REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 454 OF 2012

REPUBLIC .....APPLICANT

VERSUS

MINISTER FOR HOUSING .....1ST RESPONDENT

NATIONAL HOUSING CORPORATION.....2ND RESPONDENT

EFFICIENCY MONITORY UNIT.....3RD RESPONDENT

AND

ISAAC BUDDY MOGAKA .....INTERESTED PARTY

BOSIRE OGERO.....EX-PARTE

JUDGEMENT

1. The ex-parte Applicant, Bosire Ogero was appointed, with effect from 17th June, 2005 for a term of three years, a member and Chairman of the Board of the 2nd Respondent, the National Housing Corporation (NHC). The Applicant was given a second term on 5th June, 2008. The 1st Respondent, the Minister for Housing (the "Minister") renewed the Applicant's appointment for a third term with effect from 19th May, 2011.
2. During the Applicant's third term, the Board of the NHC was on 13th March, 2012 suspended by the Permanent Secretary of the Ministry of Housing to enable the 3rd Respondent, the Efficiency Monitoring Unit (EMU) to review the operations of the NHC. The terms of reference for the EMU were:

> **"1) To review, evaluate and investigate allegations of impropriety in allocation of houses by the Corporation;**
>
> **2) Review and ascertain that NHC complied with all policy and procedures governing public entities while developing and allocating houses built under their schemes."**

3. The EMU carried out investigations and in June 2012 came up with a report titled: "REPORT ON ALLEGATIONS OF IMPROPRIETY IN ALLOCATION OF HOUSES BY THE NATIONAL HOUSING CORPORATION (NHC)". The report will hereinafter be referred to as the Report. The EMU exonerated the Applicant from any impropriety in the purchase of five houses from the NHC.

4. According to the Applicant, the EMU nevertheless and in excess of its mandate, went ahead and recommended his dismissal on unsubstantiated allegations. He asserts that he was not given an opportunity to respond to the allegations upon which the EMU recommended his dismissal. It is the Applicant's case that the EMU went beyond its mandate in recommending his dismissal.

6. The Applicant asserts that the recommendation by the EMU that appropriate action be taken against him for contravention of Office of the President Circular Ref. No. OP/CAB.9/1A dated 6th November, 2006 (the "Circular") disregarded the guidelines in the Circular on the attendance of committee meetings by a chairman of a Board of a state corporation. It is his case that as required by guideline No. 3 of the Circular, he had been invited by the Managing Director of the NHC through a letter dated 15th July, 2008 to attend a Human Resource Committee meeting on 24th and 25th July, 2008. Further, that he did not vote in the said meeting as there were interviews to appoint several senior officers to join the NHC. It is the Applicant's contention therefore that the recommendation by the EMU was without basis and was intended to further an improper and ulterior motive by the Minister.
7. It is the Applicant's case that on 29th June, 2012, the Permanent Secretary of the Ministry of Housing wrote to all the directors, excluding him, informing them that the suspension of the activities of the Board had been lifted. The Applicant asserts that he did not receive any communication from the Minister explaining to him why he had been singled out and treated differently. The Applicant avers that his appointment as a member and Chairman of the Board of the NHC was revoked with effect from 27th June, 2012 by Minister vide Gazette Notice No. 13949 dated 5th October, 2012.
8. It is the Applicant's case that the revocation of his appointment was *ultra vires* the provisions of Section 3(2) of the Housing Act, Cap 117 (HA) as read together with Section 6(2) of the State Corporations Act, Cap 446 (SCA). Further, that his legitimate expectation that he would serve the full term was breached and so was his legitimate expectation that he would be given a written explanation if his appointment was to be terminated before the expiry of his tenure.
9. The Applicant deposes that as a member and Chairman of the Board of the NHC, he took home the sum of Kshs.2,640,000/= in allowances per annum.
10. Consequently, the Applicant through the Notice of Motion dated 14th January, 2013 prays for orders as follows:

> **"1. <u>THAT</u>, an Order of Certiorari to issue to remove to the High Court and quash the decision by the 3rd Respondent, the Efficiency Monitoring Unit, of June 2012 that the Applicant has contravened the Office of the President Circular Ref. No. OP/CAB. 9/1A and the recommendation for the Applicant's removal as Chairman of the Board.**
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> **2. <u>THAT</u>, an Order of Certiorari to issue to remove to the High Court and quash the decision of the 1st Respondent published in the Kenya Gazette on 5th October 2012 as Notice No. 13949 to revoke the appointment of the Applicant as Member and Chairman of the Board of National Housing Corporation.**
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> **3. <u>THAT</u>, an Order of Certiorari to issue to remove to the High Court and quash the decision by the 1st Respondent appointing ISAAC B. MOGAKA as a member and Chairman of the 2nd Respondent to replace the Applicant that was published on 5th October 2012 as Gazette Notice No. 13950.**
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> **4. <u>THAT</u>, an Order of Mandamus to issue directed at the 1st Respondent**

compelling him to reinstate the Applicant as Chairman of the 2nd Respondent to complete his term as Member and Chairman of the Board until 19th May 2014.

5. <u>THAT</u>, in the alternative, an Order of Mandamus to issue directed at the 1st and 2nd Respondents to compute and forthwith pay to the Applicant all his allowances and dues for the unexpired term of his tenure as Member and Chairman of the Board of the 2nd Respondent backdated to March 2012.

6. <u>THAT</u>, costs of and incidental to this application be awarded to the Applicant."

11. The application is supported by a statutory statement; the Applicant's verifying affidavit sworn on 20th December, 2012; the Applicant's supplementary affidavit sworn on 27th May, 2013; the Applicant's supplementary affidavit sworn on 13th August, 2013; and the attachments to the affidavits.
12. The 1st Respondent opposed the application through a replying affidavit sworn on 27th February, 2013 by the Permanent Secretary in the Ministry of Housing, Tirop Kosgey. He averred that as the Permanent Secretary of the Ministry of Housing, he is a member of the Board of the NHC by virtue of Section 3(2) of the HA. That during the Board's 179th meeting held on 12th March, 2012, it was resolved that the EMU which was under the Office of the Prime Minister undertakes a detailed review of the NHC as it had been noted by the Board of Directors that there were flaws and loopholes in the house allocation process.
13. Mr. Tirop deposed that on 13th March, 2012 he wrote a letter to the Office of the Prime Minister, copied to the Director of the EMU, requesting the deployment of the EMU to undertake a review of the NHC. The Board members, the Applicant included, were informed of the deployment of the EMU and the suspension of the activities of the Board during that time.
14. After concluding its work, the EMU tabled its Report in June 2012. In the Report it was noted that allocation of five houses to the Applicant was procedural but the EMU went ahead to make other observations at pages 88 to 92. One of the irregularities noted was pointed out at page 109 of the Report as follows:

> **"The Chairman of the Board who was in attendance of Human Resource Committee (a sub-committee of the Board) meeting actively participated in the interviewing of the candidates. (See the interview score sheet – ANNEX 85). The Board's Chair active participation in the interview contravened the Office of the President Circular Ref. No. OP/CAB.9/1A dated 6th November 2006 and also gave undue advantage to a candidate."**

15. Further, that the EMU noted that although the Applicant was invited to attend the Human Resource Committee meeting, he ought not to have actively participated in it since by so doing, he contravened the Circular. Also, that the Applicant's participation in the meeting of the Human Resource Committee had amounted to conferring undue advantage to a candidate and this had caused conflict of interest contrary to sections 11 and 12 of the Public Officer Ethics Act, 2003 and was also an offence under Section 42 of the Anti-Corruption and Economic Crimes Act, 2003.
16. It is the Minister's case that the revocation of the Applicant's appointment was well within the powers conferred upon him by Section 3 of the HA and that he acted genuinely on recommendations made by the EMU in its Report. The 1st Respondent's case is that the Applicant had conducted himself in a manner inconsistent with his membership of the Board of the NHC and this contravened Section 6(2) of the SCA. It is therefore the Minister's case that the Applicant failed in his responsibility as the chair of the Board of the NHC and his conduct was in breach of Article 10 of the Constitution.
17. The EMU opposed the application through a replying affidavit sworn on 27th February, 2013 by the head of the organisation Mr. Vincent Nyagilo. He averred that upon receiving the Minister's letter dated 13th March, 2012 requesting a review of the NHC he constituted a team comprising of

himself and two other senior officers. They undertook the assignment and finalized their work and submitted the Report in June 2012. That despite noting that the allocation of five houses of the Applicant was procedural, they also made observations at pages 88 to 92 of the Report *inter alia* that **"the lack of clear and concise procedures, systems and instruments for disposal/allocation of NHC services policies prior to June 2005 enable the HAC members and the Board to take advantage of the void made possible by lack of enabling policies and by virtue of their office to acquire more houses in the range between 5 to 10."**

18. Further, that due to the foregoing it would be unfair, inequitable and against the public interest that a few individuals should benefit from several houses at the expense of other members of the public. This was also contrary to the objective of the NHC housing schemes to provide as many houses as possible to Kenyans.
19. That, further and incidental to their terms of reference they also made other observations at pages 99 to 119 of the Report including: that there was a conflict of interest in the procurement of valuation services; that there were irregularities in recruitment and that there was an impropriety in the submission of the Board Audit Committee Report to the Board of Directors.
20. The EMU team also noted that the minutes revealed that in a Human Resource sub-committee meeting held on 24th and 25th July, 2008, the Applicant actively participated in interviewing the candidates and this contravened the Circular. They therefore concluded that the Applicant's actions breached the Public Officer Ethics Act and the Anti-Corruption & Economic Crimes Act.
21. It is the EMU's case therefore that the recommendation that appropriate action be taken against the Applicant was legal and in accordance with the statutory power bestowed upon it. The EMU asserts that there was no improper motive as the Report was based on data availed to it and interviews conducted on some members of staff.
22. In his two supplementary affidavits, the Applicant disputed the contents of the replying affidavits of Tirop Kosgey and Vincent Nyagilo and insisted that the recommendations made by the EMU and implemented by the Minister were made in contravention of the rules of natural justice as he was not given an opportunity to rebut the allegations.
23. The NHC opposed the application through the replying affidavit sworn on 2nd July, 2013 by its Managing Director, Peter Wachira Njuguna. It is the NHC's case that the Minister by virtue of Section 3(2) of the HA is mandated to appoint or revoke the appointment of the Chairman and members of the Board of the NHC.
24. It is the NHC's case that the Applicant failed to meet the terms and conditions of his letter of appointment dated 15th June, 2005 by failing to avert distortion in the NHC's house allocations. It is NHC's case that in its 176th Board meeting, it was recommended that its Board Audit Committee (BAC) undertake an in-depth analysis of allocation of houses with a view to determining possible distortions in the process and thereafter make recommendations on how to rectify any anomalies. The BAC prepared a report titled "Distortions in Houses Allocation" and according to that report, the Applicant declined to appear before the BAC to shed light on the allocation process. According to the BAC report, the Applicant had failed to give guidelines on the allocation of houses.
25. The NHC contends that the Applicant's execution of several contractual documents in his favour at the expense of the public was unethical and contravened the tenets of good corporate governance. It is the Board's case that in its 178th meeting, the recommendations of the BAC were adopted to the effect that the appointing authority relieves the Applicant of his duties and a letter to that effect was indeed addressed to the Minister by the Managing Director of the NHC.
26. It is the NHC's case that the Report prepared by the EMU recommended that action be taken against the Applicant and one Reginald Okumu for contravening the Circular. Further, that the Applicant's presence in the Human Resource sub-committee meeting of 24th and 25th July, 2008 in which the interview for the Estate Officer (Management) was conducted, gave undue advantage to a particular candidate in whose recruitment the Applicant had an interest and this contravened of provisions of the Public Officer Ethics Act and the Anti-Corruption and Economic Crimes Act.
27. The Chairman of the Board of the NHC participated in these proceedings as an Interested Party.
28. It is NHC's case that the Applicant failed to maintain harmonious working relationship with the Board leading to acrimonious Board meetings such as the one of 12th March, 2012. It is NHC's assertion that the Applicant unjustly enriched himself by claiming allowances he was not entitled

to. The NHC therefore contends that the Applicant is not entitled to the claim of Kshs. 2,640,000/= per annum in allowances.

29. The Interested Party did not file any response to the application but opted to rely on the affidavit of a former chairman of the NHC, Isaac Buddy Mogaka. For record purposes this Court had on 18th March, 2013 directed that the then Chairman of NHC Isaac Buddy Mogaka be served as an interested party as the outcome of the proceedings would affect him. Shortly after joining these proceedings as an Interested Party, Isaac Mogaka's appointment was revoked by the appointment of Sammy Chepkwony. Sammy Chepkwony was made the 2nd Interested Party. At the same time it was indicated to the Court that Isaac Mogaka no longer had any interest in the matter. His request to be excused from participating in the proceedings was granted and Sammy Chepkwony remained the only Interested Party. Before the matter could be heard, Sammy Chepkwony's appointment was revoked. Counsel for the Interested Party asked the Court to henceforth refer to the Interested Party as the Chairman of the NHC.

30. After considering the evidence and submissions of the parties, it is apparent that two issues are due for the consideration of this Court in this matter. The first issue is whether the Minister's decision to revoke the appointment of the Applicant as a member and Chairman of the Board of the NHC was *ultra vires* the HA and the SCA. The second issue is whether the Report of the EMU, which the Minister relied on in revoking the Applicant's appointment, was prepared in breach of the rules of natural justice.

31. The place of judicial review in the legal set-up has been restated by the courts time and again. The circumstances under which judicial review orders are available were stated by Lord Diplock in the case of **Civil Service Union v Minister for Civil Service [1985] A.C. 374 at 401 D** as:

> **"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"**
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> **(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."**

32. As, was stated in **Republic v The Vice Chancellor Jomo Kenyatta University of Agriculture and Technology ex-parte Dr. Cecilia Mwathi and another [2008] eKLR,** judicial review is available:

"1. Where there is abuse of discretion.

2. Where the decision maker exercises discretion for an improper purpose.

3. **Where the decision maker is in breach of duty to act fairly.**
4. **Where the decision maker has failed to exercise statutory discretion reasonably.**
5. **Where the decision maker acts in a manner to frustrate the purpose of the Act donating power.**
6. **Where the decision maker fails to exercise discretion.**
7. **Where the decision maker fetters the discretion given.**
8. **Where the decision is irrational and unreasonable."**

33. As for availability of judicial review orders in an employer-employee relationship, the law was stated in **Eric v J. Makokha & 4 others v Lawrence Sagini & 2 others [1994] eKLR** as follows:

> **"The word "statutory underpinning" is not a term of art. It has no recognised legal meaning. If it has, our attention was not drawn to any. Accordingly, under the normal rules of interpretation, we should give it its primary meaning. To underpin, is to strengthen. In a case in which the issue is whether an employer can legitimately remove his employee, a term which suggests that his employment is guaranteed by statute is hardly of any help.**
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> **As a concept, it may also mean, the employee's removal was forbidden by statute unless the removal met certain formal laid down requirements.**
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> **….some employees in public positions may have their employment guaranteed by statute and could not be lawfully removed unless the formal requirements laid down by the statute were observed. It is possible this is the true meaning of what has become the charmed words "statutory underpinning". If this is correct, we can readily conceive of some of such public positions. For instance, under Section 61 of the Constitution of Kenya, judges are appointable by the President and removable by him. But he cannot lawfully exercise the power of removal unless for specified misdoings and unless a tribunal appointed specially for the purpose after investigating such conduct, recommends to him such removal. So it can accurately be said that the tenure of judges was protected by the Constitution. The same applies to other constitutional office holders such as the Attorney General, Auditor General and others. Even an ordinary office holder can be protected by statute."**

34. The Court of Appeal also tackled the issue in **Republic v Professor Mwangi S. Kaimenyi ex-parte KIPPRA, Civil Appeal No. 160 of 2008** and stated that:

> **"Judicial review remedies are discretionary and the court has to consider whether they are the most efficacious in the circumstances of the case. Judicial review is in the purview of public law, not private law. In normal circumstances, employment contracts are not the subject of judicial review. In the case of *R - V- BRITISH BROADCASTING CORPORATION – Ex Parte Lavelle (1983) 1 WLR 1302*, it was emphasized that judicial review remedies are not available in a situation of employer-employee relationship. It was stated in the Queens Bench Division that:-**
>
> ***"since the disciplinary procedure under which the applicant was dismissed arose out her contract of employment and was purely private and domestic in character, the applicant was not entitled to relief by way of certiorari".***
>
> **In an ordinary contractual relationship of master and servant, if the master terminates the contract, the servant cannot obtain orders of certiorari. If the master rightly ends the**

contract, there can be no complaint. If the master wrongfully ends the contract, the servant can purse a claim for damages. In *REPUBLIC – V- JUDICIAL SERVICE COMMISSION* Ex parte Stephen Pareno HC Misc. Civ. App No. 1025 of 2003, it was correctly stated that where an officer has left office for some time it would not be desirable to force the parties together again because it would be contrary to the policy of the law and not in the public interest and the principle of master and servant clearly apply. The court further stated that "the applicant has been separated from his former employer by a six months break. Although the applicant has sought a public law remedy what he is in fact asserting is his individual right and a private law remedy appears the most efficacious in this circumstances".

This is not to say that judicial review remedies cannot be available in contracts of employment. There are instances when such remedies are available. One such instance is when the contract of employment has statutory underpinning and where there is gross and clear violation of fundamental rights. In the case of *CHIEF CONSTABLE OF NORTH WALES POLICE – V- EVANS* (1982) I WLR 1155, Lord Hailsham pronounced himself thus:

"the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority after according fair treatment reached on a matter which it is authorized by law to decide for itself a conclusion which is correct in the eyes of the court" (See also Commissioner of LANDS – V- KUNSTE HOTEL LIMITED 1995-1998 1E.A. 1 (CAK))"

35. Recently the Court of Appeal in **Stephen S. Pareno v Judicial Service Commission [2014] eKLR (Civil Appeal No. 120 of 2004)** affirmed that where a statutory process in the removal of a public employee has not been followed, orders of judicial review are available. In that case the Court observed:

> **"We reiterate that the Judicial Service Commission was and still is a public body and therefore amenable to the Judicial Review process. It had initiated a disciplinary process against the appellant with a view to terminating the appellant's employment with it in its capacity as a public body and the appellant as public officer. We also reiterate that from his pleadings, the appellant sought to attack the process employed by the public body (the respondent) in bringing an end to his public service, a matter capable of interrogation by way of a judicial review process."**

36. The Applicant's case is that his position was statutorily underpinned and orders of judicial review are thus available to him. He also argues that his removal did not comply with the laid down procedure. He asserts that he is therefore entitled to question his removal by way of judicial review.

37. Dealing with an application arising from circumstances similar to those of the case before this Court, Odunga, J in **Republic v Minister for Tourism & another ex-parte Abdulrahman Rizik & 4 others [2014] eKLR** opined that judicial review is indeed available where the procedure adopted by the Minister does not comply with statute. At paragraph 14 of this judgment he stated that:

> **"It is important to determine at this juncture whether the public law duty of procedural fairness should be applied to employment relationships. Section 6 (1) of the *State Corporations Act* expressly provides that every appointment shall be by name and by notice in the gazette and subsection (2) elucidates how an appointee shall cease to be a member of the Board. It is therefore established that the appointment to the Board of the 2nd Respondent as well as the parameters within which the appointment of the Applicants could have been revoked has statutory underpinning. As such in the absence of a contract of employment, it is clear to me that the remedies available to the Applicants lie in public law."**

38. The question as to whether or not judicial review is the ideal remedy is a different kettle of fish altogether. The Applicant is however entitled to question his removal where the law has not been complied with.
39. The respondents assert that the Applicant's removal complied with Section 3(3) of the HA and Section 6(2) of the SCA. Section 3(3) of the HA provides that:

"Establishment and constitution of National Housing Corporation

40. On the other hand Section 6(2) of the SCA, which was enacted long after the HA had been enacted, states:

> **"Composition of Boards**
>
> **(1)…….**
>
> **(2) Every appointment under subsection (1)(a) and (e) shall be by name and by notice in the Gazette and shall be for a renewable period of five years or for such shorter period as may be specified in the notice, but shall cease if the appointee—**
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> **(a) serves the Minister with written notice of resignation; or**
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> **(b) is absent, without the permission of the Minister notified to the Board, from three consecutive meetings; or**
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> **(c) is convicted of an offence and sentenced to imprisonment for a term exceeding six months or to a fine exceeding two thousand shillings; or**
>
> **(d) is incapacitated by prolonged physical or mental illness from performing his duties as a member of the Board; or**
>
> **(e) conducts himself in a manner deemed by the Minister, in consultation with the Committee, to be inconsistent with membership of the Board.**
>
> **(3) No person whose membership of a Board has ceased in accordance with paragraphs (b), (c) or (e) of subsection (2) shall be eligible for appointment to any Board thereafter.**
>
> **(4)……."**

41. The respondents appear to suggest that the HA alone is applicable to the case of the Applicant. That cannot be true. In my view, the SCA is an improvement on the HA and both the HA and the SCA are applicable to the case of the Applicant. That is why the preamble to the SCA is clear that the SCA is:

> **"An Act of Parliament to make provision for the establishment of state corporations; for control and regulation of state corporations; and for connected purposes."**

42. Section 2 of the SCA states what a state corporation is and it is clear that the NHC is a state corporation. The cancellation of the appointment of a member of the Board of a state corporation should be in accordance with Section 6(2) of the SCA. It cannot be done at the Minister's pleasure as suggested by the respondents. The rules of natural justice must be read into the HA and the SCA. The Minister (read Cabinet Secretary) ought to comply with the rules of natural justice. The Minister can only remove a member of a Board of a state corporation for the reasons found in Section 6(2) of the SCA. Where the Minister is of the view that a member of a Board has conducted himself or herself in a manner not consistent with the membership of the Board, the

Minister should consult the State Corporations Committee established by Section 27 of the SCA. The Minister cannot act as he or she desires.

43. In the case before this Court, the Applicant submitted that he was removed based on recommendations by the EMU and his views over matters which led to those particular recommendations was not sought. As already stated, the remit of the EMU was limited to the terms of reference. At the conclusion of the investigation, the EMU found that the allocation of five houses to the Applicant complied with the NHC's procedure for allocation of houses. The EMU then veered into matters that were not included in its terms of reference and concluded that the Applicant had contravened the provisions of the Public Officer Ethics Act, the Anti-Corruption and Economic Crimes Act and the Circular when he attended the interviews of certain candidates in which he had a personal interest in one of the candidates.
44. For a judicial review court, the question to be answered is whether the Applicant was given an opportunity to respond to the allegations before the EMU Report was prepared. The Applicant says he was not given an opportunity to do so. The respondents have failed to rebut the Applicant's assertion. They have not stated that the Applicant was given an opportunity to respond to the allegations. Even if they had stated that the Applicant was given a chance to respond, there was need for them to avail evidence to show that the Applicant had indeed been given such a chance to rebut the allegations.
45. The rules of natural justice were summarized by the Court of Appeal in **De Souza v Tanga Town Council [1961] E.A. 377** as follows:

> **"The general principles which should guide statutory domestic or administrative tribunals sitting in a quasi-judicial capacity are well known. The authorities are reviewed in the recent case of *University of Ceylon v Fernando* (4), [1960] 1 All E.R. 631. I think that the principles, so far as they affect the present case, may be summarized as under:**

1. **If a statute prescribes, or statutory rules or regulations binding on the domestic tribunal prescribe, the procedure to be followed, that procedure must be observed….**
2. **If no procedure is laid down, there may be an obvious implication that some form of inquiry must be made such as will enable the tribunal fairly to determine the question at issue...**
3. **In such a case the tribunal, which should be properly constituted, must do its best to act justly and to reach just ends by just means……It must act in good faith and fairly listen to both sides. It is not bound, however, to treat the question as if it were a trial: it need not examine witnesses; and it can obtain information in any way it thinks best…….A member of the tribunal may, it seems, question witnesses in the absence of the other members of the tribunal and of the defendant and it is not necessarily fatal that the evidence of witnesses (including that of the complainant) may have been taken by the tribunal in the absence of the defendant…..**
4. **The person accused must know the nature of the accusation made….**
5. **A fair opportunity must be given to those who are parties to the controversy to correct or contradict any statement prejudicial to their view….; and to make any relevant statement they may desire to bring forward…….**
6. **The tribunal should see that matter which has come into existence for the purpose of the quasi-lis is made available to both sides and, once the quasi-lis has started, if the tribunal receives a communication from one party or from a third party, it should give the other party an opportunity of commenting on it……"**

46. There is everything wrong about the EMU Report and its recommendations. In the first instance the EMU veered outside its terms of reference and addressed matters it had not been asked to investigate. Secondly, the Applicant was not given an opportunity to respond to the negative reports that had been gathered against him.
47. It can be said that the Report simply made recommendations. There was, however, failure on the part of the Minister as he did not afford the Applicant an opportunity to comment on the recommendations of the EMU before acting on those recommendations.
48. The Applicant was not given any reason why his appointment had been cancelled. He was simply confronted by Gazette Notice No. 13951 of 5th October, 2012 appointing Isaac B. Mogaka a

member and Chairman of the Board of Directors of the NHC with effect from 1st October, 2012. The giving of reasons is now part of good governance. The Minister did not give the Applicant any reasons for his removal. It can therefore be assumed that there was no good reason for the Applicant's removal. The Minister's action therefore amounts to abuse of power. The Applicant was indeed entitled to serve a full term of three years unless his removal was in accordance with Section 6(2) of the SCA.

49. The Minister's case is that he acted on the recommendations of the EMU in good faith. This admission by the Minister can only imply that the decision to revoke the appointment of the Applicant was based on the recommendations of the EMU. Those recommendations were not valid as they had been arrived at without compliance with the rules of natural justice and outside the EMU's terms of reference. The removal of the Applicant was also not in accordance with Section 6(2) of the SCA.
50. I have carefully looked at the prayers sought by the Applicant and find that some of the prayers have been overtaken by events. If orders are issued in the terms proposed by the Applicant, such orders would be difficult to implement. The prayer to quash the decision to appoint Isaac B. Mogaka to succeed the Applicant is no longer implementable as Isaac B. Mogaka's appointment has since been revoked. Another person is currently occupying the Chair of the Board of the NHC.
51. The prayer to quash the Gazette Notice appointing Isaac B. Mogaka and the prayer for an order of mandamus to compel the Minister to reinstate the Applicant as the Chairman of the Board of the NHC are no longer tenable or viable. These prayers are therefore rejected.
52. Issuance of an order of mandamus to compel the Minister and the NHC to compute and forthwith pay the Applicant all his allowances and dues for the unexpired term of his tenure would be difficult to implement. If such an order is issued, it would amount to asking the Minister and the NHC to speculate on the number of board meetings the Applicant would have attended had he remained a member and the Chairman of the Board of the NHC. I therefore decline to issue such an order.
53. However, the Applicant's litigation is not in vain. It is clear that certain findings and recommendations of the EMU did not comply with the rules of natural justice. The Minister also erred by removing the Applicant outside the provisions of Section 6(2) of the SCA. An order of certiorari will therefore issue quashing the finding and recommendation in the EMU's Report of June 2012 to the effect that the Applicant had contravened the Office of the President Circular Ref. No. OP/CAB.9/1A dated 6th November, 2006. Also quashed is the recommendation for the Applicant's removal as a member and Chairman of the NHC Board.
54. The prayer to quash the Gazette Notice revoking the appointment of the Applicant is allowed. The Gazette Notice revoking the appointment of the Applicant is removed into this Court and quashed. The purpose of this order is not to enable the Applicant to get back his position. It only serves to keep his record clean so that he can be eligible for appointment to the board of a state corporation. Issuance of an order reinstating the Applicant as a member and Chairman of the Board of the NHC can only cause chaos.
55. In view of the finding that the removal of the Applicant was unlawful, I conclude that the Applicant is deserving of costs. The Applicant will therefore have the costs of this application from the Minister (the 1st Respondent).

Dated, signed and delivered at Nairobi this 19th day of March, 2015

W. KORIR,

JUDGE OF THE HIGH COURT