establishing factors behind the collapse and more critically, the dereliction of duty by County Government officials responsible for approval of constructions and inspection of buildings"*, it is quite clear that the Respondent initiated its investigations on 6th January 2015 as supported by Statements taken by the Respondent on 10th January 2015 and 23rd January 2015. To the Respondent the law at section 30(h) of the ***CAJ Act*** requires the Respondent not to investigate ***"Any matter for the time being under investigations by any other person or commission…"*** Thus the said provision suggests a forbearance in the event there was an ongoing investigations by another person, body or commission at the time when

the Respondent is initiating an inquiry. Thus, and in the foregoing, the important question which must be answered at this point is whether as at 6th January 2015, the collapse of the Huruma Building was being investigated by the Criminal Investigations Department so as to bar the Respondent from carrying on any investigations on it. The Applicant has not stated in his affidavits or in his submissions as to the exact date the Director of Criminal Investigations Office initiated its investigations into the matter. Further, there is no documentary evidence on record from either the Criminal Investigations Department or any other department to demonstrate and prove to this Honourable Court that investigations had been commenced by DCI's office as at 6th January 2015. Hence, it cannot be assumed that the Respondent would have restrained itself in carrying out a function within its lawful mandates on a presumption that investigations would be done by DCI. To hold a contrary view would be catastrophic on the basis that it would encourage State entities mandated to exercise public duties to just sit back and await other departments with related mandates to act, which may result to no action at all by concerned departments. In this respect the Respondent relied on **Republic vs. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees** (supra) where the Court observed at paragraph 67 that:

> **"The EACC's letters do not, however, reveal when it started its investigations into the Project. The jurisdiction of the Respondent is only taken away by Section 30(h) of the CAJA where the matter is "for the time being under the investigation of any other person or Commission..."**

60. To the Respondent, a close examination of section 30(h) of the Act brings out the fact that the Commission is barred ***only*** from investigating matters which are similar to other matters being investigated by another person or a commission. It is thus critical to make a determination on whether what the Respondent enquired into was essentially what the Director of Criminal Investigation office was investigating, if any. This analysis will be possible only through an examination of the exact issues investigated by the two bodies. This analysis however, leads to the issue on whether the Respondent inquired into a criminal offence and whose discussion is presented hereinafter.

61. According to the Respondent, the functions of the Respondent are set out in Article 59(2)(h-k) of the Constitution thus:-

> ***"The functions of the Commission are –***
>
> ***h) to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;***
>
> ***i) to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unreasonable official conduct;***
>
> ***j) to report on complaints investigated under paragraphs (h) and (i) and take remedial action; and***
>
> ***k) to perform any other functions prescribed by legislation.***

62. It was submitted that the above functions are replicated in section 8 of the ***CAJ Act*** which provides that:-

> ***"The functions of the Commission shall be to—***
>
> ***a) Investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;***
>
> ***b) Investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful,***

oppressive, unfair or unresponsive official conduct within the public sector;

c) Report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon; and

d) Inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, mis-behaviour, inefficiency or ineptitude within the public service;"

63. As to whether what the Respondent investigated as indicated by its letter dated 6th January 2015 and by its report, comprised administrative actions or criminal offences the Respondent relied on section 2 of the Act defines "***administrative action"*** as

"…any action relating to matters of administration and includes—

a) A decision made or an act carried out in the public service;

b) A failure to act in discharge of a public duty required of an officer in public service;

64. It was therefore submitted that the issues that the Respondent investigated were properly within the meaning of administrative action as indicated in section 2 ***CAJ Act*** and within its mandates as indicated under Article 59(2)(h-k) of the Constitution and section 8 of the Act. While the Applicant has averred generally that the investigations were based on criminal offences, the Respondent averred that the Applicant had not stated to this Court the exact issues which were being investigated by the Director of Criminal Investigations. In any event, the fact that an issue subject to an investigation has both criminal and administrative elements does not necessarily exclude the Respondent from investigating it especially from the administrative point of view since the commencement of an investigation by the Respondent is not dependent on the outcomes thereof as such investigation can result in recommendations for criminal investigations by the DCI's office, administrative actions, civil remedies and policy or legal reforms initiatives. Further, in any event, while appreciating the provision of section 30(b) of the Act that limits the jurisdiction of the Commission to investigate criminal offences, section 41(a) of the Act is alive to the fact that in certain instances the Commission may investigate matters that disclose criminal offences in the context of administrative justice. In any event, instances of abuse of power, improper conduct, unlawful conduct, oppressive conduct and misbehaviour in public service, which the Commission is empowered to investigate, would in certain instances amount to criminal offences. It is in this regard, that the National Prosecution Policy by the Office of the Director of Public Prosecutions lists the Commission as one of the investigative agencies.

65. In this respect the Respondent relied on **Republic vs. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR**, Supreme Court decision in the Advisory Opinion No.2 in **Speaker of the Senate & Another versus Hon. Attorney General & Others [2013] eKLR** and **Republic vs. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees** (supra).

66. It was therefore submitted that the Applicant failed to demonstrate to this Court that the issues investigated by the Respondent were the same issues investigated by DCI's office and that they were criminal offences. In the Respondent's submission it inquired into issues which were distinct and separate from what the DCI's office may have investigated and which were not under investigations by anybody by the time the Respondent commenced its investigations.

67. As to whether the Respondent had a mandate to investigate a matter which was pending before a court of law, it was submitted that the Applicant herein is riding on a misconceived position that the Respondent herein investigated issues pending before a court of law yet the Applicant has not specifically informed this Honourable Court which issues investigated by the Respondent were pending in court. The Applicant has not tendered any pleadings or court documents to show that the issues investigated were similar to issues pending before a court of law. Further, the Applicant should have demonstrated that the issues were not only similar, but there was a potential risk that the investigation was likely to undermine

the court process and findings. Based on **Republic vs. Commission on Administrative Justice & Another Ex-Parte Samson Kegengo Ongeri [2015] eKLR,** it was submitted that *t*he matter is that the issues to which the Respondent investigated as shown in its report were not issues before any court of law as at 6th January 2015 when the Respondent initiated its investigations. The only case which was pending in court as correctly pointed out by the Respondent in its Report was Nairobi City Court Case No. 665 A of 2014 whereof the owner/developer of the collapsed building had been charged with failing to comply with notice issued under Public Health Act and whereby the Respondent noted that the Nairobi City County Enforcement Department had failed to enforce a warrant of arrest issued by the court against the owner/developer of the building on 27th October 2014.

68. On whether the respondent in reaching its decision ignored and/or refused to take into consideration relevant facts, it was submitted that based on the evidence on record, the underlying duty of the Applicant before the collapse and at the point of collapse of the Huruma Building included inspections of buildings, carrying out surveillance of ongoing projects, confirming that developers are carrying out developments as per what had been approved and organizing and managing demolitions of unsafe buildings. The foregoing is in line with the Directorate's title of *"Planning, Compliance and Enforcement"* and is also supported by part of contents of the "Show Cause/ Suspension" letter dated 6th January 2016 to the Applicant. Hence, as the Director in charge of the foregoing Directorate, the Applicant had a public duty of ensuring that the duties and roles within the said Directorate were performed in the best interests of the public in the Nairobi City County. This is an obligation which rested upon him and which obligation required due diligence coupled with concrete, decisive actions on his part as opposed to sitting down waiting for communications on unsafe or unapproved buildings to be brought to his office. The critical question to ask is what action did the Applicant, as the Director in charge of the Directorate of Planning, Compliance and Enforcement, take in relation to the unsafe and un-approved Huruma building before its collapse on 4th January 2015. To the Respondent, the Applicant is trying to escape liability by indicating that the Enforcement Notice was not issued by his Directorate and that he was not aware of it and further when it was issued on 31st January 2012, he was not the Director Planning, Compliance and Enforcement. The foregoing amounts to simplistic thinking. In this regard the Respondent relied on sections 8 and 9 of the ***Public Officers Ethics Act.***

69. Accordingly and in line with the foregoing facts and provisions of the law, it was right for the Respondent to conclude that the Applicant neglected his duties and hence recommended investigations of his criminal culpability. It was the Respondent's humble submissions that it took into consideration relevant facts and its decision cannot be faulted on that account.

70. As to whether applicant was denied the right to a fair hearing, the respondent submitted that its investigations were carried out as against the Nairobi City County Government especially departments concerned with the duties of inspections of buildings, surveillance of ongoing projects, supervisions, confirmation of approved plans and organizing and managing demolitions of unsafe buildings but not against a single individual. The foregoing then places the relationship between the Respondent and the County Government at an institutional level whereof anything conducted within the investigative process followed institutional procedures. This started with the Respondent writing a letter to the Nairobi City County Government on 6th June 2015 informing the County Government on the investigations. This is in line with section 37 of the CAJ Act which requires the Respondent to give notice to the administrative head of the State Organ or Public Office to be investigated. The said letter provided the required information in terms of the nature of investigations to be carried out and the reasons thereof. There is no requirement in law providing that individuals within the public office being investigated need to be notified.

71. It was however averred that notwithstanding the foregoing, a presumption arises that the Applicant who was a Director within the County Government and whose directorate was among the line directorates for investigation by the Respondent was notified by the County Government accordingly. This presumption is true as subsequently and further to the letter dated 6th January 2015, the Applicant was invited by the Respondent to its Offices at West End Towers on 23rd January 2015 whereof he personally attended to the Respondent's offices and recorded a statement with the Respondent and never raised any

objection to the said invitation and never questioned the statement recording before or on 23rd January 2015 which means that he was fully aware of the Respondent's investigations. Hence, the Applicant cannot state that he was not notified of the investigations by the Respondent. Further to the foregoing, it has to be noted that during the meeting between the Applicant and the Respondent's officer on 23rd January 2015, the Applicant was given an opportunity to be heard whereof he presented his views in relation to the issues under investigations and a statement was recorded. At the conclusion of the investigative process, his views were included in the Respondent's report and thus, it is not correct for the Applicant to claim that he was not granted an opportunity to be heard.

72. With respect to section 36 of ***CAJ Act*** it was the Respondent's Case that in an effort to ensure that the full tenets of principles of natural justice were met and as an additional safeguard, the Respondent went ahead and made further efforts to inform the named County Government's officers including the Applicant of the Respondent's findings. This was done by way of letters addressed to them through the County Secretary. It has to be noted that the County Secretary's office played critical role in the whole of the investigations in that the office was the focal point for communication and interactions between the County Government and the Respondent but further the Secretary was the head of the County Public Service as provided by section 44 of the County Government Act. Further, the representations which the County Government were to make under section 36 of the ***CAJ Act*** would have ordinarily emanated from the said office. In any event, the letter dated 24th November 2015 was being served upon the Applicant in his official capacity as a Public Official with the Nairobi County Government and as such, the law allows service to be effected upon the County Secretary as an authorized agent for service in a County Government. Hence, the Respondent's service of the letter to the Applicant through such office was well informed based on the circumstances thereof. Accordingly, the County Secretary's office having duly received the letter to the Applicant dated 24th November 2015 on 25th November 2015, had a duty to transmit the same to the Applicant based on the institutional administrative structures in the entire investigative process, his responsibility as the head of County Public Service, as an authorized agent and further because representations had to be made by the County Government, which representations required information on the named officers. What is surprising is that after the Respondent released its report on 2nd December 2015 and served upon the County Secretary in the same manner, and the report was transmitted and received by the Applicant on 3rd December 2015 as evidenced by his annexture marked JMK 1 in his Supplementary Affidavit at paragraph 1 thereof. This reinforces the Respondent's argument that the letter dated 24th November 2015 was transmitted to the Applicant, but he chose to ignore it.

73. In any event, it was submitted that it is common knowledge in practice defendants always tend to evade service of important documents in the event that they become aware of such service simply to frustrate the process at hand. The Respondent stated in its Replying Affidavit that it tried in vain to serve the Applicant, but he avoided service thus resulting to service through the Secretary Office on 24th November 2015. Whereas the Applicant faults such service, the same is well within the law and was the best suited service bearing in mind the circumstances of the investigative process and the role the County Secretary's Office was playing in the said process.

74. As regards section 39 of ***CAJ Act*** it was submitted that the Applicant has failed to disclose to this Honourable Court that he had been invited by the Respondent to submit his views and record a statement in regard to the investigations. On the contrary, the Respondent has brought out the fact that the Applicant was invited by the Respondent in its offices on 23rd January 2015 to submit his views on the matter under investigation. The Applicant indeed personally attended the Respondent's offices on the said 23rd January 2015 whereof a discussion on the issues was done culminating in a statement which was signed by Applicant. Hence, it is not true that the Applicant was not granted an opportunity to express his views on the matter.

75. To the Respondent, section 39 ***CAJ Act*** requires an opportunity to be granted to a person when the Commission forms and opinion that "…***the reputation of [such] person is likely to be prejudiced by the inquiry***,". ***Blacks Law Dictionary*** (supra) defines ***'reputation'*** as:

Estimation in which one is held, the character imputed to a person in the neighborhood where he lives. General opinion, good or bad, held of a person by those of the community in which he resides.

76. It was submitted that the Applicant in this case has not informed this Court whether his reputation was prejudiced by the Respondent's inquiry and if so, in what manner the same was prejudiced. It has to be noted that the Respondent's recommendations are based on the inquiry undertaken as against the Nairobi City County Government whereof it was noted that some County Government officers including the Applicant may be culpable of dereliction of public duty leading to the collapse of the Huruma building on 4th January 2015. The foregoing finding was based on examination of the facts and the law on inspections of buildings, surveillance of ongoing projects, supervisions, confirmation of approved plans and organising and managing demolitions of unsafe buildings and thus a recommendation by the Respondent for investigations on the criminal culpability of the Applicant to the DCI's office. The finding hence is based on the facts as at the time of investigations and which represents the true state of affairs. It cannot be said that the Applicant's reputation was injured by stating the truth on a failure to perform a public duty which had been bestowed upon the Applicant.

77. In the Respondent's view, it is important to note that the Respondent's recommendations emanated from an investigative process against the Nairobi County Government and not from a quasi-judicial process. Further, the Respondent's recommendation was an advice to an independent office which had the choice to act on such based on its mandate under the law and on the material evidence available. In any event, the recommendation by the Respondent was not a finding on the Applicant's criminal culpability and thus do not in any way whatsoever prejudice the Applicant's reputation. The said recommendations act as catalysts for action by the concerned offices where separate independent processes guided by the rules of natural justice exist. In the event that the DCI's office decides to carry out investigations, the Applicant will be afforded opportunity to record a statement, produce documents and witnesses, be accompanied by an Advocate and so on. In the event that he is arraigned before a court of law, legal provisions exists in the law to ensure his right to fair hearing is upheld. Reliance was placed on **Selvara Jan vs. Race Relations Board [1976] 1 All ER 12 as quoted in Republic v Kenya Bureau of Standards Ex-parte Powerex Lubricants Limited [2016] eKLR**, where the court held that:

> **"In all these cases it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains or penalties, or be exposed to prosecution or proceedings, or deprived of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case made against him and be afforded a fair opportunity of answering it. The investigating body is, however, the master of its own procedure. It need not hold a hearing. It can do everything in writing. It need not allow lawyers. It need not put every detail of the case against a man. Suffice if the broad grounds are given. It need not name its informants. It can give the substance only. Moreover it need not do everything itself. It can employ secretaries and assistants to do all the preliminary work and leave much to them. But, in the end, the investigating body itself must come to its own decision and make its own report."**

78. In the Respondent's view, an opportunity to be heard does not necessarily entail an oral hearing as observed in the case of **Republic vs. Board of Governors, Our Lady of Victory Girls School Kapnyeberai & another Ex-parte Korir Kipyego Joseph & another [2015] eKLR** that:

> **"…a hearing does not necessarily have to be an oral hearing in all cases and that there is ample authority that decision-making bodies, other than courts and bodies whose procedures are laid down by statute are masters of their own procedure, provided that they achieve the degree of fairness appropriate to their task. It is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing…The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting and that whatever standard is adopted it is essential that the**

person concerned would have had a reasonable opportunity of presenting his case…On the allegation that there was breach of the rules of natural Justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance".

79. The Respondent also relied on **Republic vs. the Commission of Administrative Justice & Another Ex-parte John Ndirangu Kariuki [2013] eKLR**, where the court held that:

"Based on the material on record I, am not satisfied that the recommendations of the 1st Respondent amounted to a determination for the purposes of judicial review. They were simply recommendations and the 2nd Respondent was not under any obligation to act upon them since the 2nd Respondent is expected to undertake its Constitutional and statutory mandate independently and without any directions from any person. Without the 2nd Respondent admitting them as part of the material upon which it would determine the ex-parte Applicant's eligibility, the 1st Respondent's views remain just that – recommendations. However, it is expected that when it decides to make determinations which are likely to adversely affect the rights of a person, the rules of natural justice would be adhered to. However, at the time these proceedings were instituted there is no evidence that the 2nd Respondent had commenced the process of determining the eligibility of the Applicant to hold public office and that there was imminent danger that the ex-parte Applicant was going to be denied the opportunity of being heard before a determination was made."

80. It was hence the Respondent's submissions that the Applicant was granted sufficient opportunity to be heard and to present his views which he did when he attended the Respondent's office on 23rd January 2015 and recorded a statement which meets the threshold of the right to be heard under investigations such as the one by the Respondent. There was no need to an oral hearing as the Respondent's recommendation was only for investigations by DCI's office and the DPP in the event that they admitted responsibility, which processes have their own mechanisms for ensuring the right to fair hearing.

81. The Respondent therefore asserted that the Applicant is not entitled to any of the Orders sought in his Notice of Motion Application dated 27th January 2016 as it has been shown hereinbefore in these submissions, the Applicant has not met any of the grounds that would warrant this Honourable Court to exercise its discretion to issue an order of certiorari to remove to the Honourable court the decision by the Respondent contained in the "Huruma Tragedy Report" published on 2nd December 2015. Whereas the Applicant seeks the quashing of the report in a general way, the same cannot be maintained where other state's agencies and departments have not shown any opposition to the said Report. In any event, the Applicant has generally asked for an order to quash the report without specifying the offending paragraphs, clauses or chapters, if any. It is a cardinal rule that a party is bound by its pleadings and hence the order sought by the Applicant without specificity cannot be granted.

82. It was submitted that the Applicant has sought an Order of Prohibition to prohibit the Respondent herein by themselves, their agents and/or assigns acting jointly and/or severally from proceeding with any investigations into the criminal conduct, if any, of the Applicant or any intended prosecution arising from the investigations and/or any other disciplinary action as against the Applicant. The foregoing order demonstrates that the Applicant seems to be acting on a mistaken position that the Respondent can initiate further investigations on his criminal culpability. This position is, however, mistaken as the Respondent conducted its investigations and made recommendations to appropriate state's organs, including the DCI and the DPP"s offices. The Respondent is thus *functus officio* as far as its investigations are concerned when its Report was published on 2nd December 2015. To the Respondent, a court order cannot be issued to bar what has already taken place. It is not clear as to what the Applicant means by indicating "…their agents and/or assigns…" and hence an Order of Prohibition cannot be issued in vain. In any event, any investigations into the criminal culpability of the Applicant can only be commenced by the Director of

Criminal Investigations, an office which is not a party to this suit and which the Applicant never bothered to bring to this case. Similarly, any prosecution which can be undertaken can only be done by the Office of the Director of Public Prosecutions which office is not a party to this suit. It was further submitted that a court order cannot be issued to bar actions by offices which are not parties to this suit. The foregoing notwithstanding, it cannot be imagined that the Applicant can come to court to obtain a court order which in essence insulates him from any form of investigations or prosecution in relation to his public duties and hence the Order of Prohibition sought should not be granted. He Respondent relied on **Republic vs. Commission on Administrative Justice & another Ex-Parte Samson Kegengo Ongeri [2015] eKLR** for holding at paragraph 75 that:

> **"In my view, and it has been stated before, judicial review proceedings are special proceedings and whereas the Court may quash a report or decision, the order ought not to be crafted in such a manner that even those who have not contested the decision would be entitled to benefit otherwise that would defeat the limitation provided under the Law Reform Act as read with Order 53 of the Civil Procedure Rules."**

83. Similarly in **Republic vs the Commission of Administrative Justice & Another Ex-parte John Ndirangu Kariuki** (supra) the court held that:

> **"Courts do not issue orders at large in judicial review applications. Whereas such orders may be granted in declaratory suits, the Court is not expected to go to a fishing expedition in an application for judicial review unless it is shown that the applicant's rights and fair hearing have been or are in imminent danger of being contravened."**

84. Regarding costs, it was submitted that the Applicant has not met the requirements for an award of costs in this case. The Respondent has hereinbefore indicated and demonstrated the constitutional and statutory obligations it has in ensuring efficient and effective public service delivery to the citizens to ensure the full protection and promotion of the citizenry fundamental rights. The Respondent's duty is hence a public interest duty bestowed upon it by the law for which it cannot be punished or stopped from performing its duties under the law.

85. Based on the foregoing, it was the Respondent's submissions that the present case is misconceived, bad in law and an abuse of this Honourable Court's process and the same should be dismissed with costs.

Determination

86. I have considered the application, the affidavits in support of and in opposition to the application the submissions as well as the authorities relied upon and this is the view I form of the matter.

87. It was the applicant's case that the ***Commission on Administrative Justice Act*** (Cap 102A, Laws of Kenya) (hereinafter referred to as "the Act) provides in section 30(h) that the Commission on Administrative Justice (herein after referred to as the Commission) shall not investigate any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law. The said section provides as hereunder:

> ***The Commission shall not investigate—***
>
> ***(a) proceedings or a decision of the Cabinet or a committee of the Cabinet;***
>
> ***(b) a criminal offence;***
>
> ***(c) a matter pending before any court or judicial tribunal;***
>
> ***(d) the commencement or conduct of criminal or civil proceedings before a court or other body carrying out judicial functions;***

(e) the grant of Honours or Awards by the President;

(f) a matter relating to the relations between the State and any foreign State or international organization recognized as such under international law;

(g) anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to; or

(h) any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.

88. I agree that the Respondent is expressly prohibited by the law from investigating criminal offences. The question however is whether the Respondent was in fact investigating the commission of a criminal offence.

89. It is true that the functions of the Respondent are set out in section 8 of the ***CAJ Act*** which provides that:-

"The functions of the Commission shall be to—

(a) investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;

(b) investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;

(c) report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;

(d) inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service;

(e) facilitate the setting up of, and build complaint handling capacity in, the sectors of public service, public offices and state organs;

(f) work with different public institutions to promote alternative dispute resolution methods in the resolution of complaints relating to public administration;

(g) recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;

(h) provide advisory opinions or proposals on improvement of public administration, including review of legislation, codes of conduct, processes and procedures;

(i) publish periodic reports on the status of administrative justice in Kenya;

(j) promote public awareness of policies and administrative procedures on matters relating to administrative justice;

(k) take appropriate steps in conjunction with other State organs and Commissions responsible for the protection and promotion of human rights to facilitate promotion and protection of the fundamental rights and freedoms of the individual in public administration;

(l) work with the Kenya National Commission on Human Rights to ensure efficiency,

effectiveness and complementarity in their activities and to establish mechanisms for referrals and collaboration; and

(m) perform such other functions as may be prescribed by the Constitution and any other written law.

90. It is therefore clear that one of the functions of the Respondent is to inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehaviour, inefficiency or ineptitude within the public service. Section 2 of the Act defines "***administrative action"*** as

"…any action relating to matters of administration and includes—

c) A decision made or an act carried out in the public service;

d) A failure to act in discharge of a public duty required of an officer in public service;

91. In this case, the applicant himself averred that the collapse of the subject building was attributed to poor workmanship, very shallow foundation on black cotton soil, structural defects due to poor concrete mix, use of sub-standard bars, lack of adequate reinforcements and lack of building supervision.

92. In this case the Applicant has not stated with clarity the exact issues which were being investigated by the Director of Criminal Investigations. I however agree that the fact that an issue subject to an investigation has both criminal and administrative elements does not necessarily exclude the Respondent from investigating it if the Commission views the matter as being administrative in nature as opposed to a criminal one and where the facts of the case may well constitute an administrative injustice. The mere fact that an administrative injustice may similarly constitute a criminal offence does not take it outside the purview of investigation by the Respondent. In my why what is prohibited is for the Respondent Commission to set out to investigate what is purely a criminal offence with no element whatsoever of an administrative injustice. This must necessarily so in light of the provisions of section 41(a) of the Act under which it is provided that the Commission may, upon inquiry into a complaint under the Act refer the matter to the Director of Public Prosecutions or any other relevant authority or undertake such other action as the Commission may deem fit against the concerned person or persons where the inquiry discloses a criminal offence. The position is similarly supported by section 44 of the Act which states that:-

If, after an investigation, the Commission is of the opinion that there is evidence that a person, an officer or employee of the State organ, public office or organisation which was investigated under this Act is guilty of misconduct, the Commission shall report the matter to the appropriate authority.

93. In my view what this means is that the Commission may well investigate an administrative injustice but once it forms the opinion that its investigations have unearthed the commission of a criminal offence, it must then refer the matter to the DPP or the relevant authority. In other words, it cannot take upon itself the task of undertaking what in its view amounts to a commission of a criminal offence. To this extent I agree that instances of abuse of power, improper conduct, unlawful conduct, oppressive conduct and misbehaviour in public service, which the Commission is empowered to investigate, would in certain instances amount to criminal offences.

94. In this case just like in any other judicial review proceedings, the burden lies on the applicant to prove his allegations. In **East African Community vs. Railways African Union (Kenya) and Others (No. 2) Civil Appeal No. 41 of 1974 [1974] EA 425**, it was held by the East African Court of Appeal that the onus lies on a person seeking the grant of a prerogative order to establish that it is essential for it to issue since these are not orders that are lightly made. Judicial review or prerogative writs as they were known in the past, it has been held are orders of serious nature and cannot and should not be granted lightly. They should only be granted where there are concrete grounds for their issuance. It is not enough to simply state that grounds for their issuance exist; there is a need to lay basis for alleging that there exist

grounds which justify the grant of the said orders.

95. I associate myself with the holding in **Republic vs. Kenya Power & Lighting Company Limited & Another [2013] eKLR** to the effect that:

> **"It is not enough for an applicant in judicial review proceedings to claim that a tribunal has acted illegally, unreasonably or in breach of rules of natural justice. The actual sins of a tribunal must be exhibited for judicial review remedies to be granted."**

96. On the face of it, it would seem that the Respondent investigated were properly within the meaning of administrative action as indicated in section 2 ***CAJ Act*** and within its mandate as indicated under section 8 of the Act. Based on the evidence placed before me I am unable to find that the Respondent set out to investigate the commission of a criminal offence as opposed to an administrative injustice.

97. I therefore associate myself with the position adopted by the Supreme Court in the Advisory Opinion No.2 in **Speaker of the Senate & Another versus Hon. Attorney General & Others [2013] eKLR,** at paragraph 146, that:

> **"…lawful public agency conduct under the Constitution requires every state organ to grapple, in good faith, with assigned obligations, and with a clear commitment to inter-agency harmony and cooperation and that no state agency, especially where it is represented by one person, should overlook the historical trajectory of the Constitution which is clearly marked by transition from narrow platforms of idiosyncrasy or sheer might to a scheme of progressive, accountable institutional interplays."**

98. Similarly, I agree with the decision in **Republic vs. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees** (supra) at paragraph 53 that:

> **"The Respondent's assertion that its jurisdiction should not be viewed from a narrow context is indeed correct. It is true that the Respondent is among the commissions whose existence is rooted in the promotion of respect for human rights and development of a culture of human rights in Kenya. What the Applicant does not seem to appreciate is that human rights pervades all the activities of human species. The need to respect human rights is very important in the governance of this country and where there is an allegation of maladministration the Respondent is under a duty to enquire into the complaint and act in accordance with the powers bestowed on it by the Constitution and legislation. In the circumstances of this case, I will therefore agree with the Respondent that it had jurisdiction to investigate this matter although the nature of the complaints may have been better dealt with by EACC."**

99. It was submitted that as at the time when the Respondent herein purported to carry out independent investigations in the foregoing matter, investigations by the Directorate of Criminal Investigation, the relevant state organ empowered to carry out such investigations, were still on-going. It is clear that under section 30(h) of the Act, the Commission is barred from investigating any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law. Therefore of the subject matter was being investigated by other organs such as the Directorate of Criminal Investigation, the Respondent would have been barred from commencing similar investigations. I therefore agree with the holding in **Republic vs. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR** that:

> **"When one reads the said Section, it clearly becomes apparent that Parliament intentionally limited the jurisdiction of the Respondent in the identified circumstances. The reason for this limitation is that there was need to avoid conflicts between the Respondent and other state agencies. The limitation is therefore reasonable considering that the Respondent is not a super commission capable of investigating all the things done by state organs. Where therefore another commission or any other person established by the Constitution or any**

other written law is dealing with a particular issue, the Respondent has no jurisdiction to venture into that matter."

100. The law however does not state that where the Commission is investigation a matter and another organ commences similar investigations then the Commission must down its tools. In this case, it is contended that the Respondent initiated its investigations on 6th January 2015. If at that time there were no on-going investigations into the subject matter, I agree that section 30(h) aforesaid would not operate as a forbearance on the part of the Respondent. Again the applicant has not satisfied me that as at 6th January 2015, the collapse of the *Huruma* Building was being investigated by the Criminal Investigations Department so as to bar the Respondent from carrying on any investigations on it. Since the burden lies upon the applicant to show that the orders sought are merited, it cannot be assumed that the Respondent would have restrained itself in carrying out a function within its lawful mandates on a presumption that investigations would be done by DCI. To hold a contrary view would impose an onerous duty upon State entities to undertake investigations into whether there exist other investigations before carrying out their statutory mandate. That in my view may unduly hinder such entities from carrying out their mandate to the detriment of the public. Where however it is shown that they were aware of the on-going investigations and they proceed to commence theirs, they would be at fault. In this respect the Respondent relied on **Republic vs. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees** (supra) where the Court observed at paragraph 67 that:

"The EACC's letters do not, however, reveal when it started its investigations into the Project. The jurisdiction of the Respondent is only taken away by Section 30(h) of the CAJA where the matter is "for the time being under the investigation of any other person or Commission..."

101. I also agree that in order to determine this issue, it is necessary to make a determination on the exact nature of the issues which are under investigations since under section 30(h) of the Act the Commission is barred only from investigating matters which are similar to other matters being investigated by another person or a commission. This was the position adopted in **Republic vs. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR**, where it was held that:

"The matter under investigation by another body should be the same with the matter under investigation by the Respondent. In this case, the Applicant has not demonstrated that the issues under investigation by EACC were the same with those under the investigation of the Respondent. It is also not clear whether by the time the Respondent commenced its investigations, EACC had already started its investigations. The same position applies to the investigations by the two parliamentary committees. The danger, where there is no sufficient evidence, in acceding to an application like the one of the Applicant is that matters touching on public interest may be swept under the carpet. The risk of misuse of public finances through a multiplicity of investigations is a lesser evil compared to the failure to unearth malpractices in the public service. In the circumstances of this case this application fails and the same is dismissed."

102. In this case the applicant ought to have juxtaposed the issues which were under investigations with those which the Respondent was investigating. In my view it is not enough to simply state that both organs were investigation the collapse of the Huruma building. The subject matter may be same but the issues may not necessarily be the same. In this case there is no material on the basis of which I can find that the issues which were investigated by the Respondent were the same issues under investigation by DCI's office and that they were criminal offences.

103. It was further submitted that pursuant to section 30(c) of the Act, the Commission shall not investigate a matter pending before any court or judicial tribunal hence the Respondent had no jurisdiction to enquire and/or investigate into the matter of the collapsed building in Huruma Estate since there were cases pending in court on the same facts. That the position is that the Commission has no power to investigate a matter which is the subject of court proceedings was upheld in **Republic vs.**

Commission on Administrative Justice & another Ex Parte Samson Kegengo Ongeri [2015] eKLR, where the Court stated that:

> **"I therefore do not see the reason why the word "investigate" used in section 30 of the Act ought to be substituted with the word "act". The 1st Respondent is barred from investigating matters pending in Court knowledge or otherwise of such proceedings immaterial."**

104. However once again the applicant has not placed before the Court the nature of the matters which were the subject of the said court proceedings. The Applicant did not exhibit copies of the pleadings, proceedings or court documents to show that the issues investigated were similar to issues pending before a court of law. According to the Respondent Commission, the only case which was pending in court was Nairobi City Court Case No. 665 A of 2014 whereof the owner/developer of the collapsed building had been charged with failing to comply with notice issued under ***Public Health Act*** and whereby the Respondent noted that the Nairobi City County Enforcement Department had failed to enforce a warrant of arrest issued by the court against the owner/developer of the building on 27th October 2014. This Court cannot therefore make a contrary finding without sufficient material to support such a finding.

105. It was contended that after a thorough investigation, the applicant's suspension was lifted upon being found that he was not criminally culpable. However the document exhibited in support of this contention was a letter by the Nairobi City County Government dated 16th February 2015 stated that the suspension was lifted to enable the Applicant to "…*carry out reforms in [his] sector…*" In my view it is not possible for this Court to conclusively and definitely find that the need to carry out reforms is he same as a finding of lack of criminal culpability in order to absolve the applicant from further investigations on the same subject matter assuming that the issues were the same.

106. It was the applicant's case that he was not afforded an opportunity to be heard by the Respondents who did not give him any notice or reasons concerning their investigations, and therefore the Ex parte was condemned unheard. However, in this particular instance, the Applicant was never given an opportunity to respond to allegations made against him as the letter dated 24th November, 2015 alleged to have been sent to the Applicant for purposes of a response was never served upon the Applicant but instead served upon the County Secretary of Nairobi City County who never transmitted the same. In his view, in matters with serious ramifications as the ones alluded to in the Report, service upon the affected party should have been effected directly and in person and it was upon the Respondent to ensure that service was actually effected. The applicant therefore contended that he was condemned unheard never having been given an opportunity to respond to the findings of the Commissions. In the applicant's view, no law mandates the County Secretary to act as an agent of any public officers working in a County Government in investigations of a similar nature.He relied on sections 36 and 39 of the Act, which state that:

> ***36. The Commission shall give any person, State organ, public office or organization against whom an adverse finding or recommendation is made, an opportunity to make representations concerning the finding or recommendation before the Commission includes the finding in its report.***
>
> ***39. (1) Subject to subsection (2), if at any stage of an inquiry the Commission—***
>
> ***(a) considers it necessary to inquire into the conduct of any person; or***
>
> ***(b) is of the opinion that the reputation of any person is likely to be prejudiced by the inquiry, it shall give that person an opportunity to appear before the Commission by himself or by an advocate to give evidence in his own defence.***
>
> ***(2) This section shall not apply where the credibility of a witness is being impeached.***

107. The Respondent however retorted that the Applicant was duly given notice of his right to make

representation concerning the Respondent's findings vide a letter dated 24th November 2015 which was addressed specifically to the Applicant but channelled through the County Secretary as the head of the County Public Service as provided by section 44 of the ***County Government Act***. It was disclosed that the County Secretary who duly received the letter dated 24th November 2015 on 25th November 2015 had a duty to transmit the same to the Applicant. This action, according to the applicant was after the Respondent had made various attempts to have the Ex-Parte Applicant served but the Respondent officer's numerous visits to the Applicant office did not bear fruits as he was always unavailable and thus resulting to serving him through the County Secretary' office.

108. I reiterate the decision in **Republic vs. Commission on Administrative Justice & Another Ex Parte Samson Kegengo Ongeri [2015] eKLR** which dealt with section 36 of the Act to the effect that:

> **"Therefore even without the benefit of case law, the Act itself imports the elements of a hearing before the Commission's findings are included in the report. On this issue Halsbury's Laws of England, (supra) states:**
>
> **"Where however a general duty to act judicially is cast on the competent authority, only clear language will be interpreted as conferring a power to exclude the operation of the rule, and even in the absence of express procedural requirements fairness may still dictate that prior notice and an opportunity to be heard be afforded."**

109. ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 539 at para 639 states:

> **"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the *audi alteram partem* rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court. Moreover, even in the absence of any charge, the severity of the impact of an administrative decision on the interests of an individual may suffice itself to attract a duty to comply with this rule. Common law and statutory obligations of procedural fairness now also have to be read in the light of the right under the Convention for the Protection of Human Rights and Fundamental Freedoms to a fair trial which will be engaged in cases involving the determination of civil rights or obligations or any criminal charge."**

110. In **R vs. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, 560-G**, **Lord Mustill** held:

> **"Fairness will very often require that a person who may be adversely affected by the decision will have an opportunity to make representations on his own behalf either before the decision is taken with a view to producing a favourable result; or after it is taken, with a view to procuring its modification; or both."**

111. Similarly, in **Hoffmann-La Roche (F) & Co. AG vs. Secretary of State for Trade and Industry [1975] AC 295, 368D-E** it was held that the commissioners;

> **"…must act fairly by giving to the person whose activities are being investigated a reasonable opportunity to put forward facts and arguments in justification of his conduct of these activities before they reach a conclusion which may affect him adversely."**

112. In this case, it is clear that the 24th November 2015 was never dispatched to the applicant. It was purportedly sent to the applicant's employer. There is no evidence that the applicant received the same. In fact the applicant has expressly denied receipt of the same. Whereas the Respondent contends that attempts were made to serve the applicant with the same there is no evidence of such attempts. The

contention that people who are aware that they are being sought to be served will evade the same in my view has no basis. The law provides for the manner in which such persons are to be dealt with. The requirement for service or notification is so fundamental for the validity of any administrative action that it can only be excused in very cogent evidence. In fact the failure to afford a person a hearing nullifies the wholse administrative process. In this case I have no evidence that attempts were made to notify the applicant of the intended action.

113. It was contended that the Respondent acted *ultra vires* and in excess of its jurisdiction by giving directions to the Inspector-General to investigate the applicant. It was therefore the applicant's position that the Respondent's actions are tantamount to trying to override/compel the Inspector General of police on how to carry out investigations and whom to charge and/or reviewing the decision of the Inspector General of Police, an action which is outrightly unconstitutional. I agree that the Respondent has no power to direct the Inspector General of Police on how and when to conduct investigations and to that extent I associate myself with the decision in **Titus Barasa Makhanu vs. Police Constable Simon Kinuthia Gitau No. 83653 & 3 others [2016] eKLR**, where it was stated as follows at paragraph 52:

> **"I have read the Chief Justice's circular-letter in question. The brief answer is that they are not applicable to persons serving in the police service... The Chief justice is the head of the judiciary and he has the authority and capacity to issue such regular and legal directives as he may be constitutionally and statutorily mandated. The Chief Justice may however not direct the command of the National Police Service as headed by the Inspector General. The independence of the police service in the investigations of any particular offence or in the enforcement of the law is enshrined in the Constitution under Article 245(4). It is truly unnecessary to belabor this point. The Chief Justice may give courts directions on how to handle traffic cases but not members of the police service. Any attempt to stretch directions given to the courts to the police service would be tantamount to an illegality."**

114. I have however perused the report and it is clear that what the Respondent did was to make recommendations as opposed to direction. As stated in ***Black's Henry Campbell, 1968. Black's Law Dictionary, Definition of the Terms and Phrases of American and English Jurisprudence, Ancient and Modern,*** (4th ed) West Publishing Co., St Paul, MINN. the words ***'recommend'*** means ***"to advise or counsel***" as opposed to ***'direct'*** which means ***"to point to; guide; order; command; instruct."*** I agree that the action that the Respondent took was in tandem with the spirit of section 8(c) of the ***Commission on Administrative Justice Act*** *(CAJ Act)* which enjoins the Respondent to report to the National Assembly the remedial action taken on its report hence the Respondent is expected to make steps towards remedying its findings and one such remedial action would be to make appropriate recommendations to the relevant authorities including the Inspector General of Police pursuant to sections 41 and 44 of the ***CAJ Act.*** it is in this light that I understand the decision of the Supreme Court in the case of **In Re the Matter of the Interim Independent Electoral Commission [2011] eKLR**, that:-

> **"For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and Independent Offices are not to plead "independence" as an end in itself; for public-governance tasks are apt to be severely strained by possible "clashes of independences".**

115. It was further averred that section 36 of the Act clearly states that the Commission shall give any person, State organ, public office or organization against whom an adverse finding or recommendation is made, an opportunity to make representations concerning the finding or recommendation before the Commission includes the finding in its report.

116. In the Respondent's view, its recommendations emanated from an investigative process against the Nairobi County Government and not from a quasi-judicial process. Further, the Respondent's recommendation was an advice to an independent office which had the choice to act on such based on its mandate under the law and on the material evidence available. In any event, the recommendation by the Respondent was not a finding on the Applicant's criminal culpability and thus do not in any way whatsoever prejudice the Applicant's reputation. The said recommendations act as catalysts for action by the concerned offices where separate independent processes guided by the rules of natural justice exist. In the event that the DCI's office decides to carry out investigations, the Applicant will be afforded opportunity to record a statement, produce documents and witnesses, be accompanied by an Advocate and so on. In the event that he is arraigned before a court of law, legal provisions exists in the law to ensure his right to fair hearing is upheld.

117. However, in **Re Pergamon Press Ltd [1971] Ch. 388,** the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of Law. That issue was answered as follows:

> **"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay's submission. *It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him.* They need not quote chapter and verse. An outline of the charge will usually suffice...That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind."** [Emphasis mine].

118. ***Halsbury's Laws of England*** (supra) puts it thus:

> **"However, the nature of the inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; ad it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice."**

119. It is therefore clear that the need to act fairly depends on the nature of the report and the

recommendations to be made. The circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their interests or legitimate expectations. Where the report and recommendations may have far reaching implications such as the ruining of careers and reputation as well as being the basis of judicial proceedings, the authority concerned has a duty to act fairly. It is for this reason that I believe the provisions of sections 36 and 39 of the Act are relevant.

120. In this case the Commission recommended inter alia that the DPP[and the DCI investigates the criminality in the conduct of the applicant and have them prosecuted for negligence of duty. The consequences of the failure to act by a body to whom the Commission has directed its recommendations are specified in section 42(4) of the Act as follows:

> ***(3) If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure or refusal to implement its recommendations and the National Assembly shall take appropriate action.***

121. Therefore as opposed to a situation where a body is merely tasked with investigations and preparation of a report and what follows thereafter is solely left to the institutions to which a report is made, the Commission's duty does not end at the point where the report is made. The Commission has the mandate to follow up and see that its recommendations are implemented. In my view the Commission's recommendations are the kind of recommendations which were contemplated in **Re Pergamon Press Ltd** (supra). I therefore find that the Commission was under a duty to act fairly and before condemning the ex parte applicant had to afford the applicant a fair opportunity for correcting or contradicting what was said against him.

122. In my view for a hearing to be said to be fair not only should the case that the respondent is called upon to be meet be sufficiently brought home to him and adequate or reasonable notice to enable him deal with it but also the authority concerned ought to approach the issue with an unbiased disposition. In other words the authority ought not to be seen to be seeking representations from the respondent simply for the purposes of meeting the legal criteria. The fair hearing must be meaningful for it to meet the constitutional threshold. On this aspect, ***Halsbury's Laws of England***, 5th Edn. Vol. 61 page 545 at para 640 states:

> **"The *audi alteram partem* rule requires that those who are likely to be directly affected by the outcome should be given prior notification of the action proposed to be taken, of the time and place of any hearing that is to be conducted, and of the charge or case they will be called upon to meet. Similar notice ought to be given of a change in the original date and time, or of an adjourned hearing…The particulars set out in the notice should be sufficiently explicit to enable the interested parties to understand the case they have to meet and to prepare their answer and their own cases. This duty is not always imposed rigorously on domestic tribunals which conduct their proceedings informally, and a want of detailed specification may exceptionally be held immaterial if the person claiming to be aggrieved was, in fact, aware of the nature of the case against him, or if the deficiency in the notice did not cause him any substantial prejudice…Notification of the proceedings or the proposed decision must also be given early enough to afford the person concerned a reasonable opportunity to prepare representations or put their own case. Otherwise the only proper course will be to postpone or adjourn the matter."**

123. It is therefore clear that even if it is true that the *ex parte* applicant was duly notified of the findings by the Respondent such notification was unprocedural and did not lend itself to a fair hearing.

124. In regard to the foregoing, the *ex parte* applicant herein avers that the conclusions reached by the Respondent were anchored upon a perversion of relevant facts to which this court has the power to remedy. I have considered the cases for the applicant and the Respondent and it is my view that to determine that issue would necessarily require this court to deal with the merits of the case which is not

the purview of judicial review jurisdiction. Accordingly I decline to deal with the issue.

125. I have looked at the prayers sought and it is clear that the applicant is not seeking to quash the report generally but is only concerned with those parts of the reports as relates to him. Accordingly I do not see anything wrong with the manner in which the prayers in the Motion are framed.

126. Having considered the issues raised in this application it is my view and I find that the manner in which the proceedings leading to the findings in the impugned report was conducted was tainted with procedural impropriety as the applicant as never afforded an opportunity of being heard throughout the process of investigation. Whereas it may well be that in some instances, the applicant was notified of the process, to my mind the person who stands to be adversely affected by the decision ought to be accorded an opportunity to deal with all the allegations made against him at every stage at which such allegations arise. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

> **"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...*A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at*...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...*Denial of the right to be heard renders any decision made null and void ab initio*."** [Emphasis mine].

127. This was a restatement of **Lord Wright's** decision in **General Medical Council vs. Spackman [1943] 2 All ER 337** cited with approval in **R vs. Vice Chancellor JKUAT Misc. Appl. No. 30 of 2007** that:

> **"If the principles of natural justice are violated in respect of any decision, it is, indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principles of justice. The decision must be declared as no decision."**

128. In **Ridge vs. Baldwin [1963] 2 All ER 66** at 81, **Lord Reid** expressed himself as follows:

> **"Time and again in the cases I have cited it has been stated that a decision given without the principles of natural justice is void."**

129. **Nyamu, J** (as he then was) in **Republic vs. Kajiado Lands Disputes Tribunal & Others *ex parte* Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318** held that the Court cannot countenance nullities under any guise since the High court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role hence it has powers to strike out nullities. In the premises where a decision is clearly without jurisdiction the Court ought to rise to the occasion and pronounce it to be so since as was held in **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169 at 1172:**

> **"…where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse."**

130. Having so expressed myself save for the issue of fair hearing all the other issues raised by the applicant are unmerited. However the issue of failure to adhere to the fair administration process suffices for the purposes of the orders sought herein.

Order

131. In the premises I issue the following orders:

> **a. An order of Certiorari removing to this Court for the purposes of being quashed ad quashing the decision of the Commission on Administrative Justice, the Respondent herein, to publish the "Huruma Tragedy Report" published on 2nd December, 2015 to the limited extent of recommending that the Office of the Director of Public Prosecution herein investigate the criminal conduct of the Applicant and prosecute him for negligence of duty.**
>
> **b. An order of Prohibition prohibiting the Respondent herein from by themselves, their agents/and or assigns acting jointly and/or severally from proceeding with any investigations into the criminal conduct of the Applicant or any intended prosecution arising from the investigations and/or any other disciplinary action as against the Applicant pursuant to the said report.**

132. As the applicant has not wholly succeeded on all the issues and as there is evidence that the applicant participated in some parts of the investigative process without protest, there will be no order as to costs.

133. It is so ordered.

Dated at Nairobi this 29th day of March, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Gesicho for Mr Omogeni for the ex parte applicant

CA Mwangi