



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**JUDICIAL REVIEW MISCELLANOUS APPLICATION NO. 364 OF 2018**

**AND**

**IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW ORDERS  
OF CERTIORARI AND PROHIBITION REPUBLIC.....APPLICANT**

**VERSUS**

**ATTORNEY GENERAL.....RESPONDENT**

**LAW SOCIETY OF KENYA.....INTERESTED PARTY**

**EX PARTE: FRANCIS ANDREW MORIASI**

**JUDGMENT**

**The Application**

1. The *ex-parte* Applicant herein is Francis Andrew Moriasi, an Advocate of the High Court of Kenya. He has sued the Attorney General, which is a Constitutional office established under Article 156 of the Constitution, and who will hereinafter be referred to as “the Respondent”. The Law Society of Kenya, which is a statutory body established under the Law Society of Kenya Act, and is entrusted with various functions in the administration of justice and of the legal profession in Kenya, is also joined to the suit as an Interested Party.

2. The said *ex parte* Applicant filed judicial review proceedings herein by way of a Notice of Motion application dated 26<sup>th</sup> October 2018, seeking the following orders:

**a. An order of Certiorari to remove into this Court for purposes of it being quashed, Guidelines D, H and L in the Respondent’s Circular Reference Number AG/Circular/2018 dated 1<sup>st</sup> March 2018 and titled Guidelines on Provision of Legal Services by the Office of the Attorney General & Department of Justice.**

**b. An order of Prohibition to prohibit and/or restrain the Respondent from further implementation of Guidelines D, H and L in the Respondent’s Circular Reference Number AG/Circular/2018 dated 1<sup>st</sup> March 2018 and titled “Guidelines on Provision of Legal Services by the Office of the Attorney General & Department of Justice”.**

**c. An order of Prohibition to prohibit and/or restrain the Respondent from issuing any circulars and/or directions similar to those set out in Guidelines D, H and L in the Respondent’s Circular Reference Number AG/Circular/2018 dated 1<sup>st</sup> March 2018 and titled “Guidelines on Provision of Legal Services by the Office of the Attorney General & Department of Justice”.**

**d. An order of Prohibition to prohibit and/or restrain the Respondent from in any manner implementing or seeking to enforce the implementation of Guidelines D, H and L in the Respondent’s Circular Reference Number AG/Circular/2018 dated 1<sup>st</sup> March 2018 and titled “Guidelines on Provision of Legal Services by the Office of the Attorney General & Department of Justice” or similar circulars through any other agencies or constitutional bodies, including but not limited to the Auditor General.**

**e. An order of Prohibition, to prohibit and/or restrain the Respondent from in any way interfering with direct procurement of legal services by State Corporations from advocates and application of the Advocates Remuneration Order as between the State Corporations and the Advocates.**

**f. The costs for and incidental to the application be provided for.**

3. The grounds for the application were set out in a statutory statement by the *ex parte* Applicant's Advocates dated 3<sup>rd</sup> September 2018, and a verifying affidavit sworn on the same date by the *ex parte* Applicant. The *ex parte* Applicant explained that he is on the panel of external lawyers for various corporations, wherefrom he has been obtaining legal work. He contended that the Respondent has issued unlawful directives through Circular Reference Number AG/CIRCULAR/2018 dated 1<sup>st</sup> March 2018 and titled "*Guidelines on Provision of Legal Services by the Office of the Attorney General & Department of Justice*" (hereinafter referred to as "the Circular dated 1<sup>st</sup> March 2018") which have adversely affected him and other members of the Interested Party.

4. In particular, that the Respondent has directed that the engagement of external lawyers by State Corporations, Constitutional Commissions and Independent Offices require his written approval and concurrence as relates to their terms of reference and fees payable, to which he must first issue a Certificate of Appointment. Furthermore, that no such legal fees shall be processed without the Respondent's approval and authorisation, which unlawfully interferes with the *ex parte* Applicant's practice as a lawyer, and that officers who engages legal services without such approval are also threatened with personal liability.

5. According to the *ex parte* Applicant, the Respondent's directives are not based on any Constitutional or statutory provisions, and the said Guidelines are *ultra vires*, as they attempt to undertake a parallel evaluation process which powers the Respondent does not have; that they attempt to interfere and control Constitutional Commissions and Independent Offices contrary to Article 249 of the Constitution; are illegal as they were not made as required under the Statutory Instruments Act, and are contrary to the Advocates Act and Public Procurement and Asset Disposal Act; and are arbitrary, in violation of requirements of public participation, and of the *ex parte* Applicant's legitimate expectation.

6. The Respondent thereupon filed a Notice of Preliminary Objection dated 29<sup>th</sup> October 2018, and Grounds of Opposition dated 22<sup>nd</sup> January 2019 in response to the application. The Respondent's objection was based on two grounds;- firstly, that the *ex parte* Applicant's application was statute barred by limitation, having been filed outside the prescribed time limit of six months. Secondly, that the Law Society of Kenya had been improperly enjoined as an interested party in the proceedings, being a party that cannot be affected by the orders sought.

7. The application was also opposed on the grounds that the impugned Circular consists of guidelines, and should not be construed otherwise as sought by the *ex parte* Applicant. Further, that the Respondent has both the Constitutional and statutory mandate as the principal legal adviser to Government, to issue guidelines to Government agencies including State Corporations, and to advise on the propriety of any proposed contract which may create legal obligations and liabilities upon the government.

8. The Respondent contended that the provisions of the Public Procurement and Asset Disposal Act do not divest the office of the Attorney General of its Constitutional and statutory mandate, including on advising Government on contracts of a lesser amount than Kenya shillings five billion. In addition, that the role of the Respondent as advisor encompassed outcomes of procurement processes which has the potential of creating legal obligations on government. The Respondent denied that it has acted arbitrarily, *ultra vires* its mandate, or infringed on the functional independence of any independent Constitutional Commission.

9. This Court directed that the Respondent's Preliminary Objection would be heard and determined together with the *ex parte* Applicant's application, by way of written submissions. At the time this matter was reserved for judgment on 30<sup>th</sup> April 2019, only the *ex parte* Applicant's advocates, Oundu & Company Advocates, had filed submissions dated 1<sup>st</sup> April 2019. The Interested Party's counsel, Mbugwa, Atudo & Macharia Advocates, later filed and submissions dated 17<sup>th</sup> May 2019 as their response, which this Court has considered in this judgment. The Respondent did not avail any submissions.

**The Determination**

**The Preliminary Objection**

10. I have considered the pleadings, submissions and arguments made by the parties, and note that the Respondent raised two preliminary issues which need to be determined first, namely as regards whether the *ex parte* Applicant's application was filed out of time, and whether the Interested Party was properly on record. The Respondent did not elaborate on, nor demonstrate how the application was statute barred, or on the misjoinder of the Interested Party. The *ex parte* Applicant on the other hand submitted that the Circular in issue was dated 1<sup>st</sup> March 2018, and he moved this Court on 3<sup>rd</sup> September 2018. Further, that under section 9(3) of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules, the application for leave is to be made not later than six months after the date of the impugned action. According to the Applicant, the six months would fall on 2<sup>nd</sup> September 2018, which was a Sunday, and pursuant to section 57 of the Interpretation and General Provisions Act, the last day of the six months period would therefore be 3<sup>rd</sup> September 2018.

11. In addition, that the question of whether the Interested Party has an interest in the proceedings herein is not a pure point of law, and did not meet the standard for a preliminary objection as set out in the case of **Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (1969) EA 696**. Furthermore, that the Respondent did not set out the prejudice it had suffered as a result of the Interested Party's joinder, and as the Circular dated 1<sup>st</sup> March 2018 relates to the provision of legal services, the matter has an implication on the legal practice of members of the Interested Party. Reliance was in this regard placed on the provisions of sections 4 and 7 of the Law Society of Kenya Act on the members and powers of the Interested Party, and the decision in **Methodist Church in Kenya vs Mohamed Fugicha & 3 Others (2019) e KLR**, for the position that a person who has an identifiable stake in the legal proceedings can be joined as an interested party.

12. As regards the first preliminary issue, the timelines for filing of judicial review proceedings for orders of certiorari is regulated by Order 53 Rules 2 of the Civil Procedure Rules, and if not complied with, ousts the jurisdiction of this Court. This is thus a pure point of law that has been raised by the Respondent. Order 53 Rule 2 provides as follows in this regard on the procedure for commencing judicial review

proceedings:

**“2. Leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless the application for leave is made not later than six months after the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired.”**

13. Section 57 of Interpretation and General Provisions Act provides as follows as regards computation of time:

**“ In computing time for the purposes of a written law, unless the contrary intention appears—**

**(a) a period of days from the happening of an event or the doing of an act or thing shall be deemed to be exclusive of the day on which the event happens or the act or thing is done;**

**(b) if the last day of the period is Sunday or a public holiday or all official non-working days (which days are in this section referred to as excluded days), the period shall include the next following day, not being an excluded day;**

**(c) where an act or proceeding is directed or allowed to be done or taken on a certain day, then if that day happens to be an excluded day, the act or proceeding shall be considered as done or taken in due time if it is done or taken on the next day afterwards, not being an excluded day;**

**(d) where an act or proceeding is directed or allowed to be done or taken within any time not exceeding six days, excluded days shall not be reckoned in the computation of the time.”**

Order 50 Rule 8 of the Civil Procedure Rules also stipulates that:

**“ In any case in which any particular number of days not expressed to be clear days is prescribed under these rules or by an order or direction of the court, the same shall be reckoned exclusively of the first day and inclusively of the last day.”**

14. In the instant application, the Circular whose contents are sought to be quashed by an order of certiorari is dated 1<sup>st</sup> March 2018, and the time for purposes of bringing judicial review proceedings therefore started to run on the next day which was 2<sup>nd</sup> March 2018. Six months thereafter lapsed on 2<sup>nd</sup> September 2018, and it is not contested that this date fell on a Sunday, and was therefore excluded for purposes of computing time. The *ex parte* Applicant filed his Chamber Summons application for leave in Court on 3<sup>rd</sup> September 2018, which was the last day of the deadline for filing judicial review proceedings in the circumstances. The instant judicial review proceedings were therefore filed within time.

15. On the second preliminary issue as to whether or not the Interested Party has been properly joined, this Court will need to interrogate the said party's stake and interests that are likely to be affected by these proceedings. This is thus not a pure question of law, as required by the decision in Mukisa Biscuit Manufacturing Co. Ltd -vs- West End Distributors Ltd (*supra*), wherein it was held as follows:

**“a Preliminary Objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”**

16. A preliminary objection cannot therefore be raised if any fact requires to be ascertained. In the case of Oraro -vs- Mbaja, (2005)1KLR 141, the court held that any assertion which claims to be a preliminary objection, and yet it bears factual aspects calling for proof, or seeks to adduce evidence for its authentication, is not, as a matter of legal principle, a true preliminary objection which the Court should allow to proceed.

17. This finding notwithstanding and in any event, the Interested Party herein did enter appearance in these proceedings, and did not dispute its joinder. On the contrary, the said Interested Party actively participated in the proceedings and outlined its statutory functions as provided under Section 4 the Law Society Act in the following terms:

**(a) assist the Government and the courts in matters relating to legislation, the administration of justice and the practice of law in Kenya;**

**(b) uphold the Constitution of Kenya and advance the rule of law and the administration of justice;**

**(c) ensure that all persons who practise law in Kenya or provide legal services in Kenya meet the standards of learning, professional competence and professional conduct that are appropriate for the legal services they provide;**

**(d) protect and assist the members of the public in Kenya in matters relating to or ancillary or incidental to the law;**

**(e) set, maintain and continuously improve the standards of learning, professional competence and professional conduct for the provision of legal services in Kenya;**

- (f) determine, maintain and enhance the standards of professional practice and ethical conduct, and learning for the legal profession in Kenya;
- (g) facilitate the acquisition of legal knowledge by members of the Society and ancillary service providers, including paralegals through promotion of high standards of legal education and training;
- (h) represent, protect and assist members of the legal profession in Kenya in matters relating to the conditions of practice and welfare;
- (i) formulate policies that promote the restructuring of the legal profession in Kenya to embrace the spirit, principles, values and objects the Constitution of Kenya;
- (j) facilitate the realization of a transformed legal profession that is cohesive, accountable, efficient and independent;
- (k) establish mechanisms necessary for the provision of equal opportunities for all legal practitioners in Kenya;
- (l) protect and promote the interests of consumers of legal services and the public interest generally, by providing a fair, effective, efficient and transparent procedure for the resolution of complaints against legal practitioners;
- (m) develop and facilitate adequate training programmes for legal practitioners; and
- (n) do all such other things as are incidental or to the foregoing functions.

18. The Interested Party also outlined the guiding principles in carrying out its functions and in the exercise of its powers under section 6the Act as follows:

- (a) the maintenance and advancement of constitutionalism, justice and the rule of law;
- (b) the facilitation of access to justice;
- (c) the protection of public interest;
- (d) the maintenance of integrity and professionalism; and
- (e) the promotion of cross border legal practice, inclusivity and equity.

19. Rule 2 of the Constitution of Kenya (protection of the Fundamental Rights and Fundamental Freedoms) Practice and Procedure Rules of 2013 define n interested party as: “a person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation.” Likewise, the Supreme Court in **Trusted Society of Human Rights Alliance vs Mumo Matemo & 5 Others [2014] eKLR** defined an interested Party as follows:

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

20. A person is thus legally interested in the proceedings if they lead to a result that will affect him by either establishing or curtailing his or her legal rights. From the above provisions and definitions, it is evident that the Law Society of Kenya has a stake in the impugned provisions of the Circular, to the extent that the said guidelines may affect the practice of law by members of the legal profession, and the proper administration of justice. It is therefore properly joined in these proceedings as an interested party.

### **The Substantive Issues**

21. Having found that the instant application is properly before this Court, the outstanding substantive issues raised by the *ex parte* Applicant’s, Interested Party’s, and Respondent’s pleadings and submissions are as follows:

- a. Whether the Circular dated 1<sup>st</sup> March 2018 is a statutory instruments and subject to the procedure under the Statutory Instruments Act.
- b. Whether the Respondent acted *ultra vires* and illegally in making the impugned Guidelines in the Circular dated 1<sup>st</sup> March 2018.
- c. Whether the Respondent acted fairly in making the impugned Guidelines in the Circular dated 1<sup>st</sup> March 2018.
- d. Whether the Respondent violated the *ex parte* Applicant’s legitimate expectations by impugned decisions in the Circular dated 1<sup>st</sup> March 2018.

e. Whether the ex parte Applicant merits the prayers sought.

### **On Whether the Circular is a Statutory Instrument**

22. The *ex parte* Applicant urged that the impugned Circular fails the test of legality, in so far as the process of its enactment was concerned. He submitted in this regard that under the Statutory Instruments Act, a statutory instrument is defined to include orders, regulations, directions and guidelines, and is required under section 11 (1) and (2) to be laid before the relevant House of Parliament for scrutiny and approval, and to thereafter be published in the Kenya Gazette, which was not done by the Respondent. In addition, that the lawyers who were to be affected by the circular were not consulted, and there was no public participation by stakeholders as required by section 5 of the Act and Article 10(2)(a) of the Constitution. The decision in **Republic vs County Government of Kiambu ex parte Robert Gakuru & Another, (2016) e KLR** was cited in support of this argument.

23. The Statutory Instruments Act in this regard regulates the making, scrutiny, publication and operation of statutory instruments, and defines a statutory instrument as “any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.” Therefore a statutory instrument is a category of delegated legislation, which must be made pursuant to express enabling statutory power.

24. It is notable in this respect that the Respondent is expressly granted two types of powers in this regard under the Office of the Attorney General Act. The first type of power is an executive power to provide directions and practice notes to officers to whom the Act applies. Section 18 provides for this power as follows:

**(1) The Attorney-General shall exercise powers, issue directives or practice notes to any officer to whom this Act applies for the purpose of maintaining standards and uniformity.**

**(2) The directives or practice notes issued pursuant to subsection (1) shall be in such form and manner as the Attorney-General may determine.**

25. The second power is an express legislative power to make regulations which is granted under section 32 of the Act as follows:

**“The Attorney-General may make regulations, not inconsistent with this Act, prescribing all matters required or permitted to be prescribed, or necessary or convenient to be prescribed or carrying out or giving effect to this Act. “**

26. From the definition given above of statutory instruments, and the powers granted to the Respondent, it is therefore the case that not all the guidelines, orders, or directions given by the Respondent are legislative in character and therefore statutory instruments. There may be guidelines and directions that are purely executive in character, in the sense that their objectives are solely administrative in guiding implementation of standards in laws and policies. In the present application, the Circular dated 1<sup>st</sup> March 2018 set out its purpose as follows in paragraph 3 thereof:

**“ The purpose of this Circular is to set out the services provided by the Office of the Attorney General and Department of Justice (OAG&DOJ) and to guide all Government Ministries, Departments, Semi-Autonomous Agencies, State Corporations, State Agencies, Constitutional Commissions and Independent Offices on the procedure to be followed when seeking legal services from the Attorney General”.**

27. There is no reference in the Circular dated 1<sup>st</sup> March 2018 to any statutory provision empowering the said Guidelines, or to indicate that the same were being made in exercise of any legislative powers. It is thus my finding that the said circular was not made in exercise of the legislative powers granted to the Respondent, and that its purpose was clearly stated to be explanatory. It is therefore not a statutory instrument as envisaged by the Statutory Instruments Act, and was therefore not subject to the procedure set out in the said Act as regards enactment of statutory instruments, including the requirements of consultation and publication.

### **Whether the Respondent acted ultra vires and illegally**

28. Three Guidelines in the Circular dated 1<sup>st</sup> March 2018 are being challenged in the present application as having been undertaken in excess of the powers and functions given to the Respondent. The first Guideline being challenged is Guideline D on Government Transactions, on the ground that the directions given therein are governed by the provisions of the Public Procurement and Disposal of Assets Act, which does not give any powers to the Attorney General to make any such directions as regards procurement awards and contracts. Guideline D is on “Government Transactions” and states as follows:

#### **“D: GOVERNMENT TRANSACTIONS**

**13. The Attorney General provides legal advice to the Government with regard to all transactions and agreements that the Government enters into giving rise to contractual obligations. Such agreements include loan/credit agreements, grant agreements, financing agreements, commercial contracts, subsidiary loan/credit agreements and guarantee agreements, among others.**

**14. The Attorney General must be involved in the negotiation, drafting, vetting and review of contracts and other commercial agreements, financing agreements and memoranda of understanding.**

15. The Attorney General must be involved from the analysis and selection stage and in all subsequent phases of project development and commissioning. The nature of the Attorney General's involvement will include the assessment of legal mechanisms necessary for project approval and implementation, contract negotiation, legal due diligence, drafting and review of contract compliance under the monitoring and evaluation stages.

16. After the parties conclude a negotiated text, which is the draft contract, the OAG & DOJ should be present at initialling of the document before signature. It is at this stage of initialling that mistakes of construction may be discerned and amendments to the text made. Any substantial amendment at this stage should not be made without legal advice of the OAG & DOJ.

17. Any dispute arising in the implementation phase of any agreement, contract or memorandum of understanding due to differences in interpretation of contract terms should, at the first instance, be referred to the Attorney General for consultation and advice, before the dispute settlement clause is invoked.

18. Before forwarding contracts for procurement of goods, works and services to the Attorney General for review and vetting, it shall be a mandatory requirement for the requesting Government Ministry, Department, Semi-autonomous Agency, State Corporation, State Agency, Constitutional Commission and Independent Office to be satisfied and confirm that the Procurement procedures applicable to that contract have been fulfilled. Accounting officers must ensure that they comply with all procurement procedures in accordance with relevant.

19. Within three days of the award decision and before notification of award to the proposed successful bidder, the Accounting Officer shall submit a request for review of the draft proposed contract to the attorney general together with the following documents:-

- (a) A declaration by the Accounting Officer stating that the procurement procedures have been fulfilled according to the PPADA and other relevant laws and regulations, and that the procurement satisfies value for money;
- (b) Justification of choice of Procurement procedure;
- (c) Invitation to tender and/or advertisement;
- (d) Feasibility studies, where applicable;
- (e) Tender Documents;
- (f) Bid Security documents;
- (g) Copy of signed evaluation report;
- (h) Minutes of the tender committee, where applicable
- (i) Professional opinion of the head of Procurement
- (j) Due diligence reports on proposed contractor;
- (k) Performance Guarantee/letters of comfort/letters of intent, where applicable;
- (l) Proposed award decision of the Accounting Officer (prior to notification of award);
- (m) Copy of the proposed procurement/commercial contract
- (n) Copy of the financing agreement where applicable
- (o) Proposed, subcontracting agreements, addendums, supplementary agreements, where applicable: and
- (p) Any other relevant documents

20. On receipt of all requisite documents, comments shall be rendered within four (4) days of the request. The period under reference is subject to receipt of all documentation herein above.

21. After notification of the award and acceptance, the accounting officer shall submit a request for clearance of the commercial contract to the Attorney General with the following documents:-

- (a) The revised commercial contract;
- (b) Negotiation minutes, where applicable

(c) Letter of award

(d) Letter of acceptance of award; and

(e) Confirmation that no appeal is pending before the Public Procurement Administrative Review Board (PPARB) or any court in relation to the tender.

22. On receipt of all the above documents, the Attorney General shall issue a legal opinion within three (3) days

23. The request for review must be made within the bid validity period.

24. The foregoing are minimum requirements for clearance and no request shall be received without these documents.

25. The Accounting Officer shall submit a signed copy of the contract documents to the Attorney General for information and our records.

26. Government Ministries, Departments, Semi-autonomous Agencies, State Corporations, States Agencies, Constitutional Commissions and Independent Offices that continually enter into contracts of the same type on a frequent basis are hereby instructed to work out and agree with the Attorney General on a standard form contract, which they may employ in all such contracts. However, it must be noted that under this framework, agreed texts of standard form contracts should not be amended without consultation with and approval of the Attorney General. An accounting officer who contravenes this requirement shall be held personally liable for any consequence arising therefrom.

27. Where a contract for provisions of goods, works of services is required prior to funding consideration, the line Ministry shall supply the national Treasury and the OAG & DOJ with a duly concluded commercial contract vetted by the Attorney General in order to commence the negotiation of the financing agreement.

28. Where Government Ministries, Departments, Semi-autonomous Agencies, State Corporations, States Agencies, Constitutional Commissions and Independent Offices require the legal advice of the Attorney General as a condition precedent for financial agreements before disbursement of funds, the OAG & DOJ must be involved in all stages of negotiation. The request for the legal opinion should be sought by the National Treasury and must be accompanied by the following documents.

(a) Written confirmation from the National Treasury certifying that the level of indebtedness has not and will not exceed the statutory debt ceiling by the intended financing

(b) Signed minutes of negotiations of the agreement;

(c) A copy of the agreement duly signed by the Cabinet Secretary of the National Treasury;

(d) Where the agreement is not signed by the Cabinet Secretary of the National Treasury, a written authorization by the Cabinet Secretary of the National Treasury appointing an alternative signatory shall be availed.

(e) Evidence that the Financing Agreement was vetted and cleared by the OAG & DOJ; and

(f) Where the financing agreement refers to a commercial contract or any other subsidiary agreements, the same should be availed.

29. The Attorney General shall not entertain post-signature requests for legal approval where Government Ministries, Departments, Semi-autonomous Agencies, State Corporations, States Agencies, Constitutional Commissions and Independent Offices (MDAs enter into an agreement of whatever nature without involving the OAG & DOJ.

30. Before Execution of any contract, the responsibility rests with the Accounting Officer to ensure that the contract satisfies value for money, it is in the best interest of the procuring entity and that the provisions of the Public Procurement and Asset Disposal Act of 2015 or Public Private Partnerships Act of 2013 and the implementing regulations are strictly adhered to.

31. The comments and subsequent clearance of the contract shall not operate to transfer the responsibility to comply with the Constitution, Public Procurement and Asset Disposal Act of 2015 and implementing regulations, Public Finance Management Act 2012 and all other enabling laws to the Attorney General.

32. Government Ministries, Departments, Semi-autonomous Agencies, State Corporations, States Agencies, Constitutional Commissions and Independent Offices are encouraged to familiarize themselves with agreements and contracts under their docket and their respective obligations.”

29. In relation to Guideline D, the *ex parte* Applicant urged that the Respondent has no role to play in procurement of legal services by State Corporations, and that the requirement for Accounting Officers to submit a request for reviews of draft proposed contracts with documentation relating to tenders are in excess of jurisdiction as the provisions of sections 79, 80, 84, 85, 86, 87, 134 and 135 of the Public Procurement and Assets Disposal Act. The *ex parte* Applicant detailed out the procedure provided by the said sections as regards evaluation

of tenders and notifications of awards.

30. In particular, the *ex parte* Applicant contended that section 134 of the s Public Procurement and Assets Disposal Act provides that that the Accounting Officer shall have the responsibility of preparation of contracts in line with the award decision, and only awards of a value of exceeding Kshs Five Billion are cleared by the Attorney General before they are signed. Further, that the written contract is required to be entered into within the tender validity period, which cannot be achieved with the Respondent's directives. Therefore, that the impugned Guidelines are an unlawful attempt to influence the evaluation and comparison of tenders by the Respondent, contrary to section 65(1)(b) of the Act, and that under section 43(2) of the Act, it is the Public Procurement Regulatory Authority, and not the Respondent, who has the mandate of conducting procurement audits.

31. The *ex parte* Applicant relied on the decisions in **Robert Mutiso Lelli and Cabin Crew Investments Ltd vs National Land Commission (2017) e KLR** and **Nation Media Group vs Attorney General (2017) e KLR** that an entity that exercises powers not donated to it and expressly donated to a different entity acts *ultra vires*. It was also contended that to the extent that the impugned Guidelines do not provide a criteria to be followed in the process of approval by the Respondent, the same are arbitrary and contrary to Article 227 of the Constitution which requires a fair, equitable transparent, competitive and cost effective system of procurement.

32. In determining whether or not the Respondent acted outside his powers, regard is made to the description of illegality by Lord Diplock in **Council of Civil Service Union v Minister for the Civil Service [1985] AC 374 at 410** as a failure by a public body to understand correctly the law that regulates its decision making power, or a failure to give effect to that law. In addition, in **Anisimic vs Foreign Compensation Commission (1969) 1 All ER 208 at 233**, Lord Pearce held as follows on when a public body may lack jurisdiction:

**“Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step out of its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity.**

33. It is therefore necessary when deciding whether a statutory power or duty has been lawfully exercised or performed, to identify the scope of that power and duty, and which involves construing the legislation that confers the power and duty. Article 156 of the Constitution in this respect establishes the office of the Attorney General as an office in the Executive arm of the National Government, and provides that the Attorney General is to be appointed by the President with the approval of the National Assembly. The specific duties of the Attorney General are set out as follows in Article 156 (4) to (7) of the Constitution:

**“(4) The Attorney-General—**

**(a) is the principal legal adviser to the Government;**

**(b) shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings; and**

**(c) shall perform any other functions conferred on the office by an Act of Parliament or by the President.**

**(5) The Attorney-General shall have authority, with the leave of the court, to appear as a friend of the court in any civil proceedings to which the Government is not a party.**

**(6) The Attorney-General shall promote, protect and uphold the rule of law and defend the public interest.**

**(7) The powers of the Attorney-General may be exercised in person or by subordinate officers acting in accordance with general or special instructions.”**

34. Section 4 of the Office of the Attorney General Act provides for additional functions of the Attorney General as follows:

**(1) In addition to the functions of the Attorney-General under Article 156 of the Constitution, the Attorney-General shall be responsible for—**

**(a) advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters;**

**(b) advising the Government on all matters relating to the Constitution, international law, human rights, consumer protection and legal aid;**

**(c) negotiating, drafting, vetting and interpreting local and international documents, agreements and treaties for and on behalf of the Government and its agencies;**

**(d) coordinating reporting obligations to international human rights treaty bodies to which Kenya is a member or on any matter which member States are required to report;**

- (e) drafting legislative proposals for the Government and advising the Government and its agencies on legislative and other legal matters;**
- (f) reviewing and overseeing legal matters pertaining to the registration of companies, partnerships, business names, societies, adoptions, marriages, charities, chattels, hire purchase and coat of arms;**
- (g) reviewing and overseeing legal matters pertaining to the administration of estates and trusts;**
- (h) in consultation with the Law Society of Kenya, advising the Government on the regulation of the legal profession;**
- (i) representing the national Government in all civil and constitutional matters in accordance with the Government Proceedings Act (Cap. 40);**
- (j) representing the Government in matters before foreign courts and tribunals; and**
- (k) performing any function as may be necessary for the effective discharge of the duties and the exercise of the powers of the Attorney- General.**

35. A key presumption that comes to play in construing and interpreting the Respondent's powers and functions in making the said guidelines, is that of the application of rules of constitutional law and ancillary rules of law. This is particularly so because the Respondent's role and functions as the principal legal adviser to the National Government is to ensure that the rule of law is maintained, and that Government actions are legally and constitutionally valid. Therefore, unless any contrary intention appears, the provisions on the functions and powers of the Respondent by implication import any principle or rule of the Constitution and of law which prevails and is relevant to the operation of the Respondent's powers. Put another way, the Respondent's powers cannot be construed as operating in a vacuum, but in tandem with the existing Constitutional and legal infrastructure.

36. Guideline D states that its purpose is to give legal advice as regards transactions and agreements that the Government enters into which give rise to contractual obligations, and gives various instructions in this regard. The said Guideline is thus subject to any other laws that may govern particular contracts entered into by Government, and which law will override the said Guidelines in the event of any conflict or inconsistency. This is for the reason that the guidelines are essentially administrative in nature, and the doctrine of *ultra vires* will come into play where they conflict with substantive legislation.

37. In this respect, the *ex parte* Applicant has raised valid concerns as regards the instructions given by the Respondent in paragraphs 18 to 24 of Guideline D in the Circular dated 1<sup>st</sup> March 2018, on the forwarding of contracts for procurement of goods, works and services to the Respondent. The procurement of goods and services by public entities is in this regard regulated by Article 227 of the Constitution, which requires a fair transparent competitive and cost effective system, and which states that a legislative framework shall be developed for this purpose. The relevant legislative framework is the Public Procurement and Asset Disposal Act of 2015, which provides for the awarding of contracts after the prescribed procurement processes in sections 134 and 135 as follows:

**“134. Preparation of contracts**

- (1) The accounting officer shall be responsible for preparation of contracts in line with the award decision.**
- (2) An accounting officer of a procuring entity shall ensure that all contracts of a value exceeding Kenya shillings five billion are cleared by the Attorney-General before they are signed.**
- (3) Each Cabinet Secretary shall regularly inform the Cabinet and national treasury of all government contracts exceeding Kenya shillings five billion.**
- (4) Notwithstanding the provision of subsection (3) above, any Cabinet Secretary may brief Cabinet on any other project of national importance irrespective of its value.**
- (5) This section shall not apply to contracts by Parliament and the Judiciary.**

**135. Creation of procurement contracts**

- (1) The existence of a contract shall be confirmed through the signature of a contract document incorporating all agreements between the parties and such contract shall be signed by the accounting officer or an officer authorized in writing by the accounting officer of the procuring entity and the successful tenderer.**
- (2) An accounting officer of a procuring entity shall enter into a written contract with the person submitting the successful tender based on the tender documents and any clarifications that emanate from the procurement proceedings.**
- (3) The written contract shall be entered into within the period specified in the notification but not before fourteen days have elapsed following the giving of that notification provided that a contract shall be signed within the tender validity period.**
- (4) No contract is formed between the person submitting the successful tender and the accounting officer of a procuring entity until the written contract is signed by the parties.**

(5) An accounting officer of a procuring entity shall not enter into a contract with any person or firm unless an award has been made and where a contract has been signed without the authority of the accounting officer, such a contract shall be invalid.

(6) The tender documents shall be the basis of all procurement contracts and shall, constitute at a minimum—

- (a) Contract Agreement Form;
- (b) Tender Form;
- (c) price schedule or bills of quantities submitted by the tenderer;
- (d) Schedule of Requirements;
- (e) Technical Specifications;
- (f) General Conditions of Contract;
- (g) Special Conditions of Contract;
- (h) Notification of Award.”

38. Section 139 of the Act also specifically provides for the manner that such contracts can be amended or varied as follows:

“(1) An amendment or a variation to a contract resulting from a procurement proceeding is effective only if—

- (a) the variation or amendment has been approved in writing by the respective tender awarding authority within a procuring entity; and
- (b) any contract variations or amendments for goods, works and services shall be as prescribed.

(2) An accounting officer of a procuring entity, on the recommendation of an evaluation committee, may approve the request for the following, which request shall be accompanied by a certificate from the tenderer making a justifications for such cost —

- (a) extension of contract period;
- (b) use of prime costs;
- (c) use of contingencies;
- (d) reimbursable costs; and
- (e) use of provisional sums.

(3) No contract price shall be varied upwards within twelve months from the date of the signing of the contract.”

39. The Public Procurement and Asset Disposal Act provides at section 5(1) that the Act prevails in case of any inconsistency between the Act and any other legislation or government notices or circulars, in matters relating to procurement and asset disposal, except in cases where procurement of professional service is governed by an Act of Parliament applicable for such services. It is thus evident from the said provisions that the power to make contracts in public procurement is exclusively given to the Accounting Officer of the procuring entity, and the only powers given to the Attorney General are with respect to clearance of contracts that exceed the value of Kshs Five Billion.

40. Therefore, to the extent that paragraphs 18 to 24 of Guideline D purport to change and amend the provisions of sections 134, 135 and 138 of the Public Procurement and Asset Disposal Act as regards the procedures of contracting in the procurement of goods, works and services by government entities, without any express power having been granted to the Respondent to do so, the same are *ultra vires*. The Respondent can in this respect only provide guidelines that clarify the processes of clearance of the contracts for the value of over Kshs 5 billion as envisaged by section 134 (2) of the Public Procurement and Asset Disposal Act.

41. Guidelines H and L of the said Circular are the second set of Guidelines in the Circular dated 1<sup>st</sup> March 2018 that are impugned, on account of infringing on the independence of Constitutional Commissions and Independent Offices, and the functions of other offices. The arguments made by the *ex parte* Applicant and Interested Party in this respect, are to the effect that by providing directions on matters that are within the exclusive or primary jurisdiction of other authorities, the Respondent thereby exceeded his powers.

42. The impugned Guidelines H and L are on legal services to be provided by the Respondent, and provide as follows:

## "H. CLAIMS ON BEHALF OF THE GOVERNMENT

58. Government Ministries, Departments, Semi-autonomous Agencies, State Corporations, States Agencies, Constitutional Commissions and Independent Offices intending to make claims must instruct the Attorney General immediately the cause of action arises and before the *lapse* of the limitation period which is (6) six years for contracts and (3) three years for *tort* .

59. The instructions must be clear and accompanied by all the relevant and necessary documentary evidence , statements, maps, full names and current physical address of the debtors/defendants to facilitate effective representation. The instructions should take into account the current civil procedure rules.

60. Where witnesses are required to testify on behalf of Government, the concerned Government Ministries Departments, Semi-autonomous Agencies, State Corporations, States Agencies, Constitutional Commissions and Independent Offices must facilitate their attendance and related expenses.....

## L. ENGAGEMENT OF PRIVATE LAW FIRMS, LAWYERS OR LEGAL CONSULTANTS

77. Pursuant to Section 17(1) of the Office of the Attorney General Act. No. 49 of 2012 advisory Ref AG/CONF/6/E/247 Vol.II dated 16<sup>th</sup> April 2014 and subsequent advisory Ref AG/CONF/6/D/144 Vol.II of 6<sup>th</sup> April 2017. "No Ministry or Department shall engage the service of a consultant to render any legal services relating to the functions to the Attorney General without the approval of the Attorney General.

78. All Ministries and Departments must ensure that they comply with the provisions of Section 17(1) of the Office of the Attorney General Act when seeking to engage the services or external counsel or legal consultants.

79. Commissions and Independent Offices and State Corporations shall prequalify a panel of lawyers/law firms for provisions of legal services and forward the list to the Attorney General for concurrence.

80. Where Commissions and Independent Offices and State Corporations seek to engage the external counsel or legal consultant, they seek concurrence of the Attorney General and forward the draft contract of Engagement, Non-Disclosure Agreement and any other relevant document.

81. Government Ministries, Departments, Semi-autonomous Agencies, State Corporations, States Agencies, Constitutional Commissions and Independent Offices should involve the Attorney General in the development of the terms of Reference (ToRs) and determination of the fees payable to the external counsel or legal consultants. Where Counsel is to act on behalf of a Department or Ministry, the external counsel or consultant should upon engage receive a certificate of Appointment from the Attorney General in respect of every case, consultancy or transaction.

82. Upon issuance of Certificate of Appointment, MDAs should execute a Contract of Engagement and a Non-Disclosure Agreement with the external counsel or legal consultants and forward a copy of the executed documents to the Attorney General within seven (7) working days.

83. All Government Ministries, Departments, Semi-autonomous Agencies, State Corporations, States Agencies, Constitutional Commissions and Independent Offices must conclude a remuneration agreement prior to the engagement of an external counsel on terms which must be conscionable and consistent with the applicable Advocates Remuneration Order, No post contractual arrangement on fees shall be accepted.

84. Legal fees payable to any external counsel or legal consultant under such an arrangement shall be payable upon verification and confirmation of the achievement of the agreed milestones in accordance with the ToRs.

85. All legal fees payable to any external counsel or consultant must be approved and authorised by the Attorney General and shall be paid by the contracting Independent Offices Commission and State Department.

86. Engagement of an external lawyers/law firm by Kenya's diplomatic missions abroad and the payment of their legal fees should be approved and authorised by the Attorney General. The legal fees and costs shall be borne by the Ministry responsible for Foreign Affairs.

87. Upon the Attorney General's approval, the Head of Mission or his designated alternate shall sign a Contract of Engagement with the lawyers/law firm.

88. All Government Ministries, Departments, Semi-autonomous Agencies, State Corporations, States Agencies, Constitutional Commissions and Independent Offices shall be required to submit quarterly status reports to the Attorney General on the progress of all matters under the conduct of external counsel or consultants.

89. The provisions of this part apply to litigation, arbitration and legal transactions advisors on behalf of the Government in both local and foreign jurisdictions.

90. The Attorney General shall procure the services of external counsel or consultants for all international matters on behalf of MDAs,

**91. The fees payable for external lawyers is a cost borne by the concerned MDA subject to the approval of the Attorney General.**

**92. Any procurement of legal services secured without the authority of the Attorney general constitutes a breach of the law and may condemn the concerned officer to a liability of surcharge as provided for by Article 226 (5) of the Constitution. “**

43. On Guideline H, the *ex parte* Applicant submitted that the directive that the State Corporations, Constitutional Commissions and Independent Offices must instruct only the Attorney General if they intend to file any claims disregards the law on procurement, and further, that under Article 249(2) of the Constitution, Constitutional Commissions and Independent Offices are not subject to the direction or control by any person or authority.

44. On the requirements of Guideline L that the State Corporations, Constitutional Commissions and Independent Offices shall forward list of prequalified lawyers to the Respondent for his concurrence, and for his approval of the fees payable to external counsel, the *ex parte* Applicant also cited sections 93 to 95 of the Public Procurement and Assets Disposal Act on the prequalification process, and that in tenders for professional services, the evaluation committee of a procuring entity has regard to the provisions of the Act and statutory instruments issued by relevant professional associations regarding the fees chargeable. In particular that the Respondent has no powers to override the provisions of the Advocates Remuneration Order which has statutory underpinning under section 44(1) of the Advocates Act, and which regulates remuneration of Advocates.

45. The *ex parte* Applicant also argued that section 17(1) of the Office of the Attorney General Act that was relied upon by the Respondent to issue Guideline L of the impugned Circular, does not apply to State Corporations, Constitutional Commissions and Independent Offices, and that the application of the said guidelines to the named institutions was therefore void *ab initio*. Reliance was placed on the decision by the House of Lords in **Magill vs Porter, (2001) UKHL 67** for the position that statutory powers can only be exercised for the purposes for which they are conferred.

46. The Interested Party also extensively submitted on, and outlined the parameters of the Respondent's statutory power in making the impugned guidelines. Reference was made to Article 156 of the Constitution of Kenya which donates the powers exercisable by the Respondent's office and also sets the limit thereof. It was submitted that the statute contemplated under Article 156(4)(c) is the Office of the Attorney General Act, No. 49 of 2012. That, the relevant sections of the Act in the context of the instant dispute are sections 5, 6, 16 and 17. The Interested Party cited the provisions of the Act which sets out the functions of the Respondent; namely section 6 of the Act which sets out the functions of the Respondent, and sections 16 and 17 which provide for matters reserved exclusively for the office of the Attorney General and those which it can refer or engage an external consultant.

47. It is submitted that section 5 of the Office of the Attorney General Act identifies four State entities that the Respondent is responsible for giving advice, namely government ministries, departments, constitutional commissions and state corporations. It is submitted that the Respondent cannot assert authority to conduct legal proceedings or supervise the legal affairs of all four categories of state entities, or assert the exclusive right to handle legal matters for all four categories.

48. Two reasons were given by the Interested Party for this position. Firstly, that Constitutional Commissions and Offices set out at Article 248 (2) and (3) of the Constitution are clothed with independence by Article 249. Secondly, that state corporations on the other hand are created by various statutes or by presidential decree pursuant to the provisions of Articles 131 and 132 of the Constitution of Kenya as read together with the provisions of the State Corporation Act. Further, that the said Act provides at section 3(2) and 5 that a state corporation has perpetual succession, in its corporate name is capable of suing and being sued, and shall have all the powers necessary or expedient for the performance of its functions.

49. According to the Interested Party, the implication of this is that the powers conferred upon state corporations by the State Corporations Act includes the power to retain advocates directly for purposes of attending to the provisions of section 3(2) of the Act; namely to sue and defend any litigation commenced by third parties. The Interested Party invited the Court to take judicial notice of the fact that defending court proceedings is regulated by rules of court procedure, including the Civil Procedure Act, which impose very strict timelines for filing pleadings under certificate of urgency. The Interested Party termed it inconceivable that the Respondent with its limited resources and manpower is in any position to attend to all the legal affairs of the four state entities hereinabove mentioned, in the manner envisioned under Section 5(2) of the Office of the Attorney General Act

50. It was further submitted that section 16 of the Office of the Attorney General Act does not exclusively reserve all legal matters arising in Constitutional Commissions/Offices and State Corporations for the Respondent. Further, that section 17 thereof only identifies Ministries and Government departments as the two entities that cannot engage the services of external consultants to render legal services. According to the Interested Party, section 17 seeks to invest the Respondent with the powers to regulate and approve persons that can provide legal services that relate to the Respondent's office. That therefore, the Act only relates to services that touch on representation of a Ministry or State Department in Court, and does not extend to ascertaining who is to be allowed to provide legal services to a Ministry or State Department or what that person is required to be paid.

51. The Interested Party urged that this statutory framework of powers and functions reserved for the Respondent is in keeping with numerous decisions of courts regarding the operational independence of State Corporations and Constitutional Commissions and Offices. In this regard, the Interested Party cited the Supreme Court decision in **In the Matter of Interim Independence Electoral Commission [2011] e KLR** and the case of **Republic vs Fazul Mahamed & 3 others Ex-Parte Okiya Omtatah Okiiti [2018] eKLR**, where the principles set out in Article 249(2)(b) of the Constitution were enumerated. The Interested Party asserted that in the circumstances, the Respondent's circular exceeds the power conferred to the Respondent by both the Constitution and statute, and is thus null and void.

52. Lastly, the Interested Party submitted that the Office of the Attorney General Act does not confer the office with regulatory powers over procurement services, and that under the Public Procurement and Asset Disposal Act, the details and intricacies of procurement are left to the

individual departments of the state entities. That, the Respondent is therefore usurping the role of the respective procurement departments. It was also the Interested Party's submission that the Advocates Act regulates the cost of procurement of professional legal services, as governed by the Advocates Remuneration Order.

53. This Court has already referred to the specific functions and powers that are granted by the Respondent in section 5 of the Office of the Attorney General Act which have been reproduced in the foregoing. Section 6 (1) and (2) of the Act in addition donates certain powers to the Respondent as follows:

**“(1) The Attorney-General shall, by virtue of his office, be the titular head of the bar and shall take precedence in court in all matters whenever he appears in accordance with the Advocates Act (Cap. 16).**

**(2) The Attorney-General shall, in discharging his functions under Article 156 of the Constitution have power to-**

**(a) with leave of the court or tribunal, appear at any stage of proceedings, appeal, execution or any incidental proceedings before any court or tribunal;**

**(b) require any officer in the public service to furnish any information in relation to any matter which is the subject of legal inquiry;**

**(c) summon any officer in the public service to explain any matter which is the subject of litigation by or against the Government; and**

**(d) issue directions to any officer performing legal services functions in any Government Ministry”.**

54. Section 16 of the Act also prohibit the state counsels who are appointed by the Respondent in providing advice in certain matters without the express approval of the Respondent, while section 17 states that no Ministry or Department shall engage the services of a consultant to render any legal services relating to the functions of the Attorney-General .

55. As stated before, the powers of the Attorney General require to be interpreted in line with other applicable provisions of the Constitution and statute. It is in this regard the correct position that there are existing constitutional and legal provisions that regulate the matters covered by the two Guidelines, and which specifically assign Constitutional and statutory responsibility and accountability as regards procurement of legal services and payment of legal fees to different public and private authorities.

56. It is notable in this respect that that the Office of the Attorney General is an office in the Executive arm of Government, and its functions of legal services as set out in Article 156 of the Constitution and section 4 of the Office of the Attorney General Act *vis-à-vis* Constitutional Commissions, State Corporations and other Governmental bodies is advisory. Advice is defined as the “guidance offered by one person, especially a lawyer, to another” (Blacks Law Dictionary, Ninth Edition at page 63). The Supreme Court in In the Matter of Advisory Opinion of the Court, Constitutional Application No. 2 of 2011 at paragraph 93, explained the nature of its own advisory opinions as follows:

**“On this account, it is inappropriate that the Supreme Court’s Advisory Opinion should be sought as *mere advice*. Where a government or State organ makes a request for an Opinion, it is to be supposed that such organ would *abide* by that Opinion; the Opinion is sought to *clarify a doubt*, and to enable it to *act in accordance with the law*...”**

57. Similarly, the exercise of the Respondent’s advisory powers with respect to legal services can be upon request from Government Ministries, Departments and State Corporations, or *suo moto*, in matters the administration of justice and the public interest are at stake, in his capacity the custodian of the rule of law and public interest as specifically recognized by Article 156(6) of the Constitution. Section 19 and 20 of the Office of the Attorney General Act in this respect provide that Government Ministries, Departments and State Corporations shall seek the opinion of the Attorney-General on any matter raising substantial legal or constitutional issues, and shall notify the Respondent . In addition, where such legal advice is rendered, it should not be lightly disregarded as underscored by the Supreme Court, and the responsible officer can be held to account for disregarding such advice.

58. These observations and findings notwithstanding, no express provisions of the Constitution or law in this respect permits the Respondent to limit the constitutional independence of the Constitutional Commissions or Independent Offices within the context of Article 249 of the Constitution. Likewise, no Constitutional or statutory provisions give the Respondent powers to interfere with, or limit the constitutional and statutory individual responsibility, and operational independence specifically bestowed upon Cabinet Secretaries, State Corporations and Accounting Officers.

59. In this regard the constitutional independence of Constitutional Commissions and Independent Offices is guaranteed by the Constitution, which provides in Article 249(2) as follows:

**“(2) The commissions and the holders of independent offices—**

**(a) are subject only to this Constitution and the law; and**

**(b) are independent and not subject to direction or control by any person or authority.”**

This independence has been affirmed and reiterated by the Courts in various decisions. The Supreme Court in In the Matter of Interim Independence Electoral Commission (2011) eKLR where the principles set out in Article 249(2)(b) were enumerated thus:

**“The Independence clause is meant to shield commissions from undue influence by other institutions of government...in light of regrettable memories of all powerful presidency...they serve as people’s ‘watchdogs’ and must operate without fear or favour.”**

60. When a similar argument was presented with regards to the powers of the Teachers Service Commission in Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others, [2015] eKLR, the Court of Appeal in clarified that Article 249 (2) (a) of the Constitution also stipulates that all Independent Commissions are subject to the Constitution and the law, and went on to hold as follows:

**“The Supreme Court In the Matter of Interim Independent Electoral Commission Constitutional Application (2011) eKLR, at paragraph 54 observed that “the totality of governance powers is share out among different organs. These organs play mutually-countervailing roles. In this set up, it is to be recognized that none of the several government organs functions in splendid isolation.”**

**221. TSC and SRC are both governmental organs and independent commissions. They cannot function in seclusion but must function in reciprocally complementary roles while respecting separation of powers and functions. In the Matter of the Principle of Gender Representation in the National Assembly and Senate, SC Application No. 2 of 2012 at paragraph 83, the Supreme Court emphasized that the Constitution must be interpreted holistically to ensure that other organs bearing primary responsibility for effecting operations that crystallize enforceable rights are enabled to discharge their obligations, as a basis for sustaining the design and purpose of the constitution.”**

61. Article 153 of the Constitution which provides as follows as regards the individual and collective responsibility of Cabinet Secretaries:.

**“(1) A decision by the Cabinet shall be in writing.**

**(2) Cabinet Secretaries are accountable individually, and collectively, to the President for the exercise of their powers and the performance of their functions.**

**(3) A Cabinet Secretary shall attend before a committee of the National Assembly, or the Senate, when required by the committee, and answer any question concerning a matter for which the Cabinet Secretary is responsible.**

**(4) Cabinet Secretaries shall—**

**(a) act in accordance with this Constitution; and**

**(b) provide Parliament with full and regular reports concerning matters under their control.”**

62. Cabinet Secretaries are therefore responsible for matters that arise in their Ministries, and when reporting to Parliament, Article 152 (8) of the Constitution provides that they have the right to appear and be represented when being investigated by Parliament. They can thus be sued for matters that arise in their Ministries in their capacity as Cabinet Secretaries. In addition to Cabinet Secretaries, the Constitution in Article 155 places the responsibility of administration of state departments in Principal Secretaries, who can thus be held accountable for any maladministration. Functional independence is also bestowed upon State Corporations by section 3 of the State Corporations Act which provides as follows:

**“(2) A state corporation established under this section shall—**

**(a) have perpetual succession;**

**(b) in its corporate name be capable of suing and being sued;**

**(c) subject to this Act, be capable of holding and alienating movable and immovable property.”**

63. Statutory underpinning is also now given to the concept of accountability for expenditure of public funds under both the Public Procurement and Asset Disposal Act and the Public Finance Management Act, which provide for and allocate responsibility in public expenditure to Accounting Officers. Accounting Officers in national government under the two Acts are appointed by the Cabinet Secretary in charge of Finance under section 67 of the Public Finance Management Act, which also provides for the accounting officers for Constitutional Commissions or Independent Offices. The said section provides as follows:

**(1) The Cabinet Secretary, except as otherwise provided by law, shall in writing designate accounting officers to be responsible for the proper management of the finances of the different national government entities as may be specified in the different designations.**

**(2) Except as otherwise stated in other legislation, the person responsible for the administration of a Constitutional Commission or institution or Independent Office shall be the accounting officer responsible for managing the finances of that Commission, institution or Independent Office.**

**(3) The Cabinet Secretary shall ensure that at any time there is an accounting officer in each national government entity.**

64. Therefore, a holistic interpretation of the Office of the Attorney General Act requires that it is not applied in a manner that will inhibit the performance of constitutional and statutory duties conferred upon other Governmental entities. Unlike the position that obtained in Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 Others, (supra) where the Salaries and Remuneration Commission has been given express powers that limit the powers of other Constitutional Commissions and Governmental entities as regards the salaries and benefits that they can pay, no such powers are expressly granted to the Respondent in the exercise of its legal advisory powers.

65. The ultimate, responsibility and accountability for decision making and performance of duties at the end of the day will lie with the repository of the applicable constitutional and statutory duties, as expressly recognized by the Respondent in paragraph 30 of its Guideline D of the Circular dated 1<sup>st</sup> March 2018, and these repositories cannot therefore be prevented from performing their duties without a good and legal reason. Neither the Constitution, nor the Office of the Attorney General Act in this respect grants the Respondent in the exercise of its advisory function, powers to prescribe or limit duties which are constitutionally and lawfully granted to other Government entities, as was attempted by Guideline D, H and L, and indeed any other Guidelines which has this effect in the Circular dated 1<sup>st</sup> March 2018.

66. Other than the function of providing of legal advice, which has been dealt with in the foregoing, the other function as regards legal services provided by the Respondent that was sought to be implemented by Guidelines H and L of the Circular dated 1<sup>st</sup> March 2018, is that of representing the national government in civil and constitutional matters in court or in legal proceedings to which the national government is a party. The Respondent in this respect seeks that Government Ministries, Constitutional Commissions, Independent Offices and State Corporations must instruct it when they wish to make a claim immediately a cause of action arises, and must seek the Respondent's approval when they seek to engage or pay legal fees to external counsel or legal consultants. Government ministries and departments are in this respect also required to comply with section 17(1) of the Office of the Attorney General Act.

67. A representative is one who stands for or acts on behalf of another (Blacks Law Dictionary, Ninth Edition at page 1416), and an ordinary interpretation of the function of the Respondent in representing the national Government in this respect, is that the Respondent acts on behalf of national Government agencies in litigation. Therefore the Respondent in this respect acts as an agent of the national Government entities upon instruction, and its functions of representing the national Government cannot be interpreted to extend to being the originator of the instructions by national Government entities, and certainly does not include or involve procurement of legal services for the other national Government entities. Section 17(1) of the Office of the Attorney General Act must also be read and interpreted in this context.

68. Another ground raised as regards the illegality of the Guidelines H and L, which has already been addressed by this Court, was that they are contrary to the provisions of the Public Procurement and Asset Disposal Act, as well as the Advocates Act. Indeed, as already found earlier on by this Court, the role of the Respondent's office does not extend to procurement of legal and other related services in Ministries and State Departments, State Corporations and Constitutional Commissions/offices. Under the Public Procurement and Public Assets Disposal Act, procurement of legal services is responsibility of procurement departments and Accounting Officers of those respective entities, who are required to follow certain procedures and laws in this regards, and the Respondent given any powers of procurement of legal services under the said Act.

69. Similarly, the regulation of payment of legal fees is regulated by Part IX of the Advocates Act, and section 44 of the Act provides as follows in this respect:

**“(1) The Council of the Society may make recommendation to the Chief Justice on all matters relating to the remuneration of advocates, and the Chief Justice, having considered the same, may by order, prescribe and regulate in such manner as he thinks fit the remuneration of advocates in respect of all professional business, whether contentious or non-contentious.”**

The Chief Justice has in this respect regulated remuneration of Advocates by enacting the Advocates Remunerations Order pursuant to section 44. Part IX of the Act also regulates agreements on remuneration as between advocates and clients, recovery actions for the said remuneration and the payment of fees in the absence of agreements, which is done by way of taxation of the costs by a taxing officer.

70. It is thus the finding of this Court that in this context, the Guidelines H and L of the Circular dated 1<sup>st</sup> March 2018 are *ultra vires* to the extent that they sought to direct other bodies which are granted constitutional and statutory powers and independence in the manner they should act, went beyond the functions granted to the Respondent under the Constitution and in relation to provision of legal services, and were made in excess of powers granted to the Respondent in this regard. In addition, the said circulars are also contrary to provisions in the Constitution, the State Corporations Act, the Public Procurement and Asset Disposal Act, and the Advocates Act that regulate the procurement of, and payment for legal services.

71. Lastly, the *ex parte* Applicant in this regard also argued that the Respondent's actions were also unlawful to the extent that the Respondent failed to take into account the relevant statutes, and cited the decision in Zacharia Wagonza & Another, vs Office of the Registrar Academic Kenyatta University & 2 Others,(2013) e KLR . The general rule on taking into account relevant considerations was explained in Associated Provincial Picture Houses vs Wednesbury Corporation (1948) KB 223 and is to the effect that a public body when making a decision, must take into account all the factors which the legislation conferring the relevant function expressly or implicitly requires it to have regard. The extent to which a public body inquires into a particular factor, and the weight to be attached to a factor, are however matters to be decided by the public body, provided its acts reasonably. In addition, the considerations to be taken into account will also depend on the circumstances of each case.

72. This Court has in this respect already found that the Respondent failed to take into account provisions of the Constitution, the Public Procurement and Assets Disposal Act and Advocates Act as regards the procurement of legal services and payment of legal fees, and the impugned Guidelines were therefore to this extent illegal for failing to take into account the relevant provisions of applicable laws.

On Whether the Respondent acted Fairly

73. The Interested Party submitted that the Attorney General in his circular wrote to the various government Ministries and State

Departments notifying them that every proposed engagement of external advocates by the State Corporations, Constitutional Commissions and Independent Offices must be with the written approval of the Attorney General. The Interested Party submits that this decision to prohibit the procurement of legal services without the authority of the Respondent's office was arrived at without; a) affording those charged with that responsibility in the Ministries and State Departments an opportunity to be heard; and b) fixing a date to hear them and have them give reasons on why they should not procure legal services.

74. It was therefore submitted that the Respondent's office violated the right to be heard which is a core component of the right to fair administrative action and the Interested Party cited Article 47 of the Constitution and section 4(3) of the Fair Administrative Action Act to argue that the Respondent acted unfairly. The Interested Party also cited the case of David Onyango Oloo vs the Attorney General, [1987] K.L.R.

75. The Interested Party further made submissions on reasonableness of the Respondent's actions. It is submitted that the right to fair administrative action as envisioned under Article 47 also includes the right to have a decision made in a reasonable manner. Reference was made to the English case of Associated Provincial Picture Houses vs Wednesbury Corporation (supra). It was held therein that what amounts to "unreasonableness" is the making of an administrative decision or the carrying out of an administrative action by taking into consideration factors that ought not to be taken into consideration in making the decision. It is submitted that the decision by the Respondent's office prohibiting any Ministry or state Department from procuring legal services from private entities without the Respondent's consent affirms the unreasonableness of the decision.

76. Article 47 of the Constitution in this regard provides as follows:

**(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.**

**(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.**

**Section 4(3) and (4) of the Fair Administrative Action Act provides the key procedural steps that are required to satisfy the requirements of fairness as follows:**

**(3) Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-**

**(a) prior and adequate notice of the nature and reasons for the proposed administrative action;**

**(b) an opportunity to be heard and to make representations in that regard;**

**(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;**

**(d) a statement of reasons pursuant to section 6;**

**(e) notice of the right to legal representation, where applicable;**

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

**(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.**

**(4) The administrator shall accord the person against whom administrative action is taken an opportunity to-**

**(a) attend proceedings, in person or in the company of an expert of his choice;**

**(b) be heard;**

**(c) cross-examine persons who give adverse evidence against him; and**

**(d) request for an adjournment of the proceedings, where necessary to ensure a fair hearing.**

77. The Respondent did not bring any evidence of consultation with any of the affected parties affected by the Circular of 1<sup>st</sup> March 2018, and in addition failed to comply with the provisions of its own statute which specifically requires it to consult with the Interested Party on any matter affecting the legal profession under section 4 of the Office of the Attorney General Act. This Court therefore finds that the Respondent in making the impugned Guidelines H and L was also procedurally *ultra vires* the Office of the Attorney General Act, and procedurally unfair.

78. However, this Court cannot make a finding that the impugned Guidelines were unreasonable, as the Respondent did provide its reasons for making the Guidelines which have been alluded to in the foregoing. Even though some of the reasons may have been erroneous and not supported by the law, and in the absence of any other evidence by the Interested Party to demonstrate their unreasonableness, they cannot be said to have been in defiance of logic and acceptable moral standards. This was the test laid down in in Associated Provincial Picture Houses vs Wednesbury Corporation (supra) and Council of Civil Service Unions vs The Minister for the Civil Service (1985) 1 AC 374 for the

ground of unreasonableness in judicial review.

On Whether the Respondent violated legitimate expectations.

79. According to the *ex parte* Applicant, the Respondent's actions are in breach of its legitimate expectation that as an advocate, his engagement with clients will not be arbitrarily and unlawfully interfered with, and that the Respondent as the principal legal adviser to Government, will abide by the Constitution and the law. The decision in Republic vs Ministry of East African Community, Labour & Social Protection & 4 others ex parte Umoja Children's Home & Another (2019) e KLR was cited in support of this position.

80. The Interested Party's submissions on legitimate expectation were that the Respondent's office failed to meet the legitimate expectation of the officers in charge of procuring legal services in the Ministries and state Departments. It is submitted that a representation becomes legitimately expected where the following conditions are met:

- a. The representation is clear, unambiguous, and does not have any relevant qualification;**
- b. The expectation must be induced by the behavior of the public authority;**
- c. The representation must have been made by someone who had actual or apparent authority;**
- d. The representation must be applicable to the aggrieved parties.**

81. The Interested Party relied on the case of Council of Civil Service Unions vs Minister for the Civil Services (supra). It was therein established that the term legitimate is synonymous to "reasonable expectation" and is identified in two ways: a) either from an express promise given on behalf of a public authority; b) from the existence of a regular practice which the claimant can reasonably expect to continue.

82. A five judge bench of this Court in the case of Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR exhaustively discussed the doctrine of legitimate expectation and various judicial decisions on the doctrine in a decision that was affirmed by the Court of appeal. The said bench observed as follows:

**"207. The doctrine of legitimate expectation was developed by English courts to hold rulers to their promises. In the 4<sup>th</sup> Edition, 2001 Reissue, of Halsbury's Laws of England the authors at page 212, paragraph 92 explain the concept behind the development of the principle as follows:**

**"A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.**

**The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A *legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker.*"**

83. The Supreme Court in the Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others, (2014) e KLR also explained the principle of legitimate expectation as follows:

**"[264] In proceedings for judicial review, legitimate expectation applies the principles of fairness and reasonableness, to the situation in which a person has an expectation, or interest in a public body retaining a long-standing practice, or keeping a promise.**

**[265] An instance of legitimate expectation would arise when a body, by representation or by past practice, has aroused an expectation that is within its power to fulfil. A party that seeks to rely on the doctrine of legitimate expectation, has to show that it has locus standi to make a claim on the basis of legitimate expectation."**

84. The said Court further laid down the principles that govern a successful invocation of the doctrine of legitimate expectation as follows:

**"[269] The emerging principles may be succinctly set out as follows:**

- a. there must be an express, clear and unambiguous promise given by a public authority;**
- b. the expectation itself must be reasonable;**
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and**

**d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.”**

85. Applying these principles to the present case, this Court finds that the Respondent did make express representations as regards the exercise of its statutory functions in the impugned Guidelines in the Circular dated 1<sup>st</sup> March 2018. A legitimate expectation was thus created by the representations made in the impugned Guidelines that the exercise of its functions as stated therein would be within the law. This expectation was however violated by the Respondent when it acted in excess of its powers in making the impugned Guidelines as demonstrated in the foregoing.

On whether the ex parte Applicant merits the relief sought

86. The ex parte Applicant has *inter alia* sought orders of certiorari and prohibition. The Court of Appeal held as follows in Kenya National Examinations Council vs. Republic Ex parte Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996 as regards the grant of the said orders:

**“Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision...Prohibition is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings...The order of *mandamus* is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a *mandamus* cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a *mandamus* cannot command the duty in question to be carried out in a specific way... These principles mean that an order of *mandamus* compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of *mandamus* compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then *mandamus* is wrong remedy to apply for because, like an order of prohibition, an order of *mandamus* cannot quash what has already been done...Only an order of *certiorari* can quash a decision already made and an order of *certiorari* will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of *certiorari* and that is all the court wants to say on that aspect of the matter.”**

87. I find that as the Respondent has been found to have acted *ultra vires*, unfairly, and thereby violated the *ex parte* Applicant's and Interested Party's legitimate expectations in making the impugned Guidelines, the *ex parte* Applicant is entitled to the order sought of certiorari to quash the said decision.

88. The orders sought of prohibition are also merited only to the extent that it has been established that the Respondent acted in contravention of the law specifically with respect to the paragraphs 18 to 24 of Guideline D, and Guidelines, H and L of the Circular dated 1<sup>st</sup> March 2018. However, the Court cannot restrain the Respondent from making similar Circulars in future, so long as it undertakes its functions within the law, and the prayers seeking prohibition of similar Circulars is thus not merited and is speculative.

89. Lastly, the effect of quashing the impugned Guidelines will be that the *ex parte* Applicant and Interested Party will be at liberty to apply the applicable laws as regards procurement of legal services and payment of legal fees, and therefore the orders sought to prohibit the Respondent from interfering in this regard are not only hypothetical, but also inimical to the administration of justice, as the Respondent can constitutionally interfere in cases where the rule of law is not being upheld.

90. In the premises this Court finds that the *ex parte* Applicant's Notice of Motion dated 26<sup>th</sup> October 2018 is merited only to the extent of the following orders:

**I. An Order of Certiorari be and is hereby issued to bring into this Court for the purposes of quashing the decision, paragraphs 18 to 24 of Guideline D, and Guidelines H and L in the Respondent's Circular Reference Number AG/Circular/2018 dated 1<sup>st</sup> March 2018 and titled “Guidelines on Provision of Legal Services by the Office of the Attorney General & Department of Justice”.**

**II. An order of Prohibition be and is hereby issued to prohibit and/or restrain the Respondent from in any manner implementing or seeking to enforce the implementation of, or further implementation of, paragraphs 18 to 24 of Guideline D and Guidelines H and L in the Respondent's Circular Reference Number AG/Circular/2018 dated 1<sup>st</sup> March 2018 titled “Guidelines on Provision of Legal Services by the Office of the Attorney General & Department of Justice”.**

**III. The Respondent shall meet the *ex parte* Applicant's and Interested Party's costs of the Notice of Motion dated 26<sup>th</sup>**

**October 2018.**

91. Orders accordingly.

**DATED AND SIGNED AT NAIROBI THIS 4<sup>th</sup> DAY OF JUNE 2019**

**P. NYAMWEYA**

**JUDGE**