REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 416 OF 2005

IN THE MATTER OF AN APPLICATION BY SHEM ODONGO OCHUODHO FOR ORDERS OF MANDAMUS, CERTIORARI AND PROHIBITION

REPUBLIC...APPLICANT

VERSUS

THE ATTORNEY GENERAL...1ST RESPONDENT

THE MINSTER FOR ENERGY..2ND RESPONDENT

INSPECTOR GENERAL (CORPORATIONS).....................................3RD RESPONDENT

EXPARTE SHEM ODONGO OCHUODHO

JUDGEMENT

1. By a Notice of Motion dated the 31st March, 2005, the ex-parte applicant herein, **Shem Odongo Ochuodho,** seeks the following orders:

1. **An order of Certiorari quashing the decision of the Minster of Energy as contained in the letter dated 9th December, 2004 purporting to terminate the Aggrieved Party's employment with the Kenya Pipeline Co. Ltd.**
2. **An Order of Certiorari quashing the report and recommendations of the Inspector General (Corporations) recommending that:**

I. **The Aggrieved Party be surcharged for the loss incurred by the Kenya Pipeline Co. Ltd as a result of the Aggrieved Authorizing purportedly irregular payment to Triple A Capital Limited;**
II. **The Aggrieved Party be relieved of his position at the Kenya Pipeline Co. Ltd**

3. **An order of Prohibition directed at the Minster for Energy from enforcing his decision dated 9th December, 2004 terminating the Aggrieved Party's employment as the Managing Director of the Kenya Pipeline Co. Ltd.**
4. **An order of Mandamus directed at the Minster for Energy reinstating the Aggrieved Party as the Managing Director f the Kenya Pipeline Co. Ltd.**

5. **Costs.**

Ex-Parte Applicants' Case

2. The Application was founded on the statutory statement and supported by a Verifying Affidavit sworn by the Applicant on the 25th March, 2005.
3. According to the Deponents, on or about the 24th arch, 2003 he was appointed by His Excellency the President of the Republic of Kenya, **Hon. Mwai Kibaki**, as the Managing Director of the Kenya Pipeline Co. Ltd (hereinafter referred to as KPC), a State Corporation as defined under the ***State Corporations Act*** (Cap 446) (hereinafter referred to as the Act) whose affairs and operations are governed by and subject to the provision of the Act.
4. According to the applicant, at the time of his appointment, KPC was in a critical financial position because the total debts due and overdue were in excess of Kshs. 5.2. Billion against the Cash that was being generated then of approximately Kshs. 500 Million only per month; several creditors and suppliers, both local and foreign, were threatening Court action and attachment and sale of KPC property; the foreign debts due to several institutions guaranteed by the Government of Kenya were in default and already accruing penalties that were embarrassing to the Government in the course of negations with foreign lenders; all petrol stations, except one, refused to give KPC fuel on credit for its vehicles fleet and operations were becoming difficult and costly in lost times; some contractors for critical services and supplies had given KPC "go slow" notices unless they were paid the overdue arrears; Kenya Revenue Authority were pressing for settlement of tax arrears and penalties all totalling over Kshs. 2 Billion; the Staff Pension Scheme was heavily inter funded in the amount of approximately Kshs. 1 Billion, the Retirement Benefits Authority had written demanding compliance to restore the funding levels; he pipeline itself was ageing and several sections already showed signed of fatigue, yet no provisions were made for a sinking fund for the renewal or replacement of the line, which was now twenty seen years old against an expected life of about twenty year yet under the Act, the sinking fund requirement is mandatory; the parent Ministry, that is the Ministry of Energy, directed the KPC commence immediately the remittances of Kshs. 25 Million per month for the Kipevu oil storage facility, an obligation that had not been honoured to the level required for the last nine years or so; the Staff Union had given a strike notice demanding enhanced benefits; the Ministry of Finance had declined to allow KPC to restructure the foreign debts and the parent ministry consequently directed that all the overdue foreign debts are cleared; and a Paris club meeting and an IMF Mission visit were scheduled and urgent preparations were necessary.
5. He therefore deposed that in the circumstances obtaining KPC sought third party financial assistance and Triple A made an offer among others for financial services to KPC at which time Bank lending Rates and Charges were public knowledge following regular publications of the data for all banks by the Central Bank of Kenya. It was possible therefore to enter into negations with Triple A with the participation and approval of the parent Ministry and Treasury.
6. The original short term lending offer by Triple A was through its letter dated 9th May, 2003 from which it was apparent that from the very beginning, the Triple A offer for an interest free first year was only when the loan repayment period did not exceed 12 months, and where the supplier would bear the costs of discounting the receivable. The foreign debts financed by Triple A for KPC were Government guaranteed and the creditors would not bear any discounting charges as may have been expected. In addition the amounts totalling the equivalent of Kshs. 1,878,309,194.00 could not be serviced in 12 months, hence the arrangement for the period of 36 months as per the express instructions of the Minister for finance as contained in his letter dated 22nd Jul, 2003.
7. According to the applicant, during the second half of the year 2003, overdraft rates were still coming down in the market, but the average in the period was about 16-17% charged by the major banks for all banks, the rates ranged from 14% to 22% and the parent ministry and Treasury officials participated at all slopes of the negotiations pursuant to which the 3 year loan was agreed at the flat rate of 0.88%p.m which was indeed equivalent to the comparable prevailing overdraft rates of 16-17%p.a at the time and at the meeting of 21st July, 2003 at the Treasury, the 1%p.m. interest charge was understood to be applicable from loan commencement since the interest free first year would only have been applicable if the repayment period did not exceed 12 months.
8. Accordingly, the Board approved the financial arrangements at 1%p.m. flat rate under a one year

repayment period at its meeting of 21st/24th July, 2003 which further obtained the approval of the Hon. Minister for Finance vide a letter dated 22nd July, 2003 though the KPC Board and Management did not receive any Minutes of the meetings of 21st July, 2003 held at the Treasury and were not privy to the brief given to the Minister, on the basis of which he granted the approval as per his letter dated 22nd July, 2013. As to the legal approval the KPC management presented all the necessary legal documents for the review and approval by the Attorney General's office, the parent Ministry and the Treasury and the final approvals were communicated to KPC by a letter dated 28th October, 2003 from the Minster for Energy and by a letter dated 23rd October, 2003 from the Minister for Finance.

9. It was deposed that it had been initially intended that the debts assigned to Triple A would be local debts so that Triple A would then be able to approach the creditors directly and discount the receivable. This would have enabled the total liability to be cleared within a twelve month period. However, on or about 3rd November, 2003, the Ministry of Energy, through the Permanent Secretary expressly directed KPC to utilise the funds towards settling debts to overseas creditors. However since it was not possible to discount the received owing to the overseas creditors, KPC was unable to settle the liability of triple A within a twelve month period. Thereafter Agreements for assignment of Debt between KPC and Triple A were signed on diverse dated between December, 2003 and July, 2004.
10. On 26th august, 2004, the Minster for Energy directed Chairman, the Finance Manger and the applicant to "proceed on compulsory leave with immediate effect to facilitate investigations on the issue by the Inspector General (Corporations)" on the allegations that KPC implemented a borrowing Agreement materially different from the one understood and approved by the Hon. Mister for Finance; that the interest rates implemented were different from those approved by the Minster for finance; that the agreement being implemented would result in additional interest payments in the loan period amounting to Kshs. 297,003,225.00 over and above the interest costs that would have been incurred if KPC executed the financing agreements with the terms approved by the parent Ministry and the treasury; and that by 30th June, 2004, KPC had already paid a total of Kshs. 284,712,907.00 in principle and Kshs. 87,029,082.00 in interest which was irregular because the approved agreement provided for no interest payment in the first year of the borrowing. According to the applicant these allegations were unjustified as is borne out by the facts stated above.
11. Further, the negations for these facilities were conducted over a period of more than six months before the first disbursements during which period market interest rates continued to drop and it is just about now that there appears to be a turn around with indications that even the 91 day Treasury Bill rates would make an upward turn from the lowest levels ever reached in the financial history of the country. Apart from that the Triple A facility is for a fixed period of 3 years, and in effect cushioned KPC from any interest and exchange rate fluctuations, which already appear to be on the increase currently and the margin currently enjoyed by Triple A could be temporary and could not have been foreseen at the commencement of discussions of the facilities. It was averred that the Board and Management of KPC acted with utmost good faith in handling the loan arrangements by Triple A and that all statutory approvals were sought and granted and representative of the Permanent Secretaries of the Ministry of Energy and Treasury were present at all Board Meetings where the Triple A proposal was discussed as such the relevant ministries were ostensibly aware at all items, of the progress of the negotiations. In the event that the board approved a proposal that was different from the one approved by the Ministry of Energy and the Treasury, the respective representatives would surely have raised a query and the absence of any such query would lend to the presumption that the proposal as approved by the Board was sanctioned by the parent ministries. Furthermore, the Permanent Secretary Ministry of Energy, vide a letter dated 16th February, 2004 confirmed that KPC had implemented the transaction as per the ministerial approval while the Inspector General (Corporations) was also present at the Board meeting where the Triple A proposal was approved.
12. It was asserted that Triple A is certainly not a "back-street shylock" agency but is a financial service company which is part of the Hanover Reinsurance Group, the third largest reinsurance and financial services group in the world. The interest rate of 0.88%p.m. was the comparable equivalent rate to the bank overdraft rates at the time of the negotiations. However, the loans

assigned to Triple A could not be serviced within 12 months, and therefore would not have qualified for the free (zero) first year interest. The EDC and JBIC loans which form the bulk (88%) of these facilities were Government-Guaranteed loan and these creditors would not accept to incur any discounting charges. Further, the interest margin currently being calculated and extrapolated is in fact a provision for market interest behaviour which could still change to the disadvantage of Triple A.

13. It was therefore the applicant's contention that this arrangement saved KPC and Government embarrassment that was imminent when it was felt necessary to take the Triple A offer.
14. After the said officers were ordered on compulsory leave, the Inspector General (Corporations) carried out an investigation and prepared a report and recommendations on the entire matter which according to the applicant were unlawful and/or ultra vires ad in breach of the laws of natural justice in that the findings, report and recommendations of the Inspector General (Corporations) could not have been substantiated by the evidence that was before him; the Inspector General (Corporations) failed to recognise the fact that representatives of the Permanent Secretaries of the Ministry of Energy and Treasury were present at all Board Meetings where the Triple A proposal was discussed and as such the relevant ministries were ostensibly aware at all times, of the progress of the negations and the approval of the proposal; the Inspector General (Corporations) was personally present at the meeting where the Board approved the proposed transaction with Triple a and that he (or his duly appointed agents) were present at relevant Board Meetings and as such could not have carried out the investigation in an objective and unbiased manner; the Inspector General (Corporations) has no power or authority under the provisions of the Act to recommend that the applicant be relieved of his position as Managing Director of KPC or to make any of the recommendations that he purported to make in his report.
15. In the applicant's view, the only powers that the Inspector General has under the Act are to disallow any item of account which is contrary to the law or to any direction lawfully given to a state corporation; to surcharge the amount of any expenditure so disallowed upon the person responsible for incurring or authorizing the expenditure; to surcharge any sum which has not been duly brought to account upon the person by whom that sum ought to have been brought into account; to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred; and to certify the amount due from any person upon whom he has made a surcharge.
16. Notwithstanding that pursuant to the recommendations of the Inspector General (Corporations) the Minister for Energy purported to terminate the appointment vide his letter dated 9th December, 2004 an action which the applicant believes to have been illegal and a nullity as the Minister has no power to or locus to terminate my appointment and his decision is a violation of Section 7(3) of the said Act.
17. To the applicant, under section 7(3) of the Act, only the president has the authority to revoke the appointment of any member of the Board of a State Corporation.

2nd Respondent's Case

18. In Response to the application, the 2nd Respondent filed a replying affidavit sworn by **Patrick Mwaura Nyoike**, the Permanent Secretary to the Ministry of Energy on 15th June, 2005.
19. According to him, on 27th July, 2004, following the laying before parliament by the M. P for Ntonyiri **Hon. Maoka Maore** of documents alleging questionable dealings between KPC and a private company known as Triple A Capital Ltd, there was public concern over the said transaction leading to the Ministry of Energy's instructions to the Inspector General (Corporations) to carry out investigations in the matter and determine details on how the contract between KPC and Triple A Capital Limited was entered into.
20. A perusal of the Report prepared by the Inspector General (Corporations) and attached to the affidavit of the applicant of 24th March, 2005 clearly shows that in the cause of executing its mandate, the Inspector General (Corporations), among other things, interviewed, among other people, the applicant herein. Therefore, having been granted an opportunity to make his representations regarding the transaction in question, the issue of the decision of the Inspector General (Corporations) having been reached in breach of the rules of natural justice is factually

incorrect.

21. To the deponent, the Minster for Energy, had the mandate under the constitution, the Act and other enabling law to terminate the services of the applicant upon satisfying himself that he applicant had conducted himself in a manner inconsistent with his position as Chief Executive of the Board of KPC.
22. Based on legal advice, the deponent believed that in addition to the powers of the Inspector of State Corporations set out under Section 19 of the Act, Section 18 of the same Act confers upon the Inspector of State Corporations the duty to advise the Government on all matters affecting the effective running of state corporations which powers would undoubtedly include advising on the officials to be removed from office for mismanaging state corporations.
23. To him, the dismissal of the applicant from his capacity as the Chief Executive of KPC by the Ministry was done in good faith in the public interest following a duly authorised investigation into the scandal that had attended to the subject contract and during which investigations the applicant was availed an opportunity to make representations in defence which dismissal was sanctioned by Section 6(2) of the Act, and Section 17 of the ***Employment Act***, Cap 226 of the Laws of Kenya.
24. While conceding that the applicant sought the relevant consents of the contract with Triple A Capital Limited from the Ministry of Finance and the second Respondent herein, the deponent contended that the applicant abused the said consents by using the approval to negotiate new terms with Triple A Capital Limited which terms were not only detrimental to the KPC but were lacking in authority from the Ministries of Finance and Energy.
25. It was further contended that the Statutory Statement supporting the applicants application is bad in law for containing the facts of the case contrary to properly laid down procedures and that to the extent that the applicant's application purports to be made under the provisions of the Constitution of Kenya and Order LIII simultaneously, the same is fatally and incurable incompetent.
26. In addition the orders sought by the Applicant herein cannot be granted as their net effect would be to impose a personal contract of employment of the applicant upon the Ministry of Energy contrary to law.

<u>1st and 3rd Respondents' Case</u>

27. .On behalf of the 1st and 3rd Respondents, a replying affidavit was sworn by **Edward Mugo Ngigi**, a Senior Inspector with the 3rd Respondent herein on 10th May, 2006.
28. According to the deponent, while reiterating the contents of the replying affidavit sworn on behalf of the 2nd Respondent, following the 2nd respondent's instructions given, pursuant to the provisions of the Act, he was instructed to investigate issues surrounding the borrowing of Kenya Shillings Two (2) billion by KPC and apart from himself, his investigating team comprised of **Mr. Walter Gumbo**, a Senior Inspector and **Ms. Joyce Wesonga**, Senior Auditor. According to him, on 6th September, 2004, the applicant was informed by letter about the investigations and was requested to present himself before the investigating team on 10th September, 2004 which was tasked with investigating the borrowing of a sum of Kenya Shillings two billion by the KPC.
29. The inspection team did study various letters and the contract documents entered into between the company and third parties and the ex-parte applicant was afforded an opportunity to defend/make these representations in respect to the contract entered into between the company and Triple A Capital Limited.
30. According to him, after examining all the documents that were submitted for purposes of the investigations there was evidence that the company sought third party financial assistance from Triple A Capital although bids from other tenderers had been submitted but were not considered by the applicant. Indeed, these bids were only opened at the 163rd Board meeting held on 27th September, 2004 after disclosure by the Company's management that they had remained unopened on instructions by the applicant. He further deposed that the applicant had in a letter dated 27th May, 2003 addressed to the Permanent Secretary Ministry of Finance expressly made in clear that the Kenya shillings two billion loan facility which was to be repayable in 12 months would be interest free which was reiterated by the applicant in a letter of 6th June, 2003 to the Permanent Secretary, Ministry of finance. The letter also indicated that in the event of default

within the first 12 months, an interest default rate of 0.95% per month would be imposed and any amounts outstanding, beyond 12 months would attract interest rate of 1% per month. Further, both letters from the applicant did not state the flat interest rates were applicable on the loans. He therefore deposed that the interest rate reflected was erroneous as the agreements signed between the company and Standard Chartered Bank indicated that the three year loan facility would attract an interest rate based on a 3 years Treasury Bond rate plus a margin of 3.5% p.a.

31. Further investigations also revealed that whereas the interest charged by the Standard Chartered Bank was calculated monthly and payable in arrears, the applicant had instructed the same bank to pay Triple A Capital Limited interest charges quarterly in advance. In his view, the interest charges paid to Triple A Capital Limited as duly instructed by the Applicant were manifestly excessive and from the investigation, it came out clearly that the rate of interest was 10% over and above what the Bank was charging the company for the refinancing arrangement.
32. It was further revealed that the parent Ministry (Energy) was not involved in any negations with Triple A Capital Limed and that both Treasury and Ministry of energy were unaware of the actual terms contained in the agreements executed by the Applicant and 3rd parties as the applicant by a letter dated 4th August, 2003 indicated that he would submit the agreements for verification and approval which was not done hence the approved terms by the Treasury were materially different to those the applicant had agreed upon the Triple A Capital Limited.
33. The deponent denied that the 3 year loan was provided for by Triple A Capital Ltd as it was secured by the Company from the Bank at an interest rate of 8.13% and consequently the flat rate of 0.88% per month which the applicant made the company to pay was equivalent to a rate of interest of 19.41% yet from investigations during this period, there was no bank which was charging this rate of interest for borrowings above a billion shillings. It was further denied that the Management Board of the company approve the financial arrangements and information received from the Treasury showed that the terms approved by Treasury were different from those shown by the applicant. Further, the issue of the interest not being applicable in the 1st year did not arise inspite of the extended period of 36 months since Triple A Capital Limited confirmed in its letter of 21st July, 2003 that all other terms would be the same.
34. According to him, it is on record that the applicant's finance manager was present at the meeting at Treasury on 21st July, 2003 and the Attorney General in giving the legal advice stated that the confirmation of the borrowing terms had to be obtained from the treasury.
35. It was reiterated that the respective approvals by the two (2) Ministries were given on the basis that Triple A Capital Limited was to lend the funds to the company on the terms initially approved but as it has been demonstrated Triple A Capital Limited did not have any money to lend the company and the terms applied were totally different. To the deponent, from the investigations carried out, it emerged that the Ministries, namely Finance and Energy were not involved in the negations with Triple A Capital Limited and the letter from the Ministry of Energy was based on information given by the Applicant and that it is explicit from the report, KPC as a result of the unauthorized transaction entered into by the applicant lost a colossal sum of Kshs. 151,083,225.94. I refer to page 59 of the report.
36. To him, the investigations carried out and the report made and recommendations given by the 3rd Respondent were lawful and within the provisions of the Act and specifically section 18 and 19 of the Act.
37. It was contended that the Notice of Motion before the Court is misconceived, incompetent and fatally defective having invoked both the jurisdictions under the Constitution and the ***Law Reform Act*** which are mutually exclusive and that the application is incompetent and fatally defective to the effect that it purports to be made under provisions of the Constitution of Kenya and Order LIII of the ***Civil Procedure Rules***.
38. Further, the orders sought by the ex-parte applicant are outside the ambit of judicial and/or Constitutional Review as they involve a personal contract of employment of the ex-parte applicant yet the remedy is concerned with reviewing the decision making process itself and not the merits of the decision in respect of which the Judicial Review application is made (legality of the process). Prohibition, on the other hand, cannot be obtained against tan already made decision, but only prevent the making of a contemplated decision while j orders of certiorari can only be granted against decisions but not against recommendations.

The applicants' Submissions

39. It is the Applicants' submission that the Minister for Energy has no locus or authority to terminate his employment hence his action was ultra vires as it breached section 7(3) of the Act which section does not provide for delegation of the President's power to any other person or body.
40. Apart from that the Memorandum and Articles of Association of KPC do not provide for the removal or replacement of the Directors of KPC in the manner in which the applicant's employment was terminated.
41. According to the applicant he Inspector General had no powers or authority to recommend that the Applicant be relieved of his duties. Further the said report was arrived at in breach of the Rules of Natural Justice since the said Inspector General was personally present at the meeting at which the transaction with Triple A was approved hence it was improper for him to carry out the said investigations are prepare a report. In support of this submission the applicant relied on **City of London vs. Wood [1701] 12 mod 669** and **Fairmont Investments Ltd vs. Secretary of State for Environment [1976] 1 WLR 1255**.
42. The applicant however conceded that as the prayer for prohibition had been overtaken by events, he would not pursue the same. However, the prayer for mandamus would be consequential to the prayers for certiorari.

2nd Respondent's Submissions

43. On behalf of the 2nd Respondent, it was submitted based on **Republic vs. The Hon. Chief Justice & Others ex parte Roseline Nambuye** that the two regimes of judicial review and constitution cannot be invoked simultaneously hence the application is fatally and incurably defective.
44. According to the 2nd Respondent, based on **Republic vs. Judicial Service Commission ex parte Pareno [2004] KLR 203**, the merits of the decision to terminate the applicant's employment are not the proper subject of judicial review.
45. It was submitted that the Court will not issue an order of mandamus to interfere with employment relationship based on the **Pareno Case** and **O'Reilly vs. Mackman [1983] AC 237** and that as a general rule, courts will not compel an employer to retain the services of an employee in whom the employer has lost trust and confidence and in circumstances that require the courts continued supervision of the performance of the Contract.
46. According to the 2nd Respondent, section 4 of the Act the President has the power to assign ministerial responsibility for any state corporation and matters relating thereto to the vice president and ministers as the President may direct and in this case the mandate to investigate questionable deals rested with the Minister for Energy.
47. In the said Respondent's view the principles of natural justice were adhered to since the applicant was interviewed in the course of the investigations.
48. It was submitted that section 19 of the Act with respect to the powers of the Inspector General should not be read in isolation to the other provisions such as section 18 of the Act which vests on the said office the powers to advice the Government on all matters affecting the effective running of state corporations. In support of this submission the said Respondent relied on **Attorney General vs. HRH Prince Ernest Agustus of Hanover [1957] 1 All ER 49 at 55** and **Re Bidle (Deceased) Bidle vs. General Accident Fire and Life Assurance Corporation Ltd [1948] 2 All ER 995**.
49. It was submitted that section 6(2) of the Act provides that a member of the Board may cease to hold office if he conducts himself in a manner deemed by the Minister in consultation with the Committee to be inconsistent with the membership of the Board and under section 4 thereof the President may assign ministerial responsibility to the Vice President or any Minister which he did vide Presidential Circular No. 1 of 2004.
50. It was submitted that the Minster's decision was based on cogent evidence that the applicant has acted in excess of the consents given to him which conduct amounted to gross misconduct which warranted his dismissal.

Determination

51. The first issue for determination is whether the application is incurably defective for the reasons that it is brought both under the Constitution and the ***Law Reform Act***. In order to determine this matter, one ought to appreciate the current Constitutional dispensation. The decision in the case of **Republic vs. The Hon. Chief Justice & Others ex parte Roseline Nambuye** (supra) was handed down on 22nd April 2005 before the promulgation of the current Constitution.
52. Before delving in details on this issue, one needs to recall the holding in **O'Reilly vs. Mackman [1982] 3 WLR 604, 623** where **Lord Denning** expressed himself as follows:

"Just as the pick and shovel is nolonger suitable for the winning of coal, so also the procedure of mandamus, certiorari, and actions on the case are not suitable for the winning of freedom in the new age. They must be replaced by new up-to-date machinery, by declarations, injunctions, and actions for negligence...We have in our time to deal with changes which are of equal constitutional significance to those which took place 300 years ago. Let us prove ourselves equal to the challenge. Now, over 30 years after, we do have the new and up-to-date machinery...To revert to the technical restrictions...that were current 30 years or more ago would be to reverse that progress towards a comprehensive system of administrative law that I regard as having been the greatest achievement of the English courts in my judicial lifetime. So we have proved ourselves equal to the challenge. Let us buttress our achievement by interpreting section 31 in a wide and liberal spirit. By so doing we shall have done much to prevent the abuse or misuse of power by any public authority or public officer or other person acting in the exercise of a public duty."

53. In our case, it is my considered view that this Machinery was achieved by the promulgation of the current Constitution under which Article 23(3) of the provides:

In any proceedings brought under Article 22, a court may grant appropriate relief, including—

(a) a declaration of rights;

(b) an injunction;

(c) a conservatory order;

(d) a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24;

(e) an order for compensation; and

(f) an order of judicial review.

54. The current Constitution provides in Article 47 as follows:

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

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

55. It is therefore clear that the right to fair administrative action is nolonger just a judicial review issue but a Constitutional issue as well. As was appreciated in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43 (HCK)** judicial review has been said to stem from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness. In my view it is nolonger possible to create clear distinction between the grounds upon which judicial review

remedies can be granted from those on which remedies in respect of violation of the and Constitution can be granted. Whereas the remedies in judicial review are limited and restricted, the grounds cut across both.

56. It is therefore my view and I so hold that the citation of the provisions of the Constitution in a judicial review application is nolonger fatal to such an application.

57. With respect to the prayer for prohibition, as was held in **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge & Others Civil Appeal No 266 of 1996**:

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…… Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter."

58. As was conceded by the applicant and rightly so in my view, the prayer for an order of prohibition can nolonger be granted in these proceedings.

59. With respect to the prayer for quashing the recommendations made by the Inspector General (Corporations), it is clear that the same were mere recommendations which were not binding either on the Minister or the President. They could be ignored by the appointing authority if he deemed so. The general position was restated in ***Halsbury's Laws of England*** (supra) as follows:

"The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be found."

57. Similarly, in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** the Court stated:

"The notice that is under challenge in these proceedings gave the applicants 14 days to vacate the disputed land. The letter (Notice) was written based on the findings of the Ndungu Report on land whose recommendations have not acquired any statutory form. They are mere recommendations and have no force of law and it is doubtful whether the said Report can be a basis for issuance of such notice as the one under attack in this application."

60. However, in **Re Pergamon Press Ltd [1971] Ch. 388,** the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of Law. That issue was answered as follows:

"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay,

for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay's submission. It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him. They need not quote chapter and verse. An outline of the charge will usually suffice....That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind."

61. It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present their case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidence material.
62. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court in **Baker v. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

"**The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."**

63. The Court further emphasized that procedural fairness is flexible and entirely dependent on context. In order to determine the degree of procedural fairness owed in a given in case, the court set out five factors to be considered: (1) The nature of the decision being made and the process followed in making it; (2) The nature of the statutory scheme and the term of the statute pursuant to which the body operates; (3) The importance of the decision to the affected person; (4) The presence of any legitimate expectations; and (5) The choice of procedure made by the decision-maker.
64. 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.

65. Article 47 of the Constitution provides for the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

66. In **Onyango Oloo vs. Attorney General [1986-1989] EA 456** the Court of Appeal expressed itself as follows:

"The rules of natural justice apply to administrative action in so far as it affects the rights of the appellant and the appellant's legitimate expectation to benefit from the remission by a release...The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings or of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void *ab initio.*"

67. In this case, the Respondents contend that the applicant was heard before the report was written. The applicants on the other hand contend that the 3rd Respondent ought not to have been tasked with the investigations.

68. That leads me to the role of the 3rd Respondent. Section 18 of the Act provides:

(1) There shall be an Inspector-General (Corporations) whose office shall be an office in the public service and whose duties shall be-

(a) to advise the Government on all matters affecting the effective running of state corporations;

(b) to report periodically to the Minister om management practices within any state corporation;

(c) to report to the Controller and Auditor-General any cases where moneys appropriated by Parliament are not being applied by state corporations for the purposes for which they were appropriated.

(2) For the purposes of carrying out his duties under subsection (1) the Inspector-General (Corporations) shall have the following powers-

(a) to call for and inspect all books, records, returns and documents which in his opinion relate to the accounts of, or to execution of the functions of, any state corporation;

(b) to enter and inspect the premises, including any plant and installation thereon, of any state corporation;

(c) to attend meetings of any state corporation or of a Board or committee thereof if in his opinion it is necessary to do so for the effective carrying out of his duties under this section.

(3) The Committee, or the Controller and Auditor-General may, if they consider it desirable, require the Inspector-General (Corporations) to conduct special investigations of any state corporation on their behalf and to report the findings to them.

(4) There may be appointed such staff whose offices shall be offices in the public service as are necessary to assist the Inspector General (Corporations) in the performance of his duties under this Act.

19. (1) In any investigation conducted under this Act, the Inspector-General (Corporations) shall have power

(a) to disallow any item of account which is contrary to the law or to any direction lawfully given to a state corporation;

(b) to surcharge the amount of any expenditure so disallowed upon the person responsible for incurring or authorizing the expenditure;

(c) to surcharge any sum which has not been duly brought to account upon the person by whom that sum ought to have been brought into account;

(d) to surcharge the amount of any loss or deficiency upon any person by whose negligence or misconduct the loss or deficiency has been incurred;

(e) to certify the amount due from any person upon whom he has made a surcharge.

(2) The Inspector-General (Corporations) shall as soon practicable after certifying the amount of surcharge, furnish the person surcharged with a certificate of surcharge in the prescribed form.

(3) For the purposes of this section, a member of the Board shall be deemed to be responsible for incurring or authorizing an expenditure if, being present when the resolution of the Board or committee thereof incurring or authorizing the expenditure was passed

(a) he voted in favour of it; or

(b) he did not cause his vote against the resolution to be recorded in the minutes.

(4) A person shall not be freed from liability to surcharge under this section by reason only of the fact that, in the matter giving rise to the liability, he acted in pursuance of any resolution of a Board, or of any committee thereof, if that resolution was contrary to law.

69. From the foregoing it is clear that the Inspector General (Corporations) had the powers to conduct special investigations into the affairs of the KPC and report accordingly. The only issue which the applicant took with the 3rd Respondent was that the 3rd respondent participated in the deliberations leading to the approval of the questioned transaction. The Respondents' case however is that what was actually transacted was not what was approved. For this Court to determine which of the two versions is correct, the Court would have to go into the details of what was actually approved and what was actually undertaken. Unfortunately that is not the task of a judicial review Court since to do so entails the taking of evidence and a decision being made on the merits. Accordingly this court will not embark on such an exercise since it would amount to the Court usurping the powers of the 3rd Respondent which action would itself amount to abuse of the judicial review powers granted to this Court.
70. The next issue is whether the Minister had the powers to dismiss the applicant. In this case it is the applicant's contention that the Minister did not have the powers to dismiss the applicant as the power to do so belongs to the President. In my view where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others. Similarly, in **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held that it has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it.
71. Accordingly, if the Minister purported to have exercised the powers that he did not have not only would his action be illegal but would also be in excess of or an abuse of his powers.
72. Section 7(3) of the Act provides as follows:

Notwithstanding the provisions of any other written law or the articles of association establishing and governing a Board, the President may, if at any time it appears to him that a Board has failed to carry out its functions in the national interest, revoke the appointment of any member of the Board and may himself nominate a new member for the remainder of the period of office of that member or he may constitute a new Board for such period as he shall, in consultation with the Committee, determine.

73. It is therefore clear that under the aforesaid provision the powers to inter alia revoke the appointment of any member of the Board is donated to the President. Section 4 of the Act, however provides:

The President shall assign ministerial responsibility for any state corporation and matters relating thereto to the Vice-President and the several Ministers as the President may by directions in writing determine.

74. Apart from that section 36(1) of the ***Interpretation and General Provisions Act***, Cap 2 Laws of Kenya provides:

Where by an Act the exercise of a power or the performance of a duty is conferred upon or is vested in the President, the President may, by order, transfer the exercise of that power or the performance of that duty to a Minister.

75. It was the Respondents' position which position was not expressly controverted that vide Presidential Circular No. 1 of 2004, the Minister was duly delegated the powers. Accordingly, I am not satisfied that the contention that the Minister had no powers to exercise the powers under

section 6(2)(e) of the Act has been satisfactorily proved.

76. Having arrived at the foregoing decision, the next issue for determination is whether the applicant was afforded an opportunity of being heard. There is a letter exhibited to the affidavit sworn by **Edward Mugo** dated 6th September, 2004 addressed to the applicant inviting him for an interview. It is therefore clear that the applicant was afforded an opportunity of being heard. Whether or not the allegations made merited his dismissal is beyond the scope of this application.
77. In the result I find merit no in the Notice of Motion dated the 31st March, 2005.

Orders

78. Consequently, the order which commends itself to me and which I hereby grant is that the said Motion be and is hereby dismissed with costs to the Respondents.

Dated at Nairobi this day 23rd September, 2014

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Wetangula for the 2nd Respondent

Cc Patricia