



REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS CIVIL APPLICATION NO. 383 OF 2018

In the matter of an application for Judicial Review Orders of *Certiorari* and *Prohibition*

and

In the matter of constitutional Rights pursuant to Articles 21(1), 22(1)(2)(4), 23, 24, 25 (c), 27(1), 28, 33(3), 38, 48, 196(3) of the Constitution of Kenya, 2010

and

In the matter of The Law Reform Act Section 8 & 9, Cap 26

and

In the Leadership and Integrity Act No. 19 of 2012

and

In the matter of Anti-Corruption and Economic Crimes Act, 2003

and

In the matter of Ethics and Anti-Corruption Commission Act No. 22 of 2011

and

In the matter of the County Assemblies Powers and Privileges Act. No. 6 of 2017

BETWEEN

Republic.....Applicant

versus

Ethics and Anti-Corruption Commission.....Respondent

and

Nairobi City County Assembly.....1st *Ex parte* Applicant

Hon. Anthony Kiragu Karanja.....2nd *Ex parte* Applicant

Hon. Peter Imwatoke.....3rd *Ex parte* Applicant

Hon. Elias Otieno Okumu.....4th *Ex parte* Applicant

Hon. Ibrahim Abdi Hassan.....	6 th Ex parte Applicant
Hon. Leah Naikanae Supuka.....	7 th Ex parte Applicant
Hon. Peter Wahinya.....	8 th Ex parte Applicant
Hon. Hon. Susan Makungu Kavaya.....	9 th Ex parte Applicant
Hon. Laura Mwendu Mwololo.....	10 th Ex parte Applicant
Hon. Mary Njambi.....	11 th Ex parte Applicant
Hon. Nancy Maole Grace Muthami.....	12 th Ex parte Applicant
Hon. Doris Kanario Ngoyo.....	13 th Ex parte Applicant
Hon. Ruth Ndumi Maingi.....	14 th Ex parte Applicant

JUDGMENT

The Parties.

1. The 1st *ex parte* applicant is the Nairobi City County Assembly, established under Article 176 of the Constitution. The 2nd to the 14th *ex parte* applicants are members of the Nairobi City County Assembly. (NB: The 5th *ex parte* applicant is not named in the application).
2. The Respondent, the **Ethics and Anti-Corruption Commission (EACC)**, is an independent Commission established pursuant to Article 79 of the Constitution and section 3 of the Ethics and Anti-Corruption Commission Act[1] with the status and powers of a commission under Chapter Fifteen of the Constitution for the purposes of ensuring compliance with, and enforcement of, the provisions of Chapter Six of the Constitution.

The reliefs sought.

3. The *ex parte* applicants' Notice of Motion dated 19th September 2018 seeks orders:-

- a. ***That*** the Honourable Court be pleased and do hereby grant Judicial Review order of ***Certiorari*** to remove into this honourable court and quash the summons dated 11th September 2018 by the Ethics and Anti-Corruption Commission summoning the 2nd to the 14th *ex parte* applicants for investigation on 13th September 2018 at 2.00pm over their participation in the impeachment of the Speaker of the Nairobi City County Assembly.
- b. ***That*** the honourable court be pleased and do hereby grant Judicial Review order of ***Certiorari*** to remove into this honourable court and quash the summons dated 11st September 2018 by the Ethics and Anti-Corruption Commission requiring the Clerk of the Nairobi County Assembly to provide it with privileged County Assembly proceedings and information in relation to the impeachment of the Speaker of the Nairobi City County Assembly.
- c. ***That*** the Honourable Court be pleased and do hereby grant Judicial Review order of ***Prohibition*** to remove into this honourable court and prohibit the EACC from purporting to investigate the 2nd to 14th Applicants over their participation in the County Assembly in the impeachment of the Speaker of Nairobi City County Assembly.
- d. ***That*** costs of and incidental to this application.
- e. ***That*** such further and other reliefs that this honourable court may deem just and expedient to grant.

Factual Matrix.

4. The facts giving rise to the application as far as I can distil them from the face of the application, the statutory statement and the matters set out in the annexed verifying Affidavit of **Ahmed Siro Makokha** are that on 6th September 2018 the *ex parte* applicants together with other members of the County Assembly of Nairobi participated in the impeachment of the Speaker of the Nairobi County Assembly **Hon. Beatrice Kadeverisia Elachi** which drew a lot of debate and went on to 10th day of September 2018 when the Speaker purported to report to duty in blatant violation of Member of County Assemblies(MCAs) resolution.
5. The crux of the *ex parte* applicants case is that by a letter dated 11th September 2018, EACC purported to summon the 2nd to 14th *ex parte* applicants to appear before it on 13th September 2018 at 2.00pm for purposes of investigations over their participation in the impeachment of the Speaker of Nairobi County Assembly in outright violation and disregard of Article 196(3) of the Constitution and sections 10 and 11 of the County Assemblies Powers and Privileges Act,[2] and, also, it purported to compel the Clerk of the Nairobi City County Assembly

through a letter dated 11th September 2018 to provide it with the Hansard Proceedings, all the relevant order papers and information relating to the impeachment proceedings of the Speaker of Nairobi County Assembly.

Legal foundation of the application.

6. The *ex parte* applicants aver that **Article 196(3) of the Constitution** provides that "Parliament shall enact legislation providing for the powers, privileges and immunities of County Assemblies, their Committees and Members" and pursuant to this Article the County Assemblies Powers and Privileges Act[3] was enacted. Further, the *ex parte* applicants state that, section 10 of the act provides that:- "No proceedings or decision of a county assembly or the Committee of Powers and Privileges acting in accordance with this act shall be questioned in any court." while section 11(1) of the act provides that:-"No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to a County Assembly or a Committee, or by reason of any matter or thing brought by him or her therein by a report, petition, Bill, resolution, motion or other document written to a county assembly."

7. The *ex parte* applicants contend that the impeachment of the speaker was done in the course of the performance of the members legislative duties, and that, the said summons are based solely and solely on the participation of the applicant in the impeachment of the Speaker of the Nairobi City County Assembly. Further, they aver that EACC has no powers to question legislative proceedings of the County Assembly, and, by purporting to investigate Parliamentary proceedings, EACC is acting *ultra vires*. Additionally, they aver that the summons violate their expectation of Parliamentary privilege afforded to them under the County Assemblies Powers and Privileges Act[4] and Article 196(3) of the Constitution.

8. The *ex parte* applicants also aver that sections 15,16 and 17 of the act make provision for the referral of a matter to the Committee of Powers and Privileges where a member is alleged to be in breach of privilege. Hence, they argue, by undertaking a matter that has not been presented to the Committee of Powers and Privileges, EACC has breached the laid down procedure of handling suspected cases of violation of privilege by Members of County Assemblies. They state that EACC usurped the role of the Committee of Powers and Privileges and therefore acted *ultra vires*, and, its action is illegal, unreasonable, malicious, abuse of office and procedure, in excess of powers and in bad faith.

Respondent's Replying Affidavit.

9. **Eunice Hinga**, EACC's investigator undertaking investigations on the *ex parte* applicants' conduct at the Speakers Office, Nairobi City County Assembly on 10th September 2018 swore the Replying Affidavit dated 21st September 2018.

10. She averred that in order to give effect to and establish procedures and mechanism for the effective administration of Chapter Six of the Constitution, Parliament enacted the Leadership and Integrity Act[5] pursuant to Article 80 of the Constitution. She averred that under section 4(2) of the Leadership and Integrity Act,[6] EACC has the legal mandate of overseeing and enforcing the implementation of the Leadership and Integrity Act[7].

11. Additionally, she averred that the *ex parte* applicants being members of the Nairobi City County Assembly are State Officers within the meaning of Article 260 of the Constitution and their conduct is subject to the provisions of Chapter Six of the Constitution and the laws enacted pursuant thereto. Also, she averred that being State Officers, the *ex parte* applicants are required to respect the values, principles and requirements of the Constitution which are enumerated in Articles 10,73 and 75 of the Constitution and section 3(2) of the Leadership and Integrity Act.[8] Further, she averred that pursuant to the provisions of section 37 of the Leadership and Integrity Act,[9] the Nairobi City County Assembly developed a Leadership and Integrity Code for its State Officers (who include the *ex parte* applicants and all members of the County Assembly) which regulates their conduct, and provides for the conduct expected of the State Officers at the Nairobi County Assembly.

12. She further averred that pursuant to the provisions of section 40 of the Leadership and Integrity Act[10] all the Members of the County Assembly including the *ex parte* applicant signed and committed to the Leadership and Integrity Code developed by the Nairobi City County Assembly.

13. **M/s Hinga** averred that the *ex parte* applicants were reported to have engaged and/or committed various acts inside and outside the office of the Speaker at the Nairobi City County Assembly on 10th September 2018 at about 11.30am, which actions include causing commotion, shouting, wailing and forcefully gaining entry into the Speakers office in a bid to forcefully eject her from office. She averred that the incident was done publicly outside the Assembly debating chambers and was captured by both the print and electronic media and reportedly depicts the *ex parte* applicants shouting, wailing and engaging in violent conduct directed at the Speaker and staff in the Speakers office.

14. Further, she averred that the *ex parte* applicants conduct can only be weighed in line with the provisions of Article 73(1)(a)(ii)(iii) and (vi) and 75(1)(c) of the Constitution which regulates the conduct of State Officers. She also averred that EACC in exercise of its constitutional and statutory mandate issued summons to the *ex parte* applicants to appear at its offices at Integrity Centre to shed light into the aforesaid allegations related to their conduct. She averred that the issuance of the said summons is a lawful investigative procedure which is used to formally invite any person facing an investigation to allow the person to respond to the allegations.

15. Additionally, she averred that the Privilege and Immunities of members as provided for under section 8 and 11 of the County Assemblies Powers and Privileges Act[11] as read with sections 16 and 17 of the County Government Act[12] does not apply to the conduct attributed to the *ex parte* applicants which borders on unethical conduct and or is of criminal nature, and, that, the privilege and immunities of members of County Assemblies is limited to words spoken before or written in a report to the Assembly or a Committee thereof. Also, she averred that the alleged conduct is not part of the debate in the Assembly Chambers' and or Committee as envisaged in the law, hence, such actions do not enjoy immunity.

16. **M/s Hinga** also averred that the privileges and immunities essentially belong to the house as a whole and individual members cannot

claim privilege or immunity on matters that are unrelated to their functions in the house. Further, she averred that the *ex parte* applicants whether in public or private are expected to behave in a distinguished, respectable manner and to carry out their duties in accordance with the law.

17. Lastly, **M/s Hinga** averred that EACC is not in any way investigating the impeachment of the Speaker or the participation of the *ex parte* applicants as alleged in the notice of motion but the *ex parte* applicants' conduct on 10th September 2018 in and around the Speaker's office which is distinct and separate from the Assembly debating chambers, which function is within its mandate and does not amount to usurping the powers of the committee, hence, it has not acted *ultra vires* or in excess of its jurisdiction or in abuse of its powers nor has it violated the *ex parte* applicants' rights.

Issues for determination.

18. Upon analyzing the diametrically opposed facts presented by the parties and the rival submissions by their advocates, I find that the following issues fall for determination, namely:-

a. Whether the conduct complained of is privileged.

b. Whether EACC should have allowed the matter to be investigated by the relevant Committee of the Assembly.

c. Whether the *ex parte* applicants have established any grounds to warrant the Judicial Review orders sought.

a. Whether the conduct complained of is privileged.

19. The *ex parte* applicants' counsel's submission on this issue as I understand it is that the proceedings of the County Assembly are absolutely privileged, hence, EACC has no business purporting to question the proceedings. Counsel submitted that by purporting to request for the Relevant Hansard for the Nairobi County Assembly proceedings, and, all the relevant order papers for the assembly, and, the Nairobi County Assembly House Standing Orders, EACC violated Article 196 of the Constitution and Section 11 of the County Assemblies Powers and Privileges Act.^[13] To buttress his argument, counsel cited *John Harun Mwau v Dr Andrew K. Mullei & Others*^[14] in which it was held that it is impermissible to question Parliamentary proceedings.

20. Also, counsel argued that the issues EACC seeks to investigate fall within the privileges act. He cited *Francis Matheka & 10 Others v Director of Public Prosecutions & Another*^[15] where it was held that "it would be difficult to envisage a criminal act which would fit into or be part of a parliamentary proceedings save for those contemplated under section 4 of the Privileges Act as read with section 16 of the CGA."

21. EACC's counsel's submission on this issue was that pursuant to section 11(1) of the Ethics and Anti-Corruption Commission Act,^[16] it has powers to investigate the conduct in question, and, that, the conduct does not relate to a debate before the house. He cited *Francis Matheka & 10 Others v Director of Public Prosecutions & Another*,^[17] where the court observed that privilege essentially belongs to the house as a whole and not the individual members and that the *ex parte* applicants cannot claim privilege on matters not related to debates in the house.

22. Counsel cited *Hon. Elizabeth Manyala and 12 Others vs AG & EACC*^[18] in which members of the Nairobi County Assembly were being investigated for engaging in a fist fight while the assembly was in session. The incident was captured by the print and electronic media. They pleaded parliamentary privilege and sought to quash the summons. The court observed that fighting is not part of the proceedings in the County Assembly and dismissed the application. He submitted that the immunity of Members of a County Assembly cannot be equated to a principle of immunity for any acts and or omissions done in and around the County Assembly irrespective of the circumstances of the individual case.^[19]

23. It is undisputed that all legislative bodies enjoy certain legal privileges, powers and immunities known as "Parliamentary Privilege." Parliamentary privilege is designed to remove any impediments or restraints to the legislature going about its work, and to enable it to deal with challenges to its authority. Parliamentary privilege has been justified in law on the grounds that a legislature must enjoy freedom from control by the executive and the courts (an aspect of the constitutional separation of powers); that it must possess certain powers to facilitate the carrying out of its functions; and that it, its members and others participating in its proceedings must enjoy certain immunities for the legislature to discharge its functions effectively. The privileges that a legislature enjoys are not an end in themselves; they form part of a constitutional expression of parliamentary autonomy and are a means to achieving an end—an effectively functioning legislature able to operate in the public interest.

24. Although parliamentary privilege is a (more or less) well-defined category of law, it must coexist within the general corpus of legal rights, powers and immunities that are established and recognised by legislation and the common law. It is not a body of higher or fundamental law that overrides all other law, but is subject to statutory abrogation in the ordinary way. Only clear, unambiguous legislation will override or abrogate an aspect of parliamentary privilege. Such provisions are rare owing to the constitutional role of parliamentary privilege.

25. The contestation here is whether or not the conduct complained of is 'privileged.' The *ex parte* applicants' counsels' argument is that EACC is purporting to investigate the *ex parte* applicants for participating in a "privileged legislative process." He submitted that they were summoned "for their role in the impeachment motion against their Assembly Speaker." Curiously, the *ex parte* applicants do not deny engaging in the scuffle under investigation nor have they explained how such a scuffle can by any stretch of imagination or innovation form part of a legislative debate if at all it can.

26. EACC's position is that the investigations relate to the *ex parte* applicants' conduct and scuffle with the Speaker. The undisputed details

of the scuffle are that the *ex parte* applicants are alleged to have engaged and/or committed various acts inside and outside the office of the Speaker at the Nairobi City County Assembly on 10th September 2018 at about 11.30am. The actions include causing commotion, shouting, wailing and forcefully gaining entry into the Speakers office in a bid to forcefully eject her from office. It is uncontested that this incident was done publicly outside the Assembly debating chambers. It was captured by both the print and electronic media depicting the *ex parte* applicants shouting, wailing and engaging in violent conduct directed at the Speaker and staff in the Speakers office. This is the conduct the *ex parte* applicants are trying to persuade the court to find that it forms part of the "legislative process" hence it is privileged.

27. Curiously, the position taken by the *ex parte* applicants the investigation relates to "legislative process" is not supported by their own documents. In fact, the letters exhibited to the *ex parte* applicants' application show that the investigation relates to the scuffle in question not to the impeachment process. It's evident that the argument propounded by the *ex parte* applicants that they are being questioned for participating in a legislative process is totally wrong and misleading. The letters summoning them clearly state the reasons why they were being summoned. This truism, in my view extinguishes the core ground upon which the *ex parte* applicants stand on.

28. Notwithstanding my conclusion in the preceding paragraph that the investigation does not relate to the impeachment process, I now proceed to address the question whether the said conduct can by any stretch of imagination be construed to be a "Parliamentary debate or process," in order to be classified as privileged. The classic definition of parliamentary privilege is found in Erskine May's Treatise on The Law, Privileges and Usage of Parliament:-

"Parliamentary privilege is the sum of the peculiar rights enjoyed by each House collectively...and by Members of each House individually, without which they could not discharge their functions, and which exceed those possessed by other bodies or individuals. Thus privilege, though part of the law of the land, is to certain extent an exemption from the general law."^[20]

29. May states that:-

"The distinctive mark of a privilege is its ancillary character. The privileges of Parliament are rights, which are "absolutely necessary for the due execution of its powers." They are enjoyed by individual Members because the House cannot perform its functions without unimpeded use of the services of its Members; and by each House for the protection of its Members and the vindication of its own authority and dignity."^[21]

30. Privilege essentially belongs to the House as a whole; individual Members can only claim privilege insofar as any denial of their rights, or threat made to them, would impede the functioning of the House. In addition, individual Members cannot claim privilege or immunity on matters that are unrelated to their functions in the House.^[22]

31. The facts and circumstances disclosed in this case are strikingly similar to those in the two cases cited by counsel for EACC. In *Francis Matheka & 10 Others v Director of Public Prosecutions & Another*,^[23] County Assembly proceedings degenerated into a fracas. The applicants were said to have thrown water bottles, stones, chairs, bottles and rotten egg at the speaker. Upon being charged with an offence arising from the said conduct, the applicants moved the court by way of Judicial Review seeking to quash the proceedings invoking sections 16 and 17 of the County Governments Act^[24] as read with sections 12 and 29 of the National Assembly (Powers and Privileges) Act. Upon analysing the facts and the law, the court found that the allegations in question if proved may well amount to commission of criminal offences, which cannot be covered by the relevant provisions of the act or the County Government Act.

32. In the said case, the court observed that:-

*"A reading of section 4 of the **Privileges Act** clearly reveals that the immunity be it in civil or criminal proceedings is limited to **words spoken before, or written in a report to, the Assembly or a committee, or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise**. It is therefore clear that by far, the most important right accorded to Members of the House is the exercise of freedom of speech in parliamentary proceedings. This right is a fundamental right without which they would be hampered in the performance of their duties. It permits them to speak in the House without inhibition, to refer to any matter or express any opinion as they see fit, to say what they feel needs to be said in the furtherance of the national interest and the aspirations of their constituents."*

*It is to be recognised that privilege essentially belongs to the House as a whole; individual Members can only claim privilege insofar as any denial of their rights, or threat made to them, would impede the functioning of the House. In addition, individual Members cannot claim privilege or immunity on matters that are unrelated to their functions in the House. It follows that the special privileges of Members are not intended to set them above the law; rather, the intention is to give them certain exemptions from the law in order that they might properly execute the responsibilities of their position. In this context, it would be difficult to envisage a criminal act which would fit into or be a part of a parliamentary proceeding save for those contemplated under section 4 of the **Privileges Act** as read with section 16 of the **CGA**. A criminal offence which immediately comes to one's mind in this respect is criminal libel. Similarly, the right to freedom from interference in the discharge of parliamentary duties does not apply to actions taken by Members outside parliamentary proceedings which could lead to criminal charges. No Member may claim immunity from arrest or imprisonment on such charges. Whereas the Speaker must always ensure that the privileges of the House and its Members are respected, he must at the same time ensure that the privileges accorded to Members are not misused to obstruct justice.*

Therefore, it goes without saying that if Members are charged with infractions of the criminal law other than those contemplated under the two provisions cited above, they must abide by the due process of law. To do otherwise would show contempt for the Kenyan Constitution and the system of justice. Under Article 27 of the Constitution, every person is equal before the law and has the right to equal protection and equal benefit of the law. Therefore the powers, privileges and immunities granted to the legislative assemblies ought to be enjoyed only to the extent permitted by the law and ought not to be abused for reasons outside the ambit of the law in order to commit offences which are not covered by the privilege." (Emphasis added).

33. In *Hon. Elizabeth Manyala and 12 Others vs AG & EACC*^[25] also cited by counsel for EACC, Members of the Nairobi County

Assembly were being investigated for engaging in a fist fight while the assembly was in session. The incident was captured by the print and electronic media just like the present case. They pleaded Parliamentary privilege and sought to quash the summons. The court observed that fighting is not part of the proceedings in the County Assembly and dismissed the application.

34. The leading decision on Parliamentary Privilege is *Canada (House of Commons) v Vaid*,^[26] in which Canadian Supreme Court developed a test for determining when a claim of Parliamentary privilege can protect a legislative body or its members from legal scrutiny. In a unanimous decision, the Court found that:-^[27]

"Legislative bodies created by the Constitution... do not constitute enclaves shielded from the ordinary law of the land. ... Accordingly, to determine whether a privilege exists for the benefit of the Senate or House of Commons, or their members, a court must decide whether the category and scope of the claimed privilege have been authoritatively established in relation to our own Parliament or to the House of Commons at Westminster. If so, the claim to privilege ought to be accepted by the court. However, if the existence and scope of a privilege have not been authoritatively established, the court will be required to test the claim against the doctrine of necessity — the foundation of all parliamentary privilege. In such a case, in order to sustain a claim of privilege, the assembly or member seeking its immunity must show that the sphere of activity for which privilege is claimed is so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative and deliberative body, including the assembly's work in holding the government to account, that outside interference would undermine the level of autonomy required to enable the assembly and its members to do their legislative work with dignity and efficiency. Once a claim to privilege is made out, the court will not enquire into the merits of its exercise in any particular instance." (Emphasis added).

35. The fracas EACC seeks to investigate has never been established in any civilized Parliamentary system in the world to be capable of falling within the category and scope of matters that can be accorded Parliamentary privilege nor can it pass the test of the doctrine of necessity nor can such conduct be claimed to be so closely and directly connected with the fulfilment by the assembly or its members of their functions as a legislative or a deliberative body. Privilege is that which sets Honourable Members apart from other citizens giving them rights which the public do not possess. In my view, Parliamentary privilege does not go much beyond the right of free speech in the House and the right of a Member to discharge his duties in the House.^[28] An honourable Member is not reasonably expected to stoop too low and engage in such a despicable fracas, nor, can such conduct whether within the legislative Assembly or outside be construed to be part of a legislative process to qualify for legislative immunity contemplated under the law.

36. The rights, privileges and immunities of individual Members of the House are finite, that is to say, they can be enumerated but not extended except by statute or, in some cases, by constitutional amendment. Moreover, privilege does not exist "at large" but applies only in context, which usually means within the confines of the Parliamentary Precincts and a "proceeding in Parliament." The fracas in question was not part of proceedings of the Assembly nor can it be said by any description to be part of the legislative process, proceedings or deliberations.

37. The County Assemblies Powers and Privileges Act^[29] does not define proceedings. The Parliamentary Powers and Privileges Act^[30] defines proceedings as follows:- "Proceedings" means-

a) all things said, done or written by a Member or by any officer of either House of Parliament or by any person ordered or authorised to attend before such House or its committees, in or in the presence of such House or its committees and in the course of a sitting for the purpose of transacting the business of the House or its committees; and

b) all things said, done or written between Members or between Members and officers of either House of Parliament for the purpose of enabling any Member or any such officer to carry out his or her functions.

38. May defines it as follows:-

"The primary meaning of proceedings, as a technical parliamentary term, which it had at least as early as the seventeenth century, is some formal action, usually a decision, taken by the House in its collective capacity. This is naturally extended to the forms of business in which the House takes action, and the whole process, the principal part of which is debate, by which it reaches a decision. An individual Member takes part in a proceeding usually by speech, but also by various recognized forms of formal action, such as voting, giving notice of a motion, or presenting a petition or report from a committee, most of such actions being time-saving substitutes for speaking. Officers of the House take part in its proceedings principally by carrying out its orders, general or particular. Strangers also may take part in the proceedings of a House, for example by giving evidence before it or one of its committees, or by securing the presentation of a petition."^[31]

39. In *Kielley v. Carson*^[32] the Privy Council passed the resolution that: "The only privilege given to a Legislative Assembly by the common law, was a power to protect itself from all impediments to the due course of its proceedings, and to take what measures were necessary to secure the free exercise of its legislative functions;..."

40. The gist of the established principles relating to scope/span/range/extent/reach of parliamentary privileges in common law countries over the centuries are summarised as follows:-^[33]

a) Parliamentary privileges are privileges of the House "as a whole."

b) Individual members can make claims of privilege "in so far as any denial of their rights or threats made to them, would impede the functioning of the House".

c) The method for ascertaining the scope or range of parliamentary privileges are "to consult the Records of House and relative case laws in which a claim of privilege has been made, and to examine whether it has been admitted or refused."

d) A parliamentary privilege cannot be allowed in cases between non-members of parliament or the cases between the members of parliament outside the area of parliamentary proceedings in their individual capacity.

e) Parliamentary privileges are only such rights and immunities which are “necessarily connected and are reasonably necessary” for the smooth functioning of any legislative body.

f) Parliamentary privileges include “the statements by members of the legislature in the course of its proceedings, and the right to remove, suspend or even expel a member for disorderly conduct”.

g) Parliamentary privileges does not include “to suspend or even expel a member for disorderly conduct, for an indefinite period, or to punish by arrest and commitment”.

h) It is not within the scope of any parliament of the common law “the right to punish contempt which did not obstructers its proceedings”.

i) The courts cannot intervene “in matters affecting regularity of the parliamentary procedure and the actions of officers in carrying out the procedure of parliament”.

j) Houses of Parliament cannot extend its privileges.

k) Houses of Parliament cannot claim for itself claim new privileges.

l) An act of Parliament only can create a new privilege or extend old privilege. Parliament can “apply its rights to new circumstances”.

41. The courts have a legitimate role to play in developing the law of privilege. It is settled law that the Courts are competent (or have jurisdiction) to inquire whether a privilege exists and to determine its scope or extent. If it is so determined, the courts will not inquire into how a legislative body chooses to exercise or apply the privilege. In cases of uncertainty, there is broad acceptance that the courts have jurisdiction to determine the precise extent, or scope, of a claimed privilege.[34]

42. The principle that the courts have the authority to determine the scope of a privilege was confirmed by the Supreme Court of Canada in the *Vaid*, discussed above. This principle is reflected in the doctrine of necessity, elaborated by the Court in *Vaid*, under which courts preserve their jurisdiction to inquire into the existence and scope of privilege, but once a privilege has been found to exist, and its scope is considered appropriate, it will not question how Parliament exercises or applies a privilege.[35]

43. The 1999 UK Joint Committee report offers a useful analysis of the respective roles to be played by Parliament and the courts in advancing the law of parliamentary privilege:-

“There may be good sense sometimes in leaving well alone when problems have not arisen in practice. Seeking to clarify and define boundaries may stir up disputes where currently none exists. But Parliament is not always well advised to adopt a passive stance. There is merit, in the particularly important areas of parliamentary privilege, in making the boundaries reasonably clear before difficulties arise. Nowadays people are increasingly vigorous in their efforts to obtain redress for perceived wrongs. In their court cases they press expansively in areas where the limits of the courts’ jurisdiction are not clear. Faced with demarcation problems in this jurisdictional no-man’s land, the judges perforce must determine the position of the boundary. If Parliament does not act, the courts may find themselves compelled to do so. [emphasis added][36]

44. The original purposes of parliamentary privilege were related more to protecting Parliament and parliamentarians from incursions by the reigning monarch or his or her courts. The protections served to insulate members against detention, imprisonment, and disruption of Parliament’s work by the State. Modern interpretations of privilege and necessity have shifted the focus to the modern purposes of privilege. Some have described this new approach as the “purposive connection” or “necessary connection” test.[37] In other words, the valid exercise of a privilege must be necessary for the contemporary conduct of parliamentary functions. Such a connection must be more than reasonably incidental and must relate to the core, or essential, functions of Parliament.

45. Legislative bodies and their members need certain rights and legal protections in order to carry out their essential public duties of scrutinizing legislation, enacting laws, holding the executive to account, and, to grant supply to the government. However, while emphasizing that legislative bodies should be “vigilant” in protecting the rights and immunities that are necessary to carry out these functions, legislative bodies should be “equally rigorous” in discarding conduct that is not strictly necessary for their effective functioning.

46. Applying the facts and circumstances of this case to the law and authorities discussed above, the conclusion becomes inevitable that the fracas in question if proved can result to criminal culpability, hence, it cannot constitute part of legislative process, nor can the immunity contemplated under the law be stretched to protect to such conduct.

b. Whether EACC should have allowed the matter to be investigated by the relevant Committee of the Assembly.

47. The *ex parte* applicants counsel cited sections **16(a)** of the County Assemblies Powers and Privileges Act[38] as read with sections 25, 26 (1) 27 or 29 of the Act and submitted that the applicants are accused of engaging in a scuffle which falls within the ambit of section **26** and ought to be handled as provided under the act.

48. Further, counsel argued that the matter has already been referred to the Powers and Privileges Committee as evidenced by the letter dated 11th September 2018 from the Clerk of the Nairobi City County Assembly addressed to EACC, hence, the issue should first be dealt with by the committee in line with the doctrine of exhaustion of available remedies. To fortify his argument counsel cited *Peter Muturi Njuguna v Kenya Wildlife Service*.^[39] He argued that EACC ought to respect the procedure stipulated in the County assemblies Powers and Privileges Act.^[40] He cited the powers of the Committee under section 17(3)(4) of the Act and argued that it has powers to punish an MCA in the event of violation of the act or refer the matter to the Director of Criminal Investigations for prosecution, hence, the process laid down in the act must be followed.^[41] He also argued that the doctrine which states that the provisions of a general statute must yield to those of a special one applies in this case^[42] as the act that was enacted specifically to govern privilege is the County Assemblies Power and Privileges Act.^[43]

49. EACC's counsel rejoinder to this submission was brief. He cited section 17(2) of the act which provides that:- "an inquiry by a county assembly into a mater shall not preclude criminal investigation or criminal proceedings against a Member in connection with the matter concerned" and argued that privilege cannot be used as an absolute shield and set members of the county assembly above the law and create an opportunity to obstruct justice.^[44]

50. My reading of section 17(2) cited by counsel for EACC leaves me with no doubt that an inquiry by a county assembly into a mater does not preclude criminal investigation or criminal proceedings against a Member in connection with the matter concerned. In other words, the privilege claimed may be a sword, but not a shield in criminal matters.

c. Whether the ex parte applicants have established any grounds to warrant the Judicial Review orders sought.

51. The ex parte applicants' counsel argued that the applicants have established a case for the grant of the Judicial Review orders sought.^[45] As stated above, he also invoked the doctrine that 'the provisions of a general statute must yield to those of a special one' arguing that it applies in the instant case since the County Assemblies Powers and Privileges Act^[46] was enacted to specifically govern privilege. He relied on the Canadian case of *Lalonde v Sun Life Assurance Co of Canada*^[47] and contended that this is an appropriate case to apply the maxim.

52. Counsel for EACC was of a different opinion. He concluded his submissions by urging the court to dismiss the application and pave way for the investigations to continue.

53. I find it appropriate to comment of the facts and relevancy of the Canadian case of *Lalonde v Sun Life Assurance Co of Canada*^[48] cited by counsel for the ex parte applicants and the applicability of the maxim expounded by the said case to the facts and circumstances of this case. I have severally stated that a case is only an authority for what it decides. The leading authority on this proposition is *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)

54. 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]

55. 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.

56. A reading of the facts in the cited case, the applicable law and authorities clearly shows that it has no relevancy to the facts and circumstances in the instant case. I have taken time and studied the facts, circumstances and the law discussed in the cited case. The English version of the judgement was delivered by Gonthier J. The appeal concerned the right to revoke a beneficiary under a group life insurance policy. In particular, the issue was whether the parties to a group life insurance contract intended to make the designation of the wife as beneficiary revocable. The question also arose as to whether the legislation applicable at the time allowed revocation of the wife in this regard. In the instant case, the core question is whether the conduct under investigation is privileged under the law. The facts, he issues and ratio of the authority cited is totally inapplicable to the instant case.

57. 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. 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'. The role of the court in Judicial Review is supervisory. 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.

58. 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. Broadly, in order to succeed in a Judicial Review proceeding, the applicant will need to show either:- (a) *the person or body is*

under a legal duty to act or make a decision in certain way and is unlawfully refusing or failing to do so; or (b) a decision or action that has been taken is 'beyond the powers' (in latin, 'ultra vires') of the person or body responsible for it.

59. Differently put, whether a law, act, omission, decision or conduct is invalid is determined by an objective enquiry into its conformity with the Constitution^[58] and the relevant statutory provisions authorizing the act of conduct. The court is obliged to avoid an interpretation that clashes with the constitutional values, purposes and principles and purposes of the statute. 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. ^[59]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.

60. A statute is an edict of the legislature^[60] and the conventional way of interpreting a statute is to seek the 'intention' of its maker. It is the judiciary's duty to act upon the true intention of the legislature. The courts have to objectively determine the interpretation with guidance furnished by the accepted principles.^[61] If a statutory provision is open to more than one interpretation the court has to choose that interpretation which represents the true intention of the legislature.^[62] the function of the courts is only to expound and not to legislate.^[63]

61. 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. *First*, the summons complained of have not been shown to be *illegal* or *ultra vires* or outside the functions and constitutional and statutory mandate of EACC. The decision to invite the *ex parte* applicants can only be quashed if EACC acted without jurisdiction or in excess of its powers or if the "decision" is so perverse or unreasonable that it would be against the sense of justice to allow it to stand.

62. *Second*, no abuse of powers has been proved. It has not been shown that the power was not exercised as provided under the law. It is my view that the nature and circumstances of the decision fall into the category of areas which are not disturbed by the Courts unless the decision under challenge is illegal, irrational, or un-procedural.

63. *Third*, an administrative or quasi-judicial decision can only be challenged for **illegality, irrationality and procedural impropriety**. 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.**

64. *Fourth*, statutes do not exist in a vacuum.^[64] 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.^[65] The courts should therefore strive to interpret powers in accordance with these principles.

65. The Constitution provides under Chapter Six, for Leadership and Integrity of all public officers. The Chapter is predicated upon the assumption that State officers^[66] are the nerve Centre of the Republic and carry the highest level of responsibility in the management of State affairs and, therefore, their conduct should be beyond reproach. This means that under the Constitution Kenyans decreed that those whose conduct does not bring honor, public confidence and integrity have no place in the management of public affairs. This is to ensure that those entrusted with the management of public affairs and resources are persons of good character, probity and uprightness.

66. Article 73 of the Constitution provides for the responsibilities of leadership and states that:- 73. (1) Authority assigned to a State officer — (a) is a public trust to be exercised in a manner that— (i) is consistent with the purposes and objects of this Constitution; (ii) demonstrates respect for the people; (iii) brings honour to the nation and dignity to the office; and (iv) promotes public confidence in the integrity of the office; and (b) vests in the State officer the responsibility to serve the people, rather than the power to rule them.

67. Before assuming a state office, a state officer is required to take an oath of office, under Article 74 of the Constitution affirming their commitment towards serving the people in accordance with the provisions of the Constitution.

68. Article 79 of the Constitution provides that Parliament shall enact legislation to establish an independent Ethics and Anti-Corruption Commission, which shall be and have the status and powers of a commission under Chapter Fifteen, for purposes of ensuring compliance with, and enforcement of, the provisions of the Chapter. Pursuant to the said provision, Parliament enacted the Ethics and Anti-Corruption Commission Act.^[67] The EACC Act^[68] establishes the EACC pursuant to Article 79 of the Constitution. It further provides for the functions and powers of the Commission. The Act enumerates certain functions, in addition to the roles that the Constitution has already accorded the commission. A notable function under the Constitution is the power to oversee the implementation process and compliance with the provisions of Chapter six of the Constitution on leadership and integrity.

69. Additional functions of the commission under the Act are:-^[69] **(a) In relation to State officers:- (i) Develop and promote standards and best practices in integrity and anti-corruption; (ii) Develop a code of ethics; (b) Work with other state and public offices in the development and promotion of standards and best practices in integrity and anticorruption; (c) Receive complaints on a breach of the code of ethics by public officers; (d) Investigate and recommend to the Director of Public Prosecutions the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under the Act or any other law enacted pursuant to chapter six of the Constitution; (e) Recommend appropriate action against state officers or public officers alleged to have engaged in unethical conduct; (f) Oversee the enforcement of codes of ethics prescribed for public officers; (g) Advise, on its own initiative, any person on any matter within its functions; (h) Raise public awareness on ethical issues and educate the public on the dangers of corruption, and enlist and foster public support in combating corruption but with due regard to the requirements of the Anti-Corruption and Economic Crimes Act, 2003 on confidentiality; (i) Subject to Article 31 of the Constitution, monitor the practices and procedures of public bodies to detect corrupt practices and secure the revision of methods of work or procedures that may be conducive to corrupt practices; and (j) Institute and conduct proceedings in court for purposes of recovering or protecting public property, or freezing or confiscating proceeds of corruption or those related to corruption, or the payment of compensation, or other punitive and disciplinary measures.**

70. The EACC is mandated under **Section 11(1)(d)** of the **ACECA** to investigate and recommend to the DPP the prosecution of any acts of corruption or violation of codes of ethics or other matters prescribed under that Act or any other law enacted pursuant to **Chapter Six** of the **Constitution**. Further, under the provisions of **Section 35** of **ACECA** as read with the provisions of **Section 11(1) (d) of EACC Act**, upon concluding its investigations, EACC reports to the DPP who examines the report, evidence gathered and makes an independent decision on whether to prosecute or not.

71. The obligation of EACC to perform its statutory and constitutional must be viewed in light of the foundational values underpinning the Constitution. This Court identifies the core values of constitutionalism, and values enshrined in Article **10** of the Constitution and Chapter Six of the Constitution. This court hoists high the profound importance of ensuring that all State Officers and citizens remain accountable to the Constitution, thus *ensuring accountability, transparency and good governance* and above all adhering to the requirements of Chapter Six of the Constitution. The Constitution requires that a State officer shall behave, whether in public and official life, in private life, or in association with other persons, in manner that avoids- (c) demeaning the office the officer holds. [70] government must be accountable, responsive and open.

72. The Constitution sets high standards for the exercise of public power by state institutions and officials. This Court will be acting unconstitutionally if it accepts the invitation to grant orders that will fly on the face of these clear constitutional provisions. The objective of monitoring State officials in order to guard against misconduct and malfeasance in public office forms part of the constitutional imperative to combat unethical conduct and impart integrity in public service. In undertaking its mandate, EACC is constitutionally mandated under Article 252 of the Constitution to invite or summon any person for purposes of undertaking investigations. The Constitution must be read holistically so as to achieve its purposes, values and principles.

73. My above finding arises not only from an interpretation of Articles 2,[71] 10,[72]73,[73] 75,[74] 79,[75] 252,[76] of the Constitution, but also from the fact that this court is inclined to respect the EACC's action for four reasons, **(a)** it is a constitutional imperative that the constitutional role EACC must be respected, **(b)** for the court to intervene, there must be clear evidence of breach of its constitutional duty to act fairly and legally on the part of EACC or clear abuse or misuse of discretion, **(c)** that this court has a constitutional obligation and a duty to foster a culture of integrity in public service by requiring State officers to exhibit high standards of ethical conduct both in public and private, **(d)** the Constitution provides in peremptory terms that every person has an obligation to respect, uphold and defend the Constitution.

74. 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 the Constitution, a statute or delegated legislation. The courts when exercising this power of construction are enforcing the Rule of Law, by requiring public bodies to act within the "four corners" of their powers or duties. They are also acting as guardians of Parliament's will, seeking to ensure that the exercise of power is in accordance with the scope and purpose of Parliament's enactments. The Courts have a duty to ensure citizens respect and observe the Constitution. In my view, failure or refusal by the court to exercise this duty would be treason to the Constitution.

75. I find nothing to show that the *ex parte* applicants are disputing the conduct in question. They are using privilege as a shield. EACC has enumerated in detail the reasons why the *ex parte* applicants were summoned and the legal basis for summoning them. I have examined the legal basis for the summons. The provisions discussed above are clear on the mandate of EACC. The provisions have not been challenged or shown to be in applicable or abused. I see no procedural impropriety in the issuance of the summons nor has any been alleged or proved. The *ex parte* applicants cannot be heard to say they do not know why they were being summoned. The letters they exhibited in support of their case have disclosed details as to why they were required and the provisions of the law in support thereof.

76. Certiorari is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the court being a judicial one must be exercised on the basis of evidence and sound legal principles. In any event, Certiorari can only issue to quash an illegal decision or where a state functionary has acted ultra vires or abused its discretion. None of these has been proved in this case.

77. The *ex parte* applicants also seek an order of *Prohibition*. The writ of *Prohibition* arrests the proceedings of any body, tribunal, corporation, board or person, when such proceedings are without or in excess of the jurisdiction of such body, tribunal, corporation, board or person. A *prohibiting* order is similar to a quashing order in that it prevents a tribunal or authority from acting beyond the scope of its powers. The key difference is that a *prohibiting* order acts prospectively by telling an authority not to do something in contemplation. However, as stated above, the illegality of the summons has not been established nor has it been established that EACC acted illegally or in excess of its powers nor has the decision to invite or summon them been shown to be *illegal, irrational* or a *nullity*.

78. The discretionary nature of the Judicial Review remedies sought in this application means that even if a court finds a public body has acted wrongly, it does not have to grant any remedy. Examples of where discretion will be exercised against an applicant may include where the applicant's own conduct has been unmeritorious or unreasonable, or where the applicant has not acted in good faith, or where a remedy would impede the authority's ability to deliver fair administration or legally discharge its legal mandate, or where the judge considers that an alternative remedy could have been pursued. First, in this case, the *ex parte* applicants ought to have subjected themselves to the process instead of invoking the Judicial Review jurisdiction of this Court and challenge the outcome if aggrieved. Second, provided EACC acts within its legal mandate, this court will not interfere. Third, the law does not permit the *ex parte* applicants to use immunity as a shield against criminal culpability.

Final orders.

79. In view of my analysis, determinations and conclusions herein above enumerated on the issues discussed above, I find and hold that the *ex parte* applicants have not established any grounds for this court to grant the Judicial Review Orders of *Certiorari* and *Prohibition*.

80. The upshot is that the *ex parte* applicants' application dated 19nd September 2018 is hereby dismissed with costs to the Respondent.

Orders accordingly

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

John M. Mativo

Judge.

[1] Act No. 22 of 2011.

[2] Ibid.

[3] Act No. 6 of 2017.

[4] Act No. 6 of 2017.

[5] Act No. 19 of 2012.

[6] Ibid.

[7] Ibid.

[8] Ibid.

[9] Ibid.

[10] Ibid.

[11] Act No. 6 of 2017.

[12] Act No. 17 of 2012.

[13] Citing *Francis Matheka & 10 Others v Director of Public Prosecutions & Another*{2015}eKLR.

[14] Misc App No. 186 of 2006.

[15] {2015}eKLR.

[16] Act No. 22 of 2011.

[17]{2015}eKLR.

[18] ACEC No. 42 of 2016.

[19] Citing *Abdulkadir Athman El Kindy vs DPP & EACC*, Pet No. 181 of 2016.

[20] May, 23 ed., p. 75.

[21] May, T.E., *Erskine May's Treatise on The Law, Privileges, Proceedings and Usage of Parliament*, 20th ed., edited by Sir C. Gordon, London: Butterworths, 1993,pp.70-1.

[22] Griffith, J.A.G. and Ryle, M., *Parliament: Functions, Practice nd Procedures*, 2nd ed., edited by R. Blackburn and Kennon with Sir M. Wheeler-Booth, London: Sweet & Maxwell, 2003, pp. 123-5.

[23]{2015}eKLR.

[24] Act No. 17 of 2012.

[25] ACEC No. 42 of 2016.

[26] {2005} 1 S.C.R. 667, 2005 SCC 30.

[27] Written by [Binnie J.](#)

[28] Speaker Lucien Lamoreux (Debates, April 29, 1971, p. 5338).

[29] Act No. 6 of 2017.

[30] Act No. 29 of 2017.

[31] May, 23rd ed.,p. 111.

[32] {1842}4 Moo. PC 63.

[33] Parliamentary Privileges under Indian Constitution: A critique.

[34] This is a long-standing principle, derived from the case of *Stockdale v. Hansard* (1839) 9 Ad & E 1, (1839) 112 ER 1160 (UK).

[35] A number of scholars have commented that it may be difficult to apply this principle in practice, that the distinction between scope and exercise may often be blurred. Evan Fox-Decent argues that depending upon how broadly or narrowly courts define the scope of a privilege, they may subject a claimed privilege to more intense scrutiny, intruding too deeply into the affairs of Parliament, perhaps even intruding into the exercise of a privilege. In particular, depending upon how a judge frames an issue, a particular exercise of privilege may be reviewed under the guise of scope: Evan Fox-Decent, "Parliamentary Privilege and the Rule of Law," *Canadian Journal of Administrative Law and Practice*, July 2007 (20:2), at 117.

[36] 1999 UK Joint Committee, at para 26.

[37] Gareth Griffith, *Parliamentary Privilege: the continuing debate*, New South Wales Parliamentary Research Service, Background Paper No 2/2014, March 2014, p. 1 (Griffith).

[38] Act No. 6 of 2017.

[39] {2017}eKLR.

[40] *Supra*.

[41] Citing *Peter Muturi Njuguna v Kenya Wildlife Service* {2017}eKLR.

[42] Citing the Canadian case of *Lalonde v Sun Life Assurance Co of Canada*{1992}

[43] Act No. 6 of 2017.

[44] Citing *Republic v EACC ex parte County Assembly of Homa Bay*, Homa Bay Judicial Review No. 2 of 2018.

[45]Citing *Republic v Kenya Revenue Authority, Commissioner of Customs Service & Julius Musyoki ex parte Darasa Investments Limited* {2018}eKLR.

[46] Act No. 6 of 2017.

[47] {1992}.

[48] {1992} 3 S.C.R. 261.

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

[59] 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.

[60] *Vishnu Pratap Sugar works (private) ltd. v. Chief Inspector of Stamp, U.P.*, AIR 1968 SC 102, p. 104.

[61] *R v. Secretary of State for the Environment expert Spath Holme*, (2001) 1 All ER 195, p. 216(HL).

[62] *Venkataswami Naidu v. Narasram Naraindas*, AIR 1966 SC 361, p.363.

[63] GP Singh, *Principles of Statutory Interpretation*, 13th Edition, p.4.

[64] *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”).

[65] *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.

[66] The Constitution defines State Officers as : State office” means any of the following offices— (a) President; (b) Deputy President; (c) Cabinet Secretary; (d) Member of Parliament; (e) Judges and Magistrates; (f) member of a commission to which Chapter Fifteen applies; (g) holder of an independent office to which Chapter Fifteen applies; (h) member of a county assembly, governor or deputy governor of a county, or other member of the executive committee of a county government; (i) Attorney-General; (j) Director of Public Prosecutions; (k) Secretary to the Cabinet; (l) Principal Secretary; (m) Chief of the Kenya Defence Forces; (n) commander of a service of the Kenya Defence Forces; (o) Director-General of the National Intelligence Service; (p) Inspector-General, and the Deputy Inspectors-General, of the National Police Service; or (q) an office established and designated as a State office by national legislation; “State officer” means a person holding a State office.

[67] *Supra.*

[68] *Ibid.*

[69] Section 11 of the Act.

[70] See Article 75(1) of the Constitution.

[71] Supremacy of the Constitution.

[72] National Values and Principles of Governance.

[73] Responsibilities of leadership.

[74] Conduct of State officers.

[75] Establishment and constitutional powers of EACC.

[76] General functions and powers of a Commission.