



**Chavangi & another v National Assembly & 2 others; Swazuri
(Interested Party) (Petition E239 of 2022) [2023] KEHC 19049 (KLR)
(Constitutional and Human Rights) (19 June 2023) (Judgment)**

Neutral citation: [2023] KEHC 19049 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E239 OF 2022

M THANDE, J

JUNE 19, 2023

BETWEEN

TOM AZIZ CHAVANGI 1ST PETITIONER

SALOME MUNUBI 2ND PETITIONER

AND

NATIONAL ASSEMBLY 1ST RESPONDENT

NATIONAL LAND COMMISSION 2ND RESPONDENT

KABALE TACHE ARERO 3RD RESPONDENT

AND

MOHAMMAD SWAZURI INTERESTED PARTY

JUDGMENT

1. In their Petition dated 24.5.22, the Petitioners seek the following reliefs:
 - a) An order Certiorari removing the findings and recommendations contained in the PAC Report on Examination of the Report of the Auditor General on the Financial Statements for the National Government for the Financial Year 2018/2019 in relation to the Petitioners and Interested Party at pages 1315-1316.
 - b) An order of prohibition prohibiting the 2nd Respondent from implementing the recommendations contained in the PAC Report on Examination of the Report of the Auditor General on the Financial statements for the National Government for the Financial Year 2018/2019 in so far as they relate to the Petitioners and Interested Party.



- c) Costs.
2. The Petition is supported by the Petitioners' affidavits sworn on even date and further affidavits sworn on 27.1.23. The facts herein are that on 17.5.22, the Public Accounts Committee (PAC) of the 1st Respondent tabled before the 1st Respondent, its Report on Examination of the Report of the Auditor General on the Financial Statements for the National Government for the Financial Year 2018/ 2019 (the PAC Report). Several recommendations were made in the PAC Report including that the 2nd Respondent paid Kshs. 215,622,898/= (lost amount) as land compensation contrary top guidelines was irregular and improper and further that for want of proper explanation, PAC treated the lost amount as a loss to Kenyan taxpayers. The Petitioners' complaint is that PAC Report made further recommendations that the 1st Petitioner, as the accounting officer at the material time, the Interested Party, the then Chairman and the 2nd Petitioner the then Director of Valuation and Taxation of the 2nd Respondent, are directly liable for the lost amount. PAC went on to recommend that the Petitioners and Interested Party be barred permanently from holding public office.
 3. It is the Petitioners' case that the PAC Report, if adopted, will sound a death knell to the careers of the Petitioners and Interested Party; that the Petitioner's being the Chief Executive Officer and Director respectively, though on suspension, were not afforded fair administrative action by the PAC before the adverse findings were made against them; that they were not summoned by the PAC to make representations on the matter; that the Petitioners have been summoned by other committees of the 1st Respondent in accordance with Article 125 of the Constitution, to answer to a number of issues while on suspension, that there was no reason why they were not summoned to answer to the issues relating to the lost amount; that the recommendations are designed to influence the ongoing Anti-Corruption Cases Nos. 33 of 2018 and 6 of 2019 against; that the recommendations are illegal, irrational, actuated with malice and bad faith and ought to be expunged from the PAC Report; that any decision to bar a person from holding public office can only be made by a court of law after an adjudicatory process has been conducted, hence the decision by the 1st Respondent was ultravires. It is thus their case that the Petitioners' and Interested Party's rights under Articles 27, 28 and 236 of the Constitution were violated.
 4. The Interested Party supported the Petition vide an affidavit sworn on 6.10.22. He deposed that while the PAC was debating the 2nd Respondent's 2018/2019 financial statements, it never summoned him to provide context or an explanation to the queries they had prior to being condemned; that the report does not explain how the PAC came up with the figure of Kshs. 215,622,898/= as being irregularly paid out by the 2nd Respondent and any specific action that he undertook in the payment of the lost amount outside laws and procedures in place at the time; that the report does not elaborate which amongst the several projects undertaken by the 2nd Respondent, on behalf of various ministries, during the period in question, were the subject to the lost amount that it does not list the alleged properties and/or proprietors that were paid the alleged lost amount; that the PAC Report does not list documentary evidence used by PAC to come to the conclusion that the lost amount was in fact lost due to the non-harmonization of valuations between the 2nd Respondent and the Ministry of Lands and Physical Planning (the Ministry), nor does it indicate any valuation reports that the PAC used in coming to the conclusion that the lost amount was lost; that it is not clear when the impugned payments were allegedly made for the period under review by the PAC, financial year 2018/2019.
 5. The Interested Party further deposed that the PAC Report indicates that there are discrepancies between the figures in the financial statements and the figures in the integrated financial management information system (IFMIS) but fails to mention the figures that have not been captured, thus calling to question the basis of the conclusion made by the PAC. The far-reaching recommendation that he be permanently barred from holding public office, having been made without according him a hearing



- is draconian and ultra vires the powers of the 1st Respondent as an oversight committee under Article 95(5)(a) and (b) of *the Constitution*. It also and offends the principles of natural justice and is meant to embarrass him and the Petitioners and to tarnish their carriers as public servants.
6. The Respondents have opposed the Petition. Serah Mbuli Kioko MBS, Ag Clerk of the 1st Respondent swore a replying affidavit on 12.10.22. She averred that the PAC had requested the Auditor General to audit the 2nd Respondent's financial statements for the 2018/2019 financial year. The audit report revealed the irregular and improper land compensation of the lost amount which included other expenses of the 2nd Respondent and had been paid out without harmonized valuations by the 2nd Respondent and the Ministry. PAC carried out investigations and prepared the PAC Report in which it made certain observations and recommendations. Pursuant to National Assembly Standing Order 191, the National Assembly had vide letters dated 26.1.21 and 11.3.21, invited the Petitioners to appear before the PAC regarding the investigations into audit report by the Auditor General. The Petitioners however declined the invitation vide a letter date 16.3.21. PAC then proceeded to admit evidence which it evaluated and submitted the PAC Report before the 1st Respondent on 17.5.22. The PAC Report was debated on 31.5.22 and adopted on 2.6.22. The Petitioners were given an opportunity to appear before the PAC to be heard in compliance with Article 47 of *the Constitution* and the Standing Orders. PAC thus complied with the law in carrying out investigation. The granting the orders sought by the Petitioners will result in undermining the mandate of the 1st Respondent. Further, the Petitioners have not demonstrated any violation of *the Constitution* or of their fundamental rights and freedoms and therefore this Court ought to decline to grant the order sought. The Petition is bad in law, baseless and an abuse of the court process and should be dismissed with costs.
 7. Samuel Njoroge, Clerk of the 1st Respondent swore further affidavit on 14.11.22, in which he adopted the averments of Serah Mbuli Kioko. He averred that the PAC Report does not constitute administrative action within the meaning of Article 47 of *the Constitution* and Section 2 of the *Fair Administrative Action Act*, 2015; that no proper material by way of admissible evidence has been produced by the Interested Party before the Court to justify the grant of any of the orders sought in the Petition; that the and Interested Party is bound by the issues raised by the Petitioners and Respondents and cannot introduce new issues and that the Court lacks jurisdiction to adjudicate on the new issues raised by the Interested Party; that it is not true that the PAC Report has failed to explain how it arrived at the figure of the lost amount as alleged; that on the contrary, PAC observed that despite payment of the lost amount, to other government entities out of the sum of Kshs. 12,423,333,959/= the lost amount was done without harmonization from both the 2nd Respondent and the Ministry. In the absence of an explanation, PAC treated the propriety of this payment as a loss.
 8. He further averred that Parliamentary committees are also bound by rules of evidence and any document tendered by any person before any committee must also meet the test of admissibility; that this Court is bound by the findings of fact and evidence that were reached by the PAC. The Court can only interfere with the findings of PAC if the Petitioners demonstrate that the PAC acted in excess of its jurisdiction, considered matters which it ought not to take into account or failed to consider matters that it ought to have taken into account. He deposed that the Petitioners and Interested Parties failed to meet this test. Further that the Interested Party has invited this Court to direct PAC on how to conduct its investigations and by extension Parliament's oversight role, contrary to the doctrine of separation of powers. Pursuant to National Assembly Standing Order 191, any committee of Parliament enjoys all powers and privileges bestowed upon Parliament either by *the Constitution* or statute; that Article 125 of *the Constitution* grants to Parliament and its committees the same power as the High Court, to call for evidence. He reiterated that the Petitioners were invited to appear before the PAC on 2 occasions and that PAC did not violate the Petitioners' and Interested Party's right to fair administrative action.



Further, the PAC'S mandate is donated by the Constitution and does not amount to administrative action. Hence Article 47 and the Fair Administrative Action do not apply herein. He urged that if the Court is minded to allow the Petition, it should issue a structural interdict and remit the matter back to the National Assembly for reconsideration.

9. The 2nd and 3rd Respondents filed grounds of opposition dated 27.6.22. The grounds are that the Petition the Petition does not state precisely what provision of the Constitution has been infringed by the 2nd and 3rd Respondents that has violated the Petitioners' constitutional rights; the 2nd Respondent is not part of PAC and the PAC Report having not yet been tabled and/or adopted by the National Assembly, the Petition has been filed prematurely and is not actionable as against the 2nd and 3rd Respondents; it has not been shown that the 2nd and 3rd Respondents have an identifiable legal interest or duty in these proceedings and their presence in the case is unnecessary. The 2nd and 3rd Respondents urged that the Petition against them be dismissed.
10. In the further affidavits, the Petitioners denied being invited or turning down any invitation by the 1st Respondent to respond to the Audited Financial Statements for the National Land Commission (Vote 2021) for the Financial Year 2018/2019 which is subject of this Petition. The letters referred to by the 1st Respondent were an invitation to answer to queries in relation to the report of the Auditor General on the Financial Statements for the period 2014/2015 to 2016/2017 and the year ended 30th June 2018, which they honoured.
11. In his further affidavit, the Interested Party averred that from the Auditor's report for the year ended 30.6.19, it can be observed that the 2nd Respondent, which he chaired from 2015 to 11.8.18, received a qualified opinion from the Auditor General for the year under review together with 112 other governmental ministries, agencies, departments and independent constitutional commissions; that page 678/679 of the Auditor General's report indicates that compensations paid to other government entities by the 2nd Respondent were paid without harmonized valuations from the 2nd Respondent and the Ministry -this was ostensibly on the strength of directives communicated by the PS, Ministry of Lands and Physical Planning vide a letter dated August 1, 2018; as at 13th August 2018 when he was ejected from office, the 2nd respondent had not paid any project affected persons using harmonized valuations for any project as discussions on these harmonized valuations with the Ministry of Lands and Physical Planning had just started, were not concluded, and even then, they were only to target payments for S.G. R Phase II; there is no indication when these payments were made, whether he participated in their payments in one way or the other and whether he was still in office at the time of the impugned payments were made; the alleged payments do not include the projects involved, the total project cost against which the said monies were paid the number and identities of the project affected persons and how much each was paid for each project hence loss cannot just be declared without such details; the fact that these observations by the Auditor under paragraph 1697 of the report have been marked as qualified indicates that any questions as to the veracity of these payments were to be addressed by the Accounting Officer, the 3rd respondent herein, who was in the office at the time of its preparation and publishing on April 1, 2021; and by the time he was ejected from office in August 2018, the financial year 2018- 2019 had just begun, and when the payments were made the accounting officer was the 3rd respondent who was well aware of the fact that he did not have any role in preparing valuation reports or even paying for valuation awards thereof.
12. The Interested Party stated that contrary to the averments in the replying affidavit by the 1st Respondent, there was a glaring lack of reasons or supporting documentation to anchor any of the findings and recommendations against him found on page 1315-1316 of the PAC Report; that in recommending that he be held directly liable for the lost amount, the PAC does not attempt to



surmount the constitutional threshold set by citing any evidence showing that he directed or approved the use of any public funds contrary to the law or instructions; that on page 1315 of the PAC Report, the 3rd Respondent as the accounting officer submitted documentation demonstrating that all valuations and payments were done in accordance with the directive communicated by the PS of the Ministry vide a letter dated 1.8.18; that this information was rejected by PAC because the valuation reports were neither signed nor authenticated yet there was no indication that the same were meant to be signed or authenticated by him; that there was also no evidence in the PAC Report that any attempt was made to invite him to comment on the queries arising from the Auditor's Report or the representations by the 3rd Respondent; he did not and up to now has never received any invitation by the PAC to respond to any audit queries arising from transactions conducted during the financial year 2018/2019 by the 2nd Respondent; that on close scrutiny of the letters referred to in the replying affidavit of the 1st Respondent, it is clear that none was addressed to him and none related to the transactions contained in the Auditor General's in question; that the recommendation against him in paragraph 5547 of the PAC Report on page 1315 was therefore made without him being afforded his due process rights as guaranteed in *the Constitution*. Additionally, the PAC Report covered financial year 2018/19 that started on 1.7.18 and ended 30.6.19; that he was ejected from office on 13.8.18 after having been arraigned in court in ACC 33 of 2018; that during that time until the end of his 6-year term in office in February 2019, he did not deal with any matters to do with valuation payments. Therefore, given the lack of any directly or indirectly linking him to any misconduct, the adverse recommendations exposing him to personal liability and permanently curtailing his ability to earn a living as a career public servant, was fundamentally against *the Constitution*, laws of nature and human rights.

13. Parties filed their written submissions which I have duly considered. The following issues arise for determination:
- i) Whether the Interested Party can introduce new issues not pleaded in the Petition
 - ii) Whether the 2nd and 3rd Respondents are necessary parties to the suit.
 - iii) Whether the Petitioners and Interested Party's rights under Articles 47, 50, 27, 28 and 236 of *the Constitution* were violated.
 - iv) Whether the orders sought should be granted.

Whether the Interested Party can introduce new issues not pleaded in the Petition

14. It is the 1st Respondent's contention that by alleging that it acted ultra vires in arriving at its decision and that due process was not followed, the Interested Party has introduced new issues beyond those impleaded in the Petition. The Interested Party has thus departed from and attempted to redraft the Petition thereby changing the course advanced by the Petitioners. This is contrary to the principle that an interested party's case is bound to that of the principal party in a constitutional petition and that the court must stick to the issues raised by the principal parties therein.
15. Rule 2 of *the Constitution* of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 defines an interested party as follows:
- “interested party” means a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation;
16. An interested party is one who though not a party to the proceedings before Court, but has a stake or legal interest therein and will be affected by the decision of the Court whichever way it decides. This



was affirmed by the Supreme Court in the case of *Trusted Society of Human Rights Alliance v Mumo Matemo & 5 others* [2014] eKLR where the Court stated:

"Consequently, an interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the Court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause."

17. Any person joined in any proceedings as an interested party must always be alive to the fact that he is not at liberty to frame or introduce his own issues for determination. The Court shall only consider the issues presented by the principal parties.

18. In the case of *Raila Amolo Odinga & Another v Independent Electoral and Boundaries Commission & 3 Others* [2017] eKLR the Supreme Court stated:

"The applicant, in essence is introducing new facts and issues that were not before Court. It follows that he is not in a position to advance any submission that will be helpful to the Court as it resolves the main question at hand. He is, in effect introducing a new petition, and pre-empting the duly-lodged cause of the parties in the main proceedings. This cannot be allowed. Moreover, we are also not convinced that the applicant would suffer any prejudice, if his intervention is denied. Accordingly, we dismiss this application."

19. Similarly, in the case of *Methodist Church in Kenya v Mohamed Fugicha & 3 others* [2019] eKLR, the Supreme Court stated:

Yet this Court has been categorical that the most crucial interest or stake in any case is that of the primary parties before the Court. We did remark, in *Francis Kariuki Muruatetu & Another v. Republic & 5 others*, Sup. Ct. Pet. 15 & 16 of 2015 (consolidated); [2016] eKLR, as follows (paragraphs 41, 42):

"Having carefully considered all arguments, we are of the opinion that any party seeking to join proceedings in any capacity, must come to terms with the fact that the overriding interest or stake in any matter is that of the primary/principal parties' before the Court. The determination of any matter will always have a direct effect on the primary/principal parties. Third parties admitted as interested parties may only be remotely or indirectly affected, but the primary impact is on the parties that first moved the Court. This is true, more so, in proceedings that were not commenced as Public Interest Litigation (PIL), like the proceedings now before us.

Therefore, in every case, whether some parties are enjoined as interested parties or not, the issues to be determined by the Court will always remain the issues as presented by the principal parties, or as framed by the Court from the pleadings and submissions of the principal parties. An interested party may not frame its own fresh issues or introduce new issues for determination by the Court. One of the principles for admission of an interested party is that such a party must demonstrate that he/she has a stake in the matter before the Court. That stake cannot take the form of an altogether a new issue to be introduced before the Court" [emphasis supplied].



20. Flowing from the cited authorities it is quite evident that the paramount interest for consideration in any matter by a court, is that of the primary parties. An interested party may therefore not introduce any issues to a suit that were not pleaded by the principal parties and if any new issues are introduced, they will be disregarded.
21. A careful look at the averments of the Interested Party herein, will show that he has introduced the element or ultravires which was not pleaded in the Petition. He has also gone into details about the report and what was not considered which again was not raised in the Petition. Besides, the issue as to what ought to have been considered by PAC and faulting the PAC Report goes into the merits of the decision. To go beyond the process of arriving at the recommendations in question would amount to interfering with the mandate of the 1st Respondent thereby offending the doctrine of separation of powers. Accordingly, I find that Interested Party, not being a primary party herein, may not introduce new issues not pleaded in the Petition.

Whether the 2nd and 3rd Respondents are necessary parties to the suit

22. The 2nd and 3rd Respondent' case is that there is no reasonable cause of action against them as they did not play a role in the preparation, publication and subsequent presentation of the impugned report to the 1st Respondent for debate. They did not also influence the findings of the PAC. As such, the Petition should be as between the Petitioners and the 1st Respondent Further that the Petitioners have not demonstrated precisely what provision of *the Constitution* they infringed. They submitted that the Petitioners seek relief for alleged violation of their constitutional rights by a committee of the 1st Respondent. Their presence is thus not necessary for this Court to successfully determine the Petitioners' claim and their absence will not prevent the Court from making an effective decree and or judgment. They further submitted that there is no legal right or obligation accruing to the Petitioners from them which they may claim. It was their case that if the Petitioners felt that they had information that could help the court reach a just determination by virtue of them being officers of the 2nd Respondent, they should have joined them as interested parties. They thus argued that by reason of the foregoing, the Petition against them is unmerited and urged that it be dismissed.
23. For the Petitioners, it was submitted that they were still officers of the 2nd Respondent. The action they allegedly committed, they did so as officers hence it was proper to have the 2nd and the 3rd Respondents in the proceedings and that they are necessary parties for the court to hear their side of the story.
24. Rule 5 of the Mutunga Rules makes provision with respect to addition, joinder, substitution and striking out of parties. Where a party seeks to be struck out from proceedings as the 2nd and 3rd Respondents have, the Court in making a determination is guided by Rule 5(d) which provides as follows:

The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

 - i. order that the name of any party improperly joined, be struck out; and
 - ii. that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.
25. The Court has the discretionary power to either strike out any party that is improperly joined or add any person who ought to have been joined or whose presence in the proceedings is necessary for



adjudication and settlement of a matter before Court. This may be done on the application of either party or on the Court's own motion. Joinder or striking out of a person or party may be done at any stage of the proceedings.

26. Rule 2 of the Mutunga Rules defines a respondent as follows:

“respondent” means a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom;

27. For a person to be joined as a respondent there must be allegations that such person has denied, violated, infringed, threatened to deny, violate, infringe a right or fundamental freedom.

28. Havelock, J. considered an application for joinder of parties in the case of *Pizza Harvest Limited v Felix Midigo* [2013] eKLR. The learned judge stated:

I have also taken cognizance of the case of *Amon v Raphael Tuck & Sons Ltd* (1956) 1 All ER 273, in which Devlin, J held at p. 286-287:

“What makes a person a necessary party? It is not of course, merely that he has relevant evidence to give on some of the questions involved; that would only make him a necessary witness. It is not merely that he has an interest in the correct solution of some question involved and has thought of relevant arguments to advance and is afraid that the existing parties may not advance them adequately ... the Court might often think it convenient or desirable that some of such persons should be heard so that the court could be sure that it had found the complete answer, but no one would suggest that it would be necessary to hear them for that purpose. The only reason which makes it necessary to make a person a party to an action is so that he should be bound by the result of the action, and the question to be settled, therefore, must be a question in the action which cannot be effectually and completely settled unless he is a party.”

29. In the present case, the Court notes that no such allegations have been against the 2nd and 3rd Respondents. Indeed, the dispute is primarily between the Petitioners and the 1st Respondent. Although the Petitioners herein have not made any adverse allegations against the 2nd and 3rd Respondents, they seek an order prohibiting the 2nd Respondent from implementing the recommendations contained in the PAC Report in so far as they relate to the Petitioners and Interested Party. This prayer if granted, will affect the 2nd Respondent. Such order will also affect the 3rd Respondent who is described in the Petition, as the Ag CEO of the 2nd Respondent. Both will be bound by whatever decision made by the Court, in relation to the said prayer. Accordingly, I find that the 2nd and 3rd Respondents, are necessary parties. In any event, it is in the interest of the 2nd and 3rd Respondent that they remain in the proceedings herein.

Whether the Petitioners and Interested Parties’ rights under Articles 47, 50, 27, 28 and 236 of the Constitution were violated

30. It is the 1st Respondent’s contention that the orders sought if granted will offend the doctrine of separation of powers and will be an encroachment on the independence and sovereignty of the 1st respondent

31. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only in accordance with this Constitution. Under Article 1(3) that sovereign power



is delegated to the 3 arms of government namely, the Legislature, the Executive and the Judiciary. *The Constitution* has further made clear provisions of separation of powers between these co-equal arms of government, ensuring that each carries out those functions assigned to it and that none encroaches on the authority or functions of the others unless there is breach.

32. In the case of *Trusted Society of Human Rights Alliance v Attorney General & 2 others; Matemu (Interested Party); With Kenya Human Rights Commission & another (Amicus Curiae)* (Petition 229 of 2012) [2012] KEHC 2480 (KLR) (Constitutional and Human Rights) (20 September 2012) (Judgment) a 3-judge bench of this Court considered the principle of separation of powers in relation to the judiciary and the legislature, and observed as follows:
 63. In answering these constitutional questions, it is imperative that we begin by re-stating that the doctrine of separation of powers is alive and well in Kenya. Among other pragmatic manifestations of the doctrine, it means that when a matter is textually committed to one of the coordinate arms of government, the Courts must defer to the decisions made by those other coordinate branches of government. Like many modern democratic Constitutions, the New Kenyan Constitution consciously distributes power among the three co-equal branches of government to ensure that power is not concentrated in a single branch. This design is fundamental to our system of government. It ensures that none of the three branches of government usurps the authority and functions of the others.
33. The Court went on to say:
 64. Although the Kenyan Constitution contains no explicit clause on separation of powers, the Montesquieuan influence is palpable throughout the foundational document, *the Constitution*, regarding the necessity of separating the governmental functions. *The Constitution* consciously delegates the sovereign power under it to the three branches of government and expects that each will carry out those functions assigned to it without interference from the other two. We readily agree with the Respondents that this must mean that the Courts must show deference to the independence of the Legislature as an important institution in the maintenance of our constitutional democracy as well as accord the Executive sufficient latitude to implement legislative intent.
34. And in the case of *Civil Appeal No. 11 of 2018 Pevans East Africa Limited & another v. Chairman, Betting Control and Licensing Board and 7 Others* (2013) eKLR the Court of Appeal stated:

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. Courts must decline to intervene at will in the constitutional spheres of other organs, particularly when they are invited to substitute their judgment over that of the organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the courts do not normally have.
35. Article 229 of *the Constitution* provides for the office of the auditor general. Clause (4) requires the auditor general to within six months after the end of each financial year, to audit and report, in respect of that financial year on the accounts of the various entities listed therein. Clause (7) provides that audit reports shall then be submitted to Parliament or the relevant county assembly. Clause (8) provides that within 3 months after receiving an audit report from the auditor-general, Parliament shall debate and



consider the report and take appropriate action. In discharge of its mandate under these provisions, PAC considered the Report of the Auditor General on the Financial Statements for the National Government for the Financial Year 2018/2019 and came up with the PAC Report which contained the impugned recommendations.

36. Article 165 of *the Constitution* stipulates the jurisdiction of this Court. Relevant to the proceedings herein are Clauses (3) (6) and (7) which provide as follows:

- (3) Subject to clause (5), the High Court shall have—
- a. unlimited original jurisdiction in criminal and civil matters;
 - b. jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
 - c. jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
 - d. jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
 - i. the question whether any law is inconsistent with or in contravention of this Constitution;
 - ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
 - iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
 - iv. a question relating to conflict of laws under Article 191; and
 - e. any other jurisdiction, original or appellate, conferred on it by legislation.
- (6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.
- (7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

37. Given the complaint by the Petitioners and the Interested Party, this Court has the jurisdiction under Article 165(3) to interrogate the impugned recommendations to determine whether they were in tandem with Constitutional imperatives. Indeed, the main object of separation of powers among the three arms of Government is to facilitate and secure checks and balances in governance. This means that each government's power is not absolute and can be subjected to checks and balances by other arms. This includes review of decisions of the other arms of Government by this court. Under Article 165(3)(b) of *the Constitution*, this Court has the jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Under Clause (3)(d), the Court has jurisdiction to determine whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, *the Constitution*.



38. The Supreme Court considered the review of decisions by the other arms of Government in its advisory opinion in the case of *In the Matter of Interim Independent Electoral Commission* [2011] eKLR and expressed itself as follows:

(54) The effect of *the Constitution*'s detailed provision for the rule of law in the processes of governance, is that the legality of executive or administrative actions is to be determined by the Courts, which are independent of the Executive branch. The essence of separation of powers, in this context, is that the totality of governance-powers is shared out among different organs of government, and that these organs play mutually-countervailing roles. In this set-up, it is to be recognized that none of the several governmental organs functions in splendid isolation.

39. This issue of separation of powers was also considered by the Constitutional Court in South Africa in the case of *Doctors for Life International v Speaker of the National Assembly and Others* (CCT12/05) [2006] ZACC 11 and stated:

The constitutional principle of separation of powers requires that other branches of government refrain from interfering in parliamentary proceedings. This principle is not simply an abstract notion; it is reflected in the very structure of our government. The structure of the provisions entrusting and separating powers between the legislative, executive and judicial branches reflects the concept of separation of powers. The principle 'has important consequences for the way in which and the institutions by which power can be exercised'.. ..

But under our constitutional democracy, *the Constitution* is the supreme law. It is binding on all branches of government and no less on Parliament. When it exercises its legislative authority, Parliament 'must act in accordance with, and within the limits of, *the Constitution*', and the supremacy of *the Constitution* requires that 'the obligations imposed by it must be fulfilled'. Courts are required by *the Constitution* 'to ensure that all branches of government act within the law' and fulfil their constitutional obligations. This Court 'has been given the responsibility of being the ultimate guardian of *the Constitution* and its values'. Section 167(4)(e), in particular, entrusts this Court with the power to ensure that Parliament fulfils its constitutional obligations. This section gives meaning to the supremacy clause, which requires that 'the obligations imposed by [*the Constitution*] must be fulfilled'. It would therefore require clear language of *the Constitution* to deprive this Court of its jurisdiction to enforce *the Constitution*."

40. In the case of *In the Matter of the Speaker of the Senate & another* [2013] eKLR Supreme Court stated:

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

(61) It emerges that Kenya's legislative bodies bear an obligation to discharge their mandate in accordance with the terms of *the Constitution*, and they cannot plead any internal rule or indeed, any statutory scheme, as a reprieve from that obligation. This Court recognizes the fact that *the Constitution* vests the legislative authority of the Republic in Parliament. Such authority is derived from the people. This position is embodied in Article 94(1) thereof. The said



Article also imposes upon Parliament the duty to protect *the Constitution* and to promote the democratic governance of the Republic. Article 93(2) provides that the national Assembly and the Senate shall perform their respective functions in accordance with *the Constitution*. It is therefore clear that while the legislative authority lies with Parliament, the same is to be exercised subject to the dictates of *the Constitution*. While Parliament is within its general legislative mandate to establish procedures of how it conducts its business, it has always to abide by the prescriptions of *the Constitution*. It cannot operate besides or outside the four corners of *the Constitution*. This Court will not question each and every procedural infraction that may occur in either of the Houses of Parliament. The Court cannot supervise the workings of Parliament. The institutional comity between the three arms of government must not be endangered by the unwarranted intrusions into the workings of one arm by another.

(62) However, where a question arises as to the interpretation of *the Constitution*, this Court, being the apex judicial organ in the land, cannot invoke institutional comity to avoid its constitutional duty. We are persuaded by the reasoning in the cases we have referred to from other jurisdictions to the effect that Parliament must operate under *the Constitution* which is the supreme law of the land. The English tradition of Parliamentary supremacy does not commend itself to nascent democracies such as ours. Where *the Constitution* decrees a specific procedure to be followed in the enactment of legislation, both Houses of Parliament are bound to follow that procedure. If Parliament violates the procedural requirements of the supreme law of the land, it is for the courts of law, not least the Supreme Court to assert the authority and supremacy of *the Constitution*. It would be different if the procedure in question were not constitutionally mandated. This Court would be averse to questioning Parliamentary procedures that are formulated by the Houses to regulate their internal workings as long as the same do not breach *the Constitution*. Where however, as in this case, one of the Houses is alleging that the other has violated *the Constitution*, and moves the Court to make a determination by way of an Advisory Opinion, it would be remiss of the Court to look the other way. Understood in this context therefore, by rendering this Opinion, the Court does not violate the doctrine of separation of powers. It is simply performing its solemn duty under *the Constitution* and the *Supreme Court Act*.

41. It is well settled that this Court will not generally interfere with the functions of the other arms of government unless it is alleged as in this case that Parliament has violated *the Constitution*. The Petitioners and the Interested Party contend that the 1st Respondent violated their rights as a result of the recommendations in the PAC Report notwithstanding that the same were made in the discharge of the 1st Respondent's mandate which was made in the premises, with such allegations placed before the Court, it would be remiss of the Court to look the other way. The Court must therefore intervene by dint of Article 165(3) (b) and (d)(ii) of *the Constitution*, and such intervention does not amount to violation of the doctrine of separation of powers.



42. Article 124 of *the Constitution* vests in each House of Parliament, the power to provides establish committees, and shall make Standing Orders for the orderly conduct of its proceedings, including the proceedings of its committees.
43. Article 125 of *the Constitution* provides for the power to call for evidence as hereunder:
- (1) Either House of Parliament, and any of its committees, has power to summon any person to appear before it for the purpose of giving evidence or providing information.
 - (2) For the purposes of clause (1), a House of Parliament and any of its committees has the same powers as the High Court—
 - a. to enforce the attendance of witnesses and examine them on oath, affirmation or otherwise;
 - b. to compel the production of documents; and
 - c. to issue a commission or request to examine witnesses abroad.
44. The National Assembly Standing Order 191 provides:
- Committees shall enjoy and exercise all the powers and privileges bestowed on Parliament by *the Constitution* and statute, including the power to summon witnesses, receive evidence and to request for and receive papers and documents from the Government and the public.
45. The Public Accounts Committee of the National Assembly is established under Standing Order 125 which provides as follows:
1. There shall be a select committee to be designated the Public Accounts Committee.
 2. The Public Accounts Committee shall be responsible for the examination of the accounts showing the appropriations of the sum voted by the House to meet the public expenditure and of such other accounts laid before the House as the Committee may think fit.
 3. The Public Accounts Committee shall consist of a chairperson and not more than sixteen other Members.
 4. The Public Accounts Committee constituted immediately following the general election shall serve for a period of three calendar years and that constituted thereafter shall serve for the remainder of the parliamentary term.
 5. The Public Accounts Committee shall elect a chairperson and vice-chairperson from amongst its members.
46. Flowing from the foregoing provisions, it is evident that the PAC has powers to summon a witness, compel a witness to attend its proceedings, and compel the production of documents.
47. The subject of this Petition is the finding and recommendation contained in the PAC Report at pages 1315-1316. PAC made a finding and recommendation that the Petitioners and Interested Party were directly liable for the loss of the lost amount and further that the 3 should be barred permanently from holding public office. The question before the Court therefore, is whether the PAC exercised its mandate in accordance with *the Constitution* and in accordance with the powers conferred upon it.
48. The right to fair administrative action is a hallowed right guaranteed by *the Constitution*. Article 47 of *the Constitution* provides:



1. Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.
 2. If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.
 3. Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—
 - a. provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and
 - b. promote efficient administration.
49. Parliament enacted the *Fair Administrative Action Act* to give effect to the right in Article 47(1) as required under Clause (3).
50. The Petitioners contend that the said recommendation is an administrative action within the meaning of Section 2 of the FAAA. Section 2 defines "administrative action" to include:
- i. the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or
 - ii. any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person to whom such action relates;
51. The FAAA applies to all state agencies including Parliament. Section 3 of the FAAA provides:
- (1) This Act applies to all state and non-state agencies, including any person—
 - (a) exercising administrative authority;
 - (b) performing a judicial or quasi-judicial function under *the Constitution* or any written law; or
 - (c) whose action, omission or decision affects the legal rights or interests of any person to whom such action, omission or decision relates.
52. Flowing from the foregoing provisions, the Court finds that the impugned findings and recommendation of PAC in the PAC Report which the Petitioners and Interested Party complain have has affected their rights, constitute administrative action.
53. Section 4 of the FAAA provides:
1. Every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.
 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—
 - a. prior and adequate notice of the nature and reasons for the proposed administrative action;
 - b. an opportunity to be heard and to make representations in that regard;



- c. notice of a right to a review or internal appeal against an administrative decision, where applicable;
 - d. a statement of reasons pursuant to section 6; (e) notice of the right to legal representation, where applicable;
 - e. notice of the right to cross-examine or where applicable; or
 - f. information, materials and evidence to be relied upon in making the decision or taking the administrative action.
4. The administrator shall accord the person against whom administrative action is taken an opportunity to–
- a. attend proceedings, in person or in the company of an expert of his choice;
 - b. be heard;
 - c. cross-examine persons who give adverse evidence against him; and
 - d. request for an adjournment of the proceedings, where necessary to ensure a fair hearing.
5. Nothing in this section, shall have the effect of limiting the right of any person to appear or be represented by a legal representative in judicial or quasi-judicial proceedings.
6. Where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of *the Constitution*, the administrator may act in accordance with that different procedure.
54. The above provision requires that every administrative action that a person is subjected to must be expeditious efficient, lawful, reasonable and procedurally fair. When an administrative action is taken against any person, such person shall be given written reasons for such administrative action. A person must not be ambushed by administrative action taken against him but must be given prior and adequate notice of the nature and reasons for the proposed administrative action. Additionally, such person must be accorded an opportunity to be heard and to make representations in that regard. Further such person shall be informed of the right to a review or internal appeal against an administrative decision, right to legal representation and right to cross-examine accusers. Also all information, materials and evidence to be relied upon in making the decision or taking the administrative action shall be supplied.
55. Section 7(2) of the FAAA mandates this Court to review an administrative action or decision, where:
- a. the person who made the decision–
 - i. was not authorized to do so by the empowering provision;
 - ii. acted in excess of jurisdiction or power conferred under any written law;
 - iii. acted pursuant to delegated power in contravention of any law prohibiting such delegation;
 - iv. was biased or may reasonably be suspected of bias; or
 - v. denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;



- b. a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;
- c. the action or decision was procedurally unfair;
- d. the action or decision was materially influenced by an error of law;
- e. the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;
- f. the administrator failed to take into account relevant considerations;
- g. the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;
- h. the administrative action or decision was made in bad faith;
- i. the administrative action or decision is not rationally connected to–
 - (i) the purpose for which it was taken;
 - (ii) the purpose of the empowering provision;
 - (iii) the information before the administrator; or
 - (iv) the reasons given for it by the administrator;
- j. there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;
- k. the administrative action or decision is unreasonable;
- l. the administrative action or decision is not proportionate to the interests or rights affected;
- m. the administrative action or decision violates the legitimate expectations of the person to whom it relates;
- n. the administrative action or decision is unfair; or
- o. the administrative action or decision is taken or made in abuse of power.

56. The Court of Appeal in the case of *Judicial Service Commission vs. Mbalu Mutava & Another* (2015) eKLR stated as follows with regards to Article 47 of *the Constitution*:

Article 47(1) marks an important and transformative development of administrative justice for, it not only lays a constitutional 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 right to fair administrative action is a reflection of some of the national values in article 10 such as the rule of law, human dignity, social justice, good governance, transparency and accountability. 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.

57. The Petitioners and Interested Party have accused the 1st Respondent of failing to comply with the foregoing provisions before making the adverse recommendations against them in the PAC Report. In its defence the 1st Respondent claimed to have invited them vide letters sent to them inviting them to



appear before the PAC. After looking at the said letters, I agree with the Petitioners that those letters did not concern the matter at hand. They were for the period 2014/2015 to 2016/ 2017 (SMK-5) and the (SMK-6) is for the year ended 30.6.18. All these letters are addressed to the 1st Petitioner only. No letters addressed to the 2nd Petitioner and the Interested Party were availed to the Court.

58. From the material placed before the Court it is quite evident that PAC did not accord the Petitioners and Interested Party an opportunity. There is no evidence that the 1st Respondent complied with the provisions Article 47 of *the Constitution* and the elaborate provisions of FAAA before making the adverse recommendations against them in the PAC Report. In light of this, the inescapable conclusion that can be drawn by the Court is that there was violation of the rights of the Petitioners and Interested Party as guaranteed under Article 47 of *the Constitution*.
59. The Petitioners and Interested Party contend that their right under Article 50 was violated by the 1st Respondent. Article 50 guarantees to every person the right to fair hearing. Relevant to the matter herein is Clause (1) which provides:

Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

60. Under Article 25(c), the right to a fair hearing is one of the protected rights which cannot be abrogated or limited. The right to a fair hearing was considered by the Supreme Court in the case of Evans Odhiambo Kidero & 4 others v Ferdinand Ndungu Waititu & 4 others [2014] eKLR, where Ndungu, SCJ. stated:

(257) Fair hearing, in principle incorporates the rules of natural justice, which includes the concept of audi alteram partem (hear the other side or no one is to be condemned unheard) and nemo iudex in causa sua (no man shall judge his own case) otherwise referred to as the rule against bias. Peter Kaluma, *Judicial Review: Law, Procedure and Practice* 2nd Edition (Nairobi: 2009) at page 195, notes that the rules of natural justice generally refer to procedural fairness in decision making. Further he analyses the two mentioned concepts of the rules of natural justice and states [at pages 176 and 177] that it is the duty of the courts, when dealing with individual cases, to determine whether indeed the rules of natural justice have been violated and noting that “although the necessity of hearing is well established, its scope and contents remain unsettled.”

61. The learned Judge went on to state:

(261) It is important to restate that a literal reading of the provisions of *the Constitution* show that the right to a fair hearing is broad and includes the concept of the right to a fair trial as it deals with any dispute whether they arise in a judicial or an administrative context. Comparative experience shows that the European Court has elaborated on the question regarding the scope of the right to fair trial applying the right in both civil and in criminal matters. The European Court of Human Rights (European Court) has severally explained that: “it is central to the concept of a fair trial, in civil as in criminal proceedings, that a litigant is not denied the opportunity to present his or her case effectively before the court.” (See *Steel and Morris v. United Kingdom*, [2005] ECHR 103, paragraph 59).

62. Mativo, J. (as he then was) expounded on the concept of the right to a fair hearing in the case of *Sceneries Limited v National Land Commission* [2017] eKLR. The learned Judge stated:

The right to be heard requires not only that the party concerned be given prior notice of the precise purpose of the inquiry or hearing but also that the person be given sufficient



information to prepare his/her case. As to the disclosure of information, this implies that the party concerned be apprised of reports and documents in the body's possession that may be prejudicial to his/her case. He/she should at least have access to all the information the tribunal or body relied upon when it made its decision.[45] That information should also be disclosed in due time since the party must have sufficient time to prepare for the hearing.

63. The 1st Respondent and its committees have the powers to summon any person to appear before it and to order the production of documents. PAC was legally obligated to accord the Petitioners and Interested Party the right to be heard, to give them prior notice of the precise purpose of the inquiry and sufficient information and opportunity to prepare and present their case. None of this was done. Accordingly, the 1st Respondent violated the right of the Petitioners and Interested Party to a fair hearing.
64. Article 27 guarantees to every person the right to equality and freedom from discrimination. Clause (1) provides that every person is equal before the law and has the right to equal protection and equal benefit of the law. Equality does not however connote absolute equality. The law does not also does not prohibit discrimination, but rather unfair discrimination that has an element of unfavourable bias. Where a differentiation does not amount to unfair discrimination or unfavourable bias, there is no violation of the right under Article 27.
65. In the case of *John Harun Mwau v Independent Electoral And Boundaries Commission & another* [2013] eKLR, Lenaola, J. (as he then was stated:

It must be clear that a person alleging a violation of Article 27 of *the Constitution* must establish that because of the distinction made between the claimant and others, the claimant has been denied equal protection or benefit of the law. It does not necessarily mean that different treatment or inequality will per se amount to discrimination and a violation of Article 27 of *the Constitution*. It is my view that the regulation is justified and reasonable. I am therefore in agreement with the sentiments of Khanna J in the case of *State of Kesata & Anor v N. M. Thomas & Others* 1976 AIR 490, 1976 SCR(17906 where he stated as follows;

“The principle of equality does not mean that every Law must have universal application for all persons who are not by nature, attainment or circumstances in the same position and the varying needs of different classes of persons require special treatment. The Legislature understands and appreciates the need of its own people, that its Laws are directed to problems made manifest by experience and that its discriminations are based upon adequate grounds. The rule of classification is not a natural and logical corollary of the rule of equality, but the rule of differentiation is inherent in the concept of equality. Equality means parity of treatment under parity of conditions. Equality does not connote absolute equality. A classification in order to be constitutional must rest upon distinctions that are substantial and not merely illusory. The test is whether it has a reasonable basis free from artificiality and arbitrariness embracing all and omitting none naturally falling into that category.”

66. Flowing from the foregoing, it is evident that for the Petitioners and Interested Party to succeed in the claim that they were subjected to discrimination by the 1st Respondent, they must prove unfavourable bias and the said bias must be based on the grounds set out in *the Constitution*. A point to note is that discrimination does not act in isolation. It must be demonstrated that a distinction was made



between the claimant and others and that the claimant has been denied equal protection or benefit of the law. In the case herein, the Petitioners and Interested Party have demonstrated that whereas the 3rd Respondent, who is the acting CEO of the 2nd Respondent was summoned to appear before the PAC, they were not granted such opportunity. As such, they were not afforded equal protection or benefit of the law. Their right to equality and freedom from discrimination was thus violated by the 1st Respondent.

67. Article 236 provides for the protection of public officers such as the Petitioners and the Interested Party, as follows:

A public officer shall not be-

- a) victimised or discriminated against for having performed the functions of office in accordance with this Constitution or any other law; or
- (b) dismissed, removed from office, demoted in rank or otherwise subjected to disciplinary action without due process of law.

68. The record shows that the PAC made a finding and recommendation in the PAC Report that the Petitioners and Interested Party were directly liable for the loss of the lost amount and further that the 3 should be barred permanently from holding public office. Although the PAC Report was adopted by the 1st Respondent, no evidence was placed before the Court to demonstrate that the recommendations were acted upon and resulted in their removal from office, demotion in rank or otherwise subjected to disciplinary action without due process. As a result, I am not persuaded that the Petitioners' and Interested Party's rights under Article 236 of the Constitution were violated by the 1st Respondent as alleged.

Whether the orders sought should be granted

69. The Petitioners submitted that this Court is clothed with the jurisdiction to determine this matter and to issue the orders of certiorari and prohibition as enshrined under Article 23 of the Constitution. The Interested Party urged that an order of certiorari should issue to quash the findings and recommendations contained in the Report in relation to him. He urged that the prayers in the Petition be granted with costs. The 1st Respondent submitted that should the Court find in favour of the Petitioners, it should grant an appropriate relief for the protection of the Constitution including an interdict; a post-judgment supervisory order to enable the PAC rectify the breach if any. The 1st respondent urged that the Petitioners bear the costs of the Petition having failed to meet the threshold for rant of the orders sought.
70. In the case of Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR, the Court of Appeal considered the circumstances in which judicial review orders may issue and stated:

That now That now brings us to the question we started with, namely, the efficacy and scope of mandamus, prohibition of certiorari. These remedies are only available against public bodies such as the Council in this case. What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings – See HALSBURY'S LAW



OF ENGLAND, 4th Edition, Vol.1 at pg.37 paragraph 128. When those principles are applied to the present case, the Council obviously has the power or jurisdiction to cancel the results of an examination. The question is how, not whether, that power is to be exercised. If the Council of prohibition would be ineffectual against the conviction because such an order would not quash the conviction. The conviction could be quashed either on an appeal or by an order of certiorari. The point we are making is that an order of prohibition is powerless against a decision which has already been made before such an order is issued. Such an order can only prevent the making of a decision. That, in our understanding, is the efficacy and scope of an order of prohibition.

71. The learned Judges went on to state:

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.

72. Having found as I have that in making the recommendations in the PAC Report concerning the Petitioners and the Interested Parties, the 1st Respondent did not comply with the rules of natural justice, the orders ought then ought to issue.

73. In the end, I find that the Petition dated 24.5.22 is merited and I make the following orders:

- i. An order is hereby issued expunging the findings and recommendations contained at pages 1315-1316 of the PAC Report on Examination of the Report of the Auditor General on the Financial Statements for the National Government for the Financial Year 2018/2019 in relation to the Petitioners and Interested Party.
- ii. An order of prohibition is hereby issued prohibiting the 2nd Respondent from implementing the recommendations contained at pages 1315-1316 of the PAC Report on Examination of the Report of the Auditor General on the Financial statements for the National Government for the Financial Year 2018/ 2019 in so far as they relate to the Petitioners and Interested Party.
- iii. The Petitioners shall have costs.

DATED AND DELIVERED IN NAIROBI THIS 19TH DAY OF MAY 2023

M. THANDE

JUDGE

In the presence of: -

..... for the Petitioner

..... for the 1st Respondent

..... for the 2nd and 3rd Respondents

..... for the Interested Party

..... Court Assistant

