REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISC APPLICATION NO. 108 OF 2017

IN THE MATTER OF ARTICLES 10, 35, 47, 50 (1), 157 (10), 249(2) B 251 AND 254 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF SECTIONS 3, 4(1), (3)(A),(E),(F)(G); 4(A), (C), (D), (5), 7,9,11 AND 12 OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

IN THE MATTER OF SECTIONS 4(1)(B) AND (3) OF THE ACCESS TO INFORMATION ACT

AND

IN THE MATTER OF THE OF SECTION 3 OF PETITION TO PARLIAMENT (PROCEDURE) ACT

AND

IN THE MATTER OF THE NATIONAL ASSEMBLY STANDING ORDERS

AND

IN THE MATTER OF SECTIONS 8 AND 9 OF THE LAW REFORM ACT CAP 26 OF THE LAWS OF KENYA

AND

IN THE MATTER OF ORDER 53 OF THE CIVIL PROCEDURE RULES

AND

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC.....APPLICANT

AND

SPEAKER OF THE NATIONAL ASSEMBLY.....1ST RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY.....2ND RESPONDENT

THE NATIONAL ASSEMBLY..…….....…3RD RESPONDENT

THE ATTORNEY GENERAL…….....…4TH RESPONDENT

THE PRESIDENT OF THE REPUBLIC OF KENYA….5TH RESPONDENT

EX-PARTE: EDWARD R.O.OUKO

JUDGEMENT

Introduction

1. **The ex parte applicant herein, Edward R. O. Ouko, the Auditor General, which is an independent Constitutional Office established under Article 248(3)(a) of the Constitution, has moved this Court vide his Notice of Motion dated 9th March, 2017 seeking the following orders:**

1. Certiorari to remove into this honourable court for the purposes of quashing the 1st and 2nd Respondents' decision to commit the petition dated 13th February 2017 to the Parliament Departmental Committee on Finance, Planning & Trade;

2. Prohibition restraining the 1st and 3rd Respondents by themselves, their agents or authorised representatives from debating or in any other way considering, hearing or debating the petition dated 13th February 2017 seeking the removal of the applicant.

3. Prohibition restraining the 1st Respondent from making and/or forwarding any recommendations to the 5th Respondent on the Constitution of a tribunal to investigate and remove the applicant from office.

4. Prohibition restraining the 5th Respondent from constituting a tribunal to investigate the applicant or in any other way acting on the recommendations of Parliament flowing from the petition of 13th February 2017.

5. Declaration that the petition dated 13th February 2017 presented to parliament was fatally flawed & inadmissible for contravening the National Assembly Standing Orders.

6. Declaration that the process of removing the applicant is unlawful and procedurally unfair for violating the Constitution, the Fair Administrative Action Act, the Petitions to Parliament (Procedure) Act, the Access to Information Act as well as the National Assembly Standing Orders and therefore a nullity.

7. Declaration that the receipt, processing and subsequent committal and hearing of the petition dated 13th February 2017 violated the applicant's right to a fair hearing, access to information, right to fair administrative action as well as principles of natural justice as guaranteed under the Constitution and the Fair Administrative Action Act;

8. Declaration that sections 3 (k) of the Petition to Parliament (Procedure) Act and order 230 (1) b of the National Assembly Standing Orders are unconstitutional for contravening Articles 10, 35,47, 50(1)&(3) and 251 of the Constitution as well as the Fair Administrative Actions Act.

2. **According to the applicant,** the office of the Auditor General is an independent Constitutional Office established under Article 248(3)(a) of the Constitution. Being an independent Constitutional office holder, it was contended that the said office is protected from undue interference and/or arbitrary removal from office.

3. Based on legal advice, the applicant averred that Article 251 succinctly provides the grounds and procedure of removing the Auditor General from office and according thereto it is only the National Assembly which can initiate the removal. That again, while undertaking such a removal, the National Assembly must have due regard to the Constitution, the relevant statutes, the National Assembly Standing orders and most importantly, the rules of natural justice.

4. It was averred that on or around 14th February 2017 a petitioner by the name of **Mr Emmanuel Mwagambo Mwagonah** submitted a petition to parliament for the ex parte applicant's removal from office which petition was only accompanied by an affidavit deposed by him. Upon submission of the petition on 14th February 2017, the clerk then transmitted it to the Speaker of the National Assembly who purportedly forwarded it to the Advisory committee to assess it for sufficiency of reason. On 16th February 2017, the petition was then transmitted to the Departmental Committee on Finance, Planning and Trade and the speaker simultaneously advised the members thereto that this process was quasi-judicial in nature. On 16th February 2017, the clerk to the National Assembly wrote to the ex parte applicant inviting him to appear before the Departmental Committee on Finance, Planning and Trade on 23rd February 2017 which letter the ex parte applicant saw on 20th February 2017.

5. According to the ex parte applicant upon receipt of the said letter, he wrote to the Speaker of the National Assembly through his advocates **Messrs Rachier and Amollo Advocates** indicating that owing to the nature of the proceedings which was to be quasi-judicial in nature, the advocates would represent him; that the National Assembly forwards the petition to the said advocates and most fundamentally, that the National Assembly forwards the exact charges to be answered by him, the precise part of Article 251 of the Constitution alleged to have been breached, and the manner in which the breach is alleged to have occurred. According to the applicant, this letter although responded to in an omnibus version, the key issues raised therein were never addressed. Notwithstanding the foregoing, his advocates wrote another letter on 20th February 2017 where they requested for the matter to be postponed from the scheduled time as it was not giving the ex parte applicant adequate time to prepare his response. The letter also requested that the ex parte applicant be furnished with the supporting documents to the petition to enable him properly respond to the issues raised. While the postponement was allowed from 23rd February to 28th February 2017, it was contended that the documents in support of the petition were never supplied.

6. It was averred by the ex parte applicant that on 27th February 2017, a day before the scheduled hearing, his advocates wrote to the Chairperson of the Committee on Finance, Planning and Trade indicating that they would raise preliminary objection on points of law touching on the admissibility of the petition as well as notifying the honourable committee that they would seek to cross examine the petitioner **Mr Emmanauel Mwagonah** at the time of testifying which letter was copied to all members. It was however averred that despite the fundamental questions of law and fact raised in the foregoing letter, the committee totally disregarded the said issues and even failed to make a ruling on the admissibility of the petition as presented. Notwithstanding the apparent challenges in terms of time and the case facing him, the applicant averred that he was able to draft a response to the petition as had been presented.

7. He disclosed that on 28th February 2017 he appeared before the departmental committee on Finance, Planning and Trade with a draft response on the issues that the petitioner had raised. However, it turned out that the petitioner's case was heard without the applicant being given prior notice and a chance to cross examine him. It also turned out that although he had admitted that he was acting on behalf of an undisclosed client, he was allowed to give unsworn testimony. This issue was raised by the applicant's advocates at the time of presenting his case but was overruled.

8. Based on his counsel's advice, the ex parte applicant averred that despite the process being quasi-judicial in nature as unequivocally admitted by the Speaker of the National Assembly, the National

Assembly failed to observe the principles that govern such a process as succinctly provided for under the Constitution, the ***Fair Administrative Action Act 2015***, the ***Petition to Parliament (Procedure) Act*** as well as the ***National Assembly Standing Orders***. The ex parte applicant's case was that the foregoing laws strictly govern quasi-judicial processes and are to be adhered to and followed strictly in the hierarchy provided. In his view, the National Assembly in undertaking the process of his removal blatantly violated the foregoing laws thus:

i) They failed to give him sufficient/ adequate notice to prepare his defence contrary to section 4(3)(a) of the ***Fair Administrative Action Act***. They erroneously misconstrued Standing Order 230(4) to the effect that the Petition presented to the National Assembly had to be processed and a report made to the president within 14 days. The correct position being that the 14 days would only start to run upon the petition being committed to the Departmental Committee. It is no wonder that the petition was received on 14th February 2017 by the clerk, who then forwarded it to the office of the Speaker on the same day, who again laid it before the advisory committee to interrogate whether it met the minimum threshold for committal and was committed the same day to the Departmental Committee on Finance, Planning & Trade. They then wrote a letter to the applicant which he saw on 20th February 2017 requesting him to attend the hearing of the petition on 23rd February 2017. Though he was given 2 more working days and requested to appear on 28th February 2017, the speed and time was not sufficient or adequate to mount a formidable defence to the allegations which he faced;

ii) He was not given a chance to know his accuser contrary to Articles 119 of the Constitution, section 3(i) of the ***Petition to Parliament (Procedure) Act***, Standing Order No. 223 (i) of the ***National Assembly Standing Orders*** as well as principles of natural justice. In paragraph 2 of the attached affidavit the accuser alludes that he is ***one of the petitioners*** and in his presentation to the Committee unequivocally admitted that he was an advocate acting on behalf of a client who had been dissatisfied by the decision of the D.P.P and the EACC. Despite the foregoing and the applicant's requests to face his accusers, the committee adamantly refused to do the same;

iii) The applicant was not told the **precise nature** of allegations that he was facing and the manner in which he had breached Article 251 of the Constitution. This was not only a breach of Article 10, 47 and 50 of the Constitution but also a contravention of Standing Order No. 230(i)(a) of the National Assembly Standing Orders;

iv) The applicant was not presented with the evidence that the Committee or the petitioner had relied on in prosecuting the petition or taking the administrative action contrary to section 4(3)g of the ***Fair Administrative Action Act***. The committee erroneously relied on the provisions of Order 230 (1)(b) of the ***National Assembly Standing Orders*** which provides that a petition may contain affidavits or other documents annexed to it. They failed to appreciate that the ***Fair Administrative Actions Act*** supersedes the ***National Assembly Standing Orders***;

v) The committee failed to observe the applicant's right to cross examine the accuser thereby flouting the provisions of Sections 4(3)(f) and 4(4)(c) of the ***Fair Administrative Actions Act***. Although this request was made twice and by way of preliminary objection before the proceedings commenced, the Committee not only denied the applicant the right to cross examine the accuser but also failed to make a ruling on this issue which had clearly been raised as a preliminary point of law.

9. Based on his advocate's advice, the ex parte applicant averred that by admitting the petition and proceeding to consider it, the National Assembly gravely violated the provisions of the ***Petition to Parliament (Procedure) Act***, the ***Standing Orders*** and most fundamentally the parliamentary practice and procedures. To the applicant:

i) It is of utmost suspicion on how the petition for his removal was fast tracked and undertaken in record time;

ii) There was differential and discriminatory treatment of the current petition since petitions which had hitherto been presented to the National Assembly and which contained less contraventions of the law were rendered inadmissible yet the one to oust him and which had grave inconsistencies was swiftly admitted and fast-racked;

iii) Petitions to parliament which are aimed at ousting a state officer or a constitutional office holder must allege unequivocally that the officer had conducted serious violations of the Constitution or had engaged in gross misconduct. The instant petition to remove him was just glib and roving and most fundamentally it did not allege serious violations of the Constitution or gross misconduct on his part;

iv) The petition did not demonstrate in what manner the alleged violations had occurred. The sufficiency and adequacy must be considered by the clerk, then the speaker who then forwards it to the advisory committee wherein it is then forwarded to the Departmental Committee. The Committee then has to lay down the applicable standard that the petition is to be juxtaposed before the commencement. The committee abdicated its duty when the chairperson held that it is not their duty but the duty of the tribunal to examine the threshold. This approach was totally fatal and incurably defective owing to the fact that upon the constitution of the tribunal, the applicant stands to be immediately suspended to pave way for investigations.

10. The ex parte applicant believed based on the advice from his counsel that Parliament in admitting and committing the petition to the Departmental Committee on Finance, Planning and Trade for hearing, fundamentally flouted procedural fairness in that:

i) Although he requested for particulars of how he flouted Article 251, the respondents did not address nor consider his request;

ii) He was hurriedly summoned on 23rd February 2017 vide a letter received on 20th February 2017 and although he requested for an adjournment he was not granted sufficient time to prepare but on the contrary only two days which were clearly insufficient;

iii) He was compelled to face allegations by an accuser even when there were no supporting documents;

iv) His right to raise preliminary issues was deterred and constrained when the committee failed to rule on the admissibility of the petition even when he had raised the issues of *sub judice* and the fact that the petition was in the nature of an appeal;

v) The committee failed to give him prior notice of when and where the accuser would appear:

vi) Having allowed the petitioner to appear, the committee allowed him to prosecute the case without supporting documents or evidence as by law required;

vii) The committee allowed the petitioner to proceed knowing too well that he was making representations on behalf of another person and took unsworn testimony from him;

viii) They allowed the petitioner to proceed and even adjourned further to allow him file a memorandum despite the fact that the committee could not have entertained such a memorandum without it having followed the procedure**;**

ix)Despite the applicant's requests for adjournments, the committee insisted on proceeding despite notwithstanding the fact that the petitioner had not presented his case in full and overruled his objection;

x) That despite the extension of time, the petitioner failed and/or refused to file documents as directed. Further the applicant requested for the evidence which was clearly not forthcoming**;**

xi) Rather than dismiss the petition *in limine*, the National Assembly unilaterally and without any prior request extended the time within which the petitioner would present additional documents;

xii) The committee shifted the burden of proof contrary to the adage known principle that he who alleges must proof when it called upon the ex parte applicant to present and produce documents to rebut a case which had not only been partially presented but also that had been presented without supporting evidence;

11. In the ex parte applicant's view, by admitting and proceeding as they did, the committee failed to distinguish between personal accountability expected of him from the collective responsibility he holds as the accounting officer of the Office of the Auditor General.

12. It was the applicant's case that by admitting, committing and purporting to hear the petition, the National Assembly failed to appreciate the fact that it lacked the jurisdiction to entertain the petition *ab initio* for reasons that;

i) The petitioner had admittedly stated in the petition thereof that that the matters raised in the petition have previously been addressed by the Ethics and Anticorruption Commission and the office of the Director of Public Prosecutions and a decision reached;

ii) The petitioner had filed a court petition basing on the issues raised in the petition;

iii) The question of recruitment was before the Honourable Court in petition No. 388 of 2016 which is pending;

iv) The National Assembly lacked jurisdiction to entertain allegations of a criminal nature where the Director of Public Prosecutions had pronounced himself with finality and found no fault under Article 157(10) of the Constitution;

v) An appeal against the decision of Parliament does not lie with the National Assembly;

vi) The National Assembly cannot consider matters that are sub judice as they contravene Order 89 of the ***National Assembly Standing Orders*** in that;

a) Petition 388 touching on matters of recruitment in the office of the Auditor General ; and

b) Matters which have been before the relevant constitutional organ like the office of the Director of Public Prosecutions and the Ethics and Anticorruption Commission cannot be appealed to parliament.

13. It was the ex parte applicant's case that against the foregoing procedural and substantive flaws, he was summoned, hearing proceeded amidst the blatant disregard and violations of the Constitution, the ***Fair Administrative Actions Act***, the ***Petitions to Parliament (Procedure) Act***, the ***National Assembly Standing Orders*** as well as rules of Natural Justice, the consequence being that his rights will be irreparably violated.

14. The applicant therefore contended that he was constrained to institute these proceedings to protect his interests lest he be subjected to grave violations of his fundamental rights and freedoms as guaranteed under the Constitution.

15. It was submitted on behalf of the ex parte applicant with respect to the contention that by virtue of the doctrine of separation of powers this Court has no jurisdiction to determine the motion which seeks to bar the Departmental Committee on Finance, Planning and Trade from continuing its investigations, that **Lord Denning's** statement in **Gouriet vs. Union of Post Office Workers and Others (1977) CA** suffices as a response; where he affirmed: "Be you ever so high, the law is above you." To the applicant, no one is above the law; not even the Departmental Committee on Finance, Planning and Trade. It was

submitted that there is no legislation that restricts any person from applying for judicial review remedies where procedural irregularities have been occasioned that have the effect of prejudicing a person's constitutional rights. Not even the Standing Orders of the National Assembly can purport to oust judicial review. In this respect the ex parte applicant relied on Article 93 of the Constitution which provides that: "the National Assembly and the Senate shall perform their respective functions in accordance with this Constitution". In addition, Standing Order 216 provides that the National Assembly is to function through select committees known as Departmental Committees which committees are bound to apply the Bill of Rights to all law under article 20(1) of the Constitution. This means that the Standing Orders are also to be interpreted and applied consistently with the Constitution.

16. It was submitted on behalf of the ex parte applicant that a number of procedural irregularities have occurred in the conduct of the investigations that merit intervention by this Court. These procedural irregularities go to the root of scathing the inviolable provisions of the constitution that touch on respecting and fulfilling basic human rights of the ex-parte applicant with respect to the investigations being conducted against him. According to the ex parte applicant, Standing Order 223 requires that an averment be made in the Petition indicating whether the issues in respect of which the Petition is made are pending before any court of law or other constitutional or legal body. In fact, the issues in respect of which the Petition was made were not pending before any legal body but had been investigated and determined by both the Ethics and Anti Corruption Commission and the office of the Director of Public Prosecutions. These investigations vindicated the ex-parte applicant of any wrongdoing, yet he finds himself the subject of investigations before the Committee on similar issues.

17. In this case it was submitted that the Petitioner admitted in paragraph 37 of the Petition that the matters raised in the Petition have been previously addressed by the EACC and the DPP. In the applicant's view, this is contrary to Article 28 of the Constitution which prescribes that every person has inherent dignity and the right to have that dignity respected and protected. The Committee in investigating the ex-parte applicant over concluded investigations is in fact re-opening the same investigations and peradventure constituting itself as an appeal body. This, it was submitted, is unreasonable and Standing Order 226 that gives the 1st respondent the discretion to allow comments, observations or clarifications in relation to the Petition is to be exercised reasonably which the 1st respondent failed to do.

18. In support of his case the ex parte applicant relied on the **Minister for Immigration and Citizenship vs. Li [2013] HCA 18,** in which the High Court held that the Migration Review Tribunal's refusal to adjourn review proceedings was unreasonable and that the Tribunal exceeded its jurisdiction. A majority of the Court held, in part, that: — the legislature is generally taken to have intended that a statutory discretion is to be exercised reasonably — the legal standard of reasonableness is not limited to what is known as Wednesbury unreasonableness (i.e., that a decision is 'so unreasonable that no reasonable authority could ever come to it') — taking irrelevant considerations into account, failing to take relevant considerations into account, bad faith, dishonesty, disregard of public policy and misdirecting oneself as to the operation of the statute are all relevant to the question of whether the discretion was exercised reasonably. The respondents have indeed wrongly interpreted the doctrine of separation of powers to claim that the Committee proceedings are not subject to judicial scrutiny and intervention.

19. According to the applicant, the hearing of the Petition that has aggrieved the ex-parte applicant also raises procedural irregularities and concerns about the brazen dismissal of the ex-parte applicant's rights under Articles 47 and 50 of the Constitution. According to the applicant, a reading of Article 251 of the Constitution which sets out the procedure and grounds upon which the ex-parte applicant may be removed from office, as read with Article 20 requires that in the process the Bill of Rights be applied. However ex-parte applicant was not provided with adequate notice and good time within which to prepare his defence as required by section 4(3) (a) of the ***Fair Administrative Actions Act, 2015*** which requires prior and adequate notice of the nature and reasons for the proposed administrative action. Further, contrary to Article 50 (2) (b) of the Constitution which requires that every accused person has the right to fair trial which includes the right to be informed of the charge, with sufficient detail to answer it, the ex-parte applicant who was not informed of the precise nature of the allegations he was facing with respect to the manner in which he had breached Article 251 of the Constitution.

20. In particular, the ex-parte applicant was not presented with the evidence that the Petitioner intended to, and relied upon in prosecuting the Petition. Neither was he presented with the evidence that the Committee was taking into account in arriving at its decision contrary to Standing Order 223 (k) which provides that the Petition need not have any letters, affidavits or other documents annexed to it failing to take into account firstly; section 4 (3) (g) of the ***Fair Administrative Actions Act, 2015*** which provides that the person affected by the decision is to be provided with information, materials and evidence to be relied upon in making the decision or taking the administrative action, and secondly; section 4 of the Access to Information Act, 2016 which provides that every citizen has the right of access to information held by another person and where that information is required for the exercise or protection of any right or fundamental freedom. To the applicant, both these Acts supplant the Standing Orders.

21. It was submitted that though section 4(4)(c) of the ***Fair Administrative Actions Act, 2015*** guarantees the ex-parte applicant the opportunity to be heard and to cross examine persons giving adverse evidence against him and request for an adjournment of the proceedings where necessary to ensure a fair trial, the Committee in its sagacity chose to deny the ex-parte these rights. The requests that were made twice by the ex-parte applicant by way of preliminary objections before proceedings began, not only fell on deaf Committee ears but the Committee failed to give a ruling on the same.

22. The applicant's submission was that he was denied the very requirement apparent under Standing Order 223 (i) that requires the full details of the Petitioners. It is clear from the affidavit to the Petition that the Petitioner brings the Petition as one of the named Petitioner while the others remain behind screens. The demand for disclosure was put before the Committee by the ex-parte applicant, which demand was whisked away. Again, this was contrary to section 3 (j) of the ***Petition to Parliament (Procedure), 2012***. Natural justice is one of those principles that the judiciary inherently feels strongly about. A key aspect of natural justice is having a fair hearing - and a critical part of that is not only knowing what the allegations against the accused are, but also knowing who is making those allegations.

23. In the applicant's view, the foregoing is demonstrative of the respondent's breach of laws having engaged in procedural irregularities. While the applicant was clear that he was not seeking to bar the Committee from proceeding, he emphasised that he was only seeking to have the Committee respect and protect his right to fair trial and not condemn him unheard.

24. With respect to the invocation of the doctrine of separation of powers the applicant relied on **Commission for the Implementation of The Constitution vs. National Assembly of Kenya, Senate & 2 Others [2013] eKLR, Smith vs. Mutasa & Another LRC [1990] 87, Biti and Another vs. Minister of Justice, Legal and Parliamentary Affairs and Another [2002] ZWSC 10, Kihoto Holohan vs. Zachillu and Others 1992 SCR (1) 886** and **JSC vs. Speaker of the National Assembly & 8 Others (2014) eKLR** citing the case of **Okiya Omtatah & 3 Others vs. Attorney General & 3 Others [2014] eKLR.**

25. Based on **Peter O. Ngoge vs. Francis Ole Kaparo & Others (2007) eKLR** it was contended that it is not the function of the Court to interfere with the internal arrangements of Parliament unless it can be shown that they violate the Constitution. Further support for this proposition was sought from **De Lille & Another vs. The Speaker of the National Assembly (1998)(3) SA 430(c), Speaker of National Assembly vs. De Lille MP & Another 297/98 (1999)(ZASCA 50)** and **Doctors for Life International vs. Speaker of the National Assembly and Others CCT 12/05)[2006] ZACC 11.**

26. According to the applicant, in the case of the **Speaker of the Senate and Another vs. The Hon. Attorney General and 3 Others, Advisory Opinion Reference No. 2 of 2013** the respondents had argued that pursuant to the doctrine of separation of powers, the Judiciary had no legitimate business to intervene in matters falling within the legislative competence of Parliament. Further, that Parliament's business was strictly conducted within its own standing orders which are recognised by the Constitution. The Court recognised the legislative authority vested in Parliament by the Constitution, and said it would be reluctant to question Parliamentary procedures or workings, as long as they did not breach the Constitution. However, where a dispute arises which alleges violation of the Constitution, then judicial intervention would not be a violation of the doctrine of separation of powers as the Court would merely

be performing its solemn duty under the Constitution.

27. It was the applicant's case that the claim for judicial review has a special quality which sets it apart from other forms of litigation: it is a claim against the government which may result in the government's unlawful actions being quashed. The respondents have come to take its existence for granted, but its key elements are striking: not only do individuals have the power to subject government decisions to an independent review of lawfulness, but such power is exercised on the premise that Parliament abides by the outcome in its exercise of power. Judicial review thus defines our constitutional climate. It plays a key role in ensuring that the Parliament acts only according to law. Without it, we are closer to an authoritarian or even totalitarian state. With it, we live under the rule of law.

28. In its submissions, Article 1(1) of the Constitution states that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution, while Article 20(1) clearly states that the Bill of Rights applies to all law and binds all State organs and all persons. According to him, it goes without saying that article 21 (1) states that it is a fundamental duty of the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. In this respect article 23(1) empowers the High Court with jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

29. According to the applicant the Respondents' position fails to take into account the provisions of Article 24 of the Constitution and the fact that the right to a fair trial is among those rights that cannot be limited nor derogated from (article 25) and that it is the role of Parliament under article 94(4) to protect the Constitution.

30. The Court was **urged** pursuant to Articles 159(2)(e) and 160(1) of the Constitution in exercising judicial authority, to be guided by the purpose and principles of this Constitution and to protect and promote these principles, and to be subject only to the Constitution and the law and not be subject to the control or direction of any person or authority.

1st , 2nd and 3rd Respondents' Case

31. **In** opposition **to the petition and the applications the 1st Respondent filed the following grounds of opposition:**

> **1. Article 251 of the Constitution provides for the removal of a member of an independent office from the office that they hold.**
>
> **2. The Constitution under Article 251(2) provides that any person desiring removal of a member of an independent office or a commission may present a petition to the National Assembly for such removal.**
>
> **3. The National Assembly, under Article 251(3) of the Constitution is under an obligation to consider such a petition for removal of an independent office holder.**
>
> **4. Article 251(3) of the Constitution uses the word *"shall"* and therefore the National Assembly lacks any discretion on whether or not to consider a petition presented to the House for removal. The obligation placed in the National Assembly is mandatory.**
>
> **5. The right to Petition Parliament on any matter is a right enshrined in Article 119 of the Constitution and the Petitioner who presented the petition has a right to have the relevant House of Parliament consider his petition.**
>
> **6. If any house of Parliament fails to consider a petition presented to the House in line with Article 119 of the Constitution, Parliament will be in violation of the Petitioner's constitutional rights.**

7. Under Article 95(5) of the Constitution, the National Assembly exercises oversight over State officers and initiates the process of their removal from office. As such, the petition herein is squarely within the role of the National Assembly under Article 95(5) as read with Article 251(3) of the Constitution.

8. The Application seeks orders which, if granted, would be a breach of Article 124 of the Constitution which provides for Parliament to establish its committees and make Standing Orders for the orderly conduct of its proceedings.

9. The orders sought by the Applicant violate the provisions of Article 117 of the Constitution which provides that Parliament may, for the purpose of the orderly conduct of its committees, provide for the powers and privileges of its committees.

10. There is no provision in the Constitution or the Standing Orders for persons who are not members of Parliament to cross examine a person during sittings of committees of the House in the conduct of inquiries in the exercise of the oversight mandate of Parliament.

11. The role of the Committee is to conduct an inquiry to gather evidence, in exercise of its oversight function and determine whether there are grounds for removal disclosed in the petition but not to sit as a court of law or a Tribunal.

12. The Application lacks any basis in law as the orders sought violate the constitutional power granted to Parliament to regulate its internal rules of procedure as well as the *National Assembly (Powers and Privileges) Act.*

13. The Speaker of the National Assembly has reviewed the Petition and certified that the Petition meet the requirements under the Petition to Parliament (Procedure) Act and Standing Orders but this Application seeks to subject the said decision of the Speaker of the National Assembly to judicial scrutiny contrary to Article 107 of the Constitution.

14. The orders sought in the Application violate the principle of separation of powers as they seek for this Honourable Court to interfere with the role of the National Assembly, the internal management of Parliament and its committees.

15. Each of the three arms of Government ought to be allowed to conduct its affairs without undue interference from the other arms of Government and this Application is a violation of the principle of separation of powers as it seeks for the Court to delve into matters of internal procedure of the Legislature.

16. The National Assembly conducts its affairs in accordance with the Constitution, its Standing Orders and its customs and traditions of procedure. The National Assembly makes its Standing Orders and can by resolution of a majority of members suspend, either temporarily or permanently, the application of any particular Standing Order.

17. The Applicant has not demonstrated to this Honourable Court that the grounds, upon which judicial review can be sought, have been met and therefore this Honourable Court ought to decline to exercise its powers of judicial review.

18. The jurisdiction of this Honourable Court can only be invoked in the event of an excess of jurisdiction by way of breach of the Constitution and there has been no violation of the constitution.

19. Judicial review is strictly limited to a review of the procedure of a public body; however the Application herein seeks for this Honourable Court to usurp the constitutional duty of the National Assembly and therefore this Honourable Court ought to decline from interfering with the duties of the National Assembly.

20. The role of the National Assembly at this point is to interrogate the petition for the removal of the Auditor General and determine whether the House is satisfied that the grounds for removal under Article 251(1) of the Constitution have been met.

21. In order to make such a determination, the National Assembly is gathering evidence from relevant parties.

22. The final recommendation as to whether the holder of an independent office shall be removed from office is to be made by the tribunal appointed under Article 251(4) of the Constitution and not by the National Assembly. It is at this point, if it is reached, that the Applicant shall have the right to cross-examine all witnesses.

23. The National Assembly, having gathered evidence from all the parties may determine that the petition against the Auditor General does not disclose any grounds for removal.

24. That the Applicant is due to appear before the Committee of the National Assembly on 16th March 2017 when he shall have the opportunity to present his case and adduce any evidence before the Committee that he wishes to adduce.

25. That the Applicant herein is already a party to a previous suit seeking the same orders herein, being High Court Constitutional Petition No. 62 of 2017, and is therefore guilty of forum shopping and abusing the court process.

26. The petition herein is therefore premature.

27. The application herein lacks merit.

32. **According to the said Respondents, the** on 14th February 2017, the National Assembly received a petition dated 13th February 2017 from **Mr. Emmanuel Mwagambo Mwagonnah** seeking for the removal of the Auditor General **Mr. Edward Ouko**. Following consultation and legal advice obtained in the usual manner, the Speaker of the National Assembly certified that the petition as meeting the requirements set out under the ***Petition to Parliament (Procedure) Act*** and Standing Order 230 of the ***National Assembly Standing Orders***.

33. It was averred that on 16th **February** 2017, the Speaker of the National Assembly, pursuant to Standing Order 225(2)(b) of the National Assembly Standing Orders reported the aforesaid petition to the National Assembly and committed the petition to the Departmental Committee on Finance, Planning and Trade (hereinafter *"the Committee"*) for consideration. Under Standing Order 230, the Committee has fourteen (14) days to submit a report to the House and thereafter the House has ten (10) days to consider the report.

34. It was averred that the Office of the Clerk of the National Assembly wrote a letter dated 16th February 2017 inviting the Auditor General to a meeting with the Committee on 23rd February 2017 on which date the Committee was set to meet with the Petitioner, **Mr. Emmanuel Mwagambo Mwagona** and **Auditor General, FCPA Edward Ouko, CBS** but the meeting did not take place. It was averred that on 28th February 2017, the Committee held another meeting with the same parties at which the Auditor General, sought for the Committee to give him some more time to prepare the documents that he would rely on in his defence which request the Committee granted.

35. It was averred that on 1st March 2017, the Committee sought and obtained the leave of the House to extend the period for the committee to consider this matter and prepare a report by a further twenty (21) days and on 9th March 2017, the Committee met with **Mr. Halakhe Dida Waqo**, the Chief Executive Officer, Ethics and Anti- Corruption Commission and **Mr. Keriako Tobiko**, CBS, SC, Director of Public Prosecutions on this issue.

36. According to the Respondents, the Committee sittings were still in progress as per the exhibited schedule and the Applicant herein was scheduled to appear before the Committee on 16th March 2017. It was averred that all meetings of the National Assembly are open to the public and the schedule of committee sittings was available on http://www.parliament.go.ke/the-national-assembly/committees/committees-sitting-schedule.
Accordingly being open to the public, the Applicant herein and his Advocates were free to attend the inquiry sittings and listen to the evidence produced before the Committee. To the said Respondents, indeed, representatives from the Office of the Auditor General had been attending the Committee meetings. It was disclosed that on 28th February 2017, **Mr. Munyua Ezekiel Njagi** from Rachier & Amollo Advocates, the law firm representing the Applicant in these proceedings was present in the Committee meeting and signed the attendance register and the Applicant herein appeared before the Committee with **Mr. Otiende Amollo, Advocate** as his legal representative and as such it is not true that the Applicant herein has been denied legal representation.

37. It was the said Respondents' case that the Committee intended to hear the Applicant as the last person to enable him respond to all matters raised by all the parties that appeared before the committee and address all pertinent issues regarding the petition for his removal from office. Therefore it was the Respondents' position that it would be unfair, illogical, unlawful and a breach of the rules of natural justice for the Committee to hear the Auditor General before having exhausted all witnesses appearing in this matter as the Auditor General would not have an opportunity to respond to all the evidence and matters raised before the Committee.

38. To them, there is no provision in the Constitution or the Standing Orders for persons who are not members of Parliament to cross examine a person during sittings of committees of the House in the conduct of inquiries in the exercise of the oversight mandate of Parliament. In their belief, the role of the Committee is to conduct an inquiry to gather evidence, in exercise of its oversight function and determine whether there are grounds for removal disclosed in the petition but not to sit as a court of law or a tribunal.

39. It was disclosed that the National Assembly has previously considered motions for removal from office of the Speaker of the National Assembly and the Chairperson of the National Gender and Equality Commission; the motions were dispensed with expeditiously and the petition against the Auditor General has been handled in a similar manner. According to them, there has been no discrimination or differentiation in the manner in which the petition herein has been dealt with by the National Assembly.

40. It was averred that in the case of the motion seeking removal of the **Hon. Justin Muturi, EGH, MP** from the office of the Speaker of the National Assembly, the motion for removal from office was received on 19th March 2015, the Speaker approved the motion on the same 19th March 2015, the motion was debated and finalized on 24th March 2015. This, it was averred, was an even more expeditious process than the one complained of by the Applicant herein. It was accordingly averred that it is not open to the Applicant to complain when a public office performs its functions expeditiously within the timelines provided in law. A complaint on the time taken to perform a task can only be sustained where a public office has inordinately delayed in the performance of its lawful functions.

41. Based on legal counsel, the said Respondents believed that Article 251 of the Constitution provides for the removal of a member of an independent office from the office that they hold; that Article 251(2) provides that any person desiring removal of a member of an independent office or a commission may present a petition to the National Assembly for such removal; that the National Assembly, under Article 251 (3) of the Constitution is under an obligation to consider such a petition for removal of an independent office holder; that Article 251 (3) of the Constitution uses the word "shall" and therefore the National Assembly lacks any discretion on whether or not to consider a petition presented to the House for removal; and that the right to Petition Parliament on any matter is a right enshrined in Article 119 of the Constitution and the Petitioner who presented the petition has a right to have the relevant House of Parliament consider his petition;

42. Whereas the said Respondents appreciated that that section 3 (f) of the ***Petition to Parliament***

(Procedure) Act, 2012 provides that a petitioner should indicate whether any efforts have been made to have the matter addressed by a relevant body and whether there has been any response from that body or whether the response has been unsatisfactory, in light of the foregoing, the Petitioner's disclosure that the matter has been reported to the Ethics and Anti-Corruption Commission and the Director of Public Prosecutions does not estop the National Assembly from considering the petition against the Auditor General. It was their case that the mandate of the National Assembly on the one hand and that of the Ethics and Anti-Corruption Commission and the Director of Public Prosecutions on the other hand are different even if they were to be based on the same facts. The National Assembly, it was averred exercises oversight over State Officers and initiates the process of their removal for grounds that are largely based on Chapter Six of the Constitution which deals with integrity and suitability for State Office. The Ethics and Anti-Corruption Commission and the Director of Public Prosecutions on the other hand deal with matters of alleged commission or omission of acts of a criminal nature.

43. The Respondents contended that if any house of Parliament fails to consider a petition presented to the House in line with Article 119 of the Constitution, that House of Parliament will be in violation of the Petitioner's constitutional rights. They maintained that since under Article 95(5) of the Constitution, the National Assembly exercises oversight over State officers and initiates the process of their removal from office, the petition herein is squarely within the role of the National Assembly under Article 95(5) as read with Article 251(3) of the Constitution.

44. It was their case that the phrase "initiates the process of their removal" connotes that the current process is an inquiry similar in nature to the process that the Ethics and Anti-Corruption Commission undertakes prior to recommending to the Director of Criminal Prosecution hence there is no right of cross-examination of all witnesses at this stage of inquiry or initiating the process of removal. That right shall accrue if a Tribunal were to be formed.

45. The said Respondents were therefore of the view that the instant application seeks orders which, if granted, would be a breach of Article 124 of the Constitution which provides for Parliament to establish its committees and make Standing Orders for the orderly conduct of its proceedings. Further the orders sought by the Applicant violate the provisions of Article 117 of the Constitution which provides that Parliament may, for the purpose of the orderly conduct of its committees, provide for the powers and privileges of its committees. To them therefore the Application lacks any basis in law as the orders sought violate the constitutional power granted to Parliament to regulate its internal rules of procedure as well as the ***National Assembly (Powers and Privileges) Act***.

46. The Respondents emphasised that the Speaker of the National Assembly has reviewed the Petition and certified that the Petition meets the requirements under the ***Petition to Parliament (Procedure) Act*** and ***Standing Orders*** yet this Application seeks to subject the said decision of the Speaker of the National Assembly to judicial scrutiny contrary to Article 107 of the Constitution. To that extent, it was contended that the orders sought in the Application violate the principle of separation of powers as they seek for this Court to interfere with the role of the National Assembly, the internal management of Parliament and its committees.

47. It was contended that each of the three arms of Government ought to be allowed to conduct its affairs without undue interference from the other arms of Government and that this Application is a violation of the principle of separation of powers as it seeks for the Court to delve into matters of internal procedure of the Legislature. To the Respondents, the National Assembly conducts its affairs in accordance with the Constitution, its Standing Orders and its customs and traditions of procedure. The National Assembly makes its Standing Orders and can by resolution of a majority of members suspend, either temporarily or permanently, the application of any particular Standing Order.

48. Their position was therefore that the Applicant has not demonstrated to this Court that the grounds, upon which judicial review can be sought, have been met and therefore this Court ought to decline to exercise its powers of judicial review. According to them, the jurisdiction of this Honourable Court can only be invoked in the event of an excess of jurisdiction by way of breach of the Constitution and there has been no violation of the Constitution.

49. It was contended that whereas judicial review is strictly limited to a review of the procedure of a public body, this Application seeks for this Court to usurp the constitutional duty of the National Assembly and therefore this Honourable Court ought to decline from interfering with the duties of the National Assembly. In the said Respondent's view, the role of the National Assembly at this point is to interrogate the petition for the removal of the Auditor General and determine whether the House is satisfied that the grounds for removal under Article 251(1) of the Constitution have been met. In order to make such a determination, the National Assembly is gathering evidence from relevant parties and the final recommendation as to whether the holder of an independent office shall be removed from office is to be made by the tribunal appointed under Article 251(4) of the Constitution and not by the National Assembly. It is at the Tribunal hearing stage, if it is reached, that the Applicant shall have the right to cross-examine all witnesses. It was their case that the National Assembly, having gathered evidence from all the parties may determine that the petition against the Auditor General does not disclose any grounds for removal. However, as the Applicant is due to appear before the Committee of the National Assembly he shall have the opportunity to present his case and adduce any evidence before the Committee that he wishes to adduce.

50. It was disclosed that the Applicant herein is already a party to a previous suit seeking the same orders herein, being *High Court Constitutional Petition No. 62 of 2017*, and is therefore guilty of forum shopping and abusing the court process.

51. The 1st, 2nd and 3rd Respondents therefore asserted that this application is premature.

52. While reiterating the foregoing it was submitted on behalf of the said Respondents that the National Assembly in initiating the process of removal of State Officers is therefore exercising the sovereign will of the people to remove from office State Officers who have misconducted themselves. They relied on Article 165(3)(c) of the Constitution which provides that the High Court shall have:

> ***"(c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;"***

53. Accordingly, the inquiry under Article 251 of the Constitution is an exercise for the National Assembly to investigate the matter to determine if any petition for the removal of a person from office is frivolous or whether it discloses the grounds specified by the Constitution. Therefore, the inquiry by the National Assembly is not a quasi-judicial process that is subject to judicial review but is a process of Parliament protected by Article 117 of the Constitution and the ***National Assembly (Powers and Privileges) Act***, Cap 6, Laws of Kenya. To the contrary, the quasi-judicial process is the tribunal appointed under Article 251(4)(b) of the Constitution.

54. It was submitted that the right to Petition Parliament on any matter is a right enshrined in Article 119 of the Constitution and the Petitioner who presented the petition has a right to have the relevant House of Parliament consider his petition. Under Article 95(5) of the Constitution, the National Assembly exercises oversight over State officers and initiates the process of their removal from office. As such, the petition herein is squarely within the role of the National Assembly under Article 95(5) as read with Article 251(3) of the Constitution.

55. According to the said Respondents, since Article 117 of the Constitution provides that Parliament may, for the purpose of the orderly conduct of its committees, provide for the powers and privileges of its committees, the said Article as read together with Article 19(3)(c) of the Constitution has the effect of suspending the application of the Bill of Rights and by implication the application of Article 165(3)(b) in relation to matters undergoing active consideration by any House or Committee of Parliament. This is in the public interest as the people's right to good governance overrides a State Officer's.

56. It was their submission that the role of the Committee is to conduct an inquiry to gather evidence, in exercise of its oversight function and determine whether there are grounds for removal disclosed in the petition but not to sit as a court of law or a Tribunal. It is for this purpose that the Constitution at Article

125, gives each House of Parliament and any of its committees the powers of the High Court to summon any person to appear before it for purposes of giving evidence and providing information.

57. They based their position on non-interference with parliamentary proceedings on **Civil Appeal No. 157 of 2009; John Harun Mwau vs. Dr. Andrew Mullei & Others** where the Court of Appeal held that:

> **"45. In our analysis and with the foregoing provisions in mind, one of the primary functions of Parliament is to debate and pass resolutions freely on subjects of its own choosing. This is one of the cornerstones for parliamentary democracy. The performance of this function is secured by the members of Parliament each having the right to say what they will (freedom of speech) and discuss what they will (freedom of debate). These freedoms, the single most important parliamentary privilege are the cornerstone to Sections 4 and 12 of the National Assembly (powers and Privileges) Act, Chapter 6 of the Laws of Kenya. The privilege embodies the concept of parliamentary immunity. In practical terms, the freedom of speech and debates in Parliament ought not to be impeached or questioned in any court or place out of Parliament. Tied to this concept is the doctrine of parliamentary sovereignty and separation of powers which means that the law does not allow judicial review of parliamentary proceedings except in few cases where parliamentary legislation is contrary to the Constitution and rule of law.**
>
> **46. As a general principle, a person wronged by parliamentary proceedings cannot apply for judicial review except where an Act of Parliament is unconstitutional. Consequently, statements made in Parliament may not be used to support a cause of action arising out of proceedings in Parliament. (See Prebble vs Television New Zealand (1995) 1 AC 321. The privilege and immunity conferred to parliamentary proceedings is wide and absolute – it is not excluded by the presence of malice or fraudulent purpose. In the Kenyan context, all proceedings in parliament are covered by parliamentary privilege and the absolute immunity. Proceedings in Parliament include 'everything done by a member in the exercise of his functions as a member in a committee of wither House, as well as everything said or done in either House in the transaction of parliamentary business.' (See First Report from the Select Committee on the Official Secrets Acts HC (1937-38) 173; Report from the Select Committee on the Official Secrets Act HC (1938-39) 101).**
>
> **47. In the instant case, the appellant in his judicial review Petition seeks to quash parliamentary proceedings and to compel the productions of the Hansard without leave of Parliament. It is not in doubt that the proceedings conducted before the National Assembly on 4th March 2006 were parliamentary proceedings. These proceedings are covered by parliamentary privilege envisaged in Sections 4 and 12 of the Act. We have examined the provisions of the Act and have failed to find any exception as asserted by the appellant that parliamentary privilege does not extend to reckless and or dishonourable conduct by Parliament. In the absence of such an exception, we find that the trial court did not err in arriving at the decision that judicial review orders could not issue to compel production of the Hansard or to quash parliamentary proceedings as prayed for by the appellant."**

58. According to the Respondents, the jurisdiction of this Honourable Court can only be invoked in the event of an excess of jurisdiction by way of breach of the Constitution and there has been no violation of the constitution. To them, whereas the jurisdiction of the High Court conferred by Article 165(3)(c) is strictly limited to an appeal from a decision of a tribunal, in the present case, no tribunal has been appointed and no hearings conducted hence there is no decision to appeal from to the High Court.

59. It was submitted that as the Petition herein seeks for this Honourable Court to usurp the constitutional duty of the National Assembly under Article 251 (2) and (3) of the Constitution, this Honourable Court ought to decline from interfering with the constitutional duties of the National Assembly.

60. It was reiterated that the role of the National Assembly at this stage is to interrogate the petition for

the removal of the Auditor General and determine whether the House is satisfied that the grounds for removal under Article 251(1) of the Constitution have been met or whether the petition for removal is frivolous. In order to make such a determination, the National Assembly is gathering evidence from relevant parties and the final recommendation as to whether the holder of an independent office shall be removed from office is to be made by the tribunal appointed under Article 251(4) of the Constitution and not by the National Assembly. It is at this point, if it is reached, that the ex parte Applicant herein shall have the right to cross-examine all witnesses. The National Assembly, having gathered evidence from all the parties may determine that the petition against the Auditor General does not disclose any grounds for removal.

61. It was submitted that Article 251(2) and (3) of the Constitution vest jurisdiction to consider a petition for the removal of an independent office holder solely in the National Assembly and this jurisdiction is not ousted by Chapter 6 of the Constitution where there are questions touching on the integrity of the person. To the Respondents, Article 259 of the Constitution requires that the Constitution be interpreted in a manner that promotes its values and contributed to good governance. Therefore, the Constitution should be read as a whole and this Honourable Court ought to apply purposive interpretation in determining constitutional issues. The Respondents in support of this submission relied on the Supreme Court of Kenya decision in **Speaker of the Senate & another v Attorney-General & 4 Others [2013] eKLR** which held as follows with regard to the circumstances that necessitate the intervention of the Court in matters of Parliament:

> **"It is clear to us that it would be illogical to contend that as the Standing Orders are recognized by the Constitution, this Court, which has the mandate to authoritatively interpret the Constitution itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the "internal procedures" of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation.**
>
> **[56] Such a perception is vindicated in comparative experience. The Supreme Court of Zimbabwe, in Biti & Another v. Minister of Justice, Legal and Parliamentary Affairs and Another (46/02) (2002) ZWSC10, was called upon to determine the constitutional validity of the General Laws Act, 2002 (Act No. 2 of 2002). It had been claimed that the passing of the said statute was characterized by irregularities that constituted a breach of the Standing Orders as well as the Constitution of Zimbabwe and that, consequently, the statute was unconstitutional. The Court thus held:**
>
> **"In a constitutional democracy it is the Courts, not Parliament, that determine the lawfulness of actions of bodies, including Parliament….In Smith v. Mutasa it was specifically held that the Judiciary is the guardian of the Constitution and the rights of citizens…."**
>
> **[57] The position is not different in the case of Canada, as emerges from Amax Potash Ltd. v. Government of Saskatchewan [1977] 2 S.C.R. 576 [at p.590]:**
>
> **"A state, it is said, is sovereign and it is not for the Courts to pass upon the policy or wisdom of legislative will. As a broad statement of principle that is undoubtedly correct, but the general principle must yield to the requisites of the constitution in a federal state. By it the bounds of sovereignty are defined and supremacy circumscribed. The Courts will not question the wisdom of enactments which, by the terms of the Canadian Constitution are within the competence of the Legislatures, but it is the high duty of this Court to insure that the Legislatures do not transgress the limits of their constitutional mandate and engage in the illegal exercise of power."**
>
> **……**
>
> **If then, the Courts are to regard the Constitution, and the Constitution is superior to any**

ordinary act of the Legislatures, the Constitution, and not such ordinary act, must govern the case to which they both apply." (emphasis ours)

62. In support of their case the Respondents relied on Articles 165 (3) (b) and 165 (3) (d) (ii) of the Constitution as well as the United States case of **Marbury vs Madison, 5 U.S 137 (1803)**, where the Supreme Court of the United States held:

> **"If, then, the courts are to regard the constitution, and the constitution as superior to any ordinary act of the legislature, the constitution, and not such ordinary act, must govern the case to which they may both apply."**

63. Further, they cited **HC Petition No. 227 of 2013 Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR** in which the High Court held:

> **" It is this Court which is, by virtue of Article 165(d), clothed with jurisdiction to hear any question concerning the interpretation of the Constitution including the determination of:**
>
> **"(i) the question whether any law is inconsistent with or in contravention of this Constitution;**
>
> **(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;"**
>
> **54. This is the mandate we will bear in mind as we seek to find answers to the issues raised in this petition. In passing the Constitution, Kenyans gave the responsibility of making laws to Parliament. The decision of the people must be respected, so that this Court can only interfere with the work of Parliament in situations where Parliament acts in a manner that defies logic and violates the Constitution.**

64. Based on the foregoing provisions of the Constitution and decisions from the Supreme Court of Kenya and the United States, it was submitted that it is apparent that in order for this Honourable Court to invoke its jurisdiction to inquire into acts of the National Assembly pursuant to its powers and obligations under Chapter Eight of the Constitution, the Applicant must establish that there is a violation or threatened violation of the Constitution and as can be seen from the foregoing, the Applicant has not demonstrated to this Honourable Court, that there has been a violation of the Constitution.

65. It was therefore submitted that the Applicant, having failed to demonstrate a violation of the Constitution, there is no basis to invoke the jurisdiction of the High Court under Article 165 of the Constitution and neither has the Applicant alleged that there was a violation of the Constitution. In this regard the said Respondents relied on the celebrated case of the **Owners of the Motor Vessel Lilian S (1989) KLR 1** where the Court of Appeal of Kenya held that jurisdiction is everything and where the Court lacks jurisdiction, it must down its tools and decline to delve into the realm of the legislature. In their view, the actions that are the subject of this Application are matters relating to the internal procedures of the National Assembly. They contended that Parliament and indeed legislatures all over the world are mandated to exercise control over its internal proceedings and the legislature ought to be allowed to regulate its own affairs without undue interference which right is firmly rooted in the Constitution under Articles 117 and 124.

66. Further the privilege of Parliament is also protected by statute under the ***National Assembly (Powers and Privileges) Act***, Cap 6, Laws of Kenya which privilege is bestowed upon the legislature to protect Parliament in the discharge of its functions as a representative of the people and as an oversight body that provides checks and balances in line with the principle of separation of powers. In support of this position the said Respondents cited the New Zealand case of **Prebble vs. Television New Zealand Limited [1995] 1 AC 32**, in which the Privy Council held as follows:

> **"If article 9 is looked at alone, the question is whether it would infringe the article to suggest**

that the statements made in the House were improper or the legislation procured in pursuance of the alleged conspiracy, as constituting impeachment or questioning of the freedom of speech of Parliament.

In addition to article 9 itself, there is a long line of authority which supports a wider principle, of which article 9 is merely one manifestation, viz. that the courts and Parliament are both astute to recognise their respective constitutional roles. So far as the courts are concerned they will not allow any challenge to be made to what is said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges: Burdett v. Abbot (1811) 14 East 1;Stockdale v. Hansard (1839) 9 Ad. & El. 1; Bradlaugh v. Gossett (1884) 12 Q.B.D. 271; Pickin v. British Railways Board [1974] A.C. 765; Pepper v. Hart [1993] A.C. 593. As Blackstone said in his Commentaries on the Laws of England, 17th ed. (1830), vol. 1, p. 163:

> **"the whole of the law and custom of Parliament has its original from this one maxim, 'that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere.'"**

67. It was contended that the principle of allowing Parliament to regulate its internal matters has been upheld by the Supreme Court of Kenya in **Speaker of the Senate & Another vs. Attorney-General & 4 Others [supra]** where the Supreme Court stated:

> **"This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another."**

68. Apart from that the principle of separation of powers requires that there be mutual respect between the courts and the legislature. In the present matter, the 1st, 2nd and 3rd Respondents submitted that where there is no violation of the Constitution that would invoke the jurisdiction of the High Court under Article 165, the orders sought in the present Application are a violation of the principle of separation of powers and cited the High Court of Kenya case of the **Commission for The Implementation of the Constitution vs. National Assembly of Kenya & 2 Others [2013] eKLR**, which upheld the words of **Ackermann, J** in the South African case of **National Coalition for Gay and Lesbian Equality & Others 13 Others, Case CCT No.10/99** where he stated that:

> **"the other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature."**

69. The 1st, 2nd and 3rd Respondents also relied on **Okiya Omtata Okoiti vs. the Attorney General & 5 Others (supra)** where a 3 judge bench of the Court stated that:

> **"In our view, Members of Parliament should not look over their shoulders when conducting debates in Parliament. They must express their opinions without any fear. The Court should be hesitant to interfere, except in very clear circumstances, in matters that are before the two Houses of Parliament and even those before the county assemblies."**

70. In addition the said Respondents cited **Patrick Ouma Onyango & 12 Others vs. Attorney General and 2 Others [2005] eKLR** in which the court, on the issue of whether it should interfere with a political or legislative process stated:

"The answer the court gives to this question is that whatever the technicalities or the legal theory, sound constitutional law must be founded on the bedrock of common sense and the courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters".

71. The 1st, 2nd and 3rd Respondents also relied on the decision of in **Blackburn vs. Attorney General [1971] 1 WLR 1037** in which **Salmon L.J** held:

"Whilst I recognise the undoubted sincerity of Mr. Blackburn's views I deprecate litigation the purpose of which is to influence political decisions. Such decisions have nothing to do with the courts. These courts are concerned only with the effect of such decisions if and when they have been implemented by legislation. Nor have the courts any power to interfere with the treaty-making power of the sovereign. As to Parliament, in the present state of the law it can enact, amend and repeal any legislation it pleases. The role and power of the court is to decide and enforce what is the law and not what it should be now or in the future".

72. Based on ***Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*** at page 943-944 as well as Standing Order 256 of the ***National Assembly Standing Orders***, it was submitted that Standing Orders are Rules made by the House to regulate its proceedings but the House may resolve to exempt its business from the application of the Standing Orders. Indeed Standing Order 256 of the ***National Assembly Standing Orders*** provides:

Exemption of business from Standing Orders

256. (1) Subject to paragraphs (2) and (3), a Motion may, with the approval of the Speaker, be moved by any Member, either with or without notice that the proceedings on any specified business be exempted from the provisions of Part VI (Sitting and Adjournments of the House), Part VIII (Order of Business), Part XVII (Limitation of Debate), Part XIX (Public Bills), Part XX (Private Bills), Part XXI (Committee of 193 the whole House) Part XXIV (Committee of Supply), Part XXII (Select Committees), Part XXIII (Public Petitions) and Part XXVIII (Public Access to the House and its Committees) of these Standing Orders:

(2) No Motion for the exemption of business from the Standing Orders shall be made to exempt any business from Part VIII (Special Motions), Part (XIV) (Procedure for Removal from State Office), Standing Order 120 (Publication), Standing Order 124 (Not more than one stage of a Bill to be taken at the same sitting) or Standing Order 231 (Restrictions with regard to certain financial measures).

(3) Not more than one Motion for the exemption of business from the Standing Orders may be moved at any one sitting, except with the leave of the House.

(4) A Motion under this Standing Order shall state the object of or reason for the proposed exemption and-

(a) may be moved at any time and any other business then in progress may thereupon be interrupted;

(b) may not be amended without the consent of the mover.

73. The Court was therefore urged to exercise judicial restraint and decline to violate the principle of separation of powers by interfering with the oversight role of Parliament as sought by the Applicant herein. In their view, the substance of the proceedings herein is not a matter properly before this Honourable Court and this Court ought to allow Parliament to complete its processes and should restrain itself from restricting Parliament from carrying out its constitutional obligations.

74. The said Respondents therefore prayed that the Notice of Motion Application be dismissed with costs to the 1st 2nd and 3rd Respondents.

Determinations

75. **I have considered the issues which were raised in this application.**

76. In exercising its judicial review jurisdiction the High Court does not exercise the powers conferred upon it under Article 165(3)(a) but rather the powers conferred upon it under Article 165(3)(e) as read with Article 165(6) and (7) of the Constitution.

77. **Article 251(1), (2) and (3) of the Constitution provides as hereunder:**

> ***(1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for—***
>
> > ***(a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;***
> >
> > ***(b) gross misconduct, whether in the performance of the member's or office holder's functions or otherwise;***
> >
> > ***(c) physical or mental incapacity to perform the functions of office;***
> >
> > ***(d) incompetence; or***
> >
> > ***(e) bankruptcy.***
>
> ***(2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.***
>
> ***(3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President.***

78. Article 124 of the Constitution provides as hereunder:

> ***(1) Each House of Parliament may establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.***
>
> ***(2) Parliament may establish joint committees consisting of members of both Houses and may jointly regulate the procedure of those committees.***

79. It is therefore clear that Parliament is empowered to regulate its own procedures. However whatever procedure Parliament adopts, it must be constitutional and lawful. This is my understanding of section 4(6) of the ***Fair Administrative Action Act*** which 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.***

80. Even at common law fairness in administrative action was paramount as was clearly appreciated in **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** where the Court of appeal delivered itself as follows:

> **"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." [Emphasis added].

81. With respect to the issue whether Parliament is free to adopt any procedure it wishes to adopt based on the doctrine of separation of powers, I with respect associate with the school of thought propounded in **Commission for the Implementation of the Constitution vs. National Assembly of Kenya, Senate & 2 Others [2013] eKLR, Smith vs. Mutasa & Another LRC [1990] 87, Biti and Another vs. Minister of Justice, Legal and Parliamentary Affairs and Another [2002] ZWSC 10, Kihoto Holohan vs. Zachillu and Others 1992 SCR (1) 886, JSC vs. Speaker of the National Assembly & 8 Others (2014) eKLR** citing the case of **Okiya Omtatah & 3 Others vs. Attorney General & 3 Others [2014] eKLR**, that the doctrine of separation of powers enables the three traditional arms of government as well as independent commissions to function freely without any direction or control by any other person; that unlike countries which have adopted Parliamentary Supremacy systems such as the United Kingdom, Parliament in Kenya cannot enjoy privilege, immunities and powers which are inconsistent with the fundamental rights guaranteed in the Constitution. Thus, whereas Parliamentary privilege is recognized, it does not extend to violation of the Constitution hence Parliament cannot flout the Constitution and the law and then plead immunity; where a claim to parliamentary privilege violates constitutional provisions, the Court's jurisdiction would not be defeated by the claim to privilege; that the concept of statutory finality does not detract from or abrogate the Court's jurisdiction in so far as the complaints made are based on violation of constitutional mandates or non-compliance with rules of natural justice; that whereas the people of Kenya gave the responsibility of making laws to Parliament, and such legislative power must be fully respected, the Courts can however interfere with the work of Parliament in situations where Parliament acts in a manner that defies logic and violates the Constitution.

82. To paraphrase **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006] ZACC 11; 2006 (12) BCLR 1399 (CC); 2006 (6) SA 416 (CC)** when legislative action is challenged on the grounds that Parliament did not act in accordance with the provisions of the Constitution, courts have to consider whether in so acting Parliament has given effect to its constitutional obligations. The Court proceeded that:

> **"If it should hold in any given case that Parliament has failed to do so, it is obliged by the Constitution to say so. And insofar as this constitutes an intrusion into the domain of the legislative branch of government, that is an intrusion mandated by the Constitution itself. What should be made clear is that when it is appropriate to do so, courts may – and if need be must – use their powers to make orders that affect the legislative process. Therefore, while the doctrine of separation of powers is an important one in our constitutional democracy, it cannot be used to avoid the obligation of a court to prevent the violation of the Constitution. The right and the duty of this Court to protect the Constitution are derived from the Constitution, and this Court cannot shirk from that duty. As O'Regan J explained in a recent minority judgment, 'the legitimacy of an order made by the court does not flow from the status of the institution itself, but from the fact that it gives effect to the provisions of our Constitution.' In order for the founding values that lie at the heart of our Constitution to be made concrete, it is particularly important for this Court to afford a remedy, which is not only effective, but which should also be seen to be effective. The provisions of section 172(1)(a) are clear, and they admit of no ambiguity; '[w]hen deciding a constitutional matter within its power, a court...must declare that any law or conduct that is inconsistent with the Constitution is invalid'. This section gives expression to the supremacy of the Constitution and the rule of law, which is one of the founding values of our democratic state. It echoes the supremacy clause of the Constitution, which declares that the 'Constitution is supreme...; law or conduct inconsistent with it is invalid'. It follows therefore that if a court finds that the law is inconsistent with the Constitution, it is obliged to declare it invalid…"**

83. Therefore whereas it is not the duty of the Courts to micromanage Parliamentary proceedings, it is the duty and the obligation of the Courts to ensure that Parliament conducts its proceedings in accordance

with the Constitution and the law. I therefore I agree with the position poetically adopted by the majority in Supreme Court Petition No. 1 of 2017 – **Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission & Others** at paragraph 399 that:

> **"This Court is one of those to whom that sovereign power has been delegated under Article 1(3)(c) of the same Constitution. All its powers…[are] not, selfgiven nor forcefully taken, but is donated by the people of Kenya. To dishonestly exercise that delegated power and to close our eyes to constitutional violations would be a dereliction of duty and we refuse to accept the invitation to do so however popular the invitation may seem. Therefore, however burdensome, let the majesty of the Constitution reverberate across the lengths and breadths of our motherland; let it bubble from our rivers and oceans; let it boomerang from our hills and mountains; let it serenade our households from the trees; let it sprout from our institutions of learning; let it toll from our sanctums of prayer; and to those, who bear the responsibility of leadership, let it be a constant irritant."**

84. Therefore, should the Court find that any action contravenes the provisions of the Constitution, it is obliged to state so and set the same aside. In **Masaluand Others vs. Attorney General [2005] 2 EA 165** it was held:

> **"The Constitution has to be given a generous, rather than a legalistic, interpretation aimed at fulfilling the purpose of the guarantee and securing the individual's the full benefit of the instrument. Both the purpose and the effect of the legislation must be given effect to and this is the generous and purpose construction…While it is not disputed that it is the duty of every citizen to play certain roles in a society under Article 17, the judicial officer's role and duties are unique and different. Judicial officers are charged with safeguarding the fundamental rights and freedoms of the citizenry and in the performance of their duties, they are entrusted with checking the excesses of the Executive and the Legislature. These duties require insulation from any influence direct or indirect that may warp their judgement or cause them to play into the hands of corrupt elements, especially when there is a climate of political excitement. It is noteworthy that the administration of justice is the firmest pillar of Government…When this safeguard is destroyed by whittling away the provisions of Article 128(7) and judicial officers are put at the sufferance of the Executive or at the whims of the Legislature, the independence of the judiciary is the first victim."**

85. That this is so was appreciated by the Supreme Court in **Speaker of National Assembly vs. Attorney General and 3 Others (2013) eKLR** where the Court expressed itself as follows:

> **"Parliament must operate under the Constitution which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where the Constitution decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court, to assert the authority and supremacy of the Constitution. It would be different if the procedure in question were not constitutionally mandated. *This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach the Constitution*. Where however, as in this case, one of the Houses is alleging that the other has violated the Constitution, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering his Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under the Constitution and the Supreme Court Act."** [Emphasis provided].

86. The Court went on to state as follows:

> **"Whereas all State organs, for instance, the two Chambers of Parliament, are under**

obligation to discharge their mandates as described or signaled in the Constitution, a time comes such as this, when the prosecution of such mandates raises conflicts touching on the integrity of the Constitution itself. It is our perception that all reading of the Constitution indicates that the ultimate judge of "right" and "wrong" in such cases, short of a solution in plebiscite, is only the Courts."

87. Therefore with regard to the doctrine of separation of powers, it is my view that **Lord Denning's** statement in **Gouriet vs. Union of Post Office Workers and Others (1977) CA** suffices as a response; where he affirmed: "*Be you ever so high, the law is above you*." In **Biti and Another vs. Minister of Justice, Legal and Parliamentary Affairs and Another [2002] ZWSC 10,** the Court when called upon to resolve a conflict between fundamental rights and privileges of Parliament, held that where a claim to parliamentary privilege violated constitutional provisions, the Court's jurisdiction would not be defeated by the claim to privilege.

88. **I am aware that on 21st July, 2017, the *Parliamentary Powers and Privileges Act*, No. 29 of 2017 (hereinafter referred to as "the said Act") was assented to by the President. Under section 38(1) of the said Act the *National Assembly (Powers and Privileges) Act* was repealed. However the commencement date of Act No. 29 of 2017 was indicated as 17th August, 2017.**

89. **Section 23(3)(e) of the *Interpretation and General Provisions Act*, Cap 2 Laws of Kenya provides that:**

"Where a written law repeals in whole or in part another written law, then, unless a contrary intention appears the repeal shall not—

……..

…….

(e) affect an investigation, legal proceeding or remedy in respect of a right, privilege, obligation, liability, penalty, forfeiture or punishment as aforesaid, and any such investigation, legal proceeding or remedy may be instituted, continued or enforced, and any such penalty, forfeiture or punishment may be imposed, as if the repealing written law had not been made.

90. **These proceedings were commenced before the commencement date of the said Act. In fact the said Act commenced during the pendency of this judgement. Section 11 of the said Act provides as hereunder:**

No proceedings or decision of Parliament or the Committee of Powers and Privileges acting in accordance with this Act shall be questioned in any court.

91. **According to *Statutory Interpretation*** by **Francis Benion** (4th Edition):

"The essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of retrospective laws. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow's backward adjustment of it. Such, we believe, is the nature of the law '. . . those who have arranged their affair . . . in reliance on a decision which has stood for many years should not find that their plans have been retrospectively upset.

92. **This was the position of the** Supreme Court of Kenya in **Samuel K Macharia vs. Kenya Commercial Bank Limited and Others (Application no. 2 of 2011)** at paragraph 61 where it expressed itself as follows:

" As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective and retrospective effect is not to be given to them unless by express words or necessary implication, it appears that this was the intention of the legislature."

93. **It was similarly held in <u>Municipality of Mombasa vs. Nyali Limited (1963) E.A 371</u>** thus:

"Whether or not legislation operate retrospectively depends on the intention of the enacting body as manifested by the legislation. In seeking to ascertain the intention behind the legislation, the courts are guided by certain rules of construction. One of these rules is that if the legislation affects the substantive rights, it will not be construed to have retrospective operation unless a clear intention to that effect is manifested; whereas if it affects procedure only, prima facie it operates retrospectively unless there is a good reason to the contrary."

94. The foregoing position got approval in the case of **<u>S.K Macharia & Another vs. Kenya Commercial Bank Limited & Others, SCK Application No.2 of 2011</u>** where the Supreme Court stated that:

"A retroactive law is not unconstitutional unless it inter-alia impairs obligations under contracts, divests rights or is constitutionally forbidden. Cited in Overseas Private Investment Corporation & Others vs. Attorney General & Another Petition 319 of 2012 to buttress this, in Kenya Bankers Association & Others vs. Minister of Finance & Another (2002) 1 KLR 61, the Court noted that a statute which takes away or impairs vested rights acquired under existing laws, or creates new obligations or imposes a new duty in respect of transaction already past, must be presumed to be intended not to have retrospective operation"

95. **There is no stipulation in the said Act that it was meant to operate retrospectively. Before its commencement, the ex parte applicant had the right to challenge the quasi-judicial proceedings of the said Committee.**

96. My position is supported by the decision in the case of **<u>De Lille & Another vs. The Speaker of the National Assembly (1998)(3) SA 430(c)</u>** in which the Court stated as follows:

"The National Assembly is subject to the Supremacy of the Constitution. It is an organ of state and therefore it is bound by the Bill of Rights. All its decisions and acts are subject to the Constitution and the Bill of Rights. Parliament can no longer claim supreme power subject to limitations imposed by the Constitution. It is subject in all respects to the provisions of our Constitution. It has only those powers vested in it by the Constitution expressly or by necessary implication or by other statutes which are not in conflict with the Constitution. It follows therefore that Parliament may not confer on itself or on any of its constituent parts, including the National Assembly, any powers not conferred on them by the Constitution expressly or by necessary implication."

97. On appeal the Appellate Court in **<u>Speaker of National Assembly vs. De Lille MP & Another 297/98 (1999)(ZASCA 50)</u>** rendered itself as follows:

"This enquiry must crucially rest on the Constitution of the Republic of South Africa. It is Supreme- not Parliament. It is the ultimate source of all lawful authority in the country. No Parliament, however bona fide or eminent its membership, no President, however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the Constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the Courts. No

parliament, no official and no institution is immune from Judicial scrutiny in such circumstances."

98. I also rely on **Doctors for Life International vs. Speaker of the National Assembly and Others CCT 12/05)[2006] ZACC 11** at para 38, where the Court held that:

> **"….Under our Constitutional democracy, The Constitution is the Supreme Law. It is binding on all branches of government and no less parliament when it exercises its legislative authority, Parliament must act in accordance with and within the limits of the constitution, "and the Supremacy of the Constitution requires that "the obligations imposed by it must be fulfilled" Courts are required by the Constitution "to ensure that all branches of Government Act within the Law "and fulfil their constitutional obligations."**

99. **It is therefore my view and I hold that section 11 of the *Parliamentary Powers and Privileges Act*, No. 29 of 2017 does not apply to these proceedings.**

100. **Apart from sections 11 and 12 of the said Act provides:**

> ***(1) No civil or criminal proceedings shall be instituted against any Member for words spoken before, or written in a report to Parliament or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to Parliament.***
>
> ***(2) No civil suit shall be commenced against the Speaker, the leader of majority party, the leader of minority party, chairpersons of committees and members for any act done or ordered by them in the discharge of the functions of their office.***
>
> ***(3) The Clerk or other members of staff shall not be liable to be sued in a civil court or joined in any civil proceedings for an act done or ordered by them in the discharge of their functions relating to proceedings of either House or committee of Parliament.***

101. **It is clear from the foregoing that section 12 only deals with civil proceedings. These are judicial review proceedings.** It is now trite law that the High Court in the exercise of its judicial review jurisdiction exercises neither a criminal jurisdiction nor a civil one since the powers of the High Court to grant judicial review remedies is *sui generis*. See **Commissioner of Lands vs. Kunste Hotels Ltd (1995-1998) 1 EA 1.**

102. The procedure which Parliament adopts in considering a petition such as the one the subject of these proceedings is prescribed in Order 230 of the ***National Assembly Standing Orders*** which provides that:

> ***(1) In addition to complying with the requirements of paragraphs (a), (b), (c), (d),(e), (h),(i),(j), (l) and (m) of Standing Order 223 (Form of Petition), a petition to the House for removal of a member of a Commission under Article 251 of the Constitution –***
>
> > ***(a) shall indicate the grounds under Article 251(1) of the Constitution which the member of the commission is in breach;***
> >
> > ***(b) may contain affidavits or other documents annexed to it;***
>
> ***(2) The paragraphs (1),(3), (4) and (5) of Standing Order 220 (Submission of a petition), Standing Order 222 (Notice of Intention to Present Petition), Standing Order 225 (Presentation of Petitions), and Standing Order 226 (Comments on petitions), shall apply to a petition to the House for removal of a member of a Commission under Article 251 of the Constitution.***
>
> ***(3) Every Petition presented or reported pursuant to this Standing Order shall stand committed to the relevant Departmental Committee.***

(4) Upon receipt of a petition under paragraph (3), the relevant Departmental Committee shall investigate the matter and shall, within fourteen days, report to the House whether the petition discloses ground for removal under Article 251(a) of the Constitution.

(5) The House shall, within ten days of the tabling of the report of the committee under paragraph (4) resolve whether or not the petition discloses a ground for removal under Article 251(a) of the Constitution.

(6) Where the House resolves that a petition discloses a ground for removal, the Speaker shall, within seven days of the resolution, transmit the resolution and the petition to the President."

103. In conducting its proceedings, Parliament is bound to adhere to the provisions of the Constitution one of which is Article 47 which provides as hereunder:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

104. According to the applicant in conducting proceedings under Article 251 of the Constitution, Parliament was conducting quasi judicial proceedings. The Respondents are however of the view that such proceedings are not a quasi-judicial process that is subject to judicial review but is a process of Parliament protected by Article 117 of the Constitution and the ***National Assembly (Powers and Privileges) Act***, Cap 6, Laws of Kenya. To the contrary, the quasi-judicial process is the tribunal appointed under Article 251(4)(b) of the Constitution.

105. Article 165(6) of the Constitution provides that:

The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

106. **Ackermann, J** in the South African case of **National Coalition for Gay and Lesbian Equality & Others 13 Others, Case CCT No.10/99** stated that:

"the other consideration a court must keep in mind, is the principle of the separation of powers and, flowing therefrom, the deference it owes to the legislature in devising a remedy for a breach of the Constitution in any particular case. It is not possible to formulate in general terms what such deference must embrace, for this depends on the facts and circumstances of each case. In essence, however, it involves restraint by the courts in not trespassing onto that part of the legislative field which has been reserved by the Constitution, and for good reason, to the legislature."

107. It is therefore clear that save for superior courts the Constitution empowers this Court to exercise supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. Therefore the doctrine of separation of powers applies when Parliament is carrying out its legislative functions as opposed to judicial or quasi-judicial function.

108. Assuming that the procedure that was before Parliament was a mere inquiry as alleged by the Respondent, is such an inquiry outside the purview of judicial review? According to **Lord Denning** in **Selvarajan vs. Race Relations Board [1976] 1 ALL ER 12**:

"…it has been held that the investigating body is under a duty to act fairly; but that which fairness requires depends on the nature of the investigation and the consequences which it may have on the persons affected by it. The fundamental rule is that, if a person may be subjected to pains and penalties, or be exposed to prosecution or proceedings or be deprived

of remedies or redress, or in some way adversely affected by the investigation and report, then he should be told the case against him and be afforded a fair opportunity of answering it."

109. The general position was restated in ***Halsbury's Laws of England Fourth Edition Vol. 1page 90 para 74*** as follows:

"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and 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. As has already been indicated, 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 legitimate interests or expectations. In a given context, the presumption in favour of importing the rule may be partly or wholly displaced where compliance with the rule would be inconsistent with a paramount need for taking urgent preventive or remedial action; or where disclosure of confidential but relevant information to an interested party would be materially prejudicial to the public interest or the interests of other persons or where it is impracticable to give prior notice or an opportunity to be heard; or where an adequate substitute for a prior hearing is available."

110. 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*."

111. According to the applicants, and this contention was not denied, upon the constitution of the tribunal, the applicant stands to be immediately suspended to pave way for investigations. Clearly the proceedings leading to the constitution of the Tribunal by the President, a process that is merely formal, my definitely expose the applicant to a legal hazard or other substantial prejudice. It is not just a mere formality since as a result of the Report of the Parliament and the consequential formation of the Tribunal, certain privileges, rights and interests of the applicant stand automatically suspended. It is therefore my view that in conducting its proceedings, pursuant to Article 251 of the Constitution, Parliament is undertaking an "administrative action" which is define in section 2 of the ***Fair Administrative Action Act*** as including:

> ***(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or***
>
> ***(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;***

112. So that even if, and I entertain my doubts about such a position, Parliament was not exercising quasi-judicial function pursuant to section 2(1) aforesaid, it was definitely undertaking an act that affects the legal rights or interests of the applicant to whom such action related. Accordingly it was undertaking an administrative action. It is now clear that it does not matter whether an action is described as quasi-judicial or administrative. According to **Breen vs. Amalgamated Engineering Union [1971] All E.R. 1148**, **Lord Denning** held as follows:

> **"It is now settled that a statutory body which is entrusted by Statute with discretion must act fairly. It does not matter whether its functions are described as judicial or quasi-judicial on the one hand or as administrative on the other or what you will, still it must act fairly. It must in a proper case give chance to be heard."**

113. That the members of the Departmental Committee on Finance, Planning & Trade were in fact administrators similarly comes out from the definition of an "administrator" in the said section which defines the term as "a person who takes administrative action or who makes an administrative decision."

114. One may be tempted to believe that the provisions of the ***Fair Administrative Action Act*** do not apply to proceedings of the Departmental Committee on Finance, Planning & Trade. However that Act in section 3 states that:

> ***(1) This Act applies to all state and non-state agencies, including any person***
>
> > ***(a) exercising administrative authority;***
> >
> > ***(b) performing a judicial or quasi-judicial function under the Constitution or any written law; or***
> >
> > ***(c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.***

115. Article 260 of the Constitution defines a "person" as including "***a company, association or other body of persons whether incorporated or unincorporated***." The same provision is clear that the word "includes" means "includes, but is not limited to." It is therefore clear that the a "person" for the purposes of the Constitution is not restricted to the examples given in Article 260 of the Constitution but the Court in interpreting the word casts its net wide. It is therefore my view that the term "person" includes the Departmental Committee on Finance, Planning & Trade.

116. It is worth noting that the ***Fair Administrative Action Act***, is an Act of Parliament enacted pursuant to the provisions of the Constitution. To paraphrase **Chelashaw vs. Attorney General & Another [2005] 1 EA 33**, laws made under Constitutional powers are superior and stand above those not made pursuant thereto and they should be given more regard and force.

117. Therefore in determining the issues raised in this application, Article 47 as well as its implementing legislation, the ***Fair Administrative Action Act*** must be looked into in order to determine the fairness of the process which was adopted by the Respondents. This position was restated by the Supreme Court in Advisory Opinion No. 2 of 2013 - **The Speaker of The Senate & Another vs. Honourable Attorney General & Others [2013] eKLR**, while citing with approval the decision in the Ugandan Case of **Tinyefuza vs. Attorney General Const Petition No. 1 of 1996 (1997 UGCC3)** that*:*

> **"The entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and rule of paramountcy of the written Constitution."**

118. Although issues were taken with respect to the powers of the respondents to carry out their mandate pursuant to Article 251 of the Constitution, as properly appreciated by the applicant, he was not seeking to bar the Committee from proceeding, but was only seeking to have the Committee respect and protect his rights to fair trial and not condemn him unheard. It is appreciated by the parties herein that this Court has the mandate to interfere with the actions of the Respondents where they are contrary to the Constitution and one of the Article that the Respondents must adhere to is Article 47 dealing with the right to fair administrative action. As was appreciated by **Onguto, J** in **Kenya Human Rights Commission vs. Non-Governmental Organizations Co-Ordination Board [2016] eKLR**:

> "**… a person whose interests and rights are likely to be affected by an administrative action has a reasonable expectation that they will be given a hearing before any adverse action is taken as well as reasons for the adverse administrative action as provided under Article 47 (2) of the Constitution. Generally, one expects that all the precepts of natural justices are to be observed before a decision affecting his substantive rights or interest is reached. It is however also clear that in exercising its powers to superintend bodies and tribunals with a view to ensuring that Article 47 is promoted the court is not limited to the traditional judicial review grounds. The Fair Administrative Action Act, 2015 must be viewed in that light.**
>
> **The Petitioner also alleges violation of its right to fair hearing. Article 50(1) of the Constitution makes provision for fair hearing. The Article is to the effect that every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body. The right to fair hearing is evidently closely intertwined with fair administrative action .The oft cited case of Ridge v Baldwin [1964] AC 40 restated the right to fair hearing as a rule of universal application in the case of administrative acts or decisions affecting rights. In his speech to the House of Lords in 1911, Lord Loreburn aptly put is as a 'duty lying upon everyone who decides anything' that may adversely affect legal rights.**
>
> **Halsbury Laws of England, 5th Edition 2010 Vol. 61 at para 639 on the right to be heard states that:**
>
> > **"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."**
>
> **I would state that it now appears that the court, effectively has a duty to look into not only the merits and legality of the decision made due to the requirement of "reasonable" action under Article 47, but also the process and procedure adopted due to the requirement of following all precepts of natural justice under both Articles 47 and 50(1) of the Constitution. The court proceeding under Article 47 of the Constitution is expected not only to pore over the process but also ensure that in substance there is justice to the petitioner. The traditional common**

law principles of judicial review are, in other words, not the only decisive factor. It may sound like stretching the precincts of traditional judicial review, but clearly by the Constitution providing for a "reasonable" administrative action and also enjoining decision makers to provide reasons, the constitutional scheme was to entrench the blazing trend where courts were already going into merits of decisions by innovatively applying such principles like proportionality and legitimate expectation. I must however confess that the line appears pretty thin and, perhaps, more discourse is required on the subject of traditional judicial review and the now entrenched substantive constitutional judicial review.

119. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of **President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1,** at paragraphs 135 -136 where it was held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"

120. Even without the benefit of the constitutional provisions entrenching the right to fair administrative action as a fundamental human right, it is clear that rights and fundamental freedoms are not granted but inhere in human beings and this was appreciated by the Uganda Supreme Court in **The Management Committee of Makondo Primary School and Another vs. Uganda National Examination Board, HC Civil Misc Application No.18 of 2010**, which was followed with approval by **Justice Lenaola** in **Mandeep Chauhan vs. Kenyatta National Hospital & 2 others [2013] eKLR** to the effect that:

"It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

121. That fundamental human rights are God-given clearly comes out from a reading of from Article 19(3) of the Constitution which provides as follows:

(3) The rights and fundamental freedoms in the Bill of Rights—

(a) belong to each individual and are not granted by the State;

(b) do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with this Chapter; and

(c) are subject only to the limitations contemplated in this Constitution.

122. It is therefore clear that the State does not grant rights and fundamental freedoms to any person. This is necessarily so because human rights are generally universal and inalienable rights of human beings. A Constitution simply recognises the natural and original human rights of mankind which any and every human being should have in order to lead a dignified life till his or her natural death. To emphasise that the State does not grant the same Article 3(b) is clear that the rights and fundamental freedoms in the Constitution ***do not exclude other rights and fundamental freedoms not in the Bill of Rights, but recognised or conferred by law, except to the extent that they are inconsistent with the Bill of Rights*****.** Therefore the rights contained in the Constitution are not the only rights to be enjoyed by persons but are just examples of the same. That the rights and fundamental freedoms are not favours dished by the State was made clear by **Nyamu, J** (as he then was) in **Kenya Bus Services Ltd & 2 Others vs. Attorney General [2005] 1 KLR 787** where he held that:

> **"The only difference between rights and the restrictions are that the restrictions can be challenged on the grounds of reasonableness, democratic practice, proportionality and the society's values and morals including economic and social conditions etc. whereas rights are to the spiritual, God given, and inalienable and to the non-believers changeless and the eighth wonder of the World."**

123. As was appreciated by **Nyamu, J** (as he then was) in **Richard Nduati Kariuki vs. Honourable Leonard Nduati Kariuki & Another HCMA No. 7 of 2006 [2006] 2 KLR 356:**

> **"The International instruments such as the Universal Declaration of Human Rights, the International Covenant on Civil and Political Rights (The ICCPR) and International Covenant on Economic Social and Cultural Rights (The ICESC) give recognition that human rights belong to an individual as a human being, hence the inherent dignity and the fact that those rights are equal and inalienable of all human beings. The rights are inherent to man. They are universal and inalienable and hence their ethical base, since they are intrinsic to the human condition. They are not dependent on the states or the geographical location. They are owed to all persons. For the above reasons human rights are owed by the States to all individuals within their jurisdiction and in certain situations to groups of individuals. It is a general principle in international human rights law that human beings cannot be deprived of the substance of their rights hence reference to their individuality. It is only the exercise of some of the rights that can be limited in certain circumstances. Many Constitutions of the world provide for state responsibility for not complying with the legal obligations as regards human rights. It is now recognized, that under international law, States incur responsibility or liability for not complying with their legal obligations to respect and ensure, that is, to guarantee, the effective enjoyment of the human rights recognized either by International instruments binding on the State concerned or any other source of law. An impairment of those rights which can be attributed under the rules of international law to the action or omission of any public authority constitutes an act imputable to the State, which assumes responsibility in the terms provided by the legal, source concerned."**

124. That then brings me to the ingredients of a fair hearing. In **Geothermal Development Company Limited vs. Attorney General & 3 others (2013) eKLR** it was held that:

> **"As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it.** ***Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response. This right is not limited only in cases of a hearing as in the case of a court or before a tribunal, but when taking administrative actions as well.*** **(See** ***Donoghue v South Eastern Health Board*** **[2005] 4 IR 217). Hilary Delany in his book,** ***Judicial Review of Administrative Action, Thomson Reuters 2nd edition, at page 272,*** **notes that,** ***'Even where no actual hearing is to held in relation to the making of an administrative or quasi-judicial decision, an individual may be entitled to be informed that a decision which will have adverse consequences for him may be taken and to notification of the possible consequences of the decision'*****…Article 47 enshrines the right of every person to fair administrative action. Article 232 enunciates various values and**

principles of public service including '*(c) responsive, prompt, effective, impartial and equitable provision of services' and '(f) transparency and provision to the public of timely, accurate information'*…Fair and reasonable administrative action demands that the taxpayer would be given a clear warning on the probable consequences of non-compliance with a decision before the same is taken;…In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be. (*See Charkaoui vs. Canada* [2007] SCC 9, *Alberta Workers' Compensation Board vs. Alberta Appeals Commission* (2005) 258 DLR (4th), 29, 55 and *Sinkovich vs. Strathroy Commissioners of Police (1988) 51 DLR (4th) 750)." *[Emphasis added].*

125. In Judicial **Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR***:*

"Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a court or other independent and impartial body."

126. These principles have now acquired statutory underpinning vide section 4(3) of the ***Fair Administrative Action Act, 2015*** which provides as follows:

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-

(a) prior and adequate notice of the nature and reasons for the proposed administrative action;

(b) an opportunity to be heard and to make representations in that regard;

(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;

(d) a statement of reasons pursuant to section 6;

(e) notice of the right to legal representation, where applicable;

(f) notice of the right to cross-examine or where applicable; or

(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.

127. The reason why the Respondent ought not to solely rely on the informant's information was dealt with in **Republic vs. Kenyatta University Ex Parte Njoroge Humphrey Mbuthi [2015] eKLR,** where this Court held that:

"… 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…In the absence of these witnesses and as the law required that they be availed for cross-examination, there is no way the manner in which the respondent conducted its proceedings can be said to have met the threshold under Article 47 of the Constitution pursuant to which the *Fair Administrative Action Act* was enacted."

128. In this case the applicant contended, which contention was not seriously disputed that on 28th

February 2017 when he appeared before the Departmental Committee on Finance, Planning and Trade, it turned out that the petitioner's case was heard without the applicant being given prior notice and a chance to cross examine him. It also turned out that although the petitioner had admitted that he was acting on behalf of an undisclosed client, he was allowed to give unsworn testimony. This issue was raised by the applicant's advocates at the time of presenting his case but was overruled.

129. I have considered the provisions of the ***Petition to Parliament (Procedure) Act*** as well as Order 203 of the Standing Orders and I have not seen and it has not been pointed to me that in those instruments there is a provision that expressly bars cross-examination in respect to matters falling under Article 151 of the Constitution. This does not imply that Parliament cannot provide that cross-examination is restricted or not permissible in such proceedings but cross-examination being an ingredient of the right to fair hearing its limitation ought to comply with Article 24 of the Constitution. However whatever procedure is adopted must, as decreed in section 4(6) of the ***Fair Administrative Action Act***, comply with the spirit of Article 47 of the Constitution. This position is supported by the holding of **Majanja, J** in **Dry Associates Ltd vs. Capital Markets Authority and Another Petition No. 328 of 2011** in which the learned Judge held that:

> **"Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is nolonger left to the realm of common law or judicial review under the Law Reform Act (Cap 26 of the Laws of Kenya) but it is to be measured against the standards established by the Constitution."**

130. It is therefore my view and I hold that Articles 47 and 50 of the Constitution provide a bulwark against invasions which impair human rights to fairness and dignity or which affect people adversely in a comparably serious manner. As was held in **Nakusa vs. Tororei & 2 Others (No. 2) [2008] 2 KLR (EP) 565**, the High Court has a constitutional role as the bulwark of liberty and the rule of law to interpret the Constitution and to ensure, through enforcement, enjoyment by the citizenry of their fundamental rights and freedoms which had suffered erosion during the one party system.

131. With respect to the allegation that the applicant was not given adequate time to prepare for his defence, it is clear that the applicant did apply for more time which time was given. It is not for this Court to dictate to the Parliamentary Committee the exact time that ought to be given as long as such time is reasonable. In the circumstances of this case I am however unable to find that the time given to the applicant after the adjournment of the proceedings was unreasonable.

132. The applicant however averred that he was not told the precise nature of allegations that he was facing and the manner in which he had breached Article 251 of the Constitution. This was not only a breach of Article 10, 47 and 50 of the Constitution but also a contravention of Standing Order No. 230(i)(a) of the ***National Assembly Standing Orders***. The said Order requires that the petition indicates the grounds under Article 251(1) of the Constitution which the member of the commission is in breach. This is in line with the requirement that information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be**. It is an e**lementary justice and the law demands that a person be given full information on the case against him.

133. In this case however the petition did not just refer to Article 251(1) of the Constitution. It proceeded to state that the serious violation of the Constitution was the failure to submit reports to the President and to Parliament pursuant to Article 254(1) of the Constitution. There were also allegations of wastage of public funds, contravention of Chapter Six of the Constitution, violation of the ***Public Procurement and Disposal Act, 2005***, violation of the ***Public Audit Act, 2015*** and violation of the ***Leadership and Integrity Act, 2012***. All these grounds were particularised. As to whether they were sufficient to prove the petition is not for this Court to determine. However it cannot be said that the petition did not contain grounds under Article 251(1) of the Constitution. As to whether the threshold has been met as the Committee's proceedings were still ongoing, it is premature to arrive at such a determination at this stage.

134. The applicant relied on Standing Order 223 that requires that an averment be made in the Petition

indicating whether the issues in respect of which the Petition is made are pending before any court of law or other constitutional or legal body and averred that in this case, the issues in respect of which the Petition was made were not pending before any legal body but had been investigated and determined by both the Ethics and Anti-Corruption Commission and the office of the Director of Public Prosecutions. These investigations vindicated the ex-parte applicant of any wrongdoing, yet they were the subject of investigations before the Committee. In this instance I with due respect agree with the position adopted by the Respondents that the Petitioner's disclosure that the matter has been reported to the Ethics and Anti-Corruption Commission and the Director of Public Prosecutions does not estop the National Assembly from considering the petition against the Auditor General. I agree that the mandate of the National Assembly on the one hand and that of the Ethics and Anti-Corruption Commission and the Director of Public Prosecutions on the other hand are different even if they were to be based on the same facts since the National Assembly exercises oversight over State Officers and initiates the process of their removal for grounds that are largely based on Chapter Six of the Constitution which deals with integrity and suitability for State Office. The Ethics and Anti-Corruption Commission and the Director of Public Prosecutions on the other hand deal with matters of alleged commission or omission of acts of a criminal nature.

135. Therefore the grounds for removal of a Commissioner or a holder of an independent office may not necessarily constitute an offence. It follows that the National Assembly is not barred from entertaining a petition merely because the facts relied upon were the subject of investigations by the Ethics and Anti-Corruption Commission or the Director of Public Prosecutions and that they did not find any grounds to prosecute the Commissioner or the holder of an independent office.

136. In this case however not only did the petitioner give his evidence in the absence of the applicant, but in the same evidence he disclosed that he was acting on behalf of an undisclosed client, a client who had been dissatisfied by the decision of the D.P.P and the EACC and was hence allowed to give unsworn testimony. In my view, even if the procedure permitted the Respondents to take the petitioner's evidence in the absence of the applicant, for a third party to purport to give evidence of another undisclosed person in the circumstances of the matter before the Parliamentary Committee was clearly inimical to fair administrative action and fair hearing. In **R vs. Hull University Visitor ex p Page 2 [1993] AC 682**, **Lord Browne-Wilkinson** stated that:

> **"The Fundamental principle [sc. of judicial review] is that the courts will intervene to ensure that the powers of public decision-making bodies are exercised lawfully. In all cases, save possibly one, this intervention by way of prohibition or certiorari is based on the proposition that such powers have been conferred on the decision-maker on the underlying assumption that the powers are to be exercised only within the jurisdiction conferred, in accordance with fair procedures and, in a Wednesbury sense, reasonable. If the decision-maker exercises his powers outside his jurisdiction conferred, in a manner which is procedurally irregular or is Wednesbury unreasonable, he is acting ultra vires his powers and therefore unlawfully…"**

137. The role of Constitutional Commissions and Independent Offices appears from a reading of the objectives of the said entities as enacted in Article 249 (1) and (2) of the Constitution which provides as hereunder:

> ***(1) The objects of the commissions and the independent offices are to—***
>
> ***(a) protect the sovereignty of the people;***
>
> ***(b) secure the observance by all State organs of democratic values and principles; and***
>
> ***(c) promote constitutionalism.***
>
> ***(2) The commissions and the holders of independent offices—***
>
> ***(a) are subject only to this Constitution and the law; and***

(b) are independent and not subject to direction or control by any person or authority.

138. The important role played by constitutional commissions and independent offices was appreciated by the Supreme Court in Constitutional Application No. 2 of 2011 – **Re: The Matter of the Interim Independent Electoral Commission,** where the Supreme court had this to say regarding the independence and *modus operandi* of commissions and independent offices:

> ***"…The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the 'independence clause'…These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the 'independence clause' does not accord them carte blanche*** **to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law."**

139. To that extent I agree with the decision in **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR** that:

> **"It is essential to emphasize that all organs created by the Constitution are of equal importance. They complement and defer to each other. Where one organ is of the view that another organ has overstepped its mandate, the aggrieved body should seek a solution as provided by the Constitution. Parliament cannot and must not be allowed to run roughshod over other constitutional organs. Allowing Parliament to do as it pleases will sooner rather than later lead to a breakdown of law and order."**

140. Therefore it is my view that proceedings seeking the removal of a member of a constitutional office are not to be taken lightly as they in effect seek to remove from office a person tasked with protecting the sovereignty of the people, securing the observance by all State organs of democratic values and principles and promoting constitutionalism. Unless such proceedings are taken seriously and the provisions of the Constitution and the law strictly adhered to, there is a danger that the independence of the holders of such offices would be greatly compromised hence eroding the letter and spirit of Article 249(2) of the Constitution. It is therefore my view that it would be highly unfair to rely on information allegedly furnished by a third undisclosed party through an intermediary without permitting the person who stands to be adversely affected thereby an opportunity to interrogate the veracity of the alleged information by either the source of the information or the intermediary. To permit such proceedings to be conducted in such casual and nonchalant manner can only lead to erosion of the public trust in such offices. In my view the holders of constitutional offices ought not to be placed in a position that before carrying out their constitutional mandate they have to keep looking behind their backs. As this Court appreciated in Petition 230 of 2015 - **Eng. Michael Sistu Mwaura Kamau & Others vs. Ethics and Anti-Corruption Commission &Others:**

> **"Under Article 249(1)(9) of the Constitution, the Commissions exist to *inter alia* protect the sovereignty of the people. This is the sovereignty decreed under Article 1(1) of the Constitution. Therefore to deliberately set out to extinguish the Commissions, otherwise than as provided under the Constitution and the law, amounts in our view to a violation of the spirit of the Constitution as it amounts to an assault on the people's ability to protect their sovereignty. Anybody that therefore sets out to deliberately cripple a Constitutional Commission or an independent office by intimidating the Commissioners or holders of independent offices to vacate their positions must necessarily be deemed to be in breach of Article 10 of the Constitution."**

141. In my view, Constitutional institutions in this Country ought to be accorded their due respect and deference. To set out to unjustifiably malign such institutions and the holders of the offices therein can only be explained on the basis of impunity. To set out to saw the seeds of impunity in my view amounts to breeding anarchy. A state of anarchy is clearly antithesis to law and order and inimical to a democratic family of nations which this country claims a belonging. That this is so is clearly recognised in the

preamble to the Constitution which loudly proclaims that Kenyans aspire for a government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of law. Article 10 of the Constitution expressly picks out the rule of law and democracy as some of the national values and principles of governance. These values and principles are pursuant to Article 4(2) of the Constitution, the foundation of the Republic of Kenya. In other words the said national values and principles are not merely aspirational. As was held in **Re Kadhis' Court: Very Right Rev Dr. Jesse Kamau & Others vs. The Hon. Attorney General & Another Nairobi HCMCA No. 890 of 2004:**

> **"The general provisions governing constitutional interpretation are that in interpreting the Constitution, the Court would be guided by the general principles that; (i) the Constitution was a living instrument with a soul and consciousness of its own as reflected in the preamble and fundamental objectives and directive principles of state policy. Courts must therefore endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in tune with the lofty purposes for which its makers framed it. So construed, the instrument becomes a solid foundation of democracy and the rule of law. A timorous and unimaginative exercise of judicial power of constitutional interpretation leaves the Constitution a stale and sterile documents; (ii) the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, our young democracy not only functions but also grows, and the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed…If a constitutional lawyer were to write about in the same strain as Dicey did about England, he would, to be accurate, have to emphasize the supremacy of the constitution rather than one organ of government. The constitution and any Acts amending it must in the nature of things override all other laws."**

142. Though in **Judicial Commission of Inquiry into The Goldenberg Affair & 3 Others vs. Job Kilach [2003] KLR 249**, the Court of Appeal lamented that democracy is normally a messy, and often times, a very frustrating, way of governance and that in this respect, dictatorships are more efficient, since the Kenyan nation has chosen the path of democracy rather than dictatorship, all State organs must stick to the rule of law. The phrase "rule of law" was dealt with in **Republic vs. Kombo & 3 Others Ex Parte Waweru Nairobi HCMCA No. 1648 of 2005 [2008] 3 KLR (EP) 478**:

> **"The rule of law has a number of different meanings and corollaries. Its primary meaning is that everything must be done according to the law. Applied to the powers of government, this requires that every government authority which does some act which would otherwise be wrong…or which infringes a man's liberty…must be able to justify its action as authorised by law – and nearly in every case this will mean authorised directly or indirectly by Act of Parliament. Every act of government power that is to say, every act which affects the legal rights, duties or liberties of any person, must be shown to have a strictly legal pedigree. The affected person may always resort to the Courts of law, and if the legal pedigree is not found to be perfectly in order the Court will invalidate the act, which he can safely disregard."**

143. The English case of **Reg vs. Secretary of State for the Home Department ex-parte Doody [1994] 1 AC 531** states that:

> **"The rule of law in its wider sense has procedural and substantive effect ... Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural."**

144. According to **Emukule, J** in **Muslims for Human Rights (MUHURI) & Another vs. Inspector-General of Police & 5 Others [2015] eKLR** at para 140:

> **"The principles of constitutionalism and the rule of law lie at the root of our system of government. It is a fundamental postulate of our constitutional architecture. The expression**

the rule of law conveys a sense of orderliness, of subjection to known legal rules and of executive accountability to legal authority. At its very basic level, the rule of law vouchsafes to the citizens and residents of Kenya, a stable, predictable and ordered society in which to conduct its affairs. Like our National Anthem says it is our shield and defender for individuals from arbitrary state action."

145. The majority decision of the Supreme Court while addressing itself to the necessity of adhering to the rule of law in **Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission & Others** (supra) at paragraph 394 expressed itself as hereunder that:

"It is also our view that the greatness of a nation lies not in the might of its armies important as that is, not in the largeness of its economy, important as that is also. The greatness of a nation lies in its fidelity to the Constitution and strict adherence to the rule of law, and above all, the fear of God. The Rule of law ensures that society is governed on the basis of rules and not the might of force. It provides a framework for orderly and objective relationships between citizens in a country. In the Kenyan context, this is underpinned by the Constitution."

146. In a nutshell, the rule of law also allows for predictability of actions by public bodies and the fact that law would be uniformly and objectively applied. Part of our Constitution (Article 10) asserts that transparency and accountability are some of the hallmarks that define the rules that bind a state organ.

147. I associate myself with the position of **Lord Atkin** in **Liverside vs. Anderson [1942] AC 206 at 244**, that:

"In this country, amid the clash of arms, the laws are not silent. They may be changed, but they speak the same language in war as in peace. It has always been one of the pillars of freedom, one of the principles of liberty for which on recent authority we are now fighting, that the judges are no respecters of persons and stand between the subject and any attempted encroachment on his liberty by the executive, alert to see that any coercive action is justified in law."

148. As was rightly stated in **Republic vs. Returning Officer of Kamkunji Constituency & The Electoral Commission of Kenya HCMCA No. 13 of 2008** it is the responsibility of the Court to ensure that executive action is exercised; that Parliament intended and that the High Court has the responsibility for the maintenance of the rule of law; that there cannot be a gap in the application of the rule of law; that the Court must at all times embrace a willingness to oversee executive action and to refuse to countenance behaviour that threatens either basic human rights or the rule of law.

149. Article 159(2)(e) enjoins the Courts and tribunals to be guided by *inter alia* the principle that the purpose and principles of the Constitution shall be protected and promoted. In the preamble to the Constitution one of the purposes for which Kenyans adopted, enacted and gave the Constitution to themselves and to their future generations was to exercise their sovereignty.

150. Since one of the objects of the commissions and the independent offices is to protect the sovereignty of the people, it follows that this Court ought to be guided by inter alia the principle that the said constitutional Commissions and holders of independent offices must operate in an environment devoid of subjection to direction or control by any person or authority. This is so because Article 249(2) expressly provides that the commissions and the holders of independent offices are subject only to the Constitution and the law and are independent and not subject to direction or control by any person or authority.

151. In other words the Courts and Tribunals are constitutionally bound to protect the said constitutional Commissioners and holders of independent offices from any unlawful intimidation and harassment by any person or authority.

152. **Professor Sir William Wade** in his authoritative work, ***Administrative Law***, 8th Edition at page 708

properly captured the failure of Parliamentary draughtsman as hereunder:

> **"Parliament is mostly concerned with short term considerations and is strangely indifferent to the paradox of enacting law and then preventing courts from enforcing it. The Judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power."**

153. The Supreme Court captured the issue in **Raila Amolo Odinga & Another vs. Independent Electoral and Boundaries Commission & Others** (supra) at paragraph 395 based on **Soli J Sorabjee**, ***Rule of Law A Moral Imperative for South Asia and the World***, Soli Sorabjee Lecture, Brandeis University Massachusetts, 14th April 2010 at page 2. Available at http://www.brandeis.edu/programs/southasianstudies/pdfs/rule_of_law_full_text.pdf and **Lutisone Salevao**, ***Rule of Law, Legitimate Governance and Development*** in the Pacific, (ANU Press, 2005)], as hereunder:

> **"And as Soli J Sorabjee, a former Attorney General of India once wrote, the rule of law "is the heritage of all mankind" and "a salutary reminder that 'wherever law ends, tyranny begins". Cast the rule of law to the dogs, Lutisone Salevao once observed "and government becomes a euphemistic government of men…" He adds: "History has shown (sadly, I might add) that even the best rulers have fallen prey to the cruel desires of naked power, and that reliance on the goodwill of politicians is often a risky act of good faith."123 The moment we ignore our Constitution the Kenyans fought for decades, we lose it."**

154. 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. Therefore cross-examination is now a component of fair administrative action. To that extent the previous decisions that held that in administrative action, cross-examination is inapplicable can nolonger be good law. It is in this light that I adopt the reasoning in **Nakusa vs. Tororei & 2 Others (No. 2) [2008] 2 KLR (EP) 565** (supra) that:

> **"In interpreting the Constitution, the Court must uphold and give effect to the letter and spirit of the Constitution, always ensuring that the interpretation is in tandem with aspirations of the citizenry and modern trend. The point demonstrated in the judgement of *Domnic Arony Amolo vs. Attorney General Miscellaneous Application No. 494 of 2003* is that interpretation of the Constitution has to be progressive and in the words of Prof M V Plyee in his book, *Constitution of the World*: "The Courts are not to give traditional meaning to the words and phrases of the Constitution as they stood at the time the Constitution was framed but to give broader connotation to such words and connotation in the context of the changing needs of time." In our role as "sentinels" of fundamental rights and freedoms of the citizen which are founded on laisez-faire conception of the individual in society and in part also on the political – philosophical traditions of the West, we must eschew judicial self-imposed restraint or judicial passivism which was characteristic in the days of one party state. Even if it be at the risk of appearing intransigent "sentinels" of personal liberty, the Court must enforce the Bill of Rights in our Constitution where violation is proved, and where appropriate, strike down any provision of legislation found to be repugnant to constitutional right…Before we delve into the nitty gritty in this case, it behoves us to indicate the broad principles relating to the policy of the court in interpreting the Constitution in cases of alleged violation of fundamental rights. It was said in *Republic vs. El Mann [1969] EA 357*: "…in one cardinal respect we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is, where the words used are precise, and unambiguous they are to be construed in their ordinary and natural sense.." In the case of *Patel vs. Attorney General [1968] ZLR 99* the Zambian High Court opined that the Court should lean**

on the construction that favoured the applicant rather than that which favoured the state. In the American case of *Gran vs. US 77 LLaw Ed 212* cited in *Patel vs. Attorney General* (supra) it was held that "the provisions of the Bill of Rights are to be broadly construed" so that they may be protected against gradual encroachment that seeks to deprive them of their effectiveness."

155. However, the right to cross-examination may be limited or restricted as long as the limit or restriction complies with Article 24 of the Constitution. In these proceedings, the Respondents have not justified their actions based on the same Article and there is no material on the basis of which I can find that the said right was lawfully restricted in the proceedings before the 3rd Respondent's Committee. In my view the right to cross-examine a witness in our constitutional and legislative framework is as important as the right to be heard and the restriction on that right is an exception rather than the rule. Since the principles of the right to be heard and the right to cross-examine are geared towards the realisation of fair administrative action, which is a fundamental right captured in Article 47 of the Constitution, I associate myself with the position in **Republic vs. the Honourable the Chief Justice of Kenya & Others Ex Parte Justice Moijo Mataiya Ole Keiwua Nairobi HCMCA No. 1298 of 2004** in which the Court held that:

"The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence."

156. That was the position in the case of **Chief Constable Pietermaritzburg vs. Shim 1908 29 NLR 338 341** where the court held that "it is a principle of common law that no man shall be condemned unheard, and it would require very clear words in the statute to deprive a man of that right."

157. It is similarly my view that a departure from a fundamental rule of natural justice and the right to fair administrative action may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.

158. Apart from the foregoing the applicant contended that the applicant was not presented with the evidence that the Committee or the petitioner had relied on in prosecuting the petition or taking the administrative action contrary to section 4(3)(g) of the ***Fair Administrative Action Act***. That section provides that where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is therefore a mandatory requirement that not only should the petition be furnished but that all the materials and evidence to be relied upon be furnished to the person adversely affected thereby. Therefore it was necessary that the evidence and information furnished to the Committee by the petitioner be availed to the applicant herein. The applicant contended which contention was again not disputed that his attempt to secure the same was rebuffed.

159. The Respondents have however contended that the Committee intended to hear the Applicant as the last person to enable him respond to all matters raised by all the parties that appeared before the committee and address all pertinent issues regarding the petition for his removal from office. Therefore it was the Respondents' position that it would be unfair, illogical, unlawful and a breach of the rules of natural justice for the Committee to hear the Auditor General before having exhausted all witnesses

appearing in this matter as the Auditor General would not have an opportunity to respond to all the evidence and matters raised before the Committee.

160. To paraphrase **Lenaola, J**, in **Kariuki & 2 Others vs. Minister for Gender, Sports, Culture & Social Services & 2 Others [2004] 1 KLR 588** the allegations made against the Parliament Departmental Committee on Finance, Planning & Trade is a cause of anxiety as it depicts a scenario where the Committee's conduct of the proceedings against the applicant do not measure up to the constitutional and legal threshold with regard to the applicant's rights to fair administrative action. With due respect proceedings conducted in such a manner amount to a farce. Where a body such as a parliamentary committee steps outside the boundaries of the Constitution and the law, this Court has the constitutional mandate to bring it back to track and that is all that the courts do. Judicial review orders would otherwise have no meaning in our laws.

161. Since the issues herein revolve around the violation of one of the fundamental rights under the Bill of Rights, Article 23 of the Constitution empowers this Court to "grant appropriate relief, including a declaration of rights". Under the said Article, the Applicant is entitled to 'appropriate relief' which means an effective remedy: An appropriate remedy must mean an effective remedy, for without effective remedies for breach, the values underlying and the rights entrenched in the Constitution cannot properly be upheld or enhanced.

162. Similarly, section 11 of the ***Fair Administrative Action Act, 2015*** provides as follows:

> ***(1) In proceedings for judicial review under section 8 (1), the court may grant any order that is just and equitable, including an order-***
>
> > ***(a) declaring the rights of the parties in respect of any matter to which the administrative action relates;***
> >
> > ***(b) restraining the administrator from acting or continuing to act in breach of duty imposed upon the administrator under any written law or from acting or continuing to act in any manner that is prejudicial to the legal rights of an applicant;***
>
> ***(c) directing the administrator to give reasons for the administrative action or decision taken by the administrator;***
>
> ***(d) prohibiting the administrator from acting in a particular manner;***
>
> ***(e) setting aside the administrative action or decision and remitting the matter for reconsideration by the administrator, with or without directions;***
>
> ***(f) compelling the performance by an administrator of a public duty owed in law and in respect of which the applicant has a legally enforceable right;***
>
> ***(g) prohibiting the administrator from acting in a particular manner;***
>
> ***(h) setting aside the administrative action and remitting the matter for reconsideration by the administrator, with or without directions;***
>
> ***(i) granting a temporary interdict or other temporary relief; or***
>
> ***(j) for the award of costs or other pecuniary compensation in appropriate cases.***

163. This Court is therefore empowered to fashion appropriate remedies. It must however be noted that in so doing the Court ought not to interfere with the merits of the Respondents' decision.

Order

164. **In the premises whereas I do not have any quarrel with the Respondents powers to conduct the subject proceedings, such proceedings must comply with Article 47 of the Constitution and section 4 of the *Fair Administrative Action Act* . In other words the due process must be adhered to in the conduct of the said proceedings. Accordingly, whereas I decline to quash** the 1st and 2nd Respondents' decision to commit the petition dated 13th February 2017 to the Parliament Departmental Committee on Finance, Planning & Trade, **in order to uphold the values of the Constitution as expected of this Court pursuant to Articles 3(1) and 23 and I issue the following orders:**

1) I declare that the Departmental Committee on Finance, Planning and Trade is bound to conduct its proceedings in strict compliance with and adherence to Article 47 of the Constitution and the provisions of the Fair Administrative Action Act in particular section 4 thereof.

2) I declare that the proceedings conducted by the said Departmental Committee on Finance, Planning and Trade against the ex parte applicant herein failed to meet the threshold of fair administrative action.

3) Pursuant to section 11(1)(e) of the Fair Administrative Action, I hereby set aside the proceedings conducted by the Departmental Committee on Finance, Planning and Trade against the ex parte applicant.

4) There will be no order as to costs.

165. **Orders accordingly.**

Dated at Nairobi this 22nd day of September, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Ongoro for Mr Otiende Amolo for the applicant

Miss Otieno for Mr Mwendwa for the 1st, 2nd and 3rd Respondents

CA Ooko