



**Mwau v Mullei & 3 others (Civil Appeal 157 of 2009)  
[2016] KECA 842 (KLR) (23 September 2016) (Judgment)**

Neutral citation: [2016] KECA 842 (KLR)

**REPUBLIC OF KENYA  
IN THE COURT OF APPEAL AT NAIROBI  
CIVIL APPEAL 157 OF 2009  
GBM KARIUKI, MSA MAKHANDIA & JO ODEK, JJA  
SEPTEMBER 23, 2016**

**BETWEEN**

**JOHN HARUN MWAU ..... APPELLANT**

**AND**

**ANDREW MULLEI ..... 1<sup>ST</sup> RESPONDENT**

**CENTRAL BANK OF KENYA ..... 2<sup>ND</sup> RESPONDENT**

**MINISTER FOR FINANCE ..... 3<sup>RD</sup> RESPONDENT**

**CLERK TO THE NATIONAL ASSEMBLY ..... 4<sup>TH</sup> RESPONDENT**

*(An appeal from the judgment and decree of the High Court of Kenya at Nairobi (Wendoh, J.) dated 22nd May 2009 in Nairobi Miscellaneous Application No. 186 of 2006)*

**JUDGMENT**

1. By a notice of motion dated April 18, 2006, John Harun Mwau “the appellant” filed a judicial review application seeking orders of mandamus, certiorari and prohibition against the respondents. The appellant’s grievance was that the respondents violated the rules of natural justice and failed to comply with relevant statutes or rules governing their functions; that the respondents jointly or severally published or caused to be published reports or letters linking him to a commercial bank known as Charterhouse Bank and further linked him to alleged commission of criminal offences and tax evasion; that the contents of the report or letters written by the respondents became subject of daily press and media publication and the appellant stood grave danger of suffering irreparably injury to his character and reputation; that the appellant had neither seen the report nor was he questioned in relation to the alleged letters or report; the appellant stated that he was neither a director nor shareholder of the said Charterhouse Bank and that he has never committed the alleged offences captured in the report or letters written by the respondents; that at all material times in Parliament and in media publications there had been continued debate of the report and letters written by the respondents.



2. In the judicial review application, the appellant asserted that the report or letters written by the respondents ought to have been availed to him and or produced in court for scrutiny; that despite demand, the respondents had refused and or failed to avail to the appellant the alleged report or letters. In terms of media and press publication, the appellant's grievance was that on 2<sup>nd</sup>, 3<sup>rd</sup>, 5<sup>th</sup> and 7<sup>th</sup> April 2006, he read media reports published in the daily newspapers to the effect that the respondents had linked him to Charterhouse Bank, tax evasion and alleged criminal activities.
3. In the application, the appellant prayed for orders of mandamus to compel the respondents jointly and or severally to produce before the court for purposes of scrutiny the reports or letters written by the 1<sup>st</sup> or 2<sup>nd</sup> respondents linking him to Charterhouse Bank; a mandamus to compel the respondents jointly or severally to produce in court for scrutiny evidence of all reports linking the appellant to tax evasion investigations and an order to compel the 4<sup>th</sup> respondent to produce before court all the Parliamentary Hansard proceedings for 4<sup>th</sup> April 2006 or any other date soon thereafter touching on the appellant's alleged link to Charterhouse Bank more particularly in commission of diverse criminal offences.
4. The appellant also sought an order of certiorari to bring before court and quash any proceedings conducted in Parliament linking him to Charterhouse Bank and to the commission of criminal offences.
5. The appellant further sought an order of prohibition to restrain the respondents from investigating him in matters allegedly concerning Charterhouse Bank or alleged criminal activities; a prohibitory order directed at the respondents restraining them from publishing or causing to be published articles, words or statements which are false and which adversely affect him unjustly and without being given an opportunity to be heard and a prohibitory order to restrain the respondents from maliciously injuring his reputation, character and dignity without any justification.
6. The 1<sup>st</sup> respondent Dr. Andrew Mullei, who was then Governor of Central Bank at the material time, in his replying affidavit deposed that he neither published nor authorized publication of the articles or facts alleged in support of the application; that as Governor of Central Bank he was not mandated to investigate any individual and the appellant's complaints were imaginary and false; that he was not aware of any letters written by himself as Governor concerning the appellant; that he had no control over the Hansard reports by Parliament; that he was not aware of any tax evasion investigation against the appellant; that he was unaware of allegations linking the appellant to any drugs or any reports of criminal offences or at all; that as Governor of Central Bank he had no mandate to investigate criminal offences; that the appellants judicial review application was founded on speculative documents and newspaper reports; that the persons who authored the newspaper publications should answer the same; that the order of mandamus sought can only be issued against a public body yet he has been sued in his individual capacity.
7. In opposing the application, the 2<sup>nd</sup> respondent, Central Bank of Kenya in a replying affidavit deposed by Gerald Arita Nyaoma averred that part of its statutory duty involves investigation of operations and affairs of commercial banks and in the performance of that duty, the 2<sup>nd</sup> respondent does not owe any duty to disclose the nature and extent of its investigations to any person whatsoever; that it had not made any decision or undertaken any act concerning the appellant and there was no decision made by the 2<sup>nd</sup> respondent capable of being quashed by an order of certiorari; that it is not aware of any report or letters written by itself to third parties regarding the appellant; that to prevent the 2<sup>nd</sup> respondent from conducting or investigating any person or bank would amount to interference with the statutory functions of its function.



8. The 3<sup>rd</sup> respondent, Minister for Finance, filed grounds of opposition to the effect that the Notion of Motion was misconceived, vague, ambiguous and speculative; that the appellant filed suit against the wrong parties as he should have instituted action against publishers of the letters, reports or media articles complained about.
9. The 4<sup>th</sup> respondent, the Clerk to the National Assembly filed grounds of opposition that the application disclosed no cause of action against Parliament; that the relief sought by the appellant could not be granted in view of the provisions of Sections 4 and 12 of the National Assembly (Powers and Privileges) Act, Chapter 6 of the Laws of Kenya.
10. Upon hearing the parties, the trial court (Wendoh, J.) in dismissing the application held that the appellant could not question parliamentary proceedings in a court of law pursuant to the provisions of Section 12 the National Assembly (Powers and Privileges) Act; and consequently the court would not call for the Hansard report as prayed. On the prayer to compel 2<sup>nd</sup> respondent to release to the appellant investigation reports, the trial court held that pursuant to Section 32 (2) ( c) of the Banking Act, all information obtained by the Bank in the course of inspection are confidential and used solely for the purposes of the 2<sup>nd</sup> respondent, she held further that there was no statutory duty imposed upon 2<sup>nd</sup> respondent to produce any inspection report to an individual and none of the orders sought would be available against the 2<sup>nd</sup> respondent. Relating to the payer for prohibitory orders, the trial court in dismissing the prayer observed that the appellant was seeking orders to prohibit the respondents jointly and severally from publishing or causing to be published words and statements that are false and malicious or which may adversely affect or injure his reputation; that the issue of protection of reputation and character are not issues of public law but are matters of a private nature and therefore outside the purview of judicial review.
11. Aggrieved by the judgment of the trial court, the appellant has lodged the instant appeal citing 26 grounds that can be compressed as follows:
  - i. The learned judge erred in law and fact by interpreting Order 53 Rule 7 as obligating an applicant to lodge a copy of the decision or order to be quashed by certiorari prior to being heard and the judge further erred in finding that the appellant was not specific as to the decision he sought to be quashed.
  - ii. The judge erred in holding that the appellant's case was speculative and founded on newspaper reports.
  - iii. The judge erred in seeking to create a distinction between the appellant and John Mwau Group and also erred in holding that the appellant was not mentioned in the letter dated 20<sup>th</sup> March 2006; the judge erred in failing to find that the 1<sup>st</sup> and 2<sup>nd</sup> respondents had given the letter dated 20<sup>th</sup> March 2006 to the press and erred in finding that it is the applicant who gave the press the letter dated 20<sup>th</sup> March 2006.
  - iv. The judge erred in law and fact in failing to appreciate the clear prejudice the appellant would suffer by being accused of holding multiple accounts without any evidence whatsoever or merely holding multiple accounts.
  - v. The judge erred in concluding that the 2<sup>nd</sup> respondent did not owe a public duty to the appellant and further erred in finding that no judicial review remedy could issue against the 2<sup>nd</sup> respondent;



- vi. The judge erred in holding that the confidential nature of inspection reports under Section 32 (2) (c) of the *Banking Act* insulated the Central Bank from any action regardless of its failure to comply with the confidentiality obligation thereunder.
  - vii. The judge erred in law in holding that Section 12 of the National Assembly (Powers and Privileges) Act applied to the circumstances of this case.
  - viii. The judge erred in fact by holding that the appellant had failed to demonstrate how and to what extent the respondents had acted illegally and in excess of each of their respective statutory powers.
  - ix. The judge erred in law in holding that the appellant had not specified the grounds for the respective remedies sought against each of the respondents.
12. At the hearing of this appeal, learned counsel Messrs Odera Obar appeared for the appellant while learned counsel Mr. Chacha Odera appeared for the 1<sup>st</sup> and 2<sup>nd</sup> respondents and State Counsel Mr. Kepha Onyiso appeared for the 3<sup>rd</sup> respondent while learned counsel Mr. Alex Thangei appeared for the 4<sup>th</sup> respondent.
  13. Counsel for the appellant relied on the grounds in the memorandum of appeal and reminded this Court that the specific prayer in the appeal is to set aside the judgment of the trial court and remit the notice of motion dated 18<sup>th</sup> April 2006 to the High Court for re-hearing and determination.
  14. Counsel submitted that the appellant’s judicial review application was premised on the ground that the 1<sup>st</sup> and 2<sup>nd</sup> respondents acted ultra vires the *Banking Act* and the *Central Bank of Kenya Act* thereby undermining the appellant’s legitimate expectation. He submitted that the trial court’s decision was arrived at on a collateral and malicious motive; that the court erred when it stated that the letter dated 20<sup>th</sup> March 2006 cannot be quashed because it refers to John Mwau Group and not the appellant who is John Harun Mwau; that the court erred in creating a distinction between the appellant as John Harun Mwau and “John Mwau Group”; the judge erred in holding that “John Mwau”, John Harun Group” is a legal person and therefore sui juris; that in so doing the judge erred in dismembering the appellant from John Harun Group.
  15. Counsel submitted that injury to the appellant’s character and reputation by the respondents arose from the letter dated 20<sup>th</sup> March 2006 which was signed by the 1<sup>st</sup> respondent and it expressly stated that “...John Harun Group had multiple accounts which are linked to the Nakumatt network...” and that “for instance, it should be noted that Nakumatt has never shown a profit to date, always losses. Its VAT payments are between Ksh. 33 million and Ksh. 85 million per annum. Uchumi pays Ksh. 500 to 600 million per annum. As Nakumatt’s turnover is much larger than Uchumi, you would expect corporation tax and VAT to be in the range of Ksh. 1.8 to Ksh. 2,5 billion per annum....The Minister may also query the most anomalous difference between Uchumi’s payment of VAT and Nakumatt’s.”
  16. The appellant in his submission stated that he is the one who trades in the name of John Harun Group and as such the letter dated 20<sup>th</sup> March 2006 specifically refers to him; that this statement was not controverted by anyone and the trial court erred in drawing a distinction between the appellant and John Harun Group. To augment the ground of appeal, the appellant faulted the conclusion by the trial court that the appellant did not have locus to institute the judicial review application. On this issue, the trial court in its judgment expressed itself as follows:

“Does the applicant have the necessary locus to bring this application? I find that the applicant having not been mentioned in the letter of 20<sup>th</sup> March 2009 (sic) or any other for



purposes of this application, he has no locus standi to bring this application. He may have an interest in John Mwau Group but that is a different legal person. If the Group felt injured, it is that Group that should have moved this Court for these judicial review orders.”

17. In concluding his submissions, counsel asserted that the trial court in arriving at its decision was motivated by malice. In support, counsel referred us to pages 425- 426 of the record (being pages 13 and 14 of the judgment) where the trial judge expressed herself thus: “if any reports were produced in the proceedings before the court in Criminal Case No. 200/2006, where the 1<sup>st</sup> respondent was charged with abuse of office, Mr. Odera was counsel in the matter and is aware of the offensive reports and should have specified which ones should be brought up for quashing.”
18. Counsel further took issue with the foregoing statement and emphasized that he is the Mr. Odera referred to in the judgment and as counsel he did not represent any party in the criminal case and that he was never present in the criminal proceedings. He submitted that the fact that the trial judge could refer to the appellants counsel by name in the judgment when the said counsel never appeared in the criminal case invites an inference that the trial court’s decision was not based on facts and evidence but was actuated by bad faith and malicious motivation.
19. In support of the ultra vires grounds of appeal, the appellant urged us to find that the 2<sup>nd</sup> respondent acted ultra vires by appointing a team outside the Bank to investigate other commercial banks; that the Bank had no statutory mandate to initiate criminal investigations and no mandate to investigate tax evasion.
20. Mr. Chacha Odera urged us to dismiss the appeal. He submitted that there was no decision before the trial court that could be quashed by an order of certiorari; that the appellant had not placed before the trial court a decision upon which the respondents could be compelled to act upon; that the documents attached by the appellant in his judicial review application were newspaper cuttings and newspaper reports on parliamentary proceedings; that there is a distinction between a report and proceedings; that a report cannot form a basis for certiorari; that the appellant has not seen the report he is asking the court to quash; that an order for prohibition can only issue where a body is acting beyond its powers; that there is nothing the 2<sup>nd</sup> respondent has done that warrants prohibitory orders.
21. Mr. Kepha Onyiso associated himself with submissions by the 1<sup>st</sup> and 2<sup>nd</sup> respondents emphasizing that there was no decision that was made by the 3<sup>rd</sup> respondent to warrant any judicial review orders to be issued against him; that the order sought against the 3<sup>rd</sup> respondent was improper as no letter or report was written by 3<sup>rd</sup> respondent; that the appellant never wrote to the 3<sup>rd</sup> respondent asking him to perform any public duty; that the appellant had not shown what public duty the 3<sup>rd</sup> respondent had failed or refused to discharge; that the appellant is on a fishing expedition against the 3<sup>rd</sup> respondent and his appeal should be dismissed.
22. Mr. Alex Thangei submitted that the Assembly had absolute privilege pursuant to Sections 12, 19 (1) and 29 of the National Assembly (Powers and Privileges) Act; that the 4<sup>th</sup> respondent could only conduct its proceedings in chambers and this gave it absolute privilege; that judicial review orders could not be granted to quash proceedings of Parliament. It was urged that the appellant had not shown what statutory duty had been breached by the 4<sup>th</sup> respondent; that statutory duty cannot be construed, it must be express and identifiable vide a specific statutory provision; that the trial court did not err in making a conscious distinction between the letter dated 20<sup>th</sup> March 2006 and a decision.
23. In reply to the respondent’s submissions, counsel for the appellant observed that in their submissions, none of the counsel for the respondents had commented on the findings and conclusions made by the trial court and this implied that the appellant’s submissions remain uncontroverted. On the



issue that statutory duty must be express; counsel referred this Court to excerpts from the book on Administrative Law by Durga Das Basu, 5<sup>th</sup> Edition (1998) at page 189 et seq where it is stated that a statutory authority can only exercise powers that are expressly or impliedly authorized by statute and what statute does not expressly or impliedly authorize must be taken to be prohibited.

## Analysis

24. We have considered the rival submissions by counsel and examined the record of appeal and the list of authorities filed by counsel. As this is a first appeal, it is our duty to analyze and re-assess the evidence on record and reach our own conclusions in the matter. (See *Selle -vs- Associated Motor Boat Co.* [1968] EA 123; *Jabane -vs- Olenja*, [1986] KLR 661, 664. This Court stated in the latter case that it will not lightly differ from the findings of fact of a trial judge and will only interfere with them if they are based on no evidence (see also *Ephantus Mwangi -vs- Duncan Mwangi Wambugu* (1982-88) 1 KAR 278 and *Mwanasokoni vs. Kenya Bus Services* (1982-88) 1 KAR 870.
25. The first issue for our consideration and determination is the locus of the appellant to institute judicial review proceedings before the trial court. The appellant in his Statement of Facts in support of the motion for judicial review orders refers to himself as John Harun Mwau. Nowhere in the Statement of Facts and the verifying affidavit is John Harun Group mentioned or referred to by the appellant. Before the trial court and in this Court, the appellant submitted that John Harun Mwau and John Harun Group is one and same person and that he trades as John Harun Group. A key finding and distinction made by the trial court is that John Harun Mwau is different from John Harun Group. Based on this distinction, the appellant avers that the trial court erred in fact and law and failed to appreciate that there is no distinction between the appellant as John Harun Mwau and John Harun Group.
26. We note that the appellant lodged his judicial review application on 18<sup>th</sup> April 2006 which was a date prior to the coming into effect of the 2010 Constitution. Prior to 2010, the requirement for locus standi was strictly interpreted and applied by the Kenyan courts. However, after the year 2010, Article 22 (1) and (2) of the 2010 Constitution has relaxed the strict requirement for locus standi on matters relating to enforcement of rights and fundamental freedoms. Under the Article, every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed. In addition, proceedings may be instituted by a person acting in their own interest or acting as a member of or in the interest of a group.
27. We are aware that the notice of motion dated 18<sup>th</sup> April 2006 by the appellant is not grounded on alleged violation of fundamental rights and freedoms but is founded on Order 53 of the *Civil Procedure Act* and Rules. The issue of locus standi of the appellant to institute the present proceedings is pertinent but having not been urged and canvassed before the trial court, we say no more about it.
28. The next issue for our consideration and determination is whether an applicant seeking an order for certiorari must lodge a copy of the specific decision that need to be quashed. A ground of appeal urged by the appellant is that the trial judge erred in holding that the appellant had not been specific as to the decision he sought to have quashed despite there being a letter dated 20<sup>th</sup> March 2006 on record; that the judge erred in finding that Order 53 Rule 7 of the Civil Procedure Rules imposes an obligation on an applicant to lodge a copy of the decision or order to be quashed by certiorari prior to being heard.
29. We have considered the appellant's submission on this ground of appeal. The trial court in considering the ground expressed itself as follows:

“Order 53 Rule 7 requires a party who seeks to have an order or decision quashed by certiorari to lodge it with the court, verified by an affidavit before or on the hearing of the motion. In



absence of the decision, and if the party is unable to produce the decision for good reason... then the applicant has to give a satisfactory explanation as to why the decision cannot be lodged with the court.....

In this case, the applicant should have endeavored to be specific as to what reports or letters they refer to by giving the dates, the author or the exact subject. The existence of such decision or order should not be in doubt. In this case, the applicant refers to unknown or unidentifiable investigation reports and where they were authored and by whom is unknown. The court would not want to find itself in a position where it was issuing an order in vain. The court will not speculate or do guesswork.”

30. To determine the merits as to whether the trial court erred in finding that there was no specific decision before the court that could be quashed, we must refer to the pleadings as filed by the appellant in the notice of motion dated 18<sup>th</sup> April 2006. In the application the appellant sought an order to quash investigation or inspection reports or letters allegedly written by the 1<sup>st</sup> or 2<sup>nd</sup> respondents linking him to Charterhouse Bank; he also sought scrutiny of evidence of all or any cases, reports and or letters written by the respondents jointly and or severally regarding tax evasion investigations against himself; he further sought an order to quash parliamentary proceedings linking him to Charterhouse Bank and to the commission of any criminal offences.
31. In R-v-Secretary of State for Transport ex parte London Borough of Richmond upon Thames No. 3, (1995) LR 409, it was held that the want of an identifiable decision is not fatal to an application for judicial review. An application for certiorari is to bring before the court a decision made by an inferior tribunal or public body for purposes of reviewing the decision making process and to quash the same if need be. The impugned decision must be brought before the court.
32. In the instant case, several questions arise from the record: was the decision sought to be quashed brought before the trial court? Was there any investigation or inspection report linking the appellant to Charterhouse Bank or tax evasion produced before the trial court? Were any parliamentary proceedings linking the appellant to Charterhouse Bank tendered in evidence before the trial court? Was there any letter written by the 1<sup>st</sup> and 2<sup>nd</sup> respondents linking the appellant to Charterhouse Bank or tax evasion produced before the trial court?
33. We have examined the record of appeal in this matter. There is no investigation or inspection report on record. At page 149 of the record is a letter dated 20<sup>th</sup> March 2006 written by the 1<sup>st</sup> respondent (as Governor of the Central Bank of Kenya) addressed to the Minister for Finance. The letter is embossed “SECRET”. It is the appellant’s contention that this letter is specific and it contains the decision to be quashed by an order of certiorari and it is the subject of prayer for orders of certiorari and prohibition against the 1<sup>st</sup> and 2<sup>nd</sup> respondents.
34. On our part, we are satisfied that there was no investigation or inspection report on record. The appellant in his submissions concedes that he has never seen investigation or inspection reports that form the basis of the judicial review application. Given that no investigation or inspection report was tendered before the trial court, we are persuaded that the trial court did not err in finding that an order of mandamus, certiorari or prohibition could issue in absence of evidence to show existence of the report sought to be quashed.
35. As regards the letter dated 20<sup>th</sup> March 2006, its authenticity and veracity was not questioned before the trial court. Rather, the contention degenerated in to how the said letter came to be produced before the trial magistrate’s court and by whom. The contention further related as to how the media obtained the contents of the letter. The appellant submitted that the trial judge erred in making a finding that



the letter had been produced by the prosecution in a criminal court at the request and instance of the appellant; that the court erred in finding that it is the appellant who furnished the press with the said letter. On this issue, the trial judge expressed herself thus:

“I note that the letter dated 20<sup>th</sup> March 2006 was marked secret and was addressed to the Hon. Amos Kimunya, Minister for Finance. The question is whether it was published by the respondents. The 1<sup>st</sup> respondent was charged with the offence of abuse of office soon after the letter of 20<sup>th</sup> March 2006 was written. He appeared in court on 23<sup>rd</sup> March 2006. On 10<sup>th</sup> May 2006 the court issued an order for the prosecution to produce several documents which included the letter of 20<sup>th</sup> March 2006. The said letter was then produced by the prosecution upon request by the applicant. The 1<sup>st</sup> and 2<sup>nd</sup> respondents have denied ever giving the said letter to the press and it has not been demonstrated that it is either the 1<sup>st</sup> or 2<sup>nd</sup> respondent who gave it to the press. It is the applicant who requested for its production and once it was with the court, it became a public document. That must be how the press got the letter. The publication of the letter of 20<sup>th</sup> March 2006 cannot therefore be attributed to the respondents.”

36. The relevant issue at this point is not under what circumstances the letter of 20<sup>th</sup> March 2006 was produced before the trial court but whether the said letter contains a decision that could be quashed by an order of certiorari and whether it fulfills the requirement of Order 53 Rule 7 to wit whether it contains a decision that has been produced before the trial court for purposes of quashing by way of certiorari. The relevant excerpts from the letter are to the effect that “John Harun Group had multiple accounts which are linked to the Nakumatt network but were not fully examined” and “it now seems appropriate that the Minister for Finance could provide KRA with the titles of the identified accounts...” and “I am concerned that the evidence of collusion between Charterhouse and its

“customers which infringes Know Your Customer Regulations seems to have made Charterhouse Bank a liability to the probity of the financial sector and I would recommend that you consider withdrawing its license.”

37. Having analyzed the contents of the aforesaid letter and without delving into the merits as to whether an order of certiorari can issue in relation to the letter, we are of the considered view that there is a distinction between a recommendation and a decision. A recommendation means that a decision is yet to be made. The decision maker may or may not accept and act upon the recommendation. Unless and until the recommendation is acted upon, there is no decision made capable of being quashed. We are satisfied that the letter dated 20<sup>th</sup> March 2006 does not contain a decision. That can be quashed by way of certiorari.
38. We now consider whether the trial court erred in holding that the judicial review orders as prayed for could not be granted. In arriving at its decision, the trial court observed that the appellant was seeking to prohibit the respondents from publishing or causing to be published words or statements which may adversely affect or injure his reputation or malign his character. The court noted that the issue of protection of reputation and character are not issues of public law but are matters of private law outside the purview of judicial review. Citing dicta from the case of *Commissioner of Lands -v- Kunste Hotel (1995-1996) 1 EA 1*, the trial court observed that judicial review is concerned not with private rights. In *R -v- British Broadcasting Corporation – Ex Parte Lavelle (1983) 1 WLR 1302*, it was emphasized that judicial review is in the purview of public law, not private law.
39. The law protecting character and reputation is well settled in private law. The law of libel and slander protects publication of words and material that injure the reputation or character of an individual. The



appellants judicial review application is hinged on protection of his character and reputation which are subject matter of private law on defamation. The law of defamation has adequate and effective remedies in private law and judicial review remedies are inappropriate to enforce the law of defamation. Taking into account the private law nature of grievances founded on character and reputation, we are satisfied that the trial court did not err in holding that the appellant had instituted his claim for protection of character and reputation before a wrong forum and the claim was outside the scope and purview of judicial review. Judicial review remedies of mandamus, certiorari and prohibition are not the primary remedies in a suit founded on defamation.

40. A further ground of appeal urged in this matter is the holding by the trial court that the orders of certiorari, prohibition and mandamus cannot issue against the Clerk of the National Assembly. In arriving at this holding, the trial court expressed the view that Section 12 of the National Assembly (Powers and Privileges) Act conferred immunity to the Clerk of the Assembly and no civil proceedings could be instituted against the Clerk in relation to parliamentary proceedings.
41. The appellant submitted that the trial court erred in holding that Section 12 of the Act applied in the circumstances of this case. It is the appellant's case that the privilege accorded to proceedings in Parliament does not extend to reckless or dishonourable conduct by members of Parliament. The trial court in arriving at the decision that an order for mandamus could not issue against the Clerk of the Assembly stated expressed that:

“Section 4 of the National Assembly (Powers and Privileges) Act Cap 6 of the Laws of Kenya provides that no civil or criminal proceedings shall be instituted against any member of parliament for words spoken before or within a report to the Assembly or a committee or by reason of any matter or thing brought to him therein by petition, Bill or resolution. Section 12 of the Act also provides that no proceedings or decision of the Assembly or Committee of Privileges acting in accordance with the Act shall be questioned in any court.”

42. Citing dicta from the case of R -v- The *Judicial Commission of Inquiry into the Goldenberg Affair ex parte Saitoti HC Misc. App. No. 102 of 2006*, the trial court held that a court of law cannot question the decision covered by Sections 4 and 12 of the National Assembly (Powers and Privileges) Act. Guided by the Australian persuasive authority in *Prebble -v- Television New Zealand (1994) 3 All ER 407*, the trial judge noted that courts would not allow any challenge to be made to what was said or done within the walls of Parliament in performance of its legislative function.
43. As against the Clerk of the Assembly, the appellant sought an order of mandamus to compel the Clerk to produce all the Hansard proceedings for <sup>4th</sup> April 2006 or any other date soon thereafter touching on the appellant's alleged link to Charterhouse Bank particularly allegations relating to commission of diverse criminal offences. The trial court concluded that it could not order production of the Hansard as the appellant could not question parliamentary proceedings in a court of law stemming from the privilege given by Act.
44. In considering the ground of appeal that the trial court erred in finding that parliamentary privilege applied to the facts of this case, we have analyzed the provisions of Section 4, 12, 19 and 29 of the National Assembly (Powers and Privileges) Act.

Section 4 of the Act provides:

- “4. Immunity from legal proceedings
- No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a committee,



or by reason of any matter or thing brought by him therein by petition, Bill, resolution, motion or otherwise.”

Section 12 of the Act provides:

- “ 12. Proceedings not to be questioned in courts
- No proceedings or decision of the Assembly or the Committee of Privileges acting in accordance with this Act shall be questioned in any court.”

Section 19 of the Act provides:

- “ 19. Evidence of proceedings in the Assembly or any committee not to be given without leave
1. No member or officer of the Assembly, and no person employed to take minutes of evidence before the Assembly or any committee, shall give evidence elsewhere in respect of the contents of those minutes of evidence or of the contents of any document laid before the Assembly or that committee or in respect of any proceedings or examination held before the Assembly or that committee without special leave first obtained.
  2. The special leave referred to in subsection (1) may be given during a recess or adjournment by the Speaker, or in the absence or other incapacity of the Speaker, the Clerk.”

Section 29 of the Act provides:

- “ 29. Courts not to exercise jurisdiction in respect of acts of Speaker and officers of the Assembly
- Neither the Speaker nor any officer of the Assembly shall be subject to the jurisdiction of any court in respect of the exercise of any power conferred on or vested in the Speaker or such officer by or under this Act or the Standing Orders.”

45. In our analysis and with the foregoing provisions in mind, one of the primary functions of Parliament is to debate and pass resolutions freely on subjects of its own choosing. This is one of the cornerstones for parliamentary democracy. The performance of this function is secured by the members of Parliament each having the right to say what they will (freedom of speech) and discuss what they will (freedom of debate). These freedoms, the single most important parliamentary privilege, are the cornerstone to Sections 4 and 12 of the National Assembly (Powers and Privileges) Act, Chapter 6 of the Laws of Kenya. The privilege embodies the concept of parliamentary immunity. In practical terms, the freedom of speech and debates for proceedings in Parliament ought not to be impeached or questioned in any court or place out of Parliament. Tied to this concept is the doctrine of parliamentary sovereignty and separation of powers which means that the law does not allow judicial review of parliamentary proceedings except in a few cases where parliamentary legislation is contrary to *the Constitution* and rule of law.
46. As a general principle, a person wronged by parliamentary proceedings cannot apply for judicial review except where an Act of Parliament is unconstitutional. Consequently, statements made in parliament may not be used to support a cause of action arising out of proceedings in parliament. (See *Prebble v*



Television New Zealand [1995] 1 AC 321). The privilege and immunity conferred to parliamentary proceedings is wide and absolute - it is not excluded by the presence of malice or fraudulent purpose. In the Kenyan context, all proceedings in parliament are covered by parliamentary privilege and the absolute immunity. Proceedings in Parliament include 'everything said or done by a member in the exercise of his functions as a member in a committee of either House, as well as everything said or done in either House in the transaction of parliamentary business'. (See First Report from the Select Committee on the Official Secrets Acts HC (1937-38) 173; Report from the Select Committee on the Official Secrets Acts HC (1938-39) 101).

47. In the instant case, the appellant in his judicial review application seeks to quash parliamentary proceedings and to compel production of the Hansard without leave of Parliament. It is not in doubt that the proceedings conducted before the National Assembly on 4<sup>th</sup> March 2006 were parliamentary proceedings. These proceedings are covered by parliamentary privilege envisaged in Sections 4 and 12 of the Act. We have examined the provisions of the Act and have failed to find any exception as asserted by the appellant that parliamentary privilege does not extend to reckless and or dishonorable conduct by Parliament. In the absence of such an exception, we find that the trial court did not err in arriving at the decision that judicial review orders could not issue to compel production of the Hansard or to quash parliamentary proceedings as prayed for by the appellant.
48. A pertinent issue arising from the record of appeal is the legal effect of the word "Secret" embossed on the letter dated 20<sup>th</sup> March 2006 and which letter recommendation inspection to be instituted against Charterhouse Bank and other accounts including multiple accounts of John Harun Group. Section 32 (1) of the *Banking Act*, Cap 488 of the Laws of Kenya provides that:

" 32 The Central Bank may, at any time and from time to time, and shall, if  
(1) so directed by the Minister, cause an inspection to be made by any person authorized by it, in writing, of any institution and its agencies and of their books, accounts and records.

Section 32 (2) (c) stipulates that:

" 32 all information obtained in the course of the inspection shall be treated as  
(2) confidential and used solely for the purposes of this Act and of the *Central Bank of Kenya Act* (Chapter 491 of the Laws of Kenya)."

49. The trial court in evaluating the legal effect of the word "secret" embossed on the letter dated 20<sup>th</sup> March 2006 expressed the view that the court cannot compel 2<sup>nd</sup> respondent to provide any investigation report because the said reports are received confidentially and are for purposes of the 2<sup>nd</sup> respondent. It was held that there was no statutory duty imposed on 2<sup>nd</sup> respondent to produce any inspection reports to an individual and none of the orders sought by the applicant would be available against the 2<sup>nd</sup> respondent.
50. In this appeal, the appellant contends that the trial court erred in holding that the confidential nature of the inspection reports under Section 32 of the *Banking Act* insulated 2<sup>nd</sup> respondent from any action regardless of its failure to comply with the confidentiality obligation in the Section. It was submitted that the judge erred in holding that the respondents did not owe him a public duty.
51. We have considered the provisions of Section 32 (2) (c) of the *Banking Act* on confidential nature of all information obtained in the course of the inspection. It is trite that confidential information is privileged information only shared by a few people for furthering certain purposes. In *Coco v A. N. Clark (Engineers) Ltd* [1969] R.P.C. 41, Megarry, J. developed the essential ingredients of the cause of



- action for breach of confidence: the information must be confidential in quality and nature; it must be imparted so as to import an obligation of confidence, and there must be an unauthorized use of that information resulting in the detriment of the party communicating it.
52. In *Attorney General -v- Observer Limited* (1990) 1 AC 109, some limitations to the principle of confidentiality were identified: for instance, once information had entered the public domain, it can no longer be protected as confidential; the duty of confidence applied neither to useless information, nor to trivia; and the public interest in the preservation of a confidence might be outweighed by a greater public interest favouring disclosure. In all these limitations, breach of confidential information is a cause of action that inheres in favour of the person who provided the information i.e. the informant.
  53. Applying the above principles to the instant case, the appellant did not supply any information to the respondents upon which he can assert breach of confidentiality. The trial court observed that during the criminal case against the 1<sup>st</sup> respondent, an order for production of documents was made and the letter dated 20<sup>th</sup> March 2006 was one of the documents produced in the criminal case. The production of the letter dated 20<sup>th</sup> March 2006 vide a court order made the said letter to enter public domain and the letter can no longer be protected as confidential. The production order made during the criminal trial had the effect that the public interest in the preservation of a confidence was outweighed by a greater public interest favouring disclosure of the letter dated 20<sup>th</sup> March 2006.
  54. We have further examined the provisions of Section 31 (5) of the *Banking Act* which stipulates that no duty to which the Central Bank, or its respective officers may be subject or any person carrying out an inspection under Section 32 of the Act shall be breached by reason of the disclosure, in good faith, of any information in the course of the performance of their duties and no action shall lie against the Central Bank, or officer as the case may be on account of such disclosure.
  55. Guided by the provisions of Section 31 (5) of the *Banking Act* and the limitations to the general principle of confidentiality, we make a determination that the trial court did not err in finding that Section 32 (2) (c) of the *Banking Act* protected confidential information. We are convinced that Section 31 (5) of the *Banking Act* insulates the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents from any liability arising from confidential communication received in the discharge of their functions.
  56. We now consider the ground of appeal that the respondents acted ultra vires and were in breach of their respective statutory duties. It was submitted that the trial court erred in holding that the appellant had not specified the grounds for the respective remedies sought against each of the respondents nor the capacities in which they were respectively sued; that the court erred in holding that the appellant had failed to demonstrate how and to what extent the respondents had acted illegally and in excess of each of their powers.
  57. In his submission, counsel for the appellant referred this Court to excerpts from the book on Administrative Law by Durga Das Basu, (supra) where it is stated that it is a condition of any statutory power that it must be exercised so as not to be ultra vires and must be exercised bona fide, reasonably and without negligence. Counsel submitted that a statutory authority can only exercise powers that are expressly or impliedly authorized by statute and what statute does not expressly or impliedly authorize must be taken to be prohibited. It was emphasized that it is incumbent upon every statutory authority, when its powers are challenged, to show that it has affirmatively an authority to do the particular act; that the burden of showing that the legislature has authorized an interference with private rights is upon the statutory authority.
  58. In the instant case, the 2<sup>nd</sup>, 3<sup>rd</sup> and 4<sup>th</sup> respondents are statutory bodies and their powers and duties are statutory. The appellant's case is premised on breach of statutory duty and that the respondents



acted ultra vires. To succeed in an action founded on breach of statutory duty, one must identify the specific statutory duty that has been violated. To succeed in a cause of action founded on the ultra vires doctrine, one must identify the nature and extent of statutory power conferred and then prove that the act or omission complained about is in excess or ultra vires the statutory powers conferred.

59. Section 32 of the [Banking Act](#) was cited by the 2<sup>nd</sup> respondent as a provision conferring upon it the statutory power to investigate operations and affairs of commercial banks; that under Section 3 of the Central Bank Act one of the principal functions of the 2<sup>nd</sup> respondent is to regulate operations of all commercial banks in Kenya. It is the 2<sup>nd</sup> respondent's case that whatever action it took was within the powers conferred by Section 3 of the [Central Bank of Kenya Act](#) as read with Section 32 of the [Banking Act](#).
60. In the instant case, we have examined the record of appeal and more particularly the Notice of motion dated 18<sup>th</sup> April 2006 and its verifying and supporting affidavits and the Statement of Facts. In the Statement of Facts relied upon, the appellant asserts that the respondents acted ultra vires as they have no power to investigate a criminal offence; they acted ultra vires as their conduct is in breach of the rules of natural justice as they did not give the appellant a right to be heard; they acted ultra vires as they have no power to investigate tax evasion.
61. The respondents cited Sections 3 of the Central Bank Act and Section 32 of the [Banking Act](#) to underscore the scope and extent of their statutory duty. It was incumbent upon the appellant to show that whatever the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents did was ultra vires Section 3 of the [Central Bank of Kenya Act](#) and ultra vires Section 32 of the [Banking Act](#). Failure by the appellant to demonstrate that the respondents action was not authorized by the foregoing statutory provisions leave us with no hesitation but to affirm the finding and holding by the trial court that the appellant failed to show how each of the respondents acted in excess of or without jurisdiction.
62. Another issue for our consideration is the ground of appeal that the trial court erred in finding that the appellant's judicial review application was speculative and grounded on newspaper cuttings. The Supreme Court in *Bwana Mohamed Bwana -v- Silvano Buko Bonaya*, Civil Application No. 20 of 2014 (UR), at paragraph 18 of its ruling expressed the view that courts do not speculate; courts of law litigate on factual issues; courts look at facts and that courts will not engage in mitigating apprehensive causes and speculations. This Court in *Michael Sistu Mwaura Kamau -v- Ethics & Anti-Corruption Commission & 3 others* (2015) eKLR, held that proceedings before a court of law should not be on the basis of speculation or apprehension.
63. In the Statement of Facts filed in support of the appellant judicial review application, at paragraphs (q) (s) and (t) thereof the appellant inter alia states that he feared that the 1<sup>st</sup> respondent was looking for scapegoats to divert attention in light of the criminal accusation of abuse of office charges facing him; that the appellant was genuinely apprehensive that the conduct of the respondents would continue hurting many innocent citizens and persons and create panic in the banking industry; that there is a grave danger that other persons including Charterhouse Bank are being lynched without an opportunity to be heard.
64. The 1<sup>st</sup> respondent in his replying affidavit deposed that he was unaware of any tax evasion investigations against the appellant; and that he never published any article in the press relating to the appellant.
65. We have carefully considered this ground of appeal and our take is that the respondents are not the publishers of the press articles attached to the appellants supporting affidavit. To the extent that the



respondents are neither the authors nor publishers of the media reports, we are of the view that judicial review orders cannot issue to quash or prohibit that which the respondents did not publish.

66. An issue urged in this appeal is that the trial court in arriving at its decision was actuated by malice; that proof of malice is inferred from the trial court's reference to learned counsel for the appellant Mr. Odera as having been present in the criminal case against the 1<sup>st</sup> respondent. We have earnestly considered this submission. We note that the presence or absence of learned counsel Mr. Odera in the criminal case was not a ground urged in support for the application for judicial review orders. We are satisfied that the factually incorrect statement by the trial court that learned counsel Mr. Odera was present in the criminal case is not the ratio decidendi for the decision by the trial judge in dismissing the appellant's judicial review application. Further, the appellant has not convinced us that he suffered any prejudice by reason of the factually incorrect statement made by the trial judge.
67. In totality, the upshot of our analysis leads us to conclude that this appeal lacks merit and is hereby dismissed with costs.

**DATED AND DELIVERED AT NAIROBI THIS 23<sup>RD</sup> DAY OF SEPTEMBER, 2016.**

**G.B.M. KARIUKI**

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**JUDGE OF APPEAL**

**ASIKE-MAKHANDIA**

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**JUDGE OF APPEAL**

**J. OTIENO-ODEK**

.....

**JUDGE OF APPEAL**

I certify that this is a true copy of the original.

**DEPUTY REGISTRAR**

