



**REPUBLIC OF KENYA**  
**IN THE HIGH COURT OF KENYA AT NAIROBI**  
**JUDICIAL REVIEW DIVISION**  
**JR CASE NO. 129 OF 2015**

REPUBLIC .....APPLICANT

VERSUS

THE NATIONAL ASSEMBLY

COMMITTEE OF PRIVILEGES.....1<sup>ST</sup> RESPONDENT

THE CLERK OF THE NATIONAL ASSEMBLY.....2<sup>ND</sup> RESPONDENT

THE ATTORNEY GENERAL .....3<sup>RD</sup> RESPONDENT

**Ex-parte**

**HON. ABABU NAMWAMBA**

**JUDGEMENT**

1. The ex-parte Applicant, Hon. Ababu Namwamba is a Member of the National Assembly for Budalangi Constituency and the Secretary General of the Orange Democratic Movement Party of Kenya. The 1<sup>st</sup> Respondent, the National Assembly Committee of Privileges is one of the committees of the National Assembly. The 2<sup>nd</sup> Respondent, the Clerk of the National Assembly represents the National Assembly and carries out its administrative duties. The 3<sup>rd</sup> Respondent is the Attorney General who is the chief legal advisor of the Government of Kenya.

2. The Applicant was the immediate former chairman of the Public Accounts Committee (PAC) of the National Assembly. On 5<sup>th</sup> March, 2015 the Speaker of the National Assembly tasked the Committee on Powers and Privileges (the Committee) to investigate allegations made by the members of PAC against fellow members with a view to establishing if the allegations amounted to a breach of the privileges of the National Assembly. The Committee came up with a report dated 31<sup>st</sup> March, 2015 which was discussed and adopted by the National Assembly on 14<sup>th</sup> April, 2015.

3. On 20<sup>th</sup> April, 2015 the Applicant moved this court and obtained leave to commence these judicial review proceedings. Through the notice of motion application dated 28<sup>th</sup> April, 2015 the Applicant prays for orders:

**“1. THAT the Applicant be granted an order of certiorari to bring into this court and**

quash the ruling of the speaker made on the 5<sup>th</sup> March 2015 setting in motion the whole process by purporting to suspend the Public Accounts Committee for 21 days and further quash all decisions and recommendations made by the Respondents in particular the 1<sup>st</sup> Respondent in its report dated 31<sup>st</sup> March 2015 presented and duly adopted by the 2<sup>nd</sup> Respondent on the 14<sup>th</sup> April 2015 in particular recommendation numbers 320, 321 and 323 and any further measures initiated and concluded thereafter by the National Assembly.

2. THAT the Applicant be granted an order of certiorari to bring into this court and quash the decision made by the Respondents to implement the report of the 1<sup>st</sup> Respondent that purported to dissolve and constitute the Public Accounts Committee dis-barring five current members of the Public Accounts Committee from being eligible to be considered for fresh nomination into the re-constituted Public Accounts Committee.

3. THAT the Applicant be granted an order of certiorari to bring into this court and quash and expunge from all records, including the Handsard, minutes and report of the National Assembly and its Committees all references and inferences adverse to the Applicant based on the false and unsubstantiated allegations made by Hon James Bett, Hon Omondi Anyanga, Hon Ahmed Abbas and Hon Cecily Mbarire.

4. THAT the Applicant be granted an order of prohibition directed to the Respondents in particular the 2<sup>nd</sup> Respondent prohibiting and restraining it from implementing the report dated 31<sup>st</sup> March 2015 and as adopted for implementation by the 2<sup>nd</sup> Respondent on the 14<sup>th</sup> April 2015 in particular recommendation numbers 320, 321 and 323 of the report purporting to dissolve and reconstitute the Public Accounts Committee and dis-barring five current members of the Public Accounts Committee from being eligible for fresh nomination into the reconstituted Public Accounts committee, including any other proceedings and resolutions adopted thereafter.

5. THAT the Honourable Court be pleased to grant such other or further relief as it may deem fit in the circumstances.

6. THAT the costs of these proceedings be borne by the 2<sup>nd</sup> Respondent and or as may be ordered by the court.”

4. The statutory statement filed in support of the chamber summons application for leave on 20<sup>th</sup> April, 2015 discloses that the Applicant seeks relief on the following grounds:

“1. THAT the proceedings, findings and recommendations in the said report are a gross travesty of justice as they have offended all possible principles of law, the Constitution and Parliamentary Standing Orders, practice and customs of the Kenya National Assembly.

2. THAT the 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ conduct in the process leading to the decision and adoption of the said report is manifestly malicious, unlawful, unconstitutional, unprocedural, inconsistent, contradictory and *ultra vires* the provisions and procedure of the law in particular the Constitution of Kenya, 2010 and the National Assembly Standing Orders, 2<sup>nd</sup> edition, in particular Standing Orders 52, 91(2), 107 and 108, 173 and 176, 183 and 205, as well as the National Assembly Powers and Privileges Act, the Constitution and established practices, customs and traditions of the Kenya National Assembly. The process and the report are both an unmitigated illegality.

3. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents’ decisions are unfair, discriminatory, arbitrary, inconsistent, contradictory, malicious and capricious and offend the presumption of innocence as enshrined in the Constitution.

**4. The Respondents' decisions are irrational, an abuse of power, oppressive, punitive, grossly unlawful, actuated by political malice and vendetta and against the legitimate expectation of the people of Kenya and the Applicant herein as the immediate Chairman of the Public Accounts Committee.**

**5. The Respondents' decisions are made for an illegal, improper motive and or for selective extraneous purpose failing to take into account relevant factors and provisions of the law on due process on the right to a just and fair hearing."**

5. Through his verifying affidavit sworn on 20<sup>th</sup> April, 2015, the Applicant elaborates on the grounds in support of his application by averring that the report of the Committee in demanding that members withdraw and apologise for information on which the Ethics and Anti-corruption Commission (EACC) had already commenced investigations would amount to interference in the work of an independent constitutional commission.

6. The Applicant deposed that although the Committee had powers to sanction individual members in accordance with the National Assembly (Powers and Privileges) Act, Cap 6 and the Standing Orders of the National Assembly, it had exceeded its powers by purporting to sit in judgement or to punish another committee of the National Assembly. Further, that the Committee did not have power to recommend the dissolution of another committee or to bar any member of the National Assembly from being considered for appointment to a committee.

7. The Applicant's case is that the recommendations of the Committee usurped the power vested on political parties and the National Assembly Committee on Selection by Standing Orders 173 and 176 to appoint or remove a member from any committee.

8. In support of these averments, the Applicant referred to recommendations 320, 321 and 323 in which the Committee in its report made recommendations as follows:

**"320. THAT, the House resolves to rescind its resolutions of 16<sup>th</sup> May, 2013 and 8<sup>th</sup> October, 2013 on the appointment of Members to the Public Accounts Committee and requires the Committee on Selection to nominate, within seven days, for consideration by the House, another list of membership of the Public Accounts Committee.**

**321. THAT, the House resolves that, in nominating the list under paragraph 320 the Committee on Selection shall not include-**

**(i) the Members of the Committee of Privileges, including the co-opted Members, who served in the Committee during the Inquiry on the claims of breach of privileges on the membership of Public Accounts Committee, so as not to benefit from their recommendation to dissolve the Public Accounts Committee; and**

**(ii) The following Members of the Public Accounts Committee who made allegations against others, and failed to substantiate their allegations within the period required under Standing Order 91-**

**(a) The Hon. Ababu Namwamba, MP;**

**(b) The Hon Ahmed Abass, MP;**

**(c) The Hon James Bett, MP;**

**(d) The Hon Omondi Anyanga, MP; and**

**(e) The Hon Cecily Mbarire, MP.**

322. ....

**323. THAT, and in order to preserve the ongoing work of the Committee, the House orders that the Committee on Selection nominates at least six of the previous Members of the Public Accounts Committee (from either side of the Majority and Minority coalitions) and that papers, including draft reports, minutes, Hansard record and briefs belonging to the previous Public Accounts Committee are safeguarded for handing-over to the reconstituted Committee.”**

9. According to the Applicant, the said recommendations have created other procedures of establishing committees and handling the business of the National Assembly not backed by the Standing Orders or other practices of the House. It is the Applicant’s position that the establishment and operations of the PAC can only be guided by Standing Order 205.

10. The Applicant averred that the Committee erred by recommending imposition of punishments and procedures unknown to the Standing Orders and applying the same retroactively.

11. In support of this averment, the Applicant referred to page 14 of the Committee’s report in which the Committee states:

**“X. SANCTIONS PRESCRIBED**

**315. In dealing with the matters before it and pursuant to provisions of section 10 of the National Assembly (Powers and Privileges) Act, Cap 6, Committee of Privileges prescribed the following sanctions against the respective offences-**

**(i) discussing Committee proceedings in the media – Demand for apology at the Bar of House; Repeat offender: suspension for 1 to 3 days and demand for apology at the Bar.**

**(ii) failure to make substantiation within the period required under the Standing Orders - reprimand at the Bar by the Speaker and offer apology to the House; Repeat offender: suspension for 4 to 7 days**

**(iii) a combination of both failure to make substantiation within the period required under the Standing Orders and, discussing Committee proceedings in the Media – Demand for apology and Reprimand at the Bar.**

**(iv) failure to apologise under (i) or (iii): suspension for 3 days.”**

12. It is the Applicant’s case that a sanction known as ‘apology at the bar’ does not exist in the Standing Orders.

13. The Applicant attacks the report of the Committee for being contradictory. According to the Applicant, at paragraph 325 on page 117 the Committee claims that it did not investigate bribery/corruption allegations due to lack of capacity and mandate but goes ahead to dismiss his audio recording evidence thus passing a verdict on the allegations of corruption.

14. The Applicant’s position is that the Committee acted in a discriminatory manner by failing to demand apology from some of the members who made unsubstantiated allegations in a PAC meeting of 26<sup>th</sup> February, 2016. Also, that the report was contradictory and unfairly vindictive by finding that the allegations by the members were unsubstantiated but at the same time punishing some members and referring the matter for further investigations.

15. It is the Applicant’s case that the sanctions provided by Standing Orders 91(2), 107 and 108 are limited to withdrawal and apology, reprimand and suspension for up to seven days but do not include the dissolution of a committee.

16. The Applicant averred that the Committee did not disclose to him any offence for which he was charged and the Chairman of the Committee in fact assured him that there was no accuser or any accusations against him. It is the Applicant's case that the Committee was using the National Assembly to remove him as the Chairperson of the PAC in clear breach of Standing Order 193.

17. The Applicant's position is that although Article 125 of the Constitution vests upon Parliament and its committees the powers of the High Court as regards calling of witnesses and handling of the evidence, the Committee had handled the evidence in his case in a manifestly casual, cavalier and incompetent manner without any regard to the constitutional standards.

18. According to the Applicant, the composition of the Committee was unprocedural and illegal as three 'strangers' namely Joseph Lekuton, Mohamed Elmi and Ali Wario were allowed to sit as special members of the Committee. The Applicant posits that the said 'strangers' were intended to sway the decision of the Committee.

19. It is the Applicant's deposition that on 14<sup>th</sup> March, 2015 when the report was being discussed in the National Assembly, he was denied the opportunity to participate in the discussion of the report of the Committee.

20. It is the Applicant's position that the respondents' actions amount to errors of fact, denial of the right to a fair trial, *ultra vires*, Wednesbury unreasonable, bad faith and breach of legitimate expectation. The Applicant relied on the decisions in **Republic v Judicial Service Commission of Inquiry into Goldenberg Affair & 2 others ex-parte George Saitoti [2006] eKLR** and **Immanuel Masinde Okutoyi & others v National Police Service Commission & another [2014] eKLR** to demonstrate that judicial review is available on the cited grounds.

21. The 1<sup>st</sup> and 3<sup>rd</sup> respondents did not participate in these proceedings though duly served. The 2<sup>nd</sup> Respondent opposed the application through Grounds of Opposition dated 4<sup>th</sup> June, 2015 as follows:

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

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

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

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

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

**6. The membership of committees of Parliament is a political question to be determined by political parties and the National Assembly in accordance with its rules and this Honourable Court is not the proper forum to determine such questions.**

**7. The National Assembly conducts its affairs in accordance with the Constitution, its Standing Orders and its customs and traditions of procedure. The National Assembly makes**

its Standing Orders and can by resolution of a majority of members suspend, either temporarily or permanently, the application of any particular Standing Order.

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

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

10. **In any event and without prejudice to the foregoing, the Application has been overtaken by events as a new Chair of the Public Accounts Committee has already been nominated and taken up his duties as the Chair of the Committee and as such, this Court will be engaging in an academic exercise by entertaining the present Application.**

11. **Judicial review is strictly limited to a review of the procedure of a public body; however the Application herein seeks for this Honourable Court to delve into the merits of the decision of Committee of Privileges of the National Assembly and therefore this Honourable Court ought to decline from sitting as an appellate court from the decision of a committee of the National Assembly.**

12. **The application herein lacks merit.”**

22. The 2<sup>nd</sup> Respondent also filed submissions dated 9<sup>th</sup> July, 2015. Through the submissions, it is the 2<sup>nd</sup> Respondent's case that the Applicant has not met the requirements for invoking this court's jurisdiction under Article 165 of the Constitution. The 2<sup>nd</sup> Respondent's view is that in order for this court to engage its jurisdiction to inquire into acts of the National Assembly pursuant to its powers and obligations under Chapter Eight of the Constitution, the Applicant must establish that there is a violation or threatened violation of the Constitution.

23. It is the 2<sup>nd</sup> Respondent's assertion that errors of fact, right to a fair trial, *ultra vires*, unreasonableness and breach of legitimate expectation cannot be said to amount to a violation of the Constitution. It is the 2<sup>nd</sup> Respondent's position that this court therefore lacks jurisdiction to entertain the Applicant's case. In support of the argument the 2<sup>nd</sup> Respondent cited Article 165(3)(b) and (d) of the Constitution; **Speaker of the Senate & another v Attorney General & 4 others [2013] eKLR; Marbury v Madison, 5 U.S. 137 (1803); Nairobi H.C. Petition No. 227 of 2013, Okiya Omtatah Okioti & 3 others v Attorney General & 5 others [2014] eKLR; and Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd [1989] KLR 1.**

24. The 2<sup>nd</sup> Respondent asserted that although the courts can examine and even impeach parliamentary proceedings, the threshold for the exercise of such power has not been met in this case. It is the 2<sup>nd</sup> Respondent's case that the actions that are the subject of these proceedings are matters relating to the internal procedures of the National Assembly which is mandated to exercise control over its internal proceedings and it ought to be allowed to regulate its own affairs without undue interference. This states of affairs according to the 2<sup>nd</sup> Respondent, is firmly rooted in the Constitution as provided by Articles 117 and 124.

25. The 2<sup>nd</sup> Respondent submitted that the privilege of Parliament is indeed protected by the National Assembly (Powers and Privileges) Act, Cap 6. According to the 2<sup>nd</sup> Respondent, it is necessary to guard the work of Parliament in order to enable it to discharge its mandate. The Applicant cited the decision of the Privy Council in the case of **Prebble v Television New Zealand Limited [1995] 1 AC 32** in which a statement found in Blackstone's Laws of England, 17<sup>th</sup> Ed [1830], Vol. 1, P.163 was cited. The statement is to the effect that **“the whole of the law and custom of Parliament has its original from**

**this one maxim, ‘that whatever matter arises concerning either House of Parliament, ought to be examined, discussed, and adjudged in that House to which it relates, and not elsewhere’ ”.**

26. The 2<sup>nd</sup> Respondent also urged this court to follow the statement by the Supreme Court in **Speaker of the Senate & another v Attorney General & 4 others [2013] eKLR** that “[t]his Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.”

27. Other authorities cited in support of the caution to the courts not to unnecessarily interfere with the functions of Parliament are **Commission for the Implementation of the Constitution v National Assembly of Kenya & 2 others [2013] eKLR**; **Okiya Omtatah Okoiti v the Attorney General and 5 others, Nairobi H.C. Petition No. 227 of 2013**; **Patrick Ouma Onyango & 12 others v Attorney General & 2 others [2005] 2KLR**; and **Blackburn v Attorney General [1971] 1 WLR 1037**.

28. It is the 2<sup>nd</sup> Respondent’s case that Parliament is mandated to dispense with the application of Standing Orders. Erskine May’s Treatise on the Law, Privileges, Proceedings and Usage of Parliament and Standing Order 256 are cited in support of this argument.

29. The 2<sup>nd</sup> Respondent posits that the matter before this Court is not amenable to judicial review since it seeks a review of the merits of the investigation by the Powers and Privileges Committee of the National Assembly into the PAC of the same House. The 2<sup>nd</sup> Respondent asserts that this court lacks the tools to delve into what is purely a political question.

30. In this matter, the Applicant has repeatedly complained about the breach of the law and the Constitution. He has, however, failed to adduce any evidence to support his assertions. He never particularised in his pleadings the provisions of the Constitution allegedly violated and in what manner those provisions were breached. His claim in so far as it relates to the violation of the Constitution is not pleaded sufficiently to assist this court in making a determination on the alleged violations. It is important for a party to outline the particular provisions of the Constitution that have been violated or threatened to be violated - see **Mumo Matemu v Trusted Society of Human Rights Alliance and 5 others, Nairobi Civil Appeal No. 290 of 2012**.

31. It is, however, appreciated that the Applicant clearly pointed out the Standing Orders of the National Assembly that he claims were disregarded by the 1<sup>st</sup> and 2<sup>nd</sup> respondents and proceeded to demonstrate why he believes that the cited Standing Orders were breached.

32. In the circumstances, this matter boils down to whether there was a breach of the Standing Orders of the National Assembly, and if so, whether such violation merits the invocation of the judicial review jurisdiction of this court.

33. The authorities cited by the 2<sup>nd</sup> Respondent all confirm that this court is mandated to ensure that the activities of Parliament are in compliance with the Constitution and the laws of the land. In that regard I only need to quote the decision of the Supreme Court in **Speaker of the Senate & another v Attorney General & 4 others [2013] eKLR** where the Court stated at paragraph 55 that:

**“It is clear to us that it would be illogical to contend that as the Standing Orders are recognised by the Constitution, this Court, which has the mandate to authoritatively interpret the Constitution itself, is precluded from considering their constitutionality merely because the Standing Orders are an element in the “internal procedures” of Parliament. We would state, as a legal and constitutional principle, that Courts have the competence to pronounce on the compliance of a legislative body, with the processes prescribed for the passing of legislation.”**

34. The Court continued at paragraph 61 thus:

**“It emerges that Kenya’s legislative bodies bear an obligation to discharge their mandate in accordance with the terms of the Constitution, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation.”**

35. As earlier stated, the Supreme Court did, however, caution that **“institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.”**

36. Failure to comply with the rules regulating the execution of business by a legislature will surely attract the courts’ intervention. Parliament like any other constitutional organ must play by the rules set for it by the Constitution. Where it has made rules to guide its operations, it ought to comply with such rules.

37. In the case of **Moyo & others v Zvoma & another, (SC 28/10) [2011] ZWSC (10 March 2011)**, the Supreme Court of Zimbabwe overturned the election of the Speaker of Parliament on the ground that the Speaker had not been elected through secret ballot as dictated by the Constitution and the Standing Orders.

38. In the matter before me, the Speaker of the National Assembly engaged the Committee to investigate the conduct of the members of the PAC of which the Applicant was the Chairperson.

39. The Committee is a creature of Section 10 of the National Assembly (Powers and Privileges) Act, Cap 6 which provides that:

**“10. Committee of Privileges**

**(1) There shall be established a committee, to be known as the Committee of Privileges, consisting of the Speaker and ten other members of the Assembly under the chairmanship of the Speaker.**

**(2) The members of the Committee of Privileges other than the Speaker shall be nominated by the Sessional Committee of the Assembly.**

**(3) The quorum of the Committee of Privileges established under subsection (1) shall be six including the chairmen, but otherwise, subject to this Act, the Committee shall regulate its own meetings and its own procedure.**

**(4) The Committee of Privileges shall, either of its own motion or as a result of a complaint made by any person, inquire into any alleged breach by any member of the Assembly of the Code of Conduct issued under section 9, or into any conduct of any member of the Assembly within the precincts of the Assembly (other than the Chamber) which is alleged to have been intended or likely to reflect adversely on the dignity or integrity of the Assembly or the member thereof, or to be contrary to the best interests of the Assembly or the members thereof.**

**(5) The Committee of Privileges shall, after such inquiry as is referred to in subsection (4), report its findings to the Assembly together with such recommendations as it thinks appropriate.**

**(6) The Assembly shall, in accordance with rules made by it (which rules need not be published in the *Gazette*), consider the report and recommendations thereon and may take such disciplinary action against the member concerned as may be provided by those rules.**

**(7) Any disciplinary action such as is referred to in subsection (6) may include suspension**

**from the service of the Assembly.”**

40. On the other hand, the PAC is a creature of Standing Order 205 which states that:

**“Public Accounts Committee**

**205 (1) There shall be a select committee to be designated the Public Accounts Committee.**

**(2) The Public Accounts Committee shall be responsible for the examination of the accounts showing the appropriations of the sum voted by the House to meet the public expenditure and of such other accounts laid before the House as the Committee may think fit.**

**(3) The Public Accounts Committee shall consist of a Chairperson who shall be a Member elected by the Committee from amongst the members of the Committee nominated from the minority Party or Coalition of parties, and not more than twenty six other members.**

**(5) In the Membership of the Public Accounts Committee, the Majority party or coalition of parties shall have a majority of one.**

**(6) The Public Accounts Committee constituted immediately following the general election shall serve for a period of three calendar years and that constituted thereafter shall serve for the remainder of the parliamentary term.**

**(7) The Public Accounts Committee shall elect a Vice-Chairperson from amongst its members.”**

41. As correctly submitted by the Applicant, appointment into and removal from the membership of a select committee is the preserve of the Committee on Selection upon consultation with parliamentary parties – see Standing Order 173(1). The Applicant is also correct that the discharge of a member from a select committee is the responsibility of the nominating parliamentary party. The notice to the Speaker that a member is to be discharged from a select committee is to be in writing – see Standing Order 176. Standing Order 193 provides for the removal of the chairperson or vice- chairperson of a committee through a resolution supported by a majority of the members of the particular committee.

42. The Standing Orders are therefore self-sufficient on the appointment and removal of a member, vice-chairperson or chairperson of a select committee.

43. However, the already reproduced Section 10(6) of the National Assembly (Powers and Privileges) Act, Cap 6 gives the National Assembly powers to take such disciplinary action against the member concerned as may be provided by the rules made under that sub-section. Such disciplinary action may include suspension from the service of the Assembly.

44. In the case of the Applicant, the National Assembly was moved by the Leader of the Majority to inquire into the conduct of the members of the PAC. The members of the National Assembly agreed that the trading of words amongst the members of the PAC on their integrity was likely to reflect adversely on the dignity or integrity of the Assembly.

45. The work of the Committee is governed by the National Assembly (Powers and Privileges) Act, Cap 6. Its mandate is to inquire into any alleged breach of the Code of Conduct or the conduct of any member of the National Assembly. In considering the report of the Committee, the National Assembly will act in accordance with rules made by it and take disciplinary action against the member concerned as may be provided by those rules.

46. The Applicant did raise a question of the composition of the Committee. He alleged that three ‘strangers’ participated in the proceedings of the Committee. This averment was not controverted and there is indeed evidence in form of the Handsard record that Hon. Elmi, Hon Lekuton and Hon. Ali Wario

were picked to join the Committee.

47. The use of the term ‘strangers’ by the Applicant in reference to fellow members is perturbing for the National Assembly (Powers and Privileges) Act, Cap 6 clearly defines a ‘stranger’ at Section 2 as anybody who is not a speaker, a member of the Assembly or an officer of the Assembly. Be that as it may, the Applicant is indeed correct that the membership of the Committee is defined by an Act of Parliament. Although Standing Order 195 allows any member to attend and participate in a meeting of any committee of the House such a member is not allowed to vote on any matter before a committee in which he is not a member.

48. The Committee cannot be equated to a select committee. Unlike select committees which are products of the Standing Orders, the Committee owes its existence to the National Assembly (Powers and Privileges) Act, Cap 6. According to the report (paragraph 45; page 30), Mohamed Elmi, Joseph Lekuton and Ali Wario were co-opted members. Section 10(3) allows the Committee to regulate its own meetings and procedures. The co-opting of others members cannot be faulted without reference to the procedures of the Committee.

49. It is appreciated that the Committee is indeed empowered to make any recommendations it deems fit. Those recommendations must however be lawful. A recommendation for removal from the service of the Assembly would, in my view, include removal from a committee. The powers vested in the members of the Committee by the National Assembly (Powers and Privileges) Act, Cap 6 are special powers meant to enable the Assembly regulate its business smoothly.

50. Had there been no room for special sanctions as provided by the National Assembly (Powers and Privileges) Act, Cap 6, then it would be easy to agree with the Applicant that the action against him flew in the face of Standing Orders 107 and 108 which provide for specific sanctions and Standing Orders 193 and 176 which provide for removal from a committee of the Assembly. Standing Order 193 is clear that a chairperson or vice-chairperson can only be removed by members of a particular committee. Standing Order 176 states that a committee member can only be discharged by the sponsoring parliamentary party.

51. The 2<sup>nd</sup> Respondent did submit that Standing Order 256 gives the National Assembly the authority to suspend the application of any of the Standing Orders. Standing Order 256 which provides for exemption of business from Standing Orders states:

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

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

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

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

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

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

52. The said Standing Order actually allows the Assembly to make a decision to exempt the business of the House from application of certain Standing Orders.

53. There was also a complaint that the decision of the Speaker to suspend the operations of the PAC for a period of twenty one days pending the submission of a report by the Committee was irregular. It appears that there is no provision in the Standing Orders allowing for such drastic action. Standing Order 1 gives the Speaker leeway to decide any procedural question where a matter is not expressly provided for by the Standing Orders or other orders.

54. The Applicant submitted that the decision of the Committee usurped the role of the EACC which had already commenced investigations into the matter. This assertion does not hold water as the Committee was clear in its report that it had no mandate nor capacity to investigate allegations of corruption. The Committee clearly left the matter of alleged corruption for EACC and other investigative agencies to deal with.

55. It is important to appreciate that committees are key to the operations of the National Assembly and strict compliance with Standing Orders is necessary in the appointment and removal of members of such committees. The procedure used to remove the Applicant and the other members of the PAC by the National Assembly should be used sparingly for it can easily turn into a dangerous weapon for manipulating the operations of the Assembly. It is not a procedure to be resorted to for no good cause.

56. The National Assembly should at all times adhere to its procedures. This requirement was stressed by the Ugandan Court in the case **Oloka-Onyango & 9 others v Attorney General, Uganda Constitutional Court Petition No. 8 of 2014** when it stated that **“Parliament as a law making body should set standards for compliance with the constitutional provisions and with its own Rules.”**

57. The same message was repeated at paragraph 172 of the judgment in the case of **Coalition for Reform and Democracy (CORD) & 2 others v Republic of Kenya & 10 others [2015] eKLR** when the Court observed that:

**“In our view, the principle that emerges from the above decisions read together with Article 124 (1) of the Constitution is that in a jurisdiction such as ours in which the Constitution is Supreme, the Court has jurisdiction to intervene where there has been a failure to abide by Standing Orders which have been given Constitutional underpinning under the said Article. However, the Court must exercise restraint and only intervene in appropriate instances, bearing in mind the specific circumstances of each case.”**

58. Having said so, I note that the report of the Committee is detailed. It shows that the laid down procedure was followed in placing the matter before the Committee. At paragraph 54 (Page 32) it is indicated that on 4<sup>th</sup> March, 2015, the Leader of the Majority Party raised a question and sought guidance on the matter of privilege regarding the accusations and counter-accusations of bribery amongst the members of the PAC.

59. On 5<sup>th</sup> March, 2015 the Speaker made a Communication from the Chair establishing that the accusations and counter-accusations of bribery constituted a question of breach of privileges and/or Code of Conduct by members of Parliament. The Speaker then committed the matter for inquiry before the Committee.

60. The Committee considered the practices of other commonwealth parliaments of the United Kingdom, New Zealand, Canada and India in conducting its proceedings. In making its recommendations on the sanctions to apply, the Committee noted that the National Assembly (Powers and Privileges) Act, Cap 6 gave the Committee the discretion to make recommendations as it thinks fit.

61. At paragraph 292 (pages 103 & 104), the Committee noted that:

**“The Committee observed that Parliamentary practice in comparative jurisdictions in the Commonwealth such as New Zealand and Canada, sanctions for breach of privilege and/or the code of conduct include –**

- (a) demand for an apology to be issued at the Bar;**
- (b) censure or rebuke by the House;**
- (c) suspension or expulsion from Committees;**
- (d) suspension from the House;**
- (e) expulsion from the House;**
- (f) resolution for the prosecution at law of errant Members;**
- (g) Impeachment (mostly for Speaker and Members who are also Cabinet Ministers);**
- (h) exclusion from the precincts of the House (mostly invoked on strangers or to members when the House and Committees are on recess);**
- (i) exclusion from the Parliamentary Press Gallery (invoked against offending media houses);**
- (j) order for recovery of expenses related to restoration of any damaged property of the House;**
- (k) imposition of a fine; and**
- (l) committal to imprisonment by order of the House.”**

62. The sanctions recommended by the Committee fell within the sanctions that are imposed by parliaments within the Commonwealth. The Committee did not opt for harsh sanctions. It imposed reasonable sanctions. The Applicant cannot be heard to complain for being sanctioned in accordance with Commonwealth parliamentary traditions as Section 10(6) of the National Assembly (Powers and Privileges) Act, Cap 6 allowed the Assembly to impose disciplinary action in accordance with its rules.

63. The placing of a matter before the Committee is a weighty decision. Such a decision can only be arrived at by the Speaker after concluding that the Standing Orders will not sufficiently address the situation that has arisen. The PAC had been paralysed and rendered dysfunctional by the accusations and counter-accusations by its members. The National Assembly had the responsibility of taking action and this court would be crossing its boundaries were it to direct the National Assembly on the manner it ought to have handled the matter.

64. I therefore decline the Applicant’s application and dismiss the same. In light of my findings, I direct each party to meet own costs of these proceedings.

Dated, signed and delivered at Nairobi this 23<sup>rd</sup> day of February, 2016

**W. KORIR,**

**JUDGE OF THE HIGH COURT**