



**Republic v Ethics & Anti-Corruption Commission; Monari (Interested Party);  
Ringera (Exparte) (Anti-Corruption and Economic Crimes Judicial Review 1 of 2021)  
[2023] KEHC 805 (KLR) (Anti-Corruption and Economic Crimes) (9 February 2023) (Judgment)**

Neutral citation: [2023] KEHC 805 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
ANTI-CORRUPTION AND ECONOMIC CRIMES  
ANTI-CORRUPTION AND ECONOMIC CRIMES JUDICIAL REVIEW 1 OF 2021  
EN MAINA, J  
FEBRUARY 9, 2023  
(FORMERLY JR. NO. E172 OF 2021)**

**BETWEEN**

**REPUBLIC ..... APPLICANT**

**AND**

**ETHICS & ANTI-CORRUPTION COMMISSION ..... RESPONDENT**

**AND**

**GEOFFREY MONARI ..... INTERESTED PARTY**

**AND**

**CHARLES M. RINGERA ..... EXPARTE**

**JUDGMENT**

**Background**

1. Charles M. Ringera, a former Chief Executive Officer of the Higher Education Loans Board (HELB), the *ex parte* applicant herein, challenges a decision of the respondent holding him personally liable for an alleged loss of Kshs 491,852.20 incurred by the Higher Education Loans Board (“HELB”). The respondent *vide* a demand notice dated September 27, 2021, surcharged the applicant for the said loss of Kshs 491,852.20. The applicant is alleged to have irregularly reviewed the salary of one George Monari, who was the HELB the Chief Operations Officer for the period between 2019 and November 2020, from Kshs 218,719.13 to Kshs 253, 923.43, per month, which action was undertaken without



the approval of the Board of Directors of the Higher Education Loans Board. The *ex parte* applicant therefore seeks the following orders:-

- “ 1 That this honourable court be pleased to issue an order of *certiorari* to remove and quash the respondent’s decisions against the applicant as contained in the respondent’s letters dated September 27, 2021 and November 23, 2021.
  2. That this honourable court be pleased to issue a declaratory order declaring that the respondent is in breach of the applicant’s right to fair administrative action.
  3. That this honourable court be pleased to issue a declaratory order declaring that the respondent is in breach of the applicant’s right to equality and freedom from discrimination.
  4. That this honourable court be pleased to issue an order of prohibition prohibiting the respondent from instituting or further proceeding with any recovery and or surcharge proceedings against the applicant arising out of the decisions contained in the respondent’s letters dated September 27, 2021 and November 23, 2021, and the investigations that gave rise to the said decisions.
  5. That the costs of this application be provided for.”
2. The application is expressed to be brought under the provisions of articles 10(1) and (2), 27,47(1) and (2) and 236 of the Constitution, sections 3(1) and (2), 5(3), 22 and 33 of the Higher Education Loans Board Act, 1995, section 52 of the Leadership and Integrity Act 2012, section 3(3) of the Public Officers Ethics Act, 2003, sections 4(1), (2), and (3), 10(1), and 11 of the Fair Administrative Action Act 2015, section 1A,1B and 3A of the Civil Procedure Act 2010, and order 53 (3) of the Civil Procedure Rules 2010. As can be discerned from the grounds on the face of the application, the supporting affidavit and further affidavit sworn by the applicant on January 18, 2022 and July 14, 2022 respectively, the grounds for the application can be summed up as follows:

- “ 1 The respondent’s decisions as communicated through its letters dated September 27, 2021 and November 23, 2021 are unlawful for want of jurisdiction as the respondent lacks the legal capacity to enforce the provisions of section 52 (1) of the Leadership and Integrity Act 2012, in relation to the applicant.
2. Pursuant to section 52 (1) and (2) of the Leadership and Integrity Act 2021 as read with section 3 (3) of the Public Officer Ethics Act 2003, the responsible commission for the purposes of section 52 (1) of the Leadership and Integrity Act 2012, in relation to the applicant is the Public Service Commission.
3. The applicant’s right to Fair Administrative Action under article 47 of the Constitution of Kenya 2010, as read with section 4 of the Fair Administrative Action Act 2015, has been, or is likely to be violated, by the respondent’s decision, as communicated through its aforesaid letter dated November 23, 2021, which is devoid of reasons, for the rejection of the applicant’s request for review
4. The respondent’s aforesaid decisions are irrational as they are made on the basis that the applicant illegally and unilaterally directed the review of the



basic salary of the Chief Operations Officer of the Higher Education Loans Board, when available evidence indicates, that the said salary review, had been approved by the Higher Education Loans Management Board.

5. The applicant's fundamental right under article 27 of the *Constitution* of Kenya 2010, to equality, and freedom from discrimination, has been, or is likely, to be violated, by the respondent, which is intent, on selectively commencing, recovery proceedings against him, to the exclusion of, the members of the Higher Education Loans Management Board, whose resolutions, he was executing, by virtue of his employment.
6. The applicant as the secretary of the Higher Education Loans Board is legally obligated under section 5 (3) of the *Higher Education Loans Board Act* 1995 to ensure that the secretariat of the said public body satisfactorily carries out duties and performs functions assigned to it by the board.
7. The applicant cannot be sued, and or, prosecuted by the respondent, in place of the Higher Education Loans Management Board, which is established as a body corporate under section 3 of the *Higher Education Loans Board Act* 1995, capable of suing and being sued in its own name.
8. The provisions of article 230 (4) of the *Constitution* of Kenya 2010, and the *Salaries and Remuneration Commission Act* 2011 ought to be read in conjunction with section 22 of the *Higher Education Loans Board Act* 1995.
9. Section 22 of the *Higher Education Loans Board Act* 1995 empowers the Higher Education Loans Board to employ such officers, inspectors and servants as shall be necessary for the performance of their functions under the Act and to pay out of the Higher Education Loans Fund to such officers and servants such salaries and allowances as the board may from time to time determine.
10. The boards, and Chief Executive Officers, of State Corporations, are empowered under clause 12 of the guidelines on terms and conditions of service for State Corporations, Chief Executive Officers, Chairmen and Board Members, Management staff, and unionisable staff, issued by the Permanent Secretary/ Secretary to the Cabinet and Head of the Public Service on November 23, 2004, to determine both the structure and pay levels for management staff.
11. The purported recovery proceedings that the respondent is intent on commencing, and prosecuting, against the applicant, in respect of the alleged irregular review of the salary of the chief operations officer of the Higher Education Loans Board, is selective, and discriminatory, as the review of salaries approved by the Higher Education Loans Management Board, was not limited, to the said Chief Operations Officer.
12. The applicant is protected from personal liability under section 33 of the *Higher Education Loans Board Act* 1995 for acts done *bona fide* while executing his official duties under the said Act. It is not open to the respondent or any of its officers to victimize public officers for decisions made *bona fide* merely



because they believe that they would have made a different decision under similar circumstances.

13. Article 236 (a) of the Constitution of Kenya 2010 protects public officers from being victimized or discriminated against for having performed the functions of office in accordance with the Constitution or any other law.
  14. Section 9 of the Leadership and Integrity Act 2012, must be read in conjunction with article 236 (a) of the Constitution of Kenya 2010, and section 33 of the Higher Education Loans Board Act 1995, and section 3 (1) and (2) of the Higher Education Loans Board Act 1995.
  15. Article 226 (5) of the Constitution of Kenya 2010 presupposes a determination of unlawfulness of the purported unlawful acts giving rise to the respondent's purported claim against the applicant, which the respondent lacks the legal capacity to make.
  16. Article 226 (5) of the Constitution of Kenya 2010 is inapplicable to the applicant since the relevant decisions giving rise to the respondent's purported claim against the applicant, were made by the Higher Education Loans Management Board, and not by the applicant.
  17. The respondent cannot purport to initiate, recovery proceedings against the applicant, to the exclusion of the interested party, who earned the salaries in issue, against whom, a claim could be maintained, by the responsible commission, under section 49 of the Leadership and Integrity Act 2012, in the event that the relevant payments, are found to have been wrongfully made, by the Higher Education Loans Management Board.”
3. The respondent opposed the application through its replying affidavit sworn by Peter Mwita on March 16, 2022. Peter Mwita deposes that he was in the team that conducted investigations into the allegations made against the exparte applicant; that the plaintiff has power to carry out such investigations under articles 79, 252 of the Constitution, sections 11 (1)(c) and 11(1)(d) of the Ethics and Anti-Corruption Commission Act and sections 4, 42 and 43 of the Leadership and Integrity Act, the Anti-Corruption and Economic Crimes Act; that the respondents mandate extends to *inter alia* establishing the extent of liability for the loss of, damage to public property and in appropriate cases, to institute civil proceedings against any person for recovery/restitution of such property. Further that sometimes in May 2019 the plaintiff received allegations of abuse of office and breach of code of ethics by the exparte applicant in that he had arbitrarily and in abuse of office, approved the review of the Chief Operations Officer's basic salary from Kshs 218,719.13 per month to Kshs 253,923.43 without the approval of the Board of Directors contrary to the law and legal opinion; that he directed officers working under him to effect the unlawful review and when they declined and offered their professional opinion/reasons he instituted disciplinary proceedings against him resulting in the termination of services of one of them (Chief Finance Officer). That upon the two officers being adamant the exparte applicant informed them that the salary review was a directive of the board; that however there was no such board resolution to support the review; that nevertheless the exparte applicant caused the review through an email dated March 27, 2019 and another dated March 28, 2019 in which he stated:-
- “p. Let's not engage further on our own interpretation and advisory about the cause and effect. The discussions between FSGP, myself and HR have no minutes and I have the responsibility of executing Board Directives without



being oversighted by management. I have directed that this is a board decision and therefore proceed as advised. In case you are unable to implement as I have advised direct the same to me for approval and we will proceed to take the necessary remedial action thereafter.”

.....

- s. I will be seeking an explanation from finance why CEO’s directives are having difficulties to be implemented when I have an obligation to implement board directives.”
4. It is the respondent’s contention that the review was irregular, improper and in contravention of the law as the same was not approved by the board of directors; that the minutes annexed by the exparte applicant to validate the review are minutes of a meeting held on January 30, 2020 way after the purported approval of the irregular review. The deponent also disputes that the impugned increment had the blessing of the public service commission Human Resource Policies and Procedure Manual 2016 of the HR policy for HELB. The deponent disputes that the investigations were prejudicial to HELB or that the same violated the rights of the exparte applicant. Further, the respondent acted under the law as under chapter 6 of the Constitution and the Leadership & Integrity Act 2012 it is responsible for overseeing and enforcing the implementation of the Act; that moreover the review amounted to abuse of office which is an offence under section 46 of the Anti-Corruption and Economic Crimes Act; the deponent deposed that the mandate of the Public Service Commission is limited to disciplinary issues but not criminal conduct. The deponent concludes by deposing that the exparte applicant has not demonstrated that the decision of the respondent to surcharge him was discriminatory, irrational, unlawful, unreasonable, procedurally unfair or contrary to the indicates of article 47(1) of the Constitution as alleged, and hence the application for judicial review ought to be dismissed with costs to the respondent. Annexed to the affidavits are several document which are referred to therein.
  5. The application was canvassed through written submissions.

### Submissions

6. The *ex parte* applicant contends that the impugned decision of the respondent made and communicated *vide* the letter dated September 27, 2021 is amenable to judicial review on the grounds that the decision is *ultra vires* as the respondent lacked jurisdiction to enforce the provisions of section 9 of the Leadership and Integrity Act 2012; that according to section 52 of the said Act, the public entity mandated to enforce section 9 which falls under part ii of the Act is the Public Service Commission but not the respondent. Counsel referred to section 3(3) of the Public Officers Ethics Act and contended that the respondent usurped the mandate of the Public Service Commission; that the respondent must confine itself to its statutory jurisdiction and that parliament expressly conferred the mandate to a different institution. In support of his submissions counsel cited the cases of Samuel Kamau Macharia and another v Kenya Commercial Bank Limited and 2 others [2012] eKLR and Republic v Kenya School of Law ex parte Victor Mbeve Musinga [2019] eKLR where the court held:

“Perhaps I should add that it is not the duty of the court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The court cannot add words to a statute or read words into it, which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot go to its aid to correct or make up the deficiency. Courts decide what the law is and



not what it should be. The court of course adopts a construction, which will carry out the obvious intention of the legislature but cannot legislate itself.”

7. Secondly, counsel submitted that the respondent’s contention that it was exercising its mandate to investigate criminal offences is false as such investigations should have led to the recommendation of criminal charges against the applicant and not the surcharge; that there is no law that provides for the imposition of a surcharge as a penalty for conduct that is not known in law. Counsel stated that the impugned decision was unreasonable; that the evidence shows that the contested salary review authorized by the applicant was initiated by the Human Resources Department of HELB through a Memo dated March 20, 2019, addressed to the applicant, from the Ag Head of Human Resources one Mr Wir; that, the applicant acted on the said professional advice and recommendations in the salary review. Further, that the salary was authorized by the board at the 108<sup>th</sup> and 113<sup>th</sup> Finance Staff and General Purpose Committee meetings of the Board; that the board has the legal capacity to undertake a salary review as provided under section 22 of the [Higher Education Loans Board Act](#); that the board acted within its mandate and within the limits of the advisory received from the Salary Remuneration Commission. Further, that the board is a body corporate with capacity of being sued and as such it is discriminatory to single out the applicant and surcharge him for the actions of the board.
8. Counsel further argued that it is irrational for the respondent to institute legal action against the applicant while excluding the interested party against whom a claim can be maintained. That the respondent acted upon the professional opinion of the human resource experts; that the electronic evidence produced as “PM6”, “PM7” and “PM8” are inadmissible in evidence for want of compliance with section 106(B) and 106(4) of the [Evidence Act](#). Counsel placed reliance on the case of [Peter Ngethe Ngari t/a PNN Funeral Services v Standard Group Limited PLC and another](#) 2020 eKLR and [Republic v Mark Lloyd Stevenson](#) [2016] eKLR where the court held:
  - “49. In the present case none of these conditions were met. In any event, for a computer output to be considered a document for admissibility under section 106B(1), it must satisfy the conditions in Section 106B(2) namely that:
    - a. The output must have been produced during regular use;
    - b. It must be of a type expected in ordinary use;
    - c. The computer generating the output must be operating properly or it must be shown that the accuracy of the computer is not otherwise affected; and
    - d. Where multiple computers are involved, those operating in succession and considered as one.
  50. It should be fairly obvious that the prosecution does not satisfy the conditions for section 106B(1) to apply. For one to come under this section, the computer output proposed as evidence must both certify the conditions in section 106B(2) and be accompanied by a certificate under section 106(4). In this case, the accompanying certificate serves the authenticating purpose.”
9. Counsel also contended that the respondent’s decision merits review for being incorrect; that the applicant’s right to fair administrative action under article 47 of the [Constitution](#) as read with section 4 of the [Fair Administrative Action Act](#) was violated and the decision is bad in law and should be quashed by this court.



10. For the respondent it was submitted that the applicant's notice of motion falls short of the threshold set for proving violation of fundamental rights and freedoms enjoyed under the Constitution of Kenya 2010. No evidence has been tendered to support the claim herein leaving the court no option but to reject the judicial review application in their entirety. As submitted hereinabove, the applicant appear to believe that the lawful actions of the commission amount to a breach of his constitutional rights; that the applicant's assertions are to be accepted, it would translate into a blanket bar to investigations and recovery proceedings where a person is suspected to be involved in corrupt conduct and unethical conduct; that this would signal the demised of independent inquiry into allegations of corruption and economic crime; that this honourable court is a stakeholder in the fight against corruption and should be slow to allow litigants who wish to unlawfully shield themselves from scrutiny during a national crisis of corruption and economic crimes and that it is in the public interest that major scandals are thoroughly investigated, the perpetrators are expeditiously prosecuted and punished and assets recovered. Counsel urged the court to dismiss the applicant's notice of motion in its entirety with costs to the commission.
11. Relying on the case of Republic v Secretary of the Firearms Licencing Board & 2 others Ex parte: Senator Johnson Mutbama [2018] eKLR counsel submitted that an order of prohibition cannot issue to stop the respondent from undertaking its statutory powers and duties. That it can only be prohibited if it exercises that power in contravention of the law. Counsel reiterated that the review, the subject of the surcharge, was irregular, improper and illegal as it did not have the approval of the HELB Board of Directors and as such under article 226(5) of the Constitution the exparte applicant is liable for the loss.
12. Counsel for the respondent also urged that the declaratory reliefs sought do not lie as the same can only issue upon adduction of evidence. To this end, counsel cited the case of Advanced Gaming Limited v Betting Control and Licencing Board & 2 others; Safaricom Limited (interested party) [2019] eKLR as follows:-
  - “ 188. The tests for granting a declaratory relief were settled in *Durban City Council v Association of Building Societies*[95] and confirmed in *Cordiant Trading CC v Daimler Chrysler Financial Services (Pty) Ltd*[96]The court must first be satisfied that the applicant is a person interested in an existing, future or contingent right or obligation; and if so, the court must decide whether the case is a proper one for the exercise of its discretion.
  189. The first leg of the enquiry involves establishing the existence of the necessary condition precedent for the exercise of the court's discretion. An applicant for the declaratory relief satisfies this requirement if he succeeds in establishing that he has an interest in an existing, future or contingent right or obligation. Only if the court is satisfied does it proceed to the second leg of the enquiry.
  190. The first stage of the enquiry relates to whether the public officer is authorized or obliged by law to render the impugned decision. The first answer to this question lies in the constitutional principle of legality. Organs of State and public officials are creatures of statute. Unlike natural persons who may commit any act, the only requirement being that the act ought to be legal, organs and officials of state are only empowered to act to the extent that their powers are defined and conferred by the constitution and/ or by statute. Any conduct by an organ or official of state beyond their constitutional and/ or statutory powers violates the principle of legality.



191. Applying the above factors to the present application, this court is not persuaded that the circumstances of this case warrant the granting of the declaratory reliefs sought.”

13. Counsel also contested that the ex parte applicant’s rights were violated and stated that the respondent gave him a right to be heard and hence the right to fair administrative action was observed. Counsel submitted that allegations of discrimination do not hold water as it was him that played an active role in the impugned salary review even upon in the face of professional opinion that the review should not have been implemented; counsel contended that the ex parte applicant has only made blanket allegations of violation of rights which he did not prove and which were not in any case demonstrated with a reasonable degree of precision as held in the case of *Anarita Karimi Njeru v The Republic [No 1]* [1976-80] 1KLR page 88 and in the case of *Benson Muteti Masila & 5 others v Chief Magistrate milimani Law Courts & 4 others* [2020] eKLR.

14. On whether the ex parte applicant can be held personally liable, counsel stated that the respondent had proved that the ex parte applicant acted arbitrarily and in abuse of office; that section 33 of the HELB Act does not in any way afford employees of HELB a blanket immunity and that article 226(5) of the *Constitution* requires that persons who hold public office to be liable for any loss arising from the unlawful approval of use of public funds. Counsel cited to his aid the case of *Ethics and Anti-Corruption Commission v Judith Marilyn Okungu & another* [2017] eKLR where the court stated

“Of greater significance is that the learned judge failed to grasp the essence of the appellant’s argument before him. The appellant was not merely arguing that those sections did not absolve Government officers from personal tortious liability as the preliminary objection had posed. Rather, the gist of the argument was that even were it to be conceded that government bears tortious liability for the acts of its servants who may perhaps be absolved their disclosed principal having borne liability and been sued, the case herein was not merely tortious but one where the 1st respondent is alleged to have exceeded her authority, acted in violation of the law and engaged in fraudulent acts in breach of her fiduciary duty. Such illegalities are not only null and void, they can only attach personally to the 1st respondent and she may be sued therefor.”

### **Analysis And Determination**

15. The following issues arise for determination:

1. Whether the respondent has the jurisdiction to enforce the provisions of the *Leadership and Integrity Act*
2. Whether the applicant’s right to fair administrative action was infringed upon and whether the applicant is entitled to the reliefs sought

### **Whether the Respondent has the jurisdiction to enforce the provisions of the *Leadership and Integrity Act***

16. From the outset, it is important to note that this court’s mandate in judicial review proceedings under order 53 of the *Civil Procedure Rules* and section 4 of the *Fair Administrative Action Act* is limited to the interrogation of the process and not the merits of the decision being challenged. This law was expounded further by the Supreme Court in *John Florence Maritime Services Limited & another*



*Cabinet Secretary, Transport and Infrastructure & 3 others*, SC petition 17 of 2015; [2021] eKLR. The court made a determination on the considerations to be made in judicial review when it held as follows;

“102. Despite the shift from common law to codification in the Constitution and the Fair Administrative Actions Act, the purpose of the remedy of judicial review is concerned with reviewing not the merits of the decision in respect of which the application for judicial review is made, but the decision-making process itself. This finding is further reinforced by the fact that though the court in determining a judicial review application may look at certain aspects of merit and even set aside a decision, it may not substitute its own decision on merit but must remit the same to the body or of ice with the power to make that decision.”

17. The Supreme Court further proscribed the courts from considering the merits of the decision being challenged by the following holding in *SGS Kenya Limited v Energy Regulatory Commission & 2 others*, SC Petition No 2 of 2019; [2020] eKLR :

“(45) ... We have, however, observed that the Appellate Court was right in its finding that the High Court should not have gone to the merits of the Review Board decision as if it was an appeal, nor granted the order of Mandamus, since the 1<sup>st</sup> respondent did not owe any delimited statutory duty to the petitioner.”

18. The respondent is an independent commission established under article 79 of the *Constitution* and section 3 of the *Ethics and Anti-Corruption Commission Act* 2011.

19. The mandate of the respondent in instituting civil recovery proceedings is provided under section 11(1)(c), *EACC Act* which provides that the commission shall receive complaints on the breach of the code of ethics by public officers. With respect to criminal prosecution, section 11(1)(d), *EACC Act* provides that the commission shall investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the *Anti-Corruption and Economic Crimes Act* or any other law enacted pursuant to chapter six of the *Constitution*. Section 11(1)(j) of the *EACC Act* grants the commission authority to institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures. The law is reproduced thus:

“11. Additional functions of the commission

- (1) In addition to the functions of the commission under article 252 and chapter six of the *Constitution*, the commission shall—
- a. in relation to state officers—
    - (i) develop and promote standards and best practices in integrity and anti-corruption;
    - (ii) develop a code of ethics;
  - b. work with other state and public offices in the development and promotion of standards and best practices in integrity and anticorruption;
  - c. receive complaints on the breach of the code of ethics by public officers;



- d. investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption, bribery or economic crimes or violation of codes of ethics or other matter prescribed under this Act, the *Anti-Corruption and Economic Crimes Act* or any other law enacted pursuant to chapter six of the *Constitution*;
- e. recommend appropriate action to be taken against state officers or public officers alleged to have engaged in unethical conduct;
- f. oversee the enforcement of codes of ethics prescribed for public officers;
- g. advise, on its own initiative, any person on any matter within its functions;
- h. raise public awareness on ethical issues and educate the public on the dangers of corruption and enlist and foster public support in combating corruption but with due regard to the requirements of the *Anti-Corruption and Economic Crimes Act*, 2003 (No 3 of 2003), as to confidentiality;
- i. subject to article 31 of the *Constitution*, monitor the practices and procedures of public bodies to detect corrupt practices and to secure the revision of methods of work or procedures that may be conducive to corrupt practices; and
- j. institute and conduct proceedings in court for purposes of the recovery or protection of public property, or for the freeze or confiscation of proceeds of corruption or related to corruption, or the payment of compensation, or other punitive and disciplinary measures.”

20. Further, section 4(2) of the *Leadership and Integrity Act* (LIA) provides that the commission is responsible for overseeing and enforcing the implementation of the Act. Section 52 of the Act provides that the provisions of chapter 6 of the *Constitution* apply to public officers as if they were state officers, thereby bringing the applicant under the authority of the respondent. In the case of *Dr Pius Wanjala v Ethics and Anti-Corruption Commission* [2022] eKLR this court held as follows:

“25. From the above provisions, it is evident that EACC has a wide mandate with respect to investigations of corruption and breach of codes of ethics. It has pleaded, and this has not been controverted by the petitioner, that allegations of conflict of interest and breach of code of ethics have been made against the petitioner. These allegations, if true, would amount to an offence under section 42 of ACECA.

29. It would appear that EACC was acting on information that it had received regarding unethical conduct on the part of the petitioner. Whether it was from the PSC or any other person, the EACC had the mandate to commence investigations in view of the provisions of law that I have considered above. To argue that the EACC had no mandate to investigate the allegations against the petitioner because that would usurp the mandate of the PSC would be to read very restrictively and narrowly the mandate vested in the EACC by chapter six of the *Constitution* and the anti-corruption legislative framework enacted pursuant thereto. The contentions by the petitioner with respect to



the mandate of the EACC with regard to the codes of the conduct for public officers is without merit.”

Article 79 of the Constitution also identifies the EACC as the public body which is charged with ensuring compliance with chapter six of the Constitution. That article decrees that:-

“79. Parliament shall enact legislation to establish an independent ethics and anti-corruption commission, which shall be and have the status and powers of a commission under chapter fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of this chapter.”

The argument that the respondent overstepped its mandate and hence acted *ultra vires* does not hold water.

21. It is my finding, therefore, that the respondent does have the jurisdiction to enforce the provisions of the Leadership and Integrity Act. Section 11(1) of the EACC Act also gives it a wide mandate which includes bringing and conducting civil proceedings for the enforcement of payment of compensation or other punitive and disciplinary measures. Article 226(5) of the Constitution stipulates that probity in the use of public funds is an individual responsibility. It states:

“226(5) If the holder of a public office, including a political office, directs or approves the use of public funds contrary to law or instructions, the person is liable for any loss arising from that use and shall make good the loss, whether the person remains the holder of the office or not.”

Accordingly, the allegation by the *ex parte* applicant that he was discriminated against has no basis; that it acted within its statutory and constitutional mandate in investigating the respondent and issuing the demand notice for the recovery of Kshs 491,852.20 alleged to have been lost by a public entity, the Higher Education Loans Board.

### **Whether the Applicant’s right to fair administrative action was violated**

22. On whether the applicant’s right to fair administrative action was violated by the respondent, the applicant has gone into great detail to explain the manner in which he undertook the impugned salary increment that brought about the investigations and the issuance of the demand notice by the respondent. He has not pleaded nor given evidence on the manner in which his rights to fair administrative action was violated as required of him in a claim for violation of constitutional rights as espoused in Anarita Karimi Njeru v Republic [1976-80]1 KLR. Correspondences adduced by the respondent show that he was afforded a right of hearing.
23. This court therefore finds that the action of the respondent was neither irrational, arbitrary or unreasonable and that the *ex parte* applicant is therefore not deserving of the orders sought. His application is accordingly dismissed with costs to the respondent. It is so ordered.

**SIGNED, DATED AND DELIVERED VIRTUALLY THIS 9<sup>TH</sup> DAY OF FEBRUARY, 2023.**

**E N MAINA**

**JUDGE**

