REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

JUDICIAL REVIEW APPLICATION NO. 34 OF 2018

IN THE MATTER OF THE RIGHT TO FAIR ADMINISTRATIVE ACTION

UNDER ARTICLE 47 OF THE CONSTITUTION OF KENYA 2010

AND

IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT NO 4 OF 2015

AND

IN THE MATTER OF THE PUBLIC NOTICE STRIKING OUT KOSIEYO

AND PARTNERS FROM THE LIST OF FIRMS LICENSED TO OFFER

AUDIT, ACCOUNTANCY AND ASSURANCE SERVICES

BETWEEN

REPUBLIC.....APPLICANT

VERSUS

INSTITUTE OF CERTIFIED PUBLIC

ACCOUNTANTS OF KENYA.....RESPONDENT

EX PARTE :

KOSIEYO AND PARTNERS

JUDGMENT

The Application

1. The Application before the Court for determination is a Notice of Motion dated 27th November 2017 by Kosieyo and Partners, the *ex parte* Applicant herein, (hereinafter "the Applicant"), in which it is seeking the following orders:

> **a. A judicial review order of Certiorari to quash the decision of the Institute of Certified Public Accountants of Kenya to strike off the firm of Kosieyo and Partners from the list of firms offering audit, assurance and accountancy services in Kenya without any hearing or notice, which decision was exhibited in a public notice dated 1st November 2017 circulated and widely disseminated in the Daily Nation of the same date**
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> **b. A judicial review order of Certiorari to remove into this court and quash the Institute of Certified Public Accountants of Kenya's notice publicized in the advertisement of 1st November 2017 appearing on the Daily Nation, purporting to strike off the firm of Kosieyo and Partners from the list of firms offering audit, assurance and accountancy services without being offered an opportunity to be heard or being made aware of the case made against it**

c. A judicial review order of Prohibition prohibiting the Respondent herein, the Institute of Certified Public Accountants of Kenya, from striking off the firm of Kosieyo and Partners from the list of firms offering audit, assurance and accountancy services without notice, being offered an opportunity to be heard, or being made aware of the case made against it:

d. A Declaration that that acts of the Institute of Certified Public Accountants of Kenya of striking off the firm of Kosieyo And Partners from the list of firms offering audit, assurance and accountancy services amounts to unfair administrative action;

e. An order of Mandamus compelling the Respondent herein to retract the public notice widely circulated on 1st November 2017.

f. The costs of this application be provided for

2. The application was supported by a statutory statement of facts dated 26th January 2018, and a verifying affidavit and further affidavit sworn by the Rose Adoyo Nyawalo on 26th January 2018 and 19th March 2018 respectively.

3. The deponent is the Administrator of the Estate of John Henry Nyawalo, and a beneficiary of the business of Kosieyo and Partners. John Henry Kosieyo Nyawalo, who was the founding partner of the said business died in 1993, and the deponent stated that the business has since then been managed by an interim manager approved by the Institute of Certified Public Accountants of Kenya, which is the Respondent herein.

4. The deponent gave a background of the operations of the said business since its formation in 1974, and of the good reputation and goodwill of its founding partner, as well as the details of the various interim managers who have run the business after the death of the founding partner. It is the Applicant's case that on 1st November 2017 without any notice or opportunity to be heard, the Respondent through its Chief Executive issued a public notice in the Daily Nation of 1st November 2017, informing the public that the firm of Kosieyo and Partners had been struck off from the list of firms authorized to offer accounting, audit and assurance services.

5. The Applicant attached a copy of the said public notice; an agreement dated 3rd July 2013 entered into between the Applicant and one Barrack Aggrey Obungu to provide audit services; a copy of the practicing certificate reissued by the Respondent to the said Barrack Aggrey Obungu on 1st January 2016; and a notification sent by the Applicant to the Respondent dated 12th February 2015 of the appointment of the said Barrack Aggrey Obungu as its interim manager with effect from 3rd July 2013.

6. The Applicant alleges that the Respondent's decision to strike off the firm of Kosieyo and Partners from the list of firms offering accountancy, audit and assurance services and to widely publish the notice of the decision without prior notice to the Applicant was procedurally unfair and in express violation of the basic requirements of the right to a fair hearing. According to the Applicant, the actions of the Respondent were also illegal and *ultra vires* as the same was not done with the input of the Respondent's Council, or its Registration and Quality Assurance Committee, and was instead driven by one Nebert Avutswa.

7. In addition, that the Applicant sought to be provided with the minutes and resolutions of the said Council and Committee to strike off the Applicant, and was informed verbally by the said Nebert Avutswa that they were non-existent and that the Applicant's file was missing from their records. Furthermore, that upon inquiry, the said Nebert Avutswa wrote a letter dated 27th November 2017 which the Applicant attached, stating that the firm of Kosieyo and Partners had been operating illegally, and deliberately misrepresented that he had informed the Applicant of the same.

8. According to the Applicant the said letter is unreasonable and made in bad faith, as the Respondent has never informed the Applicant at any time before the decision to strike it off that it was operating illegally. Further that the Respondent conducted bi-annual reviews and quality audits in 2011, 2013 and 2015 that approved and ensured that the Applicant was operating within the law, and the Applicant has always been operated by an interim manager who is licensed and a qualified accountant from the date of the death of the founding partner.

9. The Applicant contended that the issue of illegality of the firm of Kosieyo and Partners was contrived by the officers of the Respondent led by the said Nebert Avutswa, and is calculated to force the Applicant to sell the business name to his associates as shown by the advice by the said Nebert Avutswa to the Applicant that their only remedy was to sell the business, and he was unable to explain how the sale of an illegally operating business would legalise it. Lastly, that there are several accounting and audit firms where the founding partners have died, and they have continued to operate under interim managers, and the Applicant named some of the said firms in its pleadings.

<u>The Response</u>

10. The application was opposed by way of a Replying Affidavit and Further Affidavit sworn on 5th February 2018 and 12th June 2018 respectively by Nebart Avutswa, the Respondent's acting Chief Manager for Professional Services Compliance. It was his case that the Applicant has not disclosed material facts including various correspondences between the Applicant, the Respondent, and the Registrar of Trade Unions in which the legality of the firm was discussed; and that the Applicant had been informed on various occasions of its illegal operations.

11. He averred that Kosieyo and Partners was established in 1978 by the late Henry Nyawado Kosieyo as its sole partner and that he was issued with a practising certificate and registration certificate. Further, that after the founding partner's death on 8th January 1993, the Registration of Accountants Board established under the repealed Accountant's Act (Chapter 531 of the Laws of Kenya) informed the Applicant's Bungoma branch when it submitted payments that the board registered individuals and not organisations, and for this reason the board recalled the practising and registration certificates of the deceased founding partner.

12. The Respondent also annexed various correspondence exchanged between it, the Applicant and the Registrar of Trade Unions between March 1998 and July 1999 on the issue of the status of the firm of Kosieyo and Partners, after the Registrar of Trade Unions had raised concern that the said firm had been auditing its books of accounts after the death of the proprietor without it being informed of the death, and sought clarification as to whether a qualified accountant was signing its audited accounts.

13. He averred that subsequent to the correspondence, on 27th April 1998, the Applicant submitted a notification of a Mr Mella as its managing accountant, whereupon, the Respondent sought advice from the Attorney General on the running of the firm. The Respondent was thereupon advised to confirm the position from Mr. Mella, who stated that he had been approached by, but was never admitted as a partner to the Applicant firm, and that his name was being used by the firm without his knowledge or knowledge. Further, that the Applicant through Rose Nyawalo thereafter nominated various accountants to act as managing and or interim accountants until 2015.

14. Specifically on the events leading to the Applicant's removal from the list of firms offering accounting and audit services, the Respondent stated that on 2nd March 2015 it sent a notification to the Applicant of an incoming audit review scheduled to take place in May 2015. That subsequent to the audit and quality review, the Respondent by a letter dated 26th May 2015 informed the Applicant that the firm was operating illegally in contravention of the Accountants Act which prohibits the performance of auditing services by a person who is not a holder of a practising certificate issued in accordance with the Act. Further, that the Respondent directed that the firm be closed with immediate effect as the continual operation may be detrimental to the public.

15. The Respondent also contended that the letter dated 26th May 2015 referred to their letter of 2nd March 2015 giving notice of the audit review and was evidence that the Applicant received notice before the review, that the review was carried out, and that the Applicant had two years notice of the illegality. The Respondent denied the allegation that the letter dated 26th May 2015 is forged, and the deponent, Nebart Avutswa, stated that he personally drafted it and signed it and that the same was dispatched to the Applicant by post with a copy filed in the members file.

16. He further deponed that the Respondent moved offices from KCA University along Thika Road to its current location of ICPAK centre in 2016, and that the delivery book in which all outgoing mail is registered cannot be retrieved, as it was misplaced during the move.

17. The Respondent also relied on the provisions of section 45 of the current Accountants Act, Act Number 15 of 2008 as read with the 6th Schedule to the Act for the position that interim managers should serve for periods of 2 years after the death of a member, which provisions were not in the repealed Accountants Act. Therefore, that it was now important for the Respondent to ensure compliance with current Act and rules, and the directives by the Respondent's Council, which is its governing body pursuant to section 9 of the Act. Further, that the Respondent's Council issued one such directive after its 327th meeting, and which was communicated to the Respondent's members through a memo dated 3rd November 2015.

18. The said memo informed the members of the changes that were required to be captured in practising and annual licenses as from 1st January 2016 by removing the name of the firm or entity from the practising certificate and only indicating the name of the practitioner, while a single annual firm license would be issued indicating the name and practising numbers of all partners in the firm. The Respondent explained that the changes were meant to ensure that a member would not practice in more than one firm, a practice which had become rampant and made it difficult to monitor the conduct of members. Further, that the changes effected meant that no interim manager could practice in Kosieyo and Partners as well as in other firms as used to happen prior to 1st June 2015.

19. The Respondent refuted the allegations that it has a custom of allowing interim managers to manage firms of deceased members, and stated that the accountants practising in these firms named by the Applicant whose founding partners had died are members of the Respondents, who are duly registered and licensed and the names of the firm also comply with Respondent's by laws.

20. It was the Respondent's case that Ochieng Barrack Aggrey Obungu is not licensed to practice in Kosieyo and Partners and has not been licenced as such since 2016 to date, and has instead been licenced to practice in Aggrey and Company. That the same position applies to Joseph Abok, who has since 2015 to date been licensed to practice at Alex and partners. That it is for this reason that their nominations/appointments as interim managers by the Applicant were not acted upon by the Respondent.

21. The Respondent further alleged that the appointment of Ochieng Barack Aggrey Obungu in February 2015 and Joseph Abok in December 2016 as interim managers of the Applicant were purportedly made by Rose Adoyo Nyawalo who is not an accountant and not covered by the Act, which only allows such appointments to be made either by the Respondent or a member. Therefore, considering that the Respondent has not authorised any accountant to run the affairs of the of the Applicant as interim managers following the changes that took place in 2016, it sent a letter to the Applicant's advocates on 27th November 2017 reiterating that the firm was operating illegally.

22. Nebert Avutswa refuted the allegations that the Respondent threatened the applicant against seeking legal advice terming them false scandalous and vexatious. He averred that Rose Nyamwalo has engaged him on the matter on several occasions and she expressly asked for his views on what should be done, and he asked her to transfer the Applicant firm to a qualified member as the it could not be run through interim managers in perpetuity . He further averred that the suggestion to dispose of the firm was in line with the Respondent's *Guidelines on Office Management and Procedures for Public Practitioners* published in 2001.

23. Lastly, he refuted the allegations that the Applicant's file is missing and stated that he could produce the same in court if required, and also that he acted ultra vires, stating that he is the Secretary to the Respondent's Registration and Quality Assurance Committee, and section 13 of the Accountant's Act only applies to accountants who are duly licenced and registered under the Act.

The Determination

24. The parties were directed to canvass the application by way of written submissions, and B.M Musyoki & Company Advocates for the

Applicant file submissions dated 14th March 2018, while the Respondent's Advocates, Hamilton Harrison & Mathews Advocates, filed submissions dated 25th June 2018.

25. Before considering the issues raised and arguments thereon, it ought to be emphasized from the outset that this Court as a judicial review Court is not concerned with whether the Applicant merits or is qualified to be listed as one of the firms authorized to offer accounting, audit and assurance services. As was held in **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited, (2008) eKLR,** the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. The purpose of the remedy of judicial review is to ensure that an individual is given fair treatment by the authority to which he or she has been subjected, and it is not part of that purpose to substitute the opinion of an individual judge for that of the authority constituted by law to decide the matter in question.

26. It was also emphasized by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others, (2016) KLR that while** *Article 47* **of the Constitution as read with the grounds for review provided by section 7 of the Fair Administrative Action Act particularly the grounds of irrelevant considerations, unreasonableness and proportionality reveals an implicit shift of judicial review to include aspects of merit review of administrative action, , the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make the orders stipulated in Section 11 of the Act.**

27. The substantive issues that therefore require to be determined in this application are firstly, whether the Respondent acted illegally in striking out the firm of Kosieyo and Partners from the list of firms authorized to offer accounting audit and assurance services; secondly, whether the processes applied by the Respondent to strike out the said firm were procedurally fair; thirdly, whether the Respondent acted in bad faith and with ulterior motives in removing the Applicant from the list of firms authorized to offer accounting, audit and assurance services; and lastly, whether the Applicant is entitled to the relief sought.

Whether the Respondent Acted Illegally

28. On the first issue, the Applicant submitted that under section 9 of the Accountants Act, the Respondent is governed by its Council, and under section 13 (2) of the Act, it is the Registration Committee that issues annual licenses for firms to perform accounting and auditing services. Further, that the Secretary to the Registration Committee while attending meeting of the committee is not entitled to vote under the section and may only take minutes. In addition, that under the Third Schedule to the Act, the Registration Committee is only entitled to proceed with a matter when the quorum of members is not less than 4 and the decision made by votes and those minutes of the same must be kept.

29. The Applicant further submitted that under Regulations 6,7 and 8 of the 2nd Schedule to the Act, the decision of the Council shall on be made by voting at meetings of the Council or the Registration Committee, and that the meetings must be kept as evidence of the same. According to the Applicant, the public notice indicated that the decision had been made by the Respondent, yet it had been informed by the Respondent's employees that there has never been any meeting of the Council or the Registration Committee, and that Nerbert Avutswa who purported to be the secretary of the Registration Committee was unable to produce such minutes. That this therefore begs the question as to who made the decision, and there being no such evidence, it can only point to that the decision was made *ultra vires*. Further, that the Court should take judicial notice of the fact that the public notice was not signed.

30. The Respondent on the other hand relied on the long title of the Accountants Act No 15 of 2008 to urge that the Act only applies to accountants and company secretaries as defined in sections 18 and 24. Further, that the procedure to be followed in the event that a firm offering audit or accounting services commits an offence under the Act is provided under sections 32 to 34 of the Act, and paragraphs 1 to 5 of the 5th Schedule to the Act.

31. Therefore, that these provisions did not apply to the Applicant as it was not being run by an accountant registered under the Act, as Rose Nyawalo is not an accountant. Reliance was in this respect placed on section 2 of the Fair Administrative Actions Act, and the decision In **Capital Market Authority v Institute of Certified Public Accountants of Kenya & 3 Others [2017] eKLR** where it was held that the Accountants Act regulates the conduct of its own members.

32. I have perused the provisions of law cited by the Applicant and Respondent. Section 13 of the Accountants Act mainly deals with the establishment and functions of the Registration Committee, which is the body responsible for registration of accountants and issue of practicing certificates, and also monitoring of professional standards and conduct. The Registration Committee is required to recommend any of its members to the council in case of professional misconduct for inquiry in accordance with section s2 of the Act.

33. Section 32 and 33 of the Accountants Act is the applicable procedure when disciplinary action is sought to be taken against a member of the Respondent, and provides as follows:

> "**32. Inquiry by the Disciplinary Committee**
>
> **(1) Where the Council has reason to believe that a member of the Institute may have been guilty of professional misconduct it shall refer the matter to the Disciplinary Committee which shall inquire into the matter.**
>
> **(2) The provisions of the Fifth Schedule shall have effect with respect to an inquiry by the Disciplinary Committee pursuant to subsection (1).**
>
> **33. Recommendation after inquiry**

(1) On the completion of an inquiry under section 32 into the alleged professional misconduct of a member of the Institute, the Disciplinary Committee shall submit to the Council a report of the inquiry which shall include one or more of the following recommendations, namely—

(a) that no further action be taken against the member;

(b) that the member be reprimanded;

(c) that the member be reprimanded with publication of the reprimand in the Kenya *Gazette* or in any other suitable media which may include the newspapers, electronic media and the internet;

(d) that the member pays such costs to the Institute, not exceeding one hundred thousand shillings, as may be determined;

(e) that the member undertakes training at his own cost, of such nature and duration and at such institutions as may be determined;

(f) that the member pays to the Institute a fine not exceeding fifty thousand shillings;

(g) that the member discharges his professional obligations under any contractual arrangement subject of the alleged misconduct;

(h) that any practising certificate held by the member be suspended; or (i) that the registration of the member be cancelled and that he be not registered for such period (including life) as may be specified.

(2) Where the Disciplinary Committee, in a report makes a recommendation under subsection (1), the Council shall inform the member concerned of the action to be taken against him and effect the recommendation of the Disciplinary Committee.

(3) A member aggrieved by a determination of the Disciplinary Committee under subsection (1) may make an appeal to the Council within sixty days of the communication to him of such determination, providing the grounds upon which the appeal is lodged.

(4) The Council may upon receipt of an appeal under subsection (3) direct the Disciplinary Committee to re-open the inquiry and shall in such direction specify the aspects of the matter it requires the Disciplinary Committee to reconsider.

(5) The Disciplinary Committee shall comply with the direction of the Council under subsection (4) and shall, after concluding the inquiry, submit a report to the Council in accordance with subsection (1).

(6) Any recommendation of the Disciplinary Committee under this section shall not be effected until after the expiry of the period prescribed under subsection (3) for appeals and the subsequent conclusion of the appeal proceedings thereof.

34. The Respondent has urged that **s**ections 32 and 33 were not applicable to the Applicant as it is not its member, neither is Rose Owalo, the administrator of the Applicant's founding member's estate qualified as an accountant to be able to rely on the provisions of the Accountant's Act. However, what is of relevance as regards the legality of its actions is whether it had power to issue the notice striking out the Applicant's name, irrespective of whether the Applicant was its member or not, and if so, whether this power was exercised legally.

35. Under section 33(1) of the Act the Respondent has the power to publish a reprimand of a member in the media. However, as to whether this power was exercised legally, even if the same exists, the Court finds that no evidence was given by the Respondent of any inquiry having been undertaken as required by sections 32 and 33 of the Accountants Act, which is a requirement before the such a reprimand can be given.

36. In addition, no evidence was given of a decision by the responsible body, being the Respondent's Council, in accordance with the procedures set out in the 2nd Schedule to the Act, that the provisions in sections 32 and 33 would not be applicable with respect to the Applicant on account of it not being a member of the Respondent. Therefore the actions by the Respondent in publishing the impugned notice was not only substantively but also procedurally *ultravires*, irrespective of whether the Applicant was its member or non-member.

Whether the Respondent was Procedurally Fair

37. The second issue on procedural fairness was argued by both the Applicant and Respondents. It was urged by the Applicant that the striking out of the Applicant was made without prior notice and without being given an opportunity to be heard, and that there was no fair adminsitrative action by the respondent . In this respect, the Applicant submitted that the Respondent resorted to deliberate lies and manufacture of evidence by fabricating the letter dated 26th May 2015 stating that it had informed the applicant and the managing partner of the firm that it was operating illegally after an audit review visit, knowing no such letter was written.

38. The Applicant pointed to the provisions of Article 47 and 50 of the Constitution o the right to fair administrative action and a fair hearing as well as Schedule 3 of the Accountants Act under 2(2) which states that notice of at least fourteen days before the first day fixed for the inquiry shall be delivered to the person whose conduct is the subject of investigation. Reliance was placed on the cases of **R vs Secretary of State for the Home Department ex parte Doody (1994) AC 531 and Republic vs Truth Justice and Reconciliation Commission and Another ex parte Beth Wambui Mugo (2016) eKLR** for the proposition that fairness may require that a person who may be adversely

affected by the decision will have an opportunity to make representation on his own behalf either before the decision is taken, with a view to producing a favourable result or after it is taken with a view to procuring its modification or both.

39. It was the Respondent's position that they gave the Applicant adequate notice before they were struck off, and that a hearing does not necessarily have to be an oral hearing. The Respondent relied on the cases of **Republic vs Public Procurement Administrative Review Board & 2 Others Exparte MIG International Limited & Another [2016] eKLR** and **Kenya Revenue Authority vs Menginya Salim Murgani [2010] eKLR** for this proposition. Reliance was also placed on the cases of **Simon Gakuo vs Kenyatta University and 2 Others Misc. Civil Application No 34 of 2009**, and **Republic vs Teachers Service Commission And 2 Others** for the proposition that there are no rigid rules or universal rules as to what is needed in order to be procedurally fair, and that interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law.

40. The Respondent reiterated in its submissions that the Applicant was duly notified of the illegality through a letter dated 26th May 2015. They referred to Mr Nebert Avutswa supplementary affidavit where he swore to have written and dispatched the letter to the Applicant and that therefore it cannot state that it was not given a fair hearing. It was their submission that the applicant cannot allege fraud without proof and relied on the decision of **Vivo Energy Kenya Limited (Initial Party Shell Limited) vs George Karunji (2014) e KLR.**

41. I have considered the arguments made on the issue at hand, and note that Article 47 of the Constitution, and the provisions of the Fair Administrative Act import and imply a duty to act fairly by a decision maker in any administrative action. In addition it was held in **Lloyd vs McMahon (1987) AC 625** that where a statutory procedure is insufficient to ensure that the requirements of fairness are satisfied, courts will imply procedural steps to ensure the said requirements are met.

42. The ingredients of fairness incorporate the requirements of natural justice which are that firstly, a person must be allowed an adequate opportunity to present their case where his or her interests and rights may be adversely affected by a decision-maker; and secondly, that no one ought to be judge in his or her case which is the requirement that the deciding authority must be unbiased when according the hearing or making the decision.

43. These principles are restated in **Halsbury's Laws of England Fourth Edition Vol. 1 at** paragraph 74 as follows:

> **"The rule that no man shall be condemned unless he has been given prior notice of the allegations against him and a fair opportunity to be heard is a cardinal principle of justice...Although, in general the rule applies only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded, the nature of an inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected shall be afforded an opportunity to put their case at that stage; and it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice. As has already been indicated, the circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their legitimate interests or expectations."**

44. Article 47 of the Constitution also now provides as follows in this regard:

> ***(*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.**

45. In addition, section 4 (3) and (4) of the Fair Administrative Action Act lays down the procedure to be adopted by decision makers 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."

46. The Respondent in this respect was bound to apply the provisions of the Fair Administrative Act as the said Act applies where a decision affects the rights of any person, and not only the Respondent's members. In this respect the widow of the deceased founding member of the Applicant firm, and who was the said deceased administrator and responsible for the running of the Applicant's firm was most likely to be affected by its striking off. She was thus entitled to the procedure provided in the Fair Administrative Action Act.

47. The Respondent's submissions that adequate notice was given of the striking out of the Applicant cannot hold, for reasons that no evidence of any such specific notice having been given and received by the Applicant was provided by the Respondent. In addition, the alleged notices relied upon by the Respondent were disputed by the Applicant, and were given two years previously in May 2015, on the alleged illegal operations of the Applicant firm and not on the striking out of the firm. Lastly, no evidence of any other procedure after the alleged notices were given was provided by the Applicant before it published the advertisement striking out the Applicant firm. It is thus my finding that the Respondent did not act fairly in striking out the Applicant firm.

Whether the Respondent Acted in Bad Faith and with Ulterior Motives

48. The Applicant's arguments and submissions on this issue centred on its communications with, and the actions of the Respondent's employee, one Nebart Avutswa. However, the ground of acting in bad faith and for improper or ulterior motives is one that is determined by looking at the purpose for which a power was exercised. In this respect, no evidence was brought by the Applicant of its allegations that the said employee wanted to facilitate the sale of the Applicant firm business. In addition, the Respondent did provide reasons for its actions, which were motivated by the Respondent's statutory functions and the public interest, albeit exercised illegally and unprocedurally. I therefore find that this ground has to fail.

Whether the Applicant is Entitled to the Relief Sought.

49. As regards the relief sought, the Applicant submitted that this Court issues the orders sought to right the wrongs committed by the Respondent, and as the evidence showed that the Applicant attempted to resolve the issue with the Respondent before moving to Court.

50. The Respondent submitted that it struck off the Applicant firm in order to promote public interest, pointing to section 8 of the Accountants Act and while relying on the case of **James Mburu Gitau T/A Jambo Merchant vs Sub County Public Health Officer Kiambu County (2013) eKLR.** It was their submission that the Respondent should not be faulted for performing functions to protect the public.

51. Further, that section 7(2)(1) of the fair administrative action act sets out that proportionality is a ground for judicial review and the case of **Suchan Investments Ltd vs The Ministry of National Heritage & Culture & 3 others [2016] eKLR** was cited for the submission that the striking off of the Applicant's firm was proportional and merited in the circumstances and that the effect of quashing its decision would be that the applicants firm would be allowed to offer accountancy services to the general public contrary to section 22 of the Accountants Act.

52. The Applicant has sought orders of certiorari, prohibition and a declaration. In **Kenya National Examinations Council vs. Republic *Ex parte* Geoffrey Gathenji Njoroge Civil Appeal No. 266 of 1996** it was held *inter alia* as follows as regards 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……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."**

53. The remedy of a declaration on the other hand is one that is inherently flexible, and is normally granted to state authoritatively the lawfulness of a decision, action or failure to act, the consequences that follow from a quashing order, the existence or extent of a public body's powers and duties, the rights of individuals or the law on a particular issue. The only limitations as to grant of declarations in purely moral, social, or political matters in which no issue of law or rights arises, it will serve no practical purpose or where a court has not heard contested argument on issue to which the declaration relates and it is likely to affect other parties who are not party to the case. (See **Jonathan Moffart et al, Judicial Review: Principles and Procedures** 2013 at chapter 30.16 to 30.24).

54. This Court has the discretion to grant or refuse a remedy sought, even in cases where an Applicant has been largely successful. I find that this is one such case where I will have to decline to grant most of the remedies sought for two reasons. The first reason is that of the

Applicant firm's conduct in running its business without the required registration and licences. The Court noted that the Applicant in this respect did not provide any evidence of its current registration at the time of striking out, nor refute the Respondent's averments that it had been de-registered.

55. The second reason is the public interest in having good governance and administration of the accountancy profession. The public interest as an overriding factor when determining whether or not to grant judicial review orders was explained by Majanja J. in **R vs Capital Markets Authority ex parte Joseph Mumo Kivai & Another (2012) e KLR,** where the learned judge held that judicial review proceedings are public law proceedings for vindication of private rights. It is my view that granting the orders sought by the Applicant would have a deleterious effect on the public, who may be exposed to unregistered and unlicenced firms of accountants.

56. In the premises, I find that even though the Applicant's Notice of Motion dated 27th November 2017 is merited, the only order I will give in the circumstances of this case is a declaration that the act of the Institute of Certified Public Accountants of Kenya of striking off the firm of Kosieyo And Partners from the list of firms offering audit, assurance and accountancy services was illegal and amounted to unfair administrative action.

57. Orders accordingly**.**

DATED AND SIGNED AT NAIROBI THIS 11TH DAY OF OCTOBER 2018

P. NYAMWEYA

JUDGE