



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILIMANI LAW COURTS

JUDICIAL REVIEW DIVISION

MISC. APPLICATION NO. 317 OF 2018

IN THE MATTER OF AN APPLICATION BY APPOLO MBOYA

FOR ORDERS OF *CERTIORARI* AND *MANDAMUS*

AND

IN THE MATTER OF AN APPLICATION UNDER ARTICLES 1, 2, 3, 10, 22,

23, 25, 27, 47, 50, 159 AND 165 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF THE ADVOCATES ACT, CAP 16, LAWS OF KENYA

AND

IN THE MATTER SECTIONS 4(1)(2)(3) AND (5) OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015

AND

IN THE MATTER OF SECTIONS 5 OF THE LAW SOCIETY OF KENYA ACT, 2014

AND

IN THE MATTER OF PRIVATE PROSECUTION DISCIPLINARY CAUSES NUMBER 17 AND 26 OF 2016

BETWEEN

REPUBLIC.....APPLICANT

-VERSUS-

ADVOCATES DISCIPLINARY TRIBUNAL.....RESPONDENT

AND

APOLLO MBOYA.....EX PARTE APPLICANT

JUDGMENT

The parties.

1 The ex parte applicant is an advocate of the High Court of Kenya of 18 years standing as at the date of instituting these proceedings on 1st

August 2018. Between the period between October 2009 to 31st January 2016, he served as the Chief Executive Officer of the Law Society of Kenya (hereinafter referred to as the **LSK**) and in that capacity he served as the Respondent's Secretary. For avoidance of doubt, the Council of Law Society of Kenya shall herein after be referred to as the "Council."

2. The Respondent is the Advocates Disciplinary Tribunal (hereinafter referred to as the Tribunal) established pursuant to section 57 of the Advocates Act,^[1] (hereinafter referred to as the Act).

The relief sought.

3. By way of a Notice of Motion dated 2nd August 2018, the ex parte applicant seeks the following Judicial Review Orders against the Tribunal:-

a. That an order of certiorari to move into this court and quash the entire proceedings in Private Prosecution Disciplinary Causes Number 17 and 26 of 2016 and the decisions therein.

b. That an order of mandamus to compel the Respondent to expunge from its records the entire proceedings and the decisions in the Private Prosecution Disciplinary Causes Number 17 and 26 of 2016.

c. That this Honourable Court be pleased to grant such other or further relief as it may deem fit and necessary in the circumstances.

d. That the costs of this application be provided for.

Factual matrix.

4. The factual background as enumerated in the application seeking leave, the statutory statement and the verifying Affidavit annexed thereto are that the ex parte Applicant served as the Chief Executive of **LSK** and the Secretary to the Tribunal from October 2009 to 31st January 2016. He averred in that capacity he implemented both the Council's and Tribunal's decisions and attended to complaints from Advocates and Members of the public.

5. He averred that a one **Martin Davis Muthuri Mbogo** lodged a complaint, being Disciplinary Causes No. 105 of 2015 against a one **Alex Gatundu** Advocate for failure to account for proceeds of litigation, which he forwarded to the Tribunal for determination. He averred that on behalf of the LSK he lodged with the Tribunal Disciplinary cause No. 101 of 2015 against **Maria Goretti Nyariki**, Advocate under section 60 of the Advocates Act^[2] for practicing as an advocate in respect of Nairobi Children's Court Case No. 347 of 2008 whilst employed as a State Counsel by the Ministry of Agriculture.

6. Additionally, he states that on behalf of the Council, pursuant to a resolution of the meeting of 7th September 2015, he lodged a complaint with the Tribunal being Disciplinary Cause No. 138 of 2015 against **Edwin Sifuna**, Advocate for professional misconduct and for conduct unbecoming, for misrepresentation, contempt to the Council and bringing disrespect to the legal profession.

7. He also states that in a Council meeting held on 16th December 2015, it was resolved that the members of the Law Society of Kenya be informed of the status of all candidates contesting the LSK elections scheduled for 25th February 2016 including the causes before the Tribunal, and, pursuant to the said directive, the report was shared with the members by e-mail and other social media platform. He averred in the said elections, **Alex Gatundu** Advocate and **Edwin Sifuna**, Advocate were both elected as Council Members while **Maria Goretti Nyariki** was elected as a Member of the Tribunal.

8. He further averred that the Tribunal allowed the withdrawal of the Disciplinary Cause No. 138 of 2015 against **Edwin Sifuna** Advocate and Disciplinary Cause No. 101 of 2015 against **Maria Goretti Nyariki** on 15th and 18th April 2016 respectively, but, convicted **Alex Gatundu** Advocate in Disciplinary Cause No. 105 of 2015.

9. The ex parte applicant also averred that after retiring as the Chief Executive of the LSK, the Tribunal allowed **Alex Gatundu** and **Maria Goretti Nyariki** to institute Private Prosecution Disciplinary Causes Numbers 17 of 2016 and 26 of 2016 against him on 18th February and 4th March 2016 respectively, and, that, both complaints were drawn by **Assa Nyakundi Kibagendi**, Advocate. He averred that both complaints relate to functions he performed as the Secretary/CEO of both the LSK and the Tribunal. He averred that the complaint was that he instigated the filing of the complaints against **Alex Gatundu** and **Maria Goretti Nyariki**, and, that, made public confidential Tribunal's proceedings. He averred that the complaints were made notwithstanding the fact that he was implementing the Council's resolution.

10. Also, he averred that **Maria Goretti Nyariki** was a member of the Respondent's panel in the Private Prosecution Disciplinary Cause No. 17 of 2016 instituted by **Alex Gatundu**, while **Assa Nyakundi Kibagendi**, the Advocate for **Alex Gatundu** and **Maria Goretti** in the private prosecution Disciplinary Cause No. 17 of 2016 and 26 of 2016, upon becoming a member of the Tribunal, chaired the panel determining the private prosecution cause number 17 of 2016 on 8th May 2017 together with **Maria Goretti Nyariki** who also participated in the panel on 18th April 2016, 20th June 2016 and 19th March 2018.

11. The ex parte applicant also averred that **Ezekiel Wanjama** chaired the panel on 18th April 2016, 20th June 2016, 20 February 2017, 14th August 2017, 18th September 2017, 19th March 2018 and 18th June 2018, and by a letter dated 3rd July 2018, the Honorable Attorney General raised concern on the participation of **Ezekiel Wanjama** and **Assa Nyakundi** as twin chairpersons of the Tribunal and indicated that the same is liable for legal challenge for contravening section 57(1)(b) of the Advocates Act.^[3]

12. The ex parte applicant also averred that he was not afforded an opportunity to be heard, and, that the determination was meant to avenge him for performing duties as a Secretary of the **LSK** and for suing **Assa Nyakundi Kinagendi**. Also, he averred that **Gladys Kinyanjui** and **Michael Wabwile** who purported to enter judgment on **18th** June 2018 never participated in the hearing of the private prosecution causes numbers **17** of 2016 and **26** of 2016.

Legal foundation of the application.

13. The core grounds relied upon are that the Tribunal contravened section **58(5)** of the Act by failing to adhere to the tenets of judicial and legal proceedings, and, section **78** of the Act which grants immunity to Members of the Tribunal from being sued in respect of any act or thing done or omitted to be done in good faith in the exercise, discharge or performance of any of the powers, jurisdiction, duties or functions conferred upon him or by the Act.

14. The ex parte applicant also states that the Tribunal contravened section **5** of the Law Society of Kenya Act^[4] (herein after referred to as the LSK Act) which empowers the Society to do all things necessary for the proper and effective achievement of its objects and the performance of its functions. He also states that the Tribunal failed to accord him a hearing contrary to section **60(4)** of the Act. Further, he states that the Tribunal contravened section **57(1)(b)** of the Act by permitting **Ezekiel Wanjama** and **Assa Nyakundi** to sit in the panel as twin chairpersons of the Tribunal.

15. Additionally, he states that the decision is irrational, unreasonable, in bad faith, improper motive and tainted with procedural impropriety, unfairness and arbitrariness. He further states that the Tribunal acted unlawfully and illegally by contravening sections **4(1)(2)(3)** and **(5)** of the Fair Administrative Action Act^[5] by failing to accord him an opportunity to be heard and to make representations before conviction; and, failing to issue a notice of a right to a review or internal appeal against an administrative decision; and or issue him with a notice of the right to cross-examine; or, issue a public notice whilst the proposed administrative action is likely to materially and adversely affect the legal rights or interests of a group of persons or the general public or, undertake an administrative action that is expeditious, efficient and lawful.

16. He also states that the Tribunal violated the principles of Article **10,27(1) 35,46, 47, 50, 50(2)(n)** and **232** of the Constitution. He also states that the decision is unreasonable and irrational because the panel that heard the two causes included the complainant and the counsel acting in the two causes, thus, they were the complainants and judges in their own cause. Also, he states that the Tribunal acted in bad faith and with improper motive by altering the panel considering the complaint several times causing conflict of interests.

17. Further, he states that the Tribunal violated section **78** of the Act which grants immunity to Members of the Tribunal, and, that, it acted irrationally and unreasonably by referring cause No. **26** of 2016 to alternative dispute resolution, and, at the same time, render a conviction in cause No. **17** of 2016, yet, the issue giving rise to the complaints arose from the same decision of the Council. Additionally, he states that the decision is irrational because **Gladys Kinyanjui** and **Michael Wabwile** entered judgment on **18th** June 2018 in cause number **17** of 2016, yet, they never participated in the hearing. Also, he states that the decision it was irrational, unreasonable, in bad faith and with improper motive to make a finding that the Tribunal's proceedings are confidential while allowing the public to attend and press to report the matters.

18. The ex parte applicant also cites procedural impropriety, unfairness and arbitrariness alleging that the Tribunal entertained complaints against him yet he was implementing the decision and directive of the Council, and, by arriving at a finding that the Tribunal's proceedings are confidential contrary to the statutory and constitutional provisions of transparency and accountability. Also, he states that it was improper to constitute a panel comprising of the complainant and the counsel in cause number **17** and **26** of 2016 thus making the complainants and their counsel to be the judges in their own complaint.

19. Additionally, he states that the Tribunal denied him an opportunity to be heard; and, that, he was not given notice of the right to cross examine, nor was he given a notice of the administrative action that is likely to affect his rights. Also, he states that the Tribunal failed to undertake an administrative action that is expeditious, efficient and lawful, and, that, it acted unfairly by allowing the withdrawal of case number **138** of 2015, **101** of 2015, yet, it convicted the Respondent in no. **105** of 2015. Further, he averred the Tribunal acted unfairly by permitting **Alex Gatundu** and **Maria Goretti** to commence private prosecutions.

20. He also states that the Tribunal's conduct violated Article **47** of the Constitution, it's capricious, arbitrary, oppressive, unfair and cannot be justified within the rule of law. Lastly, he states that the decision violates his right to legitimate expectation that there will equal application of the law; and, that, the provisions of section **78** of the Act would be respected, and or that the Tribunal would adhere to the statutory provisions.

Respondent's Replying Affidavit.

21. Mercy Wambua, the Tribunal's secretary swore the Replying Affidavit dated **18th** September 2018. Regarding Disciplinary Cause No. **17** of 2016, she averred that on **18th** February 2018, the Tribunal received an Affidavit of complaint dated **15th** February 2016 from the firm of Nyakundi & Co Advocates on behalf of **Alex Gatundu** against the applicant, and, vide a letter dated **18th** February 2016 the Tribunal forwarded the complaint to the applicant who responded by a Replying Affidavit dated **26th** February 2016.

22. She averred that vide a letter dated **22nd** March 2016, the *ex parte* applicant was informed that Disciplinary Cause No. **17** of 2016 had been set down for purposes of plea taking on **18th** April 2016. Also, she averred that a hearing notice was served upon the *ex parte* applicant setting out the allegations against him and informing him of the hearing date scheduled for **20th** June 2016, and, that he was also notified that he was required to file a Replying Affidavit and supply to the Secretary Compliance & Ethics and all other parties copies of documents he intended to rely on. Further, she averred that vide a letter dated **30th** January 2017, the *ex parte* applicant was informed that Disciplinary Cause No. **17** of 2016 would come up for hearing on **20th** February 2017.

23. She also averred that vide a letter dated **10th** March 2017, the Tribunal informed the *ex parte* applicant of its orders giving time frames to the parties to file their respective submissions and a judgment date for **8th** May 2017 and pursuant thereto the *ex parte* applicant filed his submissions. Also, she averred that vide a letter dated **20th** February 2018, he was informed the date judgment being **19th** March 2018 which was re-scheduled to **18th** June 2018 when it was delivered. She averred the *ex parte* applicant as found guilty of misconduct for:- acting irregularly; acting in bad faith, acting without decorum; and, dishonorably publishing the particulars of the complainant's disciplinary cause; and, that the complainant had *locus* to file the complaint before the Tribunal, there being no advocate-client relationship between them.

24. Regarding Disciplinary Cause No. **26** of 2016, **M/s Wambua** averred that on **4th** March 2016, the Tribunal received an Affidavit of complaint dated **19th** February 2016 from Nyakundi & Co Advocates on behalf **Maria Goretti** against the *ex parte* applicant, and, that, it found that a *prima facie* case had been established against the *ex parte* applicant and ought to be set down for plea taking. Further, she averred that vide a letter dated **26th** April 2016, the *ex parte* applicant was notified about plea taking on **23rd** May 2016. Further, she averred that a hearing notice dated **19th** July 2016 was forwarded to the *ex parte* applicant setting out the allegations made against him and also notified him about the hearing date for **15th** August 2016. Additionally, she averred that the *ex parte* applicant was informed that he was required to file Reply Affidavit and supply the Deputy Secretary, Compliance & Ethics and all the parties copies of the documents he intended to rely on.

25. **M/s Wambua** also averred that the *ex parte* applicant was notified of a hearing date scheduled for **22nd** May 2017 which was changed to **18th** September 2017. Further, she averred that the orders made on the said date and the reasons for changing the hearing dates were communicated to the *ex parte* applicant. Also, she averred that on **17th** July 2018, the *ex parte* applicant was notified of a decision to have the matter placed before the Convener of the LSK Alternative Dispute Resolution Committee to attempt an amicable solution and report back to the Tribunal on **3rd** December 2018.

26. She also averred that the Tribunal's mandate under section **4** of the LSK Act includes receiving, hearing and determining complaints lodged against advocates such as the ones lodged against the *ex parte* applicant. Further, she averred that the Tribunal is established under section **57** of the Act for the purposes of *inter alia* dealing with professional misconduct on the part of advocates. Further, she averred that the Tribunal by virtue of section **60** of the Act has the mandate to receive a complaint from any person against an advocate accused of disgraceful and dishonorable conduct incompatible with the status of an advocate, and, that, section **60A(c)** of the Act allows a complaint to be brought before the Tribunal by any person on behalf of the complainant.

27. **M/s Wambua** averred that in the two causes, the *ex parte* applicant was given a fair hearing before the Tribunal, and, that he participated in the hearings, and, he never raised any complaint with regard to its composition or sittings up and until judgment, and, that, a date for mitigation and sentencing is set for **15th** October 2018. Additionally, the **M/s Wambua** averred that the *ex parte* applicant was granted a fair hearing, that he was notified of the hearing, and the dates when hearing would take place, and that he was notified in writing the orders made in his matters. She also averred that he took part in the proceedings, and, that, he filed submissions in the complaints against him, and that he did not raise any concerns or objections during the proceedings.

28. Further, she averred that in cause No. **17** of 2016, the Tribunal Members explained how and why they arrived at their decision, and, that, section **78** of the act is not a blanket immunity and that the person claiming immunity ought to show good faith.

29. Responding to the allegation that one of the *ex parte* applicant's accusers and an advocate who had represented the complainants before the Tribunal before they become members of the Tribunal sat in the panels and heard his case, she averred that the Tribunal usually sits on Mondays to mention and hear the various matters in the cause list for the particular day, and, that, the panel in question did not make any adverse orders against the *ex parte* applicant. She averred that as shown by the proceedings, the panel stated that the matter would be adjourned so as to be heard before a panel not consisting of any member with whom the *ex parte* applicant may have been in conflict with and as reflected in the proceedings, the judgment was written by a panel consisting of **Mr. E.N.K Wanjama, Ms A.N Mwaure and Ms O. Kebira**, the same panel that heard the complaint, which did not comprise of LSK Council Members, hence, it was independent.

30. Further, **M/s Wambua** averred that the issues raised by the *ex parte* applicant are grounds for appeal as opposed to Judicial Review since they require the court to interrogate the evidence. She also averred that the *ex parte* applicant never sought to cross-examine any of the parties to the complaints nor did he oppose the decision to rely on affidavit evidence as provided under Rule **18** of the Advocates (Disciplinary Committee) Rules. Additionally, she averred that the *ex parte* applicant filed submissions and never raised any concern about requesting and or being denied to cross examine any party.

31. On the allegations of bias on the grounds that complaints made against **Alex Gatundu, M/s Maria Goretti Nyariki and Edwin Sifuna** were un-procedurally withdrawn, **M/s Wambua** averred that for such a decision to be allowed, the same has to be approved by both the Tribunal, and the parties and none of the parties complained about the withdrawal. She further averred that section **62** of the Act provides that an Advocate aggrieved by an order of the Tribunal may appeal to the High Court by filing a civil appeal She also averred that the Tribunal acted within its mandate and authority, hence, the orders sought are aimed at preventing the Tribunal from carrying on its mandate.

Guiding principles.

32. There is a long-established and fundamental distinction between appeal and review. A court of appeal makes a finding on the merits of the case before it; if it decides that the decision of the lower court or tribunal was wrong, then it sets that decision aside and hands down what it believes to be the correct judgment. By contrast, in judicial review the reviewing court cannot set aside a decision merely because it believes that the decision was wrong on the merits. A court of review is concerned only with the lawfulness of the process by which the decision was arrived at, and can set it aside only if that process was flawed in certain defined and limited respects.

33. Judicial review is about the decision making process, not the decision itself. The role of the court in judicial review is supervisory. It is not an appeal and should not attempt to adopt the 'forbidden appellate approach' Judicial review is the review by a judge of the High Court of

a decision; proposed decision; or refusal to exercise a power of decision to determine whether that decision or action is unauthorized or invalid. It is referred to as supervisory jurisdiction - reflecting the role of the courts to supervise the exercise of power by those who hold it to ensure that it has been lawfully exercised.

34. Judicial review is more concerned with the manner in which a decision is made than the merits or otherwise of the ultimate decision. As long as the processes followed by the decision-maker are proper, and the decision is within the confines of the law, a court will not interfere. As was held in *Republic vs Attorney General & 4 others ex-parte Diamond Hashim Lalji and Ahmed Hasham Lalji* [6]:-

“Judicial review applications do not deal with the merits of the case but only with the process. In other words judicial review only determines whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters. It follows that where an applicant brings judicial review proceedings with a view to determining contested matters of facts and in effect urges the Court to determine the merits of two or more different versions presented by the parties the Court would not have jurisdiction in a judicial review proceeding to determine such a matter and will leave the parties to resort to the normal forums where such matters ought to be resolved. Therefore judicial review proceedings are not the proper forum in which the innocence or otherwise of the applicant is to be determined and a party ought not to institute judicial review proceedings with a view to having the Court determine his innocence or otherwise. To do so in my view amounts to abuse of the judicial process. The Court in judicial review proceedings is mainly concerned with the question of fairness to the applicant.....”

35. An administrative decision is flawed if it is illegal. A decision is illegal if it: - **(a)** contravenes or exceeds the terms of the power which authorizes the making of the decision; **(b)** pursues an objective other than that for which the power to make the decision was conferred; **(c)** is not authorized by any power; **(d)** contravenes or fails to implement a public duty.

36. Statutes do not exist in a vacuum.[7] They are located in the context of our contemporary democracy. The rule of law and other fundamental principles of democratic constitutionalism should be presumed to inform the exercise of all official powers unless Parliament expressly excludes them. There may even be some aspects of the rule of law and other democratic fundamentals which Parliament has no power to exclude.[8] The courts should therefore strive to interpret powers in accordance with these principles.

37. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the rule of law. 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 a statute or Regulations. The courts when exercising this power of construction are enforcing the rule of law, by requiring administrative bodies and tribunals 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 Parliament’s enactments.

38. Where discretion is conferred on the decision-maker the courts also have to determine the scope of that discretion and therefore need to construe the statute purposefully.[9] One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation.

39. Lord Reid in *Animistic -vs- Foreign Compensation Commission* [10] correctly stated:-

“It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word ‘jurisdiction’ has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in questions. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly.”

40. Nevertheless, whatever the purpose of Judicial Review is deemed to be, some propositions have become clear: orthodox principles of administrative law prescribe that courts engaged in review should not reconsider the merits of executive action because they are not the recipients of the discretionary power. [11] Judicial review is not an appellate procedure in which a judge reverses the substantive decision of an administrative body because of the sole ground that the merits are in the applicant’s favour. Rather, it is a supervisory procedure whereby a judge rules only upon the lawfulness of an executive decision, or the manner in which one was reached. The question for review, therefore, is whether the decision was ‘lawful or unlawful’; the question for appeal by contrast is whether the decision was ‘right or wrong.’

41. Craig has sought to justify this distinction between review and appeal by reference to the source of judicial powers: powers of review derive from the courts’ inherent jurisdiction, whereas appeals do not – they are statutory. [12] Others, however, have justified this distinction in less neutral terms. For instance, Lord Irvine, the previous Lord Chancellor, has argued that the courts should not review merits. His argument is that to do so violates the constitutional imperative of judicial self restraint. Lord Irvine identifies at least three bases for this imperative. *First*, ‘a constitutional imperative’: public authorities should exercise discretionary powers that have been entrusted to them by Parliament. Every authority has within its influence a level of knowledge and experience which justifies the decision of Parliament to entrust that authority with decision-making power. *Second*, ‘lack of judicial expertise’: it follows that the courts are ill-equipped to take decisions in place of the designated authority. *Third*, ‘the democratic imperative’: it has long been recognised that elected public authorities, and particularly local authorities, derive their authority in part from their electoral mandate. [13]

42. The grant of the orders of *Certiorari*, *Mandamus* and *Prohibition* is discretionary. The court is entitled to take into account the nature of the process against which judicial review is sought and satisfy itself that there is reasonable basis to justify the orders sought.

Issues for determination.

43. Upon considering the detailed descriptions of the Parties' positions and submissions, I find that the following issues distil themselves for determination:-

- a) Whether the impugned decision was tainted by procedural impropriety.
- b) Whether the decision the decision is irrational, unreasonable and un proportionate.
- c) Whether the decision is tainted with illegality.
- d) Whether the Respondent violated the *ex parte* applicant's right to legitimate expectation.
- e) Whether the decision is tainted by bad faith and/or whether the Tribunal failed to provide reasons for its decision.

a) Whether the impugned decision was tainted by procedural impropriety.

44. **Mr. Mboya** appearing for himself assaulted the impugned decision for being tainted with procedural impropriety. He relied on the test of procedural propriety stated in *Republic v Commission for Higher Education ex parte Peter Shitanda*,^[14] where the court quashed a decision for failing to meet threshold for procedural fairness. He submitted that the Tribunal's conduct is tainted with procedural impropriety, unfairness and arbitrariness because it entertained the complaints against him yet was he was implementing the Council's decisions and directives. He faulted the Tribunal for failing to accord him the opportunity to be heard and or serve him with a notice to cross examine, or issue a public notice on the proceedings likely to affect him or undertake an expeditious, efficient and a lawful administrative action.^[15]

45. To buttress his argument, **Mr. Mboya** argued that the Tribunal violated Article 47 of the Constitution and section 4(1)(2)(3)(4) & (4) of the Fair Administrative Action Act.^[16] He stated that he was not accorded an opportunity to be heard, nor was he given a notice of a right to review or internal appeal against the decision nor was he accorded an opportunity to cross-examine. He argued that courts are inclined to quash a decision if it is manifest that the decision has been made without fairly and justly hearing the person concerned.^[17] He faulted the Tribunal for constituting a panel comprising of the complainant and his counsel in cause number 17 of 2016, thus making the complainants to be judges in their own cause.

46. The Tribunal's counsel submitted that the Tribunal considered both parties cases and arrived at a reasoned decision. He submitted that the *ex parte* applicant was given an opportunity to be heard, and, that, he participated in the proceedings. He also submitted that the *ex parte* applicant agreed that the matter proceeds by way of affidavit evidence, and that he never at any point requested for hearing by way of *viva voce* evidence or seek to cross examine the witnesses. To buttress his argument, counsel cited *Wangui Kathryn v Disciplinary Tribunal of the Law Society of Kenya & Another*^[18] where the court held that a party to whom insufficient or inadequate notice is given ought to raise the issue with the judicial or administrative body concerned and seek for time to adequately prepare as provided under section 4(4)(d) of the Fair Administrative Action Act.^[19] He also submitted that the applicant fully participated in the proceedings, hence, a case must be distinguished from a situation where a party is denied the opportunity to be heard. To buttress his argument, counsel cited *Republic v Advocates Complaints Commission & Another*.^[20]

47. A decision suffers from procedural impropriety if in the process of its making the procedures prescribed by statute are not been 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.

48. There are three broad bases on which a decision maker may owe a duty to exercise its functions in accordance with fair procedures. *First*, legislation or another legal instrument which gives a decision making power may impose a duty to follow specific procedures. The requirements relating to procedure contained in the statute or other instrument must be complied with. However, failure to comply with required procedures does not automatically mean that the decision which follows is invalid. The courts take a range of factors into account in deciding whether or not to nullify a decision.

49. *Second*, no-one may be the judge in his or her own cause. This strikes at decision making where the decision maker is connected with the party to the dispute or the subject matter. In this context, justice should not only be done, but should be seen to be done. Consequently, appearance of bias may be as relevant as actual bias.

50. *Third*, no person against whom an adverse decision might be taken should be denied a fair hearing to allow them to put their side of the case. What constitutes a fair hearing depends on the particular circumstances of the case. These include the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it has to work.

51. *Fourth*, statutes often require that decisions made under them to be supported by reasons.

52. The term *procedural impropriety* was used by Lord Diplock in the House of Lords decision *Council of Civil Service Unions v. Minister for the Civil Service*^[21] to explain that a public authority could be acting *ultra vires* (that is, beyond the power given to it by statute) 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.^[22]

53. 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.[23] 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.[24]

54. The common law rules of natural justice consist of two pillars: impartiality (the rule against bias, or *nemo iudex in causa sua* – "no one should be a judge in his own cause") and fair hearing (the right to be heard, or *audi alteram partem* – "hear the other side").[25] The rule against bias divides bias into three categories: actual bias, imputed bias and apparent bias. More recent case law from the UK tends to refer to a duty of public authorities to act fairly rather than to natural justice. One aspect of such a duty is the obligation on authorities in some cases to give effect to procedural legitimate expectations. These are underpinned by the notion that a party that is or will be affected by a decision can expect that he or she will be consulted by the decision-maker before the decision is taken.[26]

55. 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.[27] 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.

56. 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.[28]

57. Article 47 of the constitution codifies every person's right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. [29] Further there is a right to be given reasons for any person who has been or is likely to be adversely affected by administrative action. [30] Each of these prescriptions fit the recognized grounds for judicial review of administrative actions.

58. The issue that inevitably follows is whether or not the manner in which the Tribunal conducted the proceedings and arrived at the impugned decision amounted to breach of the rules of natural justice. The concept and doctrine of Principles of Natural Justice and its application in Justice delivery system is not new. It seems to be as old as the system of dispensation of justice itself. It has by now assumed the importance of being, so to say, "*an essential inbuilt component*" of the mechanism, through which decision making process passes, in the matters touching the rights and liberty of the people. It is no doubt, a procedural requirement but it ensures a strong safeguard against any Judicial or administrative; order or action, adversely affecting the substantive rights of the individuals. In *Local Government Board v. Arlidge*, [31] Viscount Haldane observed, "*...those whose duty it is to decide must act Judicially. They must deal with the question referred to them without bias and they must give to each of the parties the opportunity of adequately presenting the case made. The decision must come to the spirit and with the sense of responsibility of a tribunal whose duty it is to meet out justice.*" (Emphasis added)

59. In *Snyder v. Massachussets*, [32] the Supreme Court of the United States observed that there was a violation of due process whenever there was a breach of a "*principle of Justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.*"

60. In India the principle is prevalent from the ancient times. [33] In this context, para 43 of the judgment of the Supreme Court [34] may be usefully quoted:-

"Indeed, natural justice is a pervasive facet of secular law where a spiritual touch enlivens legislation, administration and adjudication, to make fairness a creed of life. It has many colours and shades, many forms and shapes and, save where valid law excludes, it applies when people are affected by acts of authority. It is the bone of healthy government, recognized from earliest times and not a mystic testament of judge-made law. Indeed from the legendary days of Adam-and of Kautilya's Arthashastra-the rule of law has had this stamp of natural justice, which makes it social justice. We need not go into these deeps for the present except to indicate that the roots of natural justice and its foliage are noble and not new-fangled. Today its application must be sustained by current legislation, case law or other extant principle, not the hoary chords of legend and history. Our jurisprudence has sanctioned its prevalence even like the Anglo-American system." (Emphasis added)

61. But what is important to be noted is that the applicability of principles of natural justice is not dependent upon any statutory provision. The principle has to be mandatorily applied irrespective of the fact as to whether there is any such statutory provision or not. De Smith, in his *Judicial Review of Administrative Action*, [35] observed, "*Where a statute authorizes interference with properties or other rights and is silent on the question of hearing, the courts would apply rule of universal application and founded on principles of natural justice.*" **Wade** in *Administrative Law* [36] says that principles of natural justice operate as implied mandatory requirements, non-observance of which invalidates the exercise of power.

62. As Sir William Wade in his *Administrative Law* put it "Natural justice is concerned with the exercise of power, that is to say, with the acts and orders which produce legal results and in some way alter someone's legal position to his disadvantage. But preliminary steps, which in themselves may not involve immediate legal consequences, may lead to acts or orders which do so. In this case the protection of fair procedure may be needed throughout, and the successive steps must be considered not only separately but also as a whole. The question must always be whether, looking at the statutory procedure as a whole, each separate step is fair to the person affected." [37]

63. The constitution recognizes a duty to accord a person procedural fairness or natural justice when a decision is made that affects a person's rights, interests or legitimate expectations. It is a fundamental rule of the common law doctrine of natural justice expressed in traditional terms that, generally speaking, when an order is made which will deprive a person of some right or interest or the legitimate expectation of a benefit, he is entitled to know the case sought to be made against him and to be given an opportunity of replying to it. [38]

64. Section 4 of the Fair Administrative Act^[39] re-echoes Article 47 of the Constitution 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.

65. Subsection 4^[40] 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. As **Sedley J** put it^[41]: "*Public law is not about rights, even though abuse of power may and often do invade private rights; it is about wrongs-that is to say misuse of public power.*"

66. Review power of the court 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.^[42]

67. The right of a person to defend him/herself in the face of a decision potentially affecting his/ her 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. I have carefully analyzed the facts of this case. I note that notice was served upon the *ex parte* applicant. Details of the complaint were availed to him. He was informed in writing of his right to file a reply and submit documents in support of his case. He filed a Replying Affidavit. He participated in the hearing and filed submissions. He was accorded a hearing. He never raised an objection on the process during the trial.

68. Procedural fairness contemplated by Article 47 and the Fair Administrative Action Act^[43] demands a right to be heard before a decision affecting one's right is made. Whether or not a person was given a fair hearing of his case will depend 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."^[44]

69. What does fairness require in the present case? The standards of fairness are not immutable. They may change with the passage of time, both in the 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 dependant on the context of the decision, and this is to be taken into account in all its aspects.^[45]

70. Accordingly, the courts look at all the circumstances of the case to determine how the demands of fairness should be met.^[46] 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.

71. Upon applying the legal principles discussed above to the facts and circumstances of this case, I find that *ex parte* applicant was accorded an opportunity to be heard. He fully participated in the trial. He filed a detailed Response and submissions. He never raised any objections at any stage. He never expressed desire to adduce oral evidence or challenge evidence against him by way of cross-examination. He was given notice of delivery of the judgment and the decision was given to him. The judgment gives details and or reasons for the determination. He moved to this court within a record time, meaning that he was fully aware of the decision made.

72. I find no material to support the assertion that the complainant and her advocate sat in the panel hearing the case. The three members who heard the case and rendered the decision appended their signatures to the judgment. The records show that those who had misgivings disqualified themselves as early as at the mention for directions stage paving way for a completely different panel which ultimately heard and determined the dispute. The *ex parte* applicant never raised any objection to the composition of the panel that ultimately heard the case. I find no difficulty in concluding that the *ex parte* applicant has not demonstrated procedural impropriety or breach of the rules of Natural Justice or un fairness in the manner the complaint against him was heard and determined.

b) Whether the decision is irrational, unreasonable and un proportionate.

73. **Mr. Mboya** submitted the decision is irrational, unreasonable, and that it was arrived at in bad faith and for an improper motive because the adjudicating panel was composed of complainants, advocates and judges all rolled in one. He submitted that the manner in which the process was conducted violated the sanctity of the rules of natural justice. To buttress his argument, he cited *Chadwick Okumu v Capital Markets Authority*^[47] in which the court faulted a functionary for acting as the investigator, prosecutor, judge and executioner and nullified the decision.

74. He also argued that the Tribunal acted in bad faith and was biased because the panel was altered several times thereby creating conflict

of interest. To fortify his argument he recalled remarks attributed to a one **Ambroe Wedah** who disqualified himself on grounds that he was likely to be biased. He also argued that the decision is irrational in that section 78 of the Act granted him immunity. He also submitted that it was unreasonable for the Tribunal to refer cause Number 26 of 2016 to Alternative Dispute Resolution and reach a conviction in cause No. 17 of 2016 yet the issues giving rise to the complaints arose from the same decision of the Council of the Law Society. Further, he argued that it was irrational for **Gladys Kinyanjui** and **Michael Wabwire** to enter judgment on 18th June 2018 yet they did not participate in the hearing. Also, he submitted that it was irrational, unreasonable, in bad faith and improper motive for the Tribunal to find that the Advocates Disciplinary Proceedings are confidential while allowing the public to attend and the press to report the matters.

75. In his rejoinder on the composition of the panel, the Tribunal's counsel submitted that where appropriate a member would disqualify himself from the panel. He also argued that it is not true that the judgment was signed by members who did not hear the case, but it was signed by **ENK Kanjama, A. N. Mwaure** and **O. Kebira** but not by **Michael Wabwire** and **Gladys Kinyanjui** as alleged.

76. To fortify his argument that the Tribunal acted unfairly and in bad faith, in that the panel hearing the dispute included a complainant and his advocate, **Mr. Mboya** relied on the case of *Chadwick Okumu v Capital Markets Authority*.^[48] I had the benefit of determining the said case. I have severally stated in my judicial pronouncements that it is settled law that a case is only an authority for what it decides, position that was ably enunciated in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-^[49]

"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in Quinn vs. Leatham,^[50] that "Now before discussing the case of Allen vs. Flood^[51] and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..." (Emphasis added)

77. The ratio of any decision must be understood in the background of the facts of the particular case.^[52] It has been said long time ago that a case is only an authority for what it actually decides, and not what logically follows from it.^[53] It is well settled that a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.^[54]

78. Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.^[55] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.^[56] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.^[57] My plea is to keep the path of justice clear of obstructions which could impede it.

79. In *Chadwick Okumu v Capital Markets Authority*,^[58] the circumstances were that the Respondent wrote to the applicant detailing allegations against him and required him to Respond, which he did. The Respondent proceeded to undertake investigations and invited the applicant for a hearing. The Respondent's legal officer among others who wrote the initial demand letter (Notice to show cause), and undertook the investigations sat in the same panel acting as the investigator, prosecutor and the judge. The Respondent also sought to enforce the decision, thus, acting as the executioner. The circumstances in this case are different. True, the complainants in the two causes were elected as council member and a member of the Tribunal respectively. Their advocate is also said to have been elected as a member of the Tribunal. But as explained by **M/s Wambua** in her affidavit, and as submitted by the Tribunal's counsel, none of the said persons sat at the hearing. The initial mention was not a hearing and in any event, there is evidence that they disqualified themselves as expected, and ultimately, the matter was heard by a totally different panel.

80. Fundamental to the legitimacy of public decision-making is the principle that official decisions should not be infected with improper motives such as fraud or dishonesty, malice or personal self-interest. These motives, which have the effect of distorting or unfairly biasing the decision-maker's approach to the subject of the decision, automatically cause the decision to be taken for an improper purpose and thus take it outside the permissible parameters of the power.

81. A power is exercised fraudulently if its repository intends for an improper purpose, for example dishonestly, to achieve an object other than that which he claims to be seeking. The intention may be to promote another public interest or private interests. A power is exercised maliciously if its repository is motivated by personal animosity towards those who are directly affected by its exercise.

82. Bad faith has been defined rarely, but an Australian case defined it as "a lack of honest or genuine attempt to undertake the task and involves a personal attack on the honesty of the decision-maker."^[59] Recklessness was held not to involve bad faith.^[60] Bad faith is a serious allegation which attracts a heavy burden of proof.^[61] I will later consider whether the ex applicant has discharged this burden.

83. Reasonableness, within the context administrative law cannot be imbued with a single meaning.^[62] Pillay states that the first element of a reasonable administrative action is rationality, and the second proportionality. Rationality means that evidence and information must support a decision an administrator takes.^[63] Hoexter explains that the purpose of rationality is to avoid an imbalance between the adverse and beneficial effects and to consider using less drastic means to achieve the desired goal.^[64]

84. It is common ground that unreasonableness and irrationality are grounds for Judicial Review. Rationality, as a ground for the Review of an administrative action is dealt with in Section 7(2) (i) of Fair Administrative Action^[65] 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." The test for rationality was stated as follows:-^[66]

“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.”

85. 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.^[67] Contextualizing the impugned decision with the circumstances under which it was made leaves the court with the irresistible conclusion that the decision was not influenced by other considerations nor was it made in utter abuse of power and discretion. It cannot be said that it was not connected or related to the purpose of the statute. There is no evidence that it was influenced by extraneous circumstances not rationally connected to the purpose of the statute or the discretion given under the act.

86. Reasonableness, as a ground for the review of an administrative action is dealt with in Section 7 (2) (k) of the Fair Administrative Action Act.^[68] A court or tribunal has the power to review an administrative action if the exercise of the power or the performance of the function authorised by the empowering provision, in pursuance of which the administrative action was purportedly taken, is so unreasonable that no reasonable person could have so exercised the power or performed the function. 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^[69] as ‘conduct which no sensible authority acting with due appreciation of its responsibilities would have decided to adopt.’ Whatever the rubric under which the case is placed, the question here reduces, as I see it, to whether the decision maker has struck a balance fairly and reasonably open to him.^[70]

87. In determining whether a decision 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.^[71] In this regard, the court notes the contents of **Mercy Wambua** Replying Affidavit in which she has addressed all the allegations raised, including the steps taken at the preliminary stages, the constitution and composition of the panel, and the clarification that the judgment was signed by **ENK Kanjama, A. N. Mwaure** and **O. Kebira** who heard the complaint but not by **Michael Wabwile** and **Gladys Kinyanjui** as alleged.

88. 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^[72] and that the impugned decision had to be “verging on absurdity” in order for it to be vitiated.^[73]* This stringent test has been applied in Australia^[74] where the Court held that in order for invalidity to be determined, the decision must be one which no reasonable person could have reached and to prove such a case required “something overwhelming.” It must have been conduct which no sensible authority acting with due appreciation of its responsibilities could have decided to adopt and when “looked at objectively, is so devoid of any plausible justification that no reasonable body of persons could have reached them.” Given the facts of this case, I am not persuaded that a different tribunal properly addressing itself to the same facts and circumstances could have arrived at a different conclusion. In fact, the *ex parte* applicant never advanced this argument despite citing unreasonableness.

89. 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 whether the decision falls within a range of possible, acceptable outcomes which are defensible with respect to the facts and law. Put differently, no argument was advanced before me that the decision falls outside the range of possible acceptable outcomes applying the same set of facts and the 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;

90. 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.

91. 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.^[75] The *ex parte* applicant has not demonstrated any of the above requirements for legal unreasonableness.

92. 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 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.

93. 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, or where the decision maker failed to apply his mind to the matter. This is not a proper case for judicial interference.

c) Whether the decision is tainted with illegality.

94. **Mr. Mboya** cited *Republic v Secretary County Public Board & Another ex parte Hulbai Gedi Adbiille* [76] and *Council of Civil Service Union v Minister for Civil Service* [77] in support of his submission that in order to succeed in an application for Judicial Review, an applicant must show that the decision complained of is tainted with illegality, irrationality and procedural impropriety. He further submitted that Judicial Review is limited to the process and does not require the court to venture into merits of the decision. [78] He argued that the Tribunal acted illegally in that it contravened the constitution and the statute. He stated that the actions complained of violated Articles 27(1), [79] [35] [80], 47 [81], 50 [82] & 50(2) of the Constitution. Additionally, he argued that the Tribunal contravened section 58(5) of the Advocates Act [83] by failing to adhere to the tenets of judicial proceedings, which required it to apply itself to the evidence including the decision of the Council and take into cognizance of the conflict of interest by the advocates and the complaints commission who participated in the panel.

95. Further, **Mr. Mboya** submitted that the Tribunal contravened section 78 of the Act which grants immunity to the members of the Tribunal from being sued in respect of any act or thing done or omitted to be done in good faith in the exercise, discharge or performance of any of the powers, jurisdiction, duties or functions conferred upon him or by virtue of the Act. He argued that he was at all material times the Tribunal's secretary and secretary to LSK. He also argued that the immunity in question is akin to the absolute immunity bestowed upon members of the judiciary by Article 160(5) of the Constitution [84] and that his functions were judicial in nature.

96. **Mr. Mboya** also argued that by a letter dated 3rd July 2018, the honourable Attorney General raised concern on the participation of **Ezekiel Wanjama** and **Assa Nyakundi** as twin chairpersons of the Tribunal and indicated that the same is liable for legal challenge, hence, the Tribunal violated section 57(1)(b) of the Act [85] by permitting **Ezekiel Wanjama** and **Assa Nyakundi** to sit in the panel.

97. The Respondent's counsel cited *Republic v Disciplinary Committee & Another ex parte Daniel Kamunda Njue* [86] in support of his submission that the Tribunal has jurisdiction to entertain complaints against advocates. He argued that section 57 of the Act mandates the Tribunal to receive, hear and dispose complaints brought against an advocate in the manner prescribed under section 60 of the act, and that, the *ex parte* applicant is an Advocate, hence, he falls within the jurisdiction of the court.

98. He also submitted that section 78 of the Act requires that a person acting under the said section to act in good faith. Also, he submitted that, though the *ex parte* argued that he was acting under the instructions of the counsel to inform the members the status of those vying, he communicated through his personal face book account, as opposed to the official communication platform of the LSK, hence, he did not act in good faith. He also submitted that even if the decision is erroneous on its merits, this court cannot intervene. [87]

99. Safeguarding legality is the most important purpose for the judicial review of administrative actions. Thus, in most administrative law systems, a person seeking judicial review of an administrative decision must be able to persuade the court that there are grounds for review in order for the legality of the administrative decision to be judicially challenged. In one sense, there must always be the premise of "want of legality."

100. In response to a challenge to the legality of administrative action, courts generally need to consider the compliance of administrators with both substantive and procedural legal rules. This is because any administrative decision making process involves the exercise of legally conferred powers and the observation of legally prescribed procedures.

101. The most basic rules of administrative law are first that decision makers may exercise only those powers which are conferred on them by law and, second, that they may exercise those powers only after compliance with such procedural prerequisites as exist. So long as administrators comply with these two rules, their decisions are safe. From the perspective of administrators and statutory bodies, this fundamental principle generally requires that the exercise of powers of administrators and statutory bodies must strictly comply with the law both substantively and procedurally. It follows, therefore, that the legality of an administrative decision or decisions rendered by Tribunals can be judicially challenged on grounds that the administrative decision does not comply with the above mentioned basic requirements of legality.

102. The most obvious example of illegality is where a body acts beyond the powers which are prescribed for it. In other words, it acts *ultra vires*. Decisions taken for improper purposes may also be illegal. Illegality also extends to circumstances where the decision-maker misdirects itself in law. When exercising a discretionary power, a decision-maker may take into account a range of lawful considerations. If the exercise of the discretionary power has been influenced by considerations that cannot lawfully be taken into account, or by the disregard of relevant considerations required to be taken into account, a court will normally find that the power had been exercised illegally.

103. The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second issue that can be argued under illegality is fettering discretion. This heading for judicial review entails considering whether an administrative body actually exercised the power it has, or whether because of some policy it has adopted, it has in effect failed to exercise its powers as required. In general terms the courts accept that it is legitimate for public authorities to formulate policies that are 'legally relevant of [their] powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust.' An illegality can also occur where a body exercised a power which was within its functions but exceeded the scope of power that is legally conferred to it.

104. The exercise of discretionary powers, as the rule of law requires, must be consistent with a variety of legal requirements and subject to judicial control. Consequently, the legality of an administrative decision or a decision of a Tribunal can be challenged on the grounds that discretion is abused or improperly exercised by administrator or the Tribunal.

105. Also relevant is the concept 'error of law' which is mainly concerned with the erroneous applications of the law.

106. Judicial Review remedies are meant to afford the prejudiced party administrative justice, to advance efficient and effective public administration compelled by constitutional precepts and at a broader level, to entrench the Rule of Law. 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 a statute or Regulations. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring administrative 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 Parliament's enactments.

107. Two critical issues flow from the foregoing section. *First*, whether the impugned decision can be read in a manner consistent with the provisions of law conferring the power to the Tribunal. *Second*, judicial oversight is necessary to ensure that decisions are taken in a manner which is lawful, reasonable, rational and procedurally fair.^[88] What matters is to establish whether the decision was taken in a manner which is lawful, reasonable, rational and procedurally fair.

108. 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. The action or decision complained of must conform to the statutory provisions and must pass the Constitutional muster. In *John Wachiuri T/A Githakwa Graceland & Wandumbi Bar & 50 Others vs The County Government of Nyeri & Ano*^[89] the court emphasized that there are three categories of public law wrongs which are commonly used in cases of this nature. These are:-

*a. **Illegality**- Decision makers must understand the law that regulates them. If they fail to follow the law properly, their decision, action or failure to act will be "illegal". Thus, an action or decision may be illegal on the basis that the public body has no power to take that action or decision, or has acted beyond its powers.*

*b. **Fairness**- Fairness demands that a public body should never act so unfairly that it amounts to abuse of power. This means that if there are express procedures laid down by legislation that it must follow in order to reach a decision, it must follow them and it must not be in breach of the rules of natural justice. The body must act impartially, there must be fair hearing before a decision is reached.*

*c. **Irrationality and proportionality**- The courts must intervene to quash a decision if they consider it to be demonstrably unreasonable as to constitute '**irrationality**' or '**perversity**' on the part of the decision maker. The benchmark decision on this principle of judicial review was made as long ago as 1948 in the celebrated decision of **Lord Green** in *Associated Provincial Picture Houses Ltd vs Wednesbury Corporation*^[90]:-*

"If decision on a competent matter is so unreasonable that no reasonable authority could ever have come to it, then the courts can interfere...but to prove a case of that kind would require something overwhelming..."

109. The provisions conferring mandate upon the Tribunal must be read in the context of not one but three different imperatives. The *first* is to enable the Tribunal to effectively carry out its specially identified statutory mandate. The Constitution and the act clearly envisages an important and active decisional role for the Tribunal to perform its functions through the application of the law. *Second*, the Constitution declares that everyone is entitled to a Fair Administrative Action. In as much as the Tribunal's decisions affects the *ex parte* Applicant, the Tribunal is obliged **not** to act unfairly. The impugned decision must accordingly be construed so as to promote respect for the Bill of Rights. A *third* dimension must also be borne in mind. The Constitution envisages the right to be resolved by the application of the law in a fair and public hearing, before a court or if appropriate another independent and impartial tribunal or body.^[91] Put differently, it could not have been the intention of the legislature to contemplate a situation whereby the Tribunal would act in such a manner as to violate or trump or trivialize a citizens' constitutional rights.

110. Guided by the foregoing tested legal principles and applying the same to the circumstances of this case, I will first address the alleged violation of constitutional provisions. It is settled law that it is not enough for a litigant to particularize provisions of the Constitution. The actual violation must be specifically pleaded and proved. The *ex parte* applicant cites violation of Article 27 of the Constitution. No evidence has been tendered to support discrimination or differential treatment. The only allegation is that some complaints were referred to the alternative dispute resolution mechanism. That may be so, but, such referrals are done with the consent of the parties. In any event, he never made any request for the complaint against him to be considered for ADR.

111. The *ex parte* applicant also cites violation of Article 35 of the Constitution. This allegation hangs in the air. He has not stated which information was denied to him, whether he made the request and why he never moved the court for appropriate orders. The details of the complaints were availed to him. He filed a Reply. He participated in the trial. He filed submission. He was served with a copy of the determination. He cannot be heard to claim that some information was left out. This being a judicial process, he could have applied for orders to be supplied with any information or evidence against him.

112. As for the alleged violation of Articles 47, 50 & 50(2) of the Constitution, I find comfort in the Court of Appeal decision in *J.S.C. vs Mbalu Mutava*^[92] which 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) of the Constitution. 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.^[93] Fair hearing under Article 50 (1) applies in proceedings before a court of law or independent and impartial tribunals or bodies.

113. The *ex parte* applicant has alleged violation of Article 58(5) of the Act which provides that "all proceedings before the Tribunal shall be

deemed for the purpose of Chapter X1 of the Penal Code^[94] to be judicial proceedings and for the purposes of the Evidence Act^[95] to be legal proceedings. I find nothing in the ex parte applicant's application and submissions to support this allegation. The proceeding were conducted by way of affidavits and submissions which is provided for. The ex parte applicant never at any stage expressed desire to adduce oral evidence or desire to cross-examine the complainant.

114. The ex parte applicant consistently argued that he was performing duties as the Secretary to the Council and the Tribunal, hence, he is entitled to the immunity provided under section 78 of the Act which provides that "No Member of the Tribunal, nor any person who is or was at any material time, or the secretary, thereof, shall be liable to be sued in any civil court for or in respect of any act or thing done or omitted to be done, or ordered to be done or omitted, by him, in good faith, in the exercise, discharge or performance or intended or purported exercise, discharge or performance, of any of the powers *jurisdiction, duties or functions conferred upon him under or by virtue of this Act.*"

115. The Tribunal's position is that the above immunity only applies where a person acts in good faith. It is common ground that the ex parte applicant posted details of complaints against the complainants in the causes filed against him in his face book account. Despite the clear requirement of good faith under the above provision, he made no attempt at all to explain whether he acted in good faith. Instead he likened the immunity under section 78 cited above with the constitutional immunity granted to judicial officers under Article 160(5) of the Constitution.

116. First, by publishing or posting the said information in the face book account, he was not executing an order of the Tribunal. It follows that he cannot claim immunity under the above section.

117. Second, he states that he was acting for and on behalf of the Council. Unfortunately, the section he seeks to rely on only protects members of the Tribunal and not the Council.

118. Third, no order from the Tribunal was produced directing him to publish the said information.

119. Fourth, even if he was acting under an order of the Tribunal (which he was not), he would be required to demonstrate good faith. Whereas the definition of subordinate courts under Article 169 of the Constitution includes tribunals established by or under an act of Parliament, the ex parte applicant did not address his mind to the provisions of section 6 of the Judicature Act^[96] which provides that:-

"No judge or magistrate, and no other person acting judicially, shall be liable to be sued in a civil court for an act done or ordered by him in the discharge of his judicial duty, whether or not within the limits of his jurisdiction, provided he, at the time, in good faith believed himself to have jurisdiction to do or order the act complained of; and no officer of a court or other person bound to execute the lawful warrants, orders or other process of a judge or such person shall be liable to be sued in any court for the execution of a warrant, order or process which he would have been bound to execute if within the jurisdiction of the person issuing it"

120. *Fifth*, the test in Article 160(5) of the Constitution and section 6 of the Judicature Act^[97] is that the judicial officer must have done the thing complained of or omitted to do it in good faith in the lawful performance of a judicial function. Lawful in this context means "conforming to, permitted by, or recognized by law or rules."^[98] I am afraid, the ex parte applicant has not demonstrated that he was executing orders of the Tribunal when he published the information nor has he discharged the burden of proving good faith. In other words all that he needed to do is to establish the lawfulness of publishing the information. His allegation that he was acting under the instructions of the Council of the Law Society does not help. Minutes of the council authorizing the publication in the forum he chose could have sufficed.

121. The adjective of the word lawful is (a) allowed or permitted by law; not contrary to law: a lawful enterprise. (b) recognized or sanctioned by law; legitimate, (c) appointed or recognized by law; legally qualified, (d) acting or living according with the law; law-abiding.^[99] Allowable or permissible by being in conformity with laws, principles, regulations, statutes, etc., meant to govern or regulate a particular activity or conduct. It also means legal and legitimate.^[100] The ex parte applicant did not demonstrate the lawfulness of his action of posting the information on his face book account.

122. In view of my analysis of the facts and the law herein above, it is my conclusion that the ex parte applicant has not demonstrated that the impugned decision is tainted with illegality.

d) Whether the Respondent violated the ex parte applicant's right to legitimate expectation.

123. Mr. Mboya argued that the Tribunal violated his right to legitimate expectation that he is entitled to equal protection of the law, and, that, the Tribunal will not act contrary to section 78 of the Advocates Act.^[101]

124. Counsel for the Tribunal did not address this particular issue.

125. The importance of fair administrative action as a Constitutional right was appreciated in the South African case of *President of the Republic of South Africa and Others vs. South African Rugby Football Union and Others*^[102] where it was held as follows with regard to similar provisions on just administrative action in Section 33 of the South African Constitution:-

"...The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades..."

126. 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. Firstly it asks whether the administrator's actions created a reasonable expectation in the mind of the aggrieved party. If the answer to this question is 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, that is enforce the legitimate expectation. The first step in the analysis has both an objective and a subjective dimension. It is firstly asked whether a reasonable expectation of a certain outcome was created. The representation itself must be precise and specific and importantly, lawful. 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.

127. 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*.^[103] 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 and afford the individual holding that expectation due procedure before the expectation is disappointed. Failing such procedure, the individual may approach a court to review the administrator's actions on the ground of procedural unfairness. 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.

128. Addressing the subject of legitimate expectation, *H. W. R. Wade & C. F. Forsyth*^[104] at pages 449 to 450, 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)

129. 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 ones 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 provisions of the law cited by the *ex parte* applicant discussed above earlier clearly do not support his allegation of violation of his right to legitimate expectation. On the contrary, there is nothing to support the allegation that the Tribunal violated the said provisions or the *ex parte* applicant's right to legitimate expectation.

e) Whether the decision is tainted by bad faith and/or whether the Tribunal failed to provide reasons for its decision.

130. **Mr. Mboya** argued severally that the Tribunal acted *in bad faith and with improper motive*. He cited instances such as changing the panel hearing the complaint. He also submitted that the Tribunal arrived at a finding that the its proceedings are confidential contrary to the constitutional provisions requiring transparency. He also cited failure to be given reasons.

131. The Tribunal's counsel's submission rejoinder was that the *ex parte* applicant was accorded a fair hearing, and on the alleged failure to give with a notice to appeal, he argued that the *ex parte* applicant as a former Secretary to the Tribunal and the counsel is fully aware of the procedures. Specifically, he argued that the *ex parte* applicant is yet to appear for mitigation, hence, the process cannot be complete before mitigation and sentencing is done. He relied on Court of Appeal decision in *Paul Misili Wambua v Disciplinary Committee & Another*.^[105]

132. A decision maker must not seek to achieve a purpose other than the purpose for which the power to make the decision has been granted by Parliament. Bad faith can be inferred where there is a deliberate breach of due process or where the decision maker appears to have been influenced by irrelevant considerations. As stated earlier bad faith requires a high standard of prove. I find no evidence in this case to demonstrate bad faith.

133. Section 4(2) of the Fair Administrative Action Act^[106] provides that "every person has the right to be given written reasons for any administrative action that is taken against him." This position was reiterated by the Court of Appeal in *Suchan Investment Limited v Ministry of National Heritage & Culture & 3 other*^[107] in the following words:-

"Under Article 47 (2) of the Constitution as read with the provisions of the Fair Administrative Actions Act of 2015, the common law position that there is no duty to give reasons for administrative decision is no longer a general principle of law in Kenya. A shift has taken place and there is requirement to give reasons for administrative decisions... In Judicial Service Commission -v- Hon. Justice Mutava Mbalu, Civil Appeal No. 52 of 2014, Githinji JA in considering the duty to give reasons for administrative action in light of Article 47 (2) of the Constitution expressed that reasons for decision should be given as a matter of right where a right under the Bill of Rights has been or is likely to be adversely affected by the administrative action and not otherwise; that the right to be given written reasons for the decision can be limited by law for a reasonable and justifiable cause."

134. However, cases are context sensitive. The *ex parte* applicant was supplied with a copy of the judgment which details the determination. It not clear what other reason he wants. The proceedings being judicial in nature, all that the *ex parte* applicant requires is the judgment and proceedings to enable him to lodge an appeal. He has not said he applied for proceedings and was denied. For a court to uphold a plea for refusal to be provided with reasons, the nature of the impugned decision is relevant. For a judicial proceeding as in this case, other than the

judgment and the proceedings, no other reasons can be provided. Above, all, the *ex parte* applicant is yet to offer mitigation and the sentence is yet to be pronounced. The allegation that the *ex parte* applicant was refused reasons must fail.

Final orders.

135. In view of my analysis of the issues distilled herein above, and the conclusions made on each issue, the conclusion becomes irresistible that the *ex parte* applicant has not demonstrated any grounds to warrant this court to grant the Judicial Review orders sought. Accordingly, I find and hold that the *ex parte* Applicant's Application dated 2nd August 2018 must fail. Consequently, I hereby dismiss the application dated 2nd August 2018 with costs to the Respondent.

Orders accordingly.

Signed, Delivered and Dated at Nairobi this 17th day of January 2019.

John M. Mativo

Judge.

[1] Cap 16, Laws of Kenya.

[2] Cap 16, Laws of Kenya.

[3] Cap 16, Laws of Kenya.

[4] Act No. 21 of 2014.

[5] Act No. 4 of 2015.

[6] {2014} eKLR.

[7] *R. vs Secretary of State for the Home Department Ex p. Pierson* [1998] A.C. 539 at 587 (Lord Steyn: "Parliament does not legislate in a vacuum. Parliament legislates for a...liberal democracy based upon the traditions of the common law . . . and . . . , unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law").

[8] *Jackson vs Attorney General* [2005] UKHL 56; [2006] 1 A.C. 262 at [120] (Lord Hope), [102] (Lord Steyn), [159] (Baroness Hale suggest that the rule of law may have become "the ultimate controlling factor in our unwritten constitution"; and see J. Jowell, "Parliamentary Sovereignty under the New Constitutional Hypothesis" [2006] P.L. 262.

[9] Sir Rupert Cross, *Statutory Interpretation*, 13th edn. (1995), pp.172–75; J. Burrows, *Statute Law in New Zealand*, 3rd edn. (2003), pp.177–99. For a recent example in Canada see *ATCO Gas and Pipelines Ltd vs Alberta (Energy and Utilities Board)* [2006] S.C.R. 140.

[10] {1969} 1 All ER 20.

[11] S. De Smith, H. Woolf and J. Jowell, *Principles of Judicial Review* (Sweet and Maxwell, 1999) at 20.

[12] P. Craig, *Administrative Law*, 5th ed (Sweet and Maxwell, 2003) at p. 9.

[13] Lord Irvine, "Judges and Decision-Makers: the Theory and Practice of *Wednesbury* Review" [1996] PL 59, at 60-61

[14] {2013} eKLR.

[15] Citing *Republic v City Council of Nairobi ex parte Taxi Cabs association* {2010}eKLR.

[16] Act No. 4 of 2015.

[17] Citing *Daniel Nyongesa and Others v Egerton University College* CA No. 90 of 1989.

[18] {2016}eKLR.

[19] Act No. 4 o 2015.

[20] {2013}eKLR.

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

[22] *Ibid.*

[23] 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](#).

[24] *Supra*, note 18.

[25] *Supra*, Note 20, at p 342.

[26] *Ibid.*, page 313.

[27] 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>.

[28] (1897) 18 N.S.W.R. 282, 288 (S.C.).

[29] Article 47(1) of the Constitution.

[30] Article 47(2) of the Constitution.

[31] {1915} AC 120 (138) HL

[32] {1934} 291 US 97(105)

[33] We find it Invoked in Kautllya's Arthashastra.

[34] In the case of *Mohinder Singh Gill v. Chief Election Commissioner*, AIR 1978 SC 851

[35] (1980), at page 161.

[36] (1977) at page 395.

[37] 6th Ed at pages 570.

[38] *Kioa v West* (1985), Mason J.

[39] Act No. 4 of 2015.

[40] *Ibid.*

[41] in *R vs Somerset CC Ex parte Dixon*(COD){1997} Q.B.D. 323.

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

[43] Act No. 4 of 2015.

[44] See S. De Smith, *Judicial Review of Administrative Action*, 4th ed. J. Evans (1980), 352- 4.

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

[46] 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).

[47] {2018}eKLR.

[48] {2018}eKLR.

[49] MANU/SC/0047/1967

- [50] {1901} AC 495
- [51] {1898} AC 1
- [52] *Ambica Quarry Works vs. State of Gujarat and Ors.* MANU/SC/0049/1986
- [53] *Ibid*
- [54] *Bhavnagar University v. Palitana Sugar Mills Pvt Ltd* (2003) 2 SC 111 (vide para 59)
- [55] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, *Prashant Vats Versus University of Delhi & Anr.* (Citing Lord Denning).
- [56] *Ibid*
- [57] *Ibid*
- [58] {2018}eKLR.
- [59] See *SCA v Minister of Immigration* [2002] F.C.A.F.C. 397 at [19].
- [60] *NAFK v Minister of Immigration* (2003) 130 F.C. 210, [24].
- [61] *Daihatsu Australia Pty Ltd v Federal Commission of Australia* (2001) 184 A.L.R. 576 (Finn J. at 587)
- [62] Hoexter, C. 2007. *Administrative law in South Africa*. Cape Town: Juta.
- [63] Pillay, A. 2005. Reviewing reasonableness: an appropriate standard for evaluating state action and inaction? *South African Law Journal*, 122(2): 419-439.
- [64] *Supra* Note 62.
- [65] Act No. 4 of 2015.
- [66] By Chaskalson P, in *Pharmaceutical Manufacturers Association of SA and Another: In re Ex parte President of the Republic of South Africa and Others* [2000 \(4\) SA 674 \(CC\)](#) at page 708; paragraph 86.
- [67] In *Trinity Broadcasting (Ciskei) v ICA of SA*, 2004(3) SA 346 (SCA) at 354H- 355A, Howie P
- [68] Act No. 4 of 2015.
- [69] [{1976} UKHL 6](#); [{1976} 3 All ER 665](#) at 697; [{1976} UKHL 6](#); , [{1977} AC 1014](#) at 1064.
- [70] Lord Cooke in *R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd*, [{1995} 1 All ER 129](#) (HL) at 157.
- [71] See *Carephone (Pty) Ltd v Marcus* NO [1999 \(3\) SA 304 \(LAC\)](#) at 316, para 36, per Froneman JA.
- [72] See *Bromley London Borough Council vs Greater London Council* {1983} 1 AC 768 (at [821]).
- [73] *Puhlhofer v Hillingdon London Borough Council* [1986] 1 AC 484.
- [74] In *Prasad v Minister for Immigration* {1985} 6 FCR 155.
- [75] Justin Gleeson, "Taking stock after Li", in Debbie Mortimer (ed) *Administrative Justice and its Availability* (Federation Press, 2015) 37.
- [76] {2015}eKLR.
- [77] {1984} ALL ER 935.
- [78] Citing *Isaack Osman Sheikh vs IEBC & Others*, Civil Appeal No. 180 of 2013.
- [79] Equality and Freedom from discrimination.
- [80] Access to Information.

[81] Fair Administrative Action Act.

[82] Fair Hearing.

[83] Cap 16, Laws of Kenya.

[84] Citing *Maina Gitonga v Catherine Nyawira Maina & Another* {2015}eKLR.

[85] Cap 16, Laws of Kenya.

[86] {2016} eKLR.

[87] citing *Republic v Disciplinary Committee & Another ex parte Daniel Kamunda Njue, ibid*

[88] See *VDZ Construction (Pty) Ltd vs Makana Municipality & Others* {2011} JOL 28061 (ECG) para 11

[89] JR No 17 B of 2015.

[90] {1948} 1 K. B. 223, H.L.

[91] Article 50 (1).

[92] {2015}eKLR

[93] *Ibid.*

[94] Cap 63, Laws of Kenya.

[95] Cap 80, Laws of Kenya.

[96] Cap 8, Laws of Kenya.

[97] *Ibid.*

[98] <https://www.google.com/search?q=meaning+of+lawful&ie=utf-8&oe=utf-8&client=firefox-b>

[99] <http://www.dictionary.com/browse/lawful>

[100] <http://www.businessdictionary.com/definition/lawful.html>

[101] Cap 16, Laws of Kenya.

[102](CCT16/98) 2000 (1) SA 1, at paragraphs135 -136.

[103] 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.

[104] *Administrative Law*, by [H.W.R. Wade](#), [C. F. Forsyth](#), Oxford University Press, 2000.

[105]{2015}eKLR.

[106] Act No. 4 of 2015.

[107] {2016} eKLR.