REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 474 OF 2016

IN THE MATTER OF AN APPLICATION BY ELIZABETH NAILANTEI NKUKUU FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF PROHIBITION AND CERTIORARI

AND

IN THE MATTER OF SECTIONS 7, 8 AND 9 OF THE FAIR ADMINISTRATIVE ACT, 2015

AND

IN THE MATTER OF THE ACCOUNTANTS ACT, CAP 531

AND

IN THE MATTER OF AN APPLICATION FOR LEAVE BY ELIZABETH NAILANTEI NKUKUU TO INSTITUTE JUDICIAL REVIEW PROCEEDINGS CHALLENGING THE COMPLAINT FILED AGAINST HER DATED 6TH NOVEMBER, 2014.

JUDGEMENT

Introduction

1. By a Notice of Motion dated 21st October, 2016, the *ex parte* applicant herein, **Elizabeth Nailantei Nkukuu**, seeks the following orders:

> **1. An Order of Certiorari to remove into Court and quash the proceedings that were carried on in the absence of the Applicant and strike out the Respondent's written submissions filed on 8th August, 2016.**
>
> **2. An Order of Prohibition to stop the Institute of Certified Public Accountants of Kenya form continuing to conduct an inquiry over the Ex-parte Applicant herein.**
>
> **3. An Order of Prohibition to prohibit the Institute of Certified Public Accountants of Kenya from conducting any future inquiries over the Ex-parte Applicant herein on the foot of the complaint lodged against her by the British American Asset Managers Limited.**
>
> **4. Costs of this application be provided for.**

Applicant's Case

3. According to the applicant, she is a Senior Partner and Chief Investments Officer of **Cytonn Investments Management Limited** (hereinafter referred to as "Cytonn"), a company which she formed together with her partners, **Edwin Dande**, **Patricia Wanjama**, and **Shiv Arora** (hereinafter referred to as "Cytonn Defendants"). It was averred that prior to forming Cytonn, all the four were previously employed by the British American Asset Managers Ltd ("BAAM") – now known as Britam Asset Company (K) Limited ("BRITAM") which is licenced as a fund manager by the Capital Markets Authority (CMA) and the Retirement Benefits Authority (RBA) and is responsible for the Unit Trusts, Discretionary Portfolio, Cash Management Solutions and Alternative Investments.

4. According to the applicant, they were part of the team at BAAM with **Mr. Dande** as the Chief Executive Officer (CEO) while the applicant was a Senior Portfolio Manager and **Ms. Wanjama** was the Assistant Company secretary as well as the Head of legal while **Mr. Arora** was an Investment Analyst.

5. The applicant disclosed that the circumstances leading to the resignation of the Applicant herein are set out in full in an affidavit sworn by the Applicant's co-partner, **Edwin Dande** on 11th November, 2014 and filed in HCCC No. 354 of 2014, a civil suit which had been filed by BAAM and an affiliated party, against the applicant and her colleagues. It was contended by the applicant that the dispute stemmed from a tripartite joint venture arrangement for the identification and development of real estate, which had gone sour with parties in those suits blaming each other for their failure and trading accusations of impropriety i.e. a commercial dispute that led to five civil suits at the instigation of BAAM.

6. Since her resignation, the applicant averred that BAAM launched a full-scale assault against her and her colleagues in a thus far unsuccessful campaign to ruin the applicant and her colleagues' careers' and destroy their business. As part of this campaign:

a. In October 2014 BAAM (and various other affiliated entities "The Plaintiffs") moved the High Court in five separate suits accusing the Cytonn Defendants of fraud, with respect to sums invested in various real estate deals, as part of a partnership between BRITAM, BAAM and Acorn Group Limited (AGL). At the time of filing their respective suits, the Plaintiffs in HCCC NO. 353, 354, 361 and 362 of 2014, sought and obtained extra-ordinary wide ranging ex-parte injunctive reliefs essentially halting those real estate deals. Save for the other issue of costs, these suits have since been settled.

b. It lodged two criminal complaints against the four of:

i. The first one by **Mr. Anyiko** complaining that the Cytonn Defendants had acted without authority, were guilty of fraud, which complaints were essentially regurgitated from those raised in HCCC Nos. 352, 353, 354, 361 and 362 of 2014.

ii. The other complaint was that the Cytonn Defendants had established Cytonn Investment Management Limited while they were employees of BAAM as well as other allegations of conflict of interest.

c. BAAM also went after the Cytonn Defendants before various professional bodies in which they are members by:

a. filing a complaint against **Ms. Wanjama**, who is an advocate, before the Disciplinary Committee of the Law Society of Kenya.

b. lodging complaints against **Mr. Arora** and the applicant with the Certified Financial Analyst institute – The CFA Institute.

7. The applicant averred that by a letter dated 26th January 2015, she was notified through a letter that BAAM filed a complaint dated 6th November 2014, against her at the Institute of certified Public

Accountants of Kenya and from the summary of the highlights therein, it is clear that the complaint was solely based on the applicant's employment contract with BAAM, which they accused her of having breached. The applicant however contended that she has never been provided with a copy of the compliant and/or copies of any documents upon which reliance is placed.

8. To the said letter the applicant responded by her letter of 6th February, 2015 in which she provided a full narrative of the circumstances leading to her resignation as responses to the specific questions raised by ICPAK which responses included an opinion from her lawyer questioning the jurisdiction of ICPAK to entertain the complaint as well as its propriety.

9. According to the applicant, she thereafter did not hear from ICPAK until she received a letter dated 30th August, 2016, informing her that the Committee held a hearing on 23rd August, 2016, concerning the complaint lodged against her, and that the Complainant (BAAM), had tabled its submissions. The letter concluded by directing the applicant to respond to the submissions within 21 days of receiving the said letter.

10. It was contended that:

a. ICPAK has never addressed or at any rate communicated to the applicant, her objections based on its jurisdiction to entertain the complaint;

b. ICPAK has never provided her with all or even any of the documents relied on by BAAM

c. ICPAK has never notified her of any hearing on the complaint

d. ICPAK has never given her an opportunity to participate in the said hearing including the right to challenge whatever evidence I would have liked to use.

e. BAAM, without any right to do so, participated at the hearing to her exclusion.

f. ICPAK has never provided her with a transcript of the alleged hearing.

11. According to the applicant, on 16th September, 2016, she was served with what were characterized "Complainant's Supplementary Submission" which contained 15 new sets of document running 265 pages, some of which were incomplete excerpts of a so-called forensic audit report prepared by the Complainant's advocates who seem to playing the role of investigators, witnesses and prosecutors and the Applicant was given 21 days to respond.

12. According to the applicant, a close reading of **Ms. Chiggai's** affidavit in reply, it is evident that there is no serious dispute as to the fact as fully set by her as the said replying affidavit is a sustained effort at avoidance and evasiveness. Rather than responding in detail and with supporting evidence on the matters in issue in these proceedings, **Ms. Chiggai** is content to make conclusive general assertions that are misleading as well as irrelevant and designed to conceal from this Court what transpired.

13. The applicant contested the averment in paragraph 10 of **Ms Chiggai's** that the letter dated 30th August, 2016 was wrongly entitled as disciplinary committee proceedings. To her this was not a simple error as the letter proceeds to refer to a hearing which was not attended by the Complainant itself but its advocate. The purpose of the hearing, she averred, was not for investigative purposes to enable referral to the Disciplinary Committee but allowed representation by counsel for the Complainant clearly evidencing the adversarial nature of the proceedings.

14. It was further averred that the Supplementary Submission filed by the Complainant on 16th September, 2016 state they were made further to directions given in the "Preliminary Hearing" where the complainant was directed to furnish additional documents to the Disciplinary Committee.

15. It was therefore the applicant's position that the essential factual issue presented in these proceedings is that the Respondent conducted at least two hearings without any notice to and/or her participation and in addition, as confirmed in **Ms. Chiggai's** Affidavit, the Respondent engaged in *ex parte* correspondence with the Complainant and received additional information as well as documents, which apart from the two sets of submissions served upon her by the Complainant, have never been shared with her.

16. Based on legal advice the applicant contended that the Respondent, in **Ms Chiggai's** affidavit, rightly acknowledges that there is no statutory mandate for the Council to undertake investigations as the same is reserved of he Disciplinary Committee under section 32 of the ***Accountants Act***. The Respondent cannot therefore attempt to disguise the hearing of the Disciplinary Committee as an investigation by the Council.

17. The applicant averred that the alleged conduct that is the subject of the complaint does not relate to her conduct in the course of discharging her duties as an accountant. To her the disciplinary provisions a provided for in the ***Accountants Act*** only apply in instances where the conduct complained of relates to a member of the Respondent, in her role as an accountant yet in this case her role in the Complainant Company was that of a senior portfolio manager. In this case the applicant averred that she was not employed as an accountant nor did she undertake any tasks or duties as one since her specific tasks as set out in her job description were:

a. To manage investment portfolios and to manage the dealing team with the aim of delivering superior returns to investors:

b. Analysing rends in global and local markets and provide useful investing data;

c. To execute asset allocation decisions amongst client portfolios;

d. To serve as a representative of the company in client servicing and company research effort.

18. The applicant averred that the professional and ethical standards as prescribed by the Respondents are clearly with respect to the conduct of Professional Accountants in public practice and business. In the applicant's view the position adopted in the said replying affidavit that professional misconduct prohibited under section 30 of the ***Accountants Act*** cannot be elevated to or properly referred to as 'disputes' between employer and employee as defined under section 12(1) of the ***Employment and Labour Relations Court (ELRC) Act***, is incorrect since section 12(1)(a) is categorical that the ELCR has exclusive jurisdiction to hear and determine disputes relating to or arising out of employment between the employer and employee. The alleged professional misconduct, and which is factually incorrect as her acts were not done as those of an accountant, and misconduct of which is denied, arises out of her employment with the Complainant company, Britam and the same falls squarely within the jurisdiction of the ELRC. It was therefore contended that by dint of section 12(2) of the ***ELRC Act***, the ELRC has exclusive jurisdiction over all claims and complaints against an employee hence the complainant's claim and complaint as lodged against her is therefore not within the Respondent's jurisdiction.

19. It was submitted on behalf of the applicant that judicial review is a co-operative exercise in which both the Court as well as the relevant public authority work together for the sake of attaining the rule of law – "*… a relationship between the courts and those who derive their authority from public law, one of partnership based on a common aim, namely the highest standards of public administration*"- *R v Lancashire County Council ex parte Huddleston* [1986] 2 All ER, 941, 945.

20. It was submitted that in this case not only did the Respondent conduct two hearings without notice to or the participation of the *Ex-parte* Applicant, but it engaged in *ex parte* communication with the Complainant to the exclusion of the *Ex-parte* Applicant.

21. In support of the submissions the applicant relied on Part IV (sections 30 to 36 [inclusive]) of the ***Accountant's Act, 2008*** and the rules promulgated pursuant to sections 32(2) i.e. the Fifth Schedule. Section 30 (1) prescribes what acts or omissions on part of a member constitutes professional misconduct.

22. Section 31 establishes a Disciplinary Committee as a committee of the Council and prescribes the manner in which it is constituted and how its business is conducted while section 30(2) provides that such inquiry will be governed by the provisions of the Fifth Schedule. According to the applicant, the Fifth Schedule sets outs the manner in which the DC is to conduct an inquiry referred to it by the Council. According to the applicant, the provisions are not too elaborate and may be shortly stated, so far as material to these proceedings:

a. The Council prepares a Statement setting out the details of the alleged professional misconduct to be investigated which is then circulated to all members of the DC who are to investigate those allegations of professional misconduct. In light of the position taken in these proceedings by the Respondent, it should be emphasized that the Council has no inquisitorial or investigatory role. Rule 1(1) of the Fifth Schedule- *"the Council shall cause a statement setting out the allegation of professional conduct* ***to be investigated by the Disciplinary Committee****"*- investigation is the preserve of the DC.

b. Thereafter the DC sets the matter down for hearing of which the member being investigated must have a prior 14 day notice and is entitled to participate, and if s/he so chooses, can be represented by an advocate. The Respondent may also appear at that hearing by an advocate and there is no provision for Complainants appearing as parties whether in person or represented. It was emphasized that the Council has no role to play with respect to that hearing save for the limited participation by the Secretary who is entitled to appear and participate in deliberations if the Chair consents but is not entitled to vote.

c. At the conclusion of the hearing, the DC makes a decision on the inquiry on a majority vote with each member having one vote subject to the usual caveat that in the event of a tie, the Chair has the casting vote.

23. With respect to the provisions of section 33 it was submitted that.

a. In making a decision, the Disciplinary Committee also may make one or another of the recommendations set out in section 33(1) of the ***Accountants Act***, all of which are contained in a report submitted to the Council.

b. Upon receipt of the report, the affected member is informed by the Council of the action proposed by the DC.

c. By section 33(4), that member has the right to appeal against the determination made by the DC to the Council within 60 days of notification. The Council's role is appellate with the power under section 33(4) to direct that the DC re-open the inquiry.

24. According to the applicant, it is beyond peradventure that the *Ex-parte* Applicant was not given any notice of the hearings in which only Counsel for the Complainant attended and participated. No record of these hearings have been produced or sent to the *Ex-parte* Applicant even though she was expected to file submissions with respect to them. Further, there were exchanges between the Complainant and the Respondent none of which were copied to the *Ex-parte* Applicant, even if out of courtesy. To the applicant, these actions had absolutely no statutory basis. Nothing in part IV of the ***Accountant's Act*** nor the Fifth Schedule to it authorized the activities in which the Respondent engaged in. In this respect the applicant relied on **Railways Corporation v Sefu [1973] EA 327**.

25. It was the applicant's case that the impugned actions were directly contrary to the relevant legislation (both primary as well as subsidiary) which goes out of its way to incorporate the rules of natural justice and/or requirements of fundamental fairness, i.e. notice and adequate opportunity to present a defence, as part and parcel of the DC's adjudicatory functions pursuant to Regulations 1, 2 and 3 of the Fifth Schedule. These statutory requirements comply with, and are in fact based upon, two well settled principles of natural justice each of which must be satisfied and both of which are scrupulously enforced by the Courts. Firstly adequate and effective notice of any hearing. The second principle was to afford

the Applicant a real opportunity to be heard after the first principle was satisfied – no pro forma hearing would do. The applicant relied on **Hypolito Cassaino de Souza vs. Chairman and Members of Tanga Town Council [1961] EA 377, Pastoli v Kabale District Local Government Council and Others [2008] 2 EA 300, Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR**, **Republic vs. Instutute of Certified Public Accountants of Kenya Ex Parte Joy Vipinchandra Bhatt T/A JV Bhat & Company [2008] eKLR, Henry Asava Mudamba vs. Institute of Certified Public Accountants of Kenya [2015] eKLR** and **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Julius Ngumbau Mwengei T/A Mwengei & Associates [2013] eKLR.**

26. The applicant submitted that it is now hornbook law that any decision made in violation of the principles of natural justice is a nullity and would thus be quashed *ex debito justitiae* on the application of the person affected and referred to **Hypolito Cassaino de Souza vs. Chairman and Members of Tanga Town Council [1961] EA 377** at page 388 and **David Oloo Onyango vs. the Attorney-General [1987] KLR**.

27. It was submitted that the Respondent acted without jurisdiction in entertaining a complaint which relates to a dispute between the parties in their capacity as employer and employee, which jurisdiction, squarely falls exclusively on the Employment and Labour Relations Court. According to the applicant, the Disciplinary Committee as established under section 31 of the ***Accountants Act*** has the power to inquire and adjudicate over complaints of professional misconduct as prescribed under section 32 of the Act. Conduct that is deemed to amount to professional misconduct is comprehensively set out in section 30 of the Act. It is worth noting that all the circumstances relate to actions of the member as a professional and practising accountant.

28. In this case, it was submitted that the Complainant in its letter dated 6th November, 2014 and as summarized in its Submissions filed with the Respondent on 8th August, 2016 raises five (5) main grounds of professional misconduct by the *Ex-parte* Applicant whilst she was an employee of the Complainant which grounds are as follows:

a. Acting in concert with other former employees and executed on behalf of the Complainant and its affiliates, numerous unauthorized and irregular contractual arrangements that were grossly detrimental to the interests of the Complainant.

b. Conceived and established and/or facilitated the incorporation of Cytonn Investments Management Limited a business similar or substantially similar to that of the Complainant.

c. Unlawfully and irregularly authorized the payment of substantial amounts of money totalling Kshs. 1,161,465,388 out of the bank account of BAAM Real Estate Fund (and affiliate of the Complainant) to Acorn Group Limited.

d. Used confidential information about the Complainant's clients which information she acquired and/or otherwise had access to during the course if her employment with the Complainant to solicit business from the Complainant's clients.

e. Attempted to take over, for the benefit of Cytonn, certain transactions that were conceived, commenced and/or funded by the Complainant.

29. According to the applicant, there is no claim the alleged conduct that is the subject of the complaint reasonably relates to the conduct of a member in the course of discharging their duties as an accountant. The disciplinary provisions as provided for in the ***Accountants Act*** only apply in instances where the conduct complained of relates to a member of the Respondent, in their role as an accountant. The applicant submitted that her role in the Complainant Company was that of a Senior Portfolio Manager. She was and has never been employed as an accountant nor did she undertake any tasks or duties as one. The *Ex-parte* Applicant's specific tasks as set out in her job description were:

a. To manage investment portfolios and to manage the dealings with the aim of delivering superior

returns to investors;

b. Analyzing trends in global and local markets and provide useful investing data;

c. To execute asset allocation decisions amongst client portfolios;

d. To serve as a representative of the Company in client servicing and company research efforts;

30. It was submitted that the professional and ethical standards as prescribed by the Respondent which is the basis of the complaint, are clearly with respect to the conduct of professional accountants in public practice and business. Therefore, where the *Ex-parte* Applicant's alleged conduct does not fall within the ambit of the DC, it was submitted that any action taken must be sought in a judicial body with the requisite jurisdiction. To this end, the alleged professional misconduct, which is denied, arises out of the *Ex-Parte* Applicant's employment with the Complainant company and the same falls squarely within the jurisdiction of the Employment and Labour Relations Court ("ELRC") by dint of Article 162 (2) (a) of the Constitution of Kenya (2010). The exclusive jurisdiction of the ELRC is clearly expressed under section 12 (1) of the Employment and Labour Relations Court Cap 234B Laws of Kenya ("the ELRC Act"). In this respect the applicant relied on **Donald Osewe Oluoch vs. Kenya Airways Limited Civil Appeal No. 5 of 2012** where **Githinji, Karanja and Maraga JJA** rendered themselves thus:

> **"In our respective view, as long as the dispute relates to or arises from the employer/employee relationship, it is the Industrial Court which has jurisdiction to determine it. Section 12 (1) of the Industrial Relations Act quoted above makes this quite clear. It states that the Industrial Court has exclusive jurisdiction to hear [any] …claim…in respect of any matter which may arise at common law between an employer and employee in the course of employment… [Emphasis supplied]. The operative phrase in this provision is in the course of employment". What this means is that the Industrial Court has jurisdiction in any matter arising in the course of employment, irrespective of whether or not at the time of filing the claim, the employer/employee relationship will have ceased."**

31. To the applicant the law, including a binding decision of the Court of Appeal, is clear. Where a dispute arises out of employment between an employer and employee, the same must be heard and determined by the ELRC. Further, the jurisdiction of the ELRC is extended under section 12 (2) of the ELRC Act where it expressly provides that a complaint against an employee is to be lodged with the Court, such as the complaint lodged by the Complainant to the Respondent.

32. It was therefore submitted that neither the Respondent nor the DC has jurisdiction to entertain the matter and proceedings that took place were therefore illegal and ought to be quashed.

Respondents' Case

33. In opposition to the Application the Respondents contended that the Notice of Motion application is not properly intituled and in the event the Ex Parte applicant succeeds, she cannot be entitled to award of costs at all.

34. The Respondent averred that on 6th November 2014, it received a complaint from Britam as against the Ex pare Applicant upon which it wrote to the Ex parte applicant on 26th January 2015 directing her to present her response within a period of 7 days. It was disclosed that the Respondent enclosed a copy of the complaint with all the attendant attachments supporting the same.

35. Thereafter the Ex pare applicant gave her response on 6th February 2016 where at page 3 thereof, she clearly stated that there exists civil suits filed by Britam on the same matter and even proceeded to attach the Replying affidavits. To the Respondent, it was upon the Council of the Respondent to review these suits and be satisfied on the propriety of the charges before making a reference to the disciplinary committee. Accordingly, the Respondent requested the complainant to supply it with the details of the

civil suits and pleadings in the entire matters for review and such details were issued on 9th February 2015.

36. The Respondent averred that upon its investigation, it was clear that the parties had engaged in active litigation over the above issues and it was important that the parties be allowed to prosecute their respective issues before court while the Respondent could proceed only on aspects that touches directly or indirectly on professional misconduct, if any, against the Ex Parte applicant as outlined section 30 of the ***Accountants Act***. It was averred that the Council of the Respondent, through its officers and in a preliminary manner, proceeded to receive further documents and submissions from both the Complainant and the accused member and on 23rd August 2016, summoned the Complainant to submit and shed more light on the complaint and later have the very same documents and submissions submitted to the ex parte applicant for her response which was done vide a letter dated 30th August 2016 through wrongly intituled as disciplinary committee proceedings.

37. It was disclosed that even the Ex parte applicant was also intended and entitled to be called to shed more light on her response in the same manner the complainant was summoned and this procedure is proper before the council exercises its discretion to have the matter referred to the Disciplinary committee. The Respondent therefore asserted that all the rights to fair hearing of the ex parte applicant had been observed and would indeed be safeguarded at all costs in the continued proceedings and no decision had been made and would be made without affording the Ex-parte applicant all the requisite opportunity to present her case both orally and presentation and answers to all allegations and documents.

38. It was therefore averred that upon the conclusions of the internal preliminary exchange of documents and submission, a report would be made to the Council of the Respondent since pursuant to section 32 of the ***Accountants Act***, the council of the Respondent has to be satisfied that there is indeed a reason to believe that a member may have been guilty of professional misconduct before referral of the matter to a disciplinary committee. It was therefore its position that the Respondent is not intended to be a rubber stamping machine but must also conduct its own internal inquiries before being such satisfied and there exists no statutory procedure for conducting the same except the fact that the Council observes all the elements of fairness in the entire process.

39. To the Respondent, the Council through its officers ought to be fully satisfied on the veracity of the claim by seeking all the information necessary from the complainant first, then proceeding to hear and consider the response of the Ex parte applicant, which process is fair as the Council is only mandated together reject or refer matter for further inquiry and not to mete any form of punishment on the Ex parte applicant at all.

40. The Respondent was of the view that the Council and the Disciplinary Committee of the Respondent by virtue of sections 30 and 32 of the ***Accountants Act***, have authority to inquire if a member of the Respondent is guilty of any of the listed offense and mete an appropriate punishment and this includes if a member is found to have engaged in fraudulent acts in the course of discharging his or her duties as an accountant. Additionally, a member may be accused of and indeed found guilty of failing to observe professional, technical, ethical or other standards as prescribed by the Respondent as guidelines. To the Respondent, the Statute does not limit the context under which a particular member was practicing as an accountant, whether as an employee or a consultant as members are bound to desist from committing any acts prohibited under section 30 of the ***Accountants Act*** whilst in practice as an accountant anywhere.

41. It was averred that from the letter of 26th January 2015 highlighting the nature of the complaint, it is clear the allegations which the Ex parte applications stands likely to be charged with borders on fraudulent acts as well as breach of professional and ethical standards as prescribed by the Respondent in its ***By-Laws and Code of Ethics for Professional Accountants*** and that a breach of the provisions of the Code also constitutes an offence as section 30(1)(h) of the ***Accountants Act*** requires full compliance with the Respondent's guidelines.

42. It was asserted that contrary to assertions by the Ex parte applicant at Paragraph 3 and 4 of the grounds in support of the applicant, whilst the Employment and Labour Relations Court is clothed with

exclusive professional misconduct prohibited under section 30 of the ***Accountants Act*** are exclusively required to be inquired into by the Disciplinary Committee and not within the mandate of the Employment and Labour Relations Court and cannot be elevated to or properly be referred to as 'disputes' between employer and employee as defined and excluded vide Article 162(2)(a) of the Constitution and section12(1) of the ***ELRC Act***. To the Respondent, if the principle of exclusivity as defined and advanced by the Ex parte Applicant is to hold water, then any case of fraud arising in the workplace and which affects the employer cannot equally be subjected to criminal prosecution at the criminal court on the simple basis that it would be a 'dispute' arising between employer and employee only reserved for the Employment Court, such would be an absurd interpretation. On its part, there cannot be exclusivity of jurisdiction when the issue touches on offences at the workplace as competent bodies established by the constitution and Statue can concurrently or at different stages deal with the issue and mete their various punishments as known in law.

43. It was submitted on behalf of the Respondent that the proceedings conducted by the Respondent were proper and within the provisions of the ***Accountants Act*** and reference was made to section 32(1) thereof which provides as follows:

> ***Where the Council has a reason to believe that a Member of the Institute may have been guilty of Professional Misconduct, it shall refer the matter to the Disciplinary Committee.***

44. It was therefore submitted that the language of the provision clearly depicts a situation where the Council needs to be satisfied as regards the veracity and sufficiency of a complaint that has been brought against a member before making a decision to refer the matter to the Disciplinary Committee. The Council can be satisfied by demanding for more information or documents from either party and it can do this orally or by way of written submissions. It was submitted that this complaint was made by the complainant against a member of the Institute and that it is the complainant who is possessed of all the relevant facts that he deems are necessary to establish a prima-facie case against a member accused of any misconduct as per section 30 of the ***Accountants Act***.

45. According to the Respondent section 32 of the ***Accountants Act*** only mandates the Council of the Respondent to refer the matter to the Disciplinary Committee upon being satisfied of its completeness. In this case however the matter was still under inquiry by the Council and had not been referred to the Disciplinary Committee. It is upon such a referral that the member will be formally charged with the offences and then Schedule V of the ***Accountants Act*** come into operation. In this case all the Council was doing was to receive materials from which it would make a decision on the sufficiency of evidence necessary to make a decision whether or not to refer the matter to the Disciplinary Committee. However in making this decision, it is not a statutory requirement that all the parties be heard together at the same time and in an adversarial manner provided that the Council was fair to either side appearing before it. The Ex parte Applicant was not to be given different treatment as concerns her appearance, with counsel if necessary and provide further evidence but it opted to resort to this Court before a breach of the rules of natural justice crystallizes.

46. In the Respondent's view, the reason for extensive presentation of documents by all parties before referral to the Disciplinary Committee is based on the architecture or framework of laws that governs the Disciplinary Committee. According to Schedule V of the ***Accountants Act***, the Disciplinary Committee cannot receive any new evidence or consider any further ground but only utilize that which has been submitted by the Council. The Respondent relied on **Republic vs. Institute of Certified Public Accountants of Kenya Ex parte Vipichandra Bhatt t/a J V Bhatt & Company Nairobi HCMA No. 285 of 2006** referred to in the case of **Stephen Mwenesi vs. LSK (2011) eKLR**.

47. To the Respondent it is the Council that establishes the 'terms of reference' to the Disciplinary Committee. It collects all evidence and from submissions of the parties narrows down what would form the basis of inquiry by the Disciplinary Committee hence the Committee cannot go beyond that which is prescribed by the Council. Therefore it was submitted that the Council ought to collect and collate evidence and submissions of the parties to establish whether and if it is a case of referral for further inquiry, what is to be referred.

48. The Respondent contended that despite the overwhelming importance of the Council, there exists no statutory framework or procedures that guides the Council of the Respondent on how to receive and process the complaint against members. The statutory framework that has been alluded to by the Ex parte Applicant at Paragraphs 3 of the Written Submissions relates to proceedings that occurs after a member has formally been charged before the Disciplinary Committee. Here the Ex parte Applicant confirms that she has not been charged before the Disciplinary Committee at all hence buttressing the Respondent's position that no decision has been made to refer this matter to the Disciplinary Committee. The Respondent therefore submitted that in the absence of a statutory framework to guide receiving of evidence and being satisfied on the veracity and completeness of the evidence, the Council is only obliged under the relevant law that governs it to act fairly and in this case it acted fairly in the circumstances. In support of ts submissions the Respondent relied on **Michael Fordham** in ***Judicial Review Handbook***; 4th Edn. at page 1007, **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009, Russel vs. Duke of Norfork [1949] 1 All ER at 118**, ***Halsbury Laws of England*, 5th Edition 2010 Vol. 61** at para. 639, **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** and submitted that the proceedings of 23rd August 2016 were preliminary in nature, no decision has been made as regards those proceedings and the Ex parte applicant would equally be required to respond and equally be invited to an oral hearing which would also be preliminary in nature and whose intention is to enable the Council to either reject or refer the matter to disciplinary committee. The Ex parte applicant has been provided with all the materials submitted by the other party, the Council will listen to the Ex parte Applicant and there will be full degree of fairness. It was submitted that there is no evidence or even allegation that the applicant had been shut out completely from being heard at all and as per the Reply of the Respondent, no adverse finding has been made or was contemplated to be made without first hearing the Ex parte Applicant and being investigatory in nature, it is pre-mature for the Ex parte Applicant to seek the orders herein.

49. On jurisdiction it was submitted that the Council and the Disciplinary Committee of the Respondent, by virtue of sections 30 and 32 of the ***Accountants Act***, have authority to inquire if a member of the Respondent is guilty of any of the listed offences and mete an appropriate punishment and this includes *if a member is found to have engaged in fraudulent acts in the course of discharging his or her duties as an accountant or is guilty of gross negligence in the conduct of such duties*. Additionally, a member may be accused of and indeed found guilty of failing to observe professional, technical, ethical or other standards as prescribed by the Respondent as guidelines. It was submitted that the Statute does not limit the context under which a particular member was practicing as an accountants, whether as an employee or a consultant as members are bound to desist from committing any acts prohibited under section 30 of the ***Accountants Act*** whilst in practice as an accountant anywhere. This is such that it is not the intention of the Act to create a distinction between Accountants who are employed and those who are conducting or running their own practice. All Accountants hold licenses like Advocates and an Advocate (like an accountant) can be charged for a professional misconduct as such Advocate irrespective of being an associate, partner or sole proprietor. In this case it is not in dispute that the Ex parte Applicant is an accountant and member of the Respondent.

50. The Respondent submitted that from the letter of 26th January 2015 highlighting the nature of the complaint, it is clear the allegations which the Ex parte applicants stands likely to be charged with borders on fraudulent acts as well as breach of professional and ethical standards as prescribed by the Respondent in its By-Laws and Code of Ethics for Professional Accountants**.** It is clear that even a breach of the provisions of the Code also constitutes an offence as section 30(1)(h) of the ***Accountants Act*** requires full compliance with the Respondent's guidelines.

51. It was submitted that contrary to assertions by the Ex parte applicant at Paragraph 3 and 4 of the Grounds in support of the application, whilst the Employment and Labour Relations Court is clothed with exclusive jurisdiction to hear and determine disputes between employer and employee, the same did not divest the Respondent of the jurisdiction to proceed and handle any professional misconduct against a member whilst practicing his accountancy in or within an employment setting. In the Respondent's view, professional misconduct prohibited under section 30 of the ***Accountants Act*** are exclusively required to be inquired into by the Disciplinary Committee and not within the mandate of the Employment and Labour Relations Court and cannot be elevated to or properly be referred to as 'disputes' between

employer and employee as defined and excluded vide Article 162(2)(a) of the Constitution and Section 12(1) of the ELRC Act.

52. It was submitted that if the principle of exclusivity as defined and advanced by the Ex parte Applicant is to hold water, then any case of fraud arising in the workplace and which affects the employer cannot equally be subjected to criminal prosecution at the criminal court on the simple basis that it would be a 'dispute' arising between employer and employee only reserved for the Employment Court, such would be an absurd interpretation.

53. In any case, the offences are still being inquired into and the Ex Parte Applicant cannot definitively assert that she is factually not guilty of any offences that are within the province of the Respondent to inquire into and have the proceedings quashed on that basis and at the stage of the proceedings.

54. In the Respondent's view, there indeed there cannot be exclusivity of jurisdiction when the issue touches on offences at the workplace as competent bodies established by the Constitution and Statute can concurrently or at different stages deal with the issue and mete their various punishments as known in law.

Determinations

55. I have considered the application, the affidavits both in support of and in opposition thereto, the submissions filed by the respective parties as well as the authorities relied upon in support thereof.

56. In this case, it is my view that there are only two issues which fall for determination in this application.

57. The first issue is whether the procedure adopted by the Respondent had the effect of violating or threatening to violate the applicant's righto be heard.

58. In **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006, Emukule, J** expressed himself as follows:

> **"…in the absence of some statutory provision as to how the persons who is to decide is to proceed, the law will imply no more than that the substantial requirements of justice shall not be violated. The decision maker is not a judge in the proper sense of the word but he must give the parties an opportunity of being heard, before him and stating their case and their view. He must give notice that he will proceed with the matter, and he must act honestly and impartially and not under the dictation of some other person or persons to whom authority is not given by law. There must be no malversation of any kind. There could be no decision within the meaning of the statute if there was anything of that sort done contrary to the essence of justice - that phrase carries what is generally regarded as "natural justice" not even the Constitution ousts the principles of natural justice. ..what would be the point of giving some a right to be heard while denying him any knowledge as to what he would be heard about"**

59. Although it was contended that the Respondent was simply carrying out investigations before handing over the results thereof, it is my view that even in such circumstances depending on the nature of the investigations a right of hearing may be inferred.

60. 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, Iam 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."

61. It is therefore my view that the Respondent if it chose to hear the complainant was obliged to hear the applicant as well. In other words once the Respondent decided to get submissions from the complainant it was duty bound to do the same for the applicant. In this case, however, it is contended that even the Ex parte applicant was also intended and entitled to be called to shed more light on her response in the same manner the complainant was summoned and this procedure is proper before the council exercises its discretion to have the matter referred to the Disciplinary committee. The Respondent therefore asserted that all the rights to fair hearing of the ex parte applicant has been observed and would indeed be safeguarded at all costs in the continued proceedings and no decision has been made and would be made without affording the Ex-parte applicant all the requisite opportunity to present her case both orally and presentation and answers to all allegations and documents.

62. Under section 4(4)(c) of the ***Fair Administrative Action Act***, an administrator is obliged to accord the person against whom administrative action is taken an opportunity to cross-examine persons who give adverse evidence against him. However, section 4(6) of the Act provides that where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

63. It is therefore clear that an opportunity to be heard must not necessarily be by way of oral hearing as is usually the position when one is charged before a court of law. I agree with **Michael Fordham** in ***Judicial Review Handbook*** 4th Edn. at page 1007 that:

"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

64. In Kenya **Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the

Court of appeal delivered itself as follows:

> **"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. 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 procedures. 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. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made."**

65. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

> **"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."**

66. In my view, reference to hearing the other side must have been with respect to oral representation since I do not see how a decision affecting a person can be made without affording that person an opportunity to present his case either orally or by in writing in light of the provisions of Article 47 and 50 of the Constitution. However, the law is clear that where a tribunal decides to hear one party then it must hear all the parties. See **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR .**

67. In **Russel vs. Duke of Norfolk [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

> **"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."**

68. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

> **"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."**

69. However, the law is now clear that where adverse evidence is given about a person, the person is to be afforded an opportunity to cross-examine the said witnesses. This must be so since in this case the Respondent submitted that the applicant would be *equally* be required to respond and equally be *invited to an oral hearing*. It is therefore clear from the Respondent's version that in this case it was conducting oral hearing and whether such a hearing was preliminary in nature or not the applicant ought to have been afforded an opportunity to participate therein since its position was that its Council must gauge the

veracity of the material being placed before it by the complainant. In other words the Respondent's Council is not just a receptacle through which evidence is collected but it has the duty of collating and sieving through whatever material it collects.

70. Assuming the Respondent's position is correct, it would follows that it was necessary for the Respondent to furnish the applicant with all the evidence presented by the complainant so as to enable the applicant respond to and address the same. A situation where an administrator clandestinely collects material from one party and then expects the other party to deal with the same without full disclosure cannot in my view amount to fair administrative action. This was the position in **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** where the Court held:

> **"I would at this stage adopt the observations made in the *Hypolito Cassiani De Souza vs. Chairman Members of Tanga Town Council 1961 EA 77* where the court set down the general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity. P 386 – the court said; "1.if a statute prescribes, or statutory rules and regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed; 2. if no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue; 3.In such a case the tribunal, which should be properly constituted, must do its best to act justly and reach just ends by just means. It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as a trial. It need not examine witnesses; and it can obtain information in any way it thinks best…; 4.The person accused must know the nature of the accusation made; 5.A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view and to make any statement they may decide to bring forward; 6.The tribunal should see to it that matter which has come into existence for the purpose of the *quasi–lis* is made available to both sides and once the *quasi-lis* has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it."**

71. Therefore the procedure adopted by the Respondent of hearing the complainant in the absence of the applicant and then purporting to subsequently hear the applicant separately does not comply with the principles of fir administrative action.

72. However Rule 1(1) of the Fifth Schedule provides that *"the Council shall cause a statement setting out the allegation of professional conduct* ***to be investigated by the Disciplinary Committee"*****.** It is therefore clear that the mandate of carrying out investigation is the preserve of the Respondent's Disciplinary Committee. By purporting to gauge the strength of the complaint vis-à-vis the ex parte applicant's defence the Council clearly exceeded its powers at that stage of the proceedings.

73. I say at that stage because by section 33(4) of the Act, the member against whom a complaint is made has the right to appeal against the determination made by the Disciplinary Committee to the Council within 60 days of notification hence the Council's role is appellate vis-à-vis the decision of the Council. Therefore for the Council to undertake a comprehensive hearing at the initial stage of the proceedings when it also has the appellate jurisdiction would be a misnomer. The powers and the procedure before the instant DC was dealt with in **Republic vs. Institute of Certified Public Accountants of Kenya Ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006,** where the Court expressed itself as follows:

> **"The Disciplinary Committee as a statutory body can only do that which it is expressly or by necessary implication authorised to do by statute…Secondly, the Disciplinary Committee has no authority to expand its ambit beyond what has been referred to it by the Council. The terms of section 30(1) say that where the Council has reason to believe that a member has been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee, which shall inquire unto the matter. Under section 31(1), on the completion of an inquiry under section 30 into the alleged professional misconduct of a member of the**

Institute, the Disciplinary Committee shall submit to the Council a report of the inquiry put the matters beyond question or doubt. The Disciplinary Committee can only conduct an inquiry into the actual matters referred to it for inquiry by the Council. In unilaterally expanding the said inquiry into something called "conduct short of expected standards of professionalism", and thereby expanding the said inquiry beyond its terms of reference, the Disciplinary Committee acted unlawfully…Thirdly, there is nothing in either the Act, or the Fifth Schedule or any known subsidiary legislation under the Act which empowers Disciplinary Committee or indeed the Respondent, to delegate its Ad-judicatory functions to unnamed person under Section 28(1) of the Accountants Act. The Committee's findings of the Applicant guilty of such offence showed clearly that the Disciplinary Committee failed to appreciate the limits of its own jurisdiction, and also failed to apply the law as it is. It is akin to the tribunal asking itself the wrong questions, and taking into account wrong considerations. If a tribunal whose jurisdiction was limited by statute or subsidiary legislation mistook the law applicable to the facts as it had found then it must have asked itself the wrong question, i.e. one into which it was not empowered to inquire and so had no jurisdiction to determine. Its purported determination not being a 'determination' within the meaning of empowering legislation was accordingly a nullity…Error of law by a public body is a good ground for judicial review. An administrative or executive authority entrusted with the exercise of a discretion must direct itself properly in law…It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith."

74. My view is informed by the sentiments expressed in **Gathigia vs. Kenyatta University Nairobi HCMA No. 1029 of 2007 [2008] KLR 587** in which the Court expressed itself as follows:

"The petitioner also challenges the inclusion of the Vice Chancellor in the committee to sit on appeal of the petitioner's case having been a judge of first instance. As earlier noted s 14 provides for the composition of the Senate and the chairman of the said Senate is the Vice Chancellor. The letter of 11th September 2006 allowed an appeal to be made to the Vice Chancellor but the appeal was dismissed. A second appeal was made on 5th April 2007 but the same was rejected on 19th July 2007. The petitioner has faulted the decision of the Vice Chancellor who is supposed to chair the Students Disciplinary Committee for sitting on appeal. I do agree that the Vice Chancellor cannot be a judge at first instance and also on appeal…Had the Vice Chancellor sat on the 1st Committee then he would have lacked capacity to sit on appeal. Ordinarily I would agree that the provision that the Vice Chancellor sits both at 1st instance on the case and on appeal would be contrary to rules of natural justice and unconstitutional. The regulation authorizing the Vice Chancellor to sit as a judge in the 1st instance and on appeal should be relooked at."

75. In this respect it was held in **Railways Corporation vs. Sefu [1973] EA 327** at 330 that:

"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith."

76. By purporting to undertake actions which the law did not entrust to it, the Respondent's Council clearly acted without jurisdiction. with the power under section 33(4) to direct that the DC re-open the inquiry

77. The next issue is whether the Respondent had the jurisdiction to enter into the inquiry that was before it. In **Owners and Masters of The Motor Vessel "Joey" vs. Owners and Masters of The Motor Tugs "Barbara" and "Steve B" [2008] 1 EA 367** the Court of Appeal expressed itself as follows:

"The question of jurisdiction is a threshold issue and must be determined by a judge at the threshold stage, using such evidence as may be placed before him by the parties. It is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything and without it, a court has no power to make one more step. Where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction. It is for that reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court. It is immaterial whether the evidence is scanty or limited. Scanty or limited facts constitute the evidence before the court. A party who fails to question the jurisdiction of a court may not be heard to raise the issue after the matter is heard and determined. There is no reason why a question of jurisdiction could not be raised during the proceedings. As soon as that is done, the court should hear and dispose of that issue without further ado."

78. It is the Respondent's case that the Council and the Disciplinary Committee of the Respondent, by virtue of sections 30 and 32 of the ***Accountants Act***, have authority to inquire if a member of the Respondent is guilty of any of the listed offences and mete an appropriate punishment and this includes *if a member is found to have engaged in fraudulent acts in the course of discharging his or her duties as an accountant or is guilty of gross negligence in the conduct of such duties*. Additionally, a member may be accused of and indeed found guilty of failing to observe professional, technical, ethical or other standards as prescribed by the Respondent as guidelines. It was submitted that the Statute does not limit the context under which a particular member was practicing as an accountants, whether as an employee or a consultant as members are bound to desist from committing any acts prohibited under section 30 of the ***Accountants Act*** whilst in practice as an accountant anywhere.

79. What runs through the Respondent's submissions and I agree with the same position is that the member under investigation can only be investigated for acts committed in his or her capacity as an accountant. For example a member of the Respondent who is fraudulent while performing the duties of a doctor cannot surely be said to be subject to the disciplinary jurisdiction of the Respondent.

80. In this case the Respondent has set out the grounds of the complaints against the applicant as follows:

a. Acting in concert with other former employees and executed on behalf of the Complainant and its affiliates, numerous unauthorized and irregular contractual arrangements that were grossly detrimental to the interests of the Complainant.

b. Conceived and established and/or facilitated the incorporation of Cytonn Investments Management Limited a business similar or substantially similar to that of the Complainant.

c. Unlawfully and irregularly authorized the payment of substantial amounts of money totalling Kshs. 1,161,465,388.00 out of the bank account of BAAM Real Estate Fund (and affiliate of the Complainant) to Acorn Group Limited.

d. Used confidential information about the Complainant's clients which information she acquired and/or otherwise had access to during the course if her employment with the Complainant to solicit business from the Complainant's clients.

e. Attempted to take over, for the benefit of Cytonn, certain transactions that were conceived, commenced and/or funded by the Complainant.

81. If the applicant was acting as the Respondent's accountant, it may well be that the complaints in (c) and (d) may constitute professional misconduct. But, as I have said, if the same were committed when not engaged as an accountant but as someone else, the Respondent would not have the powers to investigate her. To decide otherwise would subject a person who is both an accountant and an advocate to be

subjected to disciplinary proceedings by the disciplinary bodies of both professions in respect of complaints that fall only within the jurisdiction of one.

82. In this case the applicant contends which contention is not disputed that her role in the Complainant Company was that of a Senior Portfolio Manager. She was and has never been employed as an accountant nor did she undertake any tasks or duties as one. According to her, her specific tasks as set out in her job description were:

i. To manage investment portfolios and to manage the dealings with the aim of delivering superior returns to investors;

ii. Analyzing trends in global and local markets and provide useful investing data;

iii. To execute asset allocation decisions amongst client portfolios;

iv. To serve as a representative of the Company in client servicing and company research efforts;

83. Therefore the actions complained of if true were committed in her capacity as such manager and not as an accountant.

84. From the foregoing the applicant's Notice of Motion dated 21st October, 2016 must succeed. First the Respondent's conduct of the proceedings was tainted with procedural irregularities. Secondly by conducting a hearing of the complaint the Respondent's Council exceeded its jurisdiction at that stage. As a result of its action of hearing the matter before being properly seised of the same in its appellate capacity, it cannot be said that the applicant would have a fair hearing in the event that she prefers an appeal to the Council against the decision of the DC. Thirdly, if the applicant was not carrying out her duties as an accountant or duties related to her profession as such, the Respondent had no jurisdiction to entertain proceedings against her.

Order

85. Therefore the orders which commend themselves to me and which I hereby issue are as follows:

1. An Order of Certiorari to remove into Court and quash the proceedings that were carried on in the absence of the Applicant including the written submissions filed on 8th August, 2016 which proceedings are hereby quashed.

2. An Order of Prohibition prohibiting the Institute of Certified Public Accountants of Kenya form continuing to conduct an inquiry over the Ex-parte Applicant herein.

3. An Order of Prohibition to prohibit the Institute of Certified Public Accountants of Kenya from conducting any future inquiries over the Ex-parte Applicant herein on the foot of the complaint lodged against her by the British American Asset Managers Limited.

4. Costs of this application are awarded to the applicant.

86. It is so ordered.

Dated at Nairobi this 24th day of July, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Miss Lubano for Mr Amoko for the applicant

CA Mwangi