



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA AT NAIROBI**

**JUDICIAL REVIEW DIVISION**

**(Coram: Odunga, J)**

**MISCELLANEOUS APPLICATION NO. 686 OF 2017**

**IN THE MATTER OF AN APPLICATION BY THE PARLIAMENTARY SERVICE COMMISSION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW ORDERS OF CERTIORARI AGAINST THE SALARIES AND REMUNERATION COMMISSION**

**BETWEEN**

**THE PARLIAMENTARY SERVICE COMMISSION.....APPLICANT**

**AND**

**THE SALARIES REMUNERATION COMMISSION.....RESPONDENT**

**AND**

**HON. ATTORNEY GENERAL.....1<sup>ST</sup> INTERESTED PARTY**

**LAW SOCIETY OF KENYA.....2<sup>ND</sup> INTERESTED PARTY**

**HON. BENSON MUTURA.....3<sup>RD</sup> INTERESTED PARTY**

**OKIYA OMTATAH OKOITI.....4<sup>TH</sup> INTERESTED PARTY**

**JUDGEMENT**

**Introduction**

1. The Applicant herein, the **Parliamentary Service Commission**, is an independent constitutional commission established under Article 127(1) of the Constitution. It is responsible for providing services and facilities to ensure the efficient and effective functioning of Parliament; constituting offices in the parliamentary service, and appointing and supervising office holders; preparing annual estimates of expenditure of the parliamentary service and submitting them to the National Assembly for approval, and, exercising budgetary control over the services; 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 Parliament or prescribed by national legislation.

2. 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, 2010, 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.

3. By a Notice of Motion dated 21<sup>st</sup> December 2017, the applicant herein, the Parliamentary Service Commission, an independent constitutional commission established under Article 127(1) of the Constitution, seeks an order of certiorari to remove to this Honourable Court to be quashed the decision by the Respondent contained in *Gazette Notice No.6517* published on 7<sup>th</sup> July, 2017. The applicant also

sought the costs of the application.

4. The application was based on the Articles 127(1), 93, 94, 95, 96, 230(4) and 230(5). It was further contended that the guiding principles for the Salaries and Remuneration Commission are set out in section 12 of *the Salaries and Remuneration Commission Act, No. 10 of 2011* (“the Act”).

5. According to the Applicant, the *Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013* (“*Salaries and Remuneration Commission (Regulations, 2013)*”) prescribe procedure for setting and reviewing of remuneration and benefits for state and public officers and in this regard the applicant relied on Regulations 4, 5, 6, 8, 9, 10, 12, 13, 14, 15 and 17 thereof. It was contended that in the conduct of the hearings, the Commission is obligated to consider views from: representatives from the organization seeking advice of the Commission, relevant unions and professional bodies, members of the public and any interested party.

6. It was averred that the Applicant and the Respondent are Commissions under Chapter 15 of the Constitution and that Article 249(3) of the Constitution stipulates that Parliament “*shall allocate adequate funds to enable each Commission and independent office to perform its functions*” and that “*the budget of each Commission and independent offices shall be a separate vote.*”

7. In this case the applicant averred that on 1<sup>st</sup> 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. In so doing, the Respondent did conduct 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 before causing 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*. It was contended that the Applicant Commission and state officers serving in the 11<sup>th</sup> Parliament did abide with the decision of the Respondent Commission conveyed through the Gazette notices despite being dissatisfied with the lower, unfair and patently erroneous ranking accorded to state officers serving in Parliament which had/had the effect of diminishing the status and important governance role played by Parliament under the Constitution, including oversight of state and public officers whose ranking and remuneration were now set way above those of state officers serving in Parliament.

8. The Applicant disclosed that by a letter dated 27<sup>th</sup> April 2017, the Respondent requested the Applicant for its views on the remuneration and benefits payable to state officers serving in the 12<sup>th</sup> Parliament and according to the letter, the views were to be received by 4<sup>th</sup> May, 2017. Accordingly, the Applicant prepared and submitted a Memorandum on the desired new remuneration and benefits structure for state officers in Parliament in which Memorandum, the Applicant raised the following issues, among others, with the Respondent: -

- a) The *Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013* require the Respondent to undertake a review of the remuneration and benefits of State and Public officers every 4 years;
- b) Regulation 6(1)(b) of the *Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013* provides that a comprehensive job evaluation shall be undertaken prior to a review of remuneration;
- c) The Applicant expected the Respondent to undertake a comprehensive job evaluation exercise of the State Officers in Parliament and the rest of the public service prior to the review in accordance with the law;
- d) The review should be guided by the law and international best practices and conventions; and
- e) campaigns and nominations had started and most Members of the 12<sup>th</sup> Parliament had already relinquished their positions in civil service and/or the private sector and ventured into politics on the legitimate expectation that the remuneration and benefits of Members of the 12<sup>th</sup> Parliament shall, at the very least, be similar to the remuneration and benefits payable to Members of the 11<sup>th</sup> Parliament

9. However, on 7<sup>th</sup> July 2017, the Respondent Commission caused to be published *Gazette Notice No. 6517* in the Kenya Gazette dated July, 2017 purporting to review and set the remuneration and benefits for state officers in the Senate and the National Assembly serving in the 12<sup>th</sup> Parliament, the overall effect of which are as set out below: -

- a) The remuneration for state officers serving in Parliament have been reduced and set far below those of the 11<sup>th</sup> parliament and those of coordinate state officers serving in the Executive, Constitutional Commissions and Independent Offices;
- b) The monthly gross remuneration package has been fixed for the entire term of the Office of the state officer serving in the 12<sup>th</sup> Parliament, taking away the state officers’ right to annual salary increment contrary to *Regulation 15 of the Salaries and Remuneration Commission (Remuneration & Benefits of State & Public Officers) Regulations, 2013*;
- c) *Special Parliamentary Duty Allowance* to members of Parliament with additional responsibilities: Leader of Majority Party, Leader of Minority Party, Chairperson of Committees, Members of the Speakers Panel, Chief Whips and Minority Whips previously set at a maximum of KSh.150,000 per month has been abolished;
- d) *Mortgage Benefit*: Has been reduced to Kshs.20 Million for the 12<sup>th</sup> Parliament, from a maximum of Kshs.40 Million for the Speaker and Kshs.35 Million for Members of Parliament in the 11<sup>th</sup> Parliament. The same has been retained for coordinate state officers serving in the Executive arm, Commissioners and holders of independent offices at Ksh.35 Million. The amount was set at

the previous rate to enable the state officers acquire residential housing at places that are safe to their families and to public servants including security personal attached to them.

e) *Reimbursable Mileage allowance* paid to Members of Parliament to reimburse for journeys between Nairobi and their Constituencies at AA rates has been abolished. Instead the Respondent Commission has sought to establish a fixed monthly transport allowance payable through payroll.

f) *Car grant*: has been abolished without alternative means of transport being provided to the affected state officers to perform their public duties and functions.

g) *Committee sitting allowances* have been reduced to KSh.8,000 per sitting for the Chairperson subject to a maximum of sixteen (16) payable sittings per month; KSh.8,000 previously paid to Vice Chairperson of Committee has been abolished, Vice Chairperson of Committees to earn same committee sitting allowances as ordinary committee members despite their additional responsibilities;

a) *Medical Benefit*: Annual medical cover provided for self, spouse and up to 4 children. The medical *ex-gratia* assistance to state officers in Parliament has been abolished contrary to best practice where an employer assists an employee who has exceeded their medical cover entitlement and the Employment Act (Number 11 of 2007).

h) *Retirement Benefit*: Service Gratuity scheme at the rate of 31% of the basic remuneration package for the term served previously granted to Members of Parliament who do not serve for more than one term has been removed; *the Parliamentary Pension Act, 2012* which only caters for Members of Parliament who serve for at least 2 terms strictly applied. Service gratuity scheme has been retained for public officers in the Executive at the rate of 31% of the basic remuneration package for the term served;

i) *Sitting Allowance for Plenary Sessions*; abolished despite the importance this plays in parliamentary operations and notwithstanding this being a matter falling with the jurisdiction of the Applicant Commission.

j) *Car Loan*: Reduced from Ksh.8 Million in the 11<sup>th</sup> Parliament to Ksh.7 Million for the 12<sup>th</sup> Parliament.

k) *Daily Subsistence Allowance*: to be paid as per Circular(s) by the Salaries and Remuneration Commission dated 10<sup>th</sup> and 18<sup>th</sup> December, 2014.

l) *Airtime*: Has been set at the rate of KSh.15,000 per month against KSh.20,000 for coordinate state officers in the Executive.

10. It was the Applicant's case that the impugned decision unlawfully seeks to vary, to their disadvantage and detriment, the remuneration and benefits payable to, or in respect of, state officers serving in Parliament, contrary to basic labour law and practice and the need to secure independence of parliament as a governance institution.

11. The Applicant asserted that Respondent has no mandate to revise or set the daily subsistence allowance/*per diem* rates payable to state officers and/or public officers serving in Parliament or in the Judiciary, this being a matter falling within the powers of the Parliamentary Service Commission and the Judicial Service Commission.

12. By abolishing and/or reducing the said facilitative allowances, the Respondent has acted *ultra vires* its lawful mandate and encroached into/ usurped the Applicant's mandate under Article 127(6) of the Constitution.

13. To the Applicant, the decision in the impugned *Gazette Notice No. 6517* published in the Kenya Gazette of 7<sup>th</sup> 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* requiring the Commission to take into account the recommendations of previous Commissions established to inquire into the matter of remuneration in the public service in seeking to reduce remuneration and benefits payable to state officers serving in the 12<sup>th</sup> Parliament. These include the Respondent's own previously established remuneration and benefits structure.

b) By seeking to reduce the remuneration of state officers serving in the 12<sup>th</sup> Parliament, 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 12<sup>th</sup> Parliament to levels far below the benefits granted to previous parliaments, 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 members of Parliament 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 12<sup>th</sup> Parliament, 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 12<sup>th</sup> Parliament, 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 12<sup>th</sup> Parliament, 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 1<sup>st</sup> 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) The Respondent Commission has violated *section 12 of the Salaries and Remuneration Act* requiring it to take into account “the recommendations of previous Commissions established to inquire into the matter of remuneration in the public service.”
- o) *By reducing Committee sitting allowances and setting allowances for Vice Chairpersons of Committees at same level as ordinary committee members despite their additional responsibilities*, the Respondent Commission has acted arbitrarily and violated the principle of “equal remuneration to persons for work of equal value;
- p) 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!
- q) *Reimbursable Mileage allowance* previously paid to Members of Parliament to reimburse for journeys between Nairobi and their Constituencies 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 public service as a Member of Parliament obligates one to operate two offices in Nairobi and in the Constituency, that the distance each member covers from Nairobi to each constituency are different and cannot be generally zoned and the exigencies of the nature of work of a member of Parliament are such that the journeys cannot be fixed and reimbursed through monthly transport allowance payable through the payroll.
- r) *By seeking to abolish the Gratuity Scheme for Members of Parliament while continuing the same to state officers in the executive*, the Respondent Commission has discriminated and effectively taken away the social security scheme for Members of Parliament who do not serve for at least 2 terms contrary to law.
- s) *Mortgage Benefit*: has been reduced to Kshs.20 Million from a maximum of Kshs.40 Million for the Speaker and Kshs.35 Million for Members of Parliament; while the same has been retained for persons serving in the Executive arm, Commissioners and holders of independent offices at sh.35 Million. This is open bias and discrimination against the law.

t) 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.

u) By seeking to abolish car grant without alternative means of transport being provided to state officers serving in Parliament while granting chauffeur driven official car and transport to state officers of equivalent or lower rank in the executive, the Respondent has discriminated against the state officers serving in Parliament and disabled them in the due performance of their functions.

v) By seeking to abolish Sitting Allowance for Plenary Sessions the Respondent failed to take into account the importance this plays in parliamentary operations and the fact that this is a matter falling within the jurisdiction of the Applicant Commission.

w) By seeking to set the remuneration payable to the Deputy Speaker above that payable to the Leader of Majority, the Respondent has violated the provisions of *Article 108(4) of the Constitution* prescribing the order of precedence in Parliament.

14. According to the applicant, 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. Therefore to the extent that the impugned gazette notice purports to reduce the remuneration and benefits payable to state officers in Parliament 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.

15. It was the Applicant's case that the decision to reduce the mortgage facility for state officers serving in the 12<sup>th</sup> Parliament from a maximum of Kshs.40 Million for the Speaker and Kshs.35 Million for Members of Parliament to Kshs.20 Million is without proper basis, was not preceded by a market survey to determine the prevailing market rates, failed to consider the justification and objectives of this facility, is discriminatory, arbitrary, unreasonable, irrational, capricious and unfair for the following reasons:

a) By way of *Gazette Notice Number 3143 published on 8<sup>th</sup> March, 2013*, the Respondent set the mortgage scheme and car loan for Members of the 11<sup>th</sup> Parliament at Kshs.20 Million and Kshs.7 Million respectively;

b) The Respondent's said decision was made after carrying out a job evaluation exercise, the findings and parameters whereof were contested by the Applicant and Members of the 11<sup>th</sup> Parliament;

c) By a *Circular dated 17<sup>th</sup> December, 2014*, the Respondent revised upwards mortgage and car loan schemes for state officers and other public officers in the Government to Kshs.40 Million and Kshs.10 Million, respectively;

d) The Applicant brought this fact to the attention of the Respondent and pointed out that the Respondent's actions were discriminatory against Members of the 11<sup>th</sup> Parliament and without any basis since the said schemes were lower than corresponding schemes set by the Respondent for coordinate state officers in the Executive and the Judiciary as well as other public officers;

e) Consequently, the Respondent increased the maximum mortgage entitlement for Members of the 11<sup>th</sup> Parliament to Kshs.40 Million for Speakers of Parliament and Kshs.35 Million for other Members of Parliament and the maximum entitlement for the car loan to Kshs.8 Million respectively;

f) This led to the enactment of the *Public Finance Management (Parliamentary Mortgage (Members) Scheme Fund) (Amendment) Regulations, 2015* and the *Public Finance Management (Parliamentary Car Loan (Members) Scheme Fund) (Amendment) Regulations, 2015* respectively on 26<sup>th</sup> August, 2015 to bring into operation the revised maximum mortgage entitlement to Kshs.40 Million for Speakers of Parliament and Kshs.35 Million for other Members of Parliament and the maximum entitlement for the car loan to Kshs.8 Million respectively;

g) The Respondent's purported action of reducing the mortgage and car loan schemes by way of a gazette notice without an amendment to the said Regulations is unreasonable and has failed to take into account relevant factors including: the relevant laws, the fact that housing cost is currently high and a reasonable house cannot be found at the said Kshs.20 Million and the need to avoid discrimination in public service.

h) The Respondent's action of reducing the mortgage and car loan schemes for Members of the 12<sup>th</sup> Parliament whilst maintaining the prevailing rates for state officers in the Executive is discriminatory against Members of the 12<sup>th</sup> Parliament, in bad faith, unreasonable, arbitrary and without proper any basis.

i) 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.

16. In any event, and without prejudice to the foregoing, the Applicant averred that having revised the mortgage and car loan schemes for Members of the 11<sup>th</sup> Parliament in the manner set out above, the Respondent was estopped from reviewing the same downwards for

Members of the 12<sup>th</sup> Parliament absent market survey on mortgage rates and fresh comprehensive job evaluation.

17. The Applicant further averred that, having first carried out a comprehensive job evaluation and market survey before revising the mortgage and car loan benefits of Members of the 11<sup>th</sup> Parliament, there was/is a legitimate expectation that the Respondent shall also carry out a similar exercise before revising the said benefits for Members of the 12<sup>th</sup> Parliament. This would have only led to an increase, as against a reduction, of the mortgage facility as the housing cost has increased overtime since 2013.

18. In seeking to lower the mortgage facility to state officers serving in the 12<sup>th</sup> Parliament, the Respondent was accused of having failed to undertake a market survey on housing costs in Nairobi where the affected state officers reside.

19. The Applicant averred further 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*.

20. By seeking to lower the remuneration of state officers serving in the 12<sup>th</sup> Parliament, the Respondent clearly failed to survey the prevailing economic situation and/or refused to appreciate that cost of living and inflation have arisen since 2013 when it set the remuneration for state officers in the 11<sup>th</sup> Parliament at the rates it now seeks to reduce. In their view, the review is also unfair and motivated by bad faith as it was undertaken when persons interested in becoming Members of Parliament 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 12<sup>th</sup> Parliament.

21. It was contended that the Respondent has purported to abolish and/or reduced the following facilitative allowances following within the rightful powers of the Applicant Commission: -

a) Purported to fix the subsistence and accommodation allowance (per diem) provided to Members of Parliament to facilitate them when they travel on official duty outside their two duty stations at the constituency/county and Parliament in Nairobi whereas this is squarely within the mandate of the Parliamentary Service Commission, the Applicant herein;

b) Purported to abolish the reimbursable mileage allowance, which said allowance serves to facilitate Members of Parliament in discharging their constitutional roles at the Constituency/County level and at the National level by enabling them travel to and from their constituencies/counties to Parliament in Nairobi. It is instructive that Members of Parliament are the only State Officers who have two official work stations: in Nairobi and their respective constituencies for members of the National Assembly and counties for members of the Senate. The oversight mandate vested in Parliament also obligates state officers serving in Parliament to travel across the country.

c) The car grant which the Respondent Commission has purported to abolish is a facilitative allowance previously agreed and granted to state officers serving in Parliament as it is cheaper than providing and maintaining official cars to Members of Parliament due to the distance and rugged terrains their engagements force them to travel to and from the constituency/county to Parliament in Nairobi;

d) Purported to abolish the sitting allowance for plenary sessions, reduced the sitting allowance for committee meetings and restricted the number of remunerable committee meetings to a maximum of sixteen (16) meetings per month thereby trespassing on Parliament's independence and constitutional mandate by seeking to limit parliament's free operations;

e) Purported to abolish medical *ex-gratia* assistance to Members of Parliament and their families contrary to best practice where an employer assists an employee who has exceeded their medical cover entitlement and the Employment Act (Number 11 of 2007).

22. To the Applicant, 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 Parliament, the Respondent has breached the Applicant's and Members of Parliament's right to property by way of accrued remuneration and benefits payable to Members of Parliament without 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 Parliament, the Respondent has breached the Applicant'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 Members of Parliament and state officers in Parliament 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 Parliament 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 2<sup>nd</sup> 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; and

f) To the extent that the impugned gazette notice purports to reduce and/or abolish the car grant hitherto payable to state officers serving in Parliament whilst providing the chauffeured and state maintained cars to other state officers in coordinate or lower ranks, it is discriminatory and contrary to the provisions of Article 27(1), (2) and (4) of the Constitution.

23. The Applicant's case was that the remuneration and benefits structure published through the impugned gazette notice is way below the remuneration and benefits structure of the 11<sup>th</sup> Parliament and has, in certain instances, completely abolished certain critical benefits and facilitative allowances hitherto payable to state officers serving in Parliament in Kenya and across the world, to enable them duly discharge their constitutional mandate. To it, 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.

24. The applicant's position was 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* 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.

25. It case was that 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 Parliament 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. Further, the Respondent has through the impugned gazette notice made determinations that are in excess of its jurisdiction and mandate and usurped the exclusive jurisdiction and mandate of the Applicant. In addition, the decision of the Respondent has breached a wide spectrum of the Applicant and Members of Parliament's fundamental rights and freedoms, including but not limited to those already set out above.

26. It was reiterated that the decision of the Respondent to reduce and/or abolish the remuneration and benefits of state officers in Parliament and retain similar remuneration and benefits of other state officers is discriminatory and contrary to Article 27 of the Constitution.

27. The Applicant in a supplementary affidavit deposed that in response to the *ex-parte* Applicant's letter dated 17<sup>th</sup> October 2017, on 21<sup>st</sup> December, 2017, the *ex-parte* Applicant received a letter from the Respondent Commission dated 11<sup>th</sup> December, 2017. By this letter, the Respondent Commission revised the impugned Kenya Gazette Notice No. 6517 dated 7<sup>th</sup> July, 2017 as follows: -

- a) The Respondent Commission granted monthly *Transport Facilitation Allowance* of Kshs.120,000 to affected state officers;
- b) Varied Gazette Notice No.6517 of 7<sup>th</sup> July, 2017 and reinstated Responsibility Allowance payable as *Special Parliamentary Duty Allowance* for added responsibilities up to a maximum of Kshs.150,000/= per month;
- c) Retained Gazette Notice No.6517 of 7<sup>th</sup> July, 2017 on Sitting Allowance for *Plenary* and *Committee Sittings*;
- d) Varied Gazette Notice No.6517 of 7<sup>th</sup> July, 2017 to cover up to 5 children as provided vide letter *Ref No: SRC/TS/PASC/3/35/3* dated 23<sup>rd</sup> March, 2016;
- e) Reinstated *Medical Ex Gratia* for State Officers serving in Parliament who exhaust their medical cover on a case by case basis;
- f) Retained Gazette Notice No.6517 of 7<sup>th</sup> July, 2017 on *Service Gratuity and Pension Benefits*;
- g) Reinstated *Mortgage* and *Car Loan* as provided through letter Ref. No: SRC/TS/PASXC/3/35/3 of 12<sup>th</sup> June, 2015;
- h) Reinstated *Daily Subsistence Allowance* as per SRC Circulars Ref. No: SRC/ADM/CIR/1/13 Vol. III (126) dated 10<sup>th</sup> December, 2014 and Ref. No. SRC/ADM/CIR/1/13/Vol. III (127) dated 18<sup>TH</sup> December, 2014.
- i) Retained *Car Maintenance and Mileage Allowances* as published in Gazette Notice No. 6517 of 7<sup>th</sup> July, 2017.
- j) Varied Gazette Notice No.6517 of 7<sup>th</sup> July, 2017 on Airtime provisions to Kshs.25,000/= for Speakers and Kshs.15,000/= for Members of the Applicant Commission.

28. The said letter, it was averred was first received at the office of the Speaker of the National Assembly on 15<sup>th</sup> December 2017 and at the office of the *ex-parte* Applicant on 21<sup>st</sup> December 2017, both dates being after the filing of the Application for Judicial Review herein. It was therefore the applicant's case that the Respondent had therefore taken two (2) months to respond to the *ex-parte* Applicant's letter.

### **Respondent's Case**

29. The application was however opposed by the Respondent.

30. While taking no issue with no issue with the descriptive and the respective Constitutional and statutory provisions relied upon by the Applicant and the chronology of events set out therein the Respondent however averred that:

- a. In the year 2013, the Respondent duly recommended a remuneration structure for Members of Parliament for the period 2013-2017, and duly informed all concerned parties that the four year review cycle would commence on 1<sup>st</sup> July 2013.
- b. During the said period the Members of Parliament 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 in the Parliamentary arm of Government, within the four year cycle as by law required.
- 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 7<sup>th</sup> July Gazette Notice was published.
- e. 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.
- f. The Respondent also expressly invited the Applicant to present its proposals on the mooted review and exhibited a copy of the said invitation letter.
- g. The Applicant duly responded, with its proposals on the mooted Review and the response was annexed.
- h. 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.
- i. Being dissatisfied with the said proposals, the Applicant communicated its views to the Respondent vide its letter dated 18<sup>th</sup> August 2017 and in response thereto the Respondent required further justification of the Applicant's position to which the Applicant duly responded with its justification of its proposals on the 17<sup>th</sup> October 2017.
- j. After deliberating on, and considering the said proposals by the Applicant, and their justification, the Respondent acceded to some of the Applicant's request and vide its letter dated 11<sup>th</sup> December 2017, communicated the same to the Applicant on the 13<sup>th</sup> of December 2015. However, this communication of the 11<sup>th</sup> December has not been communicated to the court.
- k. It was therefore the Respondent's position that 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.
- l. 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 in support of this position the Respondent attached a copy of the relevant report.

31. The Respondent therefore denied the allegation that the Members of the Current Parliament were unaware of the prescribed remuneration given that the same was duly published in the Kenya Gazette on the 7<sup>th</sup> of July 2017, prior to the elections.

32. As regards the allegation that the Respondent had not carried out a Job evaluation exercise, the Respondent responded that:

- 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. In the said Job evaluation the Deputy Speaker and the Leaders of the Majority and Minority parties were equally remunerated.
- d. Subsequently there has been no change in the hierarchical positions of Members of Parliament within the Applicant, or a change in their Constitutional and or Statutory powers to necessitate a fresh Job evaluation.
- e. However in the 2017 Review, the same has been adjusted to conform with the hierarchy set out in S. 108(4) of the Constitution, where the Deputy Speaker role was graded above that of the Leader of the Majority and Minority in Parliament.
- f. It is not true that fresh Offices, which include the Office of the Leaders of the Majority and Minority Parties, Deputy Leaders of Majority and Minority Parties, and Chief Whips were created under the Parliamentary Standing Orders, to necessitate a fresh Job evaluation.

g. The Job evaluation carried out in 2013, and the subsequent re-evaluation in 2017 duly took into account these positions, which were in existence then.

33. It was disclosed that in the various substantive and vibrant exchange between the parties herein, the following issues were deliberated upon:

- a. Whether Car grant, mileage allowance and special responsibility allowance are facilitative allowances falling within the Applicants exclusive mandate.
- b. Salary payable to the Members of Parliament.
- c. The sitting Allowance payable to the Members of Parliament.
- d. Car maintenance and Mileage allowances for Members of Parliament.
- e. Car grants previously granted to the Members of Parliament.
- f. Mortgage and Car Loan entitlements previously enjoyed by Members of Parliament.
- g. Per diem rates payable to Members of Parliament.
- h. Ex gratia medical assistance to Members of Parliament.
- i. Change in the Medical scheme
- j. Pension and Gratuity.

34. In deliberating on the following issues, and in arriving at the recommendations that it did, the Respondent duly considered the law, the best market practices, economic conditions, best international practices, fair administrative practices, the Rights of the Applicants employees, the economic conditions prevalent in the Country, the effect of the wage bill on the Government's Revenues, the Public Interest and the rules of Natural Justice.

35. As regards the issues whether Car grant, mileage allowance and special responsibility allowance are facilitative allowances falling within the Applicants exclusive mandate, the Respondent's position was that all these so-called facilitative allowances constitute the Members of Parliament's remuneration, which the Respondent herein is constitutionally mandated to regulate and that any statute, or regulation relied upon by the Applicant to curtail this mandate reserved for the Respondent, is to that extent a nullity.

36. As regards the salary payable to the Members of Parliament, the Respondent averred that under the 2013-2017 structure the remuneration of Parliamentary State officers was set as follows:

<b>State officers</b>	<b>En try lev el (20 13)</b>	<b>M a x p a y</b>
Speaker of National Assembly /Speakers of the senator	99 0,0 00	1, 3 2 0, 0 0 0
County Governor /Deputy Speaker of National Assembly /Deputy Speaker of the Senate/Leader of Majority Party/Cabinet Secretary /Attorney General /Secretary to the Cabinet /Chief of Defence Forces/Chairperson –IEBC/Chairperson –CIC/Auditor General	79 2,0 00	1, 0 5 6, 0 0 0
Leader of Minority Party	76 5,5 02	1, 0 2 0, 6

		70
Member of National Assembly/Member of Senate /Chairperson of Committees/Members of Speakers panel/Chief Whips/Minority Whips/registrar of Political parties/Vice Chairperson –Constitutional Commissions/Member –Constitutional Commissions /Deputy Inspector General _KP/Deputy Inspector General –AP	53,2500	71000

37. However the same was revised in 2017 as follows:

State Officer	Monthly Gross Remuneration Package
Speaker of the Senate Speaker of the National Assembly	1,155,000
Deputy speaker of the Senate Deputy Speaker of the National Assembly	924,000
Leader of Majority Party, The Senate Leader of Majority Party , The National Assembly Leader of Minority Party , The senate Leader of Minority Party, he National Assembly	765,188
Member of the Senate Member of the National Assembly	621,250

38. According to the Respondent, whereas under the 2013-2017 structure, there was provision for an annual increment, under the 2017 structure the same is fixed. To the Respondent, under Regulation 15 of the **Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations 2013**, annual increments are to be based on productivity and performance, the effective date being determined by the Policy of each Public Service organization, to be awarded after one year of service. Accordingly, the proposition by the Applicant for an annual increment is at this stage premature. Further Members of Parliament are Constitutionally in Office for a five year term, the lapse of which entitles them to seek re-election, and those elected, or re-elected commence new five year terms. It was therefore the Respondent's case that the proposition by the Applicant that their salaries have been reduced is erroneous, since under the reviewed salary structure the entry salary for the first year is higher than the previous entry salary, which will be subjected to an annual review under the provisions of Regulation 15 of the **Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations 2013**.

39. The Respondent noted that previously (prior to the 11<sup>th</sup> Parliament) Members of Parliament were remunerated, not through fixed salaries as is the case now, but through Sitting allowances.

40. As regards the sitting Allowance payable to the Members of Parliament, it was reiterated that in the Parliaments prior to the 11<sup>th</sup> Parliament, Members of Parliament did not have a salary but were remunerated through sitting allowances. Given that the Members of Parliament were now being remunerated comparably with other State Officers of equal stature, this eliminated the need for sitting allowances for the Plenary Sessions. However the sitting allowances for House Committees has been retained, at rates duly determined by the Respondent herein in keeping with its constitutional and statutory mandate, having taken into consideration the relevant factors.

41. With respect to Car maintenance and Mileage allowances for Members of Parliament, it was averred that this was proposed by the Applicant to enable the Members of Parliament maintain their vehicles and to enable them travel to their relevant Constituencies, and the Applicants recommendation was a rate of Kes. 356,525/= per month, (Capped at the AA rate of Kes. 109.8 X 750 Km X 52 weeks divided by 12 months). These was as previously provided for the 2013-2017 period. For the 2017 Review period the Respondent recommended a flat rate to be paid through pay-roll as follows;

Z o n e	One Way Distance Kilometres	Maximum Return Journey (Kilometres)	Monthly Maximum Transport Allowance for Return Journey (Kshs.)
A	Up to 375	750	266,663

B	Up to 500	1,000	355,550
C	Up to 625	1,250	444,438
D	Up to 750	1,500	533,325
E	751 and above	-	738,833

42. According to the Respondent, this took into account the various distances covered by the respective Members of Parliament as well as the Automobile Association average running rates for a new 3000 CC 4X4 vehicle costing Kes. 7,500,000/=, being the sum of Kes. 82.05 per Kilometre. Further this obviated the challenges of administering reimbursable mileage allowance for Members of Parliament, which previously had been the subject of abuse, and had led to previous convictions.

43. Dealing with the issue of Car grants previously granted to the Members of Parliament, it was averred that previously Members of Parliament were given car grants to purchase their vehicles for use. However, the Applicant proposed that the Members of Parliament be given a Car grant of Kes. 5,000,000, or in the alternative a Car allowance of Kes. 120,000 a month. Given that they were also entitled to Car Loans of Kes. 7,000,000 to purchase their vehicles, it was the Respondent's position that it no longer became necessary to issue them with Car grants and that this was arrived at after considering the relevant factors including the Government wage bill and the best International practices. In addition to affording them car loans the Respondent has recommended that they be allowed a Transport facilitation allowance of Kes. 120,000/= a month, in keeping with the Applicant's proposal, a fact concealed from the Court.

44. As regards Mortgage and Car Loan entitlements previously enjoyed by Members of Parliament, it was disclosed that the Applicant had recommended that the Respondent reinstates the previous rates for the mortgage and car loan be retained as follows:

**Mortgage**

**Car Loan**

Speaker of Parliament- Kes. 40,000,000/- Kes. 10,000,000/-

Member of Parliament – Kes. 35,000,000/- Kes. 8,000,000/-

45. All these loans are payable within the term of Parliament and tied to salary deductions. However, the Respondent considered ability to repay the car loan and mortgage within the five (5) year contract period, and found that it would be impossible to recover the said sums during the said period. Further, the Respondent considered the provisions of the Section 19 (3) of the **Employment Act, 2007** which requires that total deductions should not exceed two-thirds of employee's wages i.e. employers should pay at least one-third of employee's wage each month into a local bank account or cash as advised by the employee and the request by the Applicant was granted to maintain the 2013 benefit.

46. Regarding per diem rates payable to Members of Parliament, it was averred that the Applicants proposal was that the determination of rates for facilitative benefits such as Per Diem rate for Members of Parliament while on official, domestic or foreign travel is not the responsibility of the Respondent, and that it is the responsibility of Parliamentary Service Commission. However, the Respondent maintained that the Constitution of Kenya, 2010 mandates the Respondent to set and regularly review remuneration and benefits (both facilitative and remunerative) for all State Officers and that the Respondent is required to maintain equity and fairness in setting remuneration and benefits for State Officers which cannot be attained if employers in each public institution sets their own per diem rates.

47. With respect to ex gratia medical assistance to Members of Parliament, the Applicants sought the Respondent clarified that it may continue granting medical ex-gratia assistance on a case by case basis to Members of Parliament who shall have exhausted their medical cover entitlements but still required further medical treatment, as was the case in the previous recommendation of for the period 2013-2017. However, this is an administrative matter to that can be handled by the Applicant on a case by case basis, and could not have formed the basis of the Respondent's recommendations.

48. Dealing with **change in the Medical scheme**, the Applicant proposed to reinstate the provisions of the scheme that were in existence in the previous term as follows:

Optical Benefit –Kshs. 100,000

Dental Benefit – Kshs. 100,000

Number of children – Five (5)

49. However, in its 2017 proposal, the Respondent proposed a reduction of the number of children to be under the medical cover of the principal insured from 5 children to 4 children and reduction of optical and dental limit from Kshs. 100,000 each to Kshs. 75,000 each. However, this number of was reinstated in order to align the said Medical Cover in line with the other State Officers of similar stature.

50. With respect to pension and gratuity, the Applicant's proposal sought to have Members of Parliament given service gratuity on the following terms:

i. For Members who serve only one term of Parliament and are not re-elected shall be entitled to a service gratuity of 31% of basic pay at the end of their term of Parliament as well as a refund of their contributions without any interest.

ii. For Members of Parliament who serve more than one term shall be entitled to pension as set out in the **Parliamentary Pensions Act**.

51. However, in its recommendation of July 2017, the Respondent left all matters pertaining Pension benefits for Legislatures to be administered by Parliamentary Service Commission, guided by the **Parliamentary Pensions Act, 2012**.

52. The Respondent's case was therefore that the Application as filed is misconceived and an abuse of process and that further that the Applicant has not been candid in this matter, has concealed the following material facts, by reason of which this is not a proper case for the exercise of the Court's discretion as prayed for.

53. 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 the powers and functions of the Respondent.

54. 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.

55. 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.

56. According to the Respondent, in 2013 and pursuant to Respondent's constitutional mandate, the Respondent revised the salaries, allowances and other benefits of Members of the 11<sup>th</sup> Parliament vide Gazette Notice 2886. 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*, the National Assembly had, 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.

57. 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 11<sup>th</sup> Parliament was hence remunerated as per the 2013 Gazette Notices.

58. The Respondent therefore was of the view that the Applicants in the instant suit should not purport to challenge the same Gazette Notices in the instant suit as the decision in Petition 227 of 2013 was not appealed against or reviewed as 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 parliament would institute suit challenging the same. In any event the Applicant has not sought to quash the above Gazette Notice.

59. According to the Respondent, under the Constitution 2010, its mandate extends to all state officers, who are defined by Article 260 as persons 'holding a state office' including the members of parliament. See **Okiya Omtatah Okoiti & 3 others vs. Attorney General & 5 others (supra)**. As such, in reviewing the members of parliament salaries and benefits the Respondent acted within its constitutional mandate in arriving in the decision contained in Gazette Notice No. 6517 published on 7/7/2017 and not Ultra-vires as alleged.

60. Regarding the allegation that the Respondent in setting salaries and benefits for members of parliament 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."***

61. 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.

62. 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 Applicant in effect wants double benefit from the 2013 salary structure and 2017 salary structure which was the outcome of many engagements between applicant and respondent leading to 2017 Gazette Notice and that this is aggrandizement by the Applicant and ought not to be allowed. In support of its case the Respondent relied on Judicial Review No 43 of 2016 - **Imaran Limited & 5 Others vs. Central Bank of Kenya & 5 Others [2016] eKLR.**

63. 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.**

64. 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.**

65. 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. However, the Applicants allege that they supervise cabinet secretaries and hence ought to be remunerated higher. To this the Respondent submitted that the Applicants are for all intents and purposes employees of Kenyan citizens and earn a lot more than the average Kenyan.

66. It was 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.

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

68. The Respondent lamented that Members of Parliament have made every effort to retain the power to determine the remuneration of Members of Parliament, to circumvent the Salaries and Remuneration Commission, and its Constitutional mandate as follows:

- a) By passing resolution nullifying the Respondent in Gazette Notices 2885, 2886, 2887 and 2888 in 2013 which decision was declared unconstitutional as discussed above.
- b) Enacting the ***National Assembly Remuneration Act*** Cap 5 which purported to usurp SRC mandate but was declared unconstitutional.
- c) It is imperative to note that there is pending ***Parliamentary Service Bill 2018*** in which Clause 33 purports to grant the Parliamentary Service Commission power to determine remuneration of employees of the Parliamentary Service Commission in a bid to circumvent the SRC and its Constitutional Mandate.
- d) By initiating a motion seeking to form a tribunal for the removal of the SRC commissioners which was designed to intimidate the SRC, which decision would not auger well with the constitutional democracy and independence of SRC as stipulated in Constitution.
- e) 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.**
- f) Further, the parliament through the ***Constitutional Amendment Bill of 2013*** sought to amend Article 260 by excluding themselves as being state officers and enable them determine their salaries, which formed the subject of litigation by Commission for

69. The Respondents submitted that the Constitution 2010 is the Supreme law in Kenya and any other law which is inconsistent to the Constitution is void in accordance with Article 2 of the Constitution. The Constitution created a new framework and granted the SRC mandate to determine state officer's remuneration.

70. It was reiterated that whereas judicial review is strictly limited to a review of the procedure of a public body and not the merits of the decision, the Applicants in the instant suit seeks for this Honourable Court to delve into the merits of the decision of SRC and therefore this Honourable Court ought to decline from sitting as an appellate court from the decision of the SRC. While the Applicants allege that the Respondent has breached Constitution and statutory provisions in arriving at their remuneration and benefits, the Applicant has not provided any evidence to show that the Applicant breached the Constitution or statutory provisions. The Applicant has also not availed any evidence to show that the Respondent acted outside its Constitutional mandate or never gave them a fair hearing or that the Respondent never took into consideration all the matters it is enjoined to do in law. In this respect the Respondent relied on **Okiya Omtatah Okiiti & 3 Others vs. Attorney General & 5 Others** (supra).

71. The Respondents submitted that in setting state officers' salaries and arriving the decision contained in Gazette Notice No. 6517 published on 7/7/2017 SRC was performing its Constitutional mandate and relied on amongst others **Chief Constable of the North Wales Police vs. Evans (1982) 1 WLR 1155** where court held that:

72. According to the Respondent, since the 2013 Gazette Notices have lapsed, the Applicants' contention that they ought to be remunerated as per the 2013 Gazette Notice which was for the period between 2012-2017 cannot hold. It was therefore submitted that 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. It was noted that 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.

73. According to the Respondent, the Applicants cannot peg their remuneration on the 11<sup>th</sup> Parliament as the term of the 11<sup>th</sup> parliament came to an end. It was submitted that Members of the 12<sup>th</sup> Parliament came into office by virtue of elections held on 8<sup>th</sup> August 2017, are new employees and had contested their seats knowing of the remuneration rates as per the Gazette Notice No. No. 6517 published on 7/7/2017.

74. On the issue whether the Respondent is not properly constituted to authorise the deponent of the Affidavit, the Respondent responded as follows:

- a) Article 253 of the Constitution 2010 incorporates the Commission a body corporate with perpetual succession and a seal; and is capable of suing and being sued in its corporate name.
- b) The Respondent has powers as a body corporate under section 3 of the ***Salaries and Remuneration Act 2011***, and can do or perform all such other things or acts for the proper discharge of its functions under the Constitution and this Act as may lawfully be done or performed by a body corporate.
- c) The above indicates that it is capable of suing and being sued as a body corporate.
- d) The Commission as a body corporate capable of suing and being sued, it is an autonomous legal unit/person with perpetual succession and like other body corporate, the Commission has a separate legal personality and continues to exist independent of any human management or governance.
- e) Further, section 53 ***Interpretation and General Provisions Act (Chapter 2 of the Laws of Kenya)*** stipulate that Power of board, etc., not affected by vacancy as follows:

***“Where by or under a written law a board, commission, committee or similar body, whether corporate or un-incorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by— (a) a vacancy in the membership thereof; or (b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof”.***

In this regard the Respondent relied on **Thuita Mwangi & 2 others vs. Ethics & Anti-Corruption Commission & 3 others [2013] eKLR and Ruth Muganda vs. Kenya Anti-Corruption Commission and Director of Public Prosecutions Nairobi HC Misc. Crim. Appl. No. 288 of 2012.**

- f) It was therefore submitted that the CEO had authority to respond to the suit as the Respondents secretariat has a duty to mitigate any possible loss including defending such a suit.
- g) To the Respondent, public interest requires that the Respondent has a duty to prevent loss of public funds and failure to appear in this matter is likely to result to aggrandizement and loss of public funds which fund once paid out there is no likelihood of recovering.
- h) There is no law prohibiting the secretariat from Defending the suit.

i) If such was the case, the instant suit ought to be stayed pending such appointment of commissioners.

j) The Applicant has since obtained stay orders which orders if not dealt with at the substantive stage will lead to loss of public funds which may be irrecoverable.

75. In conclusion, it was submitted that the Respondent has demonstrated that it has a constitutional mandate to set, review the salaries and remuneration of the Applicants and that it has demonstrated that it substantially engaged the Applicants before during and after reviewing their salaries and coming up with the Decision in Gazette Notice No. 6517 published on 7/7/2017. Further, the Respondent has demonstrated that it has not breached the constitution or statutory provisions as alleged or at all and that it was merely performing its constitutional mandate and has demonstrated that 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. To the Respondent, this Application is an attempt by the Applicant to enrich and aggrandize and misuse public funds contrary to the spirit of the Constitution.

76. The Respondent therefore prayed that the Applicants Notice of motion be dismissed with cost to the Respondents since the Members of Parliament have made every effort to retain the power to determine the remuneration of Members of Parliament, to circumvent the Salaries and Remuneration Commission, and its Constitutional mandate.

### **The 2<sup>nd</sup> Interested Party's Case**

77. The 2<sup>nd</sup> Interested Party, the **Law Society of Kenya**, deposed that from the correspondences between the Applicant and the Respondent, the Public input and the stakeholders' views, it was evident that the parties fully engaged each other for a long time before the subject structure was gazetted. Further, the documents disclose that the Respondent took into account international best practices and the national wage bill before arriving at the decision.

78. It was the 2<sup>nd</sup> interested party's position that the Respondent acted within its constitutional and statutory mandate in arriving at the remuneration structure complained of.

79. It was the 2<sup>nd</sup> interested party's case that the Applicant employed clever rhetoric to purport that it is complaining about the process whereas in substance it was complaining about the merits of the decision. Accordingly, the 2<sup>nd</sup> interested party's position was that the application does not meet the threshold of judicial review and this Court has no jurisdiction to entertain the same.

80. In its submissions, the 2<sup>nd</sup> Interested Party, averred that the remedy of Judicial Review is not concerned with at the merits or correctness of the decision being challenged but is concerned with the process of arriving at the decision. Accordingly, the process must conform to the principles of natural justice in that the affected Party must be informed that a decision affecting him (whether positively or negatively) may be taken and must be given details of the matter at hand. He must be afforded a hearing by way of a response to the same and must be given relevant material presented by all parties concerned and must be allowed to respond to such materials.

81. Further, the process must not be tainted with impropriety, arbitrariness and capriciousness and must not be based extraneous considerations and it must not exclude consideration of relevant factors.

82. However, once the above principles are met in processing the impugned decision then court has no jurisdiction to entertain the judicial review application because there is nothing to be reviewed.

83. In the 2<sup>nd</sup> Interested Party's view, looking at the annexures placed before this court by the both the Applicant and the Respondent it is evident that before the Respondent made the impugned decision it engaged very extensively. It informed the Applicant of the matter being considered and that it was likely to affect the Applicant and its members. The annexures are replete with correspondence exchanged, emails and minutes of meetings. The Respondent also invited public participation and received memorandum from various stakeholders including civil society organizations and members of the public. The Respondent engaged the Applicant once again before making the decision. To the 2<sup>nd</sup> Interested Party, the deliberations were extensive and took a considerable period of time from March – July 2017.

84. It was therefore submitted that the process met the legal principles enumerated above as the Applicant was afforded a fair hearing and the process was not tainted with illegality, impropriety and irrationality. Further, it was not arbitrary or capricious but adhered to the requirements of the principles of natural justice and also complied with the requirements of ***Fair Administrative Actions under Article 47 of the Constitution and the Fair Administrative Actions Act.***

85. It was therefore submitted that this court has no jurisdiction to entertain this application and must "***down its tools***" by dismissing the application.

86. According to the 2<sup>nd</sup> Interested Party, the Applicant has come up with the hair-splitting ingenious claim that the Respondent's mandate is limited to "***salaries***" And that "***facilitative allowances***" and "***mileage claims***" are welfare matters under the Applicant's mandate. However, the exclusive and unlimited mandate of the Respondent to determine all matters relating to the salaries and remuneration of all state and public officers was settled by this Honourable Court in Nairobi H.C Petition No. 281 of 2013 - **Law Society of Kenya vs. The National Assembly and 5 Others.**

87. It was therefore contended that it cannot be fair for the Applicant to disrupt settled questions of law since the Respondent under Article 230 of the Constitution is mandated to regularly review the "***remuneration***" and "***benefits***" of all state officers. It is therefore stretching imagination to claim that allowances and mileage claims are not benefits.

88. According to the 2<sup>nd</sup> Interested Party, this is essentially a labour dispute where the Applicant and its members are asking for “more”. It happens all the time in industrial disputes. That is why international law has created special Tribunals to arbitrate such disputes. The parties first engage and if they fail to agree they move to Labour Courts for arbitration. Kenya is replete with such disputes, strikes and labour litigation.

89. The 2<sup>nd</sup> Interested Party averred that even at the point of filing this suit the Applicant was on the right path of negotiating with the Respondent. The Applicant however abruptly abandoned the discussions and rushed to this court-the wrong court. Once again in view of this matter being plainly a labour dispute it was submitted that this honourable court has no jurisdiction to entertain the Application herein and the same should be dismissed.

90. In conclusion the 2<sup>nd</sup> Interested Party contended that it had demonstrated:-

- 1) That the Application is premised upon the misguided notion that the process of arriving at the impugned decision was erroneous. However the opposite is true. Due process was observed to the letter with an abundance of caution.
- 2) That the Application is founded on the mistaken premise that the Applicant has over stretched its mandate and usurped the purported self-created mandate of the Applicant. That is simply the wrong interpretation of the constitution. The Respondent is properly within its constitutional mandate.
- 3) That the Applicant is in the wrong court with the wrong grievance. It should direct its grievances to the Labour Relations and Employment Court.
- 4) That as stated in our affidavit this honourable court merely suspended the impugned Gazette Notice. It made no further orders. If therefore the Applicant purported to resort to a revoked none existent document to make any payments to members of parliament it has done so illegally and without a court order. All such monies paid illegally must be recovered either from members of the Applicant or members of parliament.

91. It was therefore submitted that the Application is for dismissal with costs.

### **3<sup>rd</sup> Interested Party's Case**

92. The 3<sup>rd</sup> interested party herein, **Hon. Benson Mutura**, was a Member of Parliament in the immediate past Parliament.

93. According to him in setting the remuneration of state offices vide the Gazette Notices 6516, 6517, 6518 and 6519 dated 7<sup>th</sup> July, 2017, the Respondent took into account the principles set out in Article 230(5) of the Constitution. It was therefore his position that there can be no legal basis upon which any Gazette Notice contained in the special issue of the Kenya Gazette of 7<sup>th</sup> July, 2017 can be quashed or otherwise invalidated.

94. It was his view that the Applicant is concerned and aggrieved by the substance and merit of the Gazette Notice itself, which falls outside the jurisdiction of this Court.

95. The rest of the averments were however devoted to the mileage allowances payable to Members of Parliament.

### **Determinations**

96. I have considered the issues raised in this application. In my view it is important to revisit the parameters or purview of judicial review jurisdiction.

97. In determining this matter, this Court must be alive to the parameters of its 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...”**

98. 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.”**

99. 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.

100. 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.

101. 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.

102. 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.

103. 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**.

104. 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**.

105. 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**.

106. 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) 1 WLR 1155**.

107. 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.

108. 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.”

109. 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*, 5<sup>th</sup> 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.”

110. 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.”

111. 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 taken 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.”

112. 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 of 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 v 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.”

113. 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 precepts 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.”

114. 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.”

115. 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.

116. 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.”

117. 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 Okiiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR* that:

“There was extensive submission by the 2<sup>nd</sup> and 4<sup>th</sup> 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.”

118. 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.

119. That the Respondent has the power to determine the remuneration and benefits of the Members of Parliament 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 11<sup>th</sup> Parliament and any other Parliament coming into existence thereafter can only be determined by the SRC.”**

120. 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 1<sup>st</sup> 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.”**

121. Article 230(4) of the Constitution is clear in its terms and brooks no ambiguity. It provides that:

**(4) The powers and functions of the Salaries and Remuneration Commission shall be to—**

**(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.**

122. 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 the Members of Parliament on whose behalf this petition is filed by the Applicant herein. Unless that provision is amended, the applicants 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 those whose remunerations and benefits are subject to the mandate of the Respondent. Whereas the applicants and the State Officers whose remuneration are subject to the mandate of the SRC are, in the exercise of their freedom of expression, entitled to grit their teeth, express their sentiments atop the hills and down the valleys, at the end of the day they have only one option: to lick their wounds and adhere to the said decision. As long as the law stays as it is now any attempt to strip the Respondent of its Constitutional mandate is bound to suffer the same fate as was 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.

123. 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 2<sup>nd</sup> 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 than the process”.**

124. 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.

125. 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.

126. 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.**

127. 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.

128. 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.**

129. I however disagree with the Respondent's contention that as a result of the said decision, the issues raised herein are *res judicata*. In that case the Court was dealing with the constitutionality of the decision of the National Assembly of purporting to annul the Gazette Notices issued by the SRC on 1<sup>st</sup> March, 2013. The instant application seeks this Court's determination as to whether the Respondent's decision contained in *Gazette Notice No.6517* published on 7<sup>th</sup> July, 2017 is lawful.

130. 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 on 1<sup>st</sup> 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*. It is also not disputed that by a letter dated 27<sup>th</sup> April 2017, the Respondent requested the Applicant for its views on the remuneration and benefits payable to state officers serving in the 12<sup>th</sup> Parliament and according to the letter, the views were to be received by 4<sup>th</sup> May, 2017 and that on 7<sup>th</sup> July 2017, the Respondent Commission caused to be published *Gazette Notice No. 6517* in the Kenya Gazette dated July, 2017 its decision to review and set the remuneration and benefits for state officers in the Senate and the National Assembly serving in the 12<sup>th</sup> Parliament.

131. 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.”**

132. 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.*

133. In this case it was the applicant's case that in seeking to review and set remuneration for state officers serving in the 12<sup>th</sup> Parliament, 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 Parliament 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.*

134. 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."**

135. 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.”**

136. 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 since Members of Parliament are Constitutionally in Office for a five year term, the lapse of which entitles them to seek re-election, and those elected, or re-elected commence new five year terms, the Applicant's contention regarding this issue is premature.

137. It was contended that in seeking to review and set remuneration for state officers serving in the 12<sup>th</sup> Parliament, 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 Applicant was afforded an opportunity to present its 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 Applicants were afforded an opportunity of being heard and were in fact heard. 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.”**

138. 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 1<sup>st</sup> 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.

139. 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.

140. 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...”**

141. 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.6517* 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.***

142. An issue was raised to the competency of the Respondent to respond to this application. First and foremost, it is the Applicant who brought the Respondent before this Court. It would be the height of injustice to bring a person to Court and then deny him an opportunity to defend itself. Secondly, it is my view that the mere fact that the Commissioners of a Constitutional Commission are not in office does not render the Commission sterile. A Constitutional Commission does not cease to exist simply because the Commissioners are not in the office, though it may be incapacitated in performing some of its functions. In my view swearing affidavit by its secretariat is not one such function that it cannot perform.

143. It was also contended that the Applicant herein has no *locus standi* to institute these proceedings. However, Article 22(1) and (2) of the Constitution provides that:

**(1) Every person has the right to institute court proceedings**

*claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.*

*(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*

*(a) a person acting on behalf of another person who cannot act in their own name;*

*(b) a person acting as a member of, or in the interest of, a group or class of persons;*

*(c) a person acting in the public interest; or*

*(d) an association acting in the interest of one or more of its*

*members.*

144. Article 258 of the Constitution which provides as follows:

*(1) Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.*

*(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—*

*(a) a person acting on behalf of another person who cannot act in their own name;*

*(b) a person acting as a member of, or in the interest of, a group or class of persons;*

*(c) a person acting in the public interest; or*

*(d) an association acting in the interest of one or more of its members.*

145. Long before the promulgation of the current Constitution, it was held on 11<sup>th</sup> March, 1970, in *Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board* Nairobi HCMC No. 89 of 1969 [1970 EA 631; [1971] EA 289 that:

**“Section 70 of the Constitution of Kenya itself creates no rights but merely gives a list of the rights and freedoms which are protected by other sections of Chapter V of the Constitution. It may be helpful in interpreting any ambiguous expressions in later sections of Chapter V. The word “person” is defined in section 123 as including “any body of persons corporate or unincorporated. Thus, a company is a “person” within the meaning of Chapter V of the constitution which is headed “Protection of Fundamental Rights and Freedoms of the Individual” and would be entitled to all the rights and freedoms given to a “person” which it is capable of enjoying. The word “individual” can be misunderstood. It is not defined in the Constitution nor in the Interpretation and General Provisions Act (Cap 2). But the meaning of it in the context in which it is used is clear. If a right or freedom is given to a “person” and is, from its nature, capable of being enjoyed by a “corporation” then a “corporation” can claim it although it is included in the list of rights and freedoms of the individual”. The word “individual” like the word “person”, does, where the context so requires include a corporation. The word must be construed as extending, not merely to what is commonly referred to as an individual person, but to a company or corporation. Supposing the right to be given by a special Act of Parliament to a limited company, it seems impossible to suppose that they would not be within the word “individual”. “Individual” seems to be any legal person who is not the general public.”**

146. I therefore do not see any legal hindrance to the Applicant herein instituting legal proceedings in the manner it did herein.

147. Having considered the issues raised herein, while I find the other issues raised by the applicant as not being properly issues for a determination by this Court exercising its judicial review jurisdiction in light of the finding that 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 I am however satisfied that the process leading to the publication of *Gazette Notice No.6517* was not in compliance with Regulation 5 of the *Salaries and Remuneration Commission (Remuneration and Benefits of State and Public Officers) Regulations, 2013*.

148. The Respondent however lamented that Members of Parliament have made every effort to retain the power to determine the remuneration of Members of Parliament, to circumvent the Salaries and Remuneration Commission, and its Constitutional mandate by *inter alia* intimidating the Respondent Commission. As this Court has held before the holders of constitutional offices ought not to be placed in a position whereby before carrying out their constitutional mandate they have to continually keep looking over their shoulders when conducting their constitutional mandate. As this Court appreciated in *Petition 230 of 2015 - Eng. Michael Sistu Mwaura Kamau & Others vs. Ethics and Anti-Corruption Commission & Others*:

**“Under Article 249(1)(9) of the Constitution, the Commissions exist to *inter alia* protect the sovereignty of the people. This is the sovereignty decreed under Article 1(1) of the Constitution. Therefore to deliberately set out to extinguish the Commissions, otherwise than as provided under the Constitution and the law, amounts in our view to a violation of the spirit of the Constitution as it amounts to an assault on the people’s ability to protect their sovereignty. Anybody that therefore sets out to deliberately cripple a Constitutional Commission or an independent office by intimidating the Commissioners or holders of independent offices to vacate their positions must necessarily be deemed to be in breach of Article 10 of the Constitution.”**

149. I agree with the position adopted by Mwita, J in Judicial Service Commission vs. Salaries and Remuneration Commission & Another [2018] eKLR that:

**“the import of Article 249(2) of the Constitution is to the effect that constitutional commissions are independent in the execution of their mandate and should not take directions from any person or authority. That is; they are neither under the control of any person or authority in the performance of their duties and discharge of their functions nor should they receive direction in the performance of their duties...In that context, commissions and independent offices have operational, administrative, decisional and financial independence when discharging their constitutional mandate. They do not therefore seek direction or permission from any other person or authority on how they should perform their constitutional mandate. The people of Kenya, while adopting the Constitution, decided that commissions and independent offices act independently and perform their constitutional mandate to the exclusion of other organs of state, authorities or persons.”**

150. The independence of the Constitutional Commissions was appreciated by the Supreme Court in Re The matter of Interim Independent Electoral Commission [2011] eKLR by stating:

**[59] It is a matter of which we take judicial notice, that the real purpose of the “independence clause”, with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as ‘people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the “independence clause”.**

151. To attain the said independence, the Supreme Court expressed itself in Communication Commission of Kenya & 5 Others vs. Royal Media Services limited & 5 Others [2014] eKLR as follows:

**“[I]ndependence’ is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance.**

**“How is the shield of independence to be attained” In a number of ways. The main safeguard is the Constitution and the law. Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain ‘independence’ in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body. However, none of these ‘other safeguards’ can singly guarantee ‘independence’. It takes a combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence.”**

152. In my view the decision by Kenyans to entrench the independence of the Constitutional Commissions in the Constitution was informed by the experience of the regimes under the retired Constitution whereby as soon as the people elected their representatives either in the Legislature or the Executive, the said representatives no longer deemed themselves answerable to the people. The independent constitutional commissions as Article 249(1) of the Constitution provides are meant to protect the sovereignty of the people, secure the observance by all State organs of democratic values and principles and promote constitutionalism. This was clearly restated by the Supreme Court in Constitutional Application No. 2 of 2011 – Re: The Matter of the Interim Independent Electoral Commission, where it was held that:

***“...The several independent Commissions and offices are intended to serve as ‘people’s watchdogs’ and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the ‘independence clause’...These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the ‘independence clause’ does not accord them carte blanche to act or conduct themselves on whim; their independence is, by design, configured to the execution of their mandate, and performance of their functions as prescribed in the Constitution and the law.”***

153. In the course of performance of their duties, the Commissions will no doubt rub some people and institutions the wrong way since their duty is not to massage the egos of the said persons or institutions. That however is not a justification to threaten or intimidate them or the individual commissioners. Any such offensive actions against the Commissions or Commissioners can only be termed as abuse of power. Where a person believes that a particular Commission has contravened the law or violated the Constitution, the most prudent thing to do is to challenge their actions or inactions in Court.

154. Having said that we must always remember the words of the Court of Appeal in Dr. Christopher Ndarathi H Murungaru vs. Kenya Anti-Corruption Commission & Another Civil Application No. Nai. 43 of 2006 [2006] 1 KLR 77 that:

**“The Kenyan nation has chosen the path of democracy; our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times a messy system. A dictatorship, on the other hand, might be quite efficient and less messy...That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even**

**if those who are mighty and powerful might ignore the court's decisions. Occasionally, those who have been mighty and powerful are the ones who would run to seek the protection of the courts when circumstances have changed. The courts must continue to give justice to all and sundry irrespective of their status or former status."**

155. This is a court of justice and Article 159(2)(a) of the Constitution provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that justice shall be done to all, irrespective of status. Therefore it does not matter how handsome, repulsive or detestable some people may deem the applicant's conduct to be. What matters is whether the applicant has a merited justiciable case before the Court. As was held in **The President of the Republic and Others vs. South African Rugby Football Union and Others [1999] (7) BCLR 725 (CC) at para 104:**

**"The nature of the judicial function involves the performance of difficult and at times unpleasant tasks but judicial officers are nonetheless required to 'administer justice to all persons alike without fear, favour or prejudice in accordance with the Constitution and the law'. To this end they must resist all manner of pressure, regardless of where it comes from. This is the Constitutional duty common to all judicial officers. If they deviate, the independence of the judiciary would be undermined and in turn the Constitution itself."**

156. 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.6517* published on 7<sup>th</sup> July, 2017 was promulgated was tainted with procedural impropriety. It cannot be sustained.

157. In the premises I hereby issue an order of certiorari bringing into this Court the decision by the Respondent contained in *Gazette Notice No.6517* published on 7<sup>th</sup> July, 2017 for the purposes of being quashed and the same is hereby quashed. As the Applicant has not succeeded in a majority of the issues raised, there will be no order as to costs.

158. Orders accordingly.

**G V ODUNGA**

**JUDGE**

**Read, signed and delivered in open Court at Nairobi this 10<sup>th</sup> day of December, 2018**

**J M MATIVO**

**JUDGE**

**Delivered in the presence of:**