REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR CASE NO. 304 OF 2014

REPUBLIC …….....APPLICANT

VERSUS

COMMISSION ON ADMINISTRATIVE JUSTICE…….RESPONDENT

Ex-parte

NATIONAL SOCIAL SECURITY FUND BOARD OF TRUSTEES

JUDGEMENT

1. Through the Notice of motion application dated 5th August, 2014 the ex-parte Applicant, the National Social Security Fund (NSSF) Board of Trustees prays for orders that:

"1. An Order of Certiorari do issue to remove into the High Court and quash the whole Investigations Report by the Ombudsman-Kenya on Abuse of Power and Disregard of Procurement Procedures by the Ag, CEO and the Management of NSSF in the awarding of Tassia II Infrastructure Development Project (April, 2014).

2. THAT the Court be at liberty to make such further and/or alternative orders as it deems appropriate.

3. THAT Costs of this application be provided for."

2. The application is supported by the grounds set out in the Statutory Statement dated 4th August, 2014 and the facts contained in the Verifying Affidavit of the Applicant sworn on 4th August, 2014 by Richard Langat.
3. The Respondent, the Commission on Administrative Justice is a constitutional commission established under Article 59 of the Constitution of the Republic of Kenya.
4. According to the papers filed in Court, the Applicant's case is that by a letter dated 17th January, 2014, the Chairperson of the Respondent requested the Managing Trustee of the Applicant to respond to allegations enumerated in the letter of Francis Atwoli in regard to Tassia II Regularisation Scheme Infrastructure Development (the Project). A copy of the complaint was attached to the Respondent's letter.
5. The Applicant responded through a letter dated 22nd February, 2014, forwarding a detailed report

on the issues raised. It is the Applicant's case that as at the time the Respondent wrote the said letter, the Applicant's management had been invited to appear before the Public Investments Committee (PIC) of the National Assembly and the Ethics and Anti-Corruption Commission (EACC) to answer allegations regarding the Project. Further, that on 30th January, 2014, the Applicant's Managing Trustee and other managers had appeared before PIC where they were grilled about the Project.

6. On 29th January, 2014, the Respondent wrote to the Applicant indicating that it had decided to conduct investigations into the Project focusing on two issues namely; the approval of the contract by the Board of the Applicant and the administrative management of the process leading to the award of the contract.
7. On receiving this letter, the Applicant wrote to the Respondent on 3rd February, 2014, alerting it of the fact that the Project was under the investigation of EACC, PIC and the Labour and Social Welfare Committee of the National Assembly. The Applicant urged the Respondent to postpone the scheduled interview in light of those investigations and the fact that Section 30(h) of the Commission on Administrative Justice Act, 2011 (CAJA) barred the Respondent from investigating matters under investigation by other commissions.
8. The Respondent wrote back to the Applicant on 6th February, 2014, contending that its powers emanate from the Article 59(2) (h), (i) and (j) of the Constitution and therefore any legislation that would seem to curtail its functions would "not pass muster." The Respondent also stated that at the time of the commencement of the enquiry no other entity was seized of investigations in respect of the matters raised. The Respondent contended that its role was focused on administrative law while that of EACC was targeted at criminality and consequently the focus and resultant actions are distinct.
9. On 17th February, 2014, the Applicant wrote to the Secretary/ Chief Executive Officer of EACC seeking guidance as to whether it was proper for the Respondent to proceed with investigations over a matter that it was investigating. The EACC wrote back on 21st February, 2014 and copied the letter to the Respondent confirming that they were indeed investigating the matter and they were not privy to the issues being investigated by the Respondent.
10. The Applicant denies the Respondent's contention that it was the first body to commence investigations into the Project. It is the Applicant's case that the Respondent's decision to proceed with the investigation was in breach of Section 30(h) of the CAJA. Further, that on 23rd April, 2014, PIC made its findings on the matter.
11. According to the Applicant, the Respondent has published a draft Investigations Report (the Report) on the Project and its findings and recommendations conflicted with those of PIC and the rationale of Section 30(h) of the CAJA was therefore apparent. The Applicant has therefore urged this Court to issue an order removing the Respondent's Report into this Court and having it quashed.
12. As per the Statutory Statement dated 4th August, 2014, the Applicant consequently seeks relief on the grounds that:

> **"1) The Respondent acted in breach of the express language of Section 30(h) of the Commission on Administrative Justice Act which provide that the Commission shall not investigate any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law.**
>
> **2) The Applicant does not fall within the ambit of public service as contemplated by Article 260 of the Constitution and not within the ambit of section 29(1) of the Commission on Administrative Justice Act.**
>
> **3) The investigation report is a nullity in law for want of jurisdiction.**
>
> **4) It is desirable that the court do declare the report a nullity to avoid substantial prejudice and inconvenience that may ensue from acting on the recommendations."**

13. The Respondent opposed the application through a Replying Affidavit sworn on 6th October, 2014 by its Chairperson. The Respondent's case is that it is a constitutional commission established following the restructuring of the Kenya National Human Rights and Equality Commission pursuant to Article 59(4) of the Constitution. That pursuant to Article 59(5) of the Constitution as read together with Section 4 of the CAJA, the Respondent has the status and powers of a commission within the meaning of Chapter 15 of the Constitution of Kenya.
14. Further, that the Respondent has been given a wide mandate under Articles 59(2)(h)–(k), 249 and 252 of the Constitution as read with sections 8, 26, 27, 28 and 29 of the CAJA. Such mandate amongst other things includes; 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 and further to deal with maladministration through conciliation, mediation and negotiation where appropriate.
15. The Respondent contends that in the conduct of its functions, Article 252 of the Constitution and sections 8, 26, 27, 28 and 29 of the CAJA grants it powers to conduct investigations on its own initiative or on a complaint made by a member of the public, to issue summons as it deems necessary for the fulfilment of its mandate and require that statements be given under oath, to adjudicate on matters relating to administrative justice, obtain any information it considers relevant from any person or governmental authorities including requisition of reports, records and documents and to compel the production of such information, to interview any persons, and to recommend compensation or other appropriate remedies against persons or bodies to which the CAJA applies.
16. It is the Respondent's case that pursuant to Article 252(2) of the Constitution, a complaint may be made to it by any person entitled to institute court proceedings under Article 22(1) and (2) of the Constitution. Further, that under Section 31 of the CAJA, the Respondent may investigate an administrative action despite a provision in any written law to the effect that the action taken is final or cannot be appealed, challenged, reviewed, questioned or called in question.
17. The Respondent states that after undertaking its investigations, it is required under Section 42 of the CAJA to prepare a report for the state organ, public office or organization to which the investigation relates, and the report shall include the findings of the investigation, the action it considers should be taken, reasons for the decision and the recommendations deemed appropriate.
18. Further, that upon an inquiry into a complaint, the Respondent may undertake such other action as it may deem fit against a concerned person or persons where the inquiry discloses a criminal offence as provided for under Section 41 of CAJA. That under Article 59 (2)(j) of the Constitution and Section 8(g) of the CAJA, the Respondent is empowered to report on complaints investigated under paragraphs (h) and (i) and take remedial action.
19. According to the Respondent, on 14th January, 2014, Mr Francis Atwoli, the Secretary General of the Central Organization of Trade Unions who is also a member of the Applicant's Board of Trustees wrote a letter to it complaining of irregular approval of the Kshs. 5.053 billion for the Project by Applicant's Board Chairman and the Acting Managing Trustee/Chief Executive. He also complained of the improper and unprocedural awarding of the tender for the Project.
20. Pursuant to the its investigative powers, the Respondent undertook investigations into the allegations whilst focusing on the administrative management of the process leading to the award of the contract and the approval of the contract by the Board with a view to establishing the veracity of the allegations and contested matters of fact.
21. After exchange of correspondence with the Applicant's Chief Executive Officer, the Respondent invited the Applicant for hearing but the Applicant did not honour the invitations. On 6th March, 2014 the Respondent informed the Applicant in writing that it had nevertheless proceeded with investigations notwithstanding refusal to honour the invitations and advised the Applicant of its preliminary findings, and at the same time called upon the Applicant to make any further comments in rejoinder to the preliminary findings.
22. Subsequently, the Respondent held interviews and recorded statements from the Applicant's legal officer Mr Austin Ouko and other persons and documents relevant to the investigations were also recovered. Upon conclusion of its investigations, the Respondent compiled the Investigations Report titled "Abuse of Power and Disregard of Procurement Procedures by the Acting CEO and the Management of NSSF in the awarding of the Tassia II Infrastructure Development Project."

The Investigations Report shall hereinafter be simply referred to as the Report. Further, that in line with Section 42(3) of the CAJA, the Respondent forwarded the Report together with the recommendations to the Applicant for appropriate action but the Applicant failed to implement the recommendations in breach of the said provision.

23. In response to the allegation by the Applicant that the Respondent acted in breach of Section 30(h) of the CAJA and that the Report was a nullity for want of jurisdiction, the Respondent asserts that it has a constitutional and statutory mandate under Articles 59(2)(h), (i) and (j) and 252 of the Constitution and Section 8 of the CAJA; to investigate any act or omission in any sphere of government suspected to be prejudicial, improper or to constitute abuse of power, and to take appropriate remedial action.
24. The Respondent postulates that any legislation or policy that seeks to constrict or hinder exercise of its jurisdiction is in breach of the express provisions of the Constitution. Further, that Section 31 of the CAJA expressly provides that the powers of the Respondent whilst investigating an administrative action shall not be limited by any provision in any written law.
25. It is the Respondent's case that in any event, Section 30(h) of the CAJA suggests forbearance where there is an ongoing investigation at the time it commences an inquiry. In this particular instance, no other entity was seized of investigations in respect of the matters raised by the Respondent as at the time of the commencement of the inquiry. Further, that PIC and EACC commenced their investigations after the Respondent had initiated its inquiry as is evidenced by correspondence and minutes exhibited through the Applicant's verifying affidavit.
26. In addition, it is the Respondent's argument that its investigations focused solely on administrative law through investigation on maladministration (abuse of power, impropriety or prejudice) pursuant to its distinct mandate in the Constitution, quite apart from the investigations of any other body, a fact that was confirmed by EACC in the letter dated 21st February, 2014. Also that the resultant actions on the Respondent's investigations are distinct from that of any other investigations and there is indeed no conflicting recommendation between its recommendations and those of PIC.
27. On the Applicant's assertion that it does not fall under the jurisdiction of the Respondent, the Respondent contends that the Applicant is a statutory body corporate operating under the regulatory framework of the National Social Security Act, 2013, the State Corporations Act, Cap 446 and the Public Officer Ethics Act, 2003 and is therefore a public office which falls within the ambit of Section 29(1) of the CAJA.
28. The Respondent asserts that the application is in any event an abuse of process and bad in law and ought to be dismissed. The Respondent contends that the Applicant has come to court with unclean hands because it failed to comply with the recommendations of the Respondent's Report and/or to communicate with the Respondent on the same in blatant breach of section 42(3) of CAJA; the application offends the provisions of Order 53 of the Civil Procedure Rule; there is no occasion and/or basis for grant of the prayers sought; there is no decision and/or proceedings capable of being quashed by way of orders of certiorari; and that the application is accordingly premature and ought to be dismissed with costs.
29. It is the Respondent's view that this matter is of great significance to the public by virtue of the fact that the circumstances revolving around it touches on its core constitutional mandate, and therefore the determination in this matter will have a great impact on the course and practice of administrative law on ombudsmanship in Kenya as founded in both the Constitution and the CAJA.
30. Further, that this matter is also of great public importance as it involves the integrity of the Constitution and interplay between state organs/agencies being the Applicant and the Respondent herein and commitment to inter agency harmony or co-operation. The Respondent therefore urges this Court to act in accordance with the observation of the Supreme Court in **the matter of the Principle of Gender Representation in the National Assembly and the Senate [2012] eKLR,** and as the custodian of the integrity of the Constitution interpret it holistically, taking into account its declared principles, and to ensure that other organs bearing the primary responsibility for effecting operations that crystallize enforceable rights are enabled to discharge their obligations as a basis of sustaining the design and purpose of the Constitution.
31. The Respondent also asks the Court in considering this case to have in mind the advice of the Supreme Court in the Advisory Opinion in **Speaker of the Senate & another v Hon. Attorney**

General & others [2013] Eklr, that lawful public agency conduct under the Constitution requires every state organ to grapple, in good faith, with assigned obligations, and with a clear commitment to inter agency harmony and cooperation and that no state agency, especially where it is represented by one person, should overlook the historical trajectory of the Constitution which is clearly marked by transition from narrow platforms of idiosyncrasy or sheer might to a scheme of progressive, accountable institutional interplays.

32. The Respondent also holds the view that as was observed in **Re the Matter of the Interim Independent Electoral Commission [2011] eKLR,** it was established alongside the judicial branch and is entrusted with special governance mandates of critical importance in the new constitutional dispensation, and that it is the custodian of the fundamental ingredients of democracy such as rule of law, integrity, transparency, and human rights, and that the exercise of its probity in the exercise of its constitutional mandate ought to be upheld.
33. In view of the contents of the application before this Court, it is clear that the Applicant's case is premised on the assertion that the Respondent had no jurisdiction to inquire into the complaint that led to the preparation of the Report in question. The Applicant's approach on the question of jurisdiction in this matter is twofold. In the first place its case is that the Respondent acted in breach of Section 30(h) of the CAJA as it delved into the matter when the same was already under the investigation of EACC and two committees of the National Assembly. Secondly, it is the Applicant's argument that it does not fall within the ambit of public service as contemplated by Article 260 of the Constitution and neither does it fall within the ambit of Section 29(1) of the CAJA. Consequently, the Applicant contends that the Respondent has no jurisdiction over it.
34. For completion of record, I must state that there was a third argument introduced through submissions by the Applicant to the effect that the Kenya Human Rights and Equality Commission Bill, which had been published in 2011 for purposes of Article 59(4) & (5) of the Constitution was never passed or operationalized through statute. As such, there was no statute passed to restructure or proclaim the bifurcation of the Kenya Human Rights and Equality Commission into two or more commissions as envisaged under Articles 59(4) or indeed assigning each function of the Kenya Human Rights and Equality Commission to one or the other of the successor commissions. The Applicant contends that what was envisaged and expressly provided for under Article 59(4) & (5) of the Constitution is that there was to be a single Act of Parliament, perhaps the Kenya Human Rights and Equality Commission Restructuring Act, legally and constitutionally restructuring the Commission and expressly delegating the functions in the manner provided under Article 59(5) of the Constitution.
35. The Applicant goes ahead to submit that if anything, a cursory consideration of Article 59(2) of the Constitution shows that only two commissions were envisaged and those are the Kenya National Commission on Human Rights established by the Kenya National Commission on Human Rights Act, 2011 to deal with all the human rights aspects under Article 59(2) of the Constitution and the National Gender and Equality Commission created by the National Gender and Equality Commission Act, 2011 to monitor, facilitate, promote and advise on the integration of the principles of equality and freedom from discrimination in all national and county policies, laws, and administrative regulations in all public and private institutions, and take remedial action on abuses in this context under Article 59(2) of the Constitution as read together with Article 27 of the Constitution.
36. The Applicant is therefore advancing the view that the Respondent's existence is not founded on any known constitutional provision. The Respondent's apt response to this question is that the same was raised through submissions and the Court cannot address the same. The Respondent's counsel nevertheless went ahead to point out that the Respondent's existence is rooted in the Constitution.
37. I agree with the Respondent that this issue was only raised by the Applicant in the submissions stage. The question of the legal foundation of the Respondent is not one to be raised casually through submissions. As was stated by the Court of Appeal in the case of **Daniel Toroitich Arap Moi v Mwangi Stephen Muriithi & another [2014] eKLR:**

> **''Submissions are generally parties' "marketing language", each side endeavouring to convince the court that its case is the better one. Submissions, we reiterate, do not constitute evidence at all. Indeed there are many cases decided without hearing**

submissions but based only on evidence presented''

38. I will therefore not consider this issue which has been raised through submissions and to which the Respondent was never given prior notice to respond to by way of evidence. Having said so, I find it important to point to the fact that Article 59(4) gave room to Parliament to split the Kenya National Human Rights and Equality Commission **"into two or more separate commissions."** The claim that Article 59 only envisaged two entities is therefore not correct.
39. Turning back to the question of jurisdiction, I propose to start with the question as to whether the Applicant is not amenable to the jurisdiction of the Respondent. I did not find any argument in the Applicant's written submissions to support its assertion that it does not fall within the ambit of public service as contemplated by Article 260 of the Constitution and Section 29(1) of the CAJA.
40. In opposition to the Applicant's contention, the Respondent referred this Court to the decision of Lenaola, J, in the case of **Kenya Union of Domestic, Hotels, Education and Allied Workers Union v The Salaries and Remuneration Commission and another, Nairobi High Court Petition No. 294 of 2013.** In that case, one of the issues for determination by the Court was whether state corporations are public offices within the meaning of Article 260 of the Constitution. After considering the relevant provisions of the law the learned Judge opined that:

> **''Although these institutions do not receive monies from the Consolidated Fund, they are empowered by Parliament through legislation to raise income through levies and other commercial ventures. Further, state corporations receive funds from Parliament through their respective Ministries and fit the description in Article 260 regarding funds from Parliament.**
>
> **Further 'Public fund' has the meaning assigned to it by the Exchequer and Audit Act (Cap 412 Laws of Kenya). Public money is said therefore to include; revenue, any trust or other moneys held, whether temporarily or otherwise by an officer in his official capacity, either alone or jointly with any other person, whether an officer or not. Given that definition of public funds and given that the Petitioner's members work for institutions, parastatals or corporations that provide a public function, then to my mind they are properly within the public service category and therefore state corporations and their employees fall within the meaning of public office and public officers, and I so find.''**

41. I find nothing to make me hold a different view from the decision of Lenaola, J. I do not think the Applicant holds the view that it is not a state corporation or an agency of the state. I therefore hold that the Applicant falls under the jurisdiction of the Respondent.
42. As for the constitutional and statutory jurisdiction conferred upon the Respondent, the Applicant argues that the functions of the Respondent as provided under Article 59(2) of the Constitution were not to be performed in abstract but strictly in the context of human rights and equality as envisaged by Article 27 of the Constitution. The Applicant submits that it is important to appreciate that for purposes of fair administrative action, Article 47(3) of the Constitution only envisaged a statutory legislation to promote and give effect to the requirements of efficient and fair administrative action, and if necessary, the statute was required to provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal/body.
43. Further, that the Constitution did put in place a specialized commission namely EACC established under Article 79 of the Constitution to deal with leadership and integrity issues, including those set out under Article 73(2) of the Constitution, effectively dealing with investigations on 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, investigation of complaints of abuse of power, unfair treatment, manifest injustice or unlawful, oppressive, unfair or unresponsive official conduct, outside the context of human rights and equality.
44. According to the Applicant, taking into account the nature and purpose of the provisions of Articles 47(3), 59(2) & 79 of the Constitution with regard to the jurisdiction of the Respondent, it is clear that Parliament could not and did not delegate the functions under Article 59(2) of the

Constitution outside the context of human rights and equality. Furthermore, Parliament did not have constitutional authority and therefore could not have created a commission that would usurp the functions and duties exclusively vested in EACC as established under Article 79 of the Constitution. The Applicant therefore asserts that there is no jurisdictional justification as alleged by the Respondent to enable it cross into the arena of EACC.

45. The Applicant proceeds to postulate that the tribunal or body envisaged under Article 47(3) of the Constitution is a statutory body, not a commission, and accordingly, this is where the Respondent ought to have derived its statutory authority, as clearly supported by the Fair Administrative Action Bill, 2014. The Applicant urges this Court to find that it is in this narrow context under which the Respondent is to operate.

46. The Respondent's view is different from that of the Applicant. According to the Respondent, the Applicant's interpretation of Articles 47, 59(2) and 79 of the Constitution is restrictive and does not promote the purposes, values and principles of the Constitution and this goes against the provisions of Article 259(1) of the Constitution. It is the Respondent's case that both EACC and the Respondent have distinct constitutional mandates and roles to play in promoting good governance. Further, that whereas Article 79 of the Constitution tasks EACC with ensuring enforcement of Chapter Six of the Constitution (Leadership and Integrity), Articles 59(2)(h)-(k), 149(1) and 252 of the Constitution and the CAJA grants the Respondent the power to handle matters involving maladministration.

47. In my view, the starting point is to appreciate the reasons behind the establishment of the constitutional commissions and independent offices. In this regard the decision of the Supreme Court in **Re the Matter of the Interim Independent Electoral Commission [2011] eKLR** provides good guidance. In that case the Court stated:

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

48. The Court did not stop there but proceeded to caution at Paragraph 60 that:

> "**While bearing in mind that the various Commissions and independent offices are required to function free of subjection to *"direction or control by any person or authority"*, we hold that this expression is to be accorded its ordinary and natural meaning; and it means that the Commissions and independent offices, in carrying out their functions, are not to take orders or instructions from organs or persons outside their ambit. These Commissions or independent offices must, however, operate within the terms of the Constitution and the law: the "independence clause" does not accord them *carte blanche* to act or conduct themselves on whim; their independence is, by design, configured to the *execution of their mandate,* and performance of their functions as prescribed in the Constitution and the law. For due operation in the matrix, "independence" does not mean "detachment", "isolation" or "disengagement" from other players in public governance. Indeed, for practical purposes, an independent Commission will often find it necessary to co-ordinate and**

harmonize its activities with those of other institutions of government, or other Commissions, so as to maximize results, in the public interest. Constant consultation and co-ordination with other organs of government, and with civil society as may be necessary, will ensure a seamless, and an efficient and effective rendering of service to the people in whose name the Constitution has instituted the safeguards in question. The moral of this recognition is that Commissions and independent offices are not to plead "independence" as an end in itself; for public-governance tasks are apt to be severely strained by possible "clashes of independences"."

49. A commission like the Respondent is expected to operate within its constitutional and statutory mandate and cooperate with other state organs, public agencies and commissions. The aim is to ensure smooth operations that will deliver maximum benefits for the people of Kenya in whose interest the Constitution was promulgated. An expansionist commission will end up causing disharmony and thereby stalling delivery of services.
50. The question that follows is whether the Respondent crossed its boundaries in this matter. According to the Respondent, its mandate is provided under Articles 59(2)(h)-(k) of the Constitution as follows:

"The functions of the Commission are—

(*a*)……

(*b*)…….

(*c*) ……

(*d*) ……

(*e*) …….

(*f*) ……..

(*g*) ……..

(*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."

51. Those functions are replicated under the CAJA. Section 2 of the CAJA defines administrative action as follows:

"Administrative action" means any action relating to matters of administration and 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 public service;

(c) The making of a recommendation to a Cabinet Secretary; or

(d) An action taken pursuant to a recommendation made to a Cabinet Secretary;

52. 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 roles of the Respondent and EACC run into each other and it is not easy to separate complaints of maladministration from those of corruption for the two evils are more often intertwined. A simple example will do. An officer of a public body who demands a bribe before giving service is likely to delay delivery of service to a member of the public. In such a situation you will find both a case of lack of integrity which falls under the jurisdiction of EACC and a case of maladministration which is in the province of the Respondent. The commissions should therefore be able to coordinate their operations in a manner that maximises returns on the public funds allocated to them. Where the commissions are not willing to harmoniously give way to each other, Section 30 of the CAJA becomes useful.
53. 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. In the circumstances of this case, I will therefore agree with the Respondent that it had jurisdiction to investigate this matter although the nature of the complaints may have been better dealt with by EACC.
54. The remaining issue is whether the Respondent breached Section 30(h) of the CAJA. According to the Applicant, the letter from EACC clearly shows that it was investigating the matter by the time the Respondent commenced its investigations. As such the Respondent by virtue of Section 30(h) had no jurisdiction over the matter.
55. It is the Applicant's case that a well established principle in administrative law is that a public body must understand the scope and limits of its powers and must operate within those limits. The Applicant's counsel supported this argument with the decision in **Anisminic Ltd v Foreign Compensation Commission [1969] 2 A.C. 147 (HL)** where Lord Reid stated that:

> **"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word "jurisdiction" has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *Reg.* v. *Governor of Brixton Prison, Ex parte Armah* [1968] A.C. 192, 234 that if a tribunal has jurisdiction to go right it has jurisdiction to go wrong. So it has, if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things**

which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law.''

56. It is the Applicant's position that if an act is void, then it is in law a nullity. This argument was buttressed by the statement in **Macfoy v United Africa Co. Ltd [1961] 3 All E.R. 1169** where it was stated that:

> **"If an act is *void,* then it is in law a *nullity*. It is not only bad, but incurably bad. There is no need for an order of the court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse."**

The Applicant therefore urges this Court to find that the Respondent had no jurisdiction to enquire into the matter.

57. In response to the Applicant's contention that its jurisdiction was ousted by Section 30(h) of the CAJA, the Respondent asserted that it has the constitutional mandate of addressing maladministration and the role of EACC is ensuring compliance with Chapter Six of the Constitution. The Respondent argues its functions and those of EACC do not conflict but are complimentary in the broader scheme of good governance.
58. It is therefore the Respondent's case that the limitation under Section 30(h) of the CAJA should not arise for various reasons. Firstly, there were no investigations being done by EACC as at the time the Respondent commenced its inquiry through its letter dated 17th January, 2014. Secondly, there is no evidence placed before this Court to show the issues that were allegedly investigated by EACC. The Respondent submits that all that exists is the letter dated 21st February, 2014 from EACC to the Applicant, which letter does not disclose the issues being investigated by EACC. It is the Applicant's case that it is important to note that the letter in question appreciated the distinct constitutional mandates of both EACC and the Respondent and calls upon the Applicant to co-operate with the Respondent.
59. The Respondent urged this Court to be guided by the Advisory Opinion of the Supreme Court in **Speaker of the Senate & another v Hon. Attorney General & another and 3 others [2013] eKLR,** where the Court opined that lawful public agency conduct under the Constitution requires every state organ to grapple, in good faith, with assigned obligations, and with a clear commitment to inter agency harmony and co-operation and that no state agency, especially where it is represented by one person, should overlook the historical trajectory of the Constitution which is clearly marked by transition from narrow platforms of idiosyncrasy or sheer might to a scheme of progressive, accountable institutional interplays.
60. In resolving this question, the starting point is Section 30 of the CAJA. The Section states:

> **"Limitation of jurisdiction**
>
> **The Commission shall not investigate—**
>
> **(a) Proceedings or a decision of the Cabinet or a committee of the Cabinet;**
>
> **(b) A criminal offence;**
>
> **(c)A matter pending before any court or judicial tribunal;**
>
> **(d) The commencement or conduct of criminal or civil proceedings before a court or other body carrying out judicial functions;**
>
> **(e) The grant of Honours or Awards by the President;**

(f) A matter relating to the relations between the State and any foreign State or international organization recognized as such under international law;

(g) Anything in respect of which there is a right of appeal or other legal remedy unless, in the opinion of the Commission, it is not reasonable to expect that right of appeal or other legal remedy to be resorted to; or

(h) Any matter for the time being under investigation by any other person or Commission established under the Constitution or any other written law."

61. When one reads the said Section, it clearly becomes apparent that Parliament intentionally limited the jurisdiction of the Respondent in the identified circumstances. The reason for this limitation is that there was need to avoid conflicts between the Respondent and other state agencies. The limitation is therefore reasonable considering that the Respondent is not a super commission capable of investigating all the things done by state organs. Where therefore another commission or any other person established by the Constitution or any other written law is dealing with a particular issue, the Respondent has no jurisdiction to venture into that matter.
62. The Supreme Court in **Samuel Kamau Macharia & another v Kenya Commercial Bank Limited & 2 others [2012] Eklr,** underlined the importance of courts and tribunals to operate within their jurisdictional fields as follows:

> "**A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one of mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, *In the Matter of the Interim Independent Electoral Commission* (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law.''**

63. I have no doubt that the same principle is applicable to the jurisdiction of all state corporations, government agencies and commissions. None of them has unlimited mandates and they can only do that which they were established to do. The Respondent's jurisdiction is not limitless. It can only do that which the Constitution and the law allow it to do and nothing more.
64. In order to determine whether the Respondent had jurisdiction in this case, the Court has to look at the evidence presented by the parties. Two letters written by EACC both dated 21st February, 2014 are relevant to this matter. One letter is addressed to the Acting CEO of the Applicant and in that letter, EACC confirms that it was investigating the Project but was not privy to the Respondent's investigation but **"tend to believe that the Commission on Administrative Justice (CAJ) may not be investigating the same matters this Commission is, as the two Commissions have distinctive mandates in the Constitution."** The Applicant is advised to **"cooperate with any investigative agency that may have lawful reasons to inquire into the matter."**
65. The other letter is addressed to the Respondent by EACC. In that letter, EACC discloses that it is actively investigating the Project and asks the Respondent to **"urgently let us have your comments more particularly in the areas you are investigating to avoid duplication and apparent inconvenience."**
66. These two letters clearly show that EACC acted in the manner expected of any good public

organisation. It is not clear whether EACC received any reply from the Respondent. The key reason why no more than one public agency should be engaged in investigation of the same matter is that it is a waste of public resources.

67. The EACC's letters do not, however, reveal when it started its investigations into the Project. The jurisdiction of the Respondent is only taken away by Section 30(h) of the CAJA where the matter is **"for the time being under the investigation of any other person or Commission….."** The matter under investigation by another body should be the same with the matter under investigation by the Respondent.
68. In this case, the Applicant has not demonstrated that the issues under investigation by EACC were the same with those under the investigation of the Respondent. It is also not clear whether by the time the Respondent commenced its investigations, EACC had already started its investigations. The same position applies to the investigations by the two parliamentary committees.
69. The danger, where there is no sufficient evidence, in acceding to an application like the one of the Applicant is that matters touching on public interest may be swept under the carpet. The risk of misuse of public finances through a multiplicity of investigations is a lesser evil compared to the failure to unearth malpractices in the public service. In the circumstances of this case this application fails and the same is dismissed.
70. On the issue of costs, I find that the Applicant's case was not frivolous and it should not be saddled with costs for testing certain legal provisions. The appropriate order is therefore to ask each party to meet own costs and I so do.

Dated, signed and delivered at Nairobi this 10th day of July , 2015

W. KORIR,

JUDGE OF THE HIGH COURT