Republic v Attorney General; Law Society of Kenya - Nairobi Branch (Ex parte); Law Society of Kenya (Interested Party) (Application E010 of 2020) [2023] KEHC 27503 (KLR) (Judicial Review) (7 July 2023) (Judgment)

Neutral citation: [2023] KEHC 27503 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

APPLICATION E010 OF 2020

J NGAAH, J

JULY 7, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

HON ATTORNEY GENERAL ..... RESPONDENT

AND

LAW SOCIETY OF KENYA - NAIROBI BRANCH ..... EX PARTE

AND

LAW SOCIETY OF KENYA ..... INTERESTED PARTY

JUDGMENT

1. The Applicant has by a motion dated 23 July 2020 moved this Honourable Court for orders that:

> "A. An Order Of Certiorari be and is hereby issued, to quash the decision and/or resolutions of the National Development Implementation and Communication Cabinet Committee (hereafter NDICCC) dated 8th July 2020, signed/ or under the hand of Mr. Joseph Kinyua, Head of Public Service and transmitted to Ministries, State Departments for action as a decision of Cabinet (inter alia) to the effect:
>
> (viii) Not to contract external counsel without the written approval of the Attorney-General; and

(ix) Terminate within twenty-one (21) days from the date hereof engagements with all external advocates who had been contracted without the express and prior grant of the concurrence of the Attorney-General."

B. An Order Of Prohibition is hereby issued directed at the Respondent to restrain the Respondent, its officers acting under directions and/or agents from implementing the decision/ and or resolutions of the National Development Implementation and Communication Cabinet Committee (hereafter NDICCC) dated 8th July 2020, signed/ or under the hand of Mr. Joseph Kinyua, Head of Public Service (inter alia) and transmitted to Ministries, State Departments for action as a decision of Cabinet (inter alia) to the effect that:

(viii) Not to contract external counsel without the written approval of the Attorney-General; and

(ix) Terminate within twenty-one (21) days from the date hereof engagements with all external advocates who had been contracted without the express and prior grant of the concurrence of the Attorney-General."

C. That the costs of this Application be provided for"

2. The Application is brought under Section 8 and 9 of the *Law Reform Act*, cap. 26 and Order 53 rules 3 and 4 of the Civil Procedure Rules. It is based on a statutory statement dated 20 July 2020 and an affidavit sworn on even date by Ms. Helene Rafaela Namisi verifying the facts relied upon. Ms. Namisi is the vice chairperson of the applicant.

3. According to Ms. Namisi, the applicant is established under Section 24 (1) (h) of the *Law Society of Kenya Act*, cap. 18 and has 7000 members who are advocates of this Honourable Court practising within Nairobi and Kiambu Counties.

4. In both the affidavit and the statement, the Ms.Namisi has, by and large, brought to the attention of this Honourable Court two decisions in which the Court has ruled on the issues that have generated the present dispute. These cases are *Law Society of Kenya Nairobi Branch v. Malindi Law Society & Others; Civil Appeal No.287 of 2016* and Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi [2019] Eklr.

   I will return to these cases later but it is apt at this particular moment to look at the root of the dispute in the instant application.

5. At its 21st meeting held on 7 July 2020, the National Development Implementation and Communication Cabinet Committee (NDICCC) reached some resolutions pertaining to the government's ministries and state departments. Among these resolutions was the resolution to terminate legal services provided by external legal service providers to government, ministries, state agencies and departments and further to restrain these institutions from engaging external legal service providers without the approval of the Attorney General. The resolution was captured, in part as follows:

" Part A: Matters Arising From The Presidential Audience To Cabinet And The Senior Ranks Of The Executive

1. Ministries, State Departments and State Agencies were directed to:

   (vii) withdraw court cases filed against any other state agency within (fourteen) 14 days from the date hereof;

   (viii) not to contract external counsel without the written approval of the Attorney General.

   (viii) terminate within twenty-one (21) days from the date hereof engagements with all external advocates who had been contracted without the express and prior grant of the concurrence of the Attorney General."

6. The resolutions were signed by Mr. Joseph K. Kinyua who, at the material time, was the head of the public service. They were copied to Dr. Fred Matiang'i who, at the time, was the chairperson of the NDICCC.

7. On 14 July 2020, Professor George Magoha, the Cabinet Secretary in Ministry of Education wrote to all institutions of learning and their heads asking them to implement the resolutions. Similarly, Joseph Irungu, the Principal Secretary in the Ministry of Water Sanitation and Irrigation wrote to the water institutions under his ministry directing them to implement the resolutions. In his letter dated 16 July 2020, he also asked for the schedule of all court cases filed against any other state agency by the water institutions, the status of the cases and the evidence of withdrawal of those cases.

8. It is the applicants' case that they were not party to the deliberations and neither did they participate in the proceedings from which the resolutions terminating their contractual services with various state agencies and public institutions ensued. Further, Ms. Namisi has worn that services of external lawyers are competitively procured individually by state agencies and public institutions through an elaborate scheme set out in the *Public Procurement and Asset Disposal act*, No. 33 of 2015.

9. The impugned decision, it is urged, flies in the face of the *Fair Administrative Action Act*, No. 4 of 2015, in particular, section 4(3) thereof, to the extent that the applicant's members were never given the opportunity to be heard before the decision to terminate their services with various state agencies and public institutions was reached.

10. The applicant's members believe the decision to terminate their services is in bad faith and motivated by malice because Mr. Paul Kihara Kariuki, the previous Attorney General and Mr. Kennedy Ogeto who was the Solicitor General at the time the impugned resolutions were made, were battling a motion of censure by the Law Society of Kenya. As a matter of fact, they had instituted a suit against the Law Society of Kenya and the Council of the Law Society of Kenya. The suit is registered in this Honourable Court as Miscellaneous Civil Application No. 136 of 2020. The action to terminate the legal services of the applicant's members is, therefore, a vendetta and a retaliatory move against the applicant.

11. Mr Joseph Kinyua who, as noted, was the head of the public service in the executive office of the President, at the material time, swore a replying affidavit opposing the applicant's motion. He swore that he was advised by the Attorney General, which advice he verily believed to be true, that the President and the Cabinet have discretion on formulation and implementation of executive policy and that this discretion is vested upon them by *the Constitution*.

12. In this regard, the President, vide executive order no. 1 of 2019 constituted the NDICCC for the efficient coordination and administration of National Government development programmes and projects across the country and for the proper discharge of the executive authority across the nation. Among the functions of the NDICC, is to provide supervisory leadership throughout the delivery cycle of all National Government programs and projects, monitor and evaluate the follow-up mechanism for resources allocated for National Government priority programs and projects and to ensure appropriate utilization and realisation of the targeted outcomes.

13. Mr. Kinyua also swore that he was advised by the Attorney General, which advice he verily believed to be true, that all state agencies exercising executive functions at the national level are subject to the policy direction of the President on whom executive authority is vested under *the Constitution*. Again, under section 7(1) of the *State Corporations Act*, cap. 446, the President may give directions of a general or specific nature to a board of a state corporation with regard to better exercise and performance of the functions of the state corporation and the board has to give effect to the directions.

14. It has further been sworn that, as both the head of state and head of government, the President has the requisite constitutional authority to direct, as a matter of policy, that all states agencies and public institutions employ alternative dispute resolution mechanisms rather than spend valuable and scarce public resources on litigation.

15. Turning to the decision to terminate the services of the applicant's members to state agencies and public institutions, Mr. Kinyua swore that the Attorney General's concurrence in the engagement of external counsel is a policy preference decision of the national executive which is informed by the following factors:

> "a. Fiscal prudence responsibilities of the government as articulated through various directives urging restraint, prioritization of public expenditures, and optimization of limited resources;
>
> b. Projected reduction of revenue as a result of the global health emergency arising from the Covid 19 pandemic, necessitating rationalization of budgets and expenditures across government ministries, state departments and agencies;
>
> c. Management of costs in line with prudent financial management principles, recognizing that the services are similarly available within the office of the Attorney General;
>
> d. The utilization of the Attorney General to mediate disputes between ministries, departments and agencies that are all prosecuted on either side at the taxpayers' cost."

16. It has been argued also, that by dint of the provisions of Article 156 (4) (b) of *the Constitution*, the Attorney General has the express constitutional mandate to represent the National Government (which includes National Government agencies) in court or in any other legal proceedings to which the National Government is a party, other than criminal proceedings. It, therefore, follows that a policy that requires prior approval of the Attorney General before engagement of private counsel to undertake a function that is expressly vested upon that office cannot be said to be unreasonable, particularly when the same is to be undertaken at the public expense. Mr. Kinyua has further sworn that the policy directive in issue was made under the provisions of *the Constitution* and the *State Corporations Act* as opposed to the office of the Attorney General Act, cap. 6A.

17. In the written submissions filed on behalf of the applicant in support of the application before court, three issues were identified as the basis upon which the application is founded. These issues are the applicant's right to be heard; the respondent's ulterior motive in the impugned decision; and, whether, in the wake of this Honourable Court's decision in Republic v Attorney General; Law Society of Kenya (Interested Party); Ex parte; Francis Andre Moriasi [2019] eKLR, the impugned decision is illegal, unlawful and void.

18. At the very outset, it has been submitted on behalf of the applicant that these proceedings have been instituted on behalf of the applicant's members in accordance with Article 22 (2) and 258(2) of *the Constitution* and that the impugned decision is an administrative decision which has been taken against the applicant's members contrary to the provisions of the *Fair Administrative Action Act*, 2015. Section 2 of this Act defines what an 'administrative action' entails and, contrary to the respondent's argument that the impugned decision is a policy decision, the applicant's case is that, by whatever name called, the impugned decision falls within the scope of the *Fair Administrative Action Act* and, for this reason, it is to be interrogated within the context of that Act, in particular, sections 4 (3) and 5 thereof and, more importantly, Article 47 of *the Constitution* on the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

19. These provisions of the law were flouted when neither the applicant nor any of its members was given notice of the proceedings that culminated in the impugned decision. They were also not given a chance to be heard before the decision was reached. In this submission, counsel for the applicants cited the Court of Appeal decision of Judicial Service Commission v Mbalu Mutava & Another [2014] eKLR where the court emphasised that the right to a fair administrative action has been elevated to a constitutional right that is now encapsulated in Article 47 of *the Constitution*. The court captured its sentiments on this question as follows:

> " 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."

20. To the extent that the respondent ignored these provisions of the law in reaching the impugned decision, it is urged that it acted unlawfully and unconstitutionally.

21. On the question of the impugned decision being informed by an ulterior motive, it has been urged that no rationale or reason has been given to justify the decision. It has also been urged that no explanation has been tendered for the manifest failure to consult the applicant, its membership or the general public, before the impugned decision was made against the applicant's members. Accordingly, it has been urged that failure to take into account relevant considerations coupled with the respondent's violation of Article 47 of *the Constitution* and section 5 (1) of the Fair Administrative Actions Act point to the respondent's ulterior motives.

22. On the third issue, it has been urged that the impugned decision is not the first attempt by the Attorney General to flout constitutional provisions on procurement of legal services by state agencies and other independent bodies and his appetite to micromanage these processes. According to the applicant, the

first such attempt was made in 2018, when the Attorney General purported to issue what he described as "Guidelines on provision of legal services by the office of the Attorney General and Department". These guidelines provided, inter alia, as follows:

> "a. That no appointment of external counsel would be made by State Corporations, Constitutional Commissions and Independent Offices without his concurrence/ written approval and letter of appointment; and
>
> b. That Terms of reference and fees payable would have to be approved by the Attorney General."

23. These guidelines were quashed by this Honourable Court in Republic v Attorney General; Law Society of Kenya (Interested Party); Ex-parte: Francis Andrew Moriasi [2019] eKLR. Further, the decision in this case prohibited the respondent from taking the sort of action that it has taken in the impugned decision. The decision in the cited case has not been appealed against or set aside and, therefore, the respondent is bound by it.

24. The impugned decision, it has been urged, negates Articles 27 and 227 of *the Constitution* on the need for openness, transparency and fairness in public procurement of goods and services. If the respondent's decision is allowed to stand, it will open way for ethnic profiling of lawyers as a result of which legal briefs from public bodies and agencies will be given based on the profiling and political persuasions. The learned counsel for the applicant cited the case of Community Advocacy and Awareness Trust & 8 others v Attorney General & 6 others [2012] eKLR where the Court deprecated this conduct and held as follows:

> "Whereas the past was characterized by open corruption, tribalism, nepotism, favoritism, scrapping the barrel and political patronage, the new dispensation requires a break from the past. *The Constitution* signifies the end of jobs for the boys# era."

25. It was further urged on behalf of the applicant that in purporting to unilaterally rescind engagement contracts, the respondent acted irrationally and beyond the scope of his powers. The impugned decision, according to the applicant, is against the public interest since it will result in multiple claims against the state, the brunt of which will ultimately be borne by the tax payers.

26. Also supporting the motion is the interested party. It has been urged in its behalf that the respondent's decision is unlawful and that anything done in disobedience of the court order is null and void. In this regard, the interested party has cited several decisions including Martin Nyaga Wambora & 4 Others v Speaker of the Senate & 6 Others [2014] eKLR; Evan Odhiambo Kidero v Ferdinand Ndungu Waititu [2014] eKLR; Omega Enterprises (Kenya) Limited v Kenya Tourist Development Corporation Nairobi [1998] eKLR; and, Benjamin Leonard MacFoy v United Africa Company Appeal No.67 of 1960. In this last decision it was held as follows:

> "If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse. So will this judgment collapse if the statement of claim was a nullity.

27. Besides the decision being void and null, it was also urged on behalf of the 1st interested party that Article 27 of *the Constitution* prohibits discrimination on any status yet the respondent's decision seeks

to retaliate against members of the applicant, apparently for the positions they stand for. Counsel cited Republic v Firearms Licensing Board & Another; Ex parte Jimi Wanjigi [2019] eKLR where it was held:

> " The rule against bias is the second pillar of natural justice and requiring that decision-maker must approach a matter with an open mind that is free of prejudgment and prejudice."

Also cited was the case of Katiba Institute & Another v Attorney General & 2 Others; Petition 331 of 2016 where it was held that procurement of services of private law firms should be done in accordance with the law

28. The respondent's decision, it was urged, was contrary to the provisions of Article 24(3), Article 47(2) of *the Constitution* and section 4(2) and (3) of the *Fair Administrative Action Act* according to which the respondent is enjoined to give reasons for administrative actions.

29. Like the applicant, the interested party impeached the respondent's decision on the ground that was ultra vires *the Constitution* and the *Public Procurement and Asset Disposal Act*. The learned counsel for the applicant relied on R v Public Procurement Review Board & 2 Others [2019] eKLR and urged that the respondent acted beyond premises set by *the Constitution* and the Act on procurement of public goods and services.

30. In his submissions, the responded largely rehashed his depositions in the replying affidavit. He submitted that the application does not appreciate the NDICC's role, apparently, in executive affairs and that the action sought to be impugned was a ministerial function as opposed to an administrative one. It was urged that the President and Cabinet have the discretion on formulation and implementation of executive policy which discretion is vested on them by *the Constitution*. In so submitting, the respondent relied on Thirdway Alliance Kenya & Another v Head of Public Service-Joseph Kinyua & 2 Others; Martín Kimani & 15 Others (Interested Parties) [2020] eKLR.

31. The respondent also urged that the Honourable Court ought to exercise deference to the National Executive in exercise of its mandated function. Counsel cited Pevans East Africa Limited & another v. Chairman, Betting Control and Licensing Board and 7 Others (2013) eKLR; Civil Appeal No. 11 of 2018 where the Court held as follows:

> " Where *the Constitution* has reposed specific functions in an institution or organs of state, the court must give those organs sufficient leeway to discharge their mandate 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 Constitutionals spheres of other organs, particularly when they are invited to substitute their judgment over that of other organs in which constitutional power reposes, because those organs have expertise in their area of mandate, which the court do not normally have."

32. The respondent also cited the case of Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others Civil Appeal No. 290 of 2012 [2013] eKLR where the Court cited with approval the case of Democratic Alliance vs. The President of the Republic of South Africa & 3 Others CCT 122/11 [2012] ZACC 24 where it was held as follows:

> " The rational basis test involves restraint on the part of the Court. It respects the respective roles of the Courts and the Legislature. In the exercise of its legislative powers, the Legislature

has the widest possible latitude within the limits of *the Constitution*. In the exercise of their power to review legislation, courts should strive to preserve to the Legislature its rightful role in a democratic society. This equally applies to executive decisions."

33. It was submitted for the respondent that applicant has not challenged the rationality of the decision in issue and that the appropriate test for executive decisions is not the test of unreasonableness as that would constitute a merited review of the decision and go against the doctrine of separation of powers that is enshrined in *the Constitution*. On this submission, the respondent relied on Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others (supra).

34. The respondent also urged that impugned decision is neither a judicial nor a quasi-judicial one but executive in all aspects and that executive preference choices cannot be challenged as alleged. In this regard the respondent relied on the US Supreme Court in US vs. Butler,297 U.S 1[1936] where the court held as follows:

> " When an Act of Congress is appropriately challenged in the courts as not conforming to the constitutional mandate, the judicial branch of the government has only one duty; to lay the article of the Constitution which is invoked beside the statute which is challenged and to decide whether the latter squares with the former. All the court does, or can do, is to announce its considered judgment upon the question. The only power it has, if such it may be called, is the power of judgment. This court neither approves nor condemns any legislative policy. Its delicate and difficult office is to ascertain and declare whether the legislation is in accordance with, or in contravention of, the provisions of the Constitution; and, having done that, its duty ends".

In addition, counsel cited the Supreme Court of Kenya case Justus Kariuki Mate & another v. Martin Nyaga Wambora & another (2017) eKLR where the Court held as follows:

> " [84] From the facts of this case, it is clear to us that the integrity of Court Orders stands to be evaluated in terms of their inner restraint, where the express terms of the Constitution allocate specific mandates and functions to designated agencies of the State. Such restraint, in the context of express mandate allocation under Constitution, is essential, as a scheme for circumventing conflict and crisis, in the discharge of government responsibility. No governmental agency should encumber another to stall the constitutional motions of the other. The best practice from the comparative lesson, signal that the judicial organ must practice the greatest care, in determining the merits of each case." ////

35. Upon consideration of the application, the respondent's response and the parties' submissions, I come to the conclusion that the issue material to the determination of the applicant's application is the legality or lack thereof of the NDICCC's decision of 7 May 2020. As far as this court is concerned, the decision has to be weighed against the grounds of judicial review upon which the instant application has been made.

36. Of the three traditional grounds of judicial review, of illegality, irrationality and procedural impropriety, the grounds of illegality and procedural impropriety stand out prominently. These

grounds, together with the ground of irrationality have been defined in Council of Civil Service Unions v. Minister for the Civil Service [1985] A.C. 374,410 where Lord Diplock explained them as follows:

> " My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.
>
> By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.
>
> By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.
>
> I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all.

37. To a great degree, though not expressly stated, these grounds are now codified in the *Fair Administrative Action Act*, in particular section 7(2) of the Act. This section reads:

> 7. Institution of proceedings.
>
> (2) A court or tribunal under subsection (1) may review an administrative action or decision, if-
>
> (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.

38. Any of these grounds prescribed by the Act can easily be canvassed under any of three heads illegality, irrationality procedural impropriety and, of course, such other grounds that have gained traction with time as further grounds for judicial review. Even in enunciating the traditional grounds for judicial review, Lord Diplock was quick to add that further development of this area of law may yield further

grounds on a case by case basis. The principle of proportionality, for instance, is an example of the later development of judicial review grounds. However, I would be hesitant to conclude that what we now refer as to the statutory grounds in section 7(2) could be seen in this light since, as I have noted, they are more or less, components of the traditional grounds of judicial review except that they now have a statutory underpinning.

39. Turning back to the applicant's application, there should not be any doubt that the impugned decision is an "administrative decision" within the meaning assigned to this phrase in section 2 of the *Fair Administrative Action Act*. This section reads as follows:

> " administrative action" includes—
>
> (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;

40. The impugned resolution fits the description of an administrative action because, first, it emanates from the exercise of powers, functions and duties by an authority which, in this case is an executive authority or its appendage and second, if that characterization of the NDICCC is in doubt, there is no doubt that its resolution affects the legal rights or interest of the applicant's and interested parties' members. I would not agree with the respondent that simply because the resolution is christened a "ministerial" decision or a "policy" it is beyond the scrutiny of Article 47 of *the Constitution* and section 4 of the *Fair Administrative Action Act*. Indeed, it is, regardless of how the respondent wants to describe it.

41. And if I have to belabor the point, section 3 of the *Fair Administrative Action Act* leaves no doubt NDICCC and its actions, including the impugned resolution, are subject to the watchful eye of the *Fair Administrative Action Act*. This section reads as follows:

> 3. Application.
>
> (1) This Act applies to all state and non-state Application 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.

42. It follows that if, for whatever reason, the respondent felt that the services of the applicant's and interested party's members are no longer required for public agencies and authorities, then it was enjoined to comply with the conditions set forth in section 4 of the *Fair Administrative Action Act* before reaching the impugned decision. This section reads as follows:

> 4. Administrative action to be taken expeditiously, efficiently, lawfully etc.
>
> (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;

(f) notice of the right to cross-examine or where applicable; or

(g) 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.

43. Perhaps, proceeding on the mistaken view that NDICCC's decision is not subject to Article 47 of *the Constitution* and section 4 of the *Fair Administrative Action Act*, the respondent has not even suggested that the NDICC attempted to comply with any of the prescribed conditions before terminating the applicant's and interested party's members' services and restricting their future engagements with public authorities and agencies in provision of legal services without the respondent's sanction.

44. Failure to comply with section 4 of the Fair Administrative Action is enough reason to nullify the NDICCC's decision on the grounds of illegality or procedural impropriety. It is illegal because first, the NDICCC flagrantly flouted this particular section; secondly, the Committee never considered the section and, therefore, it can be said to have failed to consider relevant matters and considered irrelevant matters in reaching its decision; and, thirdly, it acted ultra vires Article 47 of *the Constitution* and section 4 of the *Fair Administrative Action Act*.

45. It would fall on the ground of procedural impropriety because despite the fact that the decision was prejudicial to the applicant's and interested party's members' interests, or rather, in the language of the Act, the decision was likely to adversely affect the rights of these persons, they were neither notified

of the proceedings that culminated in the impugned decision nor given any opportunity to be heard before this decision was reached.

46. There are two further reasons for impeaching the impugned decision on ground of illegality. One is that the provision of legal services, or any services for that matter, to public entities is not at the whim of the executive or any of its appendages. The procurement of goods and services is such a crucial task that Article 227 (1) of *the Constitution* is categorical that it is an exercise that must be fair, equitable, transparent, competitive and cost effective. The Article reads as follows: 227.

227.

(1) When a State organ or any other public entity contracts for goods or services, it shall do so in accordance with a system that is fair, equitable, transparent, competitive and cost-effective.

47. Certainly, the values of fairness, equity, transparency, competitiveness and cost-effectiveness are unlikely to be achieved in procurement of goods and services for the government agencies and public authorities if such a task was left to the whim of an individual. The applicant's and interested party's apprehension that there is bound to be discrimination if this was the case is not far-fetched.

48. And in order to ensure that these values which *the Constitution* upholds in procurement of public goods and services are given effect, *the Constitution* is clear in clause (2) of Article 227 that there has to be a law enacted by Parliament to prescribe the procedure for public procurement of goods and disposal of assets in order to protect the values enshrined in *the constitution*. This clause reads, in part as follows:

(2) An Act of Parliament shall prescribe a framework within which policies relating to procurement and asset disposal shall be implemented and may provide for all or any of the following—

Indeed, following this provision, Parliament has enacted the *Public Procurement and Asset Disposal Act*, 2015. In in its preamble, the Act says that it is:

> An Act of Parliament to give effect to Article 227 of *the Constitution*; to provide procedures for efficient public procurement and for assets disposal by public entities; and for connected purposes.

And as far as its application is concerned, it states in section 4(1) as follows:

4. Application of the Act

(1) This Act applies to all State organs and public entities with respect to—

(a) procurement planning;

(b) procurement processing;

(c) inventory and asset management;

(d) disposal of assets; and

(e) contract management.

49. Nowhere in the Act, and neither has it been suggested that the executive or any section of the executive may interfere with the procurement process of public bodies or government agencies. As correctly put by the applicant, the services of external counsel are competitively procured by state agencies and public institutions through an elaborate and detailed statutory mechanism set out in the *Public*

Procurement and Asset Disposal Act.For example, organs of state procure goods and services either by way of quotations or through a tendering process which must be within the threshold values as determined by the National Treasury from time to time. And according to section 134 of the *Public Procurement and Asset Disposal Act*, the accounting officer of a public entity or authority has the responsibility of preparation of contracts after the award of a tender. It is only in the awards that exceed the value of Kshs. 5 Billion that the Attorney General's clearance is necessary before the contracts are signed.

50. Once such contracts are signed and concluded, they are subject to the principles of contract and any other law that regulate contractual relationship between the contracting parties. Such contracts cannot be terminated or entered into on an executive fiat.

51. It follows that the decision of the NDICCC is also illegal to the extent that the respondent has breached the provisions of the *Public Procurement and Asset Disposal Act*. This sort of illegality was a question that was discussed in *Republic v Attorney General; Law Society of Kenya (Interested Party); Ex parte: Francis Andrew Moriasi* [2019] eKLR. The issues arising in that suit are the same issues that have arisen in the instant suit hence the submission by the applicant that the NDICCC's decision is contrary to the decision that has been rendered by this Honourable court. In that case the court considered Article 227 of *the Constitution*, sections 5, 39, 134 and 135 of the *Public Procurement and Asset Disposal Act* and concluded as follows:

> " The *Public Procurement and Asset Disposal Act* provides at section 5(1) that the Act prevails in case of any inconsistency between the Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal, except in cases where procurement of professional service is governed by an Act of Parliament applicable for such services. It is thus evident from the said provisions that the power to make contracts in public procurement is exclusively given to the Accounting Officer of the procuring entity, and the only powers given to the Attorney General are with respect to clearance of contracts that exceed the value of Kshs Five Billion.
>
> 40. Therefore, to the extent that paragraphs 18 to 24 of Guideline D purport to change and amend the provisions of sections 134, 135 and 138 of the *Public Procurement and Asset Disposal Act* as regards the procedures of contracting in the procurement of goods, works and services by government entities, without any express power having been granted to the Respondent to do so, the same are ultra vires.
>
> And at paragraph 58 of the judgment, the court noted:
>
> 58. ... no express provisions of *the Constitution* or law in this respect permits the Respondent to limit the constitutional independence of the Constitutional Commissions or Independent Offices within the context of Article 249 of *the Constitution*. Likewise, no Constitutional or statutory provisions give the Respondent powers to interfere with, or limit the constitutional and statutory individual responsibility, and operational independence specifically bestowed upon Cabinet Secretaries, State Corporations and Accounting Officers."

52. It cannot, therefore, be overemphasised that the question at hand has been addressed and determined. It is disturbing that the executive would proceed and overlook the judgment of this Honourable Court and come up with the resolution that is now the subject of these proceedings. It is nothing short of disdain for court's orders and the rule of law which must be condemned in the strongest terms possible.

53. Suffice it to say, I am persuaded that the applicant's application is merited and the applicant deserves the exercise of the discretion of this Honourable Court in its favour. I hereby allow the application and quash the resolution of the National Development Implementation and Communication Committee dated 8 July 2020 signed by the then head of Public Service, Mr. Joseph Kinyua and transmitted to Ministries, state departments for action as a decision of Cabinet to the effect:

> "(viii) Not to contract external counsel without the written approval of the Attorney-General; and
>
> (ix) Terminate within twenty-one (21) days from the date hereof engagements with all external advocates who had been contracted without the express and prior grant of the concurrence of the Attorney-General."

54. An order of prohibition is also hereby issued directed at the respondent to restrain him, his officers or agents acting under his directions from implementing the decision or resolutions of the National Development Implementation and Communication Cabinet Committee dated 8 July 2020, signed by Mr. Joseph Kinyua, the then head of Public Service and transmitted to Ministries, State Departments for action as a decision of Cabinet (inter alia) to the effect that:

> "(viii) (viii) Not to contract external counsel without the written approval of the Attorney-General; and
>
> (ix) Terminate within twenty-one (21) days from the date hereof engagements with all external advocates who had been contracted without the express and prior grant of the concurrence of the Attorney-General."

Parties will bear their respective costs. It is so ordered.

SIGNED, DELIVERED AND DATED 7 JULY 2023

NGAAH JAIRUS

JUDGE

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