REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL DIVISION

(Coram: Odunga, J)

PETITION NO. 9 OF 2018

AS CONSOLIDATED WITH JUDICIAL REVIEW NO. 5 OF 2018

IN THE MATTER OF ARTICLES 22(1), (2), (A-B), 23 (1), (3A-C) AND (F) AND 258 (1) AND (2 A-B) OF THE CONSTITUTION.

IN THE MATTER OF THE ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER ARTICLES 27 (1) AND (2), 40 (3), 41 (1) AND (2), 47, 174 (F), (H, I), 230 (4)(B) AND 5(A-D) AND 236 (B) OF THE CONSTITUTION

AND

IN THE MATTER OF REMUNERATION AND BENEFITS FOR STATE OFFICERS IN THE COUNTY GOVERNMENT PURSUANT TO GAZETTE NOTICE NO. 6518 PUBLISHED ON THE 7TH JULY 2017

BETWEEN

COUNTY GOVERNMENT OF KAKAMEGA.....1ST PETITIONER

KAKAMEGA COUNTY ASSEMBLY

SERVICE BOARD.....2ND PETITIONER

KAKAMEGA COUNTY ASSEMBLY FORUM.....3RD PETITIONER

AND

THE SALARIES AND REMUNERATION

COMMISSION.....RESPONDENT

AND

COUNTY GOVERNMENT OF MOMBASA.....INTERESTED PARTY

JUDGEMENT

Introduction

1. The 1st Petitioner is the **County Government of Kakamega** established as such pursuant to the provisions of Article 176 of the Constitution and comprises of the Kakamega County Executive Committee and the Kakamega County Assembly.

2. The 2nd Petitioner is the **Kakamega County Assembly Service Board**, a body corporate with perpetual succession established as such pursuant to the provisions of section 12(1) of the ***County Governments Act No. 17 of 2012***. It is comprised of the Speaker of the County Assembly as its chairperson; the leader of the majority party or a member of the county assembly deputed by him or her, as the vice-chairperson; the leader of the minority party or a member of the county assembly deputed by him or her; and one person resident in the

county, appointed by the county assembly from among persons who have knowledge and experience in public affairs, but who is not a member of the county assembly. Its responsibilities are, *inter alia*, providing services and facilities to ensure the efficient and effective functioning of the Kakamega County Assembly; constituting offices in the county assembly service, and appointing and supervising office holders; preparing annual estimates of expenditure of the county assembly service and submitting them to the Kakamega County Assembly for approval, and exercising budgetary control over the county assembly service; undertaking, singly or jointly with other relevant organizations, programmes to promote the ideals of parliamentary democracy; and performing other functions necessary for the well-being of the members and staff of the county assembly or prescribed by national legislation.

3. The 3rd Petitioner herein, **Kakamega County Assembly Forum**, is described as a society registered under the provisions of the ***Societies Act***, Chapter 108 of the Laws of Kenya by the Members of the County Assemblies within the Republic of Kenya and whose principal objective is to institutionalize law-making and oversight capacity for the County Assemblies in Kenya and form linkages with other arms of Government.

4. The Respondent herein, the **Salaries and Remuneration Commission**, is also a constitutional body established under Article 230(1) of the Constitution 2010 and under Article 230(4) of the Constitution, 201, its powers and functions are set out as being to set and regularly review the remuneration and benefits of all State officers; and to advise the national and county governments on the remuneration and benefits of all other public officers. In addition to the powers set out Commission under Article 230 (4) Constitution 2010, the Commission has power to: inquire into and advise on the salaries and remuneration to be paid out of public funds; keep under review all matters relating to the salaries and remuneration of public officers; advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector; advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector; conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices.

5. In these consolidated causes, the Petitioners/Applicants case is that on 1st March, 2013, the Respondent Commission caused to be published in *Gazette Notice Numbers 2885, 2886, 2887 and 2888* of even date the salaries for State Officers serving in the National and County Government, the Senate and the National Assembly, Constitutional Commissions and Independent Offices. By a further Circular dated 27 November 2013, the Respondent set the remuneration and benefits structure of State Officers in the first County Governments and County Assemblies. In order to come up with the salary structure, the Respondent carried out a comprehensive job evaluation exercise which resulted in the grading of the State Officers based on their relative worth. Thereafter, appropriate remuneration benchmarks were used to set the remuneration levels of the graded jobs. Economic factors such as Gross Domestic Product (GDP), ordinary revenue, expenditure and public service wage bill sustainability were considered in the determination of remuneration at the time.

6. According to the 3rd Petitioner, the Applicant Commission and state officers serving in the County Governments did abide with the decision of the Respondent Commission conveyed through the Gazette notices and the said circular despite being dissatisfied with the lower, unfair and patently erroneous ranking accorded to state officers serving in County Governments which had/has the effect of diminishing the status and important governance role played by County Assemblies in the implementation of devolution under the Constitution. By a letter dated *29 May 2017*, the Respondent requested the Applicant for its views on the remuneration and benefits payable to State Officers serving in the County Assemblies. According to the letter, the views were to be received by *8 June 2017*. It was averred that the said Petitioner requested the Respondent for a consultative forum by its letter dated 13 June 2017. Earlier, the Applicant had by its letter dated 26 May 2017 requested the Respondent for a consultative forum to air its view on the job evaluation exercise for State Officers serving in County Assemblies, but despite several attempts, the parties were unable to hold a consultative forum for purposes of the Applicant airing its views to the Respondent. Instead, by its two letters, both dated 22nd June 2017, addressed to the 3rd Petitioner, and to the All Chairperson of County Assembly Service Boards respectively, the Respondent advised that it shall proceed to finalize and publish the revised remuneration and benefits structure notwithstanding the failure to have a consultative forum with the affected parties.

7. Thereafter, in or about July, 2017, the Respondent issued a press statement in which it announced the reviewed salary structure for the all the State Officers for the period 2017-2022 purportedly in line with its four year review policy and in readiness for implementation when the newly elected State Officers would be sworn into office after the General Elections of 8th August, 2017. It was averred that the Respondent at its said press conference admitted and expressly clarified that the recommended remuneration structure for State Officers for the period 2017-2022 was anchored on the job evaluation that was undertaken in the Year 2013 and that there was no need for conducting another job evaluation allegedly on grounds that there was no significant change in the jobs since then.

8. According to the Petitioners, the Respondent's decision to review the remuneration and salaries for State Officers was published in Gazette Notice No. 6518 of 7th July, 2017 and its effect is that the Monthly Gross Remuneration Package for the State Officers in the County Governments has been reviewed downwards as follows:-

State Officer	**Monthly Gross Remuneration Package (Kshs.) applicable then**	**Reviewed Monthly Gross Remuneration Package (Kshs.)**
County Governor	1,056,000	924,000
Deputy Governor	701,441	621,250
Speaker of the County Assembly and Member of County	350,000	259,875

Executive Committee		
Deputy Speaker of County Assembly	240,000	216,563
Member of County Assembly	165,000	144,375

9. It was further contended that the following benefits and allowances were abolished namely:-

a. Governors allowance;

b. Deputy Governors allowance;

c. Reimbursable Mileage Allowance;

d. Sitting Allowance for Plenary Sessions; and

e. Special Responsibility Allowance.

10. In addition, the review has seen the payment of a fixed salary structure as opposed to incremental notches while payment of Transport Allowance has since been clustered into four zones, with Members of the County Assembly expected to be paid a fixed monthly Transport Allowance through the payroll with the effect that payment of mileage claims ceases to apply and the same is replaced with the zones Transport Allowance.

11. It was further contended that *Reimbursable Mileage allowance* for purposes of reimbursement for journeys between the County Assemblies and the MCAs Wards at AA rates has been abolished. Instead the Respondent Commission has sought to establish a fixed monthly transport allowance payable through payroll. In addition, while Sitting Allowance for Plenary Sessions has been completely abolished despite the importance this plays in County Assembly operations, the Committee Sitting Allowance has been reduced as follows:

i. Chairpersons of Committees from Kshs. 6,500/= to maximum of 8,000/= per sitting (maximum of Kshs. 208,000/= per month) to Kshs. 5,000/= per sitting (maximum of Kshs. 80,000/= per month); and

ii. Vice Chairpersons of Committees & Members from Kshs. 5,200/= to maximum of 8,000/= per sitting (maximum of Kshs. 166,400/= per month) and Kshs. 3,900/= to a maximum of 8,000/= per sitting (maximum of Kshs. 124,800/=) respectively to Kshs. 3,000/= per sitting (maximum of Kshs. 48,000/= per month).

12. According to the Petitioners, the impugned decision has unlawfully varied, to the disadvantage and detriment of the affected officers, the remuneration and benefits payable to, or in respect of, state officers serving in County Assemblies, contrary to basic labour law and practice and the need to secure independence of parliament as a governance institution.

13. It was their case that the decision in the impugned *Gazette Notice No. 6518* published in the Kenya Gazette of 7 July 2017 is unreasonable, ignored relevant considerations and the law, is discriminatory, in bad faith, arbitrary, goes against the legitimate expectations of the Applicant and those affected, is irregular, *ultra vires*, illegal, null and void thus: -

a. The Respondent failed to take into account the guiding principles set out under section 12 of the ***Salaries and Remuneration Commission Act, No. 10 of 2011*** which include the Respondent's own previously established remuneration and benefits structure.

b. By seeking to reduce the remuneration of state officers serving in County Assemblies, the Respondent has acted unreasonably and failed to take into account the rising cost of living since the remuneration and benefits were set in 2013.

c. By seeking to reduce the remuneration of state officers serving in the County Assemblies to levels far below the benefits granted to the previous County Assemblies, the executive, Commission and Independent Offices, the Respondent has ignored the provisions of Article 230(5) of the Constitution requiring it to take into account "*the need to ensure that the public services are able to attract and retain the skills required to execute their functions.*"

d. The Respondent failed to take into account the guiding principles set out under section 12 of the ***Salaries and Remuneration Commission Act, No. 10 of 2011*** requiring the Commission to be guided by the principles of "*equal remuneration to persons for work of equal value*" in seeking to abolish *Special Parliamentary Duty Allowance* to State Officers serving in County Assemblies with additional responsibilities: Leader of Majority Party, Leader of Minority Party, Chairperson of Committees, Members of the Speakers Panel, Chief Whips and Minority Whips.

e. In seeking to review and set remuneration for state officers serving in the County Assemblies, the Respondent Commission ignored the mandatory provisions of Regulation 5 of the ***Salaries and Remuneration Commission (Remuneration & Benefits of***

State & Public Officers) Regulations, 2013 requiring it, *at least one year before the review of salary and remuneration of state officers*, to cause to be conducted: *inter alia*, a survey of the prevailing economic situation; and a comprehensive job evaluation.

f. In seeking to review and set remuneration for state officers serving in the County Assemblies, the Respondent Commission violated the mandatory provisions of the ***Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013*** requiring the Commission to *"ensure attraction and retention of critical or scarce professional skills required to effectively execute the functions of the public service"; and, "to compensate for increased cost of living", in undertaking salary and remuneration review.*

g. In seeking to review and set remuneration for state officers serving in the County Assemblies, the Respondent Commission violated Regulation 8 of the ***Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013*** requiring it "to call for proposals from every public service organization, on remuneration and benefits for their respective state and public officers by notice in the Kenya Gazette and at least two daily newspapers with national circulation", whenever a review is due.

h. The Respondent Commission failed to take into account the factors stipulated under Regulation 13 of the ***Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013*** including: the existing legal provisions, comparative market surveys, prevailing market rates, justification for the allowances or benefits, prevailing policy on allowances or other remunerative benefits, the legal, social and economic issues, results of job evaluation, results of market studies, benchmark with similar organizations, equity and competitiveness.

i. The Respondent Commission ignored and failed to take into account the factors it is required by Regulation 14 of the ***Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013*** requiring the Commission to communicate the set remuneration and benefits for state officers "*not later than the second quarter of the fourth year of the review*".

j. The Respondent violated Regulation 14 of the ***Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013*** which provides that "*where a reviewed remuneration or benefit has been approved and is due, it shall be granted with effect from the 1st of July of the subsequent financial year after being factored in the national or respective county government budget*" and that communication of set remuneration shall be by notice in the Gazette.

k. The national budget for the 2017/2018 fiscal year was passed in April, 2017 and the funds the payment of which the Respondent Commission now seeks to abolish duly approved and appropriated by Parliament as required by Article 249(3) of the Constitution.

l. The Respondent Commission has ignored and failed to take into account the provisions of Regulation 15 of the ***Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013*** entitling all state officers to annual salary increment.

m. The Respondent Commission has violated section 12 of the ***Salaries and Remuneration Act*** requiring it to uphold the principle of "*equal remuneration to persons for work of equal value*" and the need to take into account "*the recommendations of previous Commissions established to inquire into the matter of remuneration in the public service*."

n. *By reducing Committee sitting allowances and setting allowances*, the Respondent Commission has acted arbitrarily and violated the principle of "*equal remuneration to persons for work of equal value*";

o. The Respondent Commission also failed to conduct hearings and consider the views of persons set forth in Regulation 17 *of* the ***Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013*** including members of the public and the affected state officers; instead choosing to time the review when those affected were deeply engaged in campaigns!

p. Reimbursable Mileage allowance previously paid to Members of Parliament to reimburse for journeys between County Assemblies and their Wards at "AA" rates has been abolished and replaced with a fixed monthly transport allowance payable through payroll and fixed vehicle maintenance allowance abolished; without taking into account the fact that the journeys cannot be fixed and reimbursed through monthly transport allowance payable through the payroll.

q. It also confirms the Respondent ignored and violated Regulation 13 of the ***Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013*** requiring it to take into account, *inter alia*: the existing legal provisions, comparative market surveys, prevailing market rates, justification for the allowances or benefits, prevailing policy on allowances or other remunerative benefits, the legal, social and economic issues, results of job evaluation, results of market studies, benchmark with similar organizations, equity and competitiveness, in determining allowances or benefits for state officers.

r. By seeking to abolish Sitting Allowance for Plenary Sessions the Respondent failed to take into account the importance this plays in County Assemblies.

14. The Petitioners insisted that the Respondent did not undertake comprehensive job evaluation before seeking to review and set the remuneration and benefits hereinabove, contrary to the mandatory provisions of Regulation 5 of ***Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013*** and the law.

15. It was however disclosed that consultations between the parties on the Respondent's impugned decision continued, and on 28 September 2017, the Applicant submitted a Memorandum to the Respondent outlining its dissatisfaction with the aforesaid review and the impugned Gazette Notice setting the new remuneration and benefits structure.

16. In the Petitioner's view, to the extent that the impugned gazette notice purports to reduce the remuneration and benefits payable to state officers in County Assemblies without undertaking any comprehensive job evaluation and market survey and without benchmarking with similar organizations, the Respondent has acted *ultra vires* the Constitution, the Act and the governing Regulations. The Petitioners further averred that having first carried out a comprehensive job evaluation and market survey before revising the remuneration and benefits of State Officers serving in the first County Assemblies, there was/is a legitimate expectation that the Respondent shall also carry out a similar exercise before revising the said benefits for current State Officers serving in County Assemblies. This would have only led to an increase, as against a reduction, of the remuneration and benefits since the cost of living has increased since 2013 when the first review was carried out by the Respondent.

17. The Applicant avers that the Respondent failed, refused and/or neglected to afford the Applicant and the affected state officers hearing prior to the purported review in breach of the rules of natural justice, contrary to the provisions of Article 47 (3) of the Constitution as read together with sections 7, 10 and 12 of the ***Fair Administrative Action Act*** and in violation of the spirit of Regulation 17 of the ***Salaries and Remuneration Commission Regulations, 2013***.

18. According to the Petitioners, the review was also unfair and motivated by bad faith as it was undertaken when persons interested in becoming MCAs had already undergone political party nominations and were in the midst of political campaigns for the August, 2017 general elections believing the then existing terms of service would prevail or better for the current County Assemblies.

19. It was further the Petitioners' case that in proceeding as it did, the Respondent violated Regulation 14 of the ***Salaries and Remuneration Commission Regulations, 2013*** requiring the Respondent Commission to communicate and set the remuneration for state officers "*not later than the second quarter of the fourth year of review*".

20. To the Petitioners, the Respondent's decision contained in the impugned gazette notice has breached the following fundamental rights and freedoms of the Applicant:

a. In so far as the impugned gazette notice purports to reduce and/or abolish the remuneration and benefits payable to state officers in County Assemblies, the Respondent has breached the Applicant's and State Officers in County Assemblies' right to property by way of accrued remuneration and benefits payable to them without any or any hearing contrary to the provisions of Article 40(1)(a) and (3) of the Constitution;

b. In so far as the impugned gazette notice purports to reduce and/or abolish the remuneration and benefits payable to state officers in County Assemblies, the Respondent has breached the Applicant's and the said State Officer's right to fair labour practices contrary to the provisions of Article 41(1) and (2) (a) and (b) of the Constitution;

c. To the extent that the impugned gazette notice purports to discriminately reduce and/or abolish the remuneration and benefits payable to state officers in County Assemblies without undertaking any job evaluation, market survey or benchmarking study as required by the Regulations, the Respondent has breached the Applicant's and the affected state officer's right to equal protection and equal benefit of the law under Article 27 of the Constitution;

d. To the extent that the impugned gazette notice purports to reduce and/or abolish the remuneration and benefits payable to state officers in County Assemblies thereby making adverse action against them without hearing, the Respondent has violated the provisions of Article 47 (1) and (2) of the Constitution as read together with sections 9, 10, 11 and 12 of the Fair Administrative Action Act;

e. To the extent that the Respondent gave notice of the review long after the lapse of the 2nd quarter of the year of review in the middle of campaigns, the Respondent breached *Regulation 14 of the Salaries and Remuneration Commission Regulations, 2013*, violated the law and engaged in unfair labour practice contrary to Article 41 of the Constitution.

21. The Petitioners contended that the remuneration and benefits structure published through the impugned gazette notice is way below the remuneration and benefits structure of the first County Assemblies and has, in certain instances, completely abolished certain critical benefits and facilitative allowances hitherto payable to state officers serving in County Assemblies in Kenya and across the world, to enable them duly discharge their constitutional mandate. Further, the decision of the Respondent embodied in the impugned gazette notice is *ultra vires* its powers under the Constitution, the ***Salaries and Remuneration Commission Act*** and the ***Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013***, both for breach of mandatory procedure and in substance.

22. The Petitioners emphasised that the impugned decision is *ex facie* illegal for the reason that no job evaluation exercise and market survey was carried out by the Respondent prior to review of the said remuneration and benefits, contrary to Regulation 6(1)(b) of the ***Salaries & Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013***. In their view, the failure by the Respondent to undertake a job evaluation and market survey resulted in the Respondent reviewing the remuneration and benefits of State Officers in County Assemblies without taking into account the constitutional principles of the need to ensure that the public services are able to attract and retain the skills required to execute their functions as well as recognize productivity and performance as required by *Article 230(5) of the Constitution*.

23. The Respondent was accused of having failed to take into account relevant factors it is obligated by law to take into account including: the legal, economic environment, the need to conduct market survey and job evaluation, the need to benchmark with similar organizations, the need to ensure equity and competitiveness, transparency and fairness in reviewing and setting remuneration of state officers. Therefore, the Petitioners contended, the Respondent through the impugned gazette notice made determinations that are in excess of its jurisdiction and the said decision breached a wide spectrum of the Applicant and State Officers serving in County Assemblies' fundamental rights and freedoms, including but not limited to those already set out above. Further, the decision of the Respondent to reduce and/or abolish the remuneration and benefits of state officers in County Assemblies and retain similar remuneration and benefits of other state officers is discriminatory and contrary to Article 27 of the Constitution.

24. In support of the Petition the Petitioners/Applicants relied on Articles 21, 22, 23, 24, 27 (1) and (2), 41(1), 47(1) and (2), 50(1) and 230 of the Constitution of Kenya.

25. The Petitioners/Applicants also relied on sections 4 and 5(1) of the ***Fair Administrative Action Act, 2015*** which was enacted, *inter alia*, to give effect to **Article 47** of the Constitution. As well as section 11 of the ***Salaries and Remuneration Commission Act*** No. 10 of 2011, the Petitioners relied on section 12 which provides further guiding principles for the Respondent to follow while undertaking salaries and remuneration review including that of equal remuneration to persons for work of equal value. In so doing, the Respondent is required by the said section to take into account the recommendations of previous commissions established to inquire into the matter of remuneration in the public service.

26. Apart from the foregoing the Petitioners' case was based on Regulations 4, 5, 8, 9, 12, 14, 15 and 17 of the ***Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013*** and in particular Regulations Regulation 8 which requires that whenever a review is due, the Respondent must by notice in the Kenya Gazette and at least two daily newspapers with national circulation, call for proposals from every public service organisation, on remuneration and benefits for their respective State and public officers which submission of proposals must be made in writing and by the fourth quarter of the third year of the review cycle; and Regulation 17, under which the Respondent is required to conduct a hearing whenever, *inter alia*, it reviews the remuneration for State officers, during which hearings the Respondent can receive written or oral representations.

27. To the Petitioners, by reviewing the salaries and remuneration of the State Officers in the County Government without first inviting proposals for the review from the affected state officers through the appropriate public service organisation-the County Secretary and the County Assembly Service Board, the Respondent denied the affected state officers an opportunity to be heard contrary to the provisions of Articles 47 and 50 of the Constitution and Sections 4 and 5(1) of the ***Fair Administrative Action Act, 2015*****.**

28. **It was further contended that by** reviewing the salaries and remuneration of the State Officers in the County Government without first inviting proposals for the review from the affected state officers through the appropriate public service organisation-the County Secretary and the County Assembly Service Board, the Respondent acted illegally without any transparency and/or fairness contrary to the spirit of Article 230(5)(d) of the Constitution. In addition, by undertaking the subject review without first causing to be conducted a comprehensive job evaluation and to, thereafter, prepare a report on the findings as a basis for the review so as to inform the affected State Officers accordingly, at least one year before the review, the Respondent acted illegally in contravention of Regulation 5 of the Regulations.

29. As a consequence, the Petitioners contended, of failure to undertake any job evaluation and by relying on the year 2013 job evaluation to conduct the subject review herein, the Respondent failed to appreciate, *inter alia*, the risen cost of living since the said year 2013, thereby breaching the affected State Officers right to fair labour practices, which include the right to fair remuneration and reasonable working conditions as guaranteed under Article 41 of the Constitution.

30. It was further averred that by abolishing the Governor's allowance, the Deputy Governor's allowance, Reimbursable Mileage allowance, sitting allowance for plenary sessions and Special Responsibility allowance, the Responded acted illegally in contravention of Regulation 6 of the Regulations that requires the Respondent, when undertaking the review, to ensure attraction and retention of critical or scarce professional skills required to effectively execute the functions of the public service; or compensate for increased cost of living. Additionally, by fixing the monthly gross remuneration package for State Officers in the County Government the Respondent violated the State Officer's legitimate expectation for an annual increment of their salaries and remuneration as stipulated under Regulation 15 of the Regulations, hence the Respondent's decision is illegal, null and void.

31. It was the Petitioners' case that the Respondent violated the legitimate expectation of the County Assembly Committee Vice Chairperson by abolishing the said State Officer's County Assembly Committee Sittings Allowance without further paying due regard to the crucial role played by the said Officer in the said Committees and when the said allowance had been provided for by Legal Notice No. 2888 of 1st March, 2013.

32. The Applicant's stated that to the extent that the Respondent has abolished payment of mileage claims for the Members of the County Assembly and replaced those with zoned transport allowance, where the said members are entitled only to a fixed monthly transport allowance through the payroll, the Respondent has acted *ultra vires* its mandate and usurped the mandate of the 2nd Applicant as enshrined under Section 12(7) of the ***County Governments Act***, ***2012***, namely, providing services and facilities to ensure the efficient and effective functioning of the county assembly, as well as performing other functions as may be by law prescribed to ensure the well-being of the members and staff of the County Assembly.

33. It was submitted that Arising from the aforementioned background, the 3rd Petitioner has narrowed down to one key issue for determination: Whether the Respondent violated any law or any principles when setting the salaries and remuneration of state officers in the County Government. In the Petitioners' view, the decision by the Respondent embodied in the impugned gazette notice is *ultra vires* its powers under the Constitution, the ***SRC Act*** and the ***SRC Regulations*** both for breach of mandatory procedure and in substance.

34. According to the Petitioners, Article 230(5) of the Constitution sets forth the principles the Respondent Commission must take into account in performing its functions while the guiding principles are set out in section 12 of the SRC Act. The SRC Regulations, on the other hand, prescribes procedure for setting and reviewing of remuneration and benefits for state and public officers.

35. As regards the contention by the Respondent that the Regulations are void for contravening the provisions of the ***Statutory Instrument Act No. 23 of 2013*** for the reason that the regulations were not tabled for scrutiny, it was submitted that the SRC Regulations were made by the Respondent pursuant to the powers conferred to it by section 26 of the ***SRC Act***. Further, it is the Respondent who caused the said Regulations to be published in Legal Notice Number 2 of 16th January, 2013. Accordingly, it was submitted that the Respondent made the Regulations it now seeks to invalidate which Regulations were relied upon by the Respondent when setting up the remuneration and benefits of state officers in 2013 and 2017 vide Gazette Notices Number 2888 and 6518 respectively as further admitted in the Replying Affidavit. In light of the above, the Respondent is precluded from alleging the invalidity of the said Regulations. In any case it was submitted that in the

event this Honourable Court finds that the Regulations are void, the Court should also find that the decision of the Respondent in Gazette Notices Number 2888 and 6518 to be illegal null and void, as the same were carried out based on the said regulations.

36. According to the Petitioners, the Respondent in its decision in the impugned Gazette Notice No, 6518 breached and ignored the relevant provisions of the law in the following ways:

> i. By seeking to reduce the remuneration of state officers serving in the County Assemblies to levels far below the benefits granted to the previous County Assemblies, the executive, Commission and Independent Offices, the Respondent has ignored the provisions of Article 230(5) of the Constitution requiring it to take into account "*the need to ensure that the public services are able to attract and retain the skills required to execute their functions.*"
>
> ii. The Respondent failed to take into account the guiding principles set out under section 12 of the ***SRC Act***, requiring the Commission to be guided by the principles of "*equal remuneration to persons for work of equal value*" in seeking to abolish *Special Parliamentary Duty Allowance* to State Officers serving in County Assemblies with additional responsibilities: Leader of Majority Party, Leader of Minority Party, Chairperson of Committees, Members of the Speakers Panel, Chief Whips and Minority Whips.

iii. In reviewing and setting the remuneration for state officers serving in the County Government, the Respondent Commission ignored the mandatory provisions of Regulation 5 of the SRC Regulations requiring it, *at least one year before the review of salary and remuneration of state officers*, to cause to be conducted: *inter alia*, a survey of the prevailing economic situation; and a comprehensive job evaluation.

37. According to the Petitioners, whereas regulation 5 requires that at least one year before the review, the SRC must conduct the study on labour market, a survey of the economic situation and a comprehensive job evaluation, the review was conducted in 2017, the same year, the Respondent published the impugned gazette notice. Therefore, a report prepared after a study or a survey is a conducted must have been communicated by the Respondent to the relevant authorities listed under Regulation 5(3) by December, 2016.To the Petitioners, the prevailing economic situation favours salary increase as against reduction.

38. In this case it was submitted that the Respondents admitted that the did not conduct a job evaluation contrary to Regulation 5 and 12. In light of the above, and noting the sentiments of the Respondent, a question arises; what then formed the basis for salary reduction and abolition of benefits, if there were no changes in hierarchical position or constitutional powers of state officers in the County Government? Furthermore, the Respondent Commission violated the mandatory provisions of Regulation 6 requiring the Commission to *"ensure attraction and retention of critical or scarce professional skills required to effectively execute the functions of the public service"; and, "to compensate for increased cost of living"*, in undertaking salary and remuneration review.

39. It was further contended that the Respondent Commission in violation of Regulation 8 failed "*to call for proposals from every public service organization, on remuneration and benefits for their respective state and public officers by notice in the Kenya Gazette and at least two daily newspapers with national circulation",* whenever a review is due. To the Petitioners, Regulation 8 envisages public involvement on public affairs. The same applies with Regulation 17 which enjoins the SRC to consider the views of the members of public when conducting hearings. These provisions, it was submitted, are consistent with our participatory democracy as birthed by our Constitution, particularly in Article 230(5) d which embraces the principle of Transparency**.**

40. In this respect the Petitioners relied on the case of **Doctors for Life International vs. Speaker of the National Assembly and Others (CCT12/05) [2006]** (quoted with approval in **Republic vs. County Government of Kiambu Ex parte Robert Gakuru & Another [2016] eKLR** and submitted that there were no meaningful participation from the public and neither the tweets nor emails from members of the public were reasonable enough to inform the Respondent's decision to set the remuneration and benefits of state officers as it did. It was further contended that the Respondent Commission also violated section 12 of the ***SRC Act*** requiring it to uphold the principle of "equal remuneration to persons for work of equal value" and the need to take into account "the recommendations of previous Commissions established to inquire into the matter of remuneration in the public service" and that by reducing Committee sitting allowances and setting allowances, the Respondent Commission has acted arbitrarily and violated the principle of "equal remuneration to persons for work of equal value". Moreover, the Respondent Commission failed to take into account the factors stipulated under Regulation 13 including: the existing legal provisions, comparative market surveys, prevailing market rates, justification for the allowances or benefits, prevailing policy on allowances or other remunerative benefits, the legal, social and economic issues, results of job evaluation, results of market studies, benchmark with similar organizations, equity and competitiveness.

41. It was contended that the Respondent Commission ignored and failed to take into account the factors stated in Regulation 14 requiring the Respondent Commission to communicate the set remuneration and benefits for state officers "not later than the second quarter of the fourth year of the review" as well as Regulation 14 of the ***SRC Regulations.*** which provides that "*where a reviewed remuneration or benefit has been approved and is due, it shall be granted with effect from the 1st of July of the subsequent financial year after being factored in the national or respective county government budget*" and that communication of set remuneration shall be by notice in the Gazette.

42. According to the Petitioners, the national budget for the 2017/2018 fiscal year was passed in April, 2017 and the funds the payment of which the Respondent Commission now seeks to abolish duly approved and appropriated by Parliament as required by Article 249(3) of the Constitution. Further, the Respondent Commission has ignored and failed to take into account the provisions of Regulation 15 entitling all state officers to annual salary increment.

43. It was submitted that the Respondent Commission also failed to conduct hearings and consider the views of persons set forth in Regulation 17 of the ***Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013*** including members of the public and the affected state officers.

44. The Petitioners also took issue with the fact that Reimbursable Mileage allowance previously paid to Members of Parliament to reimburse for journeys between County Assemblies and their Wards at "AA" rates had been abolished and replaced with a fixed monthly transport allowance payable through payroll and fixed vehicle maintenance allowance abolished; without taking into account the fact that the

journeys cannot be fixed and reimbursed through monthly transport allowance payable through the payroll. In the Petitioners' view, this also confirms the Respondent ignored and violated Regulation 13 requiring it to take into account, *inter alia*: the existing legal provisions, comparative market surveys, prevailing market rates, justification for the allowances or benefits, prevailing policy on allowances or other remunerative benefits, the legal, social and economic issues, results of job evaluation, results of market studies, benchmark with similar organizations, equity and competitiveness, in determining allowances or benefits for state officers. To them, by seeking to abolish Sitting Allowance for Plenary Sessions the Respondent failed to take into account the importance this plays in County Assemblies. In this respect, the Petitioners relied on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** (quoted with authority in **Republic v Truth, Justice and Reconciliation Commission & another Ex-Parte Beth Wambui Mugo [2016] eKLR** and it was submitted that by failing to adhere to the procedures enumerated above, the decision in the impugned gazette notice was tainted by procedural impropriety.

45. According to the Petitioners, in reviewing the remunerations and abolishing the benefits, the Respondent acted in excess of its jurisdiction and such, this Honourable Court to intervene and term the exercise by the Respondent null and void.

46. As regards breach of fundamental rights and freedoms, the Petitioners relied on Article 21 of the Constitution which enjoins the State and every State organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms in the Bill of Rights. Therefore where the rights and fundamental freedoms are denied, violated or infringed, or are threatened, Article 22 accords the aggrieved party the right to institute court proceedings and the Court is mandated by virtue of Article 23(3)(f) to issue the reliefs enumerated therein. Further, the Courts will guided by Article 10 of the Constitution which gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law. The Petitioners therefore asserted that armed with wide array of rights under the Constitution, the 3rd Petitioner approaches this Honourable Court for relief due to contravention of its rights under Articles 27, 41 and 47 on equality and freedom from discrimination, labour relations and fair administrative action.

47. According to the Petitioners, the impugned gazette notice purports to discriminately reduce and/or abolish the remuneration and benefits payable to state officers in County Assemblies without undertaking any job evaluation, market survey or benchmarking study as required by the Regulations, the Respondent has breached the Applicant's and the affected state officer's right to equal protection and equal benefit of the law under Article 27 of the Constitution. Moreover, the decision of the Respondent to reduce and/or abolish the remuneration and benefits of state officers in County Assemblies and retain similar remuneration and benefits of other state officers is discriminatory and contrary to Article 27 of the Constitution. It was therefore submitted that since members of National Assembly are currently remunerated as per the Gazette Notice 2888 of 2013, this differential treatment amounts to inequality. Reliance was placed on **Nyarangi & 3 Others vs. Attorney General [2008] KLR 688**, (quoted with approval in **Republic vs. Tanathi Water Services Board & 2 others Ex parte Senator Johnstone Muthama [2014] eKLR.**

48. With respect to the right to fair administrative action, it was submitted that the said right to just administrative action is anchored in the Constitution under Article 47. Pursuant thereto, the Fair Administrative Act No. 4 of 2015 was enacted and the Petitioners relied on section 12 thereof.

49. It was submitted that the SRC was under the constitutional obligation to ensure that its decision met the requirement of fairness as was held in the case of **R vs. Secretary of State for the Home Department ex parte Doody [1994] 1 AC 531, 560-G, (**quoted with approval in the case of *Republic v Truth, Justice and Reconciliation Commission & another case, para 62* [Supra]. According to the Petitioners, the Respondent failed, refused and/or neglected to afford the Applicant and the affected state officers hearing prior to the purported review in breach of the rules of natural justice, contrary to the provisions of Article 47 (3) of the Constitution as read together with sections 7, 10 and 12 of the ***Fair Administrative Action Act*** and in violation of the spirit of Regulation 17.

50. It was further submitted that though Article 41(1) provides that every person has the right to fair labour practices, fair labour practice has not been defined expressly either in the Constitution or statute. Based the decision of **Radido, J** in **Maxwell Miyawa & 7 Others vs. Judicial Service Commission [2017] eKLR**, it was submitted that this Court has the powers to issue appropriate relief for the 3rd Petitioner for the reason that the decision arrived at by the Respondent was unilateral and arbitrary by excluding and failing to consider the views of the public and the persons listed under regulation 17(4). It was further submitted that the Respondent breached the Applicant's and the said State Officer's right to fair labour practices contrary to the provisions of Article 41(1) and (2) (a) and (b) of the Constitution. Noting that the Respondent gave notice of the review long after the lapse of the 2nd quarter of the year of review in the middle of campaigns, the Respondent, according to the Petitioners, breached Regulation 14 of the ***Salaries and Remuneration Commission Regulations, 2013***, violated the law and engaged in unfair labour practice contrary to Article 41 of the Constitution.

51. It was therefore submitted that the remuneration and benefits structure published through the impugned gazette notice is way below the remuneration and benefits structure of the first County Assemblies and has, in certain instances, completely abolished certain critical benefits and facilitative allowances hitherto payable to state officers serving in County Assemblies in Kenya and across the world, to enable them duly discharge their constitutional mandate. To the Petitioners, the impugned decision is *ex facie* illegal for the reason that no job evaluation exercise and market survey was carried out by the Respondent prior to review of the said remuneration and benefits and that the Respondent failed to take into account relevant factors it is obligated by law to take into account including: the legal, economic environment, the need to conduct market survey and job evaluation, the need to benchmark with similar organizations, the need to ensure equity and competitiveness, transparency and fairness in reviewing and setting remuneration of state officers.

52. In their view, the failure by the Respondent to undertake a job evaluation and market survey resulted in the Respondent reviewing the remuneration and benefits of State Officers in County Assemblies without taking into account the constitutional principles of the need to ensure that the public services are able to attract and retain the skills required to execute their functions as well as recognize productivity and performance as required by *Article 230(5) of the Constitution*.

53. It was therefore concluded that as the decision of the Respondent has breached a wide spectrum of the Applicant and State Officers serving in County Assemblies' fundamental rights and freedoms, the Court should allow the Petition as prayed with costs.

54. The Petitioners therefore prayed for:

a. A Declaration that the decision of the Respondent contained in Gazette Notice No. 6518 of 7th July, 2017 purporting to review and set the remuneration and benefits for State Officers in the County Government is illegal, null and void.

b. That this Honourable Court be pleased to remove in to this Court for purposes of being quashed and to quash the decision by the Respondent contained in Gazette Notice No. 6518 of 7th July, 2017 purporting to review and set the remuneration and benefits for State Officers in the County Government.

c. That the Honourable Court be pleased to order the Respondent to shoulder the costs of this Petition.

d. That the Honourable Court be pleased to make such other order(s) as it shall deem just and expedient in the circumstances herein.

Respondent's Case

55. The application was however opposed by the Respondent.

56. While taking no issue with no issue with the descriptive and the respective Constitutional and statutory provisions relied upon by the Petitioners and the chronology of events set out therein the Respondent however averred that it acted within its Constitutional mandate and as per Articles 230 (4) (a-b) of the Constitution 2010, Sections 11 (a-d) of the Salaries and Remuneration Commission Act No. 10 of 2011 and Regulations thereto, hence the Gazette Notice No. 6518 of 7th July 2017 was published upon following the requisite procedure. It was averred that:

a. In the year 2013, the Respondent duly recommended a remuneration structure for State Officers Members of County Assembly for the period 2013-2017 and Vide Gazette Notice No.2888 dated 1st March 2013, the Respondent Gazetted the remuneration and benefits for State Officers serving the county governments. Before that the Respondent conducted a comprehensive job evaluation for all state officers and came up with salary structure and in development of the State Officers Salary structure, the Commission was cognisant of international accepted principles that relate to wage determination.

b. During the said period the Members of County Assembly were remunerated according to the said payment structure proposed.

c. In the year 2017, the Respondent duly reviewed the remuneration structure for the State Officers including those of the Members of County Assembly in accordance with its Constitutional mandate.

d. Prior to undertaking the said review in 2017, the Respondent duly undertook a study on Labour efficiency and dynamics, a survey on the prevailing economic situation, and a report generated, on the basis of which the 7th July 2017 Gazette Notice was published. Further, the Respondent Commission took into account among other things the performance of the economy, cost of living inflation, adjustment in revenue.

e. On 11th April 2017, the Respondent duly in an advertisement in the Daily Nation, invited the public to give submissions to the Respondent on the desired remuneration structure for state officers for 2017-2022, which advertisement listed all the arms of the government including Sate Officers in the County Government.

f. The Respondent duly invited, and listened to the views of the Public prior to arriving at the recommendations that it did and to prove this the Respondent exhibited a sample of emails received by the Respondent from the Public.

g. The County Assembly Forum requested the respondent for a meeting in order to deliberate the on issues raised by the County Assembly Forum in their letter dated 13/6/2017. Further, the Respondent invited the County Assembly Forum, County Assembly Service Boards for a consultative meeting and the County Assembly Forum wrote to the Respondent, with its proposals on the mooted Review.

h. Thereafter, the County Assembly Forum vide its letter dated 25/9/2017 requested for a consultative meeting with the Respondent such meeting was held on 28/9/2017 when parties deliberated on the Memorandum on the remuneration and benefits of state offices in county assemblies presented by County Assembly Forum.

i. The County Assembly Forum further requested for a consolidated car loan and mortgage benefit of Ksh 5,000,000/= which request was accepted by the Respondent after deliberation.

j. The County Assembly Forum requested the respondent for a meeting in order to deliberate the on issues raised by the County Assembly Forum in their letter dated 13/6/2017. The Respondent invited the County Assembly Forum, County Assembly Service Boards for a consultative meeting. However, the County Assembly Forum did not attend the meeting and efforts by the Respondent to contact them were futile.

k. After considering all the views presented to it, and taking into account all the relevant stakeholders views, and all the matters they are enjoined to take into account, the Respondent, in keeping with its Constitutional powers duly made its remuneration proposals to the Applicant hence Gazette Notice No. 6518 of 7th July 2017 was published upon following the requisite procedure and within the Respondents mandate.

l. That the Respondent has since learnt from newspaper that the Members of County Assembly have reverted to the 2013 remuneration package.

m. In effect, the Members of the County Assembly are benefiting from both the 2013 Gazette Notice Remuneration and part of the benefits under the recommendations in the 2017. The Applicants have agreed to a consolidated mortgage benefit of 5,000,000/= and yet they want to be remunerated under the 2013 package.

n. From all the foregoing, it is apparent that at all material times, prior to, during, and after the said study and survey the Respondent herein fully and substantively engaged the Applicant herein, who tendered its views, which views were duly considered by the Respondent in arriving at its recommendations.

o. Further, in arriving at its recommendations, the Respondent herein duly took into account all the matters that they are in law enjoined to do and according to the public sector remuneration and benefits, job evaluation policy.

57. Thereafter, the County Assembly Forum vide its letter dated 25/9/2017 requested for a consultative meeting with the Respondent such meeting was held on 28/9/2017 when parties deliberated on t*he* Memorandum on the remuneration and benefits of state offices in county assemblies presented by County Assembly Forum. The County Assembly Forum further requested for a consolidated car loan and mortgage benefit of Ksh 5,000,000/= which request was accepted by the Respondent after deliberation.

58. According to the Respondent, from all the foregoing, it is apparent that at all material times, prior to, during, and after the said study, survey and review the Respondent herein fully and substantively engaged the Applicant herein, who tendered its views, which views were duly considered by the Respondent in arriving at its recommendations.

59. The Respondent avers that by reviewing remuneration of State Officers, the Respondent acted within its mandate and did not breach any law at or any Constitution provision in any way or at all. The Respondent duly took into account all the matters that they are in law enjoined.

60. With regard to the averment to the effect that the Respondent did not carry out a Job Evaluation exercise, the Respondent avers as follows;

a. The objective of a Job evaluation exercise is to establish the relative worth of jobs within and without different public sector institutions, to generate a hierarchy and grading structure within the state organ, with a view to determine their respective remuneration, where necessary.

b. A comprehensive Job evaluation of the Applicants employees was undertaken with the full participation of the Applicant prior to the recommendations made by the Respondent in 2013.

c. Subsequently there has been no change in the hierarchical positions of Members of County Assembly or within the Applicant, or a change in their Constitutional and or Statutory powers to necessitate a fresh Job evaluation.

61. The Respondent maintained that in arriving at its recommendations, the Respondent herein duly took into account all the matters that they are in law enjoined to do and according to the public sector remuneration and benefits, job evaluation policy.

62. In the Respondent's view, the ***Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013*** which regulation were void as illustrated below:

i. The parliament enacted the ***Statutory Instrument Act No. 23 of 2013*** whose Date of commencement was 25th January 2013. Section 11 (4) of the Act stipulates that all

instruments (including regulations) must be tabled for scrutiny under the Act and failure to which any such regulations will become void.

ii. The Salaries and Remuneration Commission Subsequent to the ***Statutory Instruments Act*** enacted a subsidiary legislation i.e SRC Regulations which were however not tabled for scrutiny as required by ***Statutory Instruments Act*** No. 23 of 2013 and hence to that extend are void.

63. The Applicant are hence relying on the provisions of the SRC Regulation alleging that the Respondent did not comply with the Provisions of the SRC Regulations, which regulations are void.

64. It was the Respondent's position that it is a constitutional body whose mandate include among others determining public officer's salary, allowances and benefits. In exercising its constitutional mandate and functions, the Respondent's independence ought to be protected from interference especially by National Assembly and County Assemblies who has previously purported to usurp the power of the Respondent.

65. On behalf of the Respondent, it was submitted that the SRC is a constitutional body established under Article 230(1) of the Constitution 2010 and that Article 230(4) of the Constitution 2010 stipulates as follows: The powers and functions of the Salaries and Remuneration Commission are set out be:

(a) set and regularly review the remuneration and benefits of all State officers; and

(b) advise the national and county governments on the remuneration and benefits of all other public officers.

(5) In performing its functions, the Commission shall take the following principles into account—

(c) the need to ensure that the total public compensation bill is fiscally sustainable;

(d) the need to ensure that the public services are able to attract and retain the skills required to execute their functions;

(e) the need to recognize productivity and performance; and

(f) transparency and fairness.

66. In addition to the powers set out Commission under Article 230 (4) Constitution 2010, the Commission has power to: inquire into and advise on the salaries and remuneration to be paid out of public funds; keep under review all matters relating to the salaries and remuneration of public officers; advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector; advise the national and county governments on the harmonization, equity and fairness of remuneration for the attraction and retention of requisite skills in the public sector; conduct comparative surveys on the labour markets and trends in remuneration to determine the monetary worth of the jobs of public offices.

67. It was submitted that the Respondent has powers to determine the cycle of salaries and remuneration review upon which Parliament may allocate adequate funds for implementation; make recommendations on matters relating to the salary and remuneration of a particular State or public officer make recommendations on the review of pensions payable to holders of public offices; and perform such other functions as may be provided for by the Constitution or any other written law.

68. The Gazette Notices No. 2885 provided for Remuneration and Benefits of State Officers in the Executive, No. 2886 dealt with Remuneration and Benefits of State Officers in Parliament, No. 2887 provided for Remuneration and Benefits of State Officers in the Constitutional Commissions and Independent Offices and No. 2888 provided for Remuneration and Benefits of State Officers serving in the County Government. The National Assembly passed a resolution purporting to nullify the Gazette Notices 2885, 2886, 2887 and 2888 which were setting out remuneration for state officers and that Parliament had purportedly used its budget allocation powers to usurp the SRC's powers to directly determine the salaries and remuneration of State officers. Further, National Assembly passed a resolution purporting to nullify the Gazette Notices 2885, 2886, 2887 and 2888 which were setting out remuneration for state officers. The Parliament had purportedly used its budget allocation powers to usurp the SRC's powers to directly determine the salaries and remuneration of State officers. The National Assembly had further, vide the National Assembly Remuneration Act Cap 5 of 2012 enacted a law purporting to fix the salaries and allowances for the Speaker, the Deputy Speaker and Members of the National Assembly, and for the Vice-President and other Ministers, and for Assistant Ministers.

69. However, the ***National Assembly Remuneration Act*** Cap 5 was declared unconstitutional and the resolution by the National assembly nullifying the Gazette Notices 2885, 2886, 2887 and 2888 in published 2013 was equally declared unconstitutional in **Petition No. 227 of 2013** ***as consolidated with*** **Petition No. 281 of 2013 and 282 of 2013 - Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR**. Accordingly, the validity of the Gazette Notices 2885, 2886, 2887 and 2888 published in 2013 was settled and the previous County Assembly was hence remunerated as per the 2013 Gazette Notices.

70. The Respondent therefore was of the view that the Issues of validity of the Gazette Notices 2885, 2886, 2887 and 2888 in 2013 can thus be said to be re-judicata and ought not to be re-litigated on, as every other new Assembly would institute suit challenging the same.

71. According to the Respondent, the SRC mandate under the Constitution 2010 extends to all state officers, who are defined by Article 260 as persons 'holding a state office" including the members of county Assembly and county governments. See **Okiya Omtatah Okoiti & 3 others vs. Attorney General & 5 others (supra)**. As such, in reviewing the Applicants and Interested party salaries and benefits the Respondent acted within its constitutional mandate in arriving in the decision contained in Gazette Notice No. 6518 published on 7/7/2017 and not Ultra-vires as alleged.

72. Regarding the allegation that the Respondent in setting salaries and benefits for members of county assembly has violated Applicants independence as set out in the Constitution, it was submitted that under Article 230(4) as read with Article 259(11) on construing the Constitution 2010, the Respondents has constitutional mandate to set the Applicants remuneration since Article 259 (11) reads as follows:

> ***"If a function or power conferred on a person under this Constitution is exercisable by the person only on the advice or recommendation, with the approval or consent of, or on consultation with, another person, the function may be performed or the power exercised only on that advice, recommendation, with that approval or consent, or after that consultation, except to the extent that this Constitution provides otherwise."***

73. The above position, it was submitted was affirmed by the Court of Appeal in Teachers Service Commission (TSC) vs. Kenya Union of Teachers (KNUT) & 3 Others [2015] eKLR, where court held that the advice by SCR is binding.

74. As to whether due process was followed in arriving the decision contained in Gazette Notice No. 6517 published on 7/7/2017; the Respondent relied on Article 47 of the Constitution 2010 provides for fair administration action and submitted that section 4 of the Fair Administration Act, 2015 would require among others, Respondent to issue notice, to grant the respondent a fair hearing, to put into consideration all relevant factors. The Respondent however submitted that the above provisions were adhered to as illustrated in the replying affidavit. According to the Respondent, the Petitioners in effect wants double benefit from the 2013 salary structure and 2017 salary structure which was the outcome of many engagements between Petitioners and respondent leading to 2017 Gazette Notice and that this is aggrandizement by the Petitioners and ought not to be allowed. In support of its case the Respondent relied on Judicial Review No 43 of

75. The Court was therefore urged not to go into the merits of the decision by the Respondent as judicial review proceeding concern, is the process and not the merits. In this respect reliance was placed on Republic vs. County Government of Kiambu Ex parte Robert Gakuru & Another [2016] eKLR.

76. Further the Respondent cited the decision of the Court of Appeal in Municipal Council of Mombasa vs. Republic & Another [2002] eKLR and Kyalo Peter Kyulu vs. Wavinya Ndeti & 3 Others]2017] eKLR.

77. It was noted the Respondents reviewed salaries for all state officers and not selectively for the Applicant and hence no discrimination against the Applicants as all state officers under Article 260 of the Constitution 2010 were reviewed. Further, it is noted that all state officers in the same job grade as the Applicants are earning the same remuneration per the 2017 Gazette Notice hence no discrimination as alleged.

78. It was the however the Respondent's position that the ***Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013*** (hereinafter the regulations) are void by virtue of Statutory Instruments Act. This position was based on the following grounds:

a) Section 26 of the ***Salaries and Remuneration Commission Act No 10 of 2011***, initially stipulated that, the Commission may make regulations generally for the better carrying into effect of any provisions of this Act.

b) Through the ***Finance Act, 2012,*** which came into force on 9/1/13 at section 59 thereof, the parliament amended section 26 of the ***Salaries and Remuneration Commission Act No 10 of 2011***, by stipulating that the power to make regulations shall be exercised only after a draft of the proposed regulations has been approved by the National Assembly**.**

c) Whereas the ***Salaries and Remuneration Commission Act No 10 of 2011*** initially allowed the Respondent to make regulations generally for the better carrying into effect of any provisions of this Act, the National Assembly enacted ***Finance Act 2012*** requiring its approval and failure to which such regulation would be void.

d) The Salaries and Remuneration Commission subsequent to the ***Finance Act 2012*** enacted the SRC Regulations which were promulgated on 16/1/2013 but were not tabled for scrutiny and approval by the National Assembly as required by Section 59 of the ***Finance Act*** and hence to that extent are void.

e) The parliament thereafter enacted the ***Statutory Instrument Act No 23 of 2013*** whose Date of commencement was 25th January 2013 and section 11 (4) of the Act stipulates that all instruments (including regulations) must be tabled for scrutiny under the Act and failure to which any such regulation will become void.

79. To the Respondent, the Applicant in the instant case cannot therefore rely on the Regulations as the same are void.

80. According to the Respondent, as regards the contention that it did not conduct fresh job evaluation in 2017:

a) The objective of a Job evaluation exercise is to establish the relative worth of jobs within and without different public sector institutions, to generate a hierarchy and grading structure within the state organ, with a view to determine their respective remuneration, where necessary.

b) In the year 2013, the Respondent conducted comprehensive job evaluation and recommended a remuneration structure all state officers for the period 2013-2017. A comprehensive Job evaluation of the Applicants employees was undertaken with the full participation of the County Assemblies prior to the recommendations made by the Respondent in 2013.

c) The 2013 job evaluation looked into among other international best practices, comparable rates in other countries, and negotiations the then parliament.

d) During the 2013-2017 the County Assemblies and state officers in county government were remunerated according to the said payment structure proposed.

e) In the year 2017, the Respondent duly reviewed the remuneration structure for the State Officers including those in the County Government, as by law required.

f) Prior to undertaking the said review in 2017, the Respondent duly undertook a study on Labour efficiency and dynamics, a survey on the prevailing economic situation, and a report generated, on the basis of which the 7th July Gazette Notice was published.

g) A comprehensive Job evaluation of the Applicants employees was undertaken with the full participation of state officers in county assembly prior to the recommendations made by the Respondent in 2013.

h) Subsequently there has been no change in the hierarchical positions of Members of County Assembly or within the Applicant, or a change in their Constitutional and or Statutory powers to necessitate a fresh Job evaluation.

81. It was submitted that pursuant to constitutional provisions, the SRC issued a circular in which it limited the number of sittings of County Assemblies, over specified time-spans. In taking such a measure, the SRC was acting on the perception that it was exercising its powers and

functions under the Constitution. The Speakers of the 47 County Assemblies, on the other hand, regard the action by the SRC as of doubtful unconstitutional. The same was subject of litigation in **Speakers of the 47 County Assemblies -v- Commission on Implementation of the Constitution & 2 others [2016] eKLR.**

82. According to the Respondent, though the Petitioners contend that they ought to be remunerated as per the 2013 Gazette Notice, the 2013 Gazette notice was for the period between 2012-2017 and has since lapsed hence the Applicant cannot therefore rely on a Gazette Notice which has lapsed. In such a scenario, if the court quashes the 2017 Gazette Notice, and the 2013 Gazette Notice has since lapsed, there will be a lacuna and there will no basis to remunerate the Applicants and other state officers.

83. To the Respondent, even after the extensive engagement, the Applicant having taken the benefits of the 2017 salary structure still want to be remunerated as per the 2013 Gazette Notice salary structure which has since lapsed. This will amount to a double benefit and loss of public resources contrary to the spirit of the Constitution 2010. Further, the Respondent has since learnt from newspaper that some Members of County Assembly have reverted to the 2013 remuneration package and some have been awarded a car grant of Kshs 5,000,000/= and yet they are gaining from the outcome of the reviewed 2017 remuneration and other County Assemblies has written to the Respondent seeking clarifications on the appropriate remuneration.

84. In the Respondent's view, the Petitioners cannot peg their remuneration on the terms of the previous County Assembly as the term of the previous Assembly came to an end. Accordingly, the Applicants are new employees and came into office by virtue of elections held on 8th August 2017, are new employees and had contested their seats knowing of the remuneration rates as per the Gazette Notice No. No. 6518 published on 7/7/2017.

85. It was therefore submitted that the Respondent has demonstrated that it has a constitutional mandate to set, review the salaries and remuneration of the Applicants; that it substantially engaged the Applicants before during and after reviewing their salaries and coming up with the Decision in Gazette Notice No. 6518 published on 7/7/2017; that it has not breached the constitution or statutory provisions as alleged or at all and that it was merely performing its constitutional mandate; that the Applicants Notice of Motion seeks to question the merits of the decision by SRC contrary to settled law that Judicial review is strictly limited to a review of the procedure of a public body and not the merits of the decision. Further that the court ought not to interfere with the decision arrived by SRC.

86. According to the Respondent, it has demonstrated that this Application is an attempt by the Applicant to enrich and aggrandize and misuse public funds contrary to the spirit of the constitution.

87. It was therefore prayed that the Petition and the Application be dismissed with cost to the Respondents.

Determinations

88. Having considered the issues raised in these consolidated matters, this is the view I form in respect thereof. The parameters of constitutional petitions are now well settled. Before dealing with the rest of the issues it is important to deal with the threshold of what amounts to constitutional issues. **Nyamu, J** (as he then was) in **Muiruri vs.Credit Bank Ltd & Another Nairobi HCMCS No. 1382 of 2003 [2006] 1 KLR 385** was of the view that:

"A constitutional issue in my view is that which directly arises from court's interpretation of the Constitution."

89. It follows that a wrong action or decision does not necessarily elevate the matter to a constitutional issue in order to warrant a party aggrieved thereby instituting proceedings by way of a Constitutional Petition. As was appreciated in **Pattni & Another vs. Republic [2001] KLR 264** in which **Harrikson vs. Attorney General of Trinidad and Tobago [1980] AC 265** was cited with approval:

> **"The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the provision if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom."**

90. In that decision it was appreciated that:

> **"No human right or fundamental freedom recognised in the Constitution is contravened by a judgement or order that is wrong and is liable to be set aside on appeal for an error of fact or substantive law even where the error has resulted in a person serving a sentence of imprisonment. The remedy for errors of these kinds is to appeal to a higher court. And where there are no higher courts to appeal to, then, no one can say that there was an error. The fundamental human right is not a legal system that is infallible but one that is fair and it is only errors of procedure that are capable of constituting infringement to the rights protection by section 1(a) and no mere irregularity in procedure is enough, even though it goes to jurisdiction, . The error must amount to failure to observe one of the fundamental rules of natural justice."**

91. In my view, our current Constitution pervades all aspects of life so much so that any action taken by a party may easily be transformed into a constitutional issue by simply citing some provision of the Constitution however remote. Parties who intend to commence legal proceedings by way of a Constitutional Petition therefore ought to take note of the sentiments of the Court in **Ngoge vs. Kaparo & 4 Others [2007] 2 KLR 193, a decision affirmed by the Supreme Court in Peter Oduor Ngoge vs. Francis Ole Kaparo & 5 Others Petition No.**

2 of 2012 [2012] eKLR where the Court of Appeal expressed itself as follows:

> **"Any...inclination to demand an inquiry every time there is a bare allegation of a constitutional violation would clog the Court with unmeritorious constitutional references which would in turn trivialise the constitutional jurisdiction and further erode the proper administration of justice by allowing what is plainly an abuse of the court process. Where the facts as pleaded in this case, do not plainly disclose any breach of fundamental rights or the Constitution there cannot be any basis for an inquiry...It is the view of this court that the matter was rendered academic and speculative by the dissolution and the court has no business giving declarations and orders in a vacuum. A constitutional court has no business giving orders or declarations in academic or in speculative matters...My own conception of a constitutional issue when it relates to the interpretation of a provision of Constitution is that there are posed to the court, two or more conflicting interpretation of the Constitution and the constitutional court is asked to pronounce on which is the correct one...The notion that whenever there is failure by an organ of government or a public authority or public officer to comply with the law this necessarily entails the contravention of some human right or fundamental freedom guaranteed to individuals by the chapters of the Constitution is fallacious...the mere allegation that a human right or fundamental freedom of the applicant has been or is likely to be contravened is not of itself sufficient to entitle the applicant to invoke the jurisdiction of the court under the subsection if it is apparent that the allegation is frivolous or vexatious or an abuse of the process of the court as being made solely for the purpose of avoiding the necessity of applying in the normal way for the appropriate judicial remedy for the unlawful administrative action which involves no contravention of any human right or fundamental freedom."**

92. In this case, however, the two consolidated matters are petitions and judicial review application. As regards judicial review jurisdiction in **Republic vs. The Retirement Benefits Appeals Tribunal Ex Parte Augustine Juma & 8 Others [2013] eKLR**, it was held that:

> **"...it must be remembered that the function of this court sitting in judicial review is not concerned with the merits of the decision…I will add that judicial review is not an appeal from a decision, but a review of the manner in which the decision was made. Once a body is vested with the power to do so something under the law, then there is room for it to make that decision, wrongly as it is rightly. That is why there is the appellate procedure to test and examine the substance of the decision itself. It follows, therefore, that the correctness or 'wrongness' or error in interpretation or application of the law is not appropriately tested in judicial review forum. In simple terms, a 'wrong' decision done within the law and in adherence to the correct procedure can seldom be said to be ultra vires as to attract remedy for the prerogative writs. The Court of Appeal in Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 Others, CA Civil Appeal 145 of 2011 [2012] eKLR expressed this view as follows; Moreover, where the proceedings are regular upon their face and the inferior tribunal has jurisdiction in the original narrow sense (that is, to say, it has power to adjudicate upon the dispute) and does not commit any of the errors which go to jurisdiction in the wider sense, the quashing order (certiorari) will not be ordinarily granted on the ground that its decision is considered to be wrong either because it misconceived a point of law or misconstrued a statute (except a misconstruction of a statute relating to its own jurisdiction) or that its decision is wrong in matters of fact or that it misdirects itself in some matter..."**

93. A similar position was adopted in by **Githua, J** in **Republic vs. Commissioner of Customs Services ex-parte Africa K-Link International Limited Nairobi HC Misc. JR No. 157 of 2012 [2012] eKLR** as follows:

> **"It must always be remembered that judicial review is concerned with the process a statutory body employs to reach its decision and not the merits of the decision itself. once it has been established that a statutory body has made its decision within its jurisdiction following all the statutory procedures, unless the said decision is shown to be so unreasonable that it defies logic, the court cannot intervene to quash such a decision or to issue an order prohibiting its implementation since a judicial review court does not function as an appellate court. The court cannot substitute its own decision with that of the Respondent. Besides, the purpose of judicial review is to prevent statutory bodies from injuring the rights of citizens by either abusing their powers in the execution of their statutory duties and function or acting outside of their jurisdiction. Judicial review cannot be used to curtail or stop statutory bodies or public officers from the lawful exercise of power within their statutory mandates."**

94. According to ***Judicial Review Handbook***, 6th Edition by **Michael Fordham** at page 5, judicial review is a central control mechanism of administrative law (public law), by which the judiciary discharges the constitutional responsibility of protecting against abuses of power by public authorities. It constitutes a safeguard which is essential to the rule of law: promoting the public interest; policing parameters and duties imposed by Parliament; guiding public authorities and securing that they act lawfully; ensuring that they are accountable to law and not above it; and protecting the rights and interests of those affected by the exercise of public authority power.

95. The House of Lords in the case of **Council of Civil Service Unions vs. Minister of State for Civil Service (1984) 3 All ER 935**, rationalized the grounds of judicial review and held that the basis of judicial review could be highlighted under three principal heads, namely, illegality, procedural impropriety and irrationality. Illegality as a ground of judicial review means that the decision maker must understand correctly the law that regulates his decision making powers and must give effect to it. Grounds such as acting ultra vires, errors of law and/or fact, onerous conditions, improper purpose, relevant and irrelevant factors, acting in bad faith, fettering discretion, unauthorized delegation, failure to act etc., fall under the heading "illegality". Procedural impropriety may be due to the failure to comply with the mandatory procedures such as breach of natural justice, such as *audi alteram partem*, absence of bias, the duty to act fairly, legitimate expectations, failure to give reasons etc. Irrationality as fashioned by **Lord Diplock** in the **Council of Civil Service Unions Case** (supra) takes the form of Wednesbury unreasonableness explicated by **Lord Green** and applies to a decision which is so outrageous in its defiance to logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.

96. However, it is my view that the common law and practice by the High Court of England on judicial review still recognize and apply the conventional grounds for judicial review except within enlarged categories of intervention by the Court. In Kenya such expansion on a case to case basis is permitted by the Constitution as a way of ensuring a complete remedy is availed by the Court as a Court of law. Matters of fair trial and administrative action under Article 47 and 50 of the Constitution are proper grounds for judicial review and are a codification of

what is generally known as principles of natural justice.

97. Article 47 of the Constitution is now emphatic on the fairness of administrative action. The purpose of judicial review is to check that public bodies do not exceed their jurisdiction and carry out their duties in a manner that is detrimental to the public at large. It is meant to uplift the quality of public decision making, and thereby ensure for the citizen civilised governance, by holding the public authority to the limit defined by the law. Judicial review is therefore an important control, ventilating a host of varied types of problems. The focus of cases may range from matters of grave public concern to those of acute personal interest; from general policy to individualised discretion; from social controversy to commercial self-interest; and anything in between. As a result, judicial review has significantly improved the quality of decision making. It has done this by upholding the values of fairness, reasonableness and objectivity in the conduct of management of public affairs. It has also restrained or curbed arbitrariness, checked abuse of power and has generally enhanced the rule of law in government business and other public entities. Seen from the above standpoint it is a sufficient tool in causing the body in question to remain accountable.

98. However, it is important to remember that Judicial Review is a special supervisory jurisdiction which is different from both (1) ordinary (adversarial) litigation between private parties and (2) an appeal (rehearing) on the merits. The question is not whether the judge disagrees with what the public body has done, but whether there is some recognisable public law wrong that has been committed. Whereas private law proceedings involve the claimant asserting rights, judicial review represents the claimant invoking supervisory jurisdiction of the Court through proceedings brought nominally by the Republic. See R vs. Traffic Commissioner for North Western Traffic Area ex parte Brake [1996] COD 248.

99. In this country, judicial review is a constitutional supervision of public authorities involving a challenge to the legal and procedural validity of the decision. It does not allow the court of review to examine the evidence with a view of forming its own view about the substantial merits of the case. It may be that the tribunal whose decision is being challenged has done something which it had no lawful authority to do. It may have abused or misused the authority which it had. It may have departed from procedures which either by statute or at common law as a matter of fairness it ought to have observed. As regards the decision itself it may be found to be perverse, or irrational, or grossly disproportionate to what was required. Or the decision may be found to be erroneous in respect of a legal deficiency, as for example, through the absence of evidence, or through a failure for any reason to take into account a relevant matter, or through taking into account an irrelevant matter, or through some misconstruction of the terms of the statutory provision which the decision maker is required to apply. While the evidence may have to be explored in order to see if the decision is vitiated by such legal deficiencies, it is perfectly clear that in a case of review, as distinct from an ordinary appeal, the court may not set about forming its own preferred view of the evidence. See Reid vs. Secretary of State for Scotland [1999] 2 AC 512.

100. Judicial review, it has been cautioned, is concerned not with private rights or the merits of the decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

101. In other words the purpose of judicial review is to ensure that the individual receives fair treatment, and not to ensure that the authority, after according fair treatment reaches on a matter which it is authorised by law to decide for itself a conclusion which is correct in the eyes of the court. See Chief Constable of the North Wales Police vs. Evans (1982) I WLR 1155.

102. With respect to the ground of Wednesbury unreasonableness, it is not mere unreasonableness which would justify the interference with the decision of an inferior tribunal. It must be noted that unreasonableness is a subjective test and therefore to base a decision merely on unreasonableness places the Court at the risk of determination of a matter on merits rather than on the process. In my view, to justify interference the decision in question must be so grossly unreasonable that no reasonable authority, addressing itself to the facts and the law would have arrived at such a decision. In other words such a decision must be deemed to be so outrageous in defiance of logic or acceptable moral standards that no sensible person applying his mind to the question to be decided would have arrived at it. Therefore, whereas that the Court is entitled to consider the decision in question with a view to finding whether or not the Wednesbury test of unreasonableness is met, it is only when the decision is so grossly unreasonable that it may be found to have met the test of irrationality for the purposes of Wednesbury unreasonableness.

103. I must therefore appreciate that there is a difference between judicial review and an appeal. The South African Constitutional Court in **Sidumo vs. Rustenburg Platinum Mines Ltd [2007] ZACC 22; 2008 (2) SA 24 (CC); 2008 (2) BCLR 158 (CC)** while cautioning against the blurring of the distinction between appeal and review, nevertheless acknowledged that the enquiry into the reasonableness of a decision invariably involves consideration of the merits. The same Court in **Duncanmec (Pty) Limited vs. Gaylard N O and Others (CCT284/17) [2018] ZACC** 29 at paragraphs 41 and 42 was of the view that:

> **"[41] So as to maintain the distinction between review and appeal this Court formulated the test along the lines that unreasonableness would warrant interference if the impugned decision is of the kind that could not be made by a reasonable decision-maker. [42] This test means that the reviewing court should not evaluate the reasons provided by the arbitrator with a view to determine whether it agrees with them. That is not the role played by a court in review proceedings. Whether the court disagrees with the reasons is not material. [43] The correct test is whether the award itself meets the requirement of reasonableness. An award would meet this requirement if there are reasons supporting it. The reasonableness requirement protects parties from arbitrary decisions which are not justified by rational reasons."**

104. The courts will only interfere with the decision of a public authority if it is outside the band of reasonableness. It was well put by **Professor Wade** in a passage in his treatise on ***Administrative Law***, 5th Edition at page 362 and approved by in the case of the **Boundary Commission [1983] 2 WLR 458, 475** that:

> **"The doctrine that powers must be exercised reasonably has to be reconciled with the no less important doctrine that the court must not usurp the discretion of the public authority which Parliament appointed to take the decision. Within the bounds of legal reasonableness is the area in which the deciding authority has genuinely free discretion. If it passes those**

bounds, it acts ultra vires. The court must therefore resist the temptation to draw the bounds too lightly, merely according to its own opinion. It must strive to apply an objective standard which leaves to the deciding authority the full range of choices which the legislature is presumed to have intended."

105. In **Republic vs. Public Procurement Administrative Review Board & Another *ex parte* Gibb Africa Ltd & Another [2012] eKLR** the court set out the established reach of judicial review in Kenya thus:

"In judicial review therefore, the court's jurisdiction is limited to applying the three tests of "legality", "rationality" and "procedural propriety" to the decision under review and once the decision passes the tests the court has no business taking any further step in respect of that decision. There is always a temptation to descend into the arena and substitute the judge's decision with that of the public body whose decision is under attack. A judge should, however, avoid this temptation by all means lest he be accused of abusing the powers given to him to review the decisions of subordinate courts and tribunals. The Court of Appeal in *Grain Bulk Handlers Limited v J. B. Maina & Co. Ltd & 2 others [2006] eKLR* summarized the purpose of judicial review by stating that:-

"Judicial Review jurisdiction regulates the process by which a decision making power given by the law is exercised by the person or body given the jurisdiction. The subject matter of Judicial Review is the legality of such decisions."

From the foregoing it is clear that in judicial review, the court does not exercise its appellate powers. It mainly looks at the decision-making process to ensure that the citizen who has come into contact with an administrative body or tribunal has been treated fairly. But as observed by Lord Diplock in the already cited *Civil Service Unions vs Minister for the Civil Service case*, the court can quash the decision if the same is so unreasonable to the extent that a reasonable tribunal addressing its mind to the facts of the case would not have arrived at such a decision. In doing so, I submit, the court will have descended into the arena of decision-making. For a court to justify such action it must be clearly obvious that the decision is truly and obviously unreasonable which I submit is not the case here."

106. However, in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR**, the Court of Appeal held at paras 55-58:

"55. An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, Section 7 (2) (l) of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in Article 24 (1) (b) and (e) of the Constitution to wit that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.

56. Analysis of Article 47 of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. Section 7 (2) (f) of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; Section 7 (2) (j) identifies abuse of discretion as a ground for review while Section 7 (2) (k) stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. Section 7 (2) (k) subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i) (i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7 (2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in Section 7 (2) of the Act, 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 orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

57. In Mbogo & Another -v- Shah (1968) EA 93 at 96, this Court stated that an appellate court will not interfere with the exercise of discretion by a trial court unless the discretion was exercised in a manner that is clearly wrong because the judge misdirected himself or acted on matters which it should not have acted upon or failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion. The dictum in Mbogo -v- Shah (supra) and the principles of rationality, proportionality and requirement to give reasons for decision are pointers towards the implicit shift to merit review of administrative decisions in judicial review.

58. The essence of merit review is the power to substitute a decision. Under the Fair Administrative Actions Act, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. Section 11 (1) (e) and (h) of the Fair Administrative Action Act permits the court in a judicial

review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts."

107. I must however stress that the traditional thinking that judicial review remedies are distinct from remedies for violation of the Constitution must now take a dramatic shift. According to our Constitution judicial review remedies are part the reliefs which the Court may grant where a person complains that his or her rights have been violated. This is my understanding of the decision of the Court of Appeal in **West Kenya Sugar Company Limited vs. Kenya Sugar Board & another [2014] eKLR** to the effect that:

"32. The Constitution has expressly expanded the scope of judicial review in relation to breach of fundamental right or freedom in the Bill of Rights as by Article 23(3)(f) the High Court can grant an order of judicial review as a relief for breach of fundamental right or freedom. The determination of the question of breach of fundamental right or freedom is likely to involve the merits of the decision of a statutory, or public officer or State Officer and not merely the decision making process which is the confine of judicial review under the Law Reform Act and Order 53 CPR. Article 258 of the Constitution is silent as to reliefs the High Court can grant for contravention of other provisions of the Constitution particularly whether the High Court can grant an order for judicial review. The decision whether orders of judicial review are available for general contravention of the Constitution under Article 258 rests with the superior courts and we have to await their decision.

33. If the decision is about the decision making process and the application is made under Law Reform Act and order 53 CRP as in the present case, the jurisdiction of the court is exercised within the narrow limits of judicial review jurisdiction – the decision making process."

108. Our position now mirrors the South African position where it was held by that country's Constitutional Court in **Pharmaceutical Manufacturers Association of South Africa & Another vs. Minister of Health Case CCT 31/99**, in which **Chaskalson, P** expressed himself as follows:

"The 1961 Constitution provided in specific terms that Parliament was supreme and that no court had jurisdiction to enquire into or pronounce upon the validity of an Act of Parliament, other than one relating to the entrenched language rights. The 1983 Constitution also entrenched the supremacy of Parliament, though it made provision for courts to have jurisdiction in respect of questions relating to the specific requirements of the Constitution. This, however, has been fundamentally changed by our new constitutional order. We now have a detailed written Constitution. It expressly rejects the doctrine of the supremacy of Parliament, but incorporates other common law constitutional principles, and gives them greater substance than they previously had. The rule of law is specifically declared to be one of the foundational values of the constitutional order, fundamental rights are identified and entrenched, and provision is made for the control of public power including judicial review of all legislation and conduct inconsistent with the Constitution. Powers that were previously regulated by the common law under the prerogative and the principles developed by the courts to control the exercise of public power are now regulated by the Constitution… Whilst there is no bright line between public and private law, administrative law, which forms the core of public law, occupies a special place in our jurisprudence. It is an incident of the separation of powers under which courts regulate and control the exercise of public power by the other branches of government. It is built on constitutional principles which define the authority of each branch of government, their inter-relationship and the boundaries between them. Prior to the coming into force of the interim Constitution, the common law was "the main crucible" for the development of these principles of constitutional law. The interim Constitution which came into force in April 1994 was a legal watershed. It shifted constitutionalism, and with it all aspects of public law, from the realm of common law to the prescripts of a written constitution which is the supreme law. That is not to say that the principles of common law have ceased to be material to the development of public law. These well-established principles will continue to inform the content of administrative law and other aspects of public law, and will contribute to their future development. But there has been a fundamental change. Courts no longer have to claim space and push boundaries to find means of controlling public power. That control is vested in them under the Constitution which defines the role of the courts, their powers in relation to other arms of government, and the constraints subject to which public power has to be exercised. Whereas previously constitutional law formed part of and was developed consistently with the common law, the roles have been reversed. The written Constitution articulates and gives effect to the governing principles of constitutional law. Even if the common law constitutional principles continue to have application in matters not expressly dealt with by the Constitution, (and that need not be decided in this case) the Constitution is the supreme law and the common law, in so far as it has any application, must be developed consistently with it, and subject to constitutional control."

109. According to the said Court at paragraphs 49, 50 and 51:

"What section 35(3) and section 33(3) of the interim Constitution make clear is that the Constitution was not intended to be an exhaustive code of all rights that exist under our law. The reference in section 33(3) of the interim Constitution and section 39(3) of the 1996 Constitution is to "other rights", and not to rights enshrined in the respective Constitutions themselves. That there are rights beyond those expressly mentioned in the Constitution does not mean that there are two systems of law. Nor would this follow from the reference in section 35(3) of the interim Constitution and section 39(2) of the 1996 Constitution to the development of the common law. The common law supplements the provisions of the written Constitution but derives its force from it. It must be developed to fulfil the purposes of the Constitution and the legal order that it proclaims — thus, the command that law be developed and interpreted by the courts to promote the "spirit, purport and objects of the Bill of Rights." This ensures that the common law will evolve within the framework of the Constitution consistently with the basic norms of the legal order that it establishes. There is, however, only one system of law and within that system the Constitution is the supreme law with which all other law must comply. What would have been ultra vires under the common law by reason of a functionary exceeding a statutory power is invalid under the Constitution according to the doctrine of legality. In this respect, at least, constitutional law and common law are intertwined and there can be no difference between them. The same is true of constitutional law and common law in respect of the validity of administrative decisions within the purview of section 24 of the interim Constitution. What is "lawful administrative action," "procedurally

fair administrative action" and administrative action "justifiable in relation to the reasons given for it," cannot mean one thing under the Constitution, and another thing under the common law…Although the common law remains relevant to this process, judicial review of the exercise of public power is a constitutional matter that takes place under the Constitution and in accordance with its provisions. Section 167(3)(c) of the Constitution provides that the Constitutional Court "makes the final decision whether a matter is a constitutional matter". This Court therefore has the power to protect its own jurisdiction, and is under a constitutional duty to do so. One of its duties is to determine finally whether public power has been exercised lawfully. It would be failing in its duty if it were to hold that an issue concerning the validity of the exercise of public power is beyond its jurisdiction."

110. In my view since the Constitution is incremental in its language, what the current constitutional dispensation requires is that both the grounds and remedies in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity. It is within those prescriptions that judicial review is seen in our context. But care should be taken not to think that the traditional grounds of judicial review in a purely judicial review application under the *Law Reform Act* and Order 53 of the ***Civil Procedure Rules*** have been discarded or its scope has left the airspace of process review to merit review except in those cases provided in the Constitution; and this we have discussed elsewhere in this judgement. In other words the categories of judicial review grounds are not heretically closed as opposed to their being completely overtaken or that the Court's jurisdiction under Order 53 of the ***Civil Procedure Rules*** should include merit review. Once that distinction is made, there shall be little difficulty for this Court to maintain that it should and shall be concerned with process review rather than merit review of the decision of the Respondent Board given the statutory circumstances of this case.

111. I am therefore of the view that the decision in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001**: is still relevant in so far as it held that:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision…It is the duty of the decision maker to comply with the law in coming to its decision, and common sense and fairness demands that once the decision is made, it is his duty to bring it to the attention of those affected by it more so where the decision maker is not a limited liability company created for commercial purposes but it a statutory body which can only do what is authorised by the statute creating it and in the manner authorised by statute."

112. Being guided accordingly, I must state from the onset that it is not the duty of this Court to set out the remuneration and benefits of State officers including Members of Parliament. I therefore agree with the decision of a three Judge Bench of this Court **(Lenaola, Mumbi Ngugi and Korir, JJ)** in **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR** that:

"There was extensive submission by the 2nd and 4th respondents to the effect that the SRC violated the Constitution and breached statutory provisions in arriving at the remuneration and benefits of State officers. The petitioners and the SRC also dwelt at length on the reasons why they believe the SRC acted legally and constitutionally. Our response to these opposing arguments is that it is not the mandate of this Court to enter into the merits of the decision made by the SRC, for to do so is to interfere with the constitutional mandate of the SRC. Unless there is placed before the Court clear evidence of violation of the Constitution or of statute, or of such unreasonableness in its decision making as would justify interference by this Court, it is not the duty of the Court to inquire into the methods or modalities used by the SRC to arrive at its decision in setting the remuneration of Members of the National Assembly."

113. It is therefore my view that in this Court has no powers to demarcate to the Respondent the nature of the remuneration and benefits which the Respondent, in the exercise of its constitutional and statutory mandate is to determine.

114. That the Respondent has the power to determine the remuneration and benefits of the Petitioners is not in question. That issue was resolved, and quite properly in my view, in **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others** (supra) the aforesaid case of which held that:

"The mandate of SRC is therefore clear. Its reach extends to all state officers, who are defined by Article 260 as persons 'holding a state office.' A 'state office' is defined as meaning, among others, the following offices: (a) President; (b) Deputy President; (c) Cabinet Secretary; (d) Member of Parliament; (e) Judges and Magistrates; (f) member of a commission to which Chapter Fifteen applies…As already stated, the remuneration and benefits of the members of the 11th Parliament and any other Parliament coming into existence thereafter can only be determined by the SRC."

115. I also associate myself with the decision of this Honourable Court in Nairobi H.C Petition No. 281 of 2013 - **Law Society of Kenya vs. The National Assembly and 5 Others** in which it was *inter alia* stated as follows:-

"The mandate of the SRC is therefore clear. It extends to all state officers who are defined by Article 260…In our view, however, the SRC was doing its job, exercising its constitutional mandate and function with regard to the remuneration of State Officers, when it is issued the Special issue of the Kenya Gazette on 1st March 2013. In moving to quash the Gazette Notice containing the remuneration and benefits of its members, the National Assembly stepped into the arena reserved for the SRC by the Constitution."

116. In my view Article 230(4) of the Constitution is clear that it is the Respondent's mandate to set and regularly review the remuneration and benefits of all State officers and to advise the national and county governments on the remuneration and benefits of all other public

officers. State Officer, it is therefore clear encompasses a member of a county assembly or other member of the executive committee of a county government, on whose behalf this petition is filed by the Petitioners herein. Unless that provision is amended, the Petitioners must abide by the Respondent's decision as long as the same is made in accordance with the Constitution and the relevant statutory provisions. It does not matter whether such a decision is unpalatable to the applicants. In that case whereas the applicants are entitled to express their sentiments atop the hills and down the valleys, at the end of the day they have only one option: to adhere to the said decision.

117. It was therefore held in **JR. Misc. Application No. 477 of 2014: Republic vs. Public Procurement Administrative Review Board & 2 Others** as follows:

> **"…the issue for judicial review is not whether the decision is right or wrong, nor whether the Court agrees with it, but whether it was a decision which the authority concerned was lawfully entitled to make since a decision can be lawful without being correct. The Courts must be careful not to invade the field of policy entrusted to administrative and specialized organs by substituting their own judgment for that of the administrative authority. They should judge the lawfulness and not the wisdom of the decision. If the decision was wrong, it should be remedied by an appeal which allows the appellate court to engage in an intrusive analysis of evidence by the trial tribunal and review the merit of the decision in question…In my view the Respondent was entitled to find that the supplementary grounds did not contain fresh issues or otherwise. The mere fact that it made one decision and not the other does not justify this Court in the exercise of its judicial review jurisdiction in interfering therewith. Similarly, the Respondent's finding that the 2nd interested party did not comply with its directions issued in the respondent's earlier decision is a matter which would go to the merit rather that the process".**

118. Therefore whereas Regulation 15 of the ***Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations 2013***, provides for annual increments, the same must be based on productivity and performance. Where for example the Respondent finds, after complying with the conditions set out in the Constitution and the relevant statutes, that since the last review, there has been no improvement in productivity and/or performance of the officers concerned, this Court cannot find fault with that finding and cannot compel the Respondent to effect the annual increase since the same is not automatic but is pegged upon certain conditions being met. Therefore unless the decision not to effect the increment is clearly irrational, there would be no justification for interference.

119. However if the decision is not arrived at in accordance with the said instruments, this Court will not hesitate to state so since the Respondent must operate within the four corners of the Constitution and the law. It is trite that a judicial or quasi-judicial tribunal, such as the Board herein has no inherent powers. In **Choitram vs. Mystery Model Hair Salon [1972] EA 525**, **Madan, J** (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in **Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734**, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them.

120. It was in appreciation of the foregoing position that the Court in **Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981** held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration. See **Chogley vs. The East African Bakery [1953] 26 KLR 31 at 33 and 34; Re: Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR 1195; Choitram vs. Mystery Model Hair Salon** (supra); **Warburton vs. Loveland [1831] 2 DOW & CL. (HL) at 489; Lall vs. Jeypee Investments Ltd [1972] EA 512 at 516; Attorney General vs. Prince Augustus of Hanover [1957] AC 436 AT 461**.

121. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. As has been held time without a number, where a statute donates powers to an authority, the authority ought to ensure that the powers that it exercises are within the four corners of the statute and ought not to extend its powers outside the statute under which it purports to exercise its authority. In **Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others [2004] 2 KLR 530** it was held that the general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others.

122. Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the decisions of administrative bodies. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them. See **Re Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.**

123. In this case the factual position save for the contention that the Applicants were never afforded an opportunity of being heard are largely not in dispute. It is not disputed that by a letter dated *29 May 2017*, the Respondent requested the Applicant for its views on the remuneration and benefits payable to State Officers serving in the County Assemblies. According to the letter, the views were to be received by *8 June 2017*. It was averred that the said Petitioner requested the Respondent for a consultative forum by its letter dated 13 June 2017. Earlier, the Applicant had by its letter dated 26 May 2017 requested the Respondent for a consultative forum to air its view on the job evaluation exercise for State Officers serving in County Assemblies, but despite several attempts, the parties were unable to hold a consultative forum for purposes of the Applicant airing its views to the Respondent.

124. On 1st March, 2013, the Respondent Commission caused to be published in *Gazette Notice Numbers 2885, 2886, 2887 and 2888* of even date the salaries, remuneration and benefits for state officers serving in the Executive and National Government, the Senate and the National Assembly, the County Government, Constitutional Commissions and Independent Offices and that following a study on labour market efficiency and dynamics, a survey of the prevailing economic situation and a comprehensive job evaluation; and, engaged in necessary consultations and public participation the Respondent caused to be published the gazette notices reviewing and setting the salaries, remuneration and benefits for the said state officers as required by the Constitution, the Act and the ***Salaries and Remuneration Commission Regulations, 2013***.

125. However, Regulation 5 of the ***Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013*** provides as hereunder:

> ***"5(1) The Commission shall, at least one year before the review, cause the following to be conducted –***
>
> ***(a) a study on labour market efficiency and dynamics;***
>
> ***(b) a survey of the prevailing economic situation; and***
>
> ***(c) a comprehensive job evaluation.***
>
> ***(2) The Commission shall prepare a report on the findings under paragraph (1) and the report shall form the basis for review.***
>
> ***(3) The review shall be communicated to the Cabinet Secretary responsible for matters relating to finance, the Judicial Service Commission, the Parliamentary Service Commission and the national and county governments for inclusion in the subsequent budgetary estimates."***

126. Regulations 12 of the ***Salaries and Remuneration Commission Regulations, 2013*** prescribes the factors for pay determination for state officers and advice on remuneration for other public officers; and, states that in setting and reviewing the remuneration of State Officers and advising on remuneration for other public officers, the Commission shall consider the prevailing –

> ***(a) Fixed and variable components of the remuneration;***
>
> ***(b) Legal, social, economic and environmental issues;***
>
> ***(c) Results of job evaluation, performance and productivity;***
>
> ***(d) Results of market studies;***
>
> ***(e) Key elements and factors of pay for considerations;***
>
> ***(f) Market rates from the results of comparative market surveys;***
>
> ***(g) Collective bargaining agreements;***
>
> ***(h) Overall and specific cost of employment, relating it to the resource capacity of the organization;***
>
> ***(i) Affordability and sustainability of compensation or award to government and within the job market;***
>
> ***(j) Linkage to the national objectives, priorities and the human resource management strategy;***
>
> ***(k) Level of performance or productivity of the officer or level of performance and achievement of the national objectives by the organization;***
>
> ***(l) Salary structures in the public service;***
>
> ***(m) Benchmark with similar organizations or those organizations to which the organization loses staff;***
>
> ***(n) Equity and competitiveness; and***
>
> ***(o) Any other relevant matter to remuneration setting and advice.***

127. In this case it was the applicant's case that in seeking to review and set remuneration for the state officers, the Respondent Commission ignored the said mandatory provisions. The Respondent's case is however that there has been no change in the hierarchical positions of Members of County Assembly or within the Applicant, or a change in their Constitutional and or Statutory powers to necessitate a fresh Job evaluation. With due respect that is not what the law states. In order to justify any review of the remuneration and benefits by the Respondent, it was necessary that the Respondent undertakes a study on labour market efficiency and dynamics; a survey of the prevailing economic situation; and a comprehensive job evaluation. These processes were to be undertaken at least one year before the review. My

finding on this issue is reinforced by *Regulation 4 of the Salaries and Remuneration Commission Regulations, 2013* which deals with "Review Cycle" and provides that:

> ***(1) The Commission shall undertake a review of remuneration and benefits of state and public officers every four years.***
>
> ***(2) A review under paragraph (1) shall be conducted at the same time across the public sector.***

128. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300,** the Court while citing **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** held:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."**

129. It is therefore clear that the failure to comply with the said Regulations 5 and 12 aforesaid amounts to a procedural impropriety on the part of the Respondent. Such impropriety cannot be justified simply on the ground that the Applicants were heard before the review for the simple reason that it is the information obtained through the said processes that are to form the basis of a hearing through which the applicant s are to ventilate their issues. As was held in **Geothermal Development Company Limited vs. Attorney General & 3 Others [2013] eKLR**:

> **"28. As a component of due process, it is important that a party has reasonable opportunity to know the basis of allegations against it. Elementary justice and the law demands that a person be given full information on the case against him and given reasonable opportunity to present a response…**
>
> **30. In many jurisdictions around the world, it has long been established that notice is a matter of procedural fairness and an important component of natural justice. As such, information provided in relation to administrative proceedings must be sufficiently precise to put the individual on notice of exactly what the focus of any forthcoming inquiry or action will be."**

130. As regards annual increments, it is not in dispute that ***Regulation 15 of the Salaries and Remuneration Commission Regulations, 2013*** entitles state and public officers to annual salary increment. However, I cannot fault the Respondent's position that the Petitioners cannot peg their remuneration on the terms of the previous County Assembly as the term of the previous Assembly came to an end. Accordingly, the Petitioners are new employees and came into office by virtue of elections held on 8th August 2017, are new employees and had contested their seats knowing of the remuneration rates as per the Gazette Notice No. No. 6518 published on 7/7/2017.

131. It was contended that in seeking to review and set remuneration, the Respondent Commission violated ***Regulation 8 of the Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013*** requiring it "to call for proposals from every public service organization, on remuneration and benefits for their respective state and public officers by notice in the Kenya Gazette and at least two daily newspapers with national circulation", whenever a review is due. However, from the material presented before this Court, it is clear that the Petitioners was afforded an opportunity to present their views. While this Court has taken issue with the fact that Regulation 5 of the Regulations was not adhered to, it is however clear that the Petitioners were afforded an opportunity of being heard. In the Respondent's view, the Petitioners cannot peg their remuneration on the County Assembly as the term of the previous Assembly came to an end. Accordingly, the Applicants are new employees and came into office by virtue of elections held on 8th August 2017, are new employees and had contested their seats knowing of the remuneration rates as per the Gazette Notice No. No. 6518 published on 7/7/2017.

132. *In* **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**, the Court of Appeal held that:

> **"whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."**

133. As this Court held in **Republic vs. County Government of Kiambu Ex parte Robert Gakuru & Another [2016] eKLR** while dismissing an application based on the same grounds:

> **"Contrary to the allegation made by the applicants, the process of enactment of the impugned Act commenced in June, 2015 and the applicants were not only afforded an opportunity of being heard but did actually present their views on the Bill."**

134. In my understanding, *Regulation 14 of the Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013 which* provides that "where a reviewed remuneration or benefit has been approved and is due, it shall be granted with effect from the 1st of July of the subsequent financial year after being factored in the national or respective county government budget"

and that communication of set remuneration shall be by notice in the Gazette is meant to insulate the budgetary process so that any financial expenditures arising from a review do not interfere with the budgetary allocation for the year in which the review is undertaken. Accordingly, I agree that a decision made upon review can only take effect at the next financial year.

135. It is now contended by the Respondent that the ***Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013*** are void by virtue of ***Statutory Instruments Act*****.** With due respect that argument rings hollow. If the Respondent's position is that the said Regulations were void, then that argument begs the question on what basis were the Members of Parliament being remunerated at that time? It is noteworthy that an attempt to render the said Regulations inoperative was declared by this Court to have been unconstitutional. It is therefore my view that this Court cannot, without a proper suit being brought before it for the said purposes make a declaration that the said Regulations are void.

136. In any case was it not the duty of the Respondent to ensure that the procedure effectuating the said Regulations was adhered to? In **D. Njogu & Co. Advocates –vs- National Bank of Kenya [2009] eKLR**, in which **Koome, J** (as she then was) held that no court will lend its aid to a person who found his cause of action upon an immoral or illegal act. I reiterate the words of **Lord Mansfield CJ** in **Holman vs. Johnson** (1775) 1 Cowp 341 that:

> **"… No court will lend its aid to a man who founds his cause of action upon an immoral or an illegal act. If, from the plaintiff's own standing or otherwise, the cause of action appears to arise *ex turpi causa* ["from an immoral cause"], or the transgression of a positive law of this country, there the court says he has no right to be assisted. It is upon that ground the court goes; not for the sake of the defendant, but because they will not lend their aid to such a plaintiff…"**

137. That being the position, since the impugned Gazette Notice were meant to replace the 2013 Notices, it cannot be successfully argued that the quashing of the Gazette Notice No. 6518 of 7th July, 2017 would leave a lacuna in the remuneration of the Applicants. The effect of a decision quashing the said Gazette Notice is that the status quo prevailing before the publication of the said Gazette Notice would be revived. This position in my view would be curable by the spirit of section 24 of the ***Interpretation and General Provisions Act*** which provides that:

> ***Where an Act or part of an Act is repealed, subsidiary legislation issued under or made in virtue thereof shall, unless a contrary intention appears, remain in force, so far as it is not inconsistent with the repealing Act, until it has been revoked or repealed by subsidiary legislation issued or made under the provisions of the repealing Act, and shall be deemed for all purposes to have been made thereunder.***

138. In conclusion, whereas I find that most of the issues raised by the Applicant herein are unmerited, I am satisfied that the manner in which the Gazette Notice No. 6518 of 7th July, 2017 was promulgated was tainted with procedural impropriety. It cannot be sustained.

139. In the premises I hereby issue an order of certiorari bringing into this Court the decision by the Respondent contained in Gazette Notice No. 6518 of 7th July, 2017 for the purposes of being quashed and the same is hereby quashed. It is now upon the Respondent to decide how best to proceed from this point. As the Petitioners have not succeeded in a majority of the issues raised, there will be no order as to costs.

140. Orders accordingly.

G V ODUNGA

JUDGE

Read, signed and delivered in open Court at Nairobi this 10th day of December, 2018

J M MATIVO

JUDGE

Delivered in the presence of: