REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

MISCELLANEOUS APPLICATION NO. 378 OF 2015

REPUBLIC..APPLICANT

VERSUS

THE COMMISSION ON ADMINISTRATIVE JUSTICE.................RESPONDENT

SALARIES AND REMUNERATION COMMISSION......1ST INTERESTED PARTY

ETHICS AND ANTI-CORRUPTION COMMISSION.....2ND INTERESTED PARTY

EX PARTE: MICHAEL KAMAU MUBEA

JUDGEMENT

Introduction

1. By a Notice of Motion filed 3rd day of November, 2015, the *ex parte* applicant herein, **Michael Kamau Mubea**, the Deputy Commission Secretary of the 2nd interested party herein, the **Ethics and Ani-Corruption Commission** (hereinafter referred to as "the EACC") seeks the following orders:

a. **That an Order of Prohibition to prohibit the Respondent by itself, agents, employees or whomsoever from taking any steps, actions and or measures to implement the recommendations contained in Chapter 2 of the Respondent's Report dated April 2015 and titled 'Anonymous Complaint Against the Ethics and Anti- Corruption Commission on Alleged Impropriety and Abuse of Power by Selectively Awarding the Deputy Commission Secretary a Salary beyond rates Approved by the Salaries and Remuneration Commission and the Grave Allegations of Impropriety by some EACC Officials through Alleged Acquisition of some Houses Allegedly Donated of Facilitated by the National Social Security Fund or whose Acquisition Demonstrates Forbearance or Culpable Accommodation on the Part of NSSF at a Time when the Latter Body was under investigation by the Former and/or any other reference to the Applicant contained in the Report in relation to the Applicant's salary.**

b. **That an Order of Prohibition to prohibit the Respondent by itself, agents, employees or whomsoever from further reproducing, forwarding, distributing or otherwise publishing Chapter 2 of the Respondent's Report dated April 2015 and titled 'Anonymous Complaint Against the Ethics and Anti- Corruption Commission on Alleged Impropriety and Abuse of Power by Selectively Awarding the Deputy Commission Secretary a Salary beyond rates**

Approved by the Salaries and Remuneration Commission and the Grave Allegations of Impropriety by some EACC Officials through Alleged Acquisition of some Houses Allegedly Donated of Facilitated by the National Social Security Fund or whose Acquisition Demonstrates Forbearance or Culpable Accommodation on the Part of NSSF at a Time when the Latter Body was under investigation by the Former' touching on the remuneration of the Applicant.

c. **That an Order of Certiorari to bring into this Honourable Court for the purposes of being quashed the Respondent's Report dated April 2015 and titled 'Anonymous Complaint Against the Ethics and Anti- Corruption Commission on Alleged Impropriety and Abuse of Power by Selectively Awarding the Deputy Commission Secretary a Salary beyond rates Approved by the Salaries and Remuneration Commission and the Grave Allegations of Impropriety by some EACC Officials through Alleged Acquisition of some Houses Allegedly Donated of Facilitated by the National Social Security Fund or whose Acquisition Demonstrates Forbearance or Culpable Accommodation on the Part of NSSF at a Time when the Latter Body was under investigation by the Former touching on the remuneration of the Applicant.**

d. **That such further and other reliefs as this Honourable Court may deem just and fit to grant.**

b) **That the costs of this Application be provided for.**

***Ex Parte* Applicant's Case**

2. According to the applicant, he was offered the position of Deputy Commission Secretary of the Ethics and Anti-Corruption Commission by a letter of offer dated 15th January 2013 whose terms included a basic salary of Kshs 400,000 to 500,000. He however declined the offer and insisted on negotiating the salary payable and pursuant thereto, by a letter dated 16th January 2013, the EACC offered revised terms of the Contract including a gross salary of Kshs 500,000.00.

3. It was therefore averred at all material times he earned the salary of Kshs 500,000.00 as per his contract of employment and at no time was he informed of a contrary salary structure for his position or otherwise on the advice or directions of the Salaries and Remuneration Commission (hereinafter referred to as "the SRC") either prior to or after his appointment. However in early 2015, he received summons from the Respondent inviting him to be interviewed in respect of ongoing investigations by the Respondent on an anonymous complaint about the Applicant's salary as being beyond rates approved by the SRC and investigations into alleged unlawful and improper acquisition of houses by EACC officials from NSSF.

4. The Applicant deposed that on 12th March 2013, he appeared before the Respondent and gave an account of his appointment and remuneration under his employment contract in the process also providing the Respondent's investigators with documents in support of his representations before the Respondent's investigators. The applicant has disclosed that he has since learnt that in the course of its investigations, the Respondent also interviewed and took evidence from other persons on matters relating to the allegations against the Applicant albeit in the absence of the Applicant and that he was never given an opportunity to make representations regarding the evidence or statements by those other persons before the Report was published.

5. According to the applicant, from the Report, it is apparent that no evidence or statement was taken from the purported 'anonymous' complainant; neither does the Report set out the nature, content or scope of the complaint by the so called anonymous complainant. Nevertheless in April 2015 the Applicant received a letter dated 31st March 2015 in which the Respondent *inter alia* informed him that the Respondent had completed its investigations and prepared an Investigations Report though the letter did not enclose a copy of the alleged Investigation Report even in its draft form but listed 7 conclusions and 2 recommendations against the Applicant. To the applicant, the conclusions and recommendations listed in the Respondent's letter are materially different from the contents, conclusions and recommendations set

out in the Report that was subsequently released and published by the Respondent. For instance:

i. The Report in conclusion (xi) contends that the two deputy positions were at the same level with equal terms of service yet the letter dated 31st Marc 2015 is silent on this.

ii. Conclusion (xiii) and (xiv) in the Report draws the inference that there is a discrepancy between the Applicant's allowances totalling Kshs 280,000 while **Mr. Edward Karisa** was given an allowance totalling Kshs 255,000. The letter does not make any reference to that.

iii. Conclusions (xix) and (xxi) in the Report charge that the Applicant was aware of a purported salary structure by the SRC but failed to comply with the directive.

iv. The Report at Conclusion (xxii) emphatically states that the Applicant was *selectively* awarded his salary.

v. The recommendations in the Report include directives at EACC to vary the remuneration terms of the Applicant's employment contract while the Respondent's letter contains only two recommendations requiring the Applicant to 'cease earning that is not within the salary structures advised by the SRC..' to *'refund to the EACC..Kshs 1,509,563'*.

vi. It is also generally noteworthy that the Report has comprehensively set out and analyzed the statements and evidence tendered by the other persons interviewed by the Respondent.

6. It was averred that in response to the Respondent's letter, the Applicant through his lawyers wrote a comprehensive response receipt of which the Respondent acknowledged in the Report. Among the issues highlighted by the Applicant in the letter of response were that:

i. The Respondent had not during the investigation supplied the Applicant with a copy of the contract signed by the Applicant containing the term of Kshs 400,000 as basic salary;

ii. The Applicant was appointed and his contract of service and terms thereof formalized nearly 11 months prior to the SRC letter relied on by the Respondent;

iii. The selective victimization of the Applicant for the purported earning of salary above SRC structures is discriminatory;

iv. A letter by SRC dated 22nd January 2014 a copy of which had been availed to the Respondent's investigators expressly stated that the salary structure advised by SRC would be adopted for use for staff joining after the issuance of the letter of 22nd January 2014.

v. The Respondent had failed to take into account fair labour practices and standards by taking action that would result in detrimental variation of the Applicant's employment contract;

vi. By virtue of Gazette Notice Number 2887 of 2013 by the SRC, a serving State Officer whose remuneration and benefits were set before the operation of the SRC directions would retain their remuneration.

7. It was however deposed that the Respondent did not respond to the Applicant's letter dated 2nd April 2015 or call upon the Applicant to clarify any matters set out in the letter of response but proceeded to publish and release the Report and disregarded the weighty issues of law and fact raised by the Applicant in its letter dated 2nd April 2015.

8. The applicant therefore averred that he was never given an opportunity to see or comment on the full content and tenor of the Report before it was published and even after publication the Respondent did not avail a copy of the Report to him but that he first saw the Report in or about May 2015. According to the

applicant, following the publication of the Report, the matter and the alleged impropriety in the remuneration of the Applicant went public and received wide and adverse coverage in the media and at some point led to suspension of the Applicant's employment.

9. It was disclosed that in a letter dated 27th April 2015 the SRC wrote to the Respondent and clarified that the SRC had in fact approved the Applicant's salary and therefore the Respondent's finding to that effect was erroneous. The Respondent however dismissed the letter by the SRC by a letter dated 7th May 2015. It was contended that subsequent to the publication of the Report and the resulting defamation of the Applicant, the Applicant through its lawyers wrote to the Respondent and made several demands, *inter alia*, requiring the Respondent to withdraw the report and or amend it by deleting the negative references to the Applicant but the Respondent declined to do so and dismissed the protests by the Applicant as inconsequential.

10. It was the applicant's case that it was unreasonable and unjust for the Respondent to conduct investigations and publish a report of the gravity and such extensive implications on the Applicant's constitutional rights on the basis of an 'anonymous' complainant whose complaint or account of the facts was never disclosed at any point during the investigation. To him, by conducting the investigations and publishing the ensuing Report on the basis of an undisclosed Complainant, the Respondent denied the Applicant a fair hearing since the Applicant was denied an opportunity to face and challenge his accuser. To the applicant, the conducting of an investigation on the basis of an 'Anonymous' complainant is illegal and contrary to the requirements of section 32 of the ***Commission on Administrative Justice Act, 2011*** which stipulates that *'a complaint to the Commission may only be made by the person aggrieved by the matter complained of or on his behalf'*.

11. It was further contended that the investigations were conducted in an unfair manner as the Respondent carried out quasi-hearings and took evidence from persons in the absence of the Applicant and the Applicant was never given an opportunity to consider or challenge the evidence tendered against him before it was relied on by the Respondent.

12. Further, the Respondent was accused of publishing the Report without giving the Applicant a hearing contrary to its assurances in the letter to the Applicant dated 31st March 2015. In addition, the matters, charges and recommendations contained in the letter dated 31st March 2015 are materially different from those set out in the Report.

13. It was therefore contended that the Respondent in its conduct of the instigations and publication of the Report displayed malice and lack of objectivity such as in its letter dated 31st March 2015 addressed to the Applicant, the Respondent deliberately concealed the true and full content and tenor of the Report and provided limited information for the response by the Applicant thereby misleading the Applicant to only respond to a limited scope of the allegations against him.

14. The applicant averred that it was never supplied with a copy of the purported contract dated 15th January 2013 wherein the Applicant had purportedly agreed to a salary of Kshs 400,000-500,000/- before the publication of the report yet in the Report, the Respondent proposed to take criminal action against the Applicant for allegedly misleading the Respondent on the existence of such a contract. To the applicant, the Respondent was biased in its investigations and Report since it was made aware of other instances of the EACC officers' salaries which did not tally with the standards used against the Applicant's salary yet the Respondent dismissed the contention and obstinately pursued the case against the Applicant and to date there is no record of the Respondent investigating such other salaries.

15. It was further averred that in arriving at its decision, the Respondent disregarded material facts that were placed before it during and after the investigations and other matters that were within its knowledge and which if the Respondent considered it would have arrived at a different decision which include:

i. SRC letter dated 22nd January 2014 which in part stated that the remuneration structure advised by the SRC is to be adopted for use for any staff joining the commission after the issuance of the

letter and going forward.

ii. Letter dated 19th June 2014 by the Chairman of the EACC which raised no complaint on the part of the EACC regarding the remuneration of the Applicant;

iii. Gazette Notice No 2887 of 2013 wherein the SRC explained that serving State Officers whose remuneration and benefits were set for the position they are holding before the establishment of the SRC where such remuneration is above the set remuneration, shall retain such remuneration;

iv. The Applicant's letter dated 2nd April 2015 written to the Respondent through its lawyers setting out the above among other issues which the Respondent ignored while preparing and publishing the Report;

v. A letter by the SRC dated 27th April 2015 affirming its position in the letter dated 22nd June 2014 and clarifying that the salary structures applied by the EACC before the establishment of the SRC would prevail and that the SRC had specifically approved the current salary of the Applicant.

16. It was further contended that the Respondent took into consideration irrelevant matters in arriving at its decision and in particular;

a. The purported difference in the remuneration terms between the Applicant's employment contract and the employment contract of another official of the EACC without taking note that the Applicant specifically negotiated his remuneration terms with the EACC;

b. A purported contract of employment between the Applicant and the EACC dated 15th January 2013 which was never supplied to the Applicant before the publication of the Report and which in any event would have been overtaken by the Applicant's employment contract dated 16th January 2013.

17. The applicant further accused the Respondent of having made a mistake of fact in its interpretation of the letter dated 26th September 2014 by interpreting it to mean that the SRC had declared the Applicant's salary illegal. The SRC in its subsequent letters to the Respondent being letter dated 27th April 2015 clarified that the letter meant that although the Applicant's letter was not approved by the SRC when it was awarded in 2013, the Commission letter reviewed an appeal by the SRC and awarded the Applicant his current salary.

18. It was the applicant's case that the conduct of the Respondent in the investigations, publication of the Report and recommendations therein disclose instances of abuse and usurpation of power by the Respondent particularly since:

a. At the time of conducting the purported investigations on the Applicant's remuneration the SRC was actively considering the issue as clearly set out in the SRC letter dated 27th April 2015 and therefore by virtue of Section 30(h) of the ***Commission on Administrative Justice Act***, 2011 the Respondent was debarred from investigating the issue;

b. The Respondent has no power to direct the EACC to cease complying with its contractual obligations to the Applicant nor the power to direct the Applicant to cease receiving his salary;

c. The Respondent has purported to override the decision of the SRC on the Applicant's remuneration and the Respondent is therefore usurping the powers of the SRC under Article 230(4) of the Constitution.

19. It was therefore the applicant's case that the investigations by the respondent and the resulting report are a gross violation of the Constitution, the provisions of the ***Commission and Administrative Justice Act***, 2015 and the provisions of the ***Fair Administrative Actions Act***, No 4 of 2015 particulars of which

were:

a. Breach of the Applicant's right to fair labour practices under Article 41 of the Constitution which in statutory and international standards proscribe an adverse review of remuneration terms of employees;

b. Breach of the Applicant's right not to be discriminated upon under Article 27 of the Constitution by discriminatorily isolating the Applicant's case and treating it as different from the terms of employment of the other employees of the EACC;

c. Threatened breach of the Applicant's right to own and enjoy property in the nature of his remuneration and which remuneration had been properly acquired pursuant to a lawful employment contract entered into on 16th January 2013;

d. Breach of the Respondent's duty to satisfy itself as to the correctness of facts set out in an investigation report as it was bound to do under Section 28(5) of the ***Commission on Administrative Justice Act***;

e. Breach of the full scope of the Applicant's right to fair administrative action as provided for under Article 47 of the Constitution and Section 4(3) of the ***Fair Administrative Actions Act***, 2015.

f. Breach of the Applicant's right under Section 6 of the ***Fair Administrative Actions Act***, 2015 to be supplied with such information as may be necessary to facilitate an application for an appeal or review. The Respondent in its letter dated 31st March 2015 or thereafter never supplied the Applicant with the full content and tenor of the Report and the documents it relied on in preparing the report and making its recommendations or such statements as were recorded by persons interviewed by the Respondent in the course of the investigation.

20. It was submitted on behalf of the applicant that Respondent purported to conduct investigations on the Applicant's Remuneration yet it is not within the Respondent's power to conduct investigations on the remuneration of public officers and make recommendations as set out in the Impugned Report. By purporting to conduct investigations on the Applicant's remuneration, the Respondent usurped the powers of the SRC as set out in Article 230 (4) of the Constitution of Kenya, 2010.

21. The applicant relied on section 2 of the ***Fair Administrative Action Act***, on what constitutes administrative action and submitted that the investigative process by the Respondent on the Applicant's remuneration amounts to administrative action since the Respondent was conducting the investigation with a view to making findings and recommendations regarding the Applicant's salary. The said process, it was submitted would affect the Applicant's right to own and enjoy property in the nature of his remuneration and which remuneration had been properly acquired pursuant to a lawful employment contract entered into on 16th January 2013 and which remuneration was approved by the SRC. Consequently, the Applicant was entitled to fair administrative action. It was submitted by the applicant that the investigations were conducted in an unfair manner as the Respondent carried out quasi-hearings and took evidence from persons in the absence of the Applicant. Further, the Applicant was never given an opportunity to consider or challenge the evidence tendered against him before it was relied on by the Respondent.

22. The applicant expounded this submission by stating that in the letter dated 31st March 2015 addressed to the Applicant by the Respondent, the Respondent indicates that the investigative team interviewed various identified public officers and other identified persons relevant to the matter under investigation. At page 4 of the Impugned Report, it is indicated that various persons gave evidence to the Respondent regarding the Applicant's salary. The aforesaid persons are named as Mr. Edward Kenga Karisa, Ms. Irene Keino and Professor Jane Onsongo. However, the Applicant was never given an opportunity to consider the evidence tendered against him by the afore-said persons or cross-examine the aforesaid persons. In support of his case the applicant relied on section 4 (4) of the ***Fair Administrative Action Act***, No. 4 of 2015 which provides that an administrator shall accord the person against whom administrative

action is taken an opportunity to cross-examine persons who give adverse evidence against him. This was not done in this case and relied on **Republic vs. Kenyatta University Ex Parte Njoroge Humphrey Mbuthi [2015] eKLR**.

23. Further reliance was placed on **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300**, **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.**

24. **It was contended that** in arriving at the impugned report, the respondent acted in an unreasonable manner since the Respondent does not have the mandate to conduct investigations on the Applicant's remuneration. However, by bestowing upon itself the mandate to investigate the Applicant's remuneration, the Respondent was then enjoined to consider communication between the EACC and the SRC on the remuneration of the EACC's employees as well as any material by the SRC on the remuneration of state officers. Failure to do so renders the decision irrational and this Honourable Court is entitled to annul the decision in exercise of its supervisory powers. It was the applicant's case that a look at the Impugned Report against the materials placed before the Respondent, reveals that in arriving at its conclusion as set out in the Report, the Respondent disregarded material facts that were placed before the Respondent during and after the investigations and other matters that were within its knowledge and which if the Respondent considered, would have arrived at a different decision hence the failure by the Respondent to take into consideration relevant factors renders its decision unreasonable and irrational. In particular, it was submitted that the Respondent did not take into consideration;

a. The contract of employment dated 16th January 2013 between the Applicant and the 2nd Interested Party whereat the Applicant's gross salary was set at Shs. 780,000/=. Instead the Respondent took into consideration a purported contract of employment between the Applicant and the 2nd Interested Party dated 15th January 2013 which in any event did not exist and the Applicant is not aware of the source of the aforesaid contract.

b. The 1st Interested Party's letter dated 23rd May 2014 whereat the 1st Interested Party advised the 2nd Interested Party to retain the existing staff (public officers) salary structure;

i. By the aforesaid letter, all other communication on the subject of remuneration of the 2nd Interested Party's staff were invalidated.

ii. The 1st Interested Party being the body with the mandate to set the Applicant's remuneration had already approved the remuneration of the Applicant.

iii. From the Respondent's Replying Affidavit at paragraphs 50-60, that the Respondent alleges that at the time of conducting the investigations and issuing the final report, it did not have the letter dated 23rd May 2014 in its possession. It is clear that the deponent of the Respondent's affidavit is not being truthful by stating that the Respondent did not have possession of the letter dated 23rd May 2014 since the aforesaid letter is annexed at page 353 and 355 of the Respondent's report.

c. Letter dated 19th June 2014 by the Chairman of the 2nd Interested Party addressed to the Respondent which raised no complaint on the part of the 2nd interested party regarding the remuneration of the Applicant. By the aforesaid letter, the 2nd Interested Party informed the Respondent that the Applicant's salary was approved by the 1st Interested Party.

d. The Applicant's letter dated 2nd April 2015 written to the Respondent through its advocates clarifying that the Applicant's salary had been approved by the 1st interested party. The Respondent ignored the information set out in the aforesaid letter and proceeded to prepare and publish the Impugned Report.

e. The 1st Interested Party's letter dated 27th April 2015 affirming its position in the letter dated 23rd May 2014 and clarifying that the salary structures applied by the 2nd Interested Party before the establishment of the 1st Interested Party would prevail and that the 1st Interested Party had specifically approved the current salary of the Applicant.

25. In support of the foregoing submissions the applicant relied on **Associated Provincial Picture Houses vs. Wednesbury Corporation [1948] 1 KB 223** where it was held that:

> **"It is true the discretion must be exercised reasonably. Now what does that mean? Lawyers familiar with the phraseology commonly used in relation to exercise of statutory discretions often use the word "unreasonable" in a rather comprehensive sense. It has frequently been used and is frequently used as a general description of the things that must not be done. For instance, a person entrusted with discretion must, so to speak, direct himself properly in law. He must call his own attention to the matters which he is bound to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider. He must exclude from his consideration matters which are irrelevant to what he has to consider.If he does not obey those rules, he may truly be said, and often is said, to be acting "unreasonably".Similarly, there may be something so absurd that no sensible person could ever dream that it lay within the powers of the authority. Warrington LJ in Short Vs Poole Corporation [1926] Ch. 66,90,91 gave the example of the red-haired teacher, dismissed because she has red hair. That is unreasonable in one sense. In another sense, it is taking into consideration extraneous matters. It is so unreasonable that it might almost be described as being done in bad faith; and, in fact, all these things run into one another."**

26. He further relied **Republic vs. Public Procurement Administrative Review Board & 3 Others Ex Parte Olive Telecommunication PVT Limited [2014] eKLR**, where the court stated as follows:

> **"However, while we reiterate that this Court in exercise of its supervisory jurisdiction by way of judicial review ought not to usurp the powers of the Board, where the Board fails to consider relevant evidence and considers irrelevant ones this Court must intervene where the failure to do so renders the decision so grossly unreasonable as to render it irrational. In our view, this is the ex parte applicant's case."**

27. According to the applicant, the 1st Interested Party misled the respondent into justifying its impugned Report based on the contents of a letter dated 26th September 2014 written by the 1st Interested Party's Commission Secretary, **Mrs. Ann. R. Gitau** by stating at Chapter 2 thereof that:

> ***"However, in a letter by SRC to the CAJ, Ref: SRC/TS/CAJ/3/35/6/VOL. 1 (83) dated 26th September 2014, the SRC unequivocally stated that "the current remuneration for the incumbent in Grade 2, Deputy Commission Secretary, EACC of Shs. 780,000/= was not approved by SRC." The Commission thus relied on the SRC letter under reference in drawing its findings and conclusions."***

28. Further, at paragraph 25 of the Respondent's Replying Affidavit, the Respondent stated that:

> ***"That it was on the basis of the 1st Interested Party's letter to the Respondent dated 26th September 2014 that the Respondent decided to carry out further investigations on the Ex parte Applicant's remuneration."***

29. It was however submitted that when the said **Anne Gitau** orally testified before this Court, she stated as follows:

i. She signed the affidavit sworn on 26th January 2016 in the presence of **Rosaline Wafula**, Advocate. However, she did not appear before the Commissioner for Oaths who commissioned the affidavit.

ii. The Applicant's salary was negotiated by the EACC and the SRC "approved", "allowed" and gave nod for the EACC to continue. Consequently, she disowned the letter dated 26th September 2014 and signed by herself whereat it was stated that the Applicant's salary was not approved by the SRC.

iii. The SRC does not negotiate or set salary of public officers like the Applicant but merely gives advice.

iv. The Applicant's salary is legitimate as it was approved by the SRC.

*30. According to the applicant since **Mrs***. **Ann Gitau** did not see the commissioner for oaths append his signature on the affidavit or stamp the affidavit purportedly sworn on 26th January 2016, the affidavit is not valid and is not an affidavit as contemplated by section 5 of the ***Oaths and Statutory Declarations Act***. The said affidavit sworn by Mrs. **Ann R. Gitau** is therefore defective and ought to be struck out pursuant to the decision in **Rajput vs. Barclays Bank of Kenya Ltd & 3 Others, 2 KLR 393**, where the High Court stated as follows:

> **"My view of the matter is simply that failure to comply with the provisions of law, the Oaths and Statutory Declarations Act and the Rules thereunder is a matter of substance and not form. It is not a matter that is curable or about which the Court should take a lenient view. For this reason the affidavit is incompetent and the same is struck out."**

31. It was submitted that upon cross- examination of **Mrs. Ann R. Gitau**, it was evident that the Applicant's salary is legitimate and the same was approved by the SRC. Thus, the 1st Interested Party's Commission Secretary misled the Respondent by the letter dated 26th September 2014. Consequently, the court ought to pronounce itself on the conduct of **Mrs. Ann Gitau** and the 1st Interested Party be condemned to pay costs of this suit.

2nd Interested Party's Case

32. On its part, the 2nd interested party, the EACC averred that it recruited the Applicant through a most transparent and competitive process and that it entered into a contract of employment dated 16th January, 2013 with the Applicant herein for a gross salary of Kshs. 780,000.00 monthly. It confirmed that this is the contract held by EACC and that it is not aware of the existence of any other contract of employment between EACC and the Applicant. The EACC therefore denied the source of the documents exhibited by the Respondent as being the contract and averred that in evaluating the veracity of the complaint received, the Respondent took into account and placed a lot of weight on the copy of contract without verifying the authenticity of the same and reliability of the source as evidenced by the findings at pages 2 and 3 of its report.

33. It was disclosed that the contract between EACC and the Applicant was entered into well before the advice by the SRC referred to as vide its letter dated 10th December 2013 communicating what is referred to as "*approved remuneration structure for staff of the EACC*" and that as at the 10th December 2013 (the date of the said advice), EACC had in its employment officers at all levels from grade 1 to 12. It was revealed that the advised remuneration bands on all grades apart from grade 12 were lower than the remuneration then being earned by EACC staff.

34. It was deposed that vide a letter dated 22nd January 2014, a copy of which was availed to the Respondent, the SRC gave the following pertinent clarifications for the implementation of its advice of 10th December 2013:

a. It made it clear that ***"…the remuneration structure is to be adopted for use for any staff joining the Commission after the issuance of the letter and going forward."*** [Emphasis added].

b. It also clarified that staff recruited by EACC prior to the provision of any advice should adopt the structure given in the letter dated 10th December 2013.

c. Finally, it clarified that all staff whose grading fitted or fell within the remuneration and benefits structure advised by the SRC and whose remuneration levels are above what has been advised, should retain remuneration levels for the period of the contracts.

35. In spite of the clarifications made, EACC petitioned the SRC to reconsider its advice and expressly approve the prevailing remuneration and benefits structure for the following reasons:

a. There was apparent contextual ambiguity or inconsistency more so in clauses I and II of the letter dated 22nd January 2014.

b. Taken on its own, all members of staff fell under clause II of the letter dated 22nd January 2014. An unmitigated implementation of this clause would have meant salary cuts for staff in all grades except a few in grade 12. Such action would have resulted in widespread discontent, demotivation and possible labour dispute with members of staff whose grading was not in consonance with the advised structure.

c. The proposed salary and remuneration levels would have adversely affected retention of current staff and attraction of future staff.

d. The petition was in pursuit of and in compliance with fair labour practices that frown upon revision of terms of service to the detriment of a serving member of staff.

e. In any event, the SRC in its letter dated 22nd January 2014 explicitly welcomed further consultations.

36. According to EACC, the Applicant's position, like all other members of staff, is that of a public officer as opposed to state officer and the SRC's mandate in respect of remuneration and benefits for public officers is limited to advice as opposed to setting remuneration and benefit levels applicable to state officers only. Further, advice from SRC serves as an official guide for recommended remuneration and benefit levels but has the latitude for appeal and negotiation. It was averred that with the above understanding, EACC vide a letter dated 9th April 2014, petitioned the SRC for a review of its advice of the recommended remuneration and benefits structure which appeal the SRC considered favourably and approved the prevailing EACC staff remuneration and benefits structure, which includes that of the position of the Applicant. It was therefore contended that the above letter from the SRC settled the question of remuneration and benefits structure for all EACC staff, inclusive of the negotiated salary of the Applicant.

37. The EACC revealed that the subject investigation by the Respondent was initiated vide a letter dated 23rd May 2014 at a time that the EACC had petitioned the SRC for a review of its advice and the issue of remuneration and benefits for all EACC staff was under active consideration by the SRC. To the EACC, the fact of the Applicant's remuneration and benefits approval by the SRC was variously communicated to the Respondent vide several letters but it is apparent that the Respondent's reaction to this information was dismissive opting to selectively believe information from unauthenticated sources insinuating ill motive upon the very Constitutional Commission the Respondent argues has the constitutional authority to set and advice on remuneration and benefits structure in public service.

38. The EACC reiterated that the Respondent did not have jurisdiction to deal with the matter of salary and remuneration of public officers either at the time the issue was under active consideration by the SRC or after a determination was made by the SRC. The response by the 1st Respondent to the clarification on salary structure of EACC is one of unwillingness to accept the mandate and functions of the SRC.

39. It was averred that the Respondent's investigators never sought to interview or record a statement

from the Chairperson of the EACC before concluding and publishing their report and that had they done so, the Chairperson would have easily clarified the facts and demonstrated that the Applicant's salary was approved by the SRC as communicated to the Respondent vide the letters referred to in paragraph 20 above.

40. It was submitted on behalf of the EACC that in considering whether a public entity acted in excess of jurisdiction, it is now a well settled principle that it is not sufficient to adhere to procedural form. It is even more important to act within the legal limits of power granted to every institution. The Respondent's investigative mandate can only be exercised within the limits of constitution (Article 59(2)) and its constitutive statute (section 8 of the Commission for Administrative Justice Act).

41. It was submitted that investigation into the remuneration structure of any public institution is not among the Respondent's mandate as this is the exclusive mandate of the SRC. Accordingly, limited to the question of the remuneration structure of EACC, to include the salary and benefits of the Applicant, it was submitted that the Respondent did not have the subject matter jurisdiction which rendered its decision/recommendations a nullity.

42. The EACC cited section 30(h) of the ***Commission on Administrative Commission Act*** (CAJ Act), under which the Respondent is expressly denied jurisdiction to investigate any matter under inquiry by any Constitutional Commission. The said section provides thus:

> ***"S.30 The Commission shall not investigate—***
>
> > ***(a)…***
> >
> > ***(h) any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law."***

43. To the EACC, Investigation, relative to a question of remuneration and benefits structure, includes an inquiry by SRC. Effectively, the investigations undertaken by the Respondent were *ultra vires* the provisions of section 30 of the Respondent's constitutive statute and are amenable to judicial review by quashing. Since the SRC is a Constitutional Commission established under Article 230 of the Constitution, in view of the express limitation, the Respondent could not purport to undertake parallel inquiry into the salary of the Applicant or any other member of staff of EACC since constitutional commissions are supposed to complement each other but not to compete or usurp each other's mandate and reference was made to **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR** where the Court observed that not even Parliament can usurp the mandate of the SRC or any other constitutional organs.

44. On the issue whether the Respondent had the power to issue the recommendations that it did, it was submitted that it is settled law that a public authority may as well have jurisdiction to inquire into a matter but the resultant order/decision will be amenable to judicial review on account of the fact that it is of a kind that the authority has no power to issue. According to the EACC, there is no doubt that the inquiry undertaken by Respondent, and subject matter of this application, concerns a salary scale offered to the Applicant by the EACC. The purported anonymous allegations are to the effect that the EACC was paying and the Applicant was receiving remuneration beyond the scale advised by the SRC. The very foundation of the complaint received by the Respondent is one of contractual compensation for labour as opposed to, say, embezzlement of funds or other illegal or irregular syphoning of public funds.

45. It was submitted for EACC that after settlement of the remuneration and benefits structure vide the letter of 23 May 2014, the Respondent lacked jurisdiction, not only to inquire into the matter, but also to issue the recommendations that it did. Simply put, the Respondent had no capacity to dispute the advice of the SRC and could not make a different finding on the matter.

46. By Respondent dismissing the clarification by the SRC and charging that the SRC's decision to accept the salary and remuneration structure of the EACC is "suspect", it was submitted that the Respondent was

extending its mandate and functions beyond that which it is given by the Constitution and the CAJ Act. It assumed an expansionist stance in which it can reject or override the decisions or findings of other Commissions in the exercise of their exclusive constitutional mandate.

47. To EACC, whether the Respondent can dispute a decision of the SRC over matters of salary and remuneration is a one of constitutional and statutory mandate that goes to jurisdiction. Under its constitutive framework namely Article 59 (A) of the Constitution and the ***Commission on Administrative Justice Act***, 2011, the Respondent's investigative powers are limited to conduct in any state affairs or any act or omission in public administration in any sphere of government complaint of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. It is clear that the authority of Respondent is limited to acts or omissions in administrative action by the government or public body and their agents. However, a determination over an officer's remuneration is within the ambit of the employer and the SRC, to the exclusion of the Respondent.

48. It was submitted that the question here is whether the Respondent's report and recommendations should be allowed to stand on account of the fact that it was not aware of the settlement over the remuneration structure reached between EACC and the SRC as embodied in the letter dated 23 May 2014. The Respondent pleaded ignorance of the approval of the remuneration and benefits of the Applicant stating that the letter dated 23 May 2014 was not brought to its attention. Similarly, the Respondent never confronted EACC and the Applicant with the letter dated 26 September 2014 which was the basis upon which the Respondent made adverse finding against the EACC and its leadership. The Respondent was bound by the tenets of natural justice and fair administrative action to bring the said letter to the attention of the Respondent and seek its response. The Respondent exercises quasi-judicial powers under section 27 of the CAJ Act, and ought to have appreciated that it was duty bound to bring the said letter to the attention of EACC. Clearly, it is at this stage that the conflicting interpretation of these letters would have come to the fore and resolved.

49. It was however asserted that even assuming that the Respondent had no prior knowledge of the approved structure, ignorance of this fact did not grant it jurisdiction to investigate or issue the recommendations that it did. To the EACC, if the Respondent was doubtful of the veracity of this explanation and the settlement, its only option was to reopen the investigation limited to verifying this alleged settlement and review its findings accordingly in accordance with the evidence established by way of a supplementary report.

50. This should be seen in the light of the Respondent's blanket recommendation No. 5 which, by necessary implication, demands the implementation of a salary structure whose effect is a downward review of salaries of all EACC staff without according them a chance to be heard. Besides, it amounts to rejecting a remuneration structure which has been negotiated and settled and reviving a structure which has had been proposed but discarded through legitimate negotiations.

Respondent's Case

51. The application was however opposed by the Respondent. According to the Respondent, it is a Constitutional Commission established pursuant to Article 59(4) and Chapter Fifteen of the Constitution and the ***Commission on Administrative Justice Act***, 2011 whose mandate is to *inter-alia,* to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government and complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct. According to the Respondent, it has a quasi-judicial mandate to deal with maladministration through conciliation, mediation and negotiation where appropriate.

52. It was averred that in the conduct of its functions, the Respondent has powers to conduct investigations on its own initiative or on a complaint made by a member of the public, investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice and may issue Summons and require that statements be given under oath, adjudicate on matters relating to administrative justice, obtain relevant information

from any person or Governmental authorities and to compel production of such information. According to it, in the conduct of its functions, the Respondent can receive a complaint from any member of public anonymously and the corresponding obligation on the Respondent is to proceed with such a complaint in the context of anonymity until final conclusion. The Respondent therefore averred that it is within the law for it to receive anonymous complaints as such is provided by the Act and Regulations 3 and 5(4) of the ***Commission on Administrative Justice Regulations, 2013*** as contained in Legal Notice No 64, Kenya Gazette Supplement No. 54 of 12th April 2013.

53. It was averred that based on its aforesaid mandates, the Respondent received an anonymous complaint touching on among other issues the remuneration of the ex-parte Applicant as a staff of the Ethics and Anti-Corruption Commission, the 2nd Interested Party herein. Among the allegations contained in the anonymous complaint included the fact that the Ex-parte Applicant had signed a contract of employment with the 2nd Interested Party herein with the beginning fixed salary of Kshs 500,000/= for the position of Deputy Commission Secretary whereas the approved salary structure provided for that position had a salary range of Kshs 400,000/= up to a maximum of Kshs 500,000/=. Further, the complaint alleged that the Ex-parte Applicant had in existence two employment contracts with the 2nd Interested Party one dated 15th January 2013 and the other dated 16th January 2015 with the latter providing for the fixed salary of Kshs 500,000/=.

54. According to the Respondent, from the onset, the complaint provided tangible grounds for further inquiry and investigations to establish the truth behind it. Accordingly, the Respondent wrote a letter of inquiry to the EACC dated 23rd May 2014 inquiring among other issues the Ex-parte Applicant's remuneration issue to which the EACC responded vide a letter dated 19th June 2014. It was however averred that the Respondent found that the said response did not specifically respond to the issue of the Ex-parte Applicant's remuneration and thus gave the EACC a notice of intention to carry out further investigation into the allegations levelled against the Ex-parte Applicant's remuneration as required by the law through a letter dated 18th July 2014.

55. It was revealed that in the course of the said investigations, the Respondent wrote a letter dated 20th August 2014 to the Salaries and Remuneration Commission (SRC), the 1st Interested Party herein as the reference authority on remuneration issues within the public sector which action was informed on the legal foundation that the SRC has the Constitutional and Statutory mandate to review, recommend and or approve remuneration within the public sector and thus a firm authority for stating the correct position as far as the Ex-parte Applicant's salary question was concerned. As per the aforesaid Respondent letter to the SRC, the Respondent specifically inquired into the Ex-parte Applicant's salary issue by specifically informing the SRC that it was undertaking investigations into alleged impropriety and abuse of power in awarding the Deputy Commission Secretary of the EACC a salary beyond the rates approved by the SRC. The Respondent said letter requested the SRC to provide the Respondent with the salary structure recommended by it for the EACC's staff so as to inform the investigation process into the allegation.

56. It was averred that in its response, the SRC through a letter to the Respondent dated 26th September 2014 gave the *"current remuneration for EACC Staff"* and further went ahead to clarify the said structure by stating that "*(ii) The Current Remuneration for the incumbent in Grade 2, Deputy Commission Secretary, EACC of Kshs 780,000 indicated in the Table was not approved by SRC.* According to the Respondent, it was on the basis of the said letter that the Respondent decided to carry out further investigations on the Ex-parte Applicant's remuneration in the course of which the Respondent kept the EACC and the Applicant herein fully aware of all the processes being undertaken and they co-operated by forwarding all documents to support the Applicant's remuneration. It was revealed that among the documents forwarded by the Applicant included letters by the SRC to the EACC dated 22nd January 2014 and 10th December 2013 advising the EACC on Staff Remuneration Structure and making clarifications on the application of the remuneration structure as contained in the letter of 10th December 2013.

57. According to the Respondent, a keen examination of the said letter dated 22nd January 2014 at paragraph (ii), one can deduce the fact that staff members of the EACC who were recruited prior to the

provision of any advice by the SRC were required to adopt the structure given by the SRC in the letter dated 10th December 2014. Further, a keen examination of paragraph (iii) of the letter dated 22nd January 2014, leads to the deduction that staff who had been given remuneration and benefits structure by the SRC whose remuneration levels were above what had been advised by the letter dated 10th December 2013 had to retain those remuneration levels as advised by the SRC for the period of their current contracts. In the Respondent's view, the plain reading of the said two letters brought the effect that any staff member of the EACC earning above what was recommended by the SRC in its letter of 10th December 2013 had to adopt the remuneration as indicated in the letter dated 10th December 2013 unless such remuneration had been specifically recommended (given) by the SRC prior to the issuance of the letter dated 10th December 2013. Hence and in the foregoing, the effect of the said letters dated 10thDecember 2013 and 22nd January 2014 reinforced the clarification contained in SRC's letter dated 26thSeptember 2014 at paragraph (ii).

58. It was averred that based on the foregoing and the need to fully comply with the law and rules of natural justice, the Respondent scheduled a meeting between the Respondent and the Applicant to shed more light on the investigations in March 2015 whereof the Applicant failed to clarify on the issues insisting that his salary had been approved by the SRC. Further, the Respondent wrote to the Ex-parte Applicant through a letter dated 5th March 2015 requesting him to record a statement to clarify some issues which were unclear including how his salary with the EACC was arrived at.

59. I was deposed that in the course of the investigations, the Respondent was able to get two copies of different employment contracts of the Applicant with the EACC one dated 15th January 2013 and another dated 16th January 2013 together with the employment contract for a similar position at the same institution of 15th January 2013 which formed a solid basis for the investigations into the anonymous complaint and that based on the two contracts of employment which had different terms of engagement, the analysis of the SRC's letters dated 10th December 2013 and 22ndJanuary 2014 and 26th September 2014, all the information and documents supplied by the Applicant as well as information obtained independently in the course of investigations, the Respondent compiled its report which contained appropriate recommendations to the EACC and a draft summary of the investigations findings together with the recommendations thereof were forwarded to the Ex-parte Applicant vide the Respondent letter dated 31st March 2015. According to the Respondent, its letter dated 31st March 2015 informed the Applicant of the outcomes of the investigations and offered him a further opportunity to comment of the outcome thereof before the same was published or forwarded to the EACC for action. To the Respondent, since the letter dated 31st March 2015 to the Applicant contained a summary of the investigations findings and recommendations as was contained in the draft report, it is not true that the same was materially different as alleged by the Applicant.

60. The Respondent averred that it was after receiving the Respondent letter dated 31st March 2015 that the Applicant through his Advocates wrote a letter to the Respondent dated 2nd April 2015 in which the Applicant stated that he was not aware of a contract between himself and the EACC with a basic salary of Kshs 400,000/= per month and a annual increment of 5% and thus requested for a copy of the said contact. Contrary to the Applicant's assertion that he was not supplied with a copy of the contract dated 15th January 2015, the Respondent through a letter dated 8thApril 2015 (erroneously indicated as 8th August 2015) which letter was duly received and stamped on 8th April 2015, forwarded to the Ex-parte Applicant a copy of the referred contract and required him to do a rejoinder on or before 10th April 2015 but no response or rejoinder was received from the Applicant in relation to the contract as was required by the aforesaid letter. Accordingly, the investigations process was duly concluded with a report being compiled and forwarded to the EACC for action on 14th April 2015. The Respondent also wrote a letter dated 14th April 2015 to the Ex-Parte Applicant informing him of the outcome of the investigations and forwarding the report to him.

61. It was therefore the Respondent's contention that the investigative process was conducted within the precincts of the law and principles of natural justice whereof the Ex-parte Applicant was offered

numerous opportunities to submit his case and defend himself and that the Respondent's report is as a result of an investigative process meant to find out the truth behind an alleged complaint which process does not necessarily entail instances whereby the person being investigated can challenged the complainant's version of the allegations on a face to face meeting. To the Respondent, an investigation process is completely different from a quasi-judicial process which accordingly should afford any accused person an opportunity to challenge his accuser's version of the allegation hence the averment by the Applicant that he was not offered an opportunity to challenge his accuser thereof lacks in legal backing.

62. The Respondent revealed that it was only after the report had been sent to the EACC for action and after being shared with the SRC that the EACC wrote to the Respondent vide a letter dated 8th May 2015 informing it that the SRC had allowed the EACC to retain the existing remuneration structure for all staff including the office of the Deputy Secretary, Grade 2. Similarly, the SRC after being supplied with a copy of the investigation report wrote a letter dated 27th April 2015 which was received by the Respondent on 6th May 2015 purportedly making clarification to its letter to the Respondent dated 26th September 2014 and stating that the Ex-parte Applicant's salary had been recommended by the SRC.

63. It was the Respondent's case that it was rather surprising for the SRC to hinge its recommendation of the Ex-parte Applicant salary to a letter allegedly written on 22nd May 2014 and whose contents thereof were not captured in its letter to the Respondent four months later on 26th September 2014. Further the Ex-parte Applicant had the opportunity through-out the investigations period to supply the Respondent with the said letter by the 1st Interested Party of 22nd May 2014 to which the Applicant failed to do so.

64. According to the Respondent, the information touching on the alleged recommendation by the SRC of the Applicant's remuneration was brought to the attention of the Respondent after investigations and after publication of its report on 14th April 2015. It was the Respondent's case that the latter information by the Interested Party was an afterthought indicating manipulative tactics to defeat the course for fair administrative justice and that as at the time the Respondent's report was forwarded to the EACC being 14th April 2015, the same reflected a true position on the facts and state of affairs on the investigations process. It was therefore the Respondent's assertion that its report was based on factual information supplied by the SRC and the Applicant during the investigative process and as such, the report cannot be faulted on the basis of late information which is clearly an afterthought. To the Respondent, the SRC's letter dated 27th April 2015 was received by Respondent on 6th May 2015 and by that time, the Respondent had already published its report and thus being '*functus officio*.'

65. In the respondent's view:

> i. The allegation that the Respondent was debarred by section 30 (h) CAJ Act from investigating his remuneration when the 1st Interested Party was actively considering the issue has no legal foundation as the Respondent has different functions from the 1st Interested Party.
>
> ii. That the Respondent in its Report was discharging its mandates under the law by recommending a remedial action to an issue of maladministration within the EACC as a public body as opposed to directing the EACC on its constitutional or statutory mandate.

66. To the Respondent:

> i. That fundamental rights cannot be used as a justification for maladministration on the basis to prevent investigation on alleged instances of abuse of power.
>
> ii. That there was no discrimination of the Applicant in the investigative process as the complaint received by the Respondent was directly related to the Applicant. In any event, the Respondent was investigating alleged instances of discrimination of other EACC's staff by offering an unfair advantage to the Applicant.

iii. That the Respondent's investigations were conducted within the tenets of the law including Article 47 of the Constitution, the ***Commission on Administrative Justice Act*** and the ***Fair Administrative Actions Act 2015***.

67. In the Respondent's submission, the interpretation by the Applicant relating to the mandate of the Respondent in the extant matter is perplexing and incorrect. The mandate of the Respondent, relates to investigation of any act of maladministration in any sphere of government that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice. This includes any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in the public sector. In particular, the mandate of the Respondent is provided for under Article 59(2)(h-k) of the Constitution as read with section 8 of the ***Commission on Administrative Justice Act***.

68. To the Respondent, it is clear from the above provisions that it has a constitutional and statutory mandate to handle complaints relating to maladministration in the public sector, including impropriety and abuse of power. According to Section 2 of the ***Commission on Administrative Justice Act***, administrative action includes:

a. ***A decision made or an act carried out in the public service;***

b. ***A failure to act in discharge of a public duty required of an officer in the public service;***

c. **……..**

69. One of the issues raised in the anonymous complaint received by the Respondent vide an e-mail of 11th May 2014 alleged that there was impropriety and abuse of power in selectively awarding the Deputy Commission Secretary of the 2nd Interested Party, the Applicant herein, a salary beyond the rates approved by the 1st Interested Party. Issues of impropriety and abuse of power are specific components of maladministration that transcend all aspects of public administration, including matters relating to remuneration. Further, it not in doubt that the act that formed the basis of this complaint occurred in public administration within the meaning of Article 59(2)(h&i) of the Constitution, and Sections 2(a) and 8(a)(b) & (d) of the Commission on Administrative Justice Act for which the Respondent is empowered to act.

70. It was submitted that the act that formed the basis of the investigations by the Respondent was based on alleged impropriety and abuse of power in selectively awarding remuneration to the Applicant beyond the rates approved by the 1st Interested Party. The allegation had nothing to do with the mandate of the 1st Interested Party in Article 230(4) of the Constitution. It related to maladministration, the redress of which is not the mandate of the 1st Interested Party. The investigation related not to the salary payable to the Applicant which is the mandate of the 1st Interested Party, but to the alleged ***<u>impropriety</u>*** and ***<u>abuse of power</u>*** in awarding his salary which is an aspect of maladministration and, therefore, within the jurisdiction of the Respondent. Indeed, it is in recognition of this fact that the 1st Interested Party stated in its Replying Affidavit dated 26th January 2016 that ***'the 1st Interested Party mandate is set out in Article 230(4) of the Constitution and that the investigation of corruption is not a part of its mandate.'***

71. The Respondent contended that the applicant's interpretation of the mandate of the Respondent in relation to the complaint that formed the basis of the investigation is restrictive and misconceived and relied on **<u>Republic vs. Commission on Administrative Justice Ex-Parte National Social Security Fund Board of Trustees [2015] eKLR</u>, <u>paragraphs 52 & 53</u>,** where the Court stated as follows:

> **"looking at the constitutional and statutory functions of the Respondent, it is difficult to entertain the Applicant's attempt to shrink the mandate of the Respondent…The Respondent's assertion that its jurisdiction should not be viewed from a narrow context is indeed correct. It is true that the Respondent is among the commissions whose existence is rooted in the promotion of respect for human rights and development of a culture of human rights in Kenya. What the Applicant does not seem to appreciate is that human rights**

pervades all the activities of human species. The need to respect human rights is very important in the governance of this country and where there is an allegation of maladministration the Respondent is under a duty to enquire into the complaint and act in accordance with the powers bestowed on it by the Constitution and legislation…"

72. In the circumstances, the Respondent submitted that its investigation of the complaint regarding the awarding of alleged selective remuneration to the Applicant was within its jurisdiction and did not violate Section 30(h) of the ***Commission on Administrative Justice Act***. This was not *ultra vires* and did not amount to usurpation of the mandate of the 1st Interested Party.

73. It was submitted that the investigations by the Respondent amounted to 'administrative action' within the meaning of Articles 47 and 59(2)(h-k) of the Constitution, section 2 of the ***Commission on Administrative Action Act*** and section of 2 of the ***Fair Administrative Action Act, 2015***, the latter legislation coming into force on 17th June 2015, two months after the conclusion of the investigations. It is also not contested that, in the conduct of investigations or performance of its functions, the Respondent is constitutionally and legally bound to comply with the law, including according an opportunity to any person who is adversely mentioned or is likely to be affected by its action to make his or her representation before it. This requirement, which encompasses the rules of natural justice, undoubtedly includes procedural propriety, information of the accusations, giving such persons sufficient opportunity to be heard and giving reasons for any action taken among others.

74. In the context of the Respondent, beyond the provisions of the Constitution and the ***Fair Administrative Justice Act***, the ***Commission on Administrative Justice Act*** provides additional protective measures to ensure the right to fair administrative action. Specifically, sections 36 and 37 of the Act provides as follows:

> ***36. The Commission shall give any person, State organ, public office or organisation against whom an advance finding or recommendation is made, an opportunity to make representations concerning the finding or recommendation before the Commission concludes the finding in its report.***
>
> ***37. Before commencing an investigation under this Act, the Commission shall give notice of the intended investigation to the administrative head of the State organ, public office or organization to which the investigation relates.***

75. It was submitted that it was not in doubt that the Respondent issued a Notice of Intention to investigate the allegations regarding the Applicant's remuneration among other issues in line with Article 47 of the Constitution and Section 47 of the ***Commission on Administrative Justice Act*** vide a letter dated 18th July 2014 to the EACC and it is instructive to note that while the ***Fair Administrative Action Act***, 2015 had not been enacted then, the notification nonetheless complied with its requirements.

76. Accordingly, it was submitted that the Applicant's contention that he was not given an opportunity to be heard by the Respondent is not true. He was accorded sufficient grounds and opportunity to be heard through face to face interviews and allowed to make written representations to the Respondent on the issue before the conclusion of the investigations. The Applicant was interviewed by the Respondent on 9th March 2015 at his Office, given an opportunity to record a statement vide a letter from the Respondent dated 5th March 2015 and make representations on the adverse findings and recommendations forwarded to him vide a letter of 31st March 2015. In all these instances, the Applicant co-operated and responded positively, including the letter from his Advocates, **Ms/ S. Musalia Mwenesi Advocates** of 2nd April 2015 where he acknowledged ***'the opportunity accorded to make representations.'***

77. Before the finalisation of the investigations, the Respondent accorded another opportunity to the Applicant vide a letter dated 31st March 2015. It was submitted that from the record, it is clear that the Respondent accorded an opportunity to the Applicant to be heard and make representations on the allegations relating to his remuneration.

78. With respect the issue of the anonymous complaint, the Respondent reiterated t foregoing and relied on section 29 of the Act which states in mandatory terms that:

> ***"The Commission shall investigate any complaint, or on its own initiative, investigate any matter arising from the carrying out of an administrative action of a public office, State Corporation or any other body or agency of the State."***

79. The Respondent also cited the position of Northern Ireland in **a Briefing Paper to the Northern Ireland Assembly titled *'Own Motion Investigations by Ombudsmen' by* Ray McCaffrey,** published on 10th January 2014 at page 5.

80. Accordingly, to argue that the Respondent cannot and should not act on anonymous complaints is to misconstrue the law. A purposive and contextual reading of the Act would lend itself to a different conclusion. To find otherwise would be retrogressive at a time when international best practice is in favour of anonymous complaints system and own initiative investigations by oversight bodies such as the Respondent based on anonymous complaints. In such cases, the complaints would be treated with caution, but cannot be ignored.

81. It was submitted that the Applicant's argument that the investigations by the Respondent amounted to quasi-hearing for which he was entitled to cross-examine the witnesses, is a misconceived and incorrect interpretation of the law. The truth of the matter is that the action undertaken by the Respondent in respect of the complaint regarding the Applicant's salary was an investigation and not a hearing within the meaning of Sections 26(c), 38 and 39 of the ***Commission on Administrative Justice Act***. The exercise of the investigative jurisdiction by the Respondent is different from a quasi-judicial jurisdiction for which a hearing is conducted and witness allowed to testify and be cross-examined by 'persons likely to be prejudiced or affected.'

82. An investigation it was submitted entails an examination of facts to ascertain the veracity of allegations made. It does not require a hearing to be conducted. In relation to quasi-judicial functions, **Blacks Law Dictionary, 9th Edition** defines it as "an action by an administrative agency which ascertains certain facts, ***holds hearings***, weighs evidence, makes conclusions from the facts as the basis for their official action, and *exercises discretion of a judicial nature*." Evidently, quasi-judicial jurisdiction involves hearings or adjudication which then forms the basis of binding decisions by the administrative agencies. In such cases, the testimony of witnesses and their cross-examination is paramount.

83. In investigations, it was submitted there is no requirement of a hearing and, therefore, cross examination of witnesses. What is required is compliance with the principles of natural justice, including according affected or persons likely to be affected an opportunity to be heard. It is in this regard that investigations engender *"Recommendations"* whereas the end product of adjudication is a "Decision." In appreciation of the foregoing, the ***Commission on Administrative Justice Act***, provides under Sections 41 and 42 of the Act that the Respondent makes *"Recommendations"* after an investigation or inquiry under the Act.

84. To the Respondent, it does not, therefore, follow that the right to be heard can only be fulfilled upon cross-examination of witnesses as contended by the Applicant since every matter has to be considered from its nature and circumstances. This position was support by ***Michael Fordham*** in ***Judicial Review Handbook, 4th Edition***, at page 1007 quoted in **Joseph Mbalu Mutava vs. Attorney General & Another [2014] eKLR**; **Re Pergamon Ltd [1971] 1 Ch. 388** quoted in **Judicial Service Commission vs. Mbalu Mutava & Another [2012] eKLR** at paragraph 33 and submitted that the position of the Kenyan courts seems to be similar even in the post-2010 constitutional dispensation in relation to investigations.

85. Earlier, the High Court in ***Joseph Mbalu Mutava (Supra),*** had stated in relation to cross-examination of witnesses in quasi-judicial proceedings:

> **"Judicial opinion is divided on the requirement for cross-examination of witnesses as forming part of procedural fairness. it is also not necessary that strict rules of evidence be applied in such inquiry. It is generally agreed that a hearing can be in any form, whether by way of written representations or an oral hearing. However, when it comes to cross-examination of witnesses, a distinction is made between oral hearings and other forms of hearings in this regard."**

86. In the Respondent's view, the foregoing does not mean that there is no requirement for fairness in investigations. The Constitution and consequential Acts of Parliament are now clear on the need for fairness. However, in the context of investigations, having cross-examination of witnesses is impractical and would go against the best international practice. It would bring the functioning of investigative bodies to a halt. Corruption and maladministration would reign supreme. In such cases, the investigative agency should accord persons adversely or likely to be mentioned adversely to make their representations without necessarily cross-examining witnesses. The investigating agency must thereafter evaluate the evidence and objectively make recommendations.

87. The Respondent submitted that a number of matters where the courts in Kenya have held that cross-examination of witnesses is paramount all relate to quasi-judicial proceedings on the basis of conduct of hearings by tribunals or under similar circumstances. To it, in **Republic v Kenyatta University Ex-Parte Njoroge Humphrey Mbuthi [2015] eKLR, paras. 39 and 42** the decision of the court was primarily informed the quasi-judicial proceedings rather than investigations and therefore, is not applicable in the present matter. In this regard, reliance of the said decision.

88. In the present matter, it was submitted the Respondent evaluated the evidence and reasonably accorded the Applicant opportunities to respond to the adverse information against him. The same did not require cross-examination of witnesses since this was an investigation rather than a hearing. Although the ***Fair Administrative Action Act, 2015*** was not in operation then, the cited section 4(4) would still not have been applicable since the cross-examination envisaged thereunder relate to quasi-judicial jurisdiction. In this case, the responsibility of acting procedurally, fairly, rationally and reasonably rested on the shoulders of the Respondent which it did by examining the evidence to establish whether the allegations disclosed any issues worth investigating, following the due process by giving notices and further according the Applicant an opportunity to be heard and make representations on several occasions before finalisation of the investigation.

89. It was submitted that the Respondent provided an opportunity to the Applicant on several occasions to make representations regarding the matters under investigation. His evidence together with that of other persons interviewed was considered, evaluated and findings and recommendations made. Indeed, his argument that the Respondent ignored relevant facts is not supported by any evidence other than his own assertions. Reasonableness or fairness of the process was not dependent on the Respondent taking a position favourable to the Applicant when, in fact, the available evidence showed otherwise.

90. It was the Respondent's case that the Applicant had not met any of the grounds to warrant this Honourable Court to exercise its discretion to issue the Orders sought and relied on **Republic vs. National Transport & Safety Authority & 10 others Ex-Parte James Maina Mugo [2015] eKLR.**

91. The Respondent therefore averred that the Applicant has not met the requirements for an award of costs in this case since the Respondent had demonstrated that it acted within the law, accorded a fair hearing and full disclosure to the Applicant, acted in good faith, reasonably, fairly and rationally analysed the proffered evidence and made appropriate recommendations. There was no injustice occasioned to the Applicant or violations of his rights. The Respondent has hereinbefore indicated and demonstrated the constitutional and statutory obligations it has in ensuring efficient and effective public service delivery to the citizens to ensure the full protection and promotion of the citizenry fundamental rights. The Respondent's duty is hence a public interest duty bestowed upon it by the law to which it cannot be punished for rectifying the different anomalies and wrongs in the public sector.

92. Based on the foregoing, it was the Respondent's submissions that the present case is misconceived,

bad in law and an abuse of this Honourable Court's process and the same should be dismissed with costs.

1st Interested Party's Case

93. On behalf of the 1st interested party, the Salaries and Remuneration Commission (hereinafter referred to as "the SRC") it was averred that its mandate is set out in Article 230(4) of the constitution and that the investigation of corruption is not a part of its mandate.

94. According to the SRC, it was not a party to the recommendations that to the publishing of the respondent's report and there are no orders being sought as against it and that the joinder is improper. Further, the petitioners have not disclosed any cause of action as against the SRC and there is no remedial action required by the petitioners to be performed by the 1st respondent in this petition.

95. To SRC, the orders being sought being discretionary, they ought not to be granted.

Determination

96. I have considered the application, the affidavits in support of and in opposition to the application the submissions as well as the authorities relied upon and this is the view I form of the matter.

> 13. It is important to understand the scope of judicial review in this jurisdiction. 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.

97. Judicial review is a constitutional supervision of public authorities involving a challenge to the legal 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 the taking into account of 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.**

98. In my view 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.

99. 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.**

100. Whereas the general position is that in judicial review, the Court is only concerned with the process through which the decision is arrived at rather than the merits of the decision itself, in practice, the distinction between the two is rather blurred. That this is so was appreciated by the Court of Appeal in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others [2016] KLR,** where the Court expressed itself at paras 55-58 as hereunder:

> 55. **An issue that was strenuously urged by the respondents is that the appellant's appeal is bad in law to the extent that it seeks to review the merits of the Minister's decision while judicial review is not concerned with merits but propriety of the process and procedure in arriving at the decision. Traditionally, judicial review is not concerned with the merits of the case. However, *Section 7 (2) (l)* of the Fair Administrative Action Act provides proportionality as a ground for statutory judicial review. Proportionality was first adopted in England as an independent ground of judicial review in R v Home Secretary; Ex parte Daly [2001] 2 AC 532. The test of proportionality leads to a "greater intensity of review" than the traditional grounds. What this means in practice is that consideration of the substantive merits of a decision play a much greater role. Proportionality invites the court to evaluate the merits of the decision; first, proportionality may require the reviewing court to assess the balance which the decision maker has struck, not merely whether it is within the range of rational or reasonable decisions; secondly, the proportionality test may go further than the traditional grounds of review inasmuch as it may require attention to be directed to the relative weight accorded to interests and considerations; thirdly, the intensity of the review is guaranteed by the twin requirements in *Article 24 (1) (b)* and *(e)* of the *Constitution to wit* that the limitation of the right is necessary in an open and democratic society, in the sense of meeting a pressing social need and whether interference vide administrative action is proportionate to the legitimate aim being pursued. In our view, consideration of proportionality is an indication of the shift towards merit consideration in statutory judicial review applications.**
>
> 56. **Analysis of *Article 47* of the Constitution as read with the Fair Administrative Action Act reveals the implicit shift of judicial review to include aspects of merit review of administrative action. *Section 7 (2) (f)* of the Act identifies one of the grounds for review to be a determination if relevant considerations were not taken into account in making the administrative decision; *Section 7 (2) (j)* identifies abuse of discretion as a ground for review while *Section 7 (2) (k)* stipulates that an administrative action can be reviewed if the impugned decision is unreasonable. *Section 7 (2) (k)* subsumes the dicta and principles in the case of Associated Provincial Picture Houses Ltd v Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. *Section 7 (2) (i) (i)* and *(iv)* deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in *Section 7 (2) (i)* that require consideration if the administrative action was authorized by the empowering provision or not connected with the**

purpose for which it was take and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that the even if the merits of the decision is undertaken pursuant to the grounds in *Section 7 (2)* of the Act, the reviewing court has no mandate to substitute its own decision for that of the administrator. The court can only remit the matter to the administrator and or make orders stipulated in Section 11 of the Act. On a case by case basis, future judicial decisions shall delineate the extent of merit review under the provisions of the Fair Administrative Action Act.

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

58. **The essence of merit review is the power to substitute a decision. Under the *Fair Administrative Actions Act*, there is no power for the reviewing court to substitute the decision of the administrator with its own decision. This imposes a limit to merit review under the Act. *Section 11 (1) (e)* and *(h)* of the Fair Administrative Action Act permits the court in a judicial review petition to set aside the administrative action or decision and or to declare the rights of parties and remit the matter for reconsideration by the administrator. The power to remit means that decision making on merits is the preserve of the administrator and not the courts.**

101. In this case one of the issues that call for determination is the scope of the powers conferred upon and the mandate of the Respondent. the mandate of the Respondent is provided for under Article 59(2)(h-k) of the Constitution outlines the functions of the Commission (Kenya National Human Rights and Equality Commission) as:-

h. ***to investigate any conduct in state affairs, or any act or omission in public administration in any sphere of government, that is alleged or suspected to be prejudicial or improper or to result in any impropriety or prejudice;***

i. ***to investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct;***

j. ***to report on complaints investigated under paragraphs (h) and (i) and take remedial action; and***

k. ***to perform any other functions prescribed by legislation.***

102. Section 8 of the ***Commission on Administrative Justice Act*** on the other hand provides that the functions of the Respondent are:

a. ***investigate any conduct in state affairs, or any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice;***

b. ***investigate complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct within the public sector;***

c. ***report to the National Assembly bi-annually on the complaints investigated under paragraphs (a) and (b), and the remedial action taken thereon;***

d. ***inquire into allegations of maladministration, delay, administrative injustice, discourtesy, incompetence, misbehavior, inefficiency or ineptitude within the public service;***

e. ***…;***

f. ***…;***

g. ***recommend compensation or other appropriate remedies against persons or bodies to which this Act applies;***

h. ***…;***

103. According to the applicant, the Respondent purported to conduct investigations on the Applicant's Remuneration yet it is not within the Respondent's power to conduct investigations on the remuneration of public officers and make recommendations as set out in the Impugned Report. By purporting to conduct investigations on the Applicant's remuneration, the Respondent usurped the powers of the SRC as set out in Article 230(4) of the Constitution of Kenya, 2010. In this case, the Respondent's case was that it received a complaint from anonymous source that the applicant's emoluments were never set by the body mandated by the law to do so, the SRC. If this was the position, then it may well fall within the mandate of the Respondent's investigatory mandate since such action, in my view may well fall within the rubric of "*any act or omission in public administration by any State organ, State or public officer in National and County Governments that is alleged or suspected to be prejudicial or improper or is likely to result in any impropriety or prejudice***".** Similarly it would amount to abuse of power for an entity to arrogate itself the powers which it does not possess. I therefore do not agree with the applicant that the Respondent had no power to investigate the allegations which were made to it *ab initi*o.

104. That brings me to the nature of the complaint. It is clear that what triggered the action by the Respondent was an alleged anonymous complaint. It was the applicant's case that it was unreasonable and unjust for the Respondent to conduct investigations and publish a report of the gravity and such extensive implications on the Applicant's constitutional rights on the basis of an 'anonymous' complainant whose complaint or account of the facts was never disclosed at any point during the investigation. To him, by conducting the investigations and publishing the ensuing Report on the basis of an undisclosed Complainant, the Respondent denied the Applicant a fair hearing since the Applicant was denied an opportunity to face and challenge his accuser.

105. It is paramount at this juncture that this court establishes the ingredients and/or components of natural justice. The principles of natural justice concern procedural fairness and ensure a fair decision is reached by an objective decision maker. Maintaining procedural fairness protects the rights of individuals and enhances public confidence in the process. The ingredients of fairness or natural justice that must guide all administrative decisions are, firstly, that a person must be allowed an adequate opportunity to present his case where certain interests and rights may be adversely affected by a decision-maker; secondly, that no one ought to be judge in his or her case and this is the requirement that the deciding authority must be unbiased when according the hearing or making the decision; and thirdly, that an administrative decision must be based upon logical proof or evidentiary material.

106. A recent articulation of the elements of procedural fairness in the administrative law context was provided by the Supreme Court of Canada in **Baker vs. Canada (Minister of Citizenship & Immigration) 2 S.C.R. 817 6** where it was held:

> "**The values underlying the duty of procedural fairness relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decision affecting their rights, interests, or privileges made using a fair, impartial and open process, appropriate to the statutory, institutional and social context of the decisions."**

107. Article 47 of the Constitution of Kenya provides that every person has the right to administrative

action that is expeditious, efficient, lawful, reasonable and procedurally fair. Similarly section 4(1) of the ***Fair Administrative Action Act***, No. 4 of 2015 provides that every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair. Section 4(3) of the said Act on the other hand provides:

> ***Where an administrative action is likely to adversely affect the rights or fundamental freedoms of any person, the administrator shall give the person affected by the decision-***
>
> ***(a) prior and adequate notice of the nature and reasons for the proposed administrative action;***
>
> ***(b) an opportunity to be heard and to make representations in that regard;***
>
> ***(c) notice of a right to a review or internal appeal against an administrative decision, where applicable;***
>
> ***(d) a statement of reasons pursuant to section 6;***
>
> ***(e) notice of the right to legal representation, where applicable; (f) notice of the right to cross-examine or where applicable; or***
>
> ***(g) information, materials and evidence to be relied upon in making the decision or taking the administrative action.***

108. Section 4(4)(c) thereof on its part provides that the administrator shall accord the person against whom administrative action is taken an opportunity to cross-examine persons who give adverse evidence against him. However, section 4(6) of the Act provides that where the administrator is empowered by any written law to follow a procedure which conforms to the principles set out in Article 47 of the Constitution, the administrator may act in accordance with that different procedure.

109. It is therefore clear that an opportunity to be heard must not necessarily be by way of oral hearing as is usually the position when one is charged before a court of law. I agree with **Michael Fordham** in ***Judicial Review Handbook*** 4th Edn. at page 1007 that:

> **"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".**

110. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

> **"In the court's view, the fairness of a hearing is not determined solely by its oral nature. It may be conducted through an exchange of letters as happened in the present case. The hearing does not necessarily have to be an oral hearing in all cases. There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed and there is no rule that fairness always requires an oral hearing. Whether an oral hearing is necessary will depend upon the subject matter and circumstances of the particular case and upon the nature of the decision to be made."**

111. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc. Application No. 12 of 2002**, it was held *inter alia* as follows:

> **"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be**

unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

112. In my view, reference to hearing the other side must have been with respect to oral representation since I do not see how a decision affecting a person can be made without affording that person an opportunity to present his case either orally or by in writing in light of the provisions of Article 47 and 50 of the Constitution. However, the law is clear that where a tribunal decides to hear one party then it must hear all the parties. See **Re Hebtulla Properties Ltd. [1979] KLR 96; [1976-80] 1 KLR .**

113. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

114. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

115. However, the law is now clear that where adverse evidence is given about a person, the person is to be afforded an opportunity to cross-examine the said witnesses unless that right is excluded in circumstances that justify that course. Otherwise if some of the people who gave evidence to the investigating authority and whose evidence is sought to be relied upon are unjustifiably not availed for cross-examination, there is no way the manner in which such proceedings are conducted can be said to have met the threshold under Article 47 of the Constitution pursuant to which the ***Fair Administrative Action Act*** was enacted. It is important to note that even in cases where a different procedure is prescribed such a procedure must comply with the spirit of Article 47 of the Constitution.

116. In this case in support of its position to receive anonymous communication the Respondent relied on Regulation 5(4) of the ***Commission on Administrative Justice Regulations, 2013*** which provides that:

Despite the foregoing, a complaint may be made anonymously, or treated in such a manner as to protect the identity of, or particulars of, the complainant where necessary, as may be directed by the Chairperson.

117. On his part the applicant relied on section 32(1) of the ***Commission on Administrative Justice Act*** (hereinafter referred to as "the Act") which provides that:

A complaint to the Commission may only be made by the person aggrieved by the matter complained of or on his behalf as specified under subsection (2).

118. To the applicant it is illegal to receive a complaint from an anonymous source. In my view, there is

nothing illegal about receiving a concern from an anonymous source since the Commission may even act on its own motion. Such a concerned person however ought not to be treated as a complainant for the purposes of the veracity of the issues raised. The said concern ought to be considered as a basis for conducting independent investigations by the Respondent. My view is supported by the position in ***'Own Motion Investigations by Ombudsmen'*** (supra) that:

> ***In the event that the informant is not acting as a complainant, and is simply bringing a concern to the attention of the Ombudsman, it is open to the Ombudsman to investigate on the 'own initiative' basis (…) following preliminary examination…In some cases, information will be provided to the Ombudsman by a 'whistleblower' from within a public body who may wish to remain anonymous. To pursue issues raised by a whistleblower, any Ombudsman investigation would have to be on the basis of an own initiative…In the absence of a specific informant, it is still open to the Ombudsman to take on an own initiative investigation provided she has become aware of an action which, on preliminary examination, warrants investigation.***

119. What would be objectionable therefore would the sole reliance on the informant's information as the basis the Respondent's decision. In this case, it is the Respondent's case that it did carry out its independent investigations into the matter and arrived at a decision based on the said investigations.

120. The reason why the Respondent ought not to solely rely on the informant's information was dealt with in **Republic vs. Kenyatta University Ex Parte Njoroge Humphrey Mbuthi [2015] eKLR,** where this Court held that:

> **"… the law is now clear that where adverse evidence is given about a person, the person is to be afforded an opportunity to cross-examine the said witnesses…In the absence of these witnesses and as the law required that they be availed for cross-examination, there is no way the manner in which the respondent conducted its proceedings can be said to have met the threshold under Article 47 of the Constitution pursuant to which the** ***Fair Administrative Action Act*** **was enacted."**

121. In this case it was contended by the Respondent that, an investigation process is completely different from a quasi-judicial process which accordingly should afford any accused person an opportunity to challenge his accuser's version of the allegation hence the averment by the Applicant that he was not offered an opportunity to challenge his accuser thereof lacks in legal backing. The general position on this matter is stated in ***Halsbury's Laws of England*** (supra) as follows:

> **"The rule generally applies, at least with full force, only to conduct leading directly to a final act or decision, and not to the making of a preliminary decision or to an investigation designed to obtain information for the purpose of a report or a recommendation on which a subsequent decision may be founded."**

122. This position found favour in our local jurisprudence in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354** in which the Court stated:

> **"The notice that is under challenge in these proceedings gave the applicants 14 days to vacate the disputed land. The letter (Notice) was written based on the findings of the Ndungu Report on land whose recommendations have not acquired any statutory form. They are mere recommendations and have no force of law and it is doubtful whether the said Report can be a basis for issuance of such notice as the one under attack in this application."**

123. It was similarly held in **Judicial Service Commission vs. Mbalu Mutava & Another [2012] eKLR**, at paragraph 34 that:

> **"All these cases including** *Nancy Makhoha Baraza v Judicial Service Commission & 9 Others [2012] eKLR* **show that an investigation is not a trial and that cross-examination of witnesses, if called, is a rare occurrence. Unless the empowering law provides otherwise, the decision**

> **whether or not to summon witnesses and the decision to allow or not allow the cross-examination of witnesses, is at the sole discretion of the investigating body. Indeed, the technical rules of evidence with the attendant right to cross-examination do not form part of the natural justice rules or in this case, part of fair administrative action."**

124. However, in **Re Pergamon Press Ltd [1971] Ch. 388,** the Minister had appointed inspectors to investigate the affairs of a company and on behalf of the directors it was claimed that the inspectors should conduct the inquiry much as if it were a judicial inquiry in a Court of Law. That issue was answered as follows:

> **"It seems to me that this claim on their part went too far. This inquiry was not a court of law. It was an investigation in the public interest, in which all should surely co-operate, as they promised to do. But if the directors went too far on their side, I am afraid that Mr Fay, for the inspectors, went too far on the other. He did it very tactfully, but he did suggest that in point of law the inspectors were not bound by the rules of natural justice. He said that in all the cases where natural justice had been applied hitherto, the tribunal was under a duty to come to a determination or decision of some kind or the other. He submitted that when there was no determination or decision but only an investigation or inquiry, the rules of natural justice did not apply...I cannot accept Mr Fay's submission.** ***It is true, of course, that the inspectors are not a court of law. Their proceedings are not judicial proceedings. They are not even quasi-judicial, for they decide nothing; they determine nothing. They only investigate and report. They sit in private and are not entitled to admit the public to their meetings. They do not even decide whether there is a prima facie case. But this should not lead us to minimise the significance of their task. They have to make a report which may have wide repercussions. They may, if they think fit, make findings of fact which are very damaging to those whom they name. They may accuse some; they may condemn others; they may ruin reputations and careers. Their report may lead to judicial proceedings. It may expose persons to criminal prosecutions or to civil actions. It may bring about winding up of the company, and be used as material for the winding up...Seeing that their work and their report may lead to such consequences, I am clearly of the opinion that the inspectors must act fairly. This is a duty which rests on them, as on many other bodies, even though they are not judicial, but are only administrative. The inspectors can obtain the information in any way they think best, but before they condemn or criticise a man, they must give him a fair opportunity for correcting or contradicting what is said against him.*** **They need not quote chapter and verse. An outline of the charge will usually suffice...That is what the inspectors here propose to do, but the directors of the company want more. They want to see the transcripts of the witnesses who speak adversely of them, and to see any documents which may be used against them. They, or some of them, even claim to cross-examine the witnesses. In all these the directors go too far. This investigation is ordered in the public interest. It should not be impeded by measures of this kind."** [Emphasis mine].

125. ***Halsbury's Laws of England*** (supra) puts it thus:

> **"However, the nature of the inquiry or a provisional decision may be such as to give rise to a reasonable expectation that persons prejudicially affected should be afforded an opportunity to put their case at that stage; ad it may be unfair not to require the inquiry to be conducted in a judicial spirit if its outcome is likely to expose a person to a legal hazard or other substantial prejudice."**

126. It is therefore clear that the need to act fairly depends on the nature of the report and the recommendations to be made. The circumstances in which the rule will apply cannot be exhaustively defined, but they embrace a wide range of situations in which acts or decisions have civil consequences for individuals by directly affecting their interests or legitimate expectations. Where the report and recommendations may have far reaching implications such as the ruining of careers and reputation as well as being the basis of judicial proceedings, the authority concerned has a duty to act fairly. It is for this reason that I believe the provisions of sections 36 and 39 of the Act are relevant. The two provisions provide:

36. The Commission shall give any person, State organ, public office or organisation against whom an adverse finding or recommendation is made, an opportunity to make representations concerning the finding or recommendation before the Commission includes the findings in its report.

39(1) Subject to subsection (2), if at any stage of an inquiry, the Commission-

a. ***considers it necessary to inquire into the conduct of any person; or***

b. ***is of the opinion that the reputation of any person is likely to be prejudice by the inquiry, it shall give that person an opportunity to appear before the Commission by himself or by an advocate to give evidence in his own defence.***

127. Therefore even without the benefit of case law, the Act itself imports the elements of a hearing before the Respondent's findings are included in the report. On this issue ***Halsbury's Laws of England***, (supra) states:

"Where however a general duty to act judicially is cast on the competent authority, only clear language will be interpreted as conferring a power to exclude the operation of the rule, and even in the absence of express procedural requirements fairness may still dictate that prior notice and an opportunity to be heard be afforded."

128. In this case the Respondent recommended that the applicant refunds what in its view was an overpayment and that appropriate action be taken against the applicant. The consequences of the failure to act by a body to whom the Respondent has directed its recommendations are specified in section 42(4) of the Act as follows:

(3) ***If there is failure or refusal to implement the recommendations of the Commission within the specified time, the Commission may prepare and submit to the National Assembly a report detailing the failure or refusal to implement its recommendations and the National Assembly shall take appropriate action.***

129. Therefore as opposed to a situation where a body is merely tasked with investigations and preparation of a report and what follows thereafter is solely left to the institutions to which a report is made, the Respondent's duty does not end at the point where the report is made. The Respondent has the mandate to follow up and see that its recommendations are implemented. In my view the Respondent's recommendations are the kind of recommendations which were contemplated in **Re Pergamon Press Ltd** (supra). I therefore find that the Respondent was under a duty to act fairly and before condemning the ex parte applicant or criticising him, had to afford the applicant a fair opportunity for correcting or contradicting what was said against him.

130. The minimum ingredients of fair hearing are provided in Article 47 of the Constitution. I say the minimum because under Article 20 of the Constitution every person is entitled to enjoy the rights and fundamental freedoms in the Bill of Rights to the greatest extent consistent with the nature of the right or fundamental freedom and in applying a provision of the Bill of Rights, a court is enjoined *inter alia* develop the law to the extent that it does not give effect to a right or fundamental freedom and to adopt the interpretation that most favours the enforcement of a right or fundamental freedom.

131. In this case however, the Respondent has detailed the actions it took before compiling its report. It is clear from the facts placed before me that the applicant was afforded an opportunity of being heard during the process of investigations. It is contended that on occasions the applicant failed to respond to the Respondent's inquiries. As was held in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998**:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point

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

132. I cannot therefore fault the Respondent for failing to afford the applicant an opportunity of being heard. The Respondents decision cannot however be successfully impugned solely on the basis that the Respondent did not believe the version presented by the applicant.

133. That however is not the end of the matter with respect to this issue. It was contended that the Respondent took evidence from persons in the absence of the Applicant and that the Applicant was never given an opportunity to consider or challenge the evidence tendered against him before it was relied on by the Respondent. Some of the persons interviewed by the Respondent were public officers including **Mr. Edward Kenga Karisa**, **Ms. Irene Keino** and **Professor Jane Onsongo**. However, the Applicant was never given an opportunity to consider the evidence tendered against him by the afore-said persons or cross-examine the aforesaid persons. The Respondent has not proffered any reason why the applicant was never afforded an opportunity to challenge the evidence given by these persons. The failure to do so in my view was a violation of the applicant's right to fair administrative action.

134. The Respondent's report was further attacked on the ground that the matters, charges and recommendations contained in the letter dated 31st March 2015 were materially different from those set out in the Report. In my view since the law permits the Respondent to conduct investigations even on its own motion, if during the course of an investigation instigated by a complainant or an informant new issues come to the attention of the Respondent not covered by the complaint nothing should bar the Respondent from investigating the same as long as in the course of doing so the due process of the law is followed.

135. In this case it was contended that the Respondent in its conduct of the investigations and publication of the Report displayed malice and lack of objectivity such as in its letter dated 31st March 2015 addressed to the Applicant, the Respondent deliberately concealed the true and full content and tenor of the Report and provided limited information for the response by the Applicant thereby misleading the Applicant to only respond to a limited scope of the allegations against him. According to the respondent through a letter dated 8th April 2015 (erroneously indicated as 8th August 2015) which letter was duly received and stamped on 8th April 2015, it forwarded to the Ex-parte Applicant a copy of the referred contract and required him to do a rejoinder on or before 10th April 2015 but no response or rejoinder was received from the Applicant in relation to the contract as was required by the aforesaid letter. Accordingly, the investigations process was duly concluded with a report being compiled and forwarded to the EACC for action on 14th April 2015. This contention was never rebutted. Accordingly, the applicant had an opportunity of rebutting the same but chose not to do so.

136. It was contended that the Respondent did not have jurisdiction to deal with the matter of salary and remuneration of public officers either at the time the issue was under active consideration by the SRC or after a determination was made by the SRC. Section 30(h) of the Act bars the Respondent from investigating any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.

137. In **Republic vs. Commission on Administrative Justice & Another Ex Parte Samson Kegengo Ongeri [2015] eKLR,** this Court held that:

"It has further been contended that since the 1st Respondent was unaware of the existing court proceedings, section 30(c) is inapplicable. With due respect the 1st Respondent is

attempting to read into legislation what does not exist. The general rule is that a statute should not, in absence of express provision, be construed so that it deprives people of their accrued rights…The 1st Respondent is barred from investigating matters pending in Court knowledge or otherwise of such proceedings immaterial…Therefore even if the Commission had powers to investigate the nature of the complaints in issue but the Legislation under which it operates restricts its powers as was the case, in the instant case, the Commission would not have jurisdiction to embark on the said voyage unless the statutory bottlenecks had been removed or settled. A tribunal which has no jurisdiction to entertain a matter, it has been held, cannot purport to accord the respondent a fair hearing."

138. It was contended that the Respondent's investigators never sought to interview or record a statement from the Chairperson of the EACC before concluding and publishing their report and that had they done so, the Chairperson would have easily clarified the facts and demonstrated that the Applicant's salary was approved by the SRC as communicated to the Respondent vide the letters referred to in paragraph 20 above. It is however on record that overtures were made to the EACC. In my view it was upon the chairperson of the EACC to seize that opportunity and clarify the position rather than wait for a specific invitation to him.

139. It was submitted that investigation into the remuneration structure of any public institution is not among the Respondent's mandate as this is the exclusive mandate of the SRC. Accordingly, limited to the question of the remuneration structure of EACC, to include the salary and benefits of the Applicant, it was submitted that the Respondent did not have the subject matter jurisdiction which rendered its decision/recommendations a nullity. To my mind if a public officer is wrongfully given remuneration that he is not entitled to, the Respondent may well be entitled to investigate whether that action was undertaken in abuse of the powers of the entity concerned. Accordingly I agree that a restrictive interpretation ought not to be adopted in such circumstances in order to find that the Respondent lacked jurisdiction to deal with the matter. It would have been otherwise if the Respondent knew in advance that the said remuneration had been approved by the SRC but still insisted on investigating the same. In those circumstances the Respondent would clearly have exceeded its jurisdiction and its action would have been unreasonable. To that extent I agree with the decision in **Okiya Omtatah Okoiti & 3 Others vs. Attorney General & 5 Others [2014] eKLR** that:

"It is essential to emphasize that all organs created by the Constitution are of equal importance. They complement and defer to each other. Where one organ is of the view that another organ has overstepped its mandate, the aggrieved body should seek a solution as provided by the Constitution. Parliament cannot and must not be allowed to run roughshod over other constitutional organs. Allowing Parliament to do as it pleases will sooner rather than later lead to a breakdown of law and order."

140. It is however clear that from the material presented by the SRC that the applicant's remuneration had been approved by the SRC which is the state organ mandated to set the same. According to the Respondent, the information touching on the alleged recommendation by the SRC of the Applicant's remuneration was brought to the attention of the Respondent after investigations and after publication of its report on 14th April 2015. It was the Respondent's case that the latter information by the SRC was an afterthought indicating manipulative tactics to defeat the course for fair administrative justice and that as at the time the Respondent's report was forwarded to the EACC being 14th April 2015, the same reflected a true position on the facts and state of affairs on the investigations process. It was therefore the Respondent's assertion that its report was based on factual information supplied by the SRC and the Applicant during the investigative process and as such, the report cannot be faulted on the basis of late information which is clearly an afterthought. To the Respondent, the SRC's letter dated 27th April 2015 was received by Respondent on 6th May 2015 and by that time, the Respondent had already published its report and thus being '*functus officio*.'

141. I however am unable to find any evidence on record of the so called "manipulative tactics to defeat the course for fair administrative justice" or that the failure by either the EACC or the applicant to

disclose the fact of the approval was malicious or that the issue of the approval was an afterthought as alleged. Whereas it was imprudent for the EACC or the applicant not to have brought this issue to light earlier on, I cannot make a definite finding otherwise than speculate that the approval in fact did not exist during the investigation process.

142. Whereas, the Respondent may not have been aware of this during the tenure of its investigations and cannot therefore be faulted for not taking the same into consideration, to allow the decision to stand when it is clearly unreasonable and I daresay without jurisdiction would be unjust. **Nyamu, J** (as he then was) in **Republic vs. Kajiado Lands Disputes Tribunal & Others *ex parte* Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318** held that the Court cannot countenance nullities under any guise since the High court has a supervisory role to play over inferior tribunals and courts and it would not be fit to abdicate its supervisory role hence it has powers to strike out nullities. In the premises where a decision is clearly without jurisdiction the Court ought to rise to the occasion and pronounce it to be so since as was held in **Macfoy vs. United Africa Co. Ltd [1961] 2 All ER 1169 at 1172:**

> **"…where an act is a nullity it is trite that it is void and if an act is void, then it is in law a nullity as it is not only bad but incurably bad and there is no need for an order of the Court to set it aside, though sometimes it is convenient to have the Court declare it to be so. Where the Court finds this to be so the actions taken in pursuance thereof must therefore break down once the superstructure upon which it is based is removed; since you cannot put something on nothing and expect it to stay there as it will collapse."**

143. With respect to the conduct of **Mrs. Ann R. Gitau**, it is clear from her cross-examination that her response to the inquiries by the Respondent was reckless to say the least. She ought to have been aware of the consequences of her response and ought to have been more careful before responding in the manner she did. That is all I wish to state.

144. Having considered the issues raised in this application, it is my view and I hold that the conduct of the investigatory process by the Respondent fell short of a fair administrative action under the Constitution and the ***Fair Administrative Action Act***. I further find that the Respondent had no jurisdiction to embark on the investigation of the issues complained of during the pendency of similar investigations by the SRC and in light of the approval by SRC of the applicant's remuneration.

Order

145. In the premises I hereby issue:

> 1. **An Order of Prohibition prohibiting the Respondent by itself, agents, employees or whomsoever from taking any steps, actions and or measures to implement the recommendations contained in Chapter 2 of the Respondent's Report dated April 2015 and titled 'Anonymous Complaint Against the Ethics and Anti- Corruption Commission on Alleged Impropriety and Abuse of Power by Selectively Awarding the Deputy Commission Secretary a Salary beyond rates Approved by the Salaries and Remuneration Commission and the Grave Allegations of Impropriety by some EACC Officials through Alleged Acquisition of some Houses Allegedly Donated of Facilitated by the National Social Security Fund or whose Acquisition Demonstrates Forbearance or Culpable Accommodation on the Part of NSSF at a Time when the Latter Body was under investigation by the Former and/or any other reference to the Applicant contained in the Report in relation to the Applicant's salary.**
>
> 2. **An Order of Prohibition prohibiting the Respondent by itself, agents, employees or whomsoever from further reproducing, forwarding, distributing or otherwise publishing Chapter 2 of the Respondent's Report dated April 2015 and titled 'Anonymous Complaint Against the Ethics and Anti- Corruption Commission on Alleged Impropriety and Abuse of Power by Selectively Awarding the Deputy Commission Secretary a Salary beyond rates**

Approved by the Salaries and Remuneration Commission and the Grave Allegations of Impropriety by some EACC Officials through Alleged Acquisition of some Houses Allegedly Donated of Facilitated by the National Social Security Fund or whose Acquisition Demonstrates Forbearance or Culpable Accommodation on the Part of NSSF at a Time when the Latter Body was under investigation by the Former' touching on the remuneration of the Applicant.

3. **An Order of Certiorari removing into this Honourable Court for the purposes of being quashed the Respondent's Report dated April 2015 and titled 'Anonymous Complaint Against the Ethics and Anti- Corruption Commission on Alleged Impropriety and Abuse of Power by Selectively Awarding the Deputy Commission Secretary a Salary beyond rates Approved by the Salaries and Remuneration Commission and the Grave Allegations of Impropriety by some EACC Officials through Alleged Acquisition of some Houses Allegedly Donated of Facilitated by the National Social Security Fund or whose Acquisition Demonstrates Forbearance or Culpable Accommodation on the Part of NSSF at a Time when the Latter Body was under investigation by the Former touching on the remuneration of the Applicant which decision is hereby quashed.**

146. However as the applicant and the SRC had ample opportunity of bringing to the attention of the Respondent the fact of the said approval but they did not do so till after the completion of the investigations, there will be no order as to costs.

147. It is so ordered.

Dated at Nairobi this 22nd day of February, 2017

G V ODUNGA

JUDGE

Delivered in the presence of:

Mr Waudo for Mr Muraya for the 2nd interested party

Miss Mbora for Mr Okello for the Respondent

Miss Wafula for the 1st interested party

CA Mwangi