IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: OUKO, (P), KIAGE & GATEMBU, JJ.A)

CIVIL APPEAL NO. 89 OF 2019

CONSOLIDATED WITH

CIVIL APPEAL NO. 90 OF 2019

BETWEEN

GODFREY AJOUNG OKUMU.....1ST APPELLANT

OLIVER COLLINS WANYAMA KHABURE.....2ND APPELLANT

AND

ENGINEERS BOARD OF KENYA.....RESPONDENT

(*Being an appeal against the Judgment and Decree of the High Court at Nairobi*

(Constitutional and Judicial Review Division) (Mativo, J.) dated 29th October, 2018

in

Misc. Civil Application Nos. 107 and 108 of 2018)

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JUDGMENT OF THE COURT

The tender for the construction of Sigiri bridge which spans River Nzoia's banks and links Bunyala South and North was awarded to China Overseas Engineering Group Co. Limited (COVEC) in 2014 by the Kenya Rural Roads Authority (KeeRA). To design the works, BAC Engineering and Architecture Limited (BAC) whose Director, Godfrey Ajoung Okumu is the 1st appellant formed an association with Interphase Consultants Limited (Interphase) fronted by Oliver Collins Wanyama Khabure, the 2nd appellant and on 1st December, 2014, the two companies signed an MOU with COVEC, after which the construction of the bridge commenced.

Unfortunately, on the morning of 26th June, 2017, the bridge collapsed injuring a number of masons who were working on it at the time. Following this accident, the Engineers Board of Kenya (the respondent), the body empowered by **section 3** of the Engineers Act to register engineers and firms, regulate the engineering professional services, set the standards, develop and oversee the general practice of engineering, moving under **section 8** and **Rule 14** of the Act, commissioned an *ad hoc* Inquiry Committee, to investigate the accident. According to the report of the Committee the accident was caused primarily by;

> **"....the wrong sequencing of the concreting of the bridge deck resulting in unbalanced forces that caused instability and failure of sections of the bridge. The wrong sequencing was as a result of failure to follow standard design requirements and adhere to standard construction procedures."**

On the basis of the findings, the respondent addressed letters to the appellants requiring them to appear before the Committee to answer to the charges of professional misconduct and breach of professional obligations in violation of the Engineers Act and the Code of Ethics Conduct, 2016. They were accused of violating **section 4**5 of the Engineers Act by deliberately failing to follow the standards of conduct and practice of the engineering profession set by the respondent; that they breached **Rule 4 (d)** of the Code of Ethics and Conduct of Engineers

2016 for not acting as the employer or client, a faithful agent or trustee.

The particulars of the allegations were that the two failed to provide adequate design and sufficient information to the contractor as stipulated under the contract dated 1st July, 2015 between KeRRA (the employer) and COVEC (the contractor) to enable the latter to execute the works; that they vacated the site before completion of the project and the work proceeded without their input as a result of which the bridge collapsed occasioning the employer a loss in the sum of Ksh. 992,546,146.28; and that that amounted to an act of gross negligence.

In the second count, the two were accused of, respectively operating BAC and Interphase without prior registration by the respondent contrary to **section 29**

> **(a) (vii)** of the Engineers Act 2011.

Of course, the appellants denied these allegations insisting that BAC and Interphase carried out the detailed design strictly in accordance with the Building Code, and the instructions issued by COVEC; and that all issues raised by the respondent in the charges were adequately addressed in the designs.

Not persuaded by the appellants, the respondent, by its decision of 27th February, 2018, found the appellants **"capable of professional misconduct"**. We have deliberately highlighted these words as heavy weather was made of them and even formed a ground in this appeal. Following that decision, the respondent proceeded to suspend them for a period of two years with effect from 26th February, 2018. On 9th March, 2018, the respondent, through Gazette Notice Number 2098, notified the general public that the appellants had been suspended and their names removed from the engineers' register. This was followed by another Gazette Notice No. 3518 of 13th April, 2018, providing a list of names of engineers licensed to practice in the year 2018, and from which the two names were excluded.

Aggrieved, the appellants took out a notice of motion before the High Court in which they sought orders of:-

> a) *certiorari* to remove and quash the decision of the respondent dated 27th February, 2018;
>
> b) *prohibition* to prohibit and restrain the respondent from publishing in the Kenya Gazette or in any newspaper its decision dated 27th February 2018; and
>
> c) *prohibition* to prohibit and restrain the respondent from proceeding and recommencing any disciplinary proceedings against the appellants in respect of the charges set out above.

To support the application, the appellants explained that the main contract for the construction of the bridge was between COVEC and KeRRA while BAC and Interphase were sub-consultants whose combined role was only to carry out design reviews, reviews for feasibility and economic viability of the project, carry out value engineering to come up with an economically competitive design, prepare cost estimates, prepare/review environmental studies, quality and cost estimates and presentation of technical proposals to KeRRA as and when the same were required, and no more; that after the tender was awarded to COVEC, Interphase and BAC signed a design only contract dated 31st July, 2015 with COVEC; that the contract between BAC/Interphase and COVEC did not have any clause or term for supervision of the project; that the terms of this latter contract superseded those of the pre-bidding MOU; that upon signing the contract, COVEC became Interphase's and BAC's employer or client; that consequently, there was no privity in respect of the contract between Interphase/BAC and COVEC on the one hand and that between COVEC and KeRRA on the other hand; that in respect of the latter, there was a International Federation of Consulting Engineers (FIDIC) standard contract with KeRRA in which COVEC agreed to design, build and maintain the bridge; that the FIDIC contract assigned the responsibilities of supervision of the construction to the **'employers representative'**, that is, KeRRA; that in the construction KeRRA was represented by the Project Engineer; that by the same FIDIC contract, responsibility for all the works, including acts or defaults of any subcontractor lay on COVEC; and that upon the collapse of the bridge, the appellants visited the site, conducted their own investigations into the occurrence and prepared their report dated 12th July, 2017. The report attributed the cause of the accident to errors committed in course of construction by COVEC and specifically that there was wrong sequencing of the concreting of the bridge deck which in turn resulted in unbalanced forces. The result of the unbalanced forces is what caused the instability and failure of sections of the Bridge leading it to collapse; and that the report by the committee appointed by the respondent was equally categorical that this was the cause of the accident; and that indeed, COVEC expressly and in writing admitted its error, opened the site and proceeded to carry out the relevant remedial works without the design being changed.

The other procedural grounds proffered by the appellants were that the respondent acted without any complaint made to it by any person, making the respondent the complainant, prosecutor and the judge; that the respondent deliberately refused to consider the appellants' response and ignored their explanation contained in their report; that in the report they had explained the scope of the contract between COVEC and their two companies; that the respondent failed to appreciate that **section 48** of the Engineers Act allowed the appellants, who were in the first place licensed engineers in terms of **section 2** to practice under the names of BAC and Interphase, respectively; and that in that capacity, they were incapable of committing an offence under **section 29 (a) (vi)** of the Act.

In a response contained in the affidavit of Eng. Nicholas Mulinge Musuni, the respondent's Registrar, the respondent reiterated that the primary cause of the collapse was wrong sequencing of the concreting as a result of the appellants' failure to provide adequate design and sufficient information to the contractor as stipulated under the contract dated 1st July, 2015 between KeRRA and COVEC; that the construction proceeded without the appellants' input or supervision; that the final design drawings by the appellants presented numerous inadequacies and omissions; and that both appellants operated BAC and Interphase without having them registered by the respondent.

Subsequently, the appellants were notified of the charges which were later amended; that they appeared in person and were accorded a fair hearing; that they were suspended on the basis of the respondent's determination that the charges were proved; that the appellant had acted in a negligent and unprofessional manner by failing to adhere to the pre-bidding MOU which required BAC and Interphase, not only to design,

but also to supervise the construction for quality assurance; that BAC and Interphase were to provide technical personnel for the design and technical instruction for the construction and maintenance of the works as the contract was for **"Design, Build and Maintain"**; that the contract dated 31st July, 2015 did not supersede the pre-bidding MOU but rather it formed part of the contract as one of the priority documents; that the aforesaid contract did not provide that KeRRA engineers would supervise the construction; that according to the terms of the FIDIC contract, the engineer who draws the designs must supervise the implementation to completion of the project; that by failing to visit the site, the appellants abdicated their functions; that BAC allowed its General Manager, Mr. Michael Okumu, who was not a registered engineer to sign the contract, hence the designs were prepared by incompetent and unqualified engineers leading to the collapse of the Bridge; that the appellants never produced any evidence either from KeRRA or COVEC confirming that they were exonerated from the blame; and finally that, though there was no complainant, the respondent acted pursuant to its statutory mandate after considering the recommendations made in the report by an independent committee of experts.

In dismissing the application, the learned Judge, (Mativo, J.) made the following observations. First, he noted that judicial review is concerned with the decision making-process, not the decision itself or the merits of the decision; that as long as the process followed by the decision-maker is proper, and the decision is within the law, a court will not interfere; that an administrative decision can only be challenged for illegality, irrationality and procedural impropriety; and that judicial review is now entrenched in the Constitution.

While we affirm as accurate the observations made above on the nature of the application of judicial review, we wish to correct at this early stage, the statement on the nature and scope of judicial review, that it is not concerned with the merit of the decision but only with the process. It has been declared by nearly all levels of the court system in Kenya that, with the passage of the 2010 Constitution and enactment of the Fair Administrative Action Act, the scope of judicial review has been expanded; and that there is a shift from the traditional consideration, with the consequence that today the court can, in certain situations, evaluate the merits of the decision. See **Suchan Investment Limited vs. Ministry of National Heritage & Culture**, (2016) eKLR and **Rentco East Africa Limited, Lantech Africa Limited, Toshiba Corporation Consortium vs. Public Procurement Administrative Review Board & another** (2017) eKLR. We shall revert and explain this point further at the appropriate point in the course of the judgment.

On the substance of the application, the Judge isolated the following six issues, all of which relate to process;

> **"a. Whether absence of a written complaint renders the proceedings and the resultant decision flawed with illegality.**
>
> **b. Whether amending the charges constituted an illegality which flawed the entire process.**
>
> **c. Whether the *ex parte* applicant was accorded a fair trial.**
>
> **d. Whether the Respondent violated the *ex parte* applicant's right to legitimate expectation.**
>
> **e. Whether the process and the impugned decision is tainted with bias.**
>
> **f. Whether the *ex parte* applicant has established any grounds for the court to grant the Judicial Review Orders sought".**

On the first question, the Judge was satisfied that the collapsing of a bridge on a public road was a matter in the media, and that it would be absurd to suggest that the respondent would sit back, ignore their statutory mandate and wait for a written complaint. The respondent was entitled, in the discharge of its statutory functions, to commence investigations even *suo moto*, the Judge concluded on this point.

On the amended charges, and making reference to **sections 29(a) (vi)** and **48** of the Engineers Act, **section 382** of the Criminal Procedure Code, the learned Judge was persuaded that the appellants, having been supplied with both the original charge sheet and the amended charge sheet, having been afforded time to reply to specific issue, whether it was mandatory for BAC and Interphase to be registered with the respondent, and having been heard in their defence, no prejudice or failure of justice was occasioned to the appellants by the amendment of the charge sheet.

According to the Judge, the crux of the appellants' case rested on the question whether they were accorded a fair trial. He listed the grounds in support of this claim as, the failure to apply **section 53 (2)** of the Act which enjoins the respondent to act only on written complaints; that the respondent threatened to revoke the appellants' licenses; that the respondent was hostile to them and barred their witnesses from giving evidence, or to consider their defenses; that they were not provided with the evidence against them in advance, specifically that they were not supplied with the report marked NMM1; and that no witnesses produced evidence against them at the hearing.

In rejecting this ground, the learned Judge stated his position alluded to above, that, although the appellants' written responses and oral arguments were rejected by the respondent, it was not for him (the Judge) **" to delve into the merits of the finding"**; that the power of the Court to review an administrative action will be exercised only **"where illegality, irrationality or procedural impropriety has been proved"**, since all administrative actions must be lawful,reasonable and procedurally fair; that for a decision to be annulled, it must be demonstrated that the decision was **"not grounded on law or the process was flawed, or no reasonable tribunal properly directing its mind to the material presented before it could arrive at the same conclusion".**

The Judge ultimately found on this point that the appellants were supplied with details of the charges and each was granted time to respond; and that they indeed responded. In addition, he continued, they appeared in person and made both written and oral presentations, at the end of which the respondent's decision was communicated to them. Accordingly, the Judge was of the opinion that the procedure adopted was proper.

He said in the end that;

> **"In requiring reasonable administrative action the Constitution does not, in my view, intend that such action must in review proceedings be tested against the reasonableness of the merits of the action in the same way as in an appeal. In other words it is not required that the action must be substantively reasonable, in that sense, in order to withstand review. Apart from that being too high a threshold, it would mean that all administrative action would be liable to correction on review if objectively assessed as substantively unreasonable. The review threshold is rationality. Again, the test is an objective one, it being immaterial if the functionary acted in the belief, in good faith, that the action was rational. Rationality is, one of the criteria now laid down in the Fair Administrative Action Act. Reasonableness can, of course, be a relevant factor but only where the question is whether the action is so unreasonable that no reasonable person would have resorted to it…….**
>
> **Judicial review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. Resolving the scope of the contract would require direct evidence to be adduced and tested through cross-examination of witnesses before the court can conclude the real intention of the parties as expressed in the contract……In judicial review proceedings, the court can only determine the process not the merits of the decision".**

(Our emphasis).

This is quite a mouthful. We shall return to it, though we read in it a veiled and subtle acknowledgement that in some instances, the court will inquire into the merits of the impugned administrative action. The Judge noted that rationality, as a ground for the review of an administrative action is provided for in **Section 7(2) (i)** of the Fair Administrative Action Act, and crowned it by quoting a passage from the decision of the South African Constitutional Court in the case of **Pharmaceutical Manufacturers Association of SA and Another: In re *Ex parte* President of the Republic of South Africa and Others: 2000 (4) SA 674**

> **(CC)** at page 708; paragraph 86 thus;
>
> **"The question whether a decision is rationally related to the purpose for which the power was given calls for an objective enquiry. Otherwise a decision that, viewed objectively, is in fact irrational, might pass muster simply because the person who took it mistakenly and in good faith believed it to be rational. Such a conclusion would place form above substance, and undermine an important constitutional principle."** *Per* Chaskalson, P.

The learned Judge was also guided by the test given to rationality by Howie P. in **Trinity Broadcasting (Ciskei) vs. Independent Communications Authority of South Africa**, [2003] ZASCA 119, that;

> **"In the application of that test, the reviewing Court will ask: is there a rational objective basis justifying the connection made by the administrative decision-maker between the material made available and the conclusion arrived at."**

On reasonableness, after referring to **Section 7 (2) (k)** of the Fair Administrative Action Act, the Judge quoted extensively from some three foreign jurisdictions. We shall reproduce only one, **Carephone (Pty) Ltd vs. Marcus NO** 1999 (3) SA 304 (LAC) at 316, in which the principle was stated as follows;

> **"In determining whether administrative action is justifiable in terms of the reasons given for it, value judgments will have to be made which will, almost inevitably, involve the consideration of the 'merits' in some way or another. As long as the judge determining [the] issue is aware that he or she enters the merits not in order to substitute his or her own opinion on the correctness thereof, but to determine whether the outcome is rationally justifiable, the process will be in order."**

These three passages are important in our ultimate disposition of this appeal. But we hasten to reiterate that they suggest merit review of an administrative decision.

On the appellants' right to legitimately expect the respondent to perform its duties lawfully, fairly, rationally in conformity with the law, the Judge concluded that the appellants had not demonstrated how they relied on the respondent's decision to their detriment or how their expectations arose.

Was the respondent's decision tainted with bias? The learned Judge found none; not even a reasonable apprehension of bias; that, though the respondent was directed by the Ministry to investigate the accident, it could also *suo moto* commence the investigations; that the Committee that conducted the inquiry co-opted professionals in accordance with the law; and that its findings were not different from those reached by the appellants themselves.

With that, the learned Judge dismissed the appellants' contention that the respondent acted in bad faith by deliberately failing to consider their evidence based on a letter dated 6th February, 2018 in which the scope of the contract was explained.

We have noted elsewhere in this judgment that the use of the word **"capable"** in the respondent's letter communicating the decision by the respondent forms one of the grounds of appeal. With respect, we agree with the learned Judge that the word had no effect in the finding of the respondent. That finding was in fact contained in the report; and that the letter was merely a medium to communicate that outcome. The report found the appellants guilty of professional misconduct. How can that be construed to mean **"capable"**? For us, there is no doubt that the respondent meant "culpable" and so therefore nothing really turns on that ground.

The appellants were aggrieved by the dismissal of their application for judicial review and have brought two separate appeals, which, with leave, were consolidated and heard together. They have each raised 9 identical grounds, but which from the written submissions have been

condensed into whether the Judge erred in;

(1) finding that the respondent did not require a complaint to undertake disciplinary action against the appellants;

(2) failing to find that the respondent acted as investigator, prosecutor and Judge and that its decision was tainted with bias, abuse of power and illegality;

(3) failing to find that the respondent acted irrationally and unreasonably by not exonerating the appellants in view of admission of liability by

COVEC;

(4) finding that the appellant was accorded a fair hearing; and

(5) holding that the respondent, by finding the appellants "capable" of professional misconduct did not mean that the appellants were not to blame yet those words, in their natural and ordinary meaning cannot and do not impute any finding of guilt.

We have disposed of the last ground and wish to say no more. On the other grounds, the appellants have submitted that by **section 53(1)(2)** of the Engineers

Act, the respondent could only act on the basis of a written complaint in a prescribed manner, and not on its own motion, as was the case here; that byoriginating the complaint, prosecuting and making the decision on it, the respondent acted as a judge in its own cause; and that having been instructed by the Permanent Secretary Ministry of Transport Infrastructure Housing and Urban Development to investigate the cause of the collapse of the bridge, the respondent ought to have conducted investigations instead of drawing charges against the appellants alleging professional misconduct.

It was also contended that the respondent acted irrationally and unreasonably in suspending the appellants from the practice of engineering, despite the clear and unequivocal evidence from the main contractor that the collapse was not caused by the design of the bridge but the method of construction; that the appellants were not given a fair hearing as no evidence was presented to show how they were professionally negligent; and finally that apart from presenting a charge sheet, no one was called to provide evidence in support of the accusations contained in the charge sheet.

The respondent, for its part maintained that the requirement by **section 53 of the Engineers Act,** with respect to making of a written complaint to the respondent against an Engineer, was discretionary and not mandatory, hence the use of the word "may" in the section; that by its mandate under **section 7** of the Act, the respondent did not require, in all instances, to receive written complaint for it to commence disciplinary proceedings; that in this particular case, it had been instructed by the Principal Secretary of the Ministry of Transport, Infrastructure, Housing and Urban Development, to investigate the cause of the collapse of the bridge; that the news of the collapsed bridge was in the public domain; and that the inquiry was conducted by an independent committee which included persons co-opted under **section 8** of the Act hence there was no bias, abuse of power and illegality in the way the proceedings were commenced and conducted.

The respondent further contended that the Judge properly considered and rejected the alleged admission of liability by COVEC, and correctly found that the respondent did not act irrationally and unreasonably because the letter of 6th February, 2018 did not unequivocal exonerate the appellants; that in any case, that letter was not presented to or received by the respondent but was only produced in court; and that COVEC, not being a judicial body, its statement on liability contained in the letter did not vary the provisions of FIDIC and the MOU in which the scope of the services to be rendered by BAC and Interphase were spelt out.

The respondent is in agreement that if the Judge was to determine matters regarding the scope of the contract, that would have amounted to a merit review which is outside the ambit of judicial review. The cases of **Kenya Revenue Authority& 2 others vs. Darasa Investments Limited** [2018] eKLR and **Municipal Council of Mombasa vs. Republic & another** [2002] eKLR were cited in support of that statement.

The respondent, however, acknowledged that despite the widening of the scope of judicial review by the Constitution of Kenya 2010, a distinction between the process and merit still exists as the courts have expressed in **Mohammed A.**

Malim vs. Registered Trustees of the Agricultural Society of Kenya & 33 others [2019] eKLR and **Suchan Investment Limited vs. Ministry of National Heritage & Culture &3 others** [2016] eKLR.

On the next ground, it was submitted that the appellants were accorded a fair hearing by the respondent; that they were notified of the charges, supplied with all relevant information, given the opportunity to respond to them in writing and to present oral evidence before a decision was made by the respondent in compliance with **Article 47** of the Constitution and **section 7** of the fair Administrative Action Act; and that the Judge correctly rejected the appellants defence as to consider it would have amounted to an invitation to delve into the merits of the decision.

We have considered the rival arguments, the law and the authorities cited by both sides. It is common factor that the design drawings for the collapsed bridge were presented to COVEC by a consortium of BAC and Interphase, whose directors are the appellants, who are also engineers. It is unanimous that the bridge collapsed due to wrong sequencing of the concreting of the bridge deck. Both reports by BAC and Interphase as well as that by inquiry committee of the respondent have, in a very technical language, explained what wrong "sequencing of the concreting of the bridge deck" means. We shall attempt later to break it down in the manner we understand it.

In their report, the select committee and by extension, the respondent specifically blamed the appellants for the accident, insisting that they failed to fully comply with engineering design standards; did not adhere to contractual construction practices and failed to supervise the construction. Both were also blamed for failing to register their respective firms with the respondent. As a result of this outcome, the respondent made a decision to remove the appellants' names from the register of Engineers for two years with effect from 26th February, 2018.

For their part, the appellants applied for orders of *certiorari* and prohibition as explained earlier in this judgment. *Certiorari* to quash the above decision of the respondent and a prohibition to stop the respondent from proceeding and recommencing any disciplinary proceedings against the appellants.

Certiorari and prohibition are prerogative orders which today are both constitutional and statutory. Prior to 2010 **sections 8** and **9** of the Law Reform Act constituted the substantive basis for judicial review, while **order 53** of the Civil Procedure Rules remains to this day the procedural basis. Read with **Articles 22** and **47**, **Article 23(3)(f)** of the Constitution, the law today recognizes an order of judicial review as one of the reliefs the court can grant in appropriate cases. Similarly, Part Three of the Fair Administrative Action Act, 2015, provides for Judicial Review with **section 7(2)** legislating what, for decades, have been common law principles or grounds for judicial review. The section outlines the circumstances in which a court may review an administrative action or decision. The sub-section provides, in very wide terms, that an administrative action or decision may be reviewed by the court, if—

"(a) the person who made the decision—

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to—

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power".

Prior to the enactment of this statute, the courts had summarized these grounds into *ultra vires*, illegality, irrationality, unreasonableness and procedural impropriety. For the specific purpose of this appeal, the courts stated the grounds as follows;

"What does an ORDER OF PROHIBITION do and when will it issue? It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice.

Only an order of *CERTIORARI* can quash a decision already made and an order of certiorari will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons".

See **Kenya National Examination Council V. Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others** [1997] eKLR

On the basis of this, it has been held and exemplified over the years in such cases as the **Municipal Council of Mombasa vs. Republic & another [**2002] eKLR, that judicial review is concerned with the decision-making process, not with the merits of the decision itself.

On the other hand, irrationality has been described as the situation where;

"…there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards."

See **Republic vs. Minister of Immigration & Registration of Persons** [2013] eKLR. See also **Republic vs. Public Procurement Administrative Review Board & 3 Others *ex parte* Olive Telecom PVT Ltd** [2014] eKLR where it was stressed that;

"… 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."

It is in the context of the evolution of the orders of judicial review that this appeal is considered, starting with the first ground.

Section 53 specifically stipulates as follows;

"53. (1) A person who being dissatisfied with any professional engineering services offered or alleging a breach of the standards of conduct, specified by the Board from time to time, by a registered or licensed person under this Act, may make, in a prescribed manner, a written complaint to the Board.

(2) Upon an inquiry held by the Board to determine a complaint made under subsection (1), the person whose conduct is being inquired into shall be afforded an opportunity of being heard, either in person or through a representative of his own choice.

……

(5) Subject to this section and rules of procedure made under this Act, the Board may regulate its own procedure in disciplinary proceedings". (Our emphasis).

There is no doubt from the provisions of **sections 6** and **7** of the Engineers Act that the respondent has wide powers, which include the registration of engineers and firms, regulation of engineering professional services, setting of standards, and general practice of engineering. In the exercise of those powers, it will, among other things, consider applications for registration. It keeps and maintains the Register of all Engineers, can publish the names of all registered and licensed engineers, issue licences to qualified engineers, **"enter and inspect sites where construction, installation, erection, alteration, renovation, maintenance,processing or manufacturing works are in progress for the purpose of verifying that—**

(i) professional engineering services and works are undertaken by registered persons under this Act;

(ii) standards and professional ethics and relevant health and safety

aspects are observed", instruct, direct or order the suspension of any professional engineering services, works, projects, installation process or any other engineering works, which are done without meeting the set out standards, as well as determine and define disciplines of engineering recognized under the Act.

Further, it is empowered to establish committees to perform such functions and duties as it may determine and to co-opt persons from outside it by virtue of their knowledge or expertise in specific areas to be members of its committees.

We have elaborately set out these provisions to answer the question; whether absence of a written complaint rendered the proceedings and the respondent's final decision illegal.

Being disciplinary proceedings that may lead to loss of career, the laid down steps in **Section 53** must be followed with scrupulous care. To kick start the process of discipline, section 53 requires a written complaint to the Board in accordance with the above provision and in the manner prescribed in **Rule 14** of the Engineers **Rules, 2019.** However in view of the wide powers of the respondent, it can act on any complaint however communicated to it. It can even commence a complaint *sua sponte*. That is why we do not agree with the appellants' contention that the provision was not complied with; that there was no complainant; and that the respondent was the complainant, prosecutor and judge. In the first place, the incident of the collapsed bridge was a public matter, going by the copies of newspaper reports on record and the politics behind the construction of the bridge. There is, in addition, uncontroverted evidence that it was the Permanent Secretary Ministry of Transport Infrastructure Housing and Urban Development who directed the respondent to visit the site and investigate the cause of the collapse of the bridge. In accordance with this directive, the respondent, pursuant to **Rule 14** aforesaid established an *ad hoc* Inquiry Committee to investigate the complaint. In the second limb the appellants have complained that the learned Judge erred in failing to find that some of members of the *ad hoc* Committee were members of the respondent, and were therefore judges in their own cause. We find no merit in this ground. Without complaining to the Committee over the inclusion of members alleged to be members of the respondent and having fully participated in the proceedings, it was too late in the day for the appellants to complain to the learned Judge. But of great significance is the power vested in the respondent by **sections 7(1)** and **53(2)** aforesaid to hold an inquiry in order to determine any complaint against any of its members. In conducting the inquiry the respondent is permitted by **section 8 (3)** to co-opted persons from outside it by virtue of their knowledge and expertise. No prejudice is shown to have been occasioned. We, accordingly reject this ground.

On whether the appellants were accorded a fair trial, in addition to our holding that **section 53** of the Engineers Act was complied with, we are equally satisfied that the appellants knew both the original and amended charges and appropriately defended themselves.

The respondent simply conveyed to the appellants its decision to suspend them on account of professional misconduct and for operating BAC and Interphase, respectively without prior registration by the respondent. Under **section 6** of the Fair Administrative Action Act, the appellants were entitled as of right to be supplied with the reasons for which the action was taken against them to facilitate their application for either an appeal or review. However under **sub-section (3)(4)**, it is only if the respondent failed to supply the reasons within 30 days of requesting that the court would, in proceedings for review, presume that there was no good reason for the decision.

In the end, we are satisfied, from the foregoing, that the respondent did not violate any of items in **section 7(2)**, set out earlier in this judgment and that the proceedings leading to the respondent's impugned decision were lawful.

There is sufficient uncontroverted evidence that the appellants were notified of the charges to which they appropriately responded. They presented their defence stating their innocence, which defence was rejected by the respondent. According to the learned Judge, the explanations proffered by the appellants and dismissed by the respondent went beyond the realm and bounds of judicial review, which only deals with the process of decision- making and not the merit of the decision; and that having been persuaded that the respondent had jurisdiction to make the decision and that the necessary steps were taken before making the decision in question, it was not open to him to inquire into the terms of the contract between COVEC and BAC/Interphase or to look at the letter addressed to the respondent by COVEC whose contents were of exculpatory nature in favour of the appellants. On whether he could consider the appellants' explanation, we quote, once again, a passage in the judgment in which the learned Judge stated that;

> **"To resolve this issue, this court will be required to venture in contested issues of facts and evidence, analyze the agreements and in the process fault or uphold the decision. In my view, this is clearly a merit review, outside the function of this court. In fact section 54 of the Act provides for "appeals" to the High Court, not Judicial Review…..**
>
> **135. Judicial Review is ill equipped to deal with disputed matters of fact where it would involve fact finding on an issue which requires proof to a standard higher than the ordinary balance of probabilities in civil litigation. Resolving the scope of the contract would require direct evidence to be adduced and tested through cross-examination of witnesses before the court can conclude the real intention of the parties as expressed in the contract……In judicial review proceedings, the court can only determine the process not the merits of the decision".**

It is this explication of the law as the learned Judge understood it, that we now turn to, bearing in mind that that decision was in 2018. With respect, we agree that for a longtime judicial review was not concerned with the merits of the decision being challenged but with the decision making process itself. That was the *ratio decidendi* in the Ugandan case of **Pastoli vs. Kabale District Local Government Council and Others** [2008] 2 EA 300, which has been followed by courts in this country. It was stated in it that:

> **"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint".** (Our emphasis).

But a reading of the post 2010 decisions will show a clear and consistent trend and a departure from the previous approach to the scope of judicial review, as we shall shortly demonstrate.

We reiterate, by way of background, that prior to the enactment of the Fair Administrative Action Act, the substantive basis for judicial review applications in Kenya was the Law Reform Act. Upon the enactment of the Fair Administrative Action Act, one would have expected to see in the new law some transitional or consequential provisions specifically in relation to the Law Reform Act or at least some reference to it. But this is not so, save for **section 14** of the Fair Administrative Action Act in which it is stipulated that all proceedings pending at the

time of the coming into force of the new Act, the provisions of the Act will apply, without affecting the validity of anything previously done. Similarly, it saves the practice and procedure obtaining before its enactment. We venture to state, as we have observed elsewhere in this judgment, that with the passage of the Fair Administrative Action Act, the statutory grounds for judicial review in Kenya are now found, in addition to the common law in that Act. Those grounds are the same ones in the Constitution. This important conceptual development in modern judicial review theory and practice has been interpreted to mean a shift from exclusively reviewing the process by which a decision is made, to reviewing, in appropriate cases, the merits of the decision in question.

We can do no better than cite the decisions where this has been declared to be the norm by all levels of court system. The Supreme Court in **Communication Commission of Kenya vs. Royal Media Services & 5 Others [2014] eKLR** set

the stage for the new thinking by observing that;

> **"... the Constitution of 2010 has elevated the process of judicial review to a pedestal that transcends the technicalities of common law.... the power of judicial review in Kenya is found in the Constitution".**

Taking the queue, this Court, in an extensive elucidation said in **Suchan Investment Limited vs. Ministry of National Heritage & Culture & 3 others** [2016] KLR, at para 55-58 that:

> **"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 vs. 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. 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 vs. Wednesbury Corp. [1948] 1 KB 223 on reasonableness as a ground for judicial review. Section 7 (2) (i)**
>
> **(i) and (iv) deals with rationality of the decision as a ground for review. In our view, whether relevant considerations were taken into account in making the impugned decision invites aspects of merit review. The grounds for review in Section 7**
>
> **(2) (i) that require consideration if the administrative action was authorized by the empowering provision or not connected with the purpose for which it was taken and the evaluation of the reasons given for the decision implicitly require assessment of facts and to that extent merits of the decision. It must be noted that 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."**

A similar analysis was to follow in 2017 in the case of **Child Welfare Society of Kenya vs. Republic & 2 others *Ex-parte* Child in Family Focus Kenya** [2017] eKLR where once again the Court rendered itself thus;

> **"39. For a long time in the history of the common law, judicial review has been tried and tested as the most efficacious remedy for control of administrative decisions. It was not concerned with private rights or the merits of the decision being challenged but with the decision making process.**
>
> **...**
>
> **40. However, the dynamism of society and the events of recent history have decidedly thrust judicial review into a whole new trajectory. Nyamu, J. as he then was, clearly 'smelt' the impending extension of the scope of judicial review in 1998 in the case of Republic vs. The Commissioner of Lands, *ex-parte* Lake Flowers Limited Nairobi Misc. Application No. 1235 of 1998. 41. In the same year, this Court expressed similar views in the case of Bahajj Holdings Ltd. vs Abdo Mohammed Bahajj & Company Ltd. & Another Civil Application No. Nai.**

97 of 1998 stating that the limits of judicial review continue expanding so as to meet the changing conditions and demands affecting administrative decisions. The trend continued in Kuria & 3 Others vs. Attorney General [2002] 2 KLR 69.

….

42. The bells for expansion of the scope of judicial review rang even louder after the promulgation of the Constitution 2010. Odunga, J. for example, in Republic vs. Commissioner of Customs Services ex-parte Imperial Bank Limited [2015] eKLR recognized that "*Judicial review is a constitutional supervision of public authorities involving a challenge to the legal validity of the decision"* and the *"need to fully explore and develop the concept of judicial review in Kenya as a constitutional supervision of power and develop the law on this front"*.

….

43. One of the sources of that bold view by the High Court is our own Supreme Court which had earlier, in the case of Communication Commission of Kenya V. Royal Media Services & 5 Others"

See also **Joshua Sembei Mutua vs. Attorney General & 2 others** [2019] eKLR, **Super Nova Properties Limited & Another vs. The District Land Registrar Mombasa & 5 others** Civil Appeal No. 98 of 2016 (ur), **Josephat Kiplagat vs. Michael Bartenge** [2016] eKLR, **Rentco East Africa Limited,Lantech Africa Limited, Toshiba Corporation Consortium vs. The Public Procurement Administrative Review Board & Another,** Civil Appeal No. 24 of 2017 and **Republic vs. Attorney General & 3 others *Ex Parte* James Muchemi t/a Jampur Agencies** [2018] eKLR, among many others, confirming the new thinking.

From our own research, there are very few post 2010 decisions that have gone against this trend. For example, we were referred by the respondent to the case of **Kenya Revenue Authority & 2 others vs. Darasa Investments Limited** (supra) in which the Court attempted to plough back the general direction of the courts by insisting that;

"Judicial review is concerned with the decision making process and not the merits of the decision in respect of which the application for judicial review is made".

We note that the very bench of judges that made these pronouncements on 11th April, 2018 shortly thereafter on 19th April, 2018 in the case of **Super Nova Properties Limited & another vs. District Land Registrar Mombasa & 2 others; Kenya Anti-Corruption Commisssion & 2 others (Interested Parties)** [2018] eKLR after citing with approval the holding in **Suchan Investment Ltd** case (supra) correctly restated the position and said;

"27. On our part, we find no fault that the Judge expanded the grounds for judicial review above the conservative grounds to include the principles of proportionality, public trust, accountability by public officers, justice and equity. The test of proportionality would automatically lead to a greater intensity of review of the merits as it invites a court to evaluate the merits of the decisions, by assessing the balance to make; that is whether the decision to be made is within the range of rationality or reasonableness. Secondly, the proportionality test may go deeper into examination of the interests of those to be affected by the said decision"

We may only add that by **Article 23**, the Constitution recognizes that the court, in appropriate cases can issue an order of judicial review and then goes ahead in **Article 47(1)** to command that;

"Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair". (Our emphasis).

The intention of the framers of the above provision, in our view, was to extend the scope of judicial review beyond procedural fairness of the decision. This is also the spirit of **section 7** of the Fair Administrative Action Act, which enjoins the court to inquire into questions of whether an administrative action or decision was materially influenced by an error of law; or was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant; or the administrator failed to take into account relevant considerations; or the administrative action or decision is not rationally connected to; the purpose for which it was taken, or connected to the information before the administrator; or the administrative action or decision is unreasonable; or is not proportionate to the interests or rights affected; or the decision is simply unfair; or taken or made in abuse of power.

We believe we have been able to sufficiently demonstrate from this and the decisions we have enumerated above that, by stating that he could not consider evidence presented as defence or analyze the agreements executed by the parties in the dispute because doing so would amount to a merit review, the learned Judge erred. That said, we hasten to add that judicial review procedure where evidence of facts is ordinarily given on affidavit, is not well adapted for trying disputed facts. Therefore, where facts upon which the court is called upon to intervene by way of judicial review are disputed, the court should be reluctant to undertake a merit review.

The appellants were blamed for the collapsed bridge. They were also accused of operating BAC and Interphase without registration by the respondent. As a result, they were both suspended and their names removed from the register of engineers for a period of 2 years. The question placed before the learned Judge required consideration beyond the process of the decision. It was **an appropriate question** for considering the role of the appellants in the collapsing of the bridge.

We have, at the beginning of this judgment, stated that both the *ad hoc* Committee appointed by respondent and the appellants in their respective reports were unanimous that the primary cause of the accident was **"the wrong sequencing of the concreting of the bridge deck**

leading to unbalanced forces that in turn caused instability and failure of sections of the bridge". This is how this statement was explained. The bridge was divided into three sections: two outer spans (being the northern and southern span) and mid-span deck which was free bearing or suspended. During the construction the southern span was concreted first, followed by the mid span without concreting the northern span. This sequencing was incorrect. As a result, the northern span which was not concreted, was prematurely loaded with the full weight of the mid span at its cantilever edge causing it to destabilize and in turn the mid span of the bridge snapped off the northern span and crashed into the river. The southern span however remained in position. The correct sequence ought to have been to first concrete the northern and southern spans allowing their full development as support structures then finally concreting the mid span deck. This sequence was not followed leading to the collapse of the bridge.

While the respondent attributed the accident to the appellants' failure to provide adequate design; for lack of supervision, and failure to provide sufficient information to the contractor, the appellants, for their part, maintained that the accident occurred, not because of the design, but because of the construction; that after submitting the drawings to COVEC, the same were shared and approved by KeRRA; that the original draft, upon which the final design was based, was provided by KeRRA; that the appellants adopted the designs without interfering with the details of the sequencing; and that it was for the contractor to follow the sequencing in the design. They denied that it was their responsibility to supervise the construction.

According to the *ad hoc* Committee, the collapse of the bridge came just one day after;

> **"..the casting of the southern span and mid span without supervision of either the contractor's senior designated personnel or the resident engineer's staff… that the obligations relating to construction methodologies were not fully adhered to by the parties contracted by the employer….That the method statement was too general on the construction of the deck and did not touch on the concrete sequencing. The committee did not see any approval from the employer's representative or resident engineer of this method statement. Nonetheless concreting for the bridge deck proceeded without an approved work method statement …. no approvals were sought nor granted for the casting of the section cast immediately prior to the collapse of the bridge".**

From this and other conclusions by the committee, with respect, we cannot agree more with the appellants that indeed, the immediate cause of the accident was not the design of the bridge but the construction. It is apparent to us, from the copies of newspapers and correspondence that there was some urgency and great haste in the construction brought about, not by the purpose of the bridge,but more by the prevailing political expediency. Two weeks before the bridge collapsed, while on a campaign tour of the region, the President inspected the bridge. The newspapers did not rule out local and national politics for the collapse and expressed suspicion that the construction works was hurriedly done ahead of the President's visit.

Besides the accusations that the bridge collapsed as a result of the poor design by the appellants, the respondent contended too that the appellants failed to provide the supervision that they were obligated under the pre-bidding MOU to render in the course of the construction. We have looked at the MOU between COVEC and BAC/Interphase executed before the former was awarded the tender, and in the relevant part, we note in Article 2 **(Roles and Responsibilities)** that it was a term of the MOU that;

> · **"BAC/Interphase shall carry out design review works according to the client's requirements to the satisfaction of the client and BAC/and Interphase shall be responsible for the safety, stability and strength of the design of the works**
>
> · **Will provide design amendment and or construction quality control services during the construction phase".** (Our emphasis).

We cannot discern from the terms of the MOU any obligation on the appellants to supervise the construction. It is all about the design. But of significance is an express term that the MOU would be terminated, among other reasons, **"in the event of the bid be (sic) awarded by the client, the MOU will be replaced by a final agreement which will be based on the contract signed by the CLIENT…."**.

Parties subsequently entered into an agreement whose terms superseded those of the MOU. In the subsequent agreement, Appendix B spelt out the appellants' role and the scope of their engagement; that the design consulting firms **"are to assist the contractor to implement the project smoothly and successfully through carrying out necessary surveys and detailed design."** See **Clause 2.2. Clauses 2.3** and **2.4** of Appendix B make elaborate provision of the "design work items" and "design parameters" which do not include supervision of the construction.

The appellants averred, without rebuttal from the respondent, that after presenting the design in terms of the aforesaid agreement, they were fully paid for it, performance bond returned and their professional liability insurance was never recalled; that after the collapsed part of the bridge was repaired, the construction of the rest of the bridge resumed with COVEC using the very original designs the appellants had drawn without any alterations; and that the bridge is fully functional.

The supervision of sequencing was to be undertaken and approved by the site engineers who, according to the contract, were to be appointed by the contractor (COVEC) and the client (KeRRA). As a matter of fact, KeRRA had named project and resident engineers whose duty, we believe, was to supervise

the construction. There is evidence that COVEC too, had on site Chinese engineers who they described as highly experienced. Although the respondent maintained that KeRRA could not have been responsible for supervision, KeRRA itself did not file any affidavit denying the fact that, as the employer, they were under a duty to supervise the construction. In any case, the respondent, through the affidavit sworn by Eng. Musuni conceded that in a Design, Build and Maintain model, the supervision and maintenance aspects are squarely vested in the contractor, COVEC. KeRRA as the employer and COVEC, the contractor did not complain against BAC and Interphase, the sub-contractors for failure in the design or supervision.

Indeed, there was an unequivocal admission in writing by COVEC to the respondent acknowledging that they were responsible for the accident through the wrong sequencing of the concreting of the bridge deck. Although the respondent denied having received the letter from COVEC before making the impugned decision, they failed to explain how the letter had their date stamp. It would appear to us also that the admission of wrongdoing by COVEC was a matter of public knowledge in view of wide media reports, copies of which are on record.

Regarding the respondent's argument that the appellants were equally bound by FIDIC Contracts, we wish to explain that FIDIC contracts are internationally recognized standard form contracts, which provide for the duties and responsibilities of the main parties. They also provide for the assignment of risks between the parties. Because FIDIC contracts only provide general guidance, it is acknowledged and expected that special terms and conditions are left to parties in specific projects to agree on. Though under FIDIC, COVEC was required to give an undertaking to KeRRA that its designers and design sub-contractors have experience and capacity necessary for the design, it was for COVEC and the sub-contractors to negotiate the details of the contract. Going by this practice, and in terms of those general provisions in the FIDIC contract, the contract between KeRRA and COVEC provided that the latter would design, build and maintain the bridge. It fell on it to ensure compliance with this term, just as it was the responsibility of the 'employers representative', that is, KeRRA, to supervise the construction.

Therefore, nowhere in the MOU, the subsequent agreement or FIDIC contract, was it a requirement or a term that BAC and Interphase would supervise the project. It is equally true, from this conclusion, that it does not automatically follow that the firm that designs a project must necessarily supervise the works to completion. It all depends on what the parties freely contract.

For these reasons, the respondent failed the rationality and proportionality test and the Judge ought to have quashed the decision made on the basis that the design was flawed and on the fact that the appellants through BAC and Interphase had failed to supervise the works.

Finally, we turn to the respondent's decision that the appellants, respectively operated BAC and Interphase without registration by the respondent. On behalf of BAC, it was pleaded that;

> **"…BAC is a limited liability company, incorporated in Kenya. We were unaware of the mandatory requirement to register as a consulting company and shall immediately take steps to ensure this is remedied."**

Interphase too did not deny the charge but explained that it had commenced the process of registration. There was no specific complaint in this regard. The respondent, as it were, stumbled on it in the course of investigating the accident. That notwithstanding the appellants admitted their omission. Because there was no reasonable justification for their failure to register the two companies, the appellants were removed from the register in accordance with **section 29(a) (vi)** of the Engineers Act.

By that section, the Registrar is granted the powers to remove from the register the name of any person—

> **"(vi) who causes or permits or suffers any sole proprietorship, partnership or body corporate in which he is a sole proprietor, partner, director or shareholder to practice as a firm prior to its registration by the Board or after the Board has suspended or cancelled its registration."**

We are satisfied that this charge was proved and wish to say no more, suffice to stress that it was only on this question that the respondent could direct the removal of the appellants' names from the register but not, as we have found, on the ground of professional misconduct under **section 45(1)**.

The appeal, for these reasons, partially succeeds, and the judgment of 29th October, 2019, is set aside to the extent that it ordered the suspension of the appellants for professional misconduct.

We however uphold the decision to remove the appellants' names from the register for failing to register BAC and Interphase with the respondent, until they comply with **section 20** of the Engineers Act.

We award half the costs of this appeal and in the High Court to the appellants.

Dated and delivered at Nairobi this 6th day of November, 2020.

W. OUKO, (P)

JUDGE OF APPEAL

P.O. KIAGE

JUDGE OF APPEAL

S. GATEMBU KAIRU, (FCIArb)

JUDGE OF APPEAL

I certify that this is a true copy of the original

Signed

DEPUTY REGISTRARR