REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 302 OF 2014

REPUBLIC.....APPLICANT

VERSUS

ETHICS AND ANTI-CORRUPTION COMMISSION.....RESPONDENT

EX-PARTE

SANJAY SHAH

JUDGEMENT

1. On 4th August, 2014 this court granted leave to the ex-parte Applicant Sanjay Shah to commence these judicial proceedings. The ex-parte Applicant subsequently filed the Notice of Motion dated 11th August, 2014 in which he prays for orders that:

> **"1. An order of mandamus to compel the Respondent herein to produce before this Honourable Court and to the Ex-parte Applicant the final report in respect of Charterhouse Bank regarding the alleged offence of corruption, money laundering and tax evasion and/or any other offence established by their investigation.**
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> 2. **An order of mandamus to compel the Respondent herein to produce before the Honourable Court and to provide the Ex-parte Applicant with any investigation report by the respondent establishing that the Applicant and/or Charterhouse bank were involved in the offense of money laundering or corruption between the years 2003 to 2008.**
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> 3. **An order of mandamus to compel the Respondent herein to produce before this Honourable Court and to the Ex-parte Applicant with any authority or powers to investigate an offence of money laundering and to raid and take away the Applicant's documents and those of Charterhouse bank without a valid warrant issued by the court between the years 2003 to 2008.**
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> 4. **An order of mandamus to compel the Respondent herein to produce before this Honourable Court and to provide the Ex-parte Applicant with report with full particulars and details as to whether the Ex-parte Applicant, during the period he was managing the Charterhouse bank as its managing director was involved in corruption of whatsoever nature.**

5. **An order of mandamus to compel the Respondent herein to produce before this Honourable Court and to provide the Ex-parte Applicant with the full particulars of all the Applicant's documents, and those of Charterhouse bank including computer data, software, account opening forms, delivered to the Respondent by Peter George Odhiambo and/or Lameck Wangumba between 2003 and 2008.**

6. **An order of mandamus to compel the Respondent herein to produce before this Honourable Court and to return to the Ex-parte Applicant and to the Charterhouse bank all documents, records, account opening forms, and other information, arbitrarily collected by the Respondent from Charterhouse Bank in 2004 and in 2006.**

7. **An order of mandamus to compel the Respondent herein to produce before this Honourable Court and to return to the Ex-parte Applicant and to the Charterhouse bank all documents, records, account opening forms, information, computer software, computer data, computer diskettes, computer reports, account holders personal information and identity stolen and delivered to the Respondent by Peter George Odhiambo and Lameck Wangumba to the Respondent from Charterhouse Bank between 2003 to 2008.**

8. **An order of mandamus to compel the Respondent to provide before the Honourable Court, any credible investigation report which established that the Ex-parte Applicant and Charterhouse bank were involved in the offense of money laundering between 2003 to 2008**

9. **An order of mandamus to compel the Respondent to provide before the Honourable Court, any credible investigation report which established that the Ex-parte Applicant and Charterhouse bank were involved in the offense of corruption between 2003 to 2008**

10. **An order of mandamus to compel the Respondent to provide before the Honourable court, any credible investigation report which established that the Ex-parte Applicant and Charterhouse bank were involved in the offense of tax evasion between 2003 and 2008**

11. **An order of mandamus to compel the Respondent to provide before the Honourable Court, the mandate and authority to investigate the alleged offense of money laundering against the Ex-Parte Applicant and Charterhouse bank in which he was managing as its managing director and mandate of the Respondent to raid and forcefully take away personal documents and banking documents and customer's records from Charterhouse bank without a valid court warrant while purportedly investigating the offense of money laundering, corruption and tax evasion against the Ex-Parte Applicant and the bank.**

12. **An order of certiorari to compel the Respondent herein to bring before this Honourable Court, for the purposes of being quashed, any mandate or authority to the Respondent or any other person to investigate the offense of money laundering between the years 2003 to 2008.**

13. **An order of certiorari to compel the Respondent herein to bring before this Honourable Court, for the purposes of being quashed the investigation interim report dated 4th November 2004 or any correspondence alleging that the Ex-Parte Applicant or the Charterhouse bank which he was managing would have been involved in money laundering, corruption or tax evasion between 2003 to 2008 .**

14. **An order of certiorari to compel the Respondent herein to bring before this Honourable Court its final investigation report, if any for the purposes of being quashed regarding any allegation that the Ex-Parte Applicant and/or the Charterhouse Bank that he was managing would have been involved with the offense of money laundering or corruption or tax evasion between 2003 to 2008.**

15. **An order of certiorari to compel the Respondent herein to bring before this Honourable Court, for the purposes of being quashed, any decision to continue withholding the Ex-Parte**

Applicant's documents, records, including the account opening forms, computer software, data and any information regarding the Charterhouse Bank, collected and/or delivered to the Respondent between the years 2003 to 2008.

16. **An order of prohibition to prevent the Respondent from continuing to hold any documents, records, computer software, data, account opening forms belonging to the Ex-Parte Applicant and those of Charterhouse bank taken from him which he was managing and culpable for.**

17. **An order of prohibition to prevent the Respondent from making and/or continuing to make any allegation against the Ex-parte Applicant including the Charterhouse Bank which he was managing that they would have been involved with the offenses of money laundering, or corruption and tax evasion between the years 2003 to 2008."**

2. The application is supported by the chamber summons application for leave dated 1st August, 2014 and all the documents accompanying the application for leave.

3. The Respondent is the Ethics and Anti-Corruption Commission (EACC) established under Section 3 of the Ethics and Anti- Corruption Act, 2011 pursuant to Article 79 of the Constitution for purposes of ensuring compliance with, and enforcement of, the provisions on leadership and integrity under Chapter Six of the Constitution.

4. The Applicant's case is that he was the Managing Director of a bank known as Charterhouse ("the bank") from 1996 to 23rd June, 2006 when the Central Bank of Kenya appointed a statutory manager to take over the management and operations of the bank. The bank remains under statutory management to date.

5. According to the Applicant, the woes of the bank started in 2004 when the Kenya Anti-Corruption Commission (KACC) the predecessor of the Respondent, without warrant or court order raided its premises and carted away, in cartons, documents belonging to the bank and its customers purporting to be investigating money laundering, corruption and tax evasion. It is the Applicant's case that the Respondent refused to make a full inventory of the documents but instead signed a general acknowledgement for the documents which have not been returned to the bank to date despite demand.

6. Consequent to its actions, the Respondent in November, 2004 published an interim investigations report alleging that it had established the offence of money laundering and tax evasion and that the Applicant was involved in the offences of money laundering, tax evasion and corrupt activities. It is the Applicant's case that the said report is what led to the placement of the bank under statutory management. The Applicant's case is that the same report led to his being denied entry to the United Kingdom and has caused and continue to cause his being denied travel visa.

7. The Applicant's case is that sometimes in November, 2013 he applied for a travel permit from the British High Commission which was rejected on the ground that according to the interim report prepared by the Respondent he had been involved in corrupt activities during his tenure as the Managing Director of the bank. The Applicant on 27th November, 2013 wrote to the Respondent seeking to be informed of the contents of the interim report and to ascertain the status of the investigations that were purportedly being carried out. The Respondent wrote back inviting the Applicant for a meeting on 14th February, 2014.

8. At the meeting, the Respondent agreed to issue a comprehensive response to the issues raised but failed to do so thus forcing the Applicant to commence these proceedings.

9. The Applicant contends that the Respondent had a legal duty to publish a final report within a reasonable time but had neglected or failed to do so.

10. The Applicant's view is that the Respondent's actions are unconstitutional, illegal, malicious, arbitrary, unjust and riddled with bad faith. He thus seeks the prayers in the Notice of Motion.

11. The Respondent opposed the application through the replying affidavit of Gideon Mokaya sworn on 22nd September, 2014.

12. The Respondent's case is that on 28th November, 2004 the then Finance Minister Hon. Mwiraria, at the instance of the Central Bank of Kenya, constituted an inter-agency task force comprising of representatives from Central Bank of Kenya, Kenya Revenue Authority, the State Law Office, the Department of Governance and Ethics in the Office of the President and the defunct KACC. The task force was to investigate alleged violations by the bank of the Banking Act and other statutes relating to tax evasion and economic crimes which had been unearthed by Central Bank of Kenya during routine inspection carried out sometime in August, 2004.

13.The Respondent's case is that further investigations at the bank revealed: that a number of account holders had multiple accounts; regular massive transfers of funds to foreign destinations that were suspected to be sales proceeds of businesses; huge deposits of funds suspected to be sales proceeds of businesses to individual accounts; huge deposits of funds into lawyers' accounts suspected to be sales proceeds of leading businesses; poor record keeping indicative of cover up; loss of account opening documents for some accounts; and the Applicant, the Managing Director of the bank operating some of the accounts which belonged to companies in which he had an interest.

14.The Respondent's averment is that the inter-agency task force was intended to bring together different strengths from the enabling statutes governing the various institutions represented in the task force to make the investigations more efficient and avoid numerous investigations by the various government agencies on separate yet related issues falling within their respective legal mandates. Further, that while the various government agencies constituting the aforesaid task force supported each other in the execution of their respective legal mandates, each institution focused primarily on the issues falling within their own legal mandate.

15. The KACC derived its mandate from sections 2, 7 and 45 of the Anti-Corruption and Economic Crimes Act, 2003 which gave it power to investigate specified crimes including dishonesty in connection with tax, rates or levies imposed by statute.

16. It is the Respondent's case that the bank did not cooperate with the task force and withheld relevant information and documents forcing KACC to obtain warrants in respect of identified bank accounts. The Respondent's case is that the only documents obtained by KACC from the bank were print out of statements for the various accounts of Paolo Sattanino, W.E. Tilley (Muthaiga) Ltd, D. Shah, Sailesh Prajapatu, Creative Innovations Limited and Tusker Mattresses Limited.

17. The Respondent's case is that the delay in conclusion of investigations has been occasioned by the bank, its management and the customers who refused to cooperate with the investigators and instituted several civil suits challenging the said investigations.

18.The Respondent averred that the routine inspection by the Central Bank of Kenya had revealed that the bank may have breached banking laws in its operations whereas the preliminary investigations by the task force had disclosed that some of the customers of the bank may have been engaged in acts of tax evasion and money laundering. Owing to the fact that there were no laws on money laundering at the time, the task force focused on the issues relating to tax evasion and breach of bank laws. KACC was to investigate any economic crime once the Kenya Revenue Authority was done with the issue of tax evasion.

19. It is the Respondent's statement that the Kenya Revenue Authority has been pursuing the issue of tax evasion and had recovered taxes from some of the customers of the bank but in some instances there have been various court cases which have derailed the investigation.

20. As for the interim investigation report exhibited by the Applicant, the Respondent's position is that the same had been contrived or illegally obtained since the same was unsigned and its source undisclosed and the same should be struck out. The Respondent's view is that the Applicant is on a fishing expedition as he has not produced any evidence to demonstrate that the bank was placed under statutory management on the basis of the purported interim report or any report prepared by the Respondent or the aforesaid inter-agency task force.

21. According to the Respondent, an order of certiorari cannot issue to quash the purported interim report of 4th November, 2004 as no evidence has been adduced to demonstrate its connection with the closure of the bank two years after is issuance. Further, that an order of certiorari cannot issue to quash an unidentified final report which has not been proved to exist and which has no proven connection with the closure of the bank. Additionally, the Respondent contends that an order of mandamus cannot issue to compel the production of a report which has not been proved to exist and whose contents are unknown.

22. It is the Respondent's position that it never acted in excess of its jurisdiction and neither did the inter-agency task force flout any law. The Respondent avers that it cannot be singled out to justify the actions and findings of a task force whose membership was not confined to the Respondent's officers. The Respondent avers that it did not place the bank under statutory management as it lacks the legal mandate to do so and it cannot therefore be called upon to give reasons why the bank was put under statutory management.

23. According to the Respondent the Applicant has filed several civil suits challenging the legality of the Central Bank of Kenya's decision to place it under statutory management and the issues raised herein in so far as they concern the legality of the said decision are therefore *res judicata* or sub judice and thus not available for this court's determination. Further, that the Central Bank of Kenya had disclosed in the suits filed against it the reasons for placing the bank under statutory management and those reasons are known to the Applicant.

24. The Respondent concludes that these proceedings are an abuse of the court process. Further, that the purported interim report is preliminary. In addition, it is the Respondent's case that the Applicant ought to have enjoined Kenya Revenue Authority and the Central Bank of Kenya who were necessary parties to these proceedings. The Respondent therefore urges this court to dismiss the Applicant's case.

25. In response to the Respondent's case, the Applicant swore a further affidavit on 17th October, 2014. It is the Applicant's case that the claim that an inter-agency task force was formed is strange as the Respondent's officers are aware that the Constitution and the law do not allow the fusing of Acts of Parliament to act as one.

26. The Applicant deposes that the mandate of the Respondent is to enforce the Leadership and Integrity Act and the Public Officers Ethics Act and not the banking laws and tax laws. The Applicant states that the Respondent's officers acted *ultra vires* by purporting to enforce banking laws and tax laws.

27. The Applicant avers that the Respondent has not disclosed any offence it discovered after investigations. Further, that there is no evidence that the customers whose accounts were investigated solely banked with the bank.

28. The Applicant insists that the Respondent's officers collected more documents than those admitted in the replying affidavit and those documents were collected without warrants and without the making of any inventory.

29. The Applicant avers that the bank cannot be accused of not cooperating since it has been under the management of an employee of the Central Bank of Kenya from the time it was put under statutory management in 2006.

30. It is the Applicant's position that he or the bank cannot be held liable for the actions of the customers and/or depositors.

31. The Applicant deposes that the Respondent investigated money laundering which was not an offence known to the Kenyan law at the time of the investigations.

32. The Applicant insists that the Respondent cannot deny the existence of the interim report as the same is available in the Internet. Further, that the Respondent produced and distributed two interim reports, both under the signature of Henry Mwithia. One report was dated 12th November, 2004 and the other one was dated 30th November, 2004. The Applicant avers that the interim report has been exhibited in some of the cases which the Respondent claim were filed in court.

33. It is the Applicant's case that some of the documents carted away by the Respondent's officers are required by the Central Bank of Kenya for its supervisory purposes.

34. The Applicant insists that it amounts to witch-hunting and a violation of Articles 47 and 50 of the Constitution for the Respondent to claim that the investigations have not been finalised for close to ten years.

35. Further, that the Respondent has failed to publish in the Kenya Gazette on a quarterly basis the progress of the investigations relating to the bank.

36. The question that emerges from the pleadings of the parties is whether judicial review orders are available to the Applicant in the circumstances of this case.

37. The Applicant started by correctly submitting that although the Respondent is mandated under Section 45 of the Anti-Corruption and Economic Crimes Act (ACECA) to independently conduct investigations into corruption and economic crime, that power is subject to judicial scrutiny. On its part, the Respondent did not dispute the supervisory power of this court over it.

38. The Applicant then proceeded to submit that Section 7 of the ACECA empowers the Respondent to investigate conduct that constitutes corruption and economic crime. Section 12(1) requires other institutions to cooperate with the Applicant in its investigations. Sections 28 and 29 of ACECA empower the Respondent to request for information and or seize documents. As per Section 30, anything obtained by the Respondent shall be retained for such time as is reasonable for the purpose of investigations.

39. The Applicant went ahead and pointed out that sections 15, 35 and 36(5) require the Respondent to make investigation reports to the Attorney General (the Director of Public Prosecution as per the 2010 Constitution) on the result of the investigation, and to cause its quarterly report to be published Gazette.

40. The Applicant asserted that Section 77(4) of the repealed Constitution, being the Constitution in force at the time relevant to these proceedings, provided that no person was to be held guilty on account of an act or omission that did not, at the time it took place, constitute a criminal offence.

41. The Respondent did not dispute all these statements of law by the Applicant.

42. The Applicant then turned to the Banking Act, Cap 488 and observed that Section 32 authorises the Central Bank of Kenya to carry out an inspection on a banking institution and any non-compliance with the Banking Act is punishable by Section 49 of the Act. Again the Respondent did not attempt to controvert this correct statement of the law.

43. The Applicant then proceeded to identify the legal sins of the Respondent as follows; conducting investigations into the offence of money laundering which was not an offence known to the Kenyan laws at the time; obtaining warrants on the strength of investigation of money laundering; continuing to withhold and refusing to return the documents illegally seized from the bank; failing to make a final investigation report or publish in the Kenya Gazette a statutory report concerning the investigation of the Applicant and the bank; relying on documents delivered by Peter George Odhiambo and Lameck Wagumba; inordinate delay in finalising investigations; dishonestly obtaining warrants from the Chief Magistrate's Court; and breach of Article 47 of the Constitution by failing to respond to issues raised by

the Applicant between December, 2013 and February, 2014.

44. The Applicant asserts that he has searched copies of the Kenya Gazette from 2003 to 2007 and has not come across a notice on the constitution of the inter-agency task force referred to by the Respondent. The Applicant contends that the claim of existence of such a task force is therefore not true.

45. The Applicant submits that the Respondent having admitted being a member of a task force is responsible for the documents taken from the bank.

46. The Applicant asserts that the warrants obtained from the Chief Magistrate's Court were obtained for an unspecified offence and even after protestation by the bank, the Respondent's officer by the name Henry Mwithia managed to take away documents from the bank without preparing an inventory.

47. The Applicant contends that any irregularities that may have arisen in regard to the operations of the bank could have been dealt with by the Central Bank of Kenya and Kenya Revenue Authority but not the Respondent.

48. The Applicant submits that no offence has been disclosed in the replying affidavit of the Respondent. The Applicant insists that it is not an offence for a customer to have multiple accounts. Further, that the account opening forms that the Respondent claims were missing were actually collected by the Respondent's officers.

49. It is the Applicant's case that information on the account opening forms are currently stored electronically, and the forms stored away and the need to refer to the physical copies of the account opening forms should not arise.

50. The Applicant criticises the Respondent for relying on information from other sources in investigating the bank. Reference is made to a statement in the interim report to the effect that one account received deposits amounting to Kshs.386, 548, 898 between 5th March, 2004 and 1st September, 2004 and that the bank acted on unsigned instructions. According to the Applicant, this proved unethical conduct on the part of the Respondent.

51. The Applicant asserts that no evidence has been adduced in these proceedings to show that the bank breached banking and tax laws.

52. It is the Applicant's case that the Respondent abused its powers and the orders sought should issue accordingly. The Applicant asserts that an order of mandamus should issue to compel the Respondent to discharge its statutory duties. In support of this submission, reliance is placed on the case of **Republic v Commissioner of Lands ex-parte Kithinji Murugu M'agere [2012] eKLR.**

53. It is the Applicant's case that the Respondent has failed in its duty of issuing a final report on the investigations and it cannot blame the alleged non-co-operation by the Applicant, the bank or its customers for failing to discharge its mandate. Further, the Respondent failed to respond to the Applicant's issues despite undertaking to do so within 30 days.

54. It is the Applicant's case that he needs to travel to the United Kingdom for medical purposes and the interim reports of the Respondent should be quashed as they are the basis for the denial of the travel documents. Further, that the Respondent's investigations were commenced into the alleged offence of money laundering which offence did not exist at the time.

55. The Applicant asserts that the remedies of certiorari and prohibition are available in this case as they are tools used by the court to supervise public bodies and inferior tribunals to ensure that they do not make decisions or undertake activities which are *ultra vires* their statutory mandate or which are irrational or otherwise illegal. The Applicant cited the decisions in **Republic v Kenya National Examinations Council ex parte Geoffrey Githinji and others, Civil Appeal No. 266 of 1996** and **Postoli v Kabale District Local Government Council and others [2008] 2 EA 300** in support of his application for the

orders of certiorari and prohibition.

56. The Respondent's position is that pursuant to its mandate under Section 45 (1) (d) of ACECA to investigate failure to pay taxes, fees, levies or charges, it obtained warrant to investigate the bank. It is the Respondent's case that the warrants were validly and legally obtained and had the Applicant had any issue with the validity of the warrants he would have immediately moved the court.

57. The Respondent submitted that under Section 7(1) of ACECA its functions include investigation of any matter that raises suspicion of the occurrence or imminent occurrence of conduct constituting corruption or economic crime and conduct liable to allow, encourage or cause conduct constituting corruption or economic crime. The Respondent is also mandated to assist any law enforcement agency of Kenya in the investigation of corruption or economic crime.

58. It is the Respondent's position that whatever it did was done within its statutory mandate and once investigations are complete a report will be forwarded to the Director of Public Prosecutions as required by the law.

59. On the Applicant's assertion that the Respondent abused its power by purporting to investigate money laundering which was not an offence known to the Kenyan law in 2004, the Respondent contends that its mandate should be construed in a broad and purposive manner. It is the Respondent's case that Kenya signed and ratified the United Nations Convention Against Corruption (UNCAC) on 9th December, 2003 and the said Convention states that corruption is linked to other forms of crimes, in particular organised crime, and economic crime, including money laundering.

60. The Convention requires a state party to institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions in order to deter and detect all forms of money laundering. The Respondent asserts that the preamble of ACECA mandates it to investigate corruption, economic crime and related offences. The Act also provides for matters incidental thereto and connected therewith.

61. The Respondent, though conceding through the replying affidavit that money laundering was not an offence in 2004, appears to suggest that it was investigating money laundering by virtue of the preamble of ACECA and UNCAC. This assertion must be addressed without any further delay.

62. A crime known as money laundering was indeed unknown to our laws at the time relevant to these proceedings. The Respondent could not have on the mere strength of a preamble to an Act of Parliament or a United Nations Convention purport to investigate money laundering which was not a crime at that time.

63. On the Applicant's claim that the Respondent carted away the bank's documents, the Respondent maintained that it only took copies of the documents disclosed in the replying affidavit. Further, that warrants to investigate were also obtained by other agencies namely the Kenya Police, Kenya Revenue Authority, Central Bank of Kenya and the Criminal Investigations Department. According to the Respondent, the inter-agency approach was envisaged and allowed by Section 12 of ACECA which mandates it to cooperate with other persons or bodies.

64. On the preparation and publication of the final report in regard to the investigation of the bank, the Respondent contends that the report is not ready as Kenya Revenue Authority is yet to finalise its investigations into tax evasion since the investigations have been met with resistance from the Applicant, the bank and the bank's customers. It is the Respondent's position that in any case Section 35 of ACECA requires it to make its report to the Director of Public Prosecutions.

65. The Respondent asserts that there are no hard and fast rules providing for the manner in which investigations are to be conducted so long as they comply with the law. It is the Respondent's position therefore that obtaining information from other sources was not in excess of its powers and jurisdiction.

66. On the accusation that the investigations have taken long to complete, the Respondent first claims that the Applicant, the bank and the bank's customers have not been cooperative. Secondly, it is the Respondent's position that the investigations are massive, technical, winded and they transcend national boundaries thus the time taken to conclude them. It is the Respondent's view that the law does not stipulate the time frame within which investigations are to be completed.

67. The Respondent denies that the investigations are illegal unlawful, malicious, unreasonable, arbitrary and driven by bad faith.

68. According to the Respondent, the Applicant's claim that his visa application was rejected because of the report has not been backed by the production of any document.

69. It is the Respondent's position that its action is not in breach of Article 47 of the Constitution as it is a law enforcement action and not an administrative action in the strict sense.

70. The Respondent denied knowledge of the existence of any interim report insisting that any report that needs to be made will be made to the Director of Public Prosecutions. Further, that in any case what is referred to as a report is just but information that does not convey any decision at all.

71. It is the Respondent's submission that an order of mandamus cannot issue against it to release the investigation report as the law only allows it to do so upon completion of investigations and the report is to be given to the Director of Public Prosecutions. The Respondent cited among others the decisions in **Republic v Commissioner of Lands and another ex-parte Kithinji Murugu M'agere Nairobi H.C. Misc. Application No. 395 of 2012** and **Republic v Registrar of societies & 5 others ex-parte Kenyatta & 6 others Nairobi HCMCA No. 747 of 2006** in support of the proposition that an order of mandamus is discretionary and is only issued to compel the performance of a statutory duty.

72. It is the Respondent's case that it has not refused to forward the investigation report to the Director of Public Prosecutions as investigations are ongoing. Further, that an order of mandamus will not issue to compel the performance of something where there is no evidence of refusal by a public body to perform a duty. The case of **Republic v Kenya Forest Service ex parte Joseph Kakore Ole Mpoe & 5 others [2010] eKLR** is cited in support of this proposition.

73. As for the prayers for orders of certiorari and prohibition, it is the Respondent's position that granting the orders will emasculate and fetter it in the performance of its legal mandate.

74. It is the Respondent's case that as per Section 9(3) of the Law Reform Act, Cap 26 and Order 53 Rule 2 of the Civil Procedure Rules, 2010, an application for leave to commence judicial review proceedings in respect of an order of certiorari should not be granted unless the application for leave is made not later than six months after the date of the decision which is the subject of the application for leave.

75. It is the Respondent's case that the matters complained of by the Applicant occurred between 2003 and 2008 and orders of certiorari cannot issue since these proceedings were commenced in 2014 almost twelve years after the events in question. Further, that the Applicant did not even file an application for extension of time.

76. In support of the submission that an order of certiorari cannot issue in an application brought outside six months from the date of the occurrence of the impugned action or decision, the Applicant cited the decision in **Eldoret E & L Court JR Misc. Application No. 5 of 2014 Rosaline Tubei and 8 others v Patrick K. Cheruiyot and 5 others [2014] eKLR.**

77. The Respondent asserts that equity does not aid the indolent. Reliance is placed on the decision in **Republic v Mwangi Nguyai and 3 others ex-parte Haru Ngugai, Nairobi H.C. Misc. Application No. 89 of 2008** in support of this legal maxim.

78. The Respondent urged this Court to dismiss the Applicant's case.

79. From the pleadings and submissions of the parties, I make the following findings. It is indeed correct, as submitted by the Respondent, that an application for leave to apply for an order of certiorari should not be made later than six months from the date of the occurrence of the action or decision which is the subject of the judicial review proceedings.

80. The Applicant alleges that the interim report which he seeks to quash continues to affect him to date. He claims that when he applied for visa to travel to the United Kingdom, he was denied the same on the ground he was being investigated for corruption and economic crimes. If the Applicant's averment is correct, then it means the repercussions of the report remain alive to date and one cannot confine the report to the date of its authorship in November, 2004. In my view, the remedy of certiorari would still be available to the Applicant.

81. In the case of **Council for Civil Service Unions v Minister for Civil Service [1985] A.C. 374,** it was observed that judicial review is available where there is illegality, irrationality or procedural impropriety. In that case Lord Diplock stated that:

> **"Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety."……..**
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> **By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.**
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> **By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system.**
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> **I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice."**

82. Although the Respondent has denied the existence and authorship of the interim report which is the subject of these proceedings, the Applicant has pointed out that not only is the report available on the Internet but it has been exhibited in court cases concerning the closure of the bank.

83. The Applicant exhibited two interim reports under the names of one Henry Mwithia. The first report is dated 12th November, 2004 and the second one is dated 30th November, 2004. Both are titled: AN INTERIM REPORT BY THE TASK FORCE INVESTIGATING ECONOMIC CRIMES BY CHARTERHOUSE BANK AND RELATED COMPANIES.

84. Inside the reports it is indicated that one of the objectives of the task force was to investigate Creative Innovations Ltd, Sailesh Prajapati, D. Shah, Kariuki Muigua & Co. (Clients' Accounts) W.E. Tilley (Muthaiga) Ltd, Paolo Sattanino and Tusker Mattresses Ltd with a view to identifying potential tax evasion, illegal money transfers or violation of the Banking Act with the connivance of Charterhouse Bank Ltd. The task force was also to establish whether Charterhouse Bank Ltd aided the said companies

in committing economic crimes and whether the companies were in a network for committing economic crimes.

85. The reports also indicate the findings in respect of the accounts held by each of the companies, the recommended action and the likely charges. No specific mention is made about Charterhouse Bank Ltd.

86. The reports do not disclose the members of the task force but they disclose that the raids on Charterhouse Bank Ltd, Tusker Mattresses, Creative Innovations Limited and W.E. Tilley (Muthaiga) Ltd were led by KACC backed by officers from Kenya Revenue Authority and Banking Fraud Investigations Department. That means Kenya Revenue Authority and Central Bank of Kenya were part of the team.

87. What does the Applicant intend to achieve through these proceedings? He seeks a final report into the investigations or any investigations report into the investigations mentioned in the cited interim reports; he prays that the Respondent discloses the source of its authority to carry out the investigations; he wants the production of computer data, software and account opening forms delivered to the Respondent by Peter George Odhiambo and/or Lameck Wangumba between 2003 and 2008; he wants the Respondent to return to him all the documents collected from the bank by the Respondent between 2004 and 2006; and he also wants the Respondent to produce evidence that the bank and himself were involved in offences of money laundering, tax evasion and corruption between 2003 and 2008.

88. In essence, the Applicant seeks to obliterate the investigations into the bank. Does he have the mandate to speak for the bank? The answer is in the negative. The bank is under statutory management and the Applicant ceased being its Managing Director in 2006. Even assuming that he could sue on behalf of the bank, he has not exhibited any document granting him the authority to commence these proceedings. The orders he seeks are meant to give the bank a clean bill of health.

89. The Applicant did not sue the correct party. He concurs with the Respondent that the mandate for placing any bank under statutory management belongs to the Central Bank of Kenya. He also agrees with the Respondent that it is the Central Bank of Kenya which placed the bank under statutory management. Why did he not make the Central Bank of Kenya a Respondent?

90. The Applicant claims that the Respondent's reports are what made the Central Bank of Kenya place it under statutory management. Pursuing his argument to its logical conclusion would mean that the Central Bank of Kenya merely acted on the Respondent's reports without conducting its own inspection. Such state of affairs would amount to abuse of power by the Central Bank of Kenya. The Central Bank of Kenya was therefore a necessary party to these proceedings.

91. Was the establishment of a joint task force illegal? The Applicant says it was. He has not placed any evidence before the court to support this assertion. The laws establishing the various investigative agencies do not expect the said agencies to work in isolation. Cooperation between state agencies is important in achieving the objective of fighting crime and ACECA in particular permits cooperation.

92. These proceedings although made to appear as targeting the Respondent's alleged delay in concluding its investigations are actually directed at the decision of the Central Bank of Kenya to close the bank.

93. The Respondent indicated that the decision to close the bank was the subject of several civil suits including **Nairobi High Court (Milimani Commercial Courts) Civil Case No. 329 of 2006, Charterhouse Bank Ltd v Central Bank of Kenya & 2 others.** The Applicant does not dispute the existence of these cases. His answer is that he was not a party to any of those matters. The fact that he was not a party to these matters does not change the fact that the question of the closure of the bank has been the subject of litigation before. The answers the Applicant seeks about the legality of the Respondent's raids on the bank's premises and the fate of the documents collected from the bank lies in those cases. He could have applied to join the cases as an interested party.

94. I agree with the Applicant that ten years is indeed a long time to complete investigations into a matter however complex the investigation is. In the case before this court, however, it has been shown by the

Respondent that the investigation into the bank was delayed by orders obtained by the bank and its customers halting the investigation. The Applicant cannot turn around to blame the Respondent for the consequences of the actions of the bank and its customers.

95. Finally, the Applicant claimed that the interim investigations reports which are the subject of these proceedings have led to his being denied visa to travel to the United Kingdom. When the Respondent asked for evidence, the Applicant's answer was that the denial was verbal.

96. The Respondent submitted that the Applicant did not produce any evidence to show that he was denied permission to travel to United Kingdom. It is not enough for a party to make an allegation in court papers. Where there is evidence to back up an assertion, such evidence should be adduced. In the case before this court the Applicant has not produced any evidence that he applied to travel to the United Kingdom and his application was rejected. He has not even adduced medical evidence to show that his doctors had indeed recommended that he travels to the United Kingdom for further treatment. It is easy to agree with the Respondent that the alleged denial of visa was only a ruse meant to activate a matter that is being handled before other courts.

97. In summary I find that the Applicant has failed to establish grounds for grant of any of the orders sought. His application fails and the same is dismissed with no orders as to costs.

Dated, signed and delivered at Nairobi this 24th day of Feb., 2016

W. KORIR,

JUDGE OF THE HIGH COURT