REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 141 OF 2019

BETWEEN

REPUBLIC... APPLICANT

VERSUS

THE NATIONAL ASSEMBLY OF

THE REPUBLIC OF KENYA...................... 1ST RESPONDENT

THE HON SPEAKER OF THE

NATIONAL ASSEMBLY............................. 2ND RESPONDENT

THE CLERK OF THE

NATIONAL ASSEMBLY............................ 3RD RESPONDENT

AND

THE DIRECTOR OF

PUBLIC PROSECUTIONS.............. 1ST INTERESTED PARTY

THE DIRECTOR OF CRIMINAL

INVESTIGATIONS...........................2ND INTERESTED PARTY

THE INDEPENDENT ELECTORAL AND

BOUNDARIES COMMISSION......3RD INTERESTED PARTY

THE PUBLIC PROCUREMENT

REGULATORY BOARD................ 4TH INTERESTED PARTY

AND

IDEMIA IDENTITY AND SECURITY

FRANCE SAS... EX PARTE APPLICANT

JUDGMENT

The Parties

1. The applicant, IDEMIA Identity and Security France SAS (herein after interchangeably referred to as IDEMIA or the applicant), is a foreign company incorporated in France and duly registered in Kenya in conformity with the provisions of section **975** of the Companies Act.[1] IDEMIA, formerly Morpho S.A.S. is a French multinational company specializing in security and identity solutions, including facial recognition systems and other biometric identification services. Part of Safran group until 2017, Morpho merged with Oberthur Technologies and became OT-Morpho on 31st May 2017, then renamed as IDEMIA on September 28th September 2017. Any reference to IDEMIA in this judgment shall where the context so permits include its current and/or former names.

2. The first Respondent, the National Assembly is one of the Houses of the Parliament of the Republic of Kenya established under Article **93(1)** of Constitution. Its role under Article **95** of the Constitution includes representing the people of the constituencies and special interests in the National Assembly. It deliberates on and resolves issues of concern to the people. It enacts legislation in accordance with Part **4** of Chapter **8** of the Constitution. It determines the allocation of national revenue between the levels of government, as provided in Part **4** of Chapter Twelve of the Constitution. It appropriates funds for expenditure by the national government and other national State organs. It reviews the conduct in office of the President, the Deputy President and other State officers and initiates the process of removing them from office. It exercises oversight of State organs and approves declarations of war and extensions of states of emergency.

3. The second Respondent is the Speaker of the National Assembly. Under Article **106 (1) (a)** of the Constitution, he is elected by the National Assembly in accordance with the Standing Orders, from among persons who are qualified to be elected as members of Parliament but are not such members. Pursuant to Article **107** of the Constitution, at any sitting of a House of Parliament—**(1) (a)** the Speaker presides; **(b)** in the absence of the Speaker, the Deputy Speaker presides; and **(c)** in the absence of the Speaker and the Deputy Speaker, another member of the House elected by the House presides. **(2)** At a joint sitting of the Houses of Parliament, the Speaker of the National Assembly shall preside, assisted by the Speaker of the Senate.

4. The third Respondent is the Clerk of the National Assembly. He is appointed by the Parliamentary Service Commission with the approval of the House pursuant to Article **128** of the Constitution. He is the administrative and procedural head of the National Assembly and oversees the day to day operations and affairs of the National Assembly.

5. The first Interested Party is the Director of Public Prosecutions (herein after referred to as the DPP), established under Article **157** of the Constitution with constitutional mandate to *inter alia* institute and undertake criminal proceedings against any person before any court (other than a court martial) in respect of any offence alleged to have been committed.[2]

6. The second Respondent, the Director of Criminal Investigations (herein after referred to as the DCI) is appointed by the President under section **30** of the *National Police Service Act*.[3] Pursuant to Article **29 (6)** of the Constitution, he is a State officer for the purposes of Article **260** of the Constitution. In the performance of the functions and duties of his office, he is responsible to the Inspector-General.[4] The DCI is the chief executive officer of the Directorate of Criminal Investigation; he is responsible for— **(i)** implementing the decisions of the Inspector-General in respect of the Directorate; **(ii)** efficient administration of the Directorate; **(iii)** the day-to-day administration and management of the affairs of the Directorate; and **(iv)** the performance of such other duties as may be assigned by the Inspector General, the National Police Service Commission, or as may be prescribed by the Act, or any other written law.[5]

7. The third Interested Party is the Independent Electoral and Boundaries Commission (herein after referred to as the IEBC). It is a Constitutional Commission established under Article **88 (1)** of the Constitution. Under Article **88 (4)**, it is responsible for conducting or supervising referenda and elections to any elective body or office established by the Constitution, and any other elections as prescribed by an Act of Parliament and, in particular, for— **(a)** the continuous registration of citizens as voters; **(b)** the regular revision of the voters' roll; (**c)** the delimitation of constituencies and wards; **(d)** the regulation of the process by which parties nominate candidates for elections; **(e)** the settlement of electoral disputes, including disputes relating to or arising from nominations but excluding election petitions and disputes subsequent to the declaration of election results; **(f)** the registration of candidates for election; **(g)** voter education; **(h)** the facilitation of the observation, monitoring and evaluation of elections; **(i)** the regulation of the amount of money that may be spent by or on behalf of a candidate or party in respect of any election; **(j)** the development of a code of conduct for candidates and parties contesting elections; and **(k)** the monitoring of compliance with the legislation required by Article **82(1)(b)** relating to nomination of candidates by parties.In the discharge of its functions, IEBC is obligated to act in accordance with the Constitution and national legislation.[6]

8. Additionally, IEBC is one of the Commissions listed in Article **248** whose objects as stipulated under Article **249** are to— **(a)** protect the sovereignty of the people; **(b)** secure the observance by all State organs of democratic values and principles; and **(c)** promote constitutionalism. **(2)** The commissions and the holders of independent offices under the said Article— **(a)** are subject only to the Constitution and the law; and **(b)** are independent and not subject to direction or control by any person or authority.

9. The fourth Interested Party, the Public Procurement Regulatory Board is established under section **10** of the Public Procurement and Asset Disposal Act[7] (herein after referred to as the PPAD Act). By dint of the said section, the management of the Public Procurement Regulatory Authority is vested in the said Board. The Public Procurement Regulatory Authority is a body corporate with perpetual succession and a common seal established under section **8** of the PPAD Act. In its corporate name, it is capable of— **(a)** suing and being sued; **(b)** acquiring, safeguarding, holding, charging and disposing of moveable and immoveable property; and **(c)** doing or performing all such other things or acts for the proper discharge of its functions under the Act, which may be lawfully done by a body corporate. The specific functions of the Authority and the Board are stipulated in sections **9** and **12** of the said act.

Factual matrix

10. The factual chronology of the events which triggered these proceedings is essentially common cause or not disputed. The history of this dispute as far as I can discern it from the pleadings is uncontroverted. It is common ground that in or around 15th December, 2016 IEBC invited a one-of-supplier for the hardware component of the Kenya Integrated Electoral Management System (herein after referred to as KIEMS). It requested submissionof bids on or before 9th January, 2017 and an updated tender was subsequently released on 23/03/2017 requesting for submission on 25/03/2017.

11. Its common ground that IDEMIA successfully bid for the Tender. It signed a contract with IEBC pursuant to which it supplied the KIEMS Kits to IEBC which were used in the 8th August 2017 General Election and the 26th September, 2017 repeat Presidential Election. It is uncontested that IEBC partly paid IDEMIA for the services rendered and part of the sum remains outstanding.

12. It is common ground that on or about 18th February, 2019 IDEMIA was invited by the National Assembly Public Accounts Committee (herein after referred to PAC) to appear before it regarding *The Examination of the Report of the Auditor-General on the Financial Statements for the Independent Electoral and Boundaries Commission for the Year Ended 30th June 2017* to respond to issues relating to supply, delivery, installation and testing of the KIEMS Kits and ownership of their company.

13. IDEMIA states that it wrote to the Clerk to the Senate on 19th February, 2019 confirming attendance and provided names of its attendees. It states that it requested information on the thematic issues for discussion and possible questions to enable it avail the information but the said letters were not replied to, but, nevertheless it prepared a written Memorandum for the PAC's consideration extensively addressing the issues raised in the invitation letter dated 14th February, 2019.

14. IDEMIA states that it was not notified that the question of its compliance or otherwise with Section **974** of Companies Act[8] was an issue for discussion in the meeting held on the 21st of February, 2019. It states that subsequent to the said meeting, it has since learnt of the Report by the National Assembly recommending investigations over an offence which is unknown to the law and an arbitrary direction to the IEBC to recover sums paid to it citing un investigated violations unknown to law. It maintains that the said report violates its rights by recommending that:-

> *a. **That** the Directorate of Criminal Investigations and the Director of Public Prosecutions undertake investigations and institute appropriate criminal action under S.974(3) of the Companies Act against IDEMIA in its current name and its former names of M/S. Morpho, OT Morpho, SAFRAN Identity & Security, its officers and local representatives for having purported to do business with the IEBC before being registered as a foreign company by the Registrar of Companies and non-compliance with the mandatory provisions of S.974(1) as read together with SS. 975 and 979 of the Companies Act, 2015.*
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> *b. **That** pursuant to the provisions of S.41 of the Public Procurement and Asset Disposal Act, 2015, the Public Procurement Regulatory Authority Board investigates, within 60 days, the conduct of M/S. IDEMIA (formally operating as Morpho, OT Morpho, SAFRAN Identity & Security) and if it finds the company culpable, enters the names of the company in the central repository of debarred firms and ensures that the firm is precluded from participating, award or entering into any kind of procurement contract payable using public funds under any state department or agency in the Republic of Kenya for a period of 10 years.*
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> *c. **That** all contracts entered into between the company known as M/S. IDEMIA in its current name herein or in its former names of Morpho, OT Morph, SAFRAN Identity & Security and the IEBC be investigated and if found to have contravened SS. 974, 975, 979 or any other section of the Companies Act or any other law, be nullified.*
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> *d. **That** the IEBC takes immediate legal action to recover all monies unlawfully paid under the contract(s) entered into between itself and M/S. IDEMIA in its current name herein or in its former names of Morpho, OT Morph, SAFRAN Identity & Security or otherwise howsoever; as the contracts were entered into in contravention of the mandatory provisions of S. 974 as read together with SS.975 and 979 of the Companies Act.*
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> *e. **That** the Attorney General and the Cabinet Secretary for the National Treasury ensures compliance with the resolution of the House and any state or public offer who contravenes the said resolution be held personally liable*.

15. It maintains that under its contracts with the IEBC or under the PPAD Act and the Regulations made thereunder, it was not required to be registered in Kenya and neither was it a requirement under the International Open Tender documentation. Additionally, it states that it won the contracts on merit and on account of its technical expertise, hence, the intent of the recommendations is to threaten the payments lawfully due to it.

Legal foundation of the application

16. IDEMIA states that the recommendations are *ultra vires* the National Assembly's constitutional mandate and the Fair Administrative Actions Act[9] (herein referred to as the FAA Act). It states that the contracts between itself and IEBC did not fall within the ambit of section **974** of the Companies Act[10] which defines carrying on business in Kenya to include (but is not limited to) (a) offering debentures in Kenya or (b) offering securities for debentures in Kenya – *ejus dem generis*.

17. Additionally, IDEMIA states that section **89** of the PPAD act as read with Section **974** of the Companies Act does not obligate or otherwise require foreign companies desirous of participating in international tenders floated by public/procuring entities to register with the Registrar of Companies or obtain a certificate of compliance before entering into the such contracts. It also states that the National Assembly has assumed the role of the investigating agencies and the arbiters by concluding that the funds were paid it was unlawfully and by directing IEBC to take immediate legal action to recover sums paid under the said contract.

18. IDEMIA also states that prior to the impugned decision, it was not given adequate notice of the nature and reasons of the proposed adverse action, or an opportunity to be heard whether in person and or through a legal representative. It states that the impugned decision is *ultra vires* Articles **47** and **50(1)** of the Constitution and Sections **2; 3(1); 4(1),(3)(a)(b)(e)(g); 7(2)(a)(i)(ii)(iv)(v), (c), (d), (e), (f), (h), (i) (iii), (k), (m) & (n); 11(1)(a), (b), (d), (g), (i) & (j**) of the FAA Act.

19. Additionally, it states that the impugned decision is illegal because section **974** of the Companies Act as read with sections **975** and **979** is wide, unenforceable and vague to the extent that it creates an undefined penal provision leaving it to the subjective interpretation of state

organs. Further, it states that the decision was undertaken in violation of due process contrary to section **4(3)(a),(b),(e)** and **(g)** of the FAA Act despite availing itself through its duly authorised officers before the PAC on 21st February, 2019.

20. IDEMIA also states that when it entered into the contracts with the IEBC, there was no requirement for local registration for foreign bidders under the International Open Tender documents or under the PPAD Act. It also states that recommending criminal investigations for an offense which is not defined in law violates its rights protected under Article **27, 29(d), 40(1), 47(1) & (2)** and **50(1)** of the Constitution. It further states that the decision recommending investigations to be conducted within a defined timeline is illegal, unlawful and tainted with illegalities because section **41** of the PPAD Act does not specify a time frame but affords discretion to the Public Procurement Regulatory Board to conduct objective investigations.

21. It also states that the impugned decision is procedurally unfair and materially influenced by an error of law and breached Natural Justice by failing to give it notice and or opportunity to be heard contrary Articles **50 (1)** and **47** of the Constitution, as read with Section **4(3) & 12** FAA Act.

22. It also states that the impugned decision is marred by unreasonableness, bias, bad faith and malice because it was not given reasonable notice, reasons and opportunity to defend itself. It also states that the National Assembly's Hansard Report of the 23rd of April, 2019 refers a legal opinion ostensibly issued through the IEBC, which legal advisory was never considered demonstrating the vindictiveness and biasness against it.

23. IDEMIA also states that the decision is unreasonable, biased, malicious and irrational because it directs immediate recovery of sums paid to it in contradiction with DPP's recommendations, and, that Members of the National Assembly are on record threatening the Interested Parties. It also states that the deliberations in the Hansard Report prior to the adoption of the recommendations by the National Assembly demonstrate unreasonableness, bias, bad faith and malice against it.

24. Additionally, IDEMIA states that the impugned decision violates its legitimate expectation that the Respondents would act fairly, lawfully and take into account relevant factors. Further, it states that section **974** of the Companies Act which is alleged to have been violated is a re-enactment of Section **365** of the Repealed Companies Act, and, that, since the applicant was not having a fixed place of business (as used in the Section **365** of the Repealed Companies Act) when it entered into the impugned contracts with IEBC, (but was only supplying the requisite KIEMS Kits for use by IEBC and conducting training and support through its local partner/agent, it was not obligated to register a branch office in Kenya under Section **974** of the Companies Act nor was it required to have a local agent or representative under section **979** of the Companies Act.

25. It also states that the impugned decision has infringed its right to property and protection from discrimination. Further, it states that the Regulations operationalising the local registration by a foreign company were published by the Registrar of Companies on the 30th of June, 2017, under Legal Notice No 103 of 2017, whereas the subject contract between the IEBC and the applicant was executed on the 31st of March, 2017, three (3) months prior to the coming into effect of this said provision, hence, the National Assembly's actions are unjust and a retrospective application of the law.

Reliefs sought

26. The applicant prays for the following orders:-

> *a. A DECLARATION that the report, recommendation, decision and or directive by the National Assembly entitled "The Public Accounts Committee Report on the Examination of the Report of the Auditor-General on the Financial Statements for the Independent Electoral and Boundaries Commission for the Year Ended 30th June 2017 February 2019 as amended and adopted by the National Assembly ON 23RD APRIL, 2019" – particularly at recommendations ix(a), (b), (c), (d) and (e) at page 124 and 125 of the impugned Report; is in breach of the Applicant's rights.*
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> *b. AN ORDER OF CERTIORARI calling-up, removing, delivering-up to the Court and quashing the decision National Assembly's report, namely, the Public Accounts Committee Report on the Examination of the Report of the Auditor-General on the Financial Statements for the Independent Electoral and Boundaries Commission for the Year Ended 30th June 2017 February 2019 as amended and adopted by the National Assembly on 23RD April, 2019 – particularly recommendations ix(a), (b), (c), (d) and (e) at page 124 and 125 of the impugned Report.*
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> *c. AN ORDER OF PROHIBITION restraining the 1st to 3rd Respondents and the 1st to 4th Interested Parties, whether by themselves and or through their agents or officers from investigating, barring or in any way howsoever giving effect to or enforcing, in any manner or from interfering with the applicant on account of the report, recommendation, decision and or directive by the National Assembly entitled the Public Accounts Committee Report on the Examination of the Report of the Auditor-General on the Financial Statements for the Independent Electoral and Boundaries Commission for the Year Ended 30th June 2017 February 2019 as amended and Adopted by the National assembly on 23rd April, 2019 – particularly recommendations ix(a), (b), (c), (d) and (e) at page 124 and 125 of the impugned Report.*
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> *d. A DECLARATION that the Companies Act, 2015 at Section 974 as read with 975 and 979 thereto are unenforceable as against the Applicant on the instance of the facts relied on by the National Assembly (as the impugned law was not operational at all material times to this Petition); and, criminal sanctions thereby created, are unconstitutional as the phrase "carrying on business in Kenya" is vague, ambiguous, uncertain and undefined leaving it to the subjective interpretation of each person, and therefore incapable of compliance.*
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> *e. Any other Order as the Honorable Court may be pleased to deem necessary to give effect to the above orders.*

f. Costs do issue to the Applicant.

The first, second and third Respondent's replying Affidavit

27. Mr. Michael Sialai, the Clerk to the National Assembly swore the Replying Affidavit dated 9th May 2019 in opposition to the application. He averred that under Article **95 (4) (b)**, the National Assembly appropriates funds for expenditure by the National and other state organs and that it exercises oversight over national revenue and its expenditure. He averred that under Article **229 (6) (a)**, the Auditor General is required to audit and report on the accounts of the national and county governments and pursuant to Article **229(7)**, the Auditor General is required to submit the aforesaid reports to Parliament. Further, he averred that Article **229 (8)** requires Parliament to consider the report within three **(3)** months from the date of receipt and take appropriate action.

28. He deposed that it is lawful and within the National Assembly's constitutional mandate to consider and deal with the report of the Auditor General for the IEBC and any other reports of the Auditor General. He averred that the Reports of the Auditor General are one of the tools the National Assembly uses in exercising oversight over national revenue allocated to State organs, the other option being Article **125** which provides the power to call evidence. Mr. Sialai further averred that Article **124** and Standing Order **205 (2)** provides that the PAC shall be responsible for the examination of the accounts showing the appropriations of the sum voted by the house to meet public expenditure and of such other accounts laid before the House as the Committee may think fit.

29. He deposed that the above functions are to be performed within the purview of the role of the National Assembly stipulated in Article **95 (2) & (5) (b)**, and, that, Article **125(1) (2)** grants either house of Parliament or any of its committee's power to summon any person to appear before it for the purpose of giving evidence or providing information. He deposed that the said provision grants it powers same as the High Court to enforce/compel attendance of witnesses or to issue a commission or request to examine witnesses abroad. He further averred that National Assembly Standing Order No. 191 provides that the Committee shall enjoy and exercise all the powers and privileges bestowed on Parliament by the Constitution and statute including power to summon witnesses, receive evidence and to request for and receive papers and documents from the government and the public. Mr. Sialai deposed that in exercising its functions, the Committee and the National Assembly possess powers, privileges and immunities accorded to it by Article **117** of the Constitution and by the Parliamentary Powers and Privileges Act.[11]

30. He averred that pursuant to Article **205(2)**, PAC examined the report of the Auditor General on the IEBC for the year ending 30th June 2017 and by a letter dated 4th February 2019, the National Assembly invited the applicant to appear before the PAC to respond to matters raised adversely mentioning it. He averred that following the said invitation, IDEMIA's Executive Vice President, Mr. Mathew Foxton and Mr. Oliver Charlanes, the executive Committee Member/ Senior Vice President appeared before the Committee on 21st February 2019 and gave evidence and produced a written Memorandum thereafter.

31. He also averred that on 30th October 2018, following an invitation to appear before the Committee, Mr. Marjan Husein, the Acting Accounting Officer and Acting Secretary of the IEBC appeared before the Committee accompanied by a Commissioner of the IEBC and other officers and adduced evidence and produced an internal audit report which had been commissioned by the IEBC following the audit report by the Auditor General.

32. Mr. Sialai averred that on 27th February 2019, the Chair of the PAC tabled the Committee's Report for the year ending 30th June 2017 and subsequently, the Speaker of the National Assembly delivered a ruling expunging certain recommendations made by the PAC for being unconstitutional and directed the rest of the report to proceed for consideration by the House. He averred that the National Assembly considered the report on 28th March 2019, 2nd April 2019 and 23rd April 2019. He averred that a motion before the house including a motion to adopt or not adopt a Report of a Committee can be amended by the House in accordance with the National Assembly Standing Orders **54** and **55.** He further averred that the house has adopted a parliamentary practice that any amendment proposed must relate to the evidence adduced before the Committee which was not captured in the report of the Committee and it appears either in the observations or findings of the Committee Report which are not translated into recommendations.

33. He also averred that the National Assembly is not precluded from effecting amendments to motions before it after hearing views from the public[12]and that Parliament is not required to adjourn its proceedings every time a member proposes an amendment to a motion before the house so that further public participation can take place on the matter. He deposed that the applicant was afforded an opportunity to appear before the PAC and when asked for a local address Mr. Mathew Foxton stated that the company was in the process of registering an associate, hence, the applicant was aware that its status under the Companies Act was in question.

34. Mr. Sialai referred to the requirements of Article 227 (1) and averred that PAC found that more than 90% of the procurement of critical goods and services by the IEBC during the period under review was done in a manner that contravenes the Constitution and the PPAD Act. He averred that PAC recommended the relevant government investigative agencies to probe the matters arising from the report, and, that, the privileges conferred to the Parliamentary proceedings are wide and absolute.[13] He also deposed that the court lack jurisdiction to hear this case by dint of Article **12** of the National Assembly Powers and Privileges Act[14] as the same would amount to violation of the principle of separation of powers, and, that, the prayers sought are an affront to Article **10** and that the application is pre-emptive.

First and second Interested Party's Preliminary Objection and grounds of opposition

35. The DPP & DCI filed a Preliminary Objection dated 24th May 2019 stating that the applicant's application is a non-starter and fatally defective for not being supported by an affidavit and it is an abuse of court process. They also filed grounds of opposition stating that the application is incompetent, lacks merit and should therefore be dismissed. They stated that the application is a legal misadventure, an abuse of court process, abstract, hypothetical, academic and does not raise any ripe issues/controversies to warrant the court's intervention. They also stated that the DPP does not require the consent of any person or authority to commence any criminal proceedings while exercising its constitutional and statutory mandate nor is it under the direction or control of any person or authority.

36. Further, they stated that the DPP has power to direct the Inspector General of the National Police Service to investigate any information or allegation of criminal conduct and the Inspector General is required to comply with any such direction. They stated that the application is pre-mature, hence, it fails the ripeness test as far as the first Interested Party is concerned since the alleged recommendations have not been proved to have been submitted to the DPP. Lastly, they stated that the DCI is clothed with investigative powers, hence, the police have the requisite constitutional and statutory mandate to investigate any complaint or allegation brought to them, and, that, the orders sought are calculated to muzzle and usurp the operations and powers of independent and statutory bodies from exercising their constitutional mandate.

The third Interested Party's Replying Affidavit

37. Salome Oyugi**,** IEBC's acting Director Legal and Public Affairs Officer swore the Replying affidavit dated 15th July 2019 in response to the application. She averred that IEBC enlisted the services of applicant formerly known as Morpho SAS and Safran Identity and Security SAS and OT- Morpho to offer services and supply of goods for purposes of the 2017 general elections. She averred that as at the time she swore the affidavit, there were two (2) existing contracts between the IEBC and IDEMIA being a contract for the provision of Biometric System Vendor Support and Maintenance Services and an Agreement for Sale and purchase of hardware, services and licenses of software for an integrated election management system - Safran Identity and Security SAS.

38. M/s Oyugi averred that the contract for the provision of Biometric System Vendor Support and Maintenance Services dated 7th January, 2016 was for the provision of Biometric Voter Registration System Vendor Support during the registration of voters in the year 2016 at a cost of Kshs. 513,508,493. She averred that the said contract remains in force for a period of five (5) years from the date of its execution i.e 7th January, 2016 and it shall expire on 7th January, 2021. She also averred that the said contract provides alternative means of termination being by default, insolvency or the party's convenience all of which may attract an element of costs on either party depending on the circumstances of the termination.

39. She also averred that the other contract was for sale and purchase of hardware, services and licences of software for an integrated election management system dated 31st March, 2017 for the provision of hardware and software for use in the 2017 general election as well as support, installation and training at the cost of USD 39,964,421/=. She deposed that the said contract was amended on 28th September 2017, to provide for additional services for the repeat presidential election which took place on 26th October, 2017 at a cost of USD 23,788,186/=. She deposed that the amended contract was not independent but it was an extension of the original contract, hence, the original terms apply. She deposed that the said contract remains in force up to the last day of the warranty period or upon final payment by IEBC whichever is later. Additionally, she averred that the IEBC and IDEMIA have had various contractual relationships dating back to 2013 General Elections.

40. M/s Oyugi deposed that the PAC tabled a report on the Examination of the Report of the Auditor-General on the Financial Statements for the IEBC for the Year Ended 30th June, 2017; February 2019 as Amended and Adopted by the National Assembly on 23rd April, 2019 making the impugned recommendations. She averred that Article **95(4)** gives The National Assembly powers to determine appropriate funds for expenditure by the national government and other national State organs and to exercise oversight over national revenue and its expenditure.

41. She also averred that under Article **229(6) (a)**, the Auditor General is required to audit and report on the accounts of the National and County Governments and to submit the report to Parliament under Article **229(7)**; and under Article **229(8)**, Parliament is required to consider the report of the Auditor General within three (3) months and take appropriate action. She deposed that the PAC is established pursuant to Standing Order **205(1)** with the responsibility to examine 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.

42. She further deposed that on the basis of the foregoing legal provisions, PAC made the impugned recommendations. She averred that as for the first three recommendations listed earlier, PAC acted within its constitutional mandate. However, regarding the 4th recommendation, she deposed that PAC acted *ultra vires* because in the said recommendation it purports to declare the contracts between the IEBC and IDEMIA unlawful alleging that they were entered into in contravention of the mandatory provisions of Section **974** as read together with Sections **975** and **979** of the Companies Act. She deposed that PAC went ahead and recommended that IEBC takes immediate legal action to recover all monies paid under the contracts.

43. She averred that the Constitution is premised on the principle of separation of powers and Parliament's duty is to enact laws while the judiciary interprets the law and ensures that they meet the constitutional threshold and has the mandate to determine whether any act or conduct is inconsistent with the Constitution or any law, hence, only a court of law can determine the legal validity of a contract after hearing the parties, and only upon being moved by a party. She also averred that the PAC's recommendation directing cancellation of the contracts and recovery of sums paid can only become practical after investigation, institution of a suit and determination of such suit by a court of law.

44. She deposed that there is a valid contract between the IEBC and IDEMIA which remains in force until 2021 unless it is terminated by the parties in accordance with the contract; or it is declared illegal, void or enforceable by a court of law. Regarding PAC recommendations relating to provision of the Companies Act and section 41 of the PPAD Act, she averred that the contracts entered between the IEBC and IDEMIA prior to enactment of Companies Act and PPAD Act, cannot be subjected to the said pieces of legislation because the law does not apply retrospectively.

45. She deposed that the Regulations operationalizing Section **974** of the Companies Act which requires mandatory registration of a foreign company were published on 16th June, 2017 vide the Legal Notice No. 103 of 2017 whereas the subject contract between the IEBC and the applicant was executed on 31st of March, 2017, about 3 months prior to the coming into effect of the Regulations, hence, the commission complied with the existing law at the time of signing the contract.

Fourth Interested Party's Preliminary Objection

46. The fourth Interested Party filed a Notice of Preliminary Objection dated 3rd June 2019 stating that the application is premature and pre-emptive as far as it is concerned as the alleged recommendations have not been acted upon, and, that, the application is therefore bad in law, an abuse of the court process and ought to be dismissed with costs.

Fourth Interested Party's grounds of opposition

47. The fourth Interested Party filed grounds of opposition dated 3rd June 2019 stating that the application is premature and pre-emptive as far as it is concerned as the alleged recommendations have not been acted upon. It also stated that the orders sought are intended to usurp its statutory powers to investigate and debar. It also stated that its presence is not necessary for the court to adjudicate the claim between the applicant and the Respondents or to decide whether it breached the applicant's constitutional Rights.

Mode of hearing

48. Counsel for the applicant and counsel for the third and fourth interested parties adopted their written submissions and left it to the court to make the determination.

49. However, the Respondent's counsel and counsel for the first and second Interested Party's did not file any submissions despite the court's clear directions dated 13th May 2019 prescribing time frames for filing pleadings and submissions.

Determination

50. I will start by addressing the issue whether the Preliminary Objection raised by the 1st, 2nd and 4th Interested Parties is merited. The Preliminary Objection raised by counsel for the DPP & DCI is premised on the ground that the substantive application is fatally defective because it is not supported by an affidavit.

51. In response to this ground, the applicant's counsel argued that the substantive application states that it is supported by the Statutory Statement and a Notarized affidavit annexed thereto sworn by Mr. Yves Charvin, in conformity with Order **53** Rule **(1) (2) (4)** of the Civil Procedure Rules, 2010. He also argued that Article **159(2)(d)** as read with Section **10(1)** FAA Act dissuades court from premising determinations on procedural technicalities.

52. The fourth Interested Party's Preliminary Objection is that the application is premature and pre-emptive as far as it is concerned because the alleged recommendations have not been acted upon.

53. The applicant's counsel's response to this ground is that the suit is anchored on Article **47** as read with Sections **3** & **7** of the FAA Act in that it challenges the constitutional validity of the impugned decision. He cited this court's jurisdiction under Articles **165 (3) (d) (ii), 22 & 23** as read with Article **47** and Section **7(2)** of the FAA Act. He argued that the Preliminary Objections are without merit and unnecessarily obfuscate the matters in dispute to increase the time and litigation costs and urged the court to dismiss the objections citing *Mukisa Biscuit Manufacturing Co. Ltd vs West End Distributors ltd.* [15]

54. The objection premised on the absence of an affidavit in support of the substantive application is legally frail and unsustainable because the application seeking leave is supported by a Statutory Statement and a verifying affidavit as the law requires. The substantive application clearly states that it is premised on the grounds enumerated on the face of the application and the further grounds stated in the Statutory Statement and the verifying Affidavit. That alone extinguishes the said objection.

55. The authorities relied upon by counsel for the first and second Interested Parties were rendered in a civil appeal and in an election Petition respectively which are governed by Civil Procedure Rues and Election Petition Rules. It is trite law that the Civil Procedure Rules are not applicable to judicial review proceedings which are governed by Order **53** of the Rules. It is also trite law that a judicial review court exercises a special jurisdiction described by the Court of Appeal in *Commissioner of Lands v Hotel Kunste Ltd* [16] as a jurisdiction *sui generis* in which the Civil Procedure Act and Rules do not apply and that a court in judicial review proceedings exercises neither a civil or criminal jurisdiction. In *Wellamondi v The Chairman, Electoral Commission of Kenya**[17]*** the High Court stated: -

> "*I agree that Judicial Review Proceedings under Order 53 of the Civil Procedure Rules are a special procedure. The provisions of the order are invoked whenever orders of certiorari, mandamus, or prohibition are sought. That may be so in either civil or criminal proceedings. So in the exercise of its power under the order, the court is exercising neither a civil nor a criminal jurisdiction in the strict sense of the word. It is exercising a jurisdiction sui generis. It follows therefore that it is incompetent to invoke the provisions of section 3A and order 1 rule 8 of the Civil Procedure rules. It is equally incompetent to invoke section 42.*"

56. The other grounds upon which the objections collapse is that the grounds cited do not qualify to be Preliminary Objections. A preliminary objection must first, raise a point of law based on ascertained facts and not on evidence. If the objection is sustained, that should dispose of the matter. A preliminary objection is in the nature of a legal objection not based on the merits or facts of the case, but must be on pure points of law. In *Dismas Wambola vs Cabinet Secretary, Treasury & Others**[18]*** the court observed that preliminary objections are narrow in scope and cannot raise substantive issues raised in the pleadings that may have to be determined by the court after perusal of evidence. Law JA in *Mukisa Biscuit Manufacturers Ltd v Westend Distributors Ltd*[19] said:-

> *"...so far as I am aware, a preliminary objection consists of a pure point of law which has been pleaded, or which arises by clear implication out of pleadings, and which if argued as a preliminary objection may dispose of the suit. Examples are an objection to the jurisdiction of the court, or a plea of limitation, or a submission that the parties are bound by the contract giving rise to the suit, to refer the dispute to arbitration."*

57. In the words of Sir Charles Newbold Pat page 701, B:-

> *"...A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and, on occasion, confuse the issues, and this improper practice should stop."(Emphasis added)*

58. In *Omondi v National Bank of Kenya Ltd & Others*[20] it was held that:-

> *"The objection as to the legal competence of the Plaintiffs to sue……and the plea of res judicata are pure points of law which if determined in the favour of the Respondents would conclude the litigation and they were accordingly well taken as preliminary objections…In determining both points the Court is perfectly at liberty to look at the pleadings and other relevant matter in its records and it is not necessary to file affidavit evidence on those matters…What is forbidden is for counsel to take, and the Court to purport to determine, a point of preliminary objection on contested facts or in the exercise of judicial discretion and therefore the contention that the suit is an abuse of the process of the Court for the reason that the defendant's costs in an earlier suit have not been paid is not a true point of preliminary objection because to stay or not to stay a suit for such reason is not done ex debito justitiae (as of right) but as a matter of judicial discretion."*

59. Also relevant is *Oraro v Mbaja* [21] in which the court stated:-

> *"… A "preliminary objection" correctly understood, is now well defined as, and declared to be, a point of law which must not be blurred with factual details liable to be contested and in any event, to be proved through the processes of evidence. Any assertion, which claims to be a preliminary objection, yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the court should allow to proceed. Where a court needs to investigate facts, a matter cannot be raised as a preliminary point…Anything that purports to be a preliminary objection must not deal with disputed facts, and it must not itself derive its foundation from factual information which stands to be tested by normal rules of evidence…"(Emphasis added)*

60. My conclusion is that the above Preliminary Objections do not qualify to be pure points of law. Additionally, even if the affidavit was required, it's my view that its absence is not an incurable defect. I am guided by the provisions of Article **159(2) (d)** which obligates courts to administer justice without undue regard to procedural technicalities.

61. Next I will address the issue whether the National Assembly lawfully exercised its mandate in issuing the impugned Report. While acknowledging its legal mandate to interrogate IEBC's expenditure, the applicant's counsel submitted that this case challenges the manner and legality of the exercise of its mandate and relied on *Republic v Speaker of the National Assembly and 4 others ex-parte Edward R.O. Ouko*[22] in which the court observed that Parliament is empowered to regulate its own procedures under Articles **117** and **124** of the Constitution as read with the National Assembly Standing Orders; but whatever procedure Parliament adopts, it must be constitutional and lawful. He placed further reliance in *Speaker of National Assembly v De Lille MP and Another*[23] [23]which held that:-

> *"no Parliament, however bona fide or eminent its membership, no President however formidable be his reputation or scholarship and no official, however efficient or well meaning, can make any law or perform any act which is not sanctioned by the constitution. Section 2 of the Constitution expressly provides that law or conduct inconsistent with the Constitution is invalid and the obligations imposed by it must be fulfilled. It follows that any citizen adversely affected by any decree, order or action of any official or body, which is not properly authorised by the Constitution is entitled to the protection of the courts. No parliament, no official and no institution is immune from judicial scrutiny in such circumstances"*

62. He also cited *Doctors for Life International v Speaker of the National Assembly and Others* ***[24]*** for the holding that:-

> *" …under our Constitutional democracy, the constitution is the Supreme law. It is binding on all branches of government and no less parliament when it exercises its legislative authority, Parliament must act in accordance with and within the limits of the Constitution…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."*

63. He implored the court to invoke its jurisdiction under Articles **165(6) & (7); 165(3)(e); 165(3)(d)(ii), 165(3)(b)** and Article **47** of as read with Sections 4, 7 and 11 of the FAA Act and quash what he referred to as "the illegal discharge of the National Assembly's otherwise constitutional authority/power." He cited *R v PPARB and Another ex-parte Selex Sistemi Integrati* ***[25]*** in which the court observed that "to exempt public authorities from jurisdiction of the courts of law, is to that extent to grant dictatorial power…if the courts are prevented from enforcing the law, the remedy becomes worse than the disease." He also relied on *R v IEBC another ex-parte Coalition for Reform and democracy & 2 Others* ***[26]*** which underscored the need to hold public entities to account citing *Professor Sir William Wade*, in *Administrative law*[27] thus- "the Judges, with their eye on the long term and the rule of law, have made it their business to preserve a deeper constitutional logic, based on their repugnance to allowing any subordinate authority to obtain uncontrollable power." Additionally, he cited *R v PPARB and Another ex-parte Selex Sistemi Integrati* for the holding that all state organs must function and operate within the limits prescribed by the Constitution. He cited *R v Speaker of the National Assembly and 4 others ex-parte Edward R.O. Ouko* ***[28]*** for the proposition that a statutory body which is entrusted by Statute with discretion must act fairly.

64. Counsel for the IEBC was of a different opinion. He argued that the PAC acted *intra vires* by making the following recommendations, namely:-

> *a.* ***That*** *the DCI and the DPP undertakes investigations and institute appropriate criminal action under section* ***974 (3)*** *of the*

Companies Act against IDEMIA in its current name and its former names of M/S. Morpho, OT Morpho, SAFRAN Identity & Security, its officers and local representatives for having purported to do business with the IEBC before being registered as a foreign company by the Registrar of Companies and non-compliance with the mandatory provisions of S.974(1) s read together with sections 975 and 979 of the Companies Act.

*b. **That** pursuant to the provisions of section 41 of the PPAD Act, the fourth Interested Party investigates, within 60 days, the conduct of M/S. IDEMIA (formally operating as Morpho, OT Morpho, SAFRAN Identity & Security) and if it finds the company culpable, enters the names of the company in the central repository of debarred firms and ensures that the firm is precluded from participating, award or entering into any kind of procurement contract payable using public funds under any state department or agency in the Republic of Kenya for a period of 10 years.*

*c. **That** all contracts entered into between the company known as M/S. IDEMIA in its current name herein or in its former names of Morpho, OT Morph, SAFRAN Identity & Security and the IEBC be investigated and if found to have contravened sections 974, 975, 979 or any other section of the Companies Act or any other law, be nullified.*

65. I start my determination on this issue by recalling that the role of the National Assembly is stipulated in Article **95**. Apart from its legislative role, the National Assembly exercises oversight over national revenue and its expenditure. It exercises oversight of State organs. The objective of this role is to protect misappropriation of public funds. Relevant to the issue under consideration is Part **VI** of the Parliamentary Powers and Privileges Act[29] which provides as follows:-

18. Invitation and summoning of witnesses

1) Parliament or its committees may invite or summon any person to appear before it for the purpose of giving evidence or providing any information, paper, book, record or document in the possession or under the control of that person and, in this respect, Parliament and its committees shall have the same powers as the High Court as specified under Article 125 of the Constitution.

2) A summons issued under subsection (1) shall be issued by the Clerk on the direction of—

a. The Speaker, or

b. the chairperson of a committee acting in accordance with a resolution of the committee.

66. A fundamental tenet of statutory interpretation is that the words in a statute must be given their ordinary grammatical meaning, unless to do so would result in an absurdity. There are three important interrelated riders to this general principle, namely:- **(a)** that statutory provisions should always be interpreted purposively; **(b)** the relevant statutory provision must be properly contextualised; and **(c)** all statutes must be construed consistently with the Constitution, that is, where reasonably possible, legislative provisions ought to be interpreted to preserve their constitutional validity. This proviso to the general principle is closely related to the purposive approach referred to in **(a)**.[30]

67. This court has severally held that the correct approach to the interpretation of the Constitution is to have regard to the language and the context of the provision concerned. In addition, a generous and purposive interpretation should be adopted which gives expression to the underlying values of the Constitution.

68. Article **125** must be interpreted in the context of other relevant constitutional provisions. In this regard the following provisions of the Constitution are relevant. Article **2(1)** which provides for the supremacy of the Constitution; Article **2 (2)** which provides that no person may claim or exercise State authority except as authorized under the Constitution; Article **10** which stipulates national values and principles of governance which include transparency and accountability; Article **201 (d)** which provides that public money shall be used in a prudent and responsible way; and Article **119** which grants every person the right to petition Parliament to consider any matter within its authority. Also relevant is Article **95** which stipulates the role of Parliament, Article **125** which grants either House of Parliament power to call for evidence, and Articles **229 (7) (8)** respectively which require the Audit reports to be submitted to Parliament and to within three months after receiving the report to debate and consider the report and take appropriate action.

69. To borrow the words of the Constitutional Court of South Africa in *EFF vs Speaker* [31] stated, the National Assembly is the voice of all people and <u>the watchdog of State</u> <u>resources</u>:-

"It is the watchdog of State resources, the enforcer of fiscal discipline and cost-effectiveness for the common good of all our people. It also bears the responsibility to play an oversight role over the Executive and State organs and ensure that constitutional and statutory obligations are properly executed. For this reason, it fulfils a pre-eminently unique role of holding the Executive accountable for the fulfilment of the promises made to the populace through the State of the Nation Address, budget speeches, policies, legislation and the Constitution, duly undergirded by the affirmation or oath of office constitutionally administered to the Executive before assumption of office No doubt, it is an irreplaceable feature of good governance in South Africa."

70. To achieve this constitutional purpose, oversight over national revenue and Stage organs must be real and effective, and not illusory.[32] This is vital because the design and architecture of our constitutional dispensation is that Parliament, is a "watchdog of State resources, the enforcer of fiscal discipline and cost effectiveness for the common good of all our people.[33] The obligation on Parliament to "oversee" must be viewed in light of the foundational values underpinning the Constitution. This Court identifies the values of constitutionalism, accountability and the rule of law as foundational to the Constitution. Additionally, the principles of public finance articulated in Article **201** must be respected, observed and enforced.

71. Certain values in the Constitution have been designated as foundational to our democracy. This in turn means that as pillar-stones of this democracy, they must be observed scrupulously. If these values are not observed and their precepts not carried out conscientiously, we have a recipe for a constitutional crisis of great magnitude. In a State predicated on a desire to maintain the rule of law, it is imperative that one and all should be driven by a moral obligation to ensure the continued survival of our constitutionalism.

72. The Parliamentary Powers and Privileges Act[34] does not define the word "person." Section **18** of the Act also talks of "any person." The same words appear in Article **125.** Article **260** of the Constitution defines a person ?person includes a company, association or other body of persons whether incorporated or unincorporated. This definition provides a context within which the word "person" in section **18** of the Act must be interpreted. The applicant is subject to the Constitution.

73. Article **226 (3)** provides that (3) Subject to clause (4), the accounts of all governments and State organs shall be audited by the Auditor-General. Article **229 (4)** provides that (4) within six months after the end of each financial year, the Auditor-General shall audit and report, in respect of that financial year, on— (a) the accounts of the national and county governments; (b) the accounts of all funds and authorities of the national and county governments; (c) the accounts of all courts; (d) the accounts of every commission and independent office established by this Constitution; (e) the accounts of the National Assembly, the Senate and the county assemblies; (f) the accounts of political parties funded from public funds; (g) the public debt; and (h) the accounts of any other entity that legislation requires the Auditor-General to audit.

74. Article **228 (5)** provides that the Auditor-General may audit and report on the accounts of any entity that is funded from public funds. Sub-Article (6) provides that an audit report shall confirm whether or not public money has been applied lawfully and in an effective way, while sub-article (7) provides that audit reports shall be submitted to Parliament or the relevant county assembly. Sub-article (8), provides that within three months after receiving an audit report, Parliament or the county assembly shall debate and consider the report and take appropriate action.

75. Constitutional provisions must be construed purposively and in a contextual manner. Courts are simultaneously constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. A reading of the various constitutional provisions discussed above and the constitutional mandate of the National Assembly and the IEBC leaves me with no doubt that the National Assembly and PAC acted within its constitutional and statutory mandate in summoning the applicant and in making the first three recommendations reproduced above, hence, I am in agreement with the position taken by counsel for IEBC.

76. I now address the issue whether the impugned decision is tainted with procedural impropriety. Mr. Luci, the applicant's counsel faulted the National Assembly for failing to notify the applicant of the proposed action and failing to accord it adequate opportunity to respond to the issues. He submitted that the applicant had the right to be notified in advance of the nature and reasons for the proposed action as required by sections **4(3) (a), 4 (4) (b)** of the FAA Act. He submitted that the applicant was denied the opportunity to be heard contrary to section **4(3) (b), 4 (4) (a) & (b)** of the FAA Act. He cited *Republic v the Hon. the Chief Justice of Kenya and others ex-parte Justice Moijo Mataiya Ole Keiwua*[35]which held:-

> "*The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to the individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons. The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it and such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence.*"

77. He also relied on *R. v Race Relations Board ex parte Setrarajan* ***[36]*** for the proposition that persons affected by the investigations should be told of the case against them and afforded a fair opportunity to reply. Mr. Luci cited *Justice Amraphael Mbogholi Msagha v Chief Justice of the Republic of Kenya & 7 others* [37]in which the court cited Lord Wright in *General Medical Council v Sparckman* ***[38]*** thus:-

> "*If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision.*"

78. Mr. Luci also cited *Wiseman v Borneman* [39] and *Council of Civil Service Unions v Minister of the Civil Service* [40]in support of the duty to act fairly. Additionally, he cited *Constitutional and Administrative Law* ***[41]*** for the proposition that the rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under a duty to "act judicially. He submitted that where the right to natural justice has been vitiated, such action is made *unfairly and with bias*. He relied on *Kenya Revenue Authority v Menginya Salim Murgani* ***[42]*** which emphasised the need for decision making bodies to achieve the degree of fairness appropriate to their task.

79. A convenient starting point in tackling the issue under consideration is to explain the phrase procedural impropriety. A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not followed or if the "rules of natural justice' are not adhered to. Decision makers must act fairly in reaching their decisions. This principle applies solely to matters of procedure, as opposed to considering the substance of the decision reached.

80. The term *procedural impropriety* was used by Lord Diplock in *Council of Civil Service Unions v. Minister for the Civil Service* [43] to explain that a public authority could be acting *ultra vires* if it commits a serious procedural error. His Lordship regarded procedural impropriety as one of three broad categories of judicial review, the other two being illegality and irrationality. [44]

81. Procedural impropriety generally encompasses two things: procedural *ultra vires*, where administrative decisions are challenged because a decision-maker has overlooked or failed to properly observe statutory procedural requirements; and common law rules of natural justice and fairness. [45] Lord Diplock noted that "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," is a form of procedural impropriety.[46]

82. In recent years, the common law relating to Judicial Review of administrative action on the basis of procedural impropriety has undergone a rather remarkable transformation. The courts, using the language of "natural justice" and, more recently and more dramatically, "fairness," have brought about a situation in which a broad range of statutory authorities are subject to the observance of at least a modicum of procedural decency.[47] That a decision is against natural justice does not mean merely that it is against evidence or wrong in law; it means that the decision is such a one that the person appealing has not had his case properly considered by the Judge who decided it.

83. However erroneous the judgment may be in law or whatever injustice that erroneous judgment may inflict, the erroneousness or injustice of the judgment does not make the judgment contrary to natural justice. A decision contrary to natural justice is where the presiding Judge or Magistrate or Tribunal denies a litigant some right or privilege or benefit to which he is entitled to in the ordinary course of the proceedings, as for instance refusing to allow a litigant to address the court, or where he refuses to allow a witness to be cross- examined, or cases of that kind. [48]

84. Section **4** of the FAA Act re-echoes Article **47** and reiterates the entitlement of every Kenyan to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. In all cases where a person’s rights or fundamental freedoms is likely to be affected by an administrative decision, the administrator must give the person affected by the decision prior and adequate notice of the nature and reasons for the proposed administrative action; an opportunity to be heard and to make representations; notice of a right to a review or internal appeal against the decision where applicable; a statement of reasons; notice of the right to legal representation and right to cross-examine; as well as information, materials and evidence to be relied upon in making the decision or taking the administrative action. It is noteworthy that some of these elements are mandatory while some are only required where applicable.

85. Subsection **4** further obliges the administrator to accord affected persons an opportunity: to attend proceedings in person or in the company of an expert of his choice; a chance to be heard; an opportunity to cross-examine persons who give adverse evidence against him; and request for an adjournment of proceedings where necessary to ensure a fair hearing.

86. It is beyond argument that the power of judicial review power is no longer grounded in the common law, and therefore susceptible to being restricted or ousted by legislation. Instead the Constitution itself has conferred fundamental rights to administrative justice and through the doctrine of constitutional supremacy prevented legislation from infringing on those rights. Essentially, the clause has the effect of ‘constitutionalizing’ what had previously been common law grounds of Judicial Review of administrative action. This means that a challenge to the lawfulness, procedural fairness or reasonableness of administrative action, or adjudication of a refusal of a request to provide reasons for administrative actions involves the direct application of the constitution.[49]

87. The right of a person to defend himself in the face of a decision potentially affecting his rights or interests necessarily implies that the person must receive prior notice of the facts on which the decision will be based. Failure to give proper notice is itself a denial of natural justice and of fairness.

88. Whether or not a person was given a fair hearing of his case depends on the circumstances and the type of the decision to be made. The minimum requirement is that the person gets the chance to present his case. In the most recent edition of De Smith's *Judicial Review of Administrative Action*, it is asserted:- "The emphasis that the courts have recently placed on an implied duty to exercise discretionary powers fairly must normally be understood to mean a duty to adopt a fair procedure. But there is no doubt that the idea of fairness is also a substantive principle."[50]

89. The standards of fairness are not immutable. They may change both in general and in their application to decisions of a particular type. The principles of fairness are not to be applied by rote identically in every situation. What fairness demands is dependent on the context of the decision, and this is to be taken into account in all its aspects. [51]

90. Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.[52] In addition, the foregoing implies that the range of procedural protection will vary, depending on the context, with greater protections in some contexts rather than others. Courts have also used “fairness” as an explanation of other grounds of review. This is apparent, for example, in relation to judicial review for breach of substantive legitimate expectations. The courts have also used fairness as the explanatory basis for reviewing mistakes of fact. Courts also use fairness to rationalize judicial review of decisions based on “wrongful” or “mistaken” assessments of evidence. However, in all of the above contexts, fairness has operated as a conclusion or explanatory norm of the main ground for judicial review (for example, illegality or substantive legitimate expectations) rather than as the primary norm *per se* by which the relevant administrative decision was judged.

91. In this regard, the Court of Appeal decision in *J.S.C. v Mbalu Mutava* [53] may usefully be cited. It succinctly elucidated the law in cases of this nature. It held that the right to a fair administrative action under Article **47** is a distinct right from the right to a fair hearing under Article **50(1) (2)**. Fair administrative action broadly refers to administrative justice in public administration and is concerned mainly with control of the exercise of administrative powers by state organs and statutory bodies in the execution of constitutional duties and statutory duties guided by constitutional principles and policy considerations and that the right to a fair administrative action, though a fundamental right is contextual and flexible in its application and can be limited by law.[54] It further held that fair hearing under Article **50 (1)** applies in proceedings before a court of law or independent and impartial tribunals or bodies.

92. Contextualizing the above principles to the facts and circumstances of this case, as noted earlier, the factual matrix which triggered these proceedings is essentially uncontroverted. The applicant admits receiving the letter dated 14th February 2019 inviting it to respond to issues relating to supply, delivery, installation and testing of the KIEMS kits including ownership of the company. The said communication was

clear on the purpose of the invitation. It is dated 14th February 2019 and it specified the date, time and place the applicant were required to present themselves. It even went further to notify them to appear before the Committee with a comprehensive written submission and relevant documentation regarding the issues cited in the letter. Infact the letter went further to notify the applicant that they were at liberty to appear together with any other officials that my assist them in responding to the audit matters.

93. Sincerely, with the foregoing clear communication, the argument that the applicant was not notified the purpose of the invitation or the issues to be discussed cannot stand. It cannot be said that its rights to be informed of the case confronting it were violated. Above, they admit attending the meeting, making oral presentations and even submitted a written Memorandum. Consistent with the authorities cited above, the applicant cannot be heard to say that the decision suffers from any procedural impropriety. As the Court of Appeal held in the above cited case, cases are context sensitive. The facts and circumstances of this case do not disclose any violation of the right to natural justice of breach of section **4** of the FAA Act as read with Article **47**.

94. Next, I will address the next issue raised by the applicant's counsel on alleged violation of the right to legitimate expectation. Mr. Luci submitted that the applicant had a legitimate expectation that they were contracting with the IEBC under defined legal regime including under the PPAD Act, 2005 (Repealed) and the PPAD Act, 2015 as read with the Companies Act, Cap 486 (Repealed) and Companies Act, 2015. He argued that it was the applicant's legitimate expectation that obligations accruing under the contract including payment of the contractual sum would be honoured when it fell due. He also argued that the applicant had a legitimate expectation that the subject proceedings would be conducted in accordance with the law. He relied on *R v Principal Secretary Ministry of Mining ex-parte Airbus Helicopters Southern Africa (PTY) Ltd**[55]*** which stated that the cornerstone of legitimate expectation is a promise made to a party by a public body that it will act or not act in a particular manner and that for the promises to hold it must be made within the confines of the law i.e. with actual or ostensible authority. The court cited *"Judicial Review of Administrative Action"**[56]*** that- *a legitimate expectation arises where a person responsible for taking a decision has induced in someone a reasonable expectation that he will receive or retain a benefit or advantage. It is a basic principle of fairness that legitimate expectations ought not to be thwarted*. Mr. Luci argued that the applicant's legitimate expectation created by section **7(2) (m)** of the FAA Act has been violated.

95. In resolving the issue under consideration, I find it fit to explain that a procedural legitimate expectation rests on the presumption that a public authority will follow a certain procedure in advance of a decision being taken. In adjudicating legitimate expectation claims, the court follows a two-step approach. *First,* it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. *Second,* if the answer to this question is in affirmative, the second question is whether that expectation is legitimate. If the answer to the second question is equally affirmative, then the court will hold the administrator to the representation, and enforce the legitimate expectation.

96. The first step in the analysis has both an objective and a subjective dimension. *First*, it is asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. This requirement also implies that individuals are required to know what the law is and consequently when a representation is lawful or not and hence can be relied upon or not. [57] Once a reasonable expectation exists, the administrator is required to act in accordance with that expectation, except if there are public interest considerations, which outweighs the individual's expectation.

97. The basic premise underlying the protection of legitimate expectations seems to be the promotion of legal certainty. [58] Individuals should be able to rely on government actions and policies and shape their lives and planning on such representations. The trust engendered by such reliance is said to be central to the concept of the rule of law.[59] Forsyth describes the impact of such trust and the role the protection of legitimate expectations play in this regard aptly as follows:-

> "*Good government depends in large measure on officials being believed by the governed. Little could be more corrosive of the public's fragile trust in government if it were clear that public authorities could freely renege on their past undertakings or long-established practices."**[60]***

98. Legal certainty is not, however the only principle at play in legitimate expectation doctrine. The counter value of legality is especially important in the context of the substantive protection of legitimate expectations. [61] The fear in protecting legitimate expectations substantively is that administrators may be forced to act *ultra vires.* That would be the case where an administrator has created an expectation of some conduct, which is beyond his authority or has become beyond his authority due to a change of law or policy. If the administrator were consequently held to that representation, he would be forced to act *contra legem.* It is clear that such representations will not be upheld by the court.[62] The value of legality in law has led to the requirement that the expectation must be one of lawful administrative action before it can be either reasonable or legitimate. Legality therefore seems to take precedence over legal certainty in law. As stated above, there can be no reasonable expectation where the representation is of unlawful conduct and hence the question of legitimacy does not arise.

99. The requirements for the existence of such an expectation in South African law (whose legislation is similar to ours) were restated in *National Director of Public Prosecutions v Philips*.[63] These include:- **(i)** that there must be a representation which is "clear, unambiguous and devoid of relevant qualification," **(ii)** that the expectation must be reasonable in the sense that a reasonable person would act upon it, **(iii)** that the expectation must have been induced by the decision-maker and **(iv)** that it must have been lawful for the decision-maker to make such representation. If such an expectation exists, it will be incumbent on the administrator to respect it. If the court finds that a legitimate expectation did in fact exist, it will ordinarily invalidate the administrative action and refer the matter back to the decision-maker to deal with it in a procedurally fair manner.

100. Discussing legitimate expectation, *H. W. R. Wade & C. F. Forsyth* ***[64]*** states thus: -

> "*It is not enough that an expectation should exist; it must in addition be legitimate….* ***First*** *of all, for an expectation to be legitimate it must be founded upon a promise or practice by the public authority that is said to be bound to fulfil the expectation….* ***Second****, clear statutory words, of course, override an expectation howsoever founded….* ***Third,*** *the notification of a relevant change of policy destroys any expectation founded upon the earlier policy…."*

"*An expectation whose fulfillment requires that a decision-maker should make an unlawful decision, cannot be a legitimate expectation. It is inherent in many of the decisions, and express in several, that the expectation must be within the powers of the decision-maker before any question of protection arises. There are good reasons why this should be so: an official cannot be allowed in effect to rewrite Acts of Parliament by making promises of unlawful conduct or adopting an unlawful practice."* (Emphasis added)

101. It follows that statutory words override an expectation howsoever founded. Thus, a decision maker cannot be required to act against clear provisions of a statute just to meet one's expectations otherwise his decision would be out rightly illegal and a violation of the principle of legality, a key principle in Rule of Law. There cannot be legitimate expectation against the clear provisions of a statute. The doctrine cannot operate against clear provisions of the law and that it must be devoid of relevant qualification.

102. Earlier in this judgment, I reproduced the constitutional and statutory provisions which prescribe the mandate of the National Assembly and the powers of the PAC. I have already held that the impugned decision does not suffer from procedural impropriety. I also held that the alleged violation of section **4** of the FAA Act and Article **47** rights has not been proved. Under challenge is a decision arrived at after due process has been followed. There is nothing to show the tests for legitimate expectation discussed above have been demonstrated. Accordingly, applying the tests discussed above to this case, I find and hold that the argument that the applicant's right to legitimate expectation has been violated collapses.

103. I now turn to what I think is the core issue in this case. This is the legal validity of the following recommendations made by the National Assembly the subject of challenge in the issue under discussion. These are:-

*a. **That** pursuant to the provisions of Section **41** of the PPAD Act, 2015, the Public Procurement Regulatory Authority Board investigates, within 60 days, the conduct of M/S. IDEMIA (formally operating as Morpho, OT Morpho, SAFRAN Identity & Security) and if it finds the company culpable, enters the names of the company in the central repository of debarred firms and ensures that the firm is precluded from participating, award or entering into any kind of procurement contract payable using public funds under any state department or agency in the Republic of Kenya for a period of 10 years.*

*b. **That** all contracts entered into between the company known as M/S. IDEMIA in its current name herein or in its former names of Morpho, OT Morph, SAFRAN Identity & Security and the IEBC be investigated and if found to have contravened section **974, 975, 979** or any other section of the Companies Act or any other law, be nullified.*

*c. **That** the IEBC takes immediate legal action to recover all monies unlawfully paid under the contract(s) entered into between itself and M/S. IDEMIA in its current name herein or in its former names of Morpho, OT Morph, SAFRAN Identity & Security or otherwise howsoever; as the contracts were entered into in contravention of the mandatory provisions of Section **974** as read together with section **975** and **979** of the Companies Act.*

104. From the above recommendations, and from the facts presented by the parties and from the respective advocates submissions discussed below, the contest as I see it revolves around- (a) the legal validity or otherwise of National Assembly's recommendation on debarment under section **41** of the PPAD Act and or the applicability of the said section;

(b) the applicability or otherwise of sections **970, 975** and **979** of the Companies Act to the subject contracts and (c) the legality or otherwise of the recommendation to recover monies paid to IDEMIA under the contradicts in question and the legal validity or otherwise of direction to cancel the said contracts. At the centre of these three points is whether the National Assembly properly construed, understood and applied the law and whether they exercised powers they do not possess. Put differently, whether the said recommendation(s) is tainted with illegality.

105. Mr. Luci's assault on the legal validity of the above recommendations stands on several fronts. *First,* he argued that the recommendation to the fourth Interested Party to debar the applicant for a period not less than 10 years is flawed because section **41** of the PPAD Act does not confer the National Assembly any such authority. He submitted that the debarment is not anchored on the PPAD Act. *Second*, he argued that the National Assembly is not legally empowered to prescribe penalties. *Third*, the National Assembly's direction to IEBC to recover funds paid to IDEMIA alleging that the funds were paid in contravention of the law is not founded on law and amounts to performing a judicial function. *Fourth*, that the National Assembly purported to illegally determine contracts between IDEMIA and the IEBC, thus usurping functions constitutionally vested in a court of law.

106. *Fifth,* Mr. Luci submitted that the impugned decision is premised on an error of law because it is premised on an alleged failure to comply with section **974** of the Companies Act. He argued that an international tender does not fall under the said provision and that section **89** of the PPAD Act as read with Section **974** of the Companies Act does not obligate or otherwise require foreign companies and/or entities desirous of participating in international tenders floated by public/procuring entities to register with the Registrar of Companies or obtain a certificate of compliance before entering into such contracts. *Sixth,* he argued that the said provisions do not support rescission of the contract or withholding of payments.

107. *Seventh,* Mr. Luci submitted that the law invoked by the National Assembly is inapplicable. He cited section **1(3)** of the Companies Act which provides that the Cabinet Secretary shall by notice published in the *gazette,* bring into operation the remaining provisions of the Act on such date or such different dates as the Cabinet Secretary appoint. Flowing from the said provisions, he argued that the regulations operationalising the requirement for local registration by a foreign company and more particularly the *"Application for Registration as a Foreign Company" Form FC 1* were published by the Registrar of Companies on the *30th of June, 2017*, under *Second Schedule* to *Legal Notice No 103 of 2017*. He pointed out that the subject contract was executed on the *31st of March, 2017, three (3) months* prior to the coming into effect of the provisions relied upon, hence the illegality of the National Assembly's actions.

108. To fortify his arguments, Mr. Luci placed reliance on section **22** of the *Interpretation and General Provisions Act*, [65] which provides that

> “*where a written law repeals wholly or partially a former written law and substitutes provisions for the written law repealed, the repealed law shall remain in force until the substituted provisions come into operation.”*

He also cited section **19** of the *Interpretation and General Provisions Act* [66] which provides that

> “*where any written law or part of a written law, came or comes into operation on a particular day, it shall be deemed to have come or shall come into operation immediately on the expiration of the day next preceding such day*.”

Additionally, he cited Article **116(2)** which provides that,

> “*subject to clause **(3)** an Act of Parliament comes into force on the fourteenth day after its publication in the Gazette unless the Act stipulates a different date on or time at which it will come into force*.”

109. He argued that it was a patent error of law to require the applicant to comply with a law which was not yet in force. He relied on the treatise *Statutory Interpretation* ***[67]*** quoted in *R v Speaker of National Assembly and 4 Others ex-parte Edwrad R.O. Ouko* (infra) thus:-

> “*the essential idea of a legal system is that current law should govern current activities. Elsewhere in this work a particular Act is likened to a floodlight switched on or off, and the general body of law to the circumambient air. Clumsy though these images are, they show the inappropriateness of* retrospective laws*. If we do something today, we feel that the law applying to it should be the law in force today, not tomorrow’s backward adjustment of it. Such, we believe is the nature of the law … those who have arranged their affair … in reliance on a decision which has stood for many years should not find that their plans have been retrospectively upset*.”

110. He cited the Supreme Court of Kenya in *S.K. Macharia and Another v Kenya Commercial Bank Limited and others* [68] that:-

> “a retroactive law is not unconstitutional unless it *inter alia impairs obligations under contracts, divests rights or is constitutionally forbidden… a statute which takes away or impairs vested rights acquired under existing laws, or creates new obligations or imposes a new duty in respect of transaction already past, must be presumed to be intended not to have retrospective operation*.”

111. Fortified by the above authorities, Mr. Luci argued that the impugned decision was founded on a clear error and fatal misapprehension of law because Section **974** as read with **975** of the Companies Act had not been operationalized at the time of the subject contract was signed.

112. He faulted the National Assembly for assuming the role of the investigative agencies and the courts by directing the IEBC to take immediate legal action to recover sums paid to the applicant. He cited *Republic v Speaker of the National Assembly and 4 others Ex-Parte Edward R.O. Ouko**[69]*** for the proposition that parliamentary privilege though recognised, does not extend to violation of the Constitution. He cited *Republic v Kenya Revenue Authority ex-parte Tom Odhiambo Ojienda, SC T/A Prof Tom Ojienda and Associates**[70]*** which cited Lord Diplock in *CCSU v Minister for the Civil Service**[71]*** thus:-

> “*To qualify as a subject for judicial review the decision must have consequences which affect some person (or body of persons) other than the decision-maker, although it may affect him too. It must affect such other person either (a) by altering rights or obligations of that person which are enforceable by or against him in private law; or, (b) by depriving him of some benefit or advantage which either (i) he has in the past been permitted by the decision-maker to enjoy and which he can legitimately expect to be permitted to continue to do until there has been communicated to him some rational ground for withdrawing it on which he has been given an opportunity to comment, or (ii) he has received assurance from the decision-maker will not be withdrawn without giving him first an opportunity of advancing reasons for contending that they should not be withdrawn*.”

113. Counsel for IEBC strongly supported the applicant’s position that the recommendations under challenge are tainted with illegality. He submitted that the contract for the provision of Biometric System Vendor Support and Maintenance Services is dated 7th January, 2016, and, it is a term of the said contract that it remains in force for a period of five (5) years from the date of execution, hence it is to last until 7th January, 2021. He submitted that the contract provides alternative grounds for termination being termination among them default, insolvency and termination for convenience of the parties which may attract an element of penalty on either party depending on the circumstances leading to the termination.

114. He pointed out that the Agreement for Sale and Purchase of Hardware, Services and Licences of Software for an Integrated Election Management System between the Commission and Safran Identity and Security SAS (SIS) dated 31st March, 2017 for use in the 2017 general election as well as support, installation and training was amended on 28th September 2017 to provide for additional services for the repeat presidential election which took place on 26th October 2017. He argued that this was an extension of the original contract, hence the terms governing the original contract apply, and, that, it was to remain in force up to the last day of the warranty period or upon final payment under the contract whichever is later.

115. Counsel submitted that PAC acted *ultra vires* by recommending that the IEBC takes immediate legal action to recover all monies “unlawfully” paid under the said contract(s) citing alleged contravention of Section **974** as read together with sections **975** and **979** of the Companies Act. To fortify his argument, he cited the definition of *ultra vires* in the *Black’s Law Dictionary* which means *unauthorized; beyond the scope of power allowed or granted by a corporate charter or by law.* He relied on *Republic v Secretary of the Firearms Licensing Board & 2 others ex parte Senator Johnson Muthama**[72]*** which adopted the tests for *ultra vires* in *Pastoli v Kabale Local Government Council & others**[73]*** and submitted that the said recommendation is *ultra vires* because only a court of law can declare contracts illegal. To further buttress his position, he cited *Centre for Rights Education and Awareness & 2 others v Speaker of the National Assembly & 6*

others[74] for the holding that the interpretation of the laws is the proper and peculiar province of the courts and that the courts were designed to be an intermediate body between the people and the legislature, in order, among other things, to keep the latter within the limits assigned to their authority. He urged that the interpretation of the laws is the province of the courts and cited *Apollo Mboya v Attorney General & 2 others*[75] which held that the court interprets the law and determines how it should be applied and that the existence of separation of powers is the safeguard created by the Constitution.

116. He argued that even a court cannot declare a contract illegal on its own motion. He cited *Gatobu M'ibuutu Karatho v Christopher Muriithi Kubai*[76] for the proposition that a court of law cannot rewrite a contract and urged that there exists a valid contract between the IEBC and IDEMIA which remains in force till 2021 unless it is terminated by the parties in accordance with contracts termination clause or it is declared illegal, void or enforceable by a court of law. He cited *Judicial Service Commission v Speaker of the National Assembly & 8 others*[77] for the proposition that the court has jurisdiction to overrule the Parliament when it acts *ultra vires*. He submitted that PAC acted illegally by recommending penal sanctions including debarring because the Companies Act prescribes penalties in section **974(3)** and **(4).** He submitted that such a fine is imposed by a court of law after hearing the case and Parliament cannot abrogate this role, hence, PAC acted *ultra vires* by purporting to recommend sentences that should be meted to the applicant.

117. Additionally, counsel submitted that the law does not operate retrospectively. He submitted that the contractual relationship between the IDEMIA and IEBC dates back to the year 2013, hence, the Companies Act 2015 and the PPAD Act 2015 cannot be applied to contracts that were in place before they came into force. He relied on section **23(3)** of the Interpretation and General Provisions Act [78] and cited *Samuel Kamau Macharia and Another v Kenya Commercial Bank Ltd and 2 Others*[79] in which the Supreme Court considering the question whether the retrospective application of a statutory provision is unconstitutional stated :-

> "*As for non-criminal legislation, the general rule is that all statutes other than those which are merely declaratory or which relate only to matters of procedure or evidence are prima facie prospective, and retrospective is not to be given to them unless, by express words or necessary implication, it appears that this was the intention of the legislature. (Halsbury's Laws of England, 4th Edition Vol. 44 at p.570). A retroactive law is not unconstitutional unless it is in the nature of a bill of attainder; (ii) impairs the obligation under contracts; (iii) divests vested rights; or (iv) is constitutionally forbidden" (Emphasis ours)*

118. He submitted that the provisions of sections **974, 975** and **979** of the Companies Act were not applicable to IDEMIA at the time of executing the contracts in question as no regulations were in place. He cited section **974(1)** of the Companies Act which provides that: -*A foreign company shall not carry on business in Kenya unless-*

> *a) It is registered under this Part; or*
>
> *b) It has applied to be registered and the application has not been dealt with within the period prescribed for the purposes of this section.*

119. He also cited section **975(2)(a)** of the Companies Act which provides that: -

> *The Registrar shall approve the application for registration and register the company by entering its name and other particulars in the Foreign Companies Register, if the application: contains the information prescribed by the regulations for the purposes of this section (emphasis added).*

120. He submitted that for a foreign company to be registered in Kenya as per section **974** of the companies Act, simultaneous application of section **975** of the Act and the Regulations therefore is inevitable. He submitted that section **974** which requires mandatory registration of a foreign company before carrying on business in Kenya, is premised on section **975** which provides for the procedure for registration. Accordingly, he argued that without setting section **975** in motion, section **974** which requires mandatory registration of a foreign company lacks the feet to stand on its own.

121. Further, counsel submitted that the Regulations operationalizing section **974** of the Act which requires mandatory registration of a foreign company were published on 16th June, 2017 vide the *Legal Notice No. 103 of 2017*, whereas the subject contract were executed on 31st of March, 2017, about 3 months prior to the coming into effect of the requisite operationalizing Regulations. He submitted that as at the time of executing the contract in question, the Regulations were not in place, hence, section **974** of the Act could not stand in the absence of the said Regulations. He further submitted that registration of foreign companies could not be legally effected under the Act and maintained that sections **974** and **975** were not applicable to IDEMIA at the time of executing the contract in question.

122. Additionally, IEBC's counsel questioned the applicability of section **41** of the PPAD Act arguing that the act came into force on 7th January, 2016 while the contracts were entered into before the commencement date of the said act.

123. In resolving the issue(s) under discussion, I find it convenient to start by stating that the power of the Court to Review an administrative action is extraordinary. It is exercised sparingly, in exceptional circumstances where illegality, irrationality or procedural impropriety has been proved. How that conclusion is to be reached is not statutorily ordained and will depend on established principles informed by the constitutional imperative that administrative action must be lawful, reasonable and procedurally fair.[80]

124. A useful starting point is *Council of Civil Service Unions v. Minister for the Civil Service*[81] in which Lord Diplock enumerated a threefold classification of grounds of Judicial Review, any one of which would render an administrative decision and/or action *ultra vires*. These grounds are; *illegality, irrationality* and *procedural impropriety*. Later judicial decisions have incorporated a fourth ground to Lord Diplock's classification, namely; *proportionality*[82]. What Lord Diplock meant by *"Illegality"* as a ground of Judicial Review was that *the decision-maker must understand correctly the law that regulates his decision-making and must give effect to it.* His Lordship explained the term *"Irrationality"* by succinctly referring it to *"unreasonableness"* in Wednesbury Case.[83] By *"Procedural Impropriety"* His Lordship

sought to include those heads of Judicial Review, which uphold procedural standards to which administrative decision-makers must, in certain circumstances, adhere.

125. Judicial intervention is posited on the idea that the objective is to ensure that the public body did remain within the area assigned to it by the law. A decision which falls outside that area can therefore be described, interchangeably, as: a decision to which no reasonable decision-maker could have come; or a decision which was not reasonably open in the circumstances.

126. Illegality is divided into two categories: those that, if proved, mean that the public authority was not empowered to take action or make the decision it did; and those that relate to whether the authority exercised its discretion properly. Grounds within the first category are simple *ultra vires* and errors as to precedent facts; while errors of law on the face of the record, making decisions on the basis of insufficient evidence or errors of material facts, taking into account irrelevant considerations or failing to take into account relevant ones, making decisions for improper purposes, fettering of discretion, and failing to fulfill substantive legitimate expectations are grounds within the second category.

127. The *ultra vires* principle is based on the assumption that Judicial Review is legitimated on the ground that the courts are applying the intent of the legislature. It's true the Constitution and the statues clearly prescribe the mandate of the National Assembly. However, such power will always be subject to certain conditions contained in the Constitution and the enabling legislation. The courts' function is to police the boundaries stipulated by the Constitution and the enabling statute. The *ultra vires* principle was used to achieve this end in two related ways. In a narrow sense it captured the idea that the relevant State organ must have the legal capacity to act in relation to the topic in question.

128. In a broader sense the *ultra vires* principle has been used as the vehicle through which to impose a number of constraints on the way in which the power given to the State Organ has been exercised: it must comply with the Constitution, the law, rules of fair procedure, it must exercise its discretion to attain proper and not improper purposes, it must not act unreasonably etc. The *ultra vires* principle thus conceived provided both the basis for judicial intervention and also established its limits.

129. The task for the courts in evaluating whether a decision is illegal is essentially one of construing the content and scope of the instrument conferring the duty or power upon the decision-maker. The instrument will normally be the Constitution, a statute or delegated legislation. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring public bodies to act within the ''four corners'' of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of the Constitution and the enabling legislation. The courts have a duty to ensure that all the organs created by the Constitution respect and observe the Constitution and the enabling legislation.

130. Differently put, whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution[84] and the relevant statutory provisions and applicable Regulations. The court is obliged not only to avoid an interpretation that clashes with the constitutional values, purposes and principles but also to seek a meaning that promotes constitutional purposes, values, principles, and which advances Rule of Law, Human Rights and Fundamental Freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance.

131. *First*, I will examine the question whether the impugned recommendations are tainted with illegality. As Lord Diplock (supra) said, decision makers must understand the law and apply it properly. In this regard, section **1 (3)** of the Companies Act provides that: -

> *(3) The Cabinet Secretary shall, by notice published in the Gazette, bring into operation the remaining provisions of this Act on such date or such different dates as the Cabinet Secretary appoint.*
>
> *(4) If the Cabinet Secretary has failed to bring all of the remaining provisions into operation within nine months after the date on which this section has come into operation, the Parliament may, by resolution of each of its Houses, bring into operation such of those provisions as have not yet been commenced*

132. Section **1026** of the Companies Act provides that: - (1) The Cabinet Secretary may make regulations, not inconsistent with the provisions in the Sixth Schedule, containing provisions of a savings or transitional nature relating to the transition from the application of the repealed Act to and in relation to companies (including foreign companies) to the application of this Act. (2) Any such provision may, if those regulations so provide, have effect from the date of the passing of this Act or a later date.

133. There is no contest that the Regulations were promulgated months after the subject contacts were signed, hence, the cited provisions of the Companies Act were not in force. Similarly the PPAD Act was assented on 18th December 2015 and its commencement date was 7th January 2016, hence section **41** of the Act was in applicable. The Repealed PPAD

Act at section **115** provided for debarment under the circumstances listed therein for a period of not less than **5** years. None of the said circumstances or procedure prescribed in the said section of the repealed PPAD Act were cited. The National Assembly was specific in its recommendation. It cited section **41** of the PPAD Act, 2015 and prescribed a period of **10** years. Put differently, by invoking provisions of the Companies Act, 20125 and the PPAD Act, 2015 which legislations came into effect long after the signing of the subject contracts, the National Assembly and the PAC engaged into what is called retrospective application of the law and in the process committed an error of law.

134. The National Assembly and the PAc fell into an error of law because an important legal rule forming part of what may be described as our legal culture provides that no statute is to be construed as having retrospective operation (in the sense of taking away or impairing a vested right acquired under existing laws) unless the legislature clearly intended the statute to have effect.[85] In *Bellairs v Hodnett and Another****[86]*** it was said that not only is there a presumption against retrospective activity, but *"even where a statutory provision is expressly stated to be retrospective in its operation it is an accepted rule that, in the absence of contrary intention appearing from the statute, it is not*

treated as affecting completed transactions …"

135. The basis of this presumption is elementary considerations of fairness which dictate that individuals should have an opportunity to know what the law is and to conform their conduct accordingly. In *Du Toit v Minister of Safety and Security* ***[87]*** the court referred to an English decision that *"generally there is a strong presumption that a legislature does not intend to impose a new liability in respect of something that has already happened, because generally it would not be reasonable for a legislature to do that…"*

136. The position in English Law was aptly stated by the House of Lords in *L'Office Cherifien Des Phosphates and Another v Yamachita-Shinnihon Steamship Company Ltd: The Boucraa*.[88] In that case the main opinion was delivered by Lord Mustill who referred with approval to the following statement by Staughton LJ in *Secretary of State for Social Security and Another v Tunnicliffe* :-[89]

> *"In my judgment the true principle is that Parliament is presumed not to have intended to alter the law applicable to past events and transactions in a manner which is unfair to those concerned in them, unless a contrary intention appears. It is not simply a question of classifying an enactment as retrospective or not retrospective. Rather it may well be a matter of degree – the greater the unfairness, the more it is to be expected that Parliament will make clear if that is intended."*

137. Lord Mustill continued:-[90]

> *"Precisely how the single question of fairness will be answered in respect of a particular statute will depend on the interaction of several factors, each of them capable of varying from case to case. Thus, the degree to which the statute has retrospective effect is not a constant. Nor is the value of the rights which the statute effects, or the extent to which the value is diminished or extinguished by the retrospective effect of the statute. Again, the unfairness of adversely affecting the rights, and hence the degree of unlikelihood that this is what Parliament intended, will vary from case to case. So also will the clarity of the language used by Parliament, in the light shed on it by consideration of the circumstances in which the legislation was enacted. All these factors must be weighed together to provide a direct answer to the question whether the consequences of reading the statute with the suggested degree of retrospectivity are so unfair that the words used by Parliament cannot have been intended to mean what they might appear to say."*

138. Innes CJ in *Curtis v Johannesburg Municipality* ***[91]*** stated:-

> *"The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that there should if possible be so interpreted as not to take away rights actually vested at the time of their promulgation. The legislature is virtually omnipotent, but the Courts will not find that it intended so inequitable a result as to the destruction of existing rights unless forced to do so by language so clear as to admit of no other conclusion."*

139. Lord Brightman said in this regard that:-[92]

> *"A statute is retrospective if it takes away or impairs a vested right acquired under existing laws, or creates a new obligation, or imposes a new duty, or attaches a new disability, in regard to events already past. There is however said to be an exception in the case of a statute which is purely procedural, because no person has a vested right in any particular course of procedure, but only a right to prosecute or defend a suit according to the rules for the conduct of an action for the time being prescribed. But these expressions 'retrospective' and 'procedural', though useful in a particular context, are equivocal and therefore can be misleading.*
>
> *A statute which is retrospective in relation to one aspect of a case (eg because it applies to a pre- statute cause of action) may at the same time be prospective in relation to another aspect of the same case (eg because it applies only to the post-statute commencement of proceedings to enforce that cause of action); and an Act which is procedural in one sense may in particular circumstances do far more than regulate the course of proceedings, because it may, on one interpretation, revive or destroy the cause of action itself."*

140. The learned judge accordingly further stated that:-

> *'Whether a statute is to be construed in a retrospective sense, and if so to what extent, depends on the intention of the legislature as expressed in the wording of the statute, having regard to the normal canons of construction and to the relevant provisions of any interpretation statute.'*

141. The reasoning behind the presumption against the retrospective application of legislation is premised upon the unwillingness of the courts to inhibit vested rights. In this respect Innes CJ in *Curtis v Johannesburg Municipality* ***[93]*** stated:-

> *"The general rule is that, in the absence of express provision to the contrary, statutes should be considered as affecting future matters only; and more especially that they should if possible be so interpreted so as not to take away rights actually vested at the time of their promulgation."*

142. Applying the above jurisprudence to the facts of this case, it is my finding that a proper construction of the impugned decision, the provisions of Constitution and the enabling legislations leave me with no doubt that the impugned decision to the extent that it invokes provisions of the law which were not in force as at the time the contracts in question were signed is illegal. It offends the principle that prohibits retrospective application of the law. It offends the principle of legality. For avoidance of doubt, the contracts in question were executed prior to the provisions of the Companies act and the PPAD Act which were invoked in making the challenged recommendations. In the so doing, the National Assembly and PAC fell into an error of the law.

143. Similarly, the recommendation purporting to direct IEBC to recover all monies allegedly "unlawfully" paid to IDEMIA is *ultra vires* the powers of the National Assembly and the powers of the PAC because only a court of law can determine the legal validity or otherwise of the said payments. Further, by recommending the cancellation of contracts, the National Assembly and PAC fell into error and exercised jurisdiction it did not possess. To that extent, the first Respondent and PAC abrogated to themselves judicial functions which the law has not vested into it, hence, exercising in excess of their jurisdiction.

144. Further, for the impugned recommendations to stand, they must pass the rationality test. Rationality, as a ground for the Review of an administrative action is dealt with in Section 7(2) (i) of FAA Action which provides that:-

> "A *court or tribunal under subsection (1) may review an administrative action or decision, if-*
>
> *i. the administrative action or decision is not rationally connected to-*
>
> *a) the purpose for which it was taken;*
>
> *b) the purpose of the empowering provision;*
>
> *c) the information before the administrator; or*
>
> *d) the reasons given for it by the administrator*."

145. The test for rationality was stated in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others****[94]*** as follows:-

> "*The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance and undermine an important constitutional principle."*

146. In *Trinity Broadcasting (Ciskei) v ICA of*, [95] Howie P stated the rationality test as follows:-

> "*In the application of that test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at*."

147. A reading of the Constitution and the enabling statute leaves me with no doubt that judicial authority is vested in courts, not in the National Assembly or PAC hence, the recommendations under challenge are not rationally connected to the powers conferred upon them by the law. It was sufficient for them to recommend investigations but not to suggest or prescribe penalties.

148. Similarly, invoking provisions of the law retrospectively, and purporting to exercise a function vested upon the courts by the law, the National Assembly's and PAC's recommendations cannot pass the test of reasonableness. Reasonableness, as a ground for the review of an administrative action is dealt with in Section **7 (2) (k)** of the FAA Act. A court or tribunal has the power to review a decision if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. In *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Other****s[96]*** O'Regan J approved the reasonableness test which was stated as follows by Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd:-****[97]***

> "*The simple test used throughout was whether the decision in question was one which a reasonable authority could reach. The converse was described by Lord Diplock* **[1976] UKHL *6***; **[1976] 3 All ER 66*5*** *at 697***[1976] UKHL *6***; , **[1977] AC 101*4*** *at 1064 as 'conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt'. These unexaggerated criteria give the administrator ample and rightful rein, consistently with the constitutional separation of powers. … Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the chief constable has struck a balance fairly and reasonably open to him*."

149. In *Carephone (Pty) Ltd v Marcus NO****[98]*** per Froneman JA, stated the test as follows:-

> "*In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' in some way or another. As long as the judge determining [the] issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order*."

150. The test of *Wednesbury unreasonableness* has been stated to be that the impugned decision must be *"objectively so devoid of any plausible justification that no reasonable body of persons could have reached it****[99]*** and that the *impugned decision had to be "verging on absurdity" in order for it to be vitiated*.[100]

151. The above stringent test has been applied in Australia. In *Prasad v Minister for Immigration*,[101] the Federal Court of Australia considered the ground. The Court held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached (at 167) and to prove such a case required "something overwhelming" (at 168). It must have been conduct which no

sensible authority acting with due appreciation of its responsibilities would have decided to adopt (page 168.3), and when "looked at objectively… so devoid of any plausible justification that no reasonable body of persons could have reached them" (at 168).

152. A decision which fails to give proper weight to a relevant factors may also be challenged as being unreasonable.[102] In this regard, the National Assembly and PAC failed or ignored relevant considerations, namely, the provisions of the law they invoked were not in force at the time the contracts were signed. It is a well-established principle that if an administrative or quasi-judicial body takes into account any reason for its decision which is bad, or irrelevant, or fails to consider relevant considerations, then the whole decision, even if there are other good reasons for it, is vitiated.[103]

153. Review by a court of the reasonableness of decision made by another repository of power is concerned mostly with the existence of justification, transparency and intelligibility within the decision-making process but also with weather the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. The following propositions can offer guidance on what constitutes unreasonableness: -

> *i. Wednesbury unreasonableness is the reflex of the implied legislative intention that statutory powers be exercised reasonably;*
>
> *ii. This ground of review will be made out when the Court concludes that the decision fell outside the area of decisional freedom which that legislative assumption authorizes, that is, outside the "range" within which reasonable minds may differ;*
>
> *iii. The test of unreasonableness is whether the decision was reasonably open to the decision- maker in the circumstances of the case. To say that the decision was "not reasonably open" is the same as saying that "no reasonable decision maker" could have made it;*

154. If a statute which confers a decision-making power is silent on the topic of reasonableness, that statute should be construed so that it is an essential condition of the exercise of the powers that it be exercised reasonably. The legal standard of reasonableness must be the standard indicated by the true construction of the statute. It is necessary to construe the statute because the question to which the standard of reasonableness is addressed is whether the statutory power has been abused.

155. Legal unreasonableness comprises any or all of the following, namely; specific errors of relevancy or purpose; reasoning illogically or irrationally; reaching a decision which lacks an evident and intelligible justification such that an inference of unreasonableness can be drawn, even where a particular error in reasoning cannot be identified; or giving disproportionate or excessive weight — in the sense of more than was reasonably necessary — to some factors and insufficient weight to others.[104]

156. The Court's role remains strictly supervisory. It is concerned with determining whether there has been a lawful exercise of power having regard, in particular, to the terms, scope and purpose of the Constitution and the statute conferring the power. In circumstances where reasonable minds might differ about the outcome of, or justification for, the exercise of power, or where the outcome falls within the range of legally and factually justifiable outcomes, the exercise of power is not legally unreasonable simply because the Court disagrees, even emphatically, with the outcome or justification. If there is an evident, transparent and intelligible justification for the decision or if the decision is within the 'area of decisional freedom' of the decision-maker, it would be an error for the Court to overturn the decision simply on the basis that it would have decided the matter differently.

157. Judicial intervention in Judicial Review matters is limited to cases where the decision was arrived at arbitrarily, capriciously or *mala fide* or as a result of unwarranted adherence to a fixed principle or in order to further an ulterior or improper purpose, or where the functionary misconceived the nature of the discretion conferred upon him and took into account irrelevant considerations or ignored relevant ones; or where the decision of the functionary was so grossly unreasonable as to warrant the inference that he had failed to apply his mind to the matter.

158. I have carefully examined the recommendations in question. A reading of the recommendation purporting to nullify the contracts in question cannot pass the legality test because only a court of competent jurisdiction can make such a determination after hearing the dispute on merit. The decision to retrospectively invoke provisions of the companies Act and the PPAD Act which were not inforce as at the time the contracts were entered into is not only illegal, but the same is irrational and unreasonable. By purporting to direct recovery of money paid pursuant to a valid contract thus performing a judicial function, the National Assembly and PAC illegally arrogated to themselves judicial functions which they do not possess. It is my finding that the recommendations under challenge are legally flawed and cannot be allowed to stand.

159. Lastly, I will address the issue whether this the application discloses a case against the fourth Interested Party.

160. Counsel for the fourth Interested Party submitted that the application is pre-mature and pre-emptive as far as the fourth Interested Party is concerned because the alleged recommendations have not been acted upon and that the orders sought are intended to arbitrary usurp the fourth interested party's statutory powers to investigate and debar.

161. He also submitted that the fourth interested Party's presence is not necessary for the court to adjudicate on the constitutional claims between the applicant and the Respondents and or to decide whether the fourth Respondent breached the applicant's constitutional Rights. He submitted that the fourth Respondent is mandated with powers to ensure compliance through Investigations and debarment as provided under section **35** and **41** of the Act. For this proposition, he cited *Canopy Insurance Brokers Ltd v KRA**[105]*** and *John Makindu Makau v The County Government of Makueni.**[106]***

162. The argument raised by counsel for fourth Interested Party brings into focus the doctrine of ripeness and whether the pleadings as presented raise any allegations against the fourth Interested Party. The reason for the joinder of the fourth Interested Party is simply because of the recommendation made under section **41** of the PPAD Act asking it to investigate and debar the applicant. There is no allegation against

the fourth Interested Party

163. The principle of ripeness prevents a party from approaching a court prematurely at a time when he/she has not yet been subject to prejudice, or the real threat of prejudice, as a result of the conduct alleged to be unconstitutional. This principle was aptly captured by Kriegler J[107] in the following words:-

> "*The essential flaw in the applicants' cases is one of timing or, as the Americans and, occasionally the Canadians call it, "ripeness"... Suffice it to say that the doctrine of ripeness serves the useful purpose of highlighting that the business of a court is generally retrospective; it deals with situations or problems that have already ripened or crystallised, and not with prospective or hypothetical ones. Although, as Professor Sharpe points out and our Constitution acknowledges, the criteria for hearing a constitutional case are more generous than for ordinary suits, even cases for relief on constitutional grounds are not decided in the air. The time of this Court is too valuable to be frittered away on hypothetical fears of corporate skeletons being discovered."*

164. Lord Bridge of Harwich put it more succinctly when he stated: -

> "*It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved."***[108]**

It is perfectly true that usually the court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed[109] or threatened as provided under Article **22** of the Constitution. The requirement of a dispute between the parties is a general limitation to the jurisdiction of the Court. The existence of a dispute is the primary condition for the Court to exercise its judicial function.[110] Ripeness asks whether a dispute exists, that is, whether it has come into being.

165. Before the court is a recommendation. There are no allegations against the fourth Respondent at all in the papers filed in court nor has it been shown that it intended to act on the recommendation. No demand letter or communication was sent to it demanding that it should not act on the report nor has it been shown that it supports the recommendation. There is nothing to show that it will act on the recommendations. Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved. The court does not solve hypothetical problems and abstract questions and declaratory actions cannot be brought unless the rights in question in such action have actually been infringed or there is a real threat of infringement. Accordingly, the pleadings do not disclose a case against the fourth Interested Party nor do they show that it was not a necessary party in these proceedings.

Conclusion

166. Flowing from my analysis and determinations herein above, the conclusion becomes irresistible that the applicant's substantive application dated 16th May 2019 succeeds only to the extent discussed above. Accordingly, it is my finding that the appropriate orders to issue in the circumstances of this case, which I hereby grant are:-

> *a. **A declaration** be and is hereby issued that the Public Accounts Committee's Report as amended and adopted by the National Assembly on 23rd April 2019 entitled "The Examination of the Report of the Auditor-General on the Financial Statements for the Independent Electoral and Boundaries Commission for the Year Ended 30th June 2017, February 2019" be and is hereby declared illegal, null and void for all purposes **only to the extent** that it purports to **retrospectively** apply the provisions of sections **974, 975, 979** of the Companies Act, 2015 and section **41** of the Public Procurement and Asset Disposal Act, 2015 to contracts signed between M/s IDEMIA (in its current name and or in its former names) and the Independent Electoral and Boundaries Commission which contracts were signed before the coming into operation of the said provisions.*

> *b. **An order of certiorari** be and is hereby issued quashing the Public Accounts Committee's Report as amended and adopted by the National Assembly on 23rd April 2019 entitled "The Examination of the Report of the Auditor-General on the Financial Statements for the Independent Electoral and Boundaries Commission for the Year Ended 30th June 2017, February 2019" **only to the extent** that it purports to retrospectively apply the provisions of sections **974, 975, 979** of the Companies Act, 2015 and section **41** of the Public Procurement and Asset Disposal Act, 2015 to contracts signed between M/s IDEMIA in its current name and or in its former name, namely Morpho, OT Morpho, SAFRAN Identity & Security and the Independent Electoral and Boundaries Commission before the coming into operation of the said provisions.*

> *a. **An order of certiorari** be and is hereby issued quashing the Public Accounts Committee's Report as amended and adopted by the National Assembly on 23rd April 2019 entitled "The Examination of the Report of the Auditor-General on the Financial Statements for the Independent Electoral and Boundaries Commission for the Year Ended 30th June 2017, February 2019" **only to the extent** it purports based on a purported retrospective application of the law to recommend and or direct that all contracts entered into between M/s IDEMIA (in its current name and or in its former names), and the Independent Electoral and Boundaries Commission to be investigated and if found to have contravened sections **974, 975, 979** of the Companies Act be nullified, which investigation and cancellation would be premised on a retrospective application of the law.*

> *b. **An order of certiorari** be and is hereby issued quashing the Public Accounts Committee's Report as amended and adopted by the National Assembly on 23rd April 2019 entitled "The Examination of the Report of the Auditor-General on the Financial Statements for the Independent Electoral and Boundaries Commission for the Year Ended 30th June 2017, February 2019" **only to the extent** that it purports based on a purported retrospective application of section **41** of the Public Procurement and Asset Disposal Act, 2015, to recommend and or direct the Public Procurement Regulatory Authority Board to investigate within 60 days the conduct of M/S IDEMIA (in its current and former names) and if it finds the company culpable, it enters the names of the company in the*

Central Repository of debarred firms and ensures that the firms is precluded from participating, award or entering into any kind of procurement contract payable using public funds under any state department or agency in the Republic of Kenya for a period of 10 years.

*c. **A declaration** be and is hereby issued declaring that the Public Accounts Committee's Report as amended and adopted by the National Assembly on 23rd April 2019 entitled "The Examination of the Report of the Auditor-General on the Financial Statements for the Independent Electoral and Boundaries Commission for the Year Ended 30th June 2017, February 2019" **only to the extent** it directs Independent Electoral and Boundaries Commission to take immediate action to recover all monies paid under the contracts between M/s IDEMIA (in its current name and or in its former names), and the IEBC is ultra vires it's their constitutional and statutory mandate since it amounted to unlawful cancellation of contracts which is a function vested in courts of competent jurisdiction but not a legislative function.*

d. No orders as to costs.

Orders accordingly

Signed, Dated and Delivered at **Nairobi** this **8th** day of **April** 2020.

John M. Mativo Judge.

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[1] Act No. 17 of 2015.

[2] Article 157 (6) of the Constitution.

[3] Act No. 11A of 2011.

[4] Article 29 (8) of the Constitution.

[5] Article 29 (9) of the Constitution.

[6] Article 88 (5) of the Constitution.

[7] Act No. 33 of 2015.

[8] Act No. 17 of 2015.

[9] Act No. 4 of 2015.

[10] Act No. 17 of 2015.

[11] Act No. 29 of 2017.

[12] Citing Pevans East Africa Limited & Others v Chairman, Betting Control & Licensing Board, Civil Appeal No. 11 of 2018.

[13] Citing John Harun Mwau v Dr. Andrew Mullei & Others, Civil Appeal No. 157 of 2009.

[14] Act No. 29 of 2017.

[15] {1969} EA 696

[16] Civil Appeal No. 234 of 1995.

[17] {2002}1 KLR 286

[18] Pet No. 38 of 2017.

[19] {1969} E.A 696 AT PAGE 700.

[20] {2001} KLR 579; {2001} 1 EA 177

[21] {2005} 1 KLR 141

[22] {2017} eKLR

[23] 297/98 (1999) (ZASCA 50).

[24] CCT 12/05[2006] ZACC 11 at para 38 viz.

[25] {2008} KLR 728

[26] {2017} eKLR.

[27] 8th Ed at pg 708.

[28] {2017} eKLR.

[29] Act No. 29 of 2017.

[30] Cool Ideas 1186 CC vs Hubbard and Another {2014} ZACC 16; 2014 (4) SA 474 (CC); 2014 (8) BCLR 869 (CC) (Cool Ideas) at para 28.

[31] NA 2016 (3) SA 580 (CC).

[32] Democratic Alliance vs Speaker, National Assembly and Others 2016 (3) SA 487 (CC) at para 17.

[33] South African Broadcasting Corporation Soc Ltd and others v Democratic Alliance and others (Corruption Watch as amicus curiae) [2015] 4 All SA 719 (SCA) para 53.

[34] Act No. 29 of 2017.

[35] Nairobi HCMCA No 1298 of 2004.

[36] {1976} I ALL ER. 12

[37] {2006} eKLR.

[38] {1943} 2 ALL E.R. 337 at 345.

[39] {1969} 3 ALL ER 275 at 227.

[40] {1985} AC 374.

[41] De Smith and Brazier in 6th Edition, 1989 say at (pages 557-558).

[42] Civil Appeal no 108 of 2009.

[43] Council of Civil Service Unions v. Minister for the Civil Service [1984] UKHL 9, [1985] 1 A.C. 374, House of Lords (UK).

[44] Ibid.

[45] Peter Leyland; Gordon Anthony (2009), "Procedural Impropriety II: The Development of the Rules of Natural Justice/Fairness", Textbook on Administrative Law (6th ed.), Oxford: Oxford University Press, pp. 342–360 at 331, ISBN 978-0-19-921776-2.

[46] Supra, note 18.

[47] David J. Mullan, Natural Justice and Fairness - Substantive as well as Procedural Standards for the Review of Administrative Decision-Making? http://www.lawjournal.mcgill.ca/userfiles/other/6927003-mullan.pdf.

[48] (1897) 18 N.S.W.R. 282, 288 (S.C.).

[49] In the South African Case Pharmaceutical Manufacturers Association of South Africa & Another: exparte President of the Republic of South Africa & Others, Chaskalson, J (CCT) 31/99) [2000] ZACC 1; 2000 (2) ZA 674.

[50] See S. De Smith, Judicial Review ofAdministrativeAction,4th ed. J. Evans (1980), 352- 4.

[51] See R v. Secretary of State for the Home Department, ex parte Doody [1994] 1 AC 531 at 560.

[52] See also McInnes v. Onslow-Fane [1978] 3 All ER 211, where the Court distinguished between application, legitimate expectations, and forfeiture cases to determine the degree of procedural protection required by the situation; the implication is that the strong impact on the

individual in forfeiture cases required high level procedural protection (in the form of a right to an unbiased tribunal, right to notice of the charges, and the right to be heard) while the low impact on the individual in application cases required lower levels of procedural protection (which required just the imposition of a duty to reach an honest and non-capricious decision without bias).

[53] {2015}eKLR

[54] Ibid.

[55] {2017} eKLR.

[56] De Smith, Woolf Jowell , 6th Edn Sweet & Maxwell at pg 609.

[57] Case C-80/89, Behn v Hauptzollamt Itzehoe, 1990 E.C.R. I-2659.

[58] Søren Schønberg, Legitimate Expectations in Administrative law 118 (2003); C.f. Forsyth, The Provenance and Protection of Legitimate Expectations, 47 CAMB. L. J. 238, 242-244 (1988). The protection of legitimate expectations are in fact still stronger in German law today than is the case in EU law, see, Administrative Law of the European Union, its Member States And The United States 285 (Rene Seerden & Frits Stroink eds., 2002).

[59] Ibid.

[60][60] Ibid.

[61] Joined Cases 205-215/82, Deutsche Milchkontor GmbH et al. V Germany, 1983 E.C.R. 2633.

[62] Søren Schønberg, Legitimate Expectations in Administrative Law 118 (2003).

[63] 2002 (4) SA 60 (W) at paragraph 28, quoted with approval by the Supreme Court of Appeal in South African Veterinary Council and another v Szymanski 2003 (4) BCLR 378 (SCA) at paragraph 19 and in Minister of Environmental Affairs and Tourism and others v Phambili Fisheries (Pty) Ltd and another [2003] 2 All SA 616 (SCA) at paragraph 65.

[64] Administrative Law, by H.W.R. Wade, C. F. Forsyth, Oxford University Press, 2000, at pages 449 to 450.

[65] Cap 2, Laws of Kenya.

[66] Cap 2, Laws of Kenya.

[67] Francis Benion, 4th Edition.

[68] SCK Application no 2 of 2011.

[69] 69 {2017} e KLR.

[70] {2018} e KLR.

[71] {1984} 3 All E.R. 935.

[72] {2018} eKLR.

[73] {2008} 2 EA 300.

[74] {2017} eKLR.

[75] {2018} eKLR.

[76] {2014} eKLR.

[77] {2014} eKLR

[78] Cap 2, Laws of Kenya.

[79] SCK Application No. 2 of 2011 {2012} eKLR.

[80] See Gauteng Gambling Board vs Silverstar Development 2005 (4) SA 67 (SCA) paras 28-29

[81] {1985} AC 374.

[82] See, R v Secretary of State for Home Department ex. p. Brind {1991} AC 696, where the House of Lords rejected the test of proportionality, but did not rule it out for the future

[83] Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 KB 223.

[84] Ferreira vs Levin NO and Others; Vryenhoek and Others vs Powell NO and Others [1995] ZACC 13; 1996 (1) SA 984 (CC); 1996 (1) BCLR 1 (CC) (Ferreira v Levin) at para 26.

[85] See Peterson v Cuthbert and Company Ltd 1945 AD 420 at 430".

[86] 1978 (1) SA 1109 A, (at 1148 F – G).

[87] 2009 (1) SA 176 SCA in par. 10.

[88] 1994] 1 AC 486 ([1994] 1 ALL ER 20)

[89] {1991} 2 ALL ER 712 (CA) at 724 f to g.

[90] Ibid at at 525 F to H (AC) and 30 e to g (ALL ER).

[91] 1906 TS 308 at 311

[92] Bon Tew v Kenderaan Bas Mara {1982} 3 ALL ER 833 at 836.

[93] 1906 TS 308

[94] 2000 (4) SA 674 (CC) at page 708; paragraph 86.

[95] SA 2004(3) SA 346 (SCA) at 354H- 355A.

[96] {2004} ZACC 15; 2004 (4) SA 490 CC at 512, para 44.

[97] {1995} 1 All ER 129 (HL) at 157.

[98] 1999 (3) SA 304 (LAC) at 316, para 36.

[99] See Bromley London Borough Council vs Greater London Council {1983} 1 AC 768 (at [821].

[100] Puhlhofer v Hillingdon London Borough Council [1986] 1 AC 484.

[101][101] {1985} 6 FCR 155

[102] Minister for Aboriginal Affairs v Peko Wallsend Ltd (1986) 162 CLR 24 per Mason J (at 41).

[103] See Patel vs Witbank Town Council 1931 TPD 284 Tindall J said (at 290).

[104] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) Administrative Justice and its Availability (Federation Press, 2015) 37.

[105] Misc. Application No. 261 of 2010.

[106] HC CN 7 HR No. 1 of 2017.

[107] In Ferreira v Levin NO & others; Vryenhoek v Powell NO & others 1996 (1) SA 984 (CC) at paragraph [199].

[108] In the case of Ainsbury v Millington {1987} 1 All ER 929 (HL), which concluded at 930g: 13

[109] See Transvaal Coal Owners Association vs Board o Control 1921 TPD 447 at 452

[110] Nuclear Tests (Australia vs. France), Judgment, I.C.J. Reports 1974, pp. 270-271, para. 55; Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p. 476, para. 58)