



**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI**

**(JUDICIAL REVIEW DIVISION – MILIMANI LAW COURTS)**

**MISC. CIVIL APPLICATION NO. 182 OF 2012**

**IN THE MATTER OF: AN APPLICATION BY BARAZA LIMITED t/a KENYA  
TELEVISION NETWORK (KTN) FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY WAY  
OF ORDER OF CERTIORARI**

**&**

**IN THE MATTER OF: THE COMPLAINTS COMMISSION MEDIA COUNCIL OF KENYA.**

**&**

**IN THE MATTER OF: THE MEDIA ACT NO.3 OF 2007**

**&**

**IN THE MATTER OF: COMPLAINT NO. 075 OF 2010 KENYA REVENUE AUTHORITY –  
VS- KENYA TELEVISION NETWORK.**

**REPUBLIC .....APPLICANT**

**-VERSUS-**

**COMPLAINTS COMMISSION,**

**MEIDA COUNCIL FOR KENYA.....RESPONDENT**

**KENYA REVENUE AUTHORITY.....INTERESTED PARTY**

**EX PARTE APPLICANT**

**BARAZA LIMITED t/a KENYA TELEVISION NETWORK (KTN)**

**JUDGEMENT**

**INTRODUCTION**

1. By a Notice of Motion dated 7<sup>th</sup> May 2012 filed in Court the same day, the *ex parte* applicants herein, **Baraza Limited t/a Kenya Television Network (KTN)**, seeks the following orders:

1. **An order of certiorari to remove into the High Court the judgment/decision made by the complaints commission of the Media Council of Kenya in Complaint No. 075 of 2010 Kenya Revenue Authority –vs- Kenya Television Network, on 21<sup>st</sup> December 2011 for the purpose of it being quashed.**
2. **The costs of this application be provided.**

### **EX PARTE APPLICANT’S CASE**

3. The said Motion is based on the following grounds outlined in the Statement of Facts filed with the application for leave:

1. **The Media Act, 2007 at section 23 requires that the chairperson of complaints commission of the Media Council of Kenya be who holds or has held a judicial office in Kenya or who is an advocate of the High Court of Kenya of not less than ten years stand;**
  2. **The Constitution of the complaints commission of the Media Council of Kenya by law is required to have five (5) persons including the chair person holding stipulated qualifications;**
  3. **There is no provision under the Media Act, 2007 for the position of ‘Acting Chair’ or the complaints commission of the Media Council of Kenya;**
  4. **That as at 21<sup>st</sup> December 2011 non of the members of the complaints commission of the Media Council of Kenya held the position of chair with the stipulated qualifications;**
  5. **At the time the complaints commission of the Media Council of Kenya rendered its decision in respect of Complaint No. 075 of 2010 Kenya revenue Authority – Vs- Kenya Television Network it was not properly constituted;**
  6. **The complaints commission of the Media Council of Kenya has no statutory mandate to make any finding on the tort of defamation;**
  7. **The decision of the complaints commission of the Media Council of Kenya made on 21<sup>st</sup> December 2011 in Complaint No. 075 of 2010 Kenya Revenue Authority-vs-Kenya Television Network is null and void *ab initio*.**
4. The application is supported by a verifying affidavit sworn by **Godfrey Wambugu**, the legal officer of the applicant herein on 2<sup>nd</sup> May 2012.
5. According to the deponent, by a letter dated 5<sup>th</sup> January 2010 the *ex parte* applicant received a letter from the Executive Director of the Media Council informing that a complaint had been received from the interested party the Kenya Revenue Authority and the initial proceedings were conducted before the complaints commission of the Media Council of Kenya which was chaired by **Mr. Ken Nyaundi**. However, subsequent to his appointment to the Independent Electoral and boundaries commission **Ms. Nancy Baraza** was appointed as the chairperson of the complaints commission before whom the proceedings continued and at the time the hearing before the complaints commission was concluded on 17<sup>th</sup> May 2011 **Ms. Baraza** was due to attend an interview before the Judicial Service Commission and subsequently the parliamentary committee. In June 2011 **Ms. Nancy Baraza** was appointed as the deputy Chief justice of the Republic of Kenya when the complaint made before the complaints commission was pending submission, deliberations and judgement which written submissions were filed by the respective parties on the 28<sup>th</sup> of June 2011 and 3<sup>rd</sup> of August 2011 respectively and the same were orally highlighted on 15<sup>th</sup> September 2011. According to the deponent, he is not aware of any appointment of a chairperson to the complaints commission of the Media Council of Kenya after **Ms. Nancy Baraza** was appointed Deputy Chief Justice in June 2011 though the proceedings proceeded under chairpersonship of **Ms. Priscilla Nyokabi**. According to the applicant the said **Ms. Priscilla Nyokabi** is an advocate admitted in the year 2004 and therefore did not have ten (10) years

standing as at 21<sup>st</sup> December 2011.

### **RESPONDENTS' CASE**

6. In opposition to the application the respondents filed a replying affidavit sworn by **Murej MakOchieng**, a Commissioner with the Respondent on 21<sup>st</sup> November, 2012.
7. According to the deponent, the media Council Complaints Commission was properly constituted during the process of hearing and determination of Complaint No. 075 of 2010 instituted by the Kenya Revenue Authority. In his view, section 23(1) of the **Media Act** (hereinafter referred to as the Act) states that the complaints commission shall consist of:
  - a) A chairperson who shall be a person who holds or has held a judicial office in Kenya or who is an advocate of the High Court of Kenya of not less than 10 years standing.
  - b) Four other persons possessing experience and expertise in any one of the following areas, that is, journalism, media policy and law, media regulation, business practice and finance, entertainment, education, advertising or related social issues.
8. According to advice received from the deponent's legal counsel he believed that the Act does not provide that the chairperson of the complaints commission has to be present at every sitting of the commission and further that Section 24(1) of the Act provides for establishments of panels while subsection (2) further states that a panel established under subsection (1) shall exercise all the powers and shall perform all the duties and functions of the complaints commission in relation to any matter before the panel. He therefore deposed that **Priscilla Nyokabi** being one of the commissioners acted in her capacity as a commissioner and not as a chairperson as alleged by the Applicant and that a member of the commission other than the chairman does not have to have a minimum of ten years' experience as an advocate as that criterion is a requirement for the chairman only as per Section 23(a) of the Act. He further contended that the applicant with the knowledge that the then chairperson of the Council's Complaint Commission was appointed as the Deputy Chief justice, chose to proceed with the hearing of the complaint until its determination without raising any objections to the same hence is stopped by its actions from claiming that the complaints commission was not properly constituted during the hearing and determination of its complaint in Complaint No.075 of 2010. To the deponent, the allegations from the applicants that four other members of the complaints commission of the respondent were incapable of deliberating and rendering any decision are false allegations as the said four members are duly competent to deliberate and render any decision since the Act has not made it mandatory for a chairman to be present at every sitting of the media council complaints commission meaning that the four members can proceed with deliberation without the presence of the chairman. In his view based on legal advice, the applicant being aggrieved by the decision of the complaints commission should have appealed to the council as per section 32(1) of the Act, within fourteen (14) form the date the decision was made and further section 32(3) of the Act further states that any person aggrieved by a decision of the council may within twenty-one days from the date of such decision, appeal to the High Court on a point of law only. However, the applicant did not appeal to the council but went ahead to institute a Judicial Review application which was filed on the 3<sup>rd</sup> of May 2012 five months later after the delivery of judgment from the complaints Commission. It is his view therefore that the applicant did not exhaust all the venues for addressing their grief as to the decision/judgment of the complaints commission as provided for under section 32 of the Act yet section 33 of the Act provides for enforcement of decisions and states that a decision of the complaints commission, or the council, against which no appeal has been preferred within thirty days from the date on which the decision was made shall be adopted and enforced as an order of court. It is therefore contended that the applicant failing to appeal the decision of the complaints commission caused the decision/judgment delivered on the 21<sup>st</sup> of December 2011 by the

complaints commission to be adopted and enforced as an order of the court hence applicants cannot then file a Judicial Review application five months down the line alleging that the judgement/decision of the complaints commission is null and void. It is contended by the deponent that applicant's application is vexatious and based on an afterthought and it is only fair and in the interest of justice that the said application be dismissed.

### **INTERESTED PARTY'S CASE**

9. On its part the interested party opposed the application through a replying affidavit sworn by **Kennedy Onyonyi**, its Senior Deputy Commissioner on 25<sup>th</sup> September 2012.
10. According to the deponent, the complaint was filed following a letter written to the Respondent on 18<sup>th</sup> December 2009 by the Interested Party's then Commissioner General, **Mr. Michael Waweru** and the formal complaint was lodged on 18<sup>th</sup> February 2010. On 10<sup>th</sup> May 2010 the Respondent was to commence the hearing of the Complaint under the then Chair of the Complaints Commission, **Mr. Ken Nyaundi** on which day the same was adjourned to 7<sup>th</sup> June 2010 because of lack of quorum from the Commission as there was only one Commissioner present, **Commissioner Birech**. When the matter next came up for hearing on 7<sup>th</sup> June 2010, Counsel representing the Interested Party, **Mrs. Rosalie Ngugi** was engaged in another matter Bungoma H.C. Misc. Civil Application Nos.176 and 159 in the High Court in Bungoma and the hearing of the complaint was adjourned to 15<sup>th</sup> July 2010 under the chair of **Mr. Ken Nyaundi**. On 9<sup>th</sup> July 2010, the Respondent wrote to the Applicant and the Interested Party informing them that the its Chairperson would be away and the matter was stood over to 11<sup>th</sup> August 2010 for mention. Subsequently, the complaint was fixed for hearing on 24<sup>th</sup> September 2010 but the Respondent wrote informing the Applicant and the Interested Party of the resignation of the Media Complaints Commission Chair, **Mr. Ken Nyaundi** and the appointment of **Ms. Nancy Baraza** as the new Chairperson. Eventually, on 11<sup>th</sup> March 2011, the hearing proceeded chaired by **Mrs. Nancy Baraza** and three members of the Complaints Commission namely: **Fatuma Hirsi Mohamed, Peter Mwarua** and **Priscilla Nyokabi** while the Applicant was represented by Counsel **Mr. Werimo Echesa**. After the hearing of the complaint under the chair of **Ms. Nancy Baraza**, on 17<sup>th</sup> May 2011, the chair **Mrs. Nancy Baraza** asked both parties to file written submissions and lists of authorities. Although the parties filed their submissions, **Mrs. Nancy Baraza** was appointed Deputy Chief Justice of the Supreme Court of Kenya relinquishing her position as Chair of the Complaints Commission and on 22<sup>nd</sup> August 2011 the Respondent wrote to the Applicant and the Interested party asking them to attend a mention on 29<sup>th</sup> August 2011 for fixing of a date for highlighting submissions on which date a date of 15<sup>th</sup> September 2011 was taken. On 15<sup>th</sup> September 2011 the submissions were highlighted by Counsel for the Respondent, **Mr. Werimo Echesa** and Counsel for the Interested Party in the presence of **Commissioner Priscilla Nyokabi, Commissioner Peter Mwaura** and **Murej Mak' Ochieng** together with the Secretary to the Complaints Commission after which members of the Commission informed the Applicant and the Interested Party that Judgement will be given on Notice. Thereafter on 21<sup>st</sup> December 2011 Judgment was delivered in the presence of the following the aforesaid Commissioners as well as Commissioner **Fatuma Hirsi Mohamed**. In attendance were Respondent's Counsel **Mr. Werimo Echesa** while **Mr. Bahati Mwamuye** held brief for **Mrs. Rosalie Ngugi** for the Interested Party.
11. In its decision the Respondent made orders that the Applicant publishes an apology within 21 days from the date of Judgement; that the Applicant reiterates the story and purges it from its archives; and that Appeal to the High Court within 14 days of the Judgement. It is contended that the Applicant neither obeyed the Order of the Commission nor appealed the decision despite reminders from the Interested Party. When the interested party moved to have the said orders implemented, the applicant instituted these proceedings.
12. It is the interested party's position based on legal advice that that the Complaint was substantively heard by a duly constituted Complaints Commission from the onset and that that the Act does not require a Complaint to be heard in the presence of a Chairperson, as all it requires is that a panel is set up of not less than three members of the Commission and was no time that the complaint was

heard by less than three persons. It is the interested party's case that Section 24(2) empowers such panels to hear all complaints and that the Act does not require a decision to be rendered in the presence of the Chairperson. It is therefore contended that the decision made was sound in law and thus is not *null abinito* and that it was made within the confines of statute. The Interested Party's position is that the Complaints Commission did not make any finding on the tort of defamation but merely used the word in the context of its literal meaning and that the Applicant was properly and ably represented by Counsel, **Mr. Werimu Echesa** throughout the entire proceedings and at no time, did they raise the issues of the nullity of the decision and competence of the Commission. In any event, the interested party avers, the Act in Section 34 empowers the Complaints Commission to make rules governing its own procedure.

13. Therefore the Applicant having been a participant in the proceedings until Judgement was delivered is now stopped from impugning the Complainant Commissions decision which was sound in law hence the applicant is abusing the Court process by filing the instant case in an attempt to avoid obeying orders issued by a tribunal of competent jurisdiction. To the interested party, an Order of Certiorari cannot issue because there has been no breach of natural justice or procedural impropriety.

### **EX PARTE APPLICANT'S SUBMISSIONS**

14. It is submitted on behalf of the *ex parte* applicant that at the time the impugned decision was made in December 2011 **Ms. Nancy Baraza** had long assumed her functions as the Deputy Chief Justice hence there was no chairperson of the complaints commission. After the Departure of the chairperson the only advocate remaining as a member of the panel was **Ms. Priscilla Nyokabi** who however was as at December 2004 an advocate of 7 years standing and was never gazetted as chairperson of the commission but was merely a member thereof.

15. It is submitted that whereas **Ms. Nancy Baraza** chaired the actual hearing of the complaint she was not present at the highlighting of submissions or delivery of the decision; that **Fatuma Hirsi** who never at any time sat during the hearing of the complaint or submissions signed the decision issued in December 2011; and that **Murej Mak'Ochieng** who was never present during the actual hearing of the complaint only appeared during the highlighting of the submissions.

16. It is submitted that whereas under section 24 of the Act the commission may establish conciliation, mediation or arbitration panels consisting of not less than three members, at no time during the hearing of the Complaint No. 075 of 2010 was any panel established by the Commission to conciliate, mediate or arbitrate over the dispute since from inception of the complaint the Commission was hearing the complaint itself in terms of section 27 of the Act. It is submitted that under Rule 22 of the **Media (Complaints Commission) Rules, 2009** (hereinafter referred to as the Rules), if a decision is made after conciliation or mediation a certificate of acceptance is to be signed by both parties and since in this case that was not done, it clearly illustrates that the complaint was not dealt with by a panel but by the Commission itself and further that from section 32(1) and Rule 21(1) of the Rules, it is only the Commission that can notify the parties of the right to appeal.

17. It is therefore submitted that the Commission was not properly constituted thus no decision could be made on account of the inconsistent constitution of the Commission and the absence of the chair.

18. With respect to the applicant's participation in the proceedings, it is submitted that acquiescence, consent, waiver or failure to object would not render an invalid act for want of jurisdiction.

19. According to the applicant, under the Act and the Rules, the Complaints Commission has no substantive jurisdiction over the tort of defamation and therefore the order made on the basis that an affirmative finding for defamation had been made is *ultra vires* hence the Respondent's decision ought to be quashed with costs to the *ex parte* applicant.

### **RESPONDENT'S SUBMISSIONS**

20. On behalf of the Respondent it was submitted that under section 23(1) of the Act, the chair person is the only commissioner who has to be an advocate of the High Court of not less than 10 years standing and not the other four commissioners hence **Priscilla Nyokabi** being an advocate of the

- High Court of Kenya did not require such requirement being one of the other four Commissioners.
21. It is submitted that section 24(1) of the Act establishes panels consisting of not less than 3 members of the Commission which panel is empowered to exercise all powers, duties and functions of the Commission. It is submitted that the Commission's chairperson does not have to be present at all the sittings of the Commission. It is submitted that as the ex parte applicant participated in the complaint knowing that Nancy Baraza, the then chairperson was appointed Deputy Chief Justice, is estopped by its conduct from claiming that the Commission was not properly constituted and reliance was placed on **Reliance Bank Ltd vs. Mack Spares and Others Kisumu High Court Civil Case No. 139 of 1999**.
22. It is therefore submitted that the Commission was properly constituted during the hearing and determination of the complaint.
23. It is contended that the ex parte applicant having not appealed as provided under section 32(1)(2) and (3) of the Act, has not exhausted the forums provided in the Act for appeals. It is therefore submitted the adopted judgement of the Media Council Complaint's Commission remains enforced as an order of the court.

### **INTERESTED PARTY'S SUBMISSIONS**

24. On behalf of the interested party, it was submitted that since section 24(1) of the Act empowers the setting up of panels of not less than three persons to deal, hear and determine any matter on behalf of the Complaints Commission, the complaint was heard by three persons at all times and that section 24(2) of the Act gives the panels the powers vested in the Commission hence the Chairperson does not need to be present at all the sitting for the decision to be valid in law.
25. According to the interested party the use of the word "defamation" by the Commission was merely in its literal meaning and did not constitute a finding or the tort of defamation.
26. It is submitted that litigation must come to an end as the ex parte applicant had not followed the appellate procedure provided under the Act after fully participating in the hearing, the applicant is estopped from denying the resulting decision and in support of this submission the interested party relied on ***Halsbury's Laws of England*** paragraph 951.
27. Accordingly it was submitted that certiorari cannot issue.

### **DETERMINATION**

28. In **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** the Court of Appeal expressed itself as follows:

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

29. As indicated hereinabove section 23 of the Act provides as follows:

***There shall be established a Complaints Commission which shall consist of five persons appointed by the Council, who shall not be members of the Council, as follows—***

- (a). a Chairperson, who shall be a person who holds or has held a judicial office in Kenya***

*or who is an advocate of the High Court of Kenya of not less than ten years standing; and*

*(b). four other persons possessing experience and expertise in any one of the following areas, that is, journalism, media policy and law, media regulation, business practice and finance, entertainment, education, advertising or related social issues.*

30. From the evidence on record it is clear that the first hearing of the complaint took place before **Mrs. Nancy Baraza** as the chairperson and three members of the Complaints Commission namely: **Fatuma Hirsi Mohamed, Peter Mwarua** and **Priscilla Nyokabi**. The second hearing took place before **Mrs. Nancy Baraza, Priscilla Nyokabi** and **Peter Mwaura**. However during submissions **Mrs Nancy Baraza** was no longer the chairperson and instead the submissions were made before Commissioners **Priscilla Nyokabi, Peter Mwaura** and **Murej Mak' Ochieng**. After the submissions a decision was delivered in presence of **Priscilla Nyokabi, Fatuma Hirsi Mohamed, Peter Mwaura** and **Murej Mak Ochieng** all of whom signed the decision. However from the foregoing it is clear that **Fatuma Hirsi Mohamed** only participated in the first hearing while **Murej Mak'ochieng** did not participate in any of the hearing.
31. It is clear that as at the time of hearing the submissions and delivering its decision, the Commission had no chairperson as none of the Commissioners qualified to chair the Commission. In my view without a Chairperson the Commission cannot be said to have been validly in place. I however appreciate that under section 53 of the *Interpretation and General Provisions Act* it is provided that:

*Where by or under a written law a board, commission, committee or similar body, whether corporate or unincorporate, is established, then, unless a contrary intention appears, the powers of the board, commission, committee or similar body shall not be affected by -*

*(a) a vacancy in the membership thereof; or*

*(b) a defect afterwards discovered in the appointment or qualification of a person purporting to be a member thereof.*

32. It is my view however, that without a Chairperson of the Commission whose qualifications are stipulated in law, one cannot say that the Commission was properly constituted. In this respect I refer to **Kenya Commercial Bank Ltd vs. Kenya National Commission on Human Rights Nairobi HCMA NO. 688 of 2006 [2008] KLR 362** where the Court expressed itself as follows:

**“We have considered regulations 27 (1) & (2) and 35 (2). The chairperson establishes the hearing panel under regulation 27 (1 & 2) which comprises the presiding Commissioner, and others appointed by the chairperson, legal counsel and members of the Legal Services Department. That regulation envisages a panel consisting of more than one Commissioner, legal counsel and other staff. Regulation 35 (2) comes into play during the course of the hearing when for good reason, there is need to replace the absent Commissioners. There is no provision for the sitting of one Commissioner on the panel. Regulation 35 (2) does not apply here because right from the on set, only one Commissioner was appointed to preside over the dispute and the issue of replacement does not arise. The appointment of Godana, a single Commissioner to preside over the dispute out rightly contravenes regulation 27 (1) & (2) and is unlawful. It is the duty of the respondent to ensure that the requirements of the panel's composition are met ie regulation 27. They cannot constitute the panel contrary to provisions of the law. In this case we find that Mr Godana had no power to sit alone on the panel presiding over the dispute between the applicant and the 1st Interested Party, as it is offends clear provisions of the law. The respondent purported to rely on regulation 36 which provides that an irregularity resulting from a failure to comply with any provision of this part or any direction of the hearing panel before it has reached its decision shall not of itself render any proceedings void. We find that regulation 36 cannot remedy that omission**

because the composition of the Panel having been specifically provided for is a fundamental provision which should ideally have been in the Act. Those proceedings presided over by Godana contrary to statute call for intervention of this Court by way of judicial review.” See Equator Inn vs. Tomasyan [1971] EA 405.

33. Similarly it was held in Sammy Likuyi Adieme vs. Charles Shamwati Shisikani Kakamega HCCA No. 144 of 2003

“As the Constitution of the Provincial Land Disputes Appeals Committee is expressly provided for by statute, it may well be that the improper constitution thereof may deny the Committee the legal capacity to Act. Section 9(2) of the Land Disputes Tribunal Act stipulates that “for the purpose of hearing appeals from Tribunals in the province for which the Committee is constituted, the Committee shall sit in a panel of three members and in such places as may be determined by the Provincial Commissioners. In this case, the Provincial Appeals Committee was made up of a chairman and four members. The decision of the committee was signed by the five persons who constituted the committee and they did so presumably because they were party to the said decision. In other words, the said decision was made by them.....Section 8(5) of the Land Disputes Act states that appeals are to be determined by “the Appeals Committee, which shall consist of three members appointed under section 9”.....Therefore in so far as the decision by the Appeals Committee herein was made by five persons, it follows that there were two persons who had no authority to be involved in that decision-making exercise and their involvement must be deemed to have invalidated the decision, as the extra persons could only be construed as strangers.”

33. It is however contended by the interested party and the respondent that it was not mandatory that the Chairperson preside over all the hearings of complaints before the Commission and reliance was placed on the provisions of section 24(1) and (2) of the Act which provides:

*(1) The Complaints Commission may establish conciliation, mediation or arbitration panels, each consisting of not less than three members of the Complaints Commission, to deal with, hear and determine any matter on behalf of the Complaints Commission.*

*(2) A panel established under subsection (1) shall exercise all the powers and shall perform all the duties and functions of the Complaints Commission in relation to any matter before the panel.*

34. In Tanganyika Mine Workers Union vs. The Registrar of Trade Unions [1961] EA 629, it was held that where the provisions of an enactment are penal provisions, they must be construed strictly and that in such circumstances you ought not to do violence to its language in order to bring people within it, but ought rather to take care that no-one is brought within it who is not brought within it in express language. See London County Council vs. Aylesbury Dairy Company Ltd [1899] 1 QB 106 at 109; Muini vs. R through Medical Officer of Health, Kiambu [2006] 1 KLR (E&L) 15; Hardial Singh and Others [1979] KLR 18; [1976-80] 1 KLR 1090.

35. A strict construction of section 24(1) of the Act clearly shows that the Commission may only establish panels composed of not less than three members in cases of conciliation, mediation or arbitration. There is no express power conferred upon the Commission to establish such panels outside the three modes of dispute resolution.

36. Even if the Commission had the power to establish the said panels to hear complaints outside the three mechanisms, one would have expected the panel as constituted to hear the complaint from its inception to conclusion. In this case, in the course of the hearing the composition of the panel was altered with one Commissioner who sat on the first day of the hearing not sitting on the second hearing and only appearing to sign the decision. Another Commissioner who never sat during the hearing at all only sat during submissions and during the delivery of the decision. From the evidence it is clear that only two Commissioners **Peter Mwarua** and **Priscilla Nyokabi** sat throughout the proceedings. Procedural impropriety is one of the grounds for seeking and granting

judicial review and this has been described as a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. See **Al-Mehdawi vs. Secretary of State for The Home Department [1990] AC 876; Pastoli vs. Kabale District Local Government Council and Others Kampala HCCC No. 152 of 2006 [2008] 2 EA 300.**

37. The manner in which the hearing of the complaint was conducted was clearly tainted with procedural impropriety and I so find.
38. In its decision the Commission directed the applicant to retract the subject story in the context of an apology and make sure that the story was purged from its archives to avoid republication of the defamation. In **Dr Christopher Ndarathi Murungaru vs. The Standard Ltd and 2 Others Nairobi High Court (Civil Division) Civil Case No. 513 of 2011**, I held:

**“it would seem that the remedies under the Act are aimed towards reprimand, apology and punishment of the media house rather than compensating the victim. I am however, not surprised that the Act does not deal with award of damages. In my view in omitting to provide for damages for compensation Parliament must have been aware of the potential conflict that would have caused and the wise decision to omit that remedy from the options available to the Complaints Commission. To contend that Article 28 of the Constitution is alive when the remedy available to a party whose rights thereunder are threatened, violated or infringed is made illusory by deprivation of the Court’s jurisdiction to adjudicate thereon while the Complaints Commission is rendered powerless to adequately deal with such matters would be contrary to the rule that both purpose and the effect are relevant to the determination of the constitutional validity of a legislative or constitutional provision.”**

39. Accordingly I hold that the Commission is not empowered under section 29 of the Act to make decision on whether or not the matter complained of is defamatory. It was however contended that the phrase was used by the Commission literally. In my view the basis for a requirement that the Composition of the Commission includes advocates one of whom holds or has held a judicial office in Kenya or who is an advocate of the High Court of Kenya of not less than ten years standing is to ensure that such legal terms are not used loosely.
40. It is however the contention of the respondent and the interested party that the applicant having opted not to follow the appellate procedure provided under the Act is estopped from questioning the decision. It must be remembered that as was held in **Orengo Vs. Attorney-General & Another [2008] 1 EA 309** and **Kukal Properties Development Ltd vs. Maloo & 3 Others Civil Appeal No. 155 of 1992 [1993] KLR 52 [1990-1994] EA 281** the doctrine of estoppel does not apply to a statutory obligation or operate against the law or an Act of Parliament. In fact the Court of Appeal held in **Niazons (K) Ltd. vs. China Road & Bridge Corporation (K) Civil Appeal No. 187 of 1999** that jurisdiction cannot be conferred by estoppel, consent acquiescence or default.
41. Therefore the mere fact that an appellate procedure is provided by an Act of Parliament does not deprive the Court of its supervisory jurisdiction conferred under Article 165(6) of the Constitution to issue orders of judicial review. As was held in **Nyakinyua and Kang’ei Farmers Company Ltd vs. Kariuki Gathecha Resources Ltd (No 2) [1984] KLR 110:**

**“The Act declares that the decision of the board, one way or another, shall be final and conclusive and shall not be questioned in any court. Such words ousting the powers of the High Court to review such decisions must be construed strictly. They do not oust this power if the board has acted without jurisdiction or if it has done or failed to do something in the course of its inquiry which is of such a nature that its decision is a nullity (i.e. breached the rules of natural justice).”** See **Rex Vs. Northumberland Compensation Appeal Tribunal, Ex Parte Shaw [1951] 1 KB 711, 716; Anisminic Limited vs. Foreign Compensation Commission [1969] 1 All ER; South E Asia Fire Bricks Son Bhd Vs. Non-Metalic Mineral Products Manufacturing Employees Union & Co. [1981] AC 363.**

42. I also associate myself with the decision in **Republic vs. Kajiado Lands Disputes Tribunal & Others Ex Parte Joyce Wambui & Another Nairobi HCMA. No. 689 of 2001 [2006] 1 EA 318** to the effect that despite the irregularities 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 and it has powers to strike out nullities.
43. Whereas under Order 53 rule 2 it is provided that where the proceeding is subject to appeal and a time is limited by law for the bringing of the appeal, the judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired, it is trite that the existence of a right of appeal or alternative remedy like review will not preclude an applicant from seeking a remedy in judicial review. See **Republic vs. The Commissioner For Co-Operative Development & Kariobangi Housing & Settlement Co-Operative Society Limited Ex Parte David Mwangi & 15 Others Nairobi HCMCC No. 805 of 1990**; *Shah Vershi Devji & Co. Ltd vs. The Transport Licencing Board Nairobi HCMC No. 89 of 1969 [1971] EA 289; [1970] EA 631* and *Halsbury's Laws of England, 4<sup>th</sup> Ed. Vol. II Page 805 Para 1528*.
44. The Court is however perfectly entitled to take into account the existence of alternative remedies at the applicant's disposal in making a determination on whether or not to award costs.
45. Having considered the foregoing it is my view and I so hold that the Notice of Motion dated 7<sup>th</sup> May 2012 must succeed.

### **ORDER**

46. Accordingly it is hereby ordered that an order of certiorari be and is hereby issued bringing into the High Court the judgment/decision made by the Complaints Commission of the Media Council of Kenya in Complaint No. 075 of 2010 **Kenya Revenue Authority –vs- Kenya Television Network**, on 21<sup>st</sup> December 2011 for the purpose of it being quashed and the same is hereby quashed. However in light of the existence of appellate procedure which the applicant could but did not resort to there will be no order as to costs.

**Dated at Nairobi this day 2<sup>nd</sup> of December 2013**

**G V ODUNGA**

**JUDGE**

***Delivered in the presence of Kuyo for the applicant***