



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**MILIMANI LAW COURTS**  
**CONSTITUTIONAL PETITION NO. 157 OF 2017**

**BETWEEN**

**ROBERT AMOS OKETCH..... PETITIONER**

**AND**

**ANDREW HAMILTON**

**RAMADHAN MBARURKU**

**ABEL EVANS MURIITHI**

**JENIFER NKUENE RIRIA**

**REHEMA JAMA ALI**

**SAMUEL KIPKOECH CHEPKWONY**

**RUTH MACHARIA**

**HABIL WASWANI**

**(SUED IN THEIR PERSONAL CAPACITIES AND AS TRUSTEES OF THE NATIONAL BANK OF THE KENYA STAFF RETIREMENT BENEFIT SCHEME).....**

**.....1<sup>ST</sup> RESPONDENT**

**NATIONAL BANK OF KENYA STAFF**

**RETIREMENT BENEFITS SCHEME.....2<sup>ND</sup>  
RESPONDENT**

**SUNDEEP RAICHURA.....3<sup>RD</sup>  
RESPONDENT**

**ALEXANDER FORBES FINANCIAL SERVICES .....4<sup>TH</sup>  
RESPONDENT**

**INSTITUTE AND FACULTY OF**

**ACTUARIES DISCIPLINARY SCHEME.....5<sup>TH</sup>  
RESPONDENT**

**THE RETIREMENT BENEFITS**

**APPEALS TRIBUNAL.....1<sup>ST</sup> INTERESTED  
PARTY**

**THE RETIRMENT BENEFITS**

**APPEAL TRIBUNAL.....2<sup>ND</sup> INTERESTED  
PARTY**

**THE ATTORNEY GENERAL .....3<sup>RD</sup> INTERESTED  
PARTY**

## **JUDGMENT**

### **Introduction**

1. Robert Amos Oketch, the petitioner, is an actuarial professional and a member of the Actuarial Society of South Africa an affiliate member of the Institute and faculty of Actuaries (UK). He currently resides in South Africa working with NBC Holdings (Pty) Limited of South Africa.

2. Members of the National Bank of Kenya (Ltd) filed a complaint against the first respond a trust and pension scheme to which they belonged which was heard and in a judgment delivered in favour of the members against the 1<sup>st</sup> and 2<sup>nd</sup> respondents, it was held that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had not properly computed pension benefits due to the members because they had not complied with applicable rules when computing pension benefits. The 1<sup>st</sup> and 2<sup>nd</sup> respondents were directed to re calculate pension benefits and avail to individual members their statements but the two respondents did not comply with that direction.

3. Members who had sought to have an independent actuary compute pension benefits and had on their part commissioned their own actuarial computations through an actuarial a firm represented by Peter Harsen which had formed their claim.

4. The 1<sup>st</sup> and 2<sup>nd</sup> respondents appointed the 3<sup>rd</sup> the CEO of Alexander Forbes, the 4<sup>th</sup> respondent, to prepare actuarial computation on the pension benefits but the report was not done in accordance with the dictates of the judgment and the Trust Deed and members who were the complainants opposed that report which had been filed with the Retirement Benefit Authority, the 1<sup>st</sup> interested party here

5. With these two competing reports, the 1<sup>st</sup> interested party directed the 2<sup>nd</sup> interested party to appoint an independent actuary and parties agreed on the appointment of the petitioner. The petitioner prepared and submitted three versions of the same report to the 2<sup>nd</sup> interested party which was there after availed to both the 1<sup>st</sup> interested party and members. The reports date October 2012, December 2012 and March 2013 and done in accordance with the service level agreement, Trust Deed and rules. Parties to the dispute were then given ample opportunity to submit on those reports.

6. Being an expert, the petitioner states that he was entitled to his professional opinion and the 1<sup>st</sup> interested party was not bound to accept the report or his opinion. However, after hearing the parties in the dispute, the 1<sup>st</sup> interested party made a determination adopting the petitioner's report.

7. Further on 8<sup>th</sup> august 2014 the Retirement benefits Appeals Tribunal delivered a ruling in the case of **Elius Maina Murigi and 133 others v Benefits Scheme Appeal No 8 of 2010** in favour of members

relying on the petitioner's report.

## **The Petition**

8. In the petition dated 18<sup>th</sup> April 2017 and filed on the same day the petitioner averred that soon after filing his last report with the 1<sup>st</sup> interested party the 1<sup>st</sup>, the 2<sup>nd</sup> and 3<sup>rd</sup> respondents began a sustained intimidation, coercion threats and harassment to compel him to withdraw the report he had prepared and given to the 1<sup>st</sup> and 2<sup>nd</sup> interested parties. The petitioner stated that the threats and intimidations culminated in the filing of disciplinary proceedings with the Actuarial Society of South Africa (ASSA) the petitioner's professional society.

9. According to the petitioner, the complaint was dismissed because ASSA found that the tribunal had upheld the petitioner's report. However, the petitioner averred that the 1<sup>st</sup> to 4<sup>th</sup> respondents escalated the issue to the 5<sup>th</sup> respondent for second disciplinary proceedings over the same complaint against the petitioner which he considers intimidation.

10. The petitioner contended that the complaint against him is based on grounds that he prepared a report without sufficient information, that he lacked sufficient experience in the Kenyan law thus he made unprofessional, inaccurate and critical comments in his report which are trampled up to arm-twist and force him to withdraw the report he had made. The petitioner contended that there has never been a client actuarial relationship between him and the 1<sup>st</sup>, 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents thus the disciplinary proceedings before the ASSA are unfounded.

11. The petitioner further contended that the respondents have violated his constitutional rights to earn an honest living and that the 5<sup>th</sup> respondent has no jurisdiction to hear and determine the disciplinary proceedings against him. He further stated that the respondents are using his professional society to discredit his professional expertise.

12. The petitioner has in particular averred that the respondents have breached his dignity contrary to Articles 28, and violated Articles 159, 160 as well as 169 of the constitution on the independence of judicial authority to Kenya. The petitioner further pleaded that his freedoms of expression and conscience under Articles 32 and 33 has been violated. That his economic rights under Article 43 were violated and that the right to fair administrative action under Article 47(1) breached.

13. Based on the above, the petitioner sought the following reliefs:-

***a) A declaration that the respondents have infringed on the petitioner's constitutional rights under articles 28, 32, 33, 43, 47, 159, 160 and 169 of the Constitution of Kenya 2010 by maintaining disciplinary proceedings with the 5<sup>th</sup> respondent under the case reference No 13 of 2010.***

***b) A declaration that the disciplinary proceedings at the 5<sup>th</sup> respondent under case reference No 13/1010 are null and void as they are being carried out in breach of the petitioners constitutional rights.***

***c) A permanent injunction restraining the respondents from lodging a complaint, instituting maintaining any and or undertaking any disciplinary proceedings against the petitioner arising out of his expert report submitted to the 1<sup>st</sup> interested party in Retirement Benefits Appeal Tribunal No 8 of 2010 Elias Maina Murigi & 133 Others versus Retirement Benefits Authority and National Bank of Kenya Staff Retirement Benefits Scheme.***

***d) Damages for breach of constitutional rights of Ksh100 million.***

***e) Any other or further relief the Honourable Court may deem fit to grant in the circumstances.***

### ***1<sup>st</sup> and 2<sup>nd</sup> Respondents' Response***

14. The 1<sup>st</sup> and 2<sup>nd</sup> respondents opposed the petition through a replying affidavit by **Habil Waswani** sworn on 21<sup>st</sup> July 2017 and filed in court on the same day. It was deposed that a claim was filed before the 1<sup>st</sup> interested party on 21<sup>st</sup> March 2010 by 134 members seeking various claims including calculation of their benefits in accordance with the Trust Deed and rules but in a decision made on 28<sup>th</sup> March 2010, the 2<sup>nd</sup> interested party dismissed the complaint.

15. The complainants filed an appeal with the 1<sup>st</sup> interested party on 23<sup>rd</sup> March 2010 being Tribunal Appeal No 8 of 2010 which was however opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondents. In a determination made on 8<sup>th</sup> August 2014, the actuarial petitioner's report was adopted and respondent ordered to settle the appellants' claims according to that actuarial report.

16. It was deposed that pursuant to that decision, the 1<sup>st</sup> and 2<sup>nd</sup> respondents prepared individual claims and furnished the parties' statements of accounts and also paid them. The members then sought to execute but the application was opposed by the 1<sup>st</sup> and 2<sup>nd</sup> respondent through a preliminary objection which was however overruled by the 2<sup>nd</sup> interested party.

17. It was deposed that parties to that dispute agreed to settle members' outstanding claims. The 2<sup>nd</sup> interested party then submitted a report to the 1<sup>st</sup> interested party confirming that the statement prepared by the 1<sup>st</sup> respondent and payments made were in accordance with the Trust Deed and the Actuarial report as per the Tribunal's ruling.

18. According to further depositions, there was another motion filed by the claimants and a decision thereto was sent to the parties by email but the 1<sup>st</sup> and 2<sup>nd</sup> respondents came to learn of it through the claimants' advocates much later and the 1<sup>st</sup> interested party made orders requiring the 2<sup>nd</sup> respondent to make further payments to the members.

19. It was deposed that being dissatisfied of that decision, the 1<sup>st</sup> and 2<sup>nd</sup> respondents filed judicial review application No. 85 of 2017 and were granted leave to challenge the decision of 13<sup>th</sup> February 2017 and stay orders, that on 25<sup>th</sup> June 2013 the 1<sup>st</sup> interested party made an order directing the 2<sup>nd</sup> respondent to appoint an independent actuary to scrutinize and compare calculations done by parties taking into account what both sides had submitted and that pursuant to that order, the 2<sup>nd</sup> interested party appointed the petitioner on behalf of National Bank of Kenya to prepare a report. It was deposed that the petitioner initially submitted a report dated October 2012 but subsequently submitted another report in March 2013 which formed the basis of the complaint before the 5<sup>th</sup> respondent.

20. It was stated that the 2<sup>nd</sup> respondent sought independent advice with regard to the petitioner's report and on the basis of the professional advice given to the 2<sup>nd</sup> respondent it lawfully lodged the complaint to the 5<sup>th</sup> respondent. The 1<sup>st</sup> and 2<sup>nd</sup> respondent have therefore denied contravening the petitioner's fundamental rights by lodging the complaint to the 5<sup>th</sup> respondent which has power to deal with professional disciplinary complaints. They also contend that the petitioner's petition is premature since proceedings before the 5<sup>th</sup> respondent are yet to be concluded, that the court has no jurisdiction to stop proceedings before the 5<sup>th</sup> respondent and that the petitioner has not demonstrated how the constitutional provisions he has relied on have been violated.

### ***3<sup>rd</sup> Respondents Response***

21. The 3<sup>rd</sup> respondent filed a replying affidavit sworn on 5<sup>th</sup> June 2017 and filed in court on the same day. The 3<sup>rd</sup> respondent deposed that all reports prepared and submitted to the 2<sup>nd</sup> respondent were done in his professional capacity as an officer of the 4<sup>th</sup> respondent and not in his personal capacity. He

deposed that if there are any perceived wrongs committed by the 4<sup>th</sup> respondent, they do not attract personal liability against him. Mr. Raichura deposed that he did not engage the petitioner in his personal capacity but as an officer of the 4<sup>th</sup> respondent and their dealings were on a professional level hence the petition before court is not a disciplinary proceedings against him. He therefore deposed that there is no cause of action against him.

#### **4<sup>th</sup> Respondents Response**

22. The 3<sup>rd</sup> respondent also swore an affidavit on 5<sup>th</sup> June 2017 and filed in Court on 6<sup>th</sup> June 2017 on behalf of the 4<sup>th</sup> respondent. He deposed that the 2<sup>nd</sup> respondent has instructed the 4<sup>th</sup> respondent to offer actuarial services on case to case basis. He deposed that he was aware that there was a dispute between the 2<sup>nd</sup> respondent and its members culminating in Tribunal Appeal No 8 of 2010 before the 1<sup>st</sup> interested party and also Judicial Review Application No 85 of 2017.

23. The 3<sup>rd</sup> respondent further deposed that he was aware that the petitioner was appointed by the 2<sup>nd</sup> interested party as an independent actuary and prepared 3 reports which were virtually similar but upon perusal of the reports it was evidence that the petitioner in preparing the reports failed to undertake due diligence, exceeded his mandate and made unfounded assertions.

24. It was deposed that since the petitioner's reports referred to the 4<sup>th</sup> respondent, the 4<sup>th</sup> respondent made a report to the 2<sup>nd</sup> respondent pointing out the flaws in the petitioner's reports and in the ruling of 4<sup>th</sup> August 2014 the Tribunal upheld the 4<sup>th</sup> respondent's report.

25. There is a further deposition that a complaint was filed against the petitioner with the 5<sup>th</sup> respondent and the 5<sup>th</sup> respondent asked ASSA, the professional body to which the petitioner belongs to investigate and furnish it with a report. That a report was done which found that the petitioner had acted unprofessionally, subsequently, the petitioner was found guilty of professional misconduct by ASSA and disciplinary procedure was to follow depending on what the disciplinary committee could establish after interacting with the petitioner. However, the 2<sup>nd</sup> respondent applied for review of that decision to IFOA and after its own review of the matter, IFOA was satisfied that there were grounds for the disciplinary proceedings to be taken against the petitioner by a disciplinary tribunal. It was therefore denied that the 4<sup>th</sup> respondent escalated the complaint against the petitioner to IFOA.

#### **5<sup>th</sup> respondent's response**

26. The 5<sup>th</sup> respondent filed an affidavit by Michael James Scott notarized on 18<sup>th</sup> July 2017 as head of disciplinary investigations with the 5<sup>th</sup> respondent and filed in Court on 22<sup>nd</sup> May 2017, According to the deponent, the 5<sup>th</sup> respondent's objects are to advance matters relevant to actuarial science and to regulate and promote the actuarial profession. In doing so, it has to put public interest first. Membership to the 5<sup>th</sup> respondent is voluntary.

27. According to the deponent, rules governing the institute provide for investigations and adjudication of disciplinary allegations against members and it operates in accordance with the principles of natural justice. Members who work outside UK or non UK related business and who are members of other actuarial professions can apply to be members of the 5<sup>th</sup> respondent and can apply to be partially regulated.

28. Mr Scott deposed that there is detailed disciplinary process and once the Disciplinary makes a decision, the person dissatisfied still has a chance to appeal to the Appeal tribunal. In his deposition, the petitioner applied and was admitted to the membership and is now fully regulated by the 5<sup>th</sup> respondent since October 2015.

29. It was deposed that allegations were lodged against the petitioner in March 2013 alleging professional

misconduct. The matter was initially handled by ASSA but the complaint was later escalated to the 5<sup>th</sup> respondent and the petition was informed.

30. Mr Scott however, deposed that the investigations are new as opposed to the old disciplinary proceedings, the petitioner was also given the nature of allegation and asked to make comments which he did. It was deposed that after considering the comments Mr Scott prepared a case report which was presented to the adjudication panel, which determined that there was a case to answer by the petitioner and disciplinary proceedings would be held, but the proceedings are yet to begin.

### **Petitioner's submissions**

31. **Miss Savin**, Learned counsel for the petitioner, submitted that the petitioner was appointed by the 2<sup>nd</sup> interested party as an expert witness to prepare an actuarial report which the petitioner did. Learned counsel submitted that the matter before the Tribunal was on the correctness of calculations of pension benefits of members of the 2<sup>nd</sup> respondent and that all parties had been involved.

32. According to learned counsel, the 2<sup>nd</sup> respondent adopted the petitioner's report and made a ruling relying on that report but the 1<sup>st</sup> respondent was dissatisfied with that ruling and lodged a complaint before ASSA. In learned counsel's view, this court has jurisdiction to hear this matter because the petitioner performed his work pursuant to the service level agreement which was executed and performed in Kenya.

33. Miss Savin further submitted that the proceedings before the 5<sup>th</sup> respondent arose from work the petitioner performed in Kenya hence the court has jurisdiction to hear this petition. Counsel relied on the case of ***United India Insurance Co. Ltd v East Africa underwriters (Kenya) Ltd*** [1985] KLR 898 for the submission that courts in Kenya have discretion to assume jurisdiction over an agreement that is made to be performed in Kenya.

34. Learned Counsel went on to contend that the petition is brought under Article 22 of the Constitution thus the court has jurisdiction. Counsel argued that the petitioner's economic rights under Article 43 of the Constitution had been violated since the complaint lodged before the 5<sup>th</sup> respondent is meant to sabotage the petitioner's longstanding international professional experience.

35. It was also contended that the petitioner's freedoms of conscience and expression under Articles 32 and 33 of the constitution had been violated since the 1<sup>st</sup> and 2<sup>nd</sup> respondents never complained on the petitioner's quality of work. In counsel's view the complaint is meant to stifle the petitioner's constitutionally guaranteed right to express himself using contents of his actuarial reports in his capacity as an expert witness.

36. Counsel went on to submit that the petitioner's right to dignity under Article 28 of the Constitution had also been violated because the petitioner has been subjected to derogatory disciplinary proceedings which are meant to jeopardize his professional career and reputation of many years. Counsel further argued that the petitioner's right to fair administrative action under Article 47(1) of the constitution has been violated in that the proceedings before the 5<sup>th</sup> respondent are the same as those that were before ASSA where the petitioner was acquitted.

37. Learned counsel submitted that these proceedings are a breach of the independence of judicial authority in that the proceedings are seeking to limit the extent to which the petitioner could prefer his expert opinion as requested by the 1<sup>st</sup> and 2<sup>nd</sup> interested parties who are independent. Counsel contended that the proceedings before the 5<sup>th</sup> respondent are null and void for being against public interest as it is meant to suppress evidence given before the tribunal by the petitioner through his reports.

38. Learned counsel submitted, therefore, that the petitioner deserves the prayers he seeks in his petition including injunction and damages. On damages learned counsel contended that the petitioner's

constitutional rights have been violated and infringed hence prayed that the court grants damages as the appropriate remedy. Reliance was placed on the South Africa case of *Ntandazeli Fose v Minister of Safety and Security (quoted in Arnacherry limited v Attorney General* [2014} eKLR) for the proposition that damages is an appropriate relief for breach of constitutional rights.

### **1<sup>st</sup> Respondent's Submissions**

39. Mr. Bundotich, learned Counsel for the 1<sup>st</sup> and 2<sup>nd</sup> respondents, submitted that the petition was founded on the decision by the 5<sup>th</sup> respondent to refer the complaint lodged by the 1<sup>st</sup> and 2<sup>nd</sup> respondents to a disciplinary tribunal, but the proceedings before the disciplinary panel have not commenced. According to learned counsel, the petitioner's professional conduct is regulated by the 5<sup>th</sup> respondent and for that matter the petitioner had not shown that he had been denied a chance to be heard before a disciplinary decision is made. Learned counsel contended that the relationship between the 5<sup>th</sup> respondent and ASSA is that of professional regulation as set out in the 5<sup>th</sup> respondent's response to the petition which the petitioner had not controverted.

40. Learned counsel argued therefore that the petitioner still has a chance to present his case before the disciplinary tribunal and for that reason counsel contended that there was no breach or violation of the petitioner's constitutional rights as pleaded in the petition. He urged that the petition be dismissed with costs.

### **2<sup>nd</sup> Respondent's Submissions**

41. **Mr Odera**, learned Counsel for the 2<sup>nd</sup> respondent, submitted that this petition was wrongly filed before this court. According to learned counsel, this being a disciplinary matter, there is an internal mechanism that deals with members' professional issues and which ensures that there is a fair hearing. Counsel contended that the petitioner has an opportunity to ventilate on the issues he has brought to this court before the disciplinary organ of his professional body but cannot run to courts in Kenya claiming breach of the Constitution.

42. Learned counsel submitted that the petitioner is a member of ASSA an affiliate of the 5<sup>th</sup> respondent a body based in the United Kingdom. Counsel contended that the petitioner's attempt to be excluded from the mandate of the professional association is seeking to elevate himself above other members of the same professional body thus he wants to be treated in a special way.

43. Counsel relied on a number of decisions and submitted that the court can only intervene if it is shown that the process is being done contrary to law which is not the case here. Counsel contended that the petition does not qualify on a constitutional petition for it does set out with precision the rights infringed and the jurisdictional basis for it.

### **3<sup>rd</sup> and 4<sup>th</sup> respondent's submissions**

44. Mr. Regeru, learned counsel for the 3<sup>rd</sup> and 4<sup>th</sup> respondent, submitted that the report the subject of these proceedings had material paragraphs expunged from the record by the tribunal, 1<sup>st</sup> interested party, because they made scandalous and unsubstantiated allegations against the 3<sup>rd</sup> and 4<sup>th</sup> respondents, that the complaint the subject matter of the petition was initiated by the 2<sup>nd</sup> respondent against the petitioner and not the 3<sup>rd</sup> and 4<sup>th</sup> respondents, that there is only one complaint initiated in ASSA and later escalated to the 5<sup>th</sup> respondent as the umbrella body and that there is no double jeopardy.

45. Learned Counsel went on to submit that the 3<sup>rd</sup> respondent is CEO of the 4<sup>th</sup> respondent and that there was no basis for enjoining him in this petition in his personal capacity. Counsel relied on the case of *Anthony Francis Wareheim & Wareheim & 2 Others v Kenya Post Office Savings Bank (Civil Application Nos NAI 5 & 48 of 2002)* cited in *Victor Mabachi & another v Norton Bates Limited*

{2015}eKLR. It was submitted that there was no evidence that the 3<sup>rd</sup> respondent had breached the petitioner's constitutional rights; hence there was no justiciable claim against the 3<sup>rd</sup> respondent as a person.

46. Learned counsel submitted that the petitioner did not show that his fundamental rights had been violated to warrant the filing of this petition under the Bill of Rights. In counsel's view, the issue at hand relates to disciplinary proceedings which are yet to commence before the relevant tribunal hence it is not a matter for this Court.

47. Mr. Regeru referred to the case of *Republic v Advocates Disciplinary Committee Daniel Mutisya Ngala Ex parte Danstan Omari Mogaka* [2015]eKLR for the submission that the onus of determining whether an act amounts to professional misconduct belongs to the disciplinary tribunal. It was therefore submitted that on the basis of the above decision, the court lacks jurisdiction over this matter.

48. Learned Counsel went on to submit that the petition does not meet the threshold of a constitutional petition and cited the case of *Anarita Karimi Njeru v Republic [1979]eKLR* and *Mumo Matemo v Trusted Society of Human Rights Alliance & 5 Others* [2013} eKLR for the submission that there should be precise pleading in a constitutional petition on the constitutional provisions violated, the rights said to be infringed, the manner of infringement and the jurisdictional basis for it. Counsel submitted, therefore, that the petition did not establish any violations and should be dismissed.

### **5<sup>th</sup> Respondents Submissions**

49. **Miss Mutea**, learned Counsel for the 5<sup>th</sup> respondent, submitted that a complaint was presented to the 5<sup>th</sup> respondent by letter dated 15<sup>th</sup> March 2013 and after considering it, it was established that the petitioner was at the time working in South Africa and that his primary regulator was ASSA. The 5<sup>th</sup> respondent therefore requested ASSA to look at the complaint which was done.

50. According to learned counsel, after scrutiny of the complaint, it was established there was a basis for proper investigations and when ASSA made a determination, the 1<sup>st</sup> respondent was dissatisfied and sought review with the 5<sup>th</sup> respondent. The 5<sup>th</sup> respondent imitated investigations and the petitioner was informed about his rights.

51 Counsel contended that even as the hearing of the petition was going on, the 5<sup>th</sup> respondent had not been officially served. Counsel however submitted that the petitioner is a member of the 5<sup>th</sup> respondent and therefore subject to its rules. She submitted that the petition does not meet the constitutional test as a constitutional petition.

### **Determination**

52. I have considered this petition, responses thereto submissions by counsel for the parties and authorities relied on. In my view, this petition raises only one question for determination that is; whether the petitioner's rights and fundamental freedoms have been violated.

53. The petitioner is a professional actuary practicing and working in South Africa and is a member of ASSA an affiliate of the 5<sup>th</sup> respondent. The petitioner was appointed by the 1<sup>st</sup> interested party to prepare an actuarial report which he did. Although the report was relied on by the 1<sup>st</sup> interested party in its determination, the 1<sup>st</sup> respondent was dissatisfied with that decision and lodged a complaint with the 5<sup>th</sup> respondent challenging the petitioner's professional conduct in preparing that report.

54. The 5<sup>th</sup> respondent referred the complaint to ASSA to deal with the issue but once again the 1<sup>st</sup> respondent was not satisfied and sought a review from the 5<sup>th</sup> respondent. After the review, the 5<sup>th</sup> respondent determined that there were grounds and therefore recommended that a disciplinary tribunal

should deal with that matter prompting the petitioner to file this petition.

55. The petitioner's main complaint is that the disciplinary proceedings arising from his professional work is a violation of his rights and fundamental freedoms. He has cited various provisions of the Constitution to support his contention that his rights and fundamental freedoms have been violated. The Articles of the constitution cited include 28, 32, 33 and 43 of the Constitution. These rights range from right to dignity, right to freedom of consequence, freedom of expression, economic rights and right to fair administrative action.

56. The respondents on their part have contended that this matter is not properly before this Court since it is a professional disciplinary matter hence not suitable for the Court, that there is no violation of Constitutional rights and that the petitioner can still be heard by the disciplinary body that he is subject to as this is an internal matter.

57. The petitioner is a professional and after rendering his professional service, dissatisfied people took up the issue with the 5<sup>th</sup> respondent, his professional body, alleging that he had acted in unprofessional manner. There are currently disciplinary proceedings against him pending before a disciplinary tribunal of the 5<sup>th</sup> respondent. He now alleges that his Constitutional rights have been violated by starting the disciplinary proceeding.

58. Article 22(1) of the Constitution provides that **every person has the right to institute proceedings claiming that his right or fundamental freedom in the Bill of Rights has been denied, violated or infringed or threatened.** At the same time, Article 23(1) states that this Court **has jurisdiction under Article 165 to hear and determine applications for redress of a denial, violation or infringement or threat to a right or fundamental freedom in the Bill of Rights.** In this regard, in so far as the petitioner alleges that his rights or fundamental freedoms have been violated, infringed or is threatened, has a right to file an application before this Court for redress.

59. The petitioner has contended that his right to dignity under Article 28 of the constitution has been violated. Article 28 provides that **every person has inherent dignity and the right to have that dignity respected and protected.** That means a person's dignity cannot be violated through acts of commission or omission by others. The petitioner's argument is that as a professional actuary, the allegations and complaint raised against his report is meant to destroy his long standing professional career thus violates his dignity.

60. The other complaint by the petitioner is that his right to conscience under Article 32 and right to freedom of expression under Article 33 of the Constitution have been violated. To support this contention, the petitioner argues that the queries raised against his report have violated his right to express himself professionally through his reports. Article 32(1) provides that **every person has the right to freedom of conscience, thought, belief and opinion.** That means ones right to freedom of conscience is not derogable and cannot be taken away because the right granted by the constitution and not by the state.

61. The petitioner has also argued that his economic right under Article 43 of the Constitution has been violated. The argument in support of this is that the respondent's acts of subjecting the petitioner to disciplinary process for doing his professional work, will destroy his career thus deny him the right to earn a living as a professional. Article 43 of the constitution is on socio economic rights and everyone is entitled to socio economic rights including the right to work and earn a leaving without this right being violated.

62. The petitioner has further contended that his right to fair administrative action was violated. Article 47 (1) of the Constitution provides that **every person has a right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.** The intention of Article 47(1) is to subject administrative actions to the constitutional test of speed, efficiency, lawfulness, reasonableness and procedurally fairness so that administrative bodies that intend to take administrative actions against any of their employees, observe this Constitutional command rather than subject employees to whimsical acts. Those against whom actions are to be taken must be informed what actions are to be taken against them

and reasons, if any, for such actions in so far as they affect their rights and fundamental freedoms.

63. The fact that fair administrative actions now a constitutional right was stated by the Court of Appeal in the case of **Judicial Service Commission v ...Mulaive & 2 others [2014] eKLR** thus;

***“Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights. The right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. The administrative actions of public officers, state organs and other administrative bodies are now subjected by Article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed.”***

59. In the case of **Dry Associates Ltd v Capital Markets Authority and Another,[2012] eKLR** the Court addressed the same point and observed that **Article 47** is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law or judicial review under the **Law Reform Act (Cap 26 of the Laws of Kenya)** but is to be measured against the standards established by the Constitution.

60. The court again revisited Article 47 in the case of **Kenya Anti-corruption Commission v Lands Limited and Others [2008] eKLR** and stated that

***“the right of hearing are of fundamental importance to our system of justice and even when they are not expressed specifically in any law the supreme position of the Constitution must be implied in every Act especially, the right to due process and it cannot be taken away. Constitutional rights cannot be taken away without due process.”***

61. I have looked at the petitioner’s complaints *visa vis* the constitutional provisions he has relied on. The claim stems from a report the petitioner made in his professional capacity. That report was acted on but one of the parties to the dispute that was before the 1<sup>st</sup> interested party was dissatisfied with that report and made a complaint to the 5<sup>th</sup> respondent the petitioner’s professional body alleging professional impropriety.

62. According to the record, the 5<sup>th</sup> respondent referred the complaint to ASSA, the petitioner’s immediate professional regulator and an affiliate of the 5<sup>th</sup> respondent. ASSA made a decision which the 1<sup>st</sup> respondent was not satisfied with and it applied for review before the 5<sup>th</sup> respondent which determined that there were grounds for the disciplinary tribunal to investigate the matter but which the petitioner does not want to proceed and therefore wants this court to stop.

63. First, this being a constitutional petition, the petitioner is required to show with precision that it meets the test set in the case of **Anarita Karimi Njeru v Republic (supra)**. In that case, the court stated that where the Court stated that a party who wishes the Court to find in his favour must plead with a reasonable degree of precision the rights he claims to have been violated the constitutional provisions allegedly violated and the jurisdictional basis for it.

64. This was reiterated in the case of **Meme v Republic [2004] eKLR** thus;

***“Where a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important that he should set out with a reasonable degree of precision that of which he complains, the provisions said to have been infringed and the manner in which they are alleged to have been infringed and that the applicant's instant application had not fully complied with the basic test of constitutional references, as it was founded on generalised complains without any focus on fact, law or Constitution, hence it had nothing to do with the***

***constitutional rights of the appellants”***

The principle was re-stated in the case of ***Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others*** (supra) where the court stated;

***‘,,The principle in Anarita Karimi Njeru (supra) underscores the importance of defining the dispute to be decided by the court...Cases cannot be dealt with justly unless the parties and the court know the issues in controversy. Pleadings assist in that regard and are a tenet of substantive justice, as they give fair notice to the other party. The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle....”***

65. Applying the above principles to this case, I have considered the petitioner’s pleadings, the evidence as well as submission by his counsel and in my respectful view this is not a proper constitutional petition challenging violation of fundamental freedoms. I say so because although the petitioner has pleaded provisions of the constitution, he has not demonstrated to the required standard how his rights and fundamental freedoms have been violated infringed or are threatened to come within the ambit of Article 23(1) of the constitution for redress.

66. The right to for instance, dignity is indeed guaranteed and protected by the constitution. However what is in question before the 5<sup>th</sup> respondent and the disciplinary tribunal ordered by the 5<sup>th</sup> respondent is not about the petitioner’s dignity but whether the work he did as a professional met the professional standards required by his professional Association. The same can be said about freedom of conscience and expression. The petitioner’s freedom of conscience and expression has not been questioned in any way but what is under scrutiny is the report he made. I would say the same thing with regard to the petitioner’s claim of violation of his economic right under Article 43. That the petitioner’s right to earn a living is threatened, violated or infringed has not been demonstrated at least not from the facts of this petition.

67. As it is, the disciplinary proceedings before the tribunal have not started. t petitioner has not been heard and no finding has been made and the petitioner has not been found guilty of any professional misconduct. He is only being subjected to disciplinary action and he may very well come out of it unscathed. In that regard, the petitioner cannot plead Article 47(1) of the constitution and submit that his rights under this Article have been violated, infringed and or are threatened. It is premature to summon this Article in his aid at this time of the proceedings because the right has not fully crystallized.

68. The petitioner is not complaining that there is delay in concluding the administrative action, he is not challenging the procedural fairness or the reasonableness of the administrative action. The petitioner is not even alleging that the action is unlawful or that what the 5<sup>th</sup> respondent is doing is illegal or ultra vires its powers to enable this court examine the lawfulness of the action. It is not enough for a party to plead that there is violation of Article 47(1) of the constitution without demonstrating how and if at all the action complained of is unsustainable under the constitutional microscope.

In this respect, for a party to succeed, the administrative action must fall within the parameters stated in the case of ***Parstoli v Kabale District Local Government Council & Others*** 2008 EA 300 citing ***Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2*** and ***An Application by Bukoba Gymkhana Club [1963] EA 478*** at 479 that:

***“In order to succeed... the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or***

***act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision.”***

69. The petitioner has not shown that any of the issues discussed in the above decision form the basis of the petition before court. There is no claim of illegality, procedural impropriety, ***ultra vires*** or failure to adhere to or observe rules of natural justice. To my mind, the issues raised in this petition such as the petitioner’s freedom to expressing himself professionally or the fact that his report had been accepted and acted upon are grounds for his defence before the disciplinary tribunal.

70. I also do not see how Article 47(1) has been breached because the disciplinary proceedings are yet to be heard and the petitioner will have an opportunity to appear before the disciplinary tribunal and put up his case. Only then can he say that his right has been violated if he is not accorded a fair hearing as required. Before that, Article 47(1) cannot be summoned to the petitioner’s aid. I must also point out that parties should realize that it is not every alleged breach or violation that amounts to a constitutional violation and parties do not have to seek redress through a constitutional petition.

71. In the case of ***Benard Murage v Fine serve Africa Limited & 3 others [2015] eKLR*** the court observed that ***not each and every violation of the law must be raised before the High Court as a constitutional issue. Where there exists an alternative remedy through statutory law, then it is desirable that such a statutory remedy should be pursued first.*** The court went on to cite the case of ***Harrikinson v Attorney General of Trinidad and Tobago [1980] AC 265***, where it was stated-;

***“The notion that wherever there is a failure by an organ of government or a public officer to comply with the law this necessarily entails the contravention of some human rights or fundamental freedoms guaranteed for individuals by chapter 1 of the constitution is fallacious. The right to apply to the High Court under section 6 of the Constitution for redress when any human right or fundamental freedom is or is likely to be contravened, is an important safeguard of those rights and freedoms; but its value will be diminished if it is allowed to be misused as a general substitute for the normal procedures for invoking judicial control of administrative action... The mere allegation that a human right has been or is likely to be contravened is not itself sufficient to entitle the applicant to invoke the jurisdiction of the Court under the section if it is apparent that the allegation is frivolous, vexatious or abuse of the process of Court as being made solely for the purpose of avoiding the necessity of applying the normal way for appropriate judicial remedy for unlawful administrative action which involves no contravention of any human right or fundamental freedom.”***

72. The dispute raised herein is purely about professional conduct and whether or not the petitioner’s work met the required professional standards.. This court is ill equipped to address the issues of a professional nature that the court has no means or knowledge of or experience over. In this regard, I agree with ***Korir J’s*** observation in the case of ***Republic v Advocates Disciplinary Committee interested party Daniel Mutisya Ngala Exparte Danstan Omari Mogaka*** (supra) where the learned Judge stated’

***“The Onus of determining whether an act amounts to professional misconduct belongs to the disciplinary Tribunal. It would amount to usurpation of that mandate were the court to decide what amounts to professional misconduct. In my view, the court’s jurisdiction can only be engaged after the tribunal has made a finding as to whether or not the applicant’s actions amount to misconduct. At that point the applicant can argue that the Tribunal had no power over his actions and it is only then that the court can interrogate the decision of the Tribunal and make a finding as to whether the Tribunal had jurisdiction.***

73. This Court would therefore be slow to interfere in matters that are purely of a professional nature where only qualified people have to determine whether a party, like the petitioner in this case, acted professionally or not and in saying so, I am guided by the Court of Appeal decision in the case of **Rich Productions Limited v Kenya Pipeline Company & Another** [2014] eKLR where the Court stated that;

***“[14] The reason why the Constitution and the law establish different institutions and mechanism for dispute resolution in different sectors is to ensure that such disputes as may arise are resolved by those with the technical competence and the jurisdiction to deal with them. While the Court retains the inherent and wide jurisdiction under Article 165 to supervise bodies...such supervision is limited in various respects which I need not go into here. Suffice to say that it (the court) cannot exercise such jurisdiction in circumstances where parties before it seek to avoid mechanisms and processes provided by law, and convert the issues in dispute into constitutional issues when it is not.” (emphasis).***

74. That is precisely what I find in this petition. The petitioner as a professional is subject to the disciplinary process of his Professional body and any determination thereafter can be subject to the judicial review jurisdiction of the courts when the court will have an opportunity to examine the fairness, legality or reasonableness of the action.. Before then the court cannot determine whether or not the law was followed or whether the process was fair.

75. And in that regard, I agree with the position as was stated by the Court of Appeal of Trinidad and Tobago in the case of **Damian Delfonte v The Attorney General of Trinidad and Tobago** CA 84 of 2004 that;

***“Where there is a parallel remedy, constitutional relief should not be sought unless the circumstances of which the complaint is made include some feature which makes it appropriate to take that course. As a general rule, there must be some feature, which at least arguably, indicates the means of legal redress otherwise available would not be adequate. To seek constitutional reliefs in the absence of such a feature would be a misuse or abuse of the Court’s process. A typical but by no means exclusive example of such a feature would be a case where there has been arbitrary use of state power. Another example of a special feature would be a case where several rights are infringed. Some of which are common rights and some of which protection is available only under the Constitution it would not be fair, convenient or conducive to the proper administration of justice to require an applicant to abandon his constitutional remedy or to file separate actions for the vindication of his rights.”***

76. The 3<sup>rd</sup> respondent has also argued that he was improperly joined in these proceedings. I have examined the 3<sup>rd</sup> respondent’s role in this matter and I agree that he was not supposed to have been sued because he only acted on behalf of the 4<sup>th</sup> respondent and his role was merely that of an agent acting on behalf of the principal. No meaningful order could be made against him.

77. The 5<sup>th</sup> respondent contended that it had not been served and further that it is not subject to this court’s jurisdiction. That question is now moot given my finding above and will not add value to the determination of this matter. In any case these proceedings are premature. The upshot is that the petition dated lacks merit and is hereby dismissed. Regarding costs, I order that each party do bear their own costs.

**Dated Signed and Delivered at Nairobi this 8<sup>th</sup> Day of December 2017**

**E C MWITA**

**JUDGE**