Republic v National Treasury and Economic Planning & another; Law Society of Kenya (Ex parte Applicant) (Judicial Review Application E198 of 2024) [2025] KEHC 8955 (KLR) (Judicial Review) (23 June 2025) (Judgment)

Neutral citation: [2025] KEHC 8955 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E198 OF 2024

RE ABURILI, J

JUNE 23, 2025

BETWEEN

REPUBLIC ..... APPLICANT

AND

THE NATIONAL TREASURY AND ECONOMIC PLANNING .... 1ST RESPONDENT

THE ATTORNEY GENERAL ..... 2ND RESPONDENT

AND

THE LAW SOCIETY OF KENYA ..... EX PARTE APPLICANT

The Government practice of paying professional subscription fees for public officers gave rise to a legitimate expectation of continuity

The National Treasury issued a circular cutting 100% of Government funding for professional and trade body subscriptions. The Law Society of Kenya challenged the directive, arguing it was irrational, discriminatory, and issued without public participation. The court found that the National Treasury's mandate to rationalize expenditure was a legally grounded function meant to promote fiscal sustainability, efficiency and alignment with national priorities. Further, the failure to engage the affected professionals or their representative bodies fell short of the constitutional and administrative law requirements of procedural fairness. The court finally held that the historical practice of funding practising licence fees for public officers, absent any statutory prohibition or prior consultation, gave rise to a legitimate expectation of continuity or, at minimum, a fair and transparent process before withdrawal.

Reported by Kakai Toili

Constitutional Law *– doctrine of legitimate expectation – factors leading to the establishment of the doctrine of legitimate expectation - whether the longstanding Government practice of paying statutory professional*

subscription fees for public officers absent any statutory prohibition or prior consultation, gave rise to a legitimate expectation of continuity or a fair and transparent process before withdrawal.

Constitutional Law *– national values and principles of governance - public participation – whether the National Treasury's 100% cut on professional subscription fees without public participation and stakeholder consultation violated constitutional and procedural fairness requirements - Constitution of Kenya, article 10; Fair Administrative Action Act (Cap. 7L), section 4.*

Constitutional Law *- public finance – National Treasury – mandate of the National Treasury – rationalization of Government expenditure – whether the National Treasury had the legal mandate to rationalize Government expenditure, including issuing circulars limiting payment of professional body subscription fees by ministries, departments and agencies - Constitution of Kenya, articles 201 and 225(1).*

Judicial Review *– judicial review orders - certiorari, prohibition and mandamus - what was the nature of the judicial review orders of certiorari, prohibition and mandamus, and under what circumstances could they be issued.*

Brief facts

On July 5, 2024, the 1st respondent (the National Treasury and Economic Planning) issued Circular No. 8/2024 (the circular) to all accounting officers/principal secretaries of all ministries, departments, and agencies (MDAs). In the circular, the 1st respondent was said to have issued directives that the Government would control expenditures by initiating austerity measures on the provisions for operations and maintenance, which would be undertaken in, among others, all MDAs. According to the *ex parte* applicant (the Law Society of Kenya) the 1st respondent, via the circular, imposed a 100% cut on membership fees, dues, and subscriptions to professional and trade bodies, which, in effect, gravely affected it and its members.

The applicant stated that the new directives by the 1st respondent were irrational and discriminatory as they were imposed on the applicant's members without public participation and thus amounted to a forceful variation of their contracts without their involvement. The applicant averred that all in-house counsel working in MDAs stood to be affected by the new directives, which would force them to pay for their own practicing licence fees while employed in the public service. The new directives according to the applicant, amounted to a breach of legitimate expectations of individual in-house counsel who work in various MDAs.

The *ex parte* applicant sought for among other orders an order of *certiorari* to quash the decision of the 1st respondent issued via the circular, an order of prohibition restraining the 1st respondent from enforcing and/or implementing the circular and an order of *mandamus* compelling the 1st respondent to reinstate the budget for subscription fees and levies to professional bodies.

Issues

i. Whether the longstanding Government practice of paying statutory professional subscription fees for public officers absent any statutory prohibition or prior consultation, gave rise to a legitimate expectation of continuity or a fair and transparent process before withdrawal.
ii. Whether the National Treasury's 100% cut on professional subscription fees without public participation and stakeholder consultation violated constitutional and procedural fairness requirements.
iii. Whether the National Treasury had the legal mandate to rationalize Government expenditure, including issuing circulars limiting payment of professional body subscription fees by ministries, departments and agencies.
iv. What was the nature of the judicial review orders of *certiorari,* prohibition and *mandamus*, and under what circumstances could they be issued?

Held

1. The 1st respondent played a central role in the management of public finances in Kenya, particularly in the rationalization of budget and expenditure. Its powers and responsibilities were primarily grounded

in the Constitution of Kenya and the Public Finance Management Act (Cap. 412A). Article 201 of the Constitution provided that public finance shall be managed in a manner that promoted transparency, accountability, and effective use of resources. Under article 225(1) of the Constitution, the 1st respondent was responsible for ensuring that expenditure of public money was lawful and effective. The statutory role of the 1st respondent could be found in the Public Finance Management Act; the Act outlined the specific functions and powers of the 1st respondent.

2. In practice, budget rationalization referred to the reprioritization, restriction or reduction of expenditures to align with available resources and national development priorities. In that regard, the 1st respondent could identify non-core or non-essential spending; reallocate funds to priority sectors; or issue circulars or directives limiting certain categories of expenditure (for example professional body subscriptions, hospitality, and travel). Such decisions were typically guided by the medium-term expenditure framework (MTEF), resource ceilings issued to MDAs, recommendations of Pending Bills Committees or special audit reports. Therefore, the 1st respondent's mandate to rationalize expenditure was a legally grounded function meant to promote fiscal sustainability, efficiency and alignment with national priorities.

3. While the 1st respondent had broad powers under the Public Finance Management Act, those powers must be exercised within the bounds of the Constitution, particularly respecting the principles and values espoused in article 10 of the Constitution and the Bill of Rights. Those values, principles and or rights included transparency, consultation and fair administrative action.

4. The court had to refrain from determining issues employment and labour relations raised in the application as those were issues that were beyond the jurisdiction of the court. The court was expressly barred by article 165(5) of the Constitution from hearing and determining disputes relating to employment and labour relations.

5. The 1st respondent was mandated by law to issue circulars and even limit expenditure on what it considered non-essential services having regard to the financial situation in Kenya. Historically, Government departments had paid those fees and subscriptions to professional bodies for their employees, recognizing them as essential to enabling officers to perform their statutory functions lawfully. The court acknowledged the statutory and constitutional mandate and role of the 1st respondent and the necessity of implementing such austerity measures due to the significant fiscal shortfall.

6. The 1st respondent had the legal authority to rationalize Government spending under the Public Finance Management Act including issuing expenditure guidance. The 1st respondent may reprioritize allocations in light of macroeconomic constraints. However, statutory discretion must be exercised in conformity with constitutional values and principles. Discretion must not be abused or exercised arbitrarily.

7. It was incumbent upon the 1st respondent to, in accordance with constitutional dictates, conduct public participation through stakeholder engagement and consultations prior to issuing directives like the one impugned therein. While the 1st respondent claimed to have held budget consultations with MDAs, no evidence had been provided to demonstrate that the *ex parte* applicant or other directly affected professionals and the professional bodies that those professionals subscribed to and pay subscription fees on an annual basis were consulted before the circular was issued. It was equally surprising that the 1st respondent had not outlined its statutory mandate in all those matters complained of. It was not enough to say that there was budgetary constrains and or deficit.

8. Public participation was a core national value under article 10 of the Constitution. When an administrative decision impacted specific groups of people especially professionals, by modifying established practices or entitlements, the decision-maker had a duty to conduct focused and meaningful consultations with those affected, even if no consensus was obtained from the public

participation exercise. Article 10(2)(a) of the Constitution enshrined public participation as a binding national value.

9. Besides change of policy, the circular impacted the statutory compliance obligations of public servants. Advocates working for State agencies were not exempt from paying for annual practicing licenses. The employers paid such fees for annual practicing certificates on behalf of their professional employees. The employees would not be eligible to execute legal documents such as commissioning of oaths or appearing in court or drafting pleadings as advocates if their practicing certificates were not renewed for the year. They would as a consequence be treated as unqualified persons and therefore lacked the capacity to represent the agencies in legal matters. Those were some of the issues that would have arisen during public participation process before eliminating such fees.

10. The failure to engage professional bodies or affected MDAs prior to the issuance of the circular was a breach of article 10 of the Constitution and section 4 of the Fair Administrative Action Act. The impugned directive, which effectively shifted the burden of paying statutory practising fees to individual counsel employed in public service, constituted a significant policy shift. As such, it was mandatory that those affected were engaged. Section 4 of the Act provided that every person had the right to be given written reasons for any administrative action that was taken against him. The failure to engage the affected professionals or their representative bodies fell short of the constitutional and administrative law requirements of procedural fairness.

11. The 1st respondent's historical practice of funding practising licence fees for public officers, absent any statutory prohibition or prior consultation, gave rise to a legitimate expectation of continuity or, at minimum, a fair and transparent process before withdrawal. The abrupt revocation of that support, without transitional measures or meaningful engagement with affected persons, not only defeated that expectation but also offended the constitutional guarantees of fair administrative action that was expeditious, efficient, lawful, reasonable and procedurally fair, under article 47 of the Constitution.

12. The power of the court in judicial review was limited to examining the legality, reasonableness and procedural fairness of administrative decisions. In granting an order of *certiorari* which was discretionary, the court must weigh several things even if a body or authority committed an illegality or acted unprocedurally. The order was not automatic; the remedy must be the most efficacious.

13. The impugned circular was issued on July 7, 2024 at the commencement of the new financial year 2024/2025. Annual practicing/ subscription fees were usually paid at the beginning of the calendar year. The affected professionals had to settle those fees by themselves. The circular was not issued to last permanently. The circular was issued to MDAs on the revision of the FY 2024/2025 specifically under the recurrent budget estimate which was lapsing in a week's time on June 30, 2025. The applicant did not at the leave stage seek for any stay of implementation of the circular, although it sought for leave to apply for prohibition to restrain the 1st respondent from implementing the circular and *mandamus* to reinstate the budget for subscription of fees and levies for professional bodies.

14. The application was filed two months after the circular came into effect and no stay of implementation of the circular was sought and obtained from the court. The court encountered the file in March 2025, nine months into the financial year and now it was a few days to the end of the financial year. *Certiorari* was a tool for checking abuse of administrative authority. Even if the budget cut was implemented, the court may quash the decision to pronounce on the legality for future guidance.

15. The order of prohibition looked to the future to prohibit the action contemplated. The applicant sought to prohibit the 1st respondent from implementing the circular dated July 5, 2024 eliminating fees and or levies payable to professional bodies in the financial year which was ending in a week's time. On the facts presented before the court, there was no mention or indication that the circular was to remain in place for the subsequent financial years. It would be superfluous to prohibit an act which had already taken place.

16. *Mandamus* was a remedy that compelled the performance of a statutory or public duty that a public body had unlawfully refused or failed to perform. To succeed, the applicant must show:
    1. The existence of a clear legal duty;
    2. that the duty was owed to the applicant;
    3. that the duty had not been fulfilled; and
    4. that there was no alternative remedy.
17. *Mandamus* could not compel expenditure of funds not appropriated, the exercise of discretion in a particular way, or the performance of impossible or past acts (that was undoing past budget execution in a lapsed year). That was because Government budgets were annual and subject to parliamentary appropriation under articles 221–228 of the Constitution, and section 39 of the Public Finance Management Act. Once a financial year lapsed, the budget expired and no public officer had a duty or power to reallocate or reinstate funds to that year.
18. Where performance was no longer possible, courts did not issue futile or impossible orders. *Mandamus* was a forward-looking remedy, not a tool to undo or reverse fully executed fiscal policies. Once a budget cycle was complete, it became a matter of public accounts oversight, not judicial enforcement, especially where, like in the instant case, there was no evidence or pleading that the budget cut would transcend the budget year in which event, a new cause of action which was not pleaded would arise.
19. No declaration was sought and the court would not issue substantive orders which were never pleaded and or sought in judicial review proceedings. There being no statutory obligation to fund a specific entity in perpetuity, like constitutional commissions under article 249(3) of the Constitution, the court would not issue *mandamus* in the manner that was pleaded in the matter.
20. The impugned decision was made in violation of the constitutional value of public participation, procedural fairness and legitimate expectation, the threshold for intervention was met.

Application partly allowed.

Orders

i. *An order of certiorari was issued quashing the circular insofar in so far as it directed a 100% cut on membership fees, dues and subscriptions to trade bodies.*
ii. *As the circular took effect and had been enforced covering the period that it was intended to last, during the 2024/2025 financial year which was ending on June 30, 2025, prohibition could not issue.*
iii. *As there was no stay of implementation of the decision contained in the circular, mandamus was overtaken by events. The court could not reinstate the budget which had since lapsed. The prayer for mandamus was declined.*
iv. *Each party shall bear its own costs.*

Citations

Cases

1. British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party) (Petition 5 of 2017; [2019] KESC 15 (KLR)) — Applied
2. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2015] KESC 13 (KLR)) — Applied
3. David Wanyeki Kago v Kenya National Examinations Council (Petition E227 of 2021; [2021] KEHC 4639 (KLR)) — Applied
4. Judicial Service Comission v Mbalu Mutava & another (Civil Appeal 52 of 2014; [2015] KECA 741 (KLR)) — Applied
5. Kenya Human Rights Commission & another v Attorney General & another; Law Society of Kenya & another (Interested Parties) (Petition E179 of 2022; [2024] KEHC 15702 (KLR)) — Applied

6. Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge, N S, J W, R N, G W, A W, C W, B W, S N & J B (Civil Appeal 266 of 1996; [1997] KECA 58 (KLR)) — Applied
7. Kenya Revenue Authority v Universal Corporation Ltd (Civil Appeal (Application) 150 of 2018; [2024] KECA 1103 (KLR)) — Applied
8. Keroche Industries Limited v Kenya Revenue Authority & 5 others (Miscellaneous Civil Application 743 of 2006; [2007] KEHC 3680 (KLR)) — Applied
9. Kiambu County Government & 3 others v Robert N. Gakuru & others (Civil Application 97 of 2014; [2014] KECA 157 (KLR)) — Applied
10. Lady Justice Kalpana H. Rawal , Philip K. Tunoi & David A. Onyancha v Judicial Service Commission, Secretary, Judicial Service Commission,Judiciary, Okiya Omtata Okoiti, International Commission of Jurists,Kituo Cha Sheria & Law Society of Kenya (Civil Application 11 & 12 of 2016 & Ad Litem 1 of 2012 (Consolidated); [2016] KESC 3 (KLR)) — Applied
11. Municipal Council of Mombasa v Republic & Umoja Consultants Ltd. (Civil Appeal 185 of 2001; [2002] KECA 8 (KLR)) — Applied
12. National Assembly & another v Okoiti & 55 others (Civil Appeal E003 of 2023 & . E016, E021, E049, E064 & E080 of 2024 (Consolidated); [2024] KECA 876 (KLR)) — Applied
13. National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission, Attorney General & Jubilee Party of Kenya (Civil Appeal 258 of 2017; [2017] KECA 342 (KLR)) — Applied
14. Njoroge & 2 others v Ministry of Interior and National Administration Kenya & 2 others (Judicial Review Application 2 of 2024; [2025] KEHC 4587 (KLR)) — Applied
15. Republic v County Director-Physical Planning Department- Kiambu County,County Planning Technical Committee Kiambu County,Physical Planning Liason Committee-Kiambu County & County Government of Kiambu Ex-Parte Shainaz Shamshudin J. Jamal & Munira Sumar (Miscellaneous Civil Application 126 of 2016; [2016] KEHC 1100 (KLR)) — Applied
16. Republic v Kenya National Examination Council, Executive Officer and Council Secretary, Kenya National Examination Council Ex-Parte L M B & 319 others (Judicial Review Application 3 of 2018; [2018] KEHC 4711 (KLR)) — Applied
17. REPUBLIC V PUBLIC PROCUREMENT ADMINISTRATIVE REVIEW BOARD & 2 OTHERS (Judicial Review 216 of 2012; [2013] KEHC 6343 (KLR)) — Applied
18. Robert N. Gakuru & Others v Governor Kiambu County & 3 others (Petition 532 of 2014; [2014] KEHC 7516 (KLR)) — Applied
19. Zachariah Wagunza, Kwame Ochola Otinda V Office of the Registrar Academic Kenyatta University,Student Disciplinary Committee Kenyatta University,Dr. Paul Thomas Obade (Judicial Review Miscellaneous Application 155 of 2013; [2013] KEHC 6908 (KLR)) — Applied
20. Pastoli v Kabale District Local Government Council & others ([2008] 2 EA 300) — Applied
21. Council of Civil Service Unions versus Minister for the Civil Service ((1985) AC. 374, 410) — Applied

Statutes

1. Civil Procedure Rules (Cap 21 Sub Leg) — order 53 Rule 3(1) and Rule 4 — Cited
2. Constitution of Kenya, 2010 (const2010) — article 47(1) — Cited
3. Employment Act — section 10(5) — Cited
4. Fair Administrative Action Act (CAP 7L) — section 4(1) — Cited
5. Law Reform Act (cap 26) — section 8 — Cited
6. Public Finance Management Act (No. 18 of 2012) — In general — Cited
7. Advocates Act
8. Commission On Administrative Justice Act
9. Income Tax Act
10. Supreme Court Act

Texts

1. Hogg, QM., (Lord Hailsham) et al (Eds) (1995), Halsbury's Laws England (London: Butterworth 4th Edn Vol 17 para 13)

Advocates

None mentioned

JUDGMENT

1. Pursuant to leave granted on 5th September 2024, by Ngaah J, the Ex parte Applicant, the Premier Bar Association, the Law Society of Kenya filed their substantive motion dated 12th September 2024. The application is brought under Section 8 of the *Law Reform Act* and Order 53 Rule 3(1) and Rule 4 of the *Civil Procedure Rules*.

2. The application seeks an order of Certiorari to bring into the High Court for purposes of quashing the decision of the 1st Respondent, The National Treasury and Economic Planning, issued via the Treasury Circular No. 8/2024 on 5th July 2024, an order of Prohibition restraining the said 1st Respondent from enforcing and/or implementing the said circular and an order of Mandamus compelling the 1st Respondent to reinstate the budget for subscription fees and levies to professional bodies.

3. The application is accompanied by a statement of facts dated 3rd September 2024 and a verifying affidavit sworn by Florence Muturi, the Chief Executive Officer of the Ex parte Applicant on 3rd September 2024.

4. The Ex parte Applicant's case is that on 28th June 2024, the National Treasury and Economic Planning issued Circular No 6/2024, wherein it gave directives limiting the spending of the Financial Year 2024/25 to 15% of the approved budget until the approval of the Financial Year 2024/25 Supplementary Estimates No.1.

5. On 5th July 2024, the 1st Respondent it is stated, issued another Circular No. 8/2024 to all Accounting Officers/Principal Secretaries of all Ministries, Departments, and Agencies, stipulating guidelines on the revision of Estimates of Revenue and Expenditure for the Financial Year 2024/ 25.

6. In the said Circular, the 1st Respondent is said to have issued directives that the Government would control expenditures by initiating austerity measures on the provisions for operations and maintenance, which would be undertaken in, among others, all Ministries, Departments, and State Agencies.

7. According to the Applicant, in its quest to rationalize the Financial Year 2024/25 Recurrent Budget, the 1st Respondent, via Circular No. 8/2024, imposed a 100% cut on Membership fees, Dues, and Subscriptions to Professional and Trade Bodies, which, in effect, gravely affects it and its members.

8. The Applicant also states that the new directives by the 1st Respondent are irrational and discriminatory as they were imposed on the Applicant's members without public participation, contrary to Article 10 of *the Constitution* of Kenya and sections 27 and 28 of the *Advocates Act*, Cap 16 of the Laws of Kenya and thus amounts to a forceful variation of their contracts without their involvement.

9. It is the Applicant's case that the new directives were issued unilaterally, without any clear communication of the right to appeal, leaving the affected parties with no recourse to challenge the decision. The Applicant also states that the 1st Respondent's actions have effectively forced these

directives upon its members, compelling them to accept the terms without any meaningful dialogue or consideration of their concerns.

10. The Applicant avers that all in-house counsel working in Ministries, State Departments, and Agencies stand to be affected by the new directives, which will force them to pay for their own Practicing Licence fees while employed in the Public Service.

11. According to the Applicant, most in-house counsel will be unable to pay the annual fees to renew their practising certificate as from 2025 if the directives are implemented leading to the inevitable high rates of non-compliant advocates to the detriment of the public institutions whose interests will be at stake should it happen.

12. The new directives according to the Applicant, amount to a breach of legitimate expectations of individual in-house counsel who work in various Ministries, Departments and Agencies.

13. The Ex parte Applicant's further case is that it has attempted to resolve this matter amicably as is evidenced by their letter dated 22nd August 2024 in line with fair administrative action to no avail.

The Respondent's Response.

14. The 1st Respondent filed a Replying Affidavit sworn by Dr. Chris K. Kiptoo, the Principal Secretary in the 1st Respondent Ministry on 27th March 2025.

15. The 1st Respondent contends that the rejection of the Finance Bill 2024 resulted to a financing gap of Kshs.346 billion which was meant to finance the FY 2024/2025 budget estimates and as a result, this necessitated rationalization of the budget by similar amount to close the financing gap.

16. That the National Treasury vide Circular NO. 8/2024 issued guidelines to all Ministries, Departments and Agencies on the revision of the FY 2024/25 Budget Estimates. That the guidelines provided the areas of budget cuts including the percentage cut. Among the items identified was Membership Fees, Dues and Subscriptions to professional and Trade Bodies.

17. Dr. Kiptoo deposes that the budgetary process is consultative and involves many stakeholders who enrich the process through providing input to the process. Further, that the National Treasury Circular provides guidelines to Ministries, Departments and Agencies on how to process budgets including having meetings with them. It is his disposition that the Ministries, Departments and Agencies were consulted before the preparation and finalization of the supplementary estimates.

Submissions.

18. The application was canvassed by way of written submissions, with the Ex parte Applicant filling its submissions dated 24th April 2025.in the said submissions, the exparte applicant argues that Article 47(1) of *the Constitution* of Kenya, 2010 and section 4(1) of the *Fair Administrative Action Act* CAP 71 provide that every person has the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair.

19. Similarly, that section 7(2) of the *Fair Administrative Action Act* CAP 7L Laws of Kenya provides for the grounds for judicial review. These include failure to give the affected people an opportunity to be heard, procedural unfairness, unreasonableness, legitimate expectation among others.

20. In light of the foregoing, the ex parte Applicant contends that its members were entitled to a decision that was lawful, reasonable and procedurally fair.

21. It is submitted that the 1st Respondent's decision was procedurally unfair and that Section 5(1) of the *Fair Administrative Action Act* provides for the procedure to be followed in the event a decision is to be made affecting a group of people. The Applicant submits that the 1st Respondent did not adhere to any of the steps highlighted under section 5(1) of the *Fair Administrative Action Act*.

22. The Applicant also submits that the 1st Respondent has failed to adduce any proof that Ministries, Departments and Agencies (MDAs) were consulted before this decision was made. That in any case, consultations with the MDAs does not count as public participation.

23. The Applicant relies on the case of Republic versus County Government of Kiambu and Exparte Robert Gakuru & Jamofastar Welfare Association, Judicial Review Case No. 434 of 2015 where the court observed that public participation is not a mere cosmetic venture or a public relations exercise.

24. It also relies on the case of *Zachariah Wagunza & another versus Office of the Registrar Academic Kenyatta University & 2 others* [2013] eKLR where the court relied on the case of *Municipal Council of Mombasa vs. Republic & Umoja Consultants Limited Civil Appeal No. 185 of 2001* where the court is said to have stated that Judicial Review concerns itself with whether the affected party was given an opportunity to be heard.

25. For the definition of legitimate expectation, the Ex parte Applicant relies on the case of *Republic vs. County Director Physical Planning Department Kiambu County, County Planning Technical Committee Kiambu County, Physical Planning Liason Committee Kiambu County, The County Government of Kiambu and Shainaz Shamshudin Jamal, Munira Sumar* Miscellaneous Civil Application No. 126 of 2016 where the court while defining legitimate expectation observed that as per the definition provided under *Halsbury's Laws of England 4th Edition*, a legitimate expectation arises from a public authority's representation, promise, or consistent practice, and is protected by courts to uphold fairness, predictability, and certainty.

26. The Ex parte Applicant submits that its members have consistently had their membership fees dues, and subscriptions to professional and trade bodies paid by their employers and that consequently, the 1st Respondent's decision to have a 100% cut is an affront to their legitimate expectations.

27. The Applicant also places reliance on the case of Republic versus Cabinet Secretary, Ministry of Health and Oscar Kambona and Kenya Nutritionists & Dieticians Institute, Miscellaneous Application 329 of 2019 where the court relied on *Council of Civil Service Unions versus Minister for the Civil Service* (1985) AC. 374, 410 for what constitutes illegality as a ground for judicial review.

28. The Ex parte Applicant further submits that the 1st Respondent contravened the provisions of section 10(5) of the *Employment Act* which requires that any attempt to revise a contract must be done in consultation with an employee and that notice of such change must be in writing.

29. It is submitted that the 1st Respondent, in its decision issued vide Circular No. 8/2024, altered the employment terms of the members of the Ex parte Applicant without giving any regard to their views and that this action was outside its statutory mandate as only the employer of the Ex parte Applicant's members can cause a variation of the employment terms.

30. In conclusion, the Ex parte Applicant submits that for the foregoing reasons, the 1st Respondent's decision was irrational, procedurally unfair, illegal, irrational, devoid of public participation, with no opportunity to appeal, thereby offending the Ex part Applicant's members' legitimate expectations and ultra vires to its statutory mandate.

31. The Respondents did not file any written submissions despite the court having granted them leave to file the same on 28th April 2025.

Analysis and Determination.

32. I have considered the application and the accompanying affidavit, statutory statement and annexures which include the impugned directive. I have also considered the submissions and arguments in support of the application.

33. The issues arising for determination are:

    i. Whether the 1st Respondent's decision to eliminate budgetary allocations for professional membership fees via Treasury Circular No. 8/2024 was lawful and required adherence to the principles and values of public participation espoused in Article 10 of *the Constitution*.

    ii. Whether the impugned directive violated the legitimate expectations and constitutional rights of the Applicant's members to fair administrative action.

    iii. Whether the Applicant is entitled to the judicial review remedies of certiorari, prohibition, and mandamus.

    iv. What orders should this Court make?

On whether the 1st Respondent's decision to eliminate budgetary allocations for professional membership fees via Treasury Circular No. 8/2024 was lawful and required adherence to the principles and values of public participation espoused in Article 10 of *the Constitution*.

34. To resolve the above issue, it is important to first and foremost, appreciate the role of the National Treasury in budget and expenditure rationalization in Kenya. I will therefore summarize that role here in order to determine whether the decision in the circular was lawful and procedurally fair.

35. The National Treasury plays a central role in the management of public finances in Kenya, particularly in the rationalization of budget and expenditure. Its powers and responsibilities are primarily grounded in *the Constitution* of Kenya, 2010 and the *Public Finance Management Act*, No. 18 of 2012 (PFMA).

36. Under the Constitutional, Article 201 provides that public finance shall be managed in a manner that promotes transparency, accountability, and effective use of resources.

37. Under Article 225(1), the National Treasury is responsible for ensuring that expenditure of public money is lawful and effective.

38. The stator role of the National Treasury can be found in the *Public Finance Management Act*, (PFMA), 2012. The *Public Finance Management Act* outlines the specific functions and powers of the National Treasury, including:

    a) Formulation of Budget Policy. Under Section 12(1)(a) & (b), the National Treasury is responsible for managing the national government's budget preparation process and promoting transparency and accountability in public finance.

    b) Expenditure Control and Rationalization-Section 13 of the Act mandates the National Treasury to promote efficient, effective, and economic use of public resources.

    Section 14(1)(a) of the Act authorizes the Cabinet Secretary for the National Treasury to issue guidelines to MDAs on budget implementation and financial management.

39. Section 15(2)(b) of the Act allows the Treasury to suspend or limit expenditures or commitments when necessary due to insufficient resources.

c) Budget Execution Oversight. Under Section 39(1) of the Act, the Treasury ensures that funds are spent according to the law and that budget implementation is aligned with government priorities.

d) Power to Issue Circulars: The National Treasury may issue circulars, guidelines and instructions, including on rationalization of expenditures, such as freezing or limiting specific spending (e.g., training, foreign travel, or professional fees) to ensure fiscal discipline.

40. In practice, budget rationalization refers to the reprioritization, restriction or reduction of expenditures to align with available resources and national development priorities. In this regard, the National Treasury can identify non-core or non-essential spending; reallocate funds to priority sectors; or issue circulars or directives limiting certain categories of expenditure (e.g., professional body subscriptions, hospitality, and travel).

41. Such decisions are typically guided by the Medium-Term Expenditure Framework (MTEF), resource ceilings issued to MDAs, recommendations of Pending Bills Committees or special audit reports.

42. It therefore follows that the National Treasury's mandate to rationalize expenditure is a legally grounded function meant to promote fiscal sustainability, efficiency and alignment with national priorities.

43. While the Treasury has broad powers under the PFMA, these powers must be exercised within the bounds of *the Constitution*, particularly respecting the principles and values espoused in Article 10 and the Bill of Rights. These values, principles and or rights include transparency, consultation and fair administrative action.

44. The impugned circular, dated limits spending and is part of an expenditure rationalization effort by the National Treasury. It directed those public entities shall during the financial year 2024/2025, not pay for professional memberships and subscriptions for their officers. The Treasury cited the need to curb non-essential spending due to budgetary constraints occasioned by the rejection of the Finance Bill, 2024 Act, which led to a significant budget deficit amounting to Kshs. 346 billion, and as a result, austerity measures had to be taken and implemented to rationalize public expenditure.

45. The Applicant contends that this circular undermines legal compliance by public officers who are legally required to be in good standing with professional bodies such as legal practitioners. Further, that it tends to unilaterally vary the terms of employment of those employees contrary to section 10 (5) of the *Employment Act*. I must however refrain from determining issues employment and labour relations raised in the application as those are issues that are beyond the jurisdiction of this Court. This Court is expressly barred by Article 165(5) of *the Constitution* from hearing and determining disputes relating to employment and labour relations.

46. That said, as I have stated above, the National Treasury is mandated by law to issue circulars and even limit expenditure on what it considers non-essential services having regard to the financial situation in the country.

47. Historically, government departments have paid these fees and subscriptions to professional bodies for their employees, recognizing them as essential to enabling officers to perform their statutory functions lawfully.

48. This Court therefore does acknowledge the statutory and constitutional mandate and role of the National Treasury and the necessity of implementing such austerity measures due to the significant fiscal shortfall.

49. The applicant cites Articles 10 and 47 of *the Constitution* and argues that the impugned action was unilateral and lacked any meaningful public participation, disrupted a legitimate expectation of government-paid compliance with statutory bodies and was irrational and unfair, breaching public officers' right to fair administrative action.

50. Therefor on whether the 1st Respondent's decision to eliminate budgetary allocations for professional membership fees and subscriptions via Treasury Circular No. 8/2024 was lawful and procedurally fair, there is no dispute that the National Treasury has the legal authority to rationalize government spending under the PFMA, 2012 including issuing expenditure guidance. The Treasury may reprioritize allocations in light of macroeconomic constraints.

51. However, statutory discretion must be exercised in conformity with constitutional values and principles. As has been repeatedly stated by courts in this country, discretion must not be abused or exercised arbitrarily.

52. It was incumbent upon the National Treasury to, in accordance with constitutional dictates, conduct public participation through stakeholder engagement and consultations prior to issuing directives like the one impugned herein.

53. While the 1st Respondent claims to have held budget consultations with Ministries, Departments and Agencies, no evidence has been provided to demonstrate that the Ex parte Applicant or other directly affected professionals and the professional bodies that those professionals subscribe to and pay subscription fees on an annual basis were consulted before Circular No. 8/2024 was issued. It is equally surprising that the 1st respondent has not outlined its statutory mandate in all these matters complained of. It is not enough to say that there was budgetary constrains and or deficit. What would be the legal basis for such decisions?

54. Public participation is a core national value under Article 10 of *the Constitution*. When an administrative decision impacts specific groups of people especially professionals, by modifying established practices or entitlements, the decision-maker has a duty to conduct focused and meaningful consultations with those affected, even if no consensus is obtained from the said public participation exercise.

55. Article 10(2)(a) of *the Constitution* enshrines public participation as a binding national value. The Court in Doctors for Life International v Speaker of the National Assembly (CCT 12/05) [2006] ZACC 11 explained that public participation ensures decisions reflect public interest and are not arbitrary.

56. The High Court in *Robert N. Gakuru & Others v Governor, Kiambu County & 3 Others* [2014] eKLR stated that "public participation must be real and not illusory... meaningful engagement with the citizenry is essential."

57. In *National Assembly & another v Okoiti & 55 others* (Civil Appeal E003 of 2023 & E016, E021, E049, E064 & E080 of 2024 (Consolidated)) [2024] KECA 876 (KLR) (31 July 2024) (Judgment)the Court of appeal stated as follow regarding intervention by the High Court in matters policy:

> " H. Whether the trial Court abdicated its jurisdiction by holding that it cannot intervene on policy decisions.

209. Mr. Ochiel learned counsel for the 15th, 16th, 17th ,18th, 19th and 22nd respondents faulted the learned judges for misinterpreting Articles 10 and 165(3) on its jurisdiction thereby abdicating its jurisdiction to test the constitutionality of "anything" including policy said to infringe *the Constitution* in holding that the challenged taxes were constitutional because they were "matters within the competence of the legislature and reflected the policy choices of the national government" and were "governed by policy".

210. Mr. Murugara urged that the court lacks jurisdiction to interfere with tax legislation based on the merger of policy and legislation of public finance principles, equal protection of law, fairness and judicial authority, since the rate of taxation is a policy decision that rests with the legislature. In support of the finding by the learned judges of the High Court, counsel cited the finding in Ndora Stephen vs. Minister for Education & 2 Others (supra) where the High Court held that formulation of policy and implementation thereof were within the province of the executive.

211. The learned judges of the High Court held as follows:

" 172. Section 26 of the Finance Act amended the third schedule of the *Income Tax Act* to introduce new tax bands. In addition, section 7 of the Act amended section 10 of the *Income Tax Act* relating to withholding tax. The petitioners have not demonstrated how these amendments affect specific provisions of *the Constitution*. In any event, we hold that these are matters related to tax policy and administration...

Conclusions

220. Having considered, the matters placed before us for determination, we now conclude as follows:

i

...

ii

...

iii

....

(c)

That, section 26 of the Finance Act, 2023 which amends the third schedule of the *Income Tax Act* to introduce new tax bands and section 7 of the Act that amends section 10 of the *Income Tax Act* in regard to withholding tax are matters related to tax policy and administration and thus not unconstitutional."

212. We have no doubt that the State has the constitutional obligation to collect taxes, and that the National Assembly therefore has the constitutional mandate to legislate to this effect pursuant to Article 209 (1) which empowers the national government to impose taxes. However, Article 165 (3) (d) (i) & (ii) confers vast jurisdiction to the High Court to hear any question respecting the interpretation of *the Constitution* including the determination of the

question whether or not any law is inconsistent with or in contravention of *the Constitution* and also the question whether anything said to be done under the authority of *the Constitution* or of any law is in consistent with, or in contravention of, *the Constitution*. The above provision is wide enough to cover a policy or decision made by a State organ or public body.

This Court in the Pevans case held:

"Where *the Constitution* had reposed specific functions in an institution or organs of State, the courts must give those institutions or organs sufficient leeway to discharge their mandates and only accept an invitation to intervene when those bodies are demonstrably shown to have acted in contravention of *the Constitution*, the law or that their decisions are so perverse, so manifestly irrational that they cannot be allowed to stand under the principles and values of our Constitution...."

214. Accordingly, we agree with Mr. Ochiel's argument that the High Court in the impugned holding misinterpreted Articles 10 and 165 (3) on its jurisdiction effectively abdicating its jurisdiction to test the constitutionality of "anything" including policy said to infringe *the Constitution*. It is only when a state organ is executing policy within the law that the courts will be slow to intervene. Accordingly, the High Court erred in making a blanket statement suggesting that courts ought not to intervene in all policy matters."[emphasis added]

58. Besides change of policy, I find that the circular impacted the statutory compliance obligations of public servants. Advocates working for state agencies are not exempt from paying for annual practicing licenses. The employers pay such fees for annual practicing certificates on behalf of their professional employees. The employees would not be eligible to eve execute legal documents such as commissioning of oaths or appearing in court or drafting pleadings as advocates if their practicing certificates are not renewed for the year. They would as a consequence be treated as unqualified persons and therefore lack the capacity to represent the agencies in legal matters. These are some of the issues that would have arisen during public participation process before eliminating such fees.

59. The failure to engage professional bodies or affected MDAs prior to the issuance of the circular was a breach of Article 10 and Section 4 of the *Fair Administrative Action Act*.

60. The Supreme Court in the case of *British American Tobacco Kenya PLC v Cabinet Secretary for the Ministry of Health & 2 others; Kenya Tobacco Control Alliance & another (Interested Parties); Mastermind Tabacco Kenya Limited (Affected Party)* [2019] KESC 15 (KLR) held as follows regarding public participation as a constitutional value:

> " Public participation and consultation was a living constitutional principle that went to the constitutional tenet of the sovereignty of the people. In line with the court's mandate under section 3 of the *Supreme Court Act*, the following were the guiding principles for public participation:
>
> a. As a constitutional principle under article 10(2) of *the Constitution*, public participation applied to all aspects of governance.
>
> b. The public officer and/or entity charged with the performance of a particular duty bore the onus of ensuring and facilitating public participation.

c. The lack of a prescribed legal framework for public participation was no excuse for not conducting public participation; the onus was on the public entity to give effect to the constitutional principle using reasonable means.

d. Public participation had to be real and not illusory. It was not a cosmetic, public relations act or a mere formality to be undertaken as a matter of course just to 'fulfill' a constitutional requirement. There was need for both quantitative and qualitative components in public participation.

e. Public participation was not an abstract notion; it must be purposive and meaningful.

f. Public participation had to be accompanied by reasonable notice and reasonable opportunity. Reasonableness could be determined on a case to case basis.

g. Public participation was not necessarily a process consisting of oral hearings, written submissions could also be made. The fact that someone was not heard was not enough to annul the process.

h. Allegations of lack of public participation did not automatically vitiate the process. The allegations had to be considered within the peculiar circumstances of each case: the mode, degree, scope and extent of public participation was to be determined on a case to case basis.

"Components of meaningful public participation included the following;

i. clarity of the subject matter for the public to understand;

j. structures and processes (medium of engagement) of participation that were clear and simple;

k. opportunity for balanced influence from the public in general;

l. commitment to the process;

m. inclusive and effective representation;

n. integrity and transparency of the process;

o. capacity to engage on the part of the public, including that the public had to be first sensitized on the subject matter."

1. Similarly, in *British American Tobacco Ltd v Cabinet Secretary for the Ministry of Health & 5 others* [2017] KECA 763 (KLR) the Court of Appeal observed thus:

"

"46. The procedure adopted in making the Regulations has been challenged to the extent that there was no consultation or adequate public participation. In this regard, Article 10 of *the Constitution* identifies inclusiveness, transparency, accountability and public participation as key values and principles of governance that bind all State organs, State officers and public officers in the interpretation of *the Constitution* or enactment or interpretation of any law.....

> "47. It is clear that since the promulgation of *the Constitution* of Kenya 2010, the concept of public participation and consultation has been entrenched. Indeed, the concept is consistent with the principle of sovereignty of the people that permeates *the Constitution* and in accordance with Article 1(4) of *the Constitution* is exercised at both national and county levels. It is thus not surprising that the courts have addressed the concept of Public participation in enactment of legislation, severally since the promulgation of *the Constitution* of Kenya 2010."

62. The Court in *Kenya Human Rights Commission v Attorney General & Another* [2018] eKLR also noted that:

> " Public participation is one of the national values and principles in our constitution which must be observed by all persons; state organs and public officers in the exercise of their responsibilities. Article 10 (1) of *the constitution* states that the national values and principles of governance in this Article bind all State organs, State officers, public officers and all persons whenever any of them applies or interprets *the Constitution*; (b) enacts, applies or interprets any law; or makes or implements public policy decisions. .And according to Article 10 (2), the national values and principles of governance include patriotism, national unity, sharing and devolution of power, the rule of law, democracy and "participation of the people."

63. The Court of Appeal in *Kiambu County Government & 3 others v Robert N. Gakuru & Others* [2017] eKLR noted that:

> " ...The issue of public participation is of immense significance considering the primacy it has been given in the supreme law of this country and in relevant statutes relating to institutions that touch on the lives of the people. *The Constitution* in Article 10 which binds all state organs, state officers, public officers and all persons in the discharge of public functions, highlights public participation as one of the ideals and aspirations of our democratic nation,.."

64. The court in *Njoroge & 2 others v Ministry of Interior and National Administration Kenya & 2 others* [2025] KEHC 4587 (KLR) while quashing the Cabinet Secretary's directives observed thus:

> " The absence of notice, explanation, or consultation constitutes a violation of the duty to act fairly, transparently, and reasonably. The directives were issued in a unilateral manner and had far reaching implications on businesses, including closure of premises and seizure of stock. As correctly asserted by the applicants, there was no regulatory impact assessment done before issuance of such directives, which are administrative actions. And being adverse in nature, required strict compliance with Article 47 and the *Fair Administrative Action Act*.
>
> "35.In Kiambu County Government & 3 others v Robert N. Gakuru & Others [2017] KECA 459 (KLR), the Court of Appeal emphasized that public participation and procedural fairness are not mere formalities but substantive rights that ground the validity of administrative decisions. Similarly, in Olkalou Sub-County Liquor Traders Association v Ministry of Interior & National Administration & Others [2024] KEHC 5791 (KLR), the High Court underscored the illegality of abrupt closure of businesses without due process or prior notice to the affected traders.
>
> "36.This Court, therefore, finds that the failure to consult, notify or engage the affected parties renders the directives by the Cabinet Secretary's to be procedurally unfair and thus in

violation of Article 47 of *the Constitution*. Accordingly, the impugned directives ate found to be unconstitutional and susceptible to being quashed by way of judicial review orders of certiorari."

65. In the case of *Independent Electoral Boundaries Commission (iebc) v National Super Alliance (nasa) & 6 others*, Civil Appeal No 224 Of 2017 [2017] eKLR, the Court of Appeal held that:

> "In our view, analysis of the jurisprudence from the Supreme court leads us to clear conclusion that article 10(2) of *the Constitution* is justiciable and enforceable immediately. For avoidance of doubt, we find and hold that the values espoused in article 10(2) are neither aspirational nor progressive; they are immediate, enforceable and justiciable. The values are not directive principles...."

66. The impugned directive, which effectively shifts the burden of paying statutory practising fees to individual counsel employed in public service, constitutes a significant policy shift. As such, it was mandatory that those affected are engaged as stipulated in the decisions which I have cited above.

67. Whether the impugned directive violated the Applicant's members' right to fair Administrative Action espoused in Article 47 of *the Constitution* and their legitimate expectations.

68. Section 5 of the *Fair Administrative Action Act*, the Act implementing Article 47 of *the Constitution* stipulates that:

5. Administrative action affecting the public

(1)In any case where any proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public, an administrator shall

(a) issue a public notice of the proposed administrative action inviting public views in that regard;

(b) consider all views submitted in relation to the matter before taking the administrative action;

(c) consider all relevant and materials facts; and

(d) where the administrator proceeds to take the administrative action proposed in the notice

(i) give reasons for the decision of administrative action as taken;

(ii) issue a public notice specifying the internal mechanism available to the persons directly or indirectly affected by his or her action to appeal; and specify the manner and period within the which such appeal shall be lodged.

(2) Nothing in this section shall limit the power of any person to

(a) challenge any administrative action or decision in accordance with the procedure set out under the *Commission on Administrative Justice Act* (Cap. 7J) or any successor to the Commission on Administrative Justice under section 55 of the *Commission on Administrative Justice Act* (Cap. 7J);

(b) apply for review of an administrative action or decision by a court of competent jurisdiction in exercise of his or her right under *the Constitution* or any written law; or

(c) institute such legal proceedings for such remedies as may be available under any written law.

69. The Court of Appeal case of *Judicial Service Commission v Mbalu Mutava & another* [2015] eKLR held that:

> " Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a foundation for control of the powers of state organs and other administrative bodies, but also entrenches the right to fair administrative action in the Bill of Rights...The administrative actions of public officers, state organs and other administrative bodies are now subjected by article 47(1) to the principle of constitutionality rather than to the doctrine of ultra vires from which administrative law under the common law was developed."

70. Additionally, section 4 of the Act provides that (2) Every person has the right to be given written reasons for any administrative action that is taken against him.

(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision. Prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations in that regard; and notice of a right to a review or internal appeal against an administrative decision, where applicable

71. In the Court's view, the failure to engage the affected professionals or their representative bodies fell short of the constitutional and administrative law requirements of procedural fairness.

Whether the impugned directive violated the legitimate expectations and constitutional rights of the Applicant's members.

72. The doctrine of legitimate expectation was authoritatively defined in Council of C*ivil Service Unions v Minister for the Civil Service* [1985] AC 374, and adopted by Kenyan courts in *Keroche Industries Ltd v Kenya Revenue Authority & 5 Others* [2007] KLR 240, which latter case is discussed below.

73. The doctrine encapsulates that where a public body by past practice, promise, or conduct leads a party to expect certain treatment, a departure from that expectation requires consultation or justification.

74. The 1st Respondent in its response to the application indicates that it has, over the years, relied on budgetary allocations for the payment of membership and practising licence fees for its members of professional bodies such as the Law Society of Kenya, working in the public service. That the failure to assent to the Finance Bill created a financing gap which necessitated the rationalization of the recurrent budget.

75. Thus, it is not in dispute that in this case, the Government had over the years consistently paid these subscriptions to professional bodies such as the applicant herein. That long-standing and repeated conduct gave rise to a legitimate expectation among professional public servants and professional bodies like the Applicant that such facilitation would continue and therefore, absent, fair notice and stakeholder engagement was a necessity and a mandatory requirement.

76. The deposition of the Principal Secretary, the National treasury, of the consistent past practice, in the absence of express statutory exclusion, creates a legitimate expectation of continuity or, at the very least, of prior consultation before withdrawal of the benefit.

77. A five-judge bench of the High Court in the case of *Kalpana H. Rawal v Judicial Service Commission & 4 others* [2015] eKLR exhaustively discussed the doctrine of legitimate expectation citing various judicial pronouncements on the doctrine in a decision that was affirmed by the Court of Appeal. The said bench observed as follows:.

> "
>
> "207. The doctrine of legitimate expectation was developed by English courts to hold rulers to their promises. In the 4th Edition, 2001 Reissue, of Halsbury's Laws of England the authors at page 212, paragraph 92 explain the concept behind the development of the principle as follows:
>
> "A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.
>
> The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker."

78. The Supreme Court in the *Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others*, [2014] eKLR also explained the principle of legitimate expectation as follows:

> "(264) In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.
>
> (265) An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation."

79. The Court further laid down the principles that govern a successful invocation of the doctrine of legitimate expectation as follows:

> "(269) The emerging principles may be succinctly set out as follows:

a. there must be an express, clear and unambiguous promise given by a public authority;

b. the expectation itself must be reasonable;

c. the representation must be one which it was competent and lawful for the decision-maker to make; and

d. there cannot be a legitimate expectation against clear provisions of the law or *the Constitution*."

80. The Court of Appeal in *Kenya Revenue Authority v Universal Corporation Ltd* [2020] eKLR also had occasion to shed light on the principles that guide the Court while applying the doctrine of legitimate expectation. In agreeing with various High Court decisions, the Learned Judges of Appeal made the following summary of when legitimate expectation arises:

> "... a legitimate expectation arises where there is demonstration that: a decision maker led a party affected by the decision to believe that he would receive or retain a benefit or advantage including a benefit that he/she/it would be accorded a hearing before the decision was taken; a promise was made to a party by a public body that it would act or not act in a certain manner and which promise was made within the confines of the law; the pubic authority whether by practice or promise committed itself to the legitimate expectation; the representation was clear and unambiguous; the claimant fell within the class of person(s) who were entitled to rely upon the representation(s) made by the public authority; the representation was reasonable and that the claimant relied upon it to its detriment; there was no overriding interest arising from the decision maker's action and representation; the representation was fair in the circumstances of the particular case and that the same arose from actual or ostensible authority of the affected public authority to make the same; the promise related either to a past or future benefit; its main purpose is to challenge the decision maker to demonstrate regularity, predictability and certainty in their dealings with persons likely to be affected by their action in the discharge of their public mandate."

81. In the case of *David Wanyeki Kago v Kenya National Examinations Council* [2022] KEHC 26897 (KLR) it was stated as follows on the issue of legitimate expectation:

> "
>
> "147. The term 'legitimate expectation' is a conglomerate of two words; that is 'legitimate' and 'expectation'. According to Black's Law Dictionary 9th Edition, (Bryan A. Garner, Thomson Reuters Publishers) the word 'legitimate' is defined at page 984 to mean: - Complying with the law; lawful. Genuine; valid.
>
> "148. The same dictionary defines 'expectation' at page 658 in the following terms: -
>
> the act of looking forward; anticipation. A basis on which something is expected to happen; esp., the prospect of receiving wealth, honors, or the like.
>
> "149. As can be discerned from the foregoing separate definitions, legitimate expectation therefore means: -
>
> The act of looking forward or anticipating something that is lawful/genuine or valid.

A legal basis upon which someone expects that something is to happen."

82. In *Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi* [2007] eKLR the Court dealt with the doctrine in the following terms:

> " ...legitimate expectation is based not only on ensuring that legitimate expectations by the parties are not thwarted, but on a higher public interest beneficial to all including the respondents, which is, the value or the need of holding authorities to promises and practices they have made and acted on and by so doing upholding responsible public administration. This in turn enables people affected to plan their lives with a sense of certainty, trust, reasonableness and reasonable expectation.
>
> "An abrupt change as was intended in this case, targeted at a particular company or industry is certainly abuse of power. Stated simply legitimate expectation arises for example where a member of the public as a result of a promise or other conduct expects that he will be treated in one way and the public body wishes to treat him or her in a different way... Public authorities must be held to their practices and promises by the courts and the only exception is where a public authority has a sufficient overriding interest to justify a departure from what has been previously promised."

83. Guided by established jurisprudence on the doctrine of legitimate expectation including the decisions in Kalpana H. Rawal, Royal Media Services, Universal Corporation Ltd, David Wanyeki Kago, and Keroche Industries, it is evident that where a public authority has, through consistent past practice or representation, created a lawful and reasonable expectation, it is bound to honour that expectation unless there exists a compelling public interest justifying a departure.

84. In this case, the 1st Respondent's historical practice of funding practising licence fees for public officers, absent any statutory prohibition or prior consultation, gave rise to a legitimate expectation of continuity or, at minimum, a fair and transparent process before withdrawal. The abrupt revocation of this support, without transitional measures or meaningful engagement with affected persons, not only defeats that expectation but also offends the constitutional guarantees of fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair, under Article 47.

85. Accordingly, the impugned directive cannot stand in the face of these well-settled legal principles.

Whether the Applicant is entitled to the judicial review remedies of certiorari, prohibition, and mandamus

86. The power of this Court in judicial review is limited to examining the legality, reasonableness and procedural fairness of administrative decisions.

87. In the Ugandan Case of *Pastoli v Kabale District Local Government Council & others* [2008] 2 EA 300 the court stated inter alia

> " In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when

the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the rules of natural justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision...."

88. The above decision evenly fits in the circumstances of this case. The 1st respondent in issuing the circular, acted within the law that allows it to issue circiulars and even implement budgetary cuts. However, as the implementation was to directly affect the applicant's members, public participation and consultation was not discretionary. Additionally, notice ought to have been issued alerting them of the intention to effect the budgetary cuts in view of the statutory requirement that such members must take out a paid annual fees before they can be allowed to practice law. Part of the annual practicing certificate levy is utilized by the applicant for administrative expenses and therefore abruptly stopping the levy would adversely affect the operations of the Bar Association besides excluding its members from practicing their profession, noting that it is an offence t practice without taking out a current practicing certificate.

89. However, in granting an order of certiorari which is discretionary, the court must weigh several things even if a body or authority committed an illegality or acted unprocedurally. The order is not automatic, the remedy must be the most efficacious. *Halsbury's Laws of England* 4th edition volume II page 805 paragraph 1508 states as follows:

> "Certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for it grant exist. The court has to weigh one thing after another to say whether or not the remedy is the most efficacious in the circumstances ..... The discretion of the court being a judicial one, must be exercised on the basis of evidence and sound principles."

90. According to *Halsbury's Laws of England* 4th Edn. Vol. 1(1) para 12 page 270:

> "The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus) ...are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision

to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief." [Emphasis added].

91. In the case of *Republic v Public Procurement Administrative Review Board & 2 others* [2019] eKLR where Mativo J (as he then was) stated:

> " Certiorari issues to quash a decision that is ultra vires. Review on a writ of certiorari is not a matter of right but of judicial discretion. A petition for a writ of certiorari will be granted only for compelling reasons. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exists. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles."

92. The circular which is impugned was issued on 7th July 2024 at the commencement of the new financial year 2024/2025. Annual practicing/ subscription fees are usually paid at the beginning of the calendar year. It follows that the affected professionals have had to settle those fees by themselves. The circular was not issued to last permanently. The circular was issued to MDAs on the revision of the FY 2024/2025 specifically under the recurrent budget estimate which is lapsing in a week's time on 30th June, 2025. The applicant did not at the leave stage seek for any stay of implementation of the said circular, although it sought for leave to apply for prohibition to restrain the 1st respondent from implementing the circular and mandamus to reinstate the budget for subscription of fees and levies for professional bodies.

93. The application was filed two months after the circular came into effect and no stay of implementation of the circular was sought and obtained from the Court. I encountered the file herein in March 2025, nine months into the financial year and now it is a few days to the end of the said financial year.

94. The question is whether the orders sought can issue.

95. On whether certiorari can issue, Certiorari is a tool for checking abuse of administrative authority. Even if the budget cut was implemented, the court may quash the decision to pronounce on the legality for future guidance. In the often-cited case of *Pastoli v Kabale District Local Government Council* [2008] 2 EA 300, it was held that Judicial review is about legality, not just results.

96. As for the order of prohibition, it looks to the future to prohibit the action contemplated. The applicant seeks to prohibit the 1st respondent from implementing the circular dated 5th July 2024 eliminating fees and or levies payable to professional bodies in the financial year which is ending in a week's time. In *Republic v Kenya National Examination Council Ex-parte Gathenji & others* Civil Appeal No 260 of 1996 the Court of Appeal stated that 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 of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision made. Prohibition cannot quash a decision which has already been made. It can only prevent the making of a contemplated decision.

97. In this case, on the facts presented before this court, there is no mention or indication that the circular was to remain in place for the subsequent financial years. That being the case and the decision having been implemented, it would be superfluous to prohibit an act which has already taken place.

98. On whether mandamus can issue where the impugned decision has already been implemented, Mandamus is a remedy that compels the performance of a statutory or public duty that a public body has unlawfully refused or failed to perform. To succeed, the applicant must show:

a. The existence of a clear legal duty;

b. That the duty is owed to the applicant;

c. That the duty has not been fulfilled;

d. That there is no alternative remedy.

1. However, mandamus cannot compel expenditure of funds not appropriated, the exercise of discretion in a particular way, or the performance of impossible or past acts (i.e., undoing past budget execution in a lapsed year). This is because Government budgets are annual and subject to Parliamentary appropriation under

Articles 221–228 of *the Constitution*, and Section 39 of the *Public Finance Management Act* (PFMA), 2012. Once a financial year lapses, the budget expires and no public officer has a duty or power to reallocate or reinstate funds to that year.

100. In addition, where performance is no longer possible, Courts do not issue futile or impossible orders. Mandamus is a forward-looking remedy, not a tool to undo or reverse fully executed fiscal policies. Once a budget cycle is complete, it becomes a matter of public accounts oversight, not judicial enforcement, especially where, like in the instant case, there is no evidence or pleading that the budget cut would transcend the budget year in which event, a new cause of action which was not pleaded would arise.

101. In the often-cited case of *Kenya National Examinations Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 Others* [1997] eKLR, the Court of Appeal stated as follows regarding mandamus remedy:

> "...To conclude this aspect of the matter, an order of mandamus compels the performance of a public duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same. If the complaint is that the duty has been wrongly performed, i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done. Only an order of CERTIORARI can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the appeal before us, the respondents did not apply for an order of certiorari and that is all we want to say on that aspect of the matter..."

102. It is also worth noting that no declaration was sought and the court would not issue substantive orders which were never pleaded and or sought in judicial review proceedings. Again, there being no statutory obligation to fund a specific entity in perpetuity, like constitutional commissions under Article 249(3), this court would not issue mandamus in the manner that was pleaded in this matter.

103. Consequently, for the reasons above, the court having found that the impugned decision was made in violation of the constitutional value of public participation, procedural fairness and legitimate expectation, this Court is satisfied that the threshold for intervention is met. The application partially succeeds to the extend that the court makes the following orders:

i. An Order of Certiorari is hereby issued quashing Treasury Circular No. 8/2024 insofar in so far as it directed a 100% cut on Membership fees, Dues and Subscriptions to Trade Bodies.

ii. As the circular took effect and has been enforced covering the period that it was intended to last, during the 2024/2025 financial year which is ending on 30th June 2025, Prohibition cannot issue.

iii. As there was no stay of implementation of the decision contained in the circular, Mandamus was overtaken by events. The court cannot reinstate the budget which has since lapsed. The prayer for mandamus is declined.

iv. Each party shall bear its own costs.

v. This file is closed.

DATED SIGNED AND DELIVERED AT NAIROBI VIRTUALLY THIS 23RD DAY OF JUNE, 2025

R.E. ABURILI

JUDGE