CUEA CLS 123 Administrative Law

Judicial Review

Lecture Notes

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Contents

1. What is Judicial Review?

Judicial review is the supervisory jurisdiction of the High Court to review the decision of an inferior tribunal to determine its conformity to the law. Judicial Review determines the legality and regularity of

- A decision
- A proposed decision
- A failure to act

2. Origins

The courts have historically had jurisdiction to review the decisions of public bodies under an ancient form of common law remedy known as the "prerogative writs". Over time the procedural rules that applied became very complex and finally metamorphosed into the remedy of Judicial Review

3. Two strands of Judicial Review

There are two strands of Judicial Review

- Judicial Review in Administrative Law
- Judicial Review in Constitutional Law

Judicial Review in administrative Law is the power of the High Court to determine the legality and regularity of inferior tribunals or bodies. It is **typically directed at the executive branch of the government.**

Judicial Review in Constitutional Law is the power of the Court to review the acts of the other arms of government to determine their constitutionality. It is **directed at all the other arms of government**. Its origin is typically traced to the seminal decision of the United States Supreme Court in Madbury vs Madison [1] It is said to be a necessary consequence of the supremacy of the constitution. The court

[1] 1803 I Cranch.

has the last word on whether or not anything done under the constitution or written law is in conformity with the constitution.

4. Relationship with Constitutional Law

As has been explained there are two strands of Judicial Review. One in Constitutional Law and the other in Constitutional Law. The former is concerned with ensuring that the executive arm of government acts within the law. The latter is concerned with the constitutionality of the acts of all the organs of government. Inevitably, there are overlaps. The situation in Kenya is somewhat complicated. Articles 23,47,89 and 165 all give the High Court powers of Judicial Review both in Administrative Law and in Constitutional Law. The rule of the thumb is that if a claim can fit within the administrative law remedy it must be brought as such as not clothed as a constitutional remedy.

Gladys Mwaniki (Regional Club) & 6 others v Gordon Oluoch & 7 others [2]

The petitioners filed a constitutional reference to contest the decision of the Kenya Taekwondo Association to select participants to the All Africa Games. The petitioner's argued that the conduct of the association was arbitrary and discriminatory and denied them a chance to participate in the games in violation of their constitutional rights. They sought a declaration that the selection process was unconstitutional, null and void. They also sought damages for breach of their rights. The respondents objected to the jurisdiction of the court. They argued that the Sports Act provides a procedure for resolution of such disputes and the dispute should have been taken to the Sports Tribunal.

The court agreed that where statute provides a remedy, the mere fact that the facts of the case can fit within a claim for violation of the constitution does not give rise to an action in constitutional law. The person aggrieved must adopt the statutory remedy .In this case however the court was of the view that there is no express power conferred upon the Tribunal to award damages sought by the petitioners in the petition. The court found that the Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly. Accordingly the matter was properly before the court.

The court cited with approval several cases that have held that where there is an overlap between a relief in constitutional law and a remedy provided by statute, recourse must be to the remedy provided by statute[3]. Accordingly, whenever there is an option between a remedy

[2] [2015] eKLR

[3]Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728, The Speaker of the

in administrative law and a remedy in constitutional law, recourse must to to the remedy in administrative law.

.If however it has issues which are constitutional in nature, then it can be framed as a constitutional law remedy. The distinction is important as constitutional matters are commenced by way of petitions and Judicial Review in administrative law is commenced by way of an application in chambers, Exparte. The Fair Administrative Action Act confounded the matter by expanding the remedies available on Judicial Review in administrative action. The courts have however insisted that the two don not necessarily collapse into each other and distinctions remain

CCK v Royal Media Services Ltd [2014] eKLR

The Supreme Court recognized that the power of any judicial review is now found in the constitution

Republic v Director of Public Prosecution Ex Parte Chamanlal Vrajlal Kamani [2015] eKLR

"the grounds in judicial review applications be developed and the grounds for granting relief under the Constitution and the common law be fused, intertwined and developed so as to meet the changing needs of our society so as to achieve fairness and secure human dignity… But care should be taken not to think that the traditional grounds of judicial review in a purely judicial review application under the Law Reform Act and Order 53 of the Civil Procedure Rules have been discarded or its scope has left the airspace of process review to merit review except in those cases provided in the Constitution. In other words the categories of judicial review grounds are not heretically closed as opposed to their being completely overtaken…"

Commission on Administrative Justice v Insurance Regulatory Authority & another [2017] eKLR

On reliefs available from this court, Article 23 (3) provides that the court ma grant appropriate relief including a declaration of rights, an injunction, a conservatory order, a declaration of invalidity o any law that denies, violates, infringes, or threatens a right, compensation and an order of judicial review.

Thus, judicial review is available as relief to a claim of violation of the rights and freedoms guaranteed in the constitution. The constitution has expressly granted

National Assembly vs. Karume [2008] 1 KLR 426 (EP), Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887, Diana Kethi Kilonzo & Another vs. IEBC and 10 Others Constitutional Petition Number 359 of 2013 [2013] KLR , Francis Mutuku vs. Wiper Democratic Movement – KENYA & 2 Others [2015] eKLR, Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000,Safmarine Container N V of Antwerp vs. Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010

the High Court jurisdiction over any person, body or authority exercising a quasi-judicial function. The point of focus is whether the function was judicial or quasi-judicial and affected constitutional rights including the right to fair administrative action under Article 47, or the right to natural justice under Article 50.

Any decision making process that does not adhere to the constitutional tests either on constitutional rights or on procedural fairness, cannot stand court scrutiny. The Supreme Court of Kenya recognized that the power of any judicial review is now found in the constitution in the case of C.C.K. vs Royal Media Services Ltd[21]where it painted the clearest picture of the evolved nature of judicial review in Kenya. In that case, the Supreme Court held that the power of judicial review in Kenya is found in the Constitution, as opposed to the principle of the possibility of judicial review of legislation established in Madbury v Madison[22] The Court cited Articles 23(3)(d) and 165(3)(d)) of the constitution. Also, the Constitution has entrenched the right of fair administrative action under Article 47 of the Constitution.

Pharmaceutical Manufacturers Association of South Africa in re ex parte President of the Republic of South Africa & Others 2000 (2) SA 674 (CC),

The common law principles that previously provided the grounds for judicial review of public power have **been subsumed under the Constitution** and, insofar as they might continue to be relevant to judicial review, they gain their force from the Constitution. In the judicial review of public power, the two are intertwined and do not constitute separate concepts. The court rejected the reasoning that there were now two systems of law, each dealing with the same subject matter, each having similar requirements, each operating in its own field with its own highest court. According to the court, the implications of the constitutional provisions is that henceforth, there was only one system of law shaped by the Constitution which is the supreme law, and all law, including the common law, derives its force from the Constitution and is subject to constitutional control.[4]

5. Public Law or Private Law Remedy

Traditionally Judicial review was a public law remedy[5]. The proper province of JR is the control of public power.[6] Not anymore. The fair administrative action act extends the remedy of judicial review to non state actors. So does the constitution. Section 3 of the Fair

[4] Para 33
[5] Alex Carroll, Constitutional and Administrative Law (6th (edn), Pearson Education Limited 2011) 321. See also O Hood Philips, Paul Jackson and Patricia Leopold, O Hood Philips & Jackson: Constitutional and Administrative Law (8 edn, London: Sweet and Maxwell, 2001) 698.
[6] O Hood Philips, Paul Jackson and Patricia Leopold, O Hood Philips & Jackson: Constitutional and Administrative Law (8 edn, London: Sweet and Maxwell, 2001) 698

Administrative Action Act extends the scope of fair administrative action and judicial review to the administrative actions of public and private persons or bodies. But even before the innovations in the constitution and FAAA there were strong currents of opinion that Judicial Review should focus on the excercise of power irrespective of the source.. It has been suggested that the focus of judicial review should not be on whether the powers exercised were public, but that every exercise of power had the potential to adversely affect individual rights

Republic v Kenya Cricket Association & 2 others [2006] eKLR

The applicant brought Judicial Review proceedings seeking orders of certiorari and prohibition against the Respondents, the Kenya Cricket Association (KCA 1st Respondent) the Hon. Mr. Justice Ahmed Ebrahim (2nd Respondent) and International Cricket Council (3rd Respondent ICC). Respondents filed skeleton arguments in which they raised a preliminary objection on jurisdiction arguing, inter alia, that the Respondents are private bodies and Judicial Review does not apply to private bodies.

Held;

Judicial review does not lie against private bodies

This case is arguably overtaken by events. The FAAA makes no distinction between public and private actors. Neither does the CoK 2010. The horizontal application of the Bill of rights arguably extends the remedy of Judicial Review to non state actors

6. Control of Public Power or entrenchment of parliamentary sovereignty

Judicial Review typically flies in the face of arguments about separation of powers. The remedy makes the courts look like the superior arm of government to the extent that the courts have the final word on the legality of the acts of the other arms of government. However, there is, within the concept of separation of powers a concept of checks and balances which requires that the other arms of government should have a say on what another arm of government is doing. There are therefore great efforts in literature to explain away the apparent conflict between Judicial Review and Separation of Powers. Proponents of parliamentary Sovereignty therefore prefer to see judicial review as a judicial endorsement of parliamentary sovereignty. Judicial Review is said to ensure the executive remains within the four corners of the law. It thus gives effect to parliamentary sovereignty.[7]

[7] Hilaire Barnett Constitutional & Administrative Law (5th (Edn), Australia, Cavendish Publishing Limited 2004) 88 it is part of the rule of law. Controls public power
HWR Wade and CF Forsyth, Administrative Law (10th edn, OUP 2009

7. Legal Basis

As a common law remedy, judicial review was imported into Kenya by the reception clause (Now in section 3 of the Judicature Act) . However s 9 of the Law Reform Act gives the High Court powers to grant prerogative writs to the same extent as her majesty' s courts of Justice in England. Order 53 of the Civil Procedure Rules provide for the process for institution actions in Judicial Review. Article 23 47 89 165 of the CoK 2010 provide for Judicial Review. Finally the Fair Administrative Action Act has now provided a comprehensive statutory framework for Judicial Review in Kenya and introduced many innovations

8. The Ultra Vires Doctrine

The basic tenet of judicial review is that government must be according to law not whim or caprice. The power of government is derived only from law, not from usage or estoppel. The locus classicus is another seminal decision; the decision o of Lord Camden in Entick vs Carrington[8]. Entick v Carrington[9] is a leading case in English law and UK constitutional law establishing the civil liberties of individuals and limiting the scope of executive power. It is famous for the dictum of Lord Camden: "If it is law, it will be found in our books. If it not to be found there, it is not law. Below is an excerpt on the case extracted from Wiki Pedia

On 11 November 1762, the King's Chief Messenger, Nathan Carrington, and three other King's messengers, James Watson, Thomas Ardran, and Robert Blackmore, broke into the home of the Grub Street writer, John Entick in the parish of St Dunstan, Stepney "with force and arms". Over the course of four hours, they broke open locks and doors and searched all of the rooms before taking away 100 charts and 100 pamphlets, causing £2,000 of damage. The King's messengers were acting on the orders of Lord Halifax, newly appointed Secretary of State for the Northern Department, "to make strict and diligent search for ... the author, or one concerned in the writing of several weekly very seditious papers in titled, The Monitor, or British Freeholder". Entick sued the messengers for trespassing on his land.

The trial took place in Westminster Hall presided over by Lord Camden, the Chief Justice of the Common Pleas. Carrington and his colleagues claimed that they acted on Halifax's warrant, which gave them legal authority to search Entick's home; they therefore could not be liable for the tort. However, Camden held that

[8] 1765 19 st TR 1030 Common Pleas
[9] Ibid

Halifax had no right under statute or under precedent to issue such a warrant and therefore found in Entick's favour. In the most famous passage Camden stated:

> 'The great end, for which men entered into society, was to secure their property.[3] That right is preserved sacred and incommunicable in all instances, where it has not been taken away or abridged by some public law for the good of the whole. The cases where this right of property is set aside by private law, are various. Distresses, executions, forfeitures, taxes etc are all of this description; wherein every man by common consent gives up that right, for the sake of justice and the general good. By the laws of England, every invasion of private property, be it ever so minute, is a trespass. No man can set his foot upon my ground without my licence, but he is liable to an action, though the damage be nothing; which is proved by every declaration in trespass, where the defendant is called upon to answer for bruising the grass and even treading upon the soil. If he admits the fact, he is bound to show by way of justification, that some positive law has empowered or excused him. The justification is submitted to the judges, who are to look into the books; and if such a justification can be maintained by the text of the statute law, or by the principles of common law. If no excuse can be found or produced, the silence of the books is an authority against the defendant, and the plaintiff must have judgment.'

Hence Lord Camden ruled, as later became viewed as a general principle, that the state may do nothing but that which is expressly authorised by law, while the individual may do anything but that which is forbidden by law.

Choitram vs. Mystery Model Hair Salon [1972] EA 525, Madan, J (as he then was)

Powers must be expressly conferred; they cannot be a matter of implication.

Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734,

The Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them.

Republic vs. Kenya Revenue Authority Ex Parte Aberdare Freight Services Ltd & 2 Others[10]

The general principle remains however, that a public authority may not vary the scope of its statutory powers and duties as a result of its own errors or the conduct of others…Therefore where the law exhaustively provides for the jurisdiction of an executive body or authority, the body or authority must operate within those limits and ought not to expand its jurisdiction through administrative craft or innovation. The courts would be no rubber stamp of the

[10] [2004] 2 KLR 530

decisions of administrative bodies or executive authorities. Whereas, if Parliament gives great powers to them, the courts must allow them to it, the Courts must nevertheless be vigilant to see that the said bodies exercise those powers in accordance with the law. The administrative bodies and tribunals or boards must act within their lawful authority and an act, whether it be of a judicial, quasi-judicial or administrative nature, is subject to the review of the courts on certain grounds. The tribunals or boards must act in good faith; extraneous considerations ought not to influence their actions; and they must not misdirect themselves in fact or law. Most importantly they must operate within the law and exercise only those powers which are donated to them by the law or the legal instrument creating them…I therefore have no hesitation in holding that the Board has no powers to issue orders in the nature of certiorari, mandamus and prohibition."

The driver of Sunrise Travellers Ltd driver was arrested and charged with contravening the stipulated speed limit while driving motor vehicle registration number KCJ 417. Upon his arrest, agents of the NTSA confiscated the motor vehicle's Road Service Licence and the driver's licence and proceeded to blacklist the motor vehicle for a period of 30 days.. Being aggrieved by the said decision, the Sunrise appealed to the, Transport Licensing Appeals Board (hereinafter referred to as "the Board") whose jurisdiction is confined to affirming or reversing the decision of NTSA or making such 'other orders as it considers necessary and fit' The Board proceeded to grant prerogative writs. NTSA moved to the high court to quash the writs for lack of jurisdiction. It was argued on behalf of the Board that the phrase 'other orders as it considers necessary and fit' included prerogative orders.

Held

The Board had no jurisdiction to grant the orders. The words. 'other orders as it considers necessary and fit' must be construed ejusdem generis with the preceding words. Per Odunga

Jaset Enterprises Limited vs. Director General National Transport and Safety Authority

""The phrase such other order as the Board considers necessary and fit coming after affirmation or reversal of the decision of the Authority in my view ought to be read ejusdem generis to the two expressly specified reliefs. Further, such other reliefs can only be issued pursuant to section 11 of the Fair Administrative Action Act which provides for remedies which the High Court or a subordinate Court may grant. The orders of certiorari, mandamus and prohibition are NOT some of the orders which the subordinate court is expressly empowered to issue under the said provision. It ought to be noted that such orders have a long history and whereas the effect of grant of the orders under section 11 aforesaid may well be the same as the grant of the said orders, I am not prepared to hold that subordinate courts have the powers to issue orders of mandamus, prohibition and certiorari. This must necessarily be so since under section 8(2) of the Law Reform Act, it is only the High Court

that is expressly empowered to issue orders in the nature of prerogative writs. It ought to be appreciated that such orders are usually in the nature of supervisory reliefs issuable pursuant to Article 165(6) of the Constitution which only confers jurisdiction for their issuance on the High Court and Courts of equal status subject to the conferment of such jurisdiction by Parliament…It is trite that an executive body or authority has no inherent powers. In Choitram vs. Mystery Model Hair Salon [1972] EA 525, Madan, J (as he then was) was of the view that powers must be expressly conferred; they cannot be a matter of implication. Similarly, in Gullamhussein Sunderji Virji vs. Punja Lila and Another HCMCA No. 9 of 1959 [1959] EA 734, it was held that Rent Restriction Board is the creation of statute and neither the Board nor its chairman has any inherent powers but only those expressly conferred on them. It was in appreciation of the foregoing position that the Court in Ex Parte Mayfair Bakeries Limited vs. Rent Restriction Tribunal and Kirit R (Kirti) Raval Nairobi HCMCC No. 246 of 1981 held that in testing whether a statute has conferred jurisdiction on an inferior court or a tribunal the wording must be strictly construed: it must in fact be an express conferment and not a matter of implication since a Tribunal being a creature of statute has only such jurisdiction as has been specifically conferred upon it by the statute. Therefore where the language of an Act is clear and explicit the court must give effect to it whatever may be the consequences for in that case the words of the statute speak the intention of the legislature. Further, each statute has to be interpreted on the basis of its own language for words derive their colour and content from their context and secondly, the object of the legislation is a paramount consideration."

8.1. Acquisition of power is by law, not by usage or estoppel

Estoppel is a principle of law(sometimes regarded as a rule of evidence) which provides that a person, who, by some statement or representation of fact, causes another to act to his detriment in reliance of the truth of that representation is not allowed to deny it though it may be wrong. In public law, however, the doctrine has a major limitation. It cannot be invoked so as to give a public authority powers which it does not in law posses. In other words, no estoppel can legitimate action which is ultra vires

Henry Muthee Kathurima -vs- Commissioner of Lands & Another - Civil Appeal No. 8 of 2014

The Court of Appeal while considering the doctrine of estoppel expressed itself as follows:-

"…Estoppel cannot be used to circumvent Constitutional provisions and estoppel cannot override express statutory procedures; there can be no estoppel against a statute. (See Tarmal Industries Ltd. – vs- Commissioner of Customs & Excise, (1968) E.A. 471; see also Maritime Electric Co. Ltd. -vs-General Dairies Ltd. (1937) 1 All ER 748).

Maritime Electric Company vs General Diaries Ltd 1937 AC 611

An electricity authority, by misreading a meter undercharged its customer for two years. When the error was discovered, the authority sought to recover the under-payment. The applicant challenged the action arguing that the authority was estopped by its action from denying the accuracy of the bills rendered. The court rejected the challenge on the basis that the authority had a statutory duty to charge for its services and the doctrine of estoppel could not operate to prevent the authority from performing its statutory function.

Minister for Agriculture and Fisheries vs Mathews 1950 1KB 148

The minister had powers to take possession of land under a statutory power of occupation but no power to grant leases in respect of such occupied land. A minister did take possession of land pursuant to such statutory powers and proceeded to grant a lease to a tenant. It was held that no estoppel operated to stop the minister from denying the grant

Rhyl UDC vs Rhyl Amusements Ltd 1959 1 WLR 465

A local authority could only grant a lease with the consent of the minister. A local authority granted a lease without such consent. It was held that the local authority was not estopped prevented from denying the validity of its own lease

But the courts have applied the doctrine where there is a violation of formalities or time lines not implicating *ultra vires*

8.2. Improper delegation

An action would be taken to be ultra vires if the action is taken by a person to whom the power did not belong or if the power was improperly delegated either because there was no authority to delegate or the procedure for delegation was improper

Geoffrey Kiragu Njogu v Public Service Commission & 2 others Civil Appeal No 57 OF 2014 [2015] eKLR (CA)

The appellant an, Assistant Chief was arraigned in court and charged in Criminal Case No. 59 of 2007 for corruption. The appellant was interdicted on 14th November, 2007 by the then Provincial Commissioner and was paid half his salary. By dated 8th January, 2008 the 2nd respondent informed the appellant of the 1st respondent's decision to retire him in public interest with immediate effect. By a letter dated 4th March, 2008 the appellant pleaded with the 2nd respondent to reconsider the said decision and wait for the outcome of the criminal case.

Subsequently, the appellant was acquitted of the criminal charges against him on. By a letter dated 4th February, 2010 addressed to the District Commissioner, Kirinyaga South, the appellant requested for his reinstatement as an Assistant

Chief. On 24th March 2011, the said District Officer invited the appellant to attend training. The District Commissioner *vide* letters dated 8th July, 2011 and 23rd September, 2011 requested the 2nd respondent to reinstate the appellant and his half salary which had been unpaid from February, 2008. The appellant also wrote another letter dated 13th October, 2010 to the 1st respondent seeking reinstatement. On 19th October, 2012 the 2nd respondent informed the appellant that his appeal for reinstatement had been rejected and his case closed. Subsequently, by a letter dated 7th December, 2012 the District Commissioner, Mwea West wrote to the appellant to clear with his office and return all his uniforms and any other government properties in his possession pursuant to his retirement. The appellant made further several appeals to the 2nd respondent without success.

The appellant initiated judicial review proceedings seeking orders that;

- An order of certiorari to move to this honourable court to quash the decision of the 2nd respondent through the District Commissioner, Mwea West dated 7th December, 2012 requiring the applicant (appellant) to clear with the 2nd respondent due to his retirement from service in public interest.
- An order of prohibition restraining the 1st and 2nd respondents from using the concluded Criminal Case No. 59 of 2007 against the applicant as a ground for retiring the applicant in public interest.
- An order of mandamus compelling the 1st and 2nd respondents to pay the applicant all his outstanding salary dues from the 14th November, 2007 being the interdiction date.

One of the issues before court was whether the powers of the Public Service Commission to make the decision to reinstate a public officer after suspension or interdiction can be delegated

Held

A District Commissioner has no power to retire a public officer and a plain reading of the letter dated 7th December, 2012 cannot be construed to be a retirement letter. The letter dated 7th December, 2012 is not from the 1st respondent who was the employer of the appellant; the said letter is signed on behalf of a District Commissioner who was neither the employer of the appellant nor a person exercising powers delegated by the 1st respondent in relation to making the decision to retire a public officer

Only the 1st or 2nd respondents could reinstate the appellant and not the District Commissioner. The powers and duties of the 1st respondent to discipline or reinstate an officer cannot and was never delegated to the District Commissioner. The legal effect of an improper or unauthorized exercise of delegation is to render the decision of the delegate invalid. *(*See **Allingham -v- Minister for Agriculture, Fisheries and Food**, ***[1948] 1 All ER***

780; **Municipal Board of Mombasa -v- Kala (1955)22 EACA 319;** and ***Karia -v- Dhananin*** **[1969] EA 392**). The 1st and 2nd respondents have no power to divest themselves of their functions and delegate the same to the District Commissioner.

8.3. Abuse of power

Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240

"….On the issue of discretion Prof Sir William Wade in his Book Administrative Law has summarized the position as follows: The powers of public authorities are --- essentially different from those of private persons. A man making his will may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land ……regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfilment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them……..when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance…From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government

limited by law – this in turn is the meaning of constitutionalism. Certainty of law is a major requirement to business and investors. Imposition of a different tariff, to that an investor contemplated when setting up an industry is **reckless, irrational and unreasonable and it violates the principle of certainty and the rule of law**. Such a style of decision making cannot offer a conducive business or investment climate. The courts have a role in keeping public authorities within certainty of law. To enable them to do this the frontiers of judicial review have to expand. For now let it suffice to state and hold that the actions and decision of public authorities must be questioned directed and shaped by the law and, if not the courts must intervene…The rule of law is the cog upon which all the provisions of the Constitution turn…I hold that the pubic bodies decisions and activities should always turn on this cog as well, failing which the courts are entitled to intervene where this is overlooked, as I have done in this case….. My finding on this is that **where there is evidence of abuse of power as indicated in one or two of the cases cited above the court is entitled to proceed as if the source of that power did not exist in respect of the special circumstances where the abuse was perpetrated**. Parliament did not confer and cannot reasonably be said to have conferred power in any of the taxing Acts so that the same powers are abused by the decision making bodies. In such situations even in the face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of power. A court of law should never sanction abuse of power, whether arising from statute or discretion. Equally important is the uncertainty resulting from a change of tariff. As held above this is a violation of the rule of law. This violation has the same legal effect as abuse of power and attracts the same verdict – see Benett case (supra). Nothing is to be done in the name of justice which stems from abuse of power. It must be settled law by now, that a decision affecting the rights of an individual which stems from abuse of power cannot be lawful because it is outside the jurisdiction of the decision making authority guilty of abusing power. Abuse of power taints the entire impugned decision. A decision tainted with abuse of power is not severable. The other reason why the impugned decision cannot be severed from any other lawful actions in the same decision is because of the great overlap which has occurred in this case stretching from illegality, irrationality impropriety of procedure to abuse of power. Once tainted always tainted in the eyes of the law."

8.4. Unauthorised assumption of powers

8.5. Limits of Power: Procedural

8.6. Failure to observe rules of procedure

8.7. Defects of form

8.8. Limits of Powers

8.9. Improper Exercise of Power

8.10. Fettering own Discretion/Jurisdiction by self imposed rules of policy

8.11. Relevant and irrelevant considerations

8.12. Unreasonableness/Acting on No Evidence/Leading to Absurdity

9. Grounds for Review

Traditionally, there are two grounds for review and a possibility of third one

- The action is Ultra vires
- The action is in breach of the rules of natural justice namely the rule against bias and the right to be heard
- The third possible ground is controversial and is accordingly subsumed in the first. It is called Wednesbury unreasonableness

Article 47 of the Constitution provides f every Kenyan is entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. These provisions are echoed in S 4 FAAA. The implication is that the grounds upon which Judicial Review can be granted have been substantially expanded and the

10. Judicial Review is concerned with the process, not the merits

A court sitting on a Judicial Review application is typically concerned with the process that leads to the decision. Not the decision itself[11]. The line dividing the two can be very thin

[11] Jaset Enterprises Limited vs. Director General National Transport and Safety Authority

indeed. When considering the reasonableness of the act, the courts appear to attack the decision rather than the process that led to the decision. Courts are quick to explain that the finding that a decision is unreasonable necessarily implies that there was no way a tribunal that made the decision could have followed the correct procedure. Accordingly, even when attacking the reasonableness of the decision, the court is still concerned about the process that led to the decision and not the decision itself.

11. Natural Justice

"Natural justice" is a legal doctrine which requires an absence of bias (nemo iudex in causa sua) and the right to a fair hearing (audi alteram partem). Ridge vs Baldwin marked the first time that the doctrine had been used to overturn a non-judicial (or quasi-judicial) decision.)

11.1. The right to a fair hearing (*audi alteram partem*)

The Right to a Hearing Where there is a "legitimate expectation

The "Legitimate expectation" must be of a right which is real, not speculative

Right to a Hearing may arise merely out of a public undertaking or promise:

Rights to a hearing means and includes sufficient notice of the charge: thus there is a duty of disclosure:

Sufficient notice may imply sufficient time to prepare defence and even to occasion adjournment of hearing:

Sufficient Notice implies sufficient disclosure for affected person to comprehend/appreciate fully the implication of the charge: additional charges if made, must be disclosed

Right to hearing, adjournments and right to representation

Right a hearing: evidence, reasons and records to

11.2. Ridge vs Baldwin

The Brighton police authority dismissed its Chief Constable (Charles Ridge) without offering him an opportunity to defend his actions. The Chief Constable appealed, arguing that the Brighton Watch Committee (headed by George Baldwin) had acted unlawfully (ultra vires) in terminating his appointment in 1958 following criminal proceedings against him. There was a long standing authority for the proposition that the rules of natural justice could not be applied to administrative decisions.

The House of Lords held that Baldwin's committee had violated the doctrine of natural justice, overturning a long held position that the doctrine of natural justice could not be applied to administrative decisions.

Lord Morris of Borth-y-Gest said: 'It is well established that the essential requirements of natural justice at least include that before someone is condemned he is to have an opportunity of defending himself, and in order that he may do so that he is to be made aware of the charges or allegations or suggestions which he has to meet: Kanda v Government of Malaya. My Lords, here is something which is basic to our system: the importance of upholding it far transcends the significance of any particular case

11.3. Meaning of right to be heard

11.4. Meaning of sufficient notice

11.5. Sufficient Notice implies sufficient disclosure:

11.6. Right to hearing, adjournments and right to representation

11.7. Right to a hearing: evidence, reasons and records

11.8. Where the Principles of natural justice may not apply:

There are instances where principles of the rules of natural justice do not apply. The rules do not apply;

- Where there is waiver
- Where they are disapplication by Statute, express or implied
- In the Legislative Process
- In Initiating Procedure

12. Legitimate expectation

The doctrine of legitimate expectation has been developed in the context of the rules of natural justice. Underlying the concept is the determination of the courts to ensure that discretion is excercise fairly with due regard to those who are directly affected by the decision. It is one of the ways in which administrative law can control abuse of power. Where, therefore, some boon or benefit has been promised by an official (or has been regularly granted by the official in similar circumstances) that boon or benefit may be legitimately expected by those who have placed their trust in the promise of the official. It would be unfair to dash expectations without at least granting the person affected an opportunity to show cause to the official why his discretion should be excercise in a way that that fulfils expectations

Legitimate expectation is based on the reasoning that there should be trust between the governed and the governors. Legitimate expectation of consultation is aroused either by promise or by an established practice of consultation.

12.1. By Promise

AG of Hong Kong vs Ng Yuen Shiu 1983 AC 629

The government of Hon Kong announced that certain illegal immigrants, who were liable for deportation, would be interviewed individually and treated on their own merits in each case. One such immigrant was only allowed to answer questions without being able to put forward his own case. The Privy Council quashed the deportation holding that 'when a public authority has promised to follow a certain procedure, it is in the interest of good administration that it should act fairly and should implement its promise, so long as implementation does not interfere with its statutory duty.

12.2. By established practice

Civil servants employed in secret work in government communications headquarters were prohibited from belonging to a trade union. There was an established practice of consultation in such matters. In a case where there were no such consultations the House of Lords held that the procedure would have been unfair and unlawful had there not been overriding considerations of national security.[12]

Not every expectation is legitimate. Each case turns on its own merits. But the general requirements are that the assurance must be clear, unambiguous, and unequivocal.

[12] Council of Civil Servants Union vs Minister for the Civil Service 1985 AC 374

There must be knowledge of and reliance on the promise or established practice. However, if the action turns out to be discriminatory, then the same will be judicially reviewed even if the persons affected had no knowledge of the promise or established practice or did not infact rely on it. In such a case however, the action will not be based on legitimate expectation but on some other grounds of ultra vires

The assurance must not be unlawful and the person arousing the expectation must have the authority to arouse it in the first place.. There are , however proposals that the making of ultra vires misrepresentations should be treated as maladministration and innocent represented whose expectations are legitimately aroused and who suffer losses arising from the unfulfilled expectations should be compensated.

Henry Muthee Kathurima -vs- Commissioner of Lands & Another - Civil Appeal No. 8 of 2014

"An illuminating consideration of the concept of "legitimate expectation" is found in the South African case, South African Veterinary Council -vs-Szymanski, 2003(4) S.A. 42 (SCA) at [paragraph 28] "The law does not protect every expectation but only those which are 'legitimate".

Republic –vs- Nairobi City County & Another ex parte Wainaina Kigathi Mungai, High Court Judicial Review Misc. case No. 356 of 2013; [2014] eKLR]: "…the legal position is that legitimate expectation cannot override the law."[13]

There are two categories of legitimate expectation

Expectation of that a certain procedure would be followed(see AG of Hong Kong vs Ng Yuen Shiu 1983 AC 629)

Expectation of a favorable outcome of a particular decision

R vs Home Secretary Ex Parte Mohammed Asif Khan 1984 1 WR 1337

The home office published criteria to be followed in an application to allow a child to be admitted to the UK for purposes of adoption. An applicant met the published criteria. It was held that it is that criteria and not any other that would be followed. Inevitably the applicant would be admitted to the UK. Otherwise it may be irrational . Or it may be that irrelevant considerations have driven the decision

12.3. Procedural vs Substantive expectations

Procedural expectations speak to an expectation that a certain procedure will be followed. It is easy to hold the decision maker to his promise or established practice to follow such procedure, save in exceptional circumstances. Substantive

[13] Para 33

expectation, on the other hand, speaks to the outcome of a decision. This is more problematic. Ordinarily, legitimate expectation protects procedural due process. But in situations where an applicant meets all the criteria, the applicant is entitled to a favorable decision. Any other outcome will be deemed to be irrational or to have taken into account irrelevant considerations. Accordingly, substantive expectations are thus protected.

13. The Rule against Bias (*Nemo judex in causa sua*)

A judge is disqualified from determining a case in which he may or may fairly be suspected to be biased. It is therefore not so much the existence of actual bias as the appearance of bias, The locus classicus is the decision of the House of Lords in R v Sussex Justices, Ex parte McCarthy ([1924] 1 KB 256, [1923] All ER Rep 233) and in particular, the statement of Lord Hewett at p259 that 'that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

Dimes vs Grand Junction Cannal (1852) 3HCL 759

Lord Chancellor Cottenham, sitting in Chancery, affirmed a number of decrees made by the Vice Chancellor in favour of a canal company in which Lord Cottenham was a shareholder to the extent of several thousand pounds. The House of Lords set aside the decrees on account of Lord Cottenham's pecuniary interest. Interestingly the House of Lords then considered the case and upheld the decree of the Vice Chancellor

Per Lord Campbell at 793 'No one can suppose that Lord Cottenham could be, in the remotest degree, influenced by the interest that he had in this concern; but, my Lords, it is of the last importance that the maxim, that no man is to be a judge in his own cause, should be held sacred. And that is is not to be confined to a cause in which he is a party, but applies to a cause in which he has an interest...And it will have a most salutary influence on (inferior) tribunals when it is known that the High Court of last resort, in a case in which the Lord Chancellor of England had an interest, considered that his decree was on that account a decree not according to law, and was set aside. This will be a lesson to all inferior tribunals to take care not only that in their decrees they are not influenced by their personal interest, but to avoid the appearance of laboring under such influence'.

The King v. Sussex Justices Ex parte McCarthy 1924] KB 256 [1923] EWHC KB 1

In 1923 McCarthy, a motorcyclist was involved in a road accident which resulted in his prosecution before a magistrate's court for dangerous driving. Unknown to the defendant and his solicitor, the clerk to the justices was a

member of the firm of solicitors acting in a civil claim against the defendant arising out of the accident that had given rise to the prosecution. The clerk retired with the justices, who returned to convict the defendant.

On learning of the clerk's provenance, the defendant applied to have the conviction quashed. The justices swore affidavits stating that they had reached their decision to convict the defendant without consulting their clerk

Per Lord Hewart CJ

"It is said, and, no doubt, truly, that when that gentleman retired in the usual way with the justices, taking with him the notes of the evidence in case the justices might desire to consult him, the justices came to a conclusion without consulting him, and that he scrupulously abstained from referring to the case in any way. But while that is so, a long line of cases shows that it is not merely of some importance but is of fundamental importance that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

The question therefore is not whether in this case the deputy clerk made any observation or offered any criticism which he might not properly have made or offered; the question is whether he was so related to the case in its civil aspect as to be unfit to act as clerk to the justices in the criminal matter. The answer to that question depends not upon what actually was done but upon what might appear to be done.

Nothing is to be done which creates even a suspicion that there has been an improper interference with the course of justice. Speaking for myself, I accept the statements contained in the justices' affidavit, but they show very clearly that the deputy clerk was connected with the case in a capacity which made it right that he should scrupulously abstain from referring to the matter in any way, although he retired with the justices; in other words, his one position was such that he could not, if he had been required to do so, discharge the duties which his other position involved. His twofold position was a manifest contradiction.

In those circumstances I am satisfied that this conviction must be quashed, unless it can be shown that the applicant or his solicitor was aware of the point that might be taken, refrained from taking it, and took his chance of an acquittal on the facts, and then, on a conviction being recorded, decided to take the point. On the facts I am satisfied that there has been no waiver

of the irregularity, and, that being so, the rule must be made absolute and the conviction quashed.

R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No.2)) [1998] UKHL 41; 3 W.L.R. 1456 (H.L. 1998)

Pinochet was accused by a Spanish judge of torture, a crime under international law which can be prosecuted in any country under the doctrine of universal jurisdiction. The Spanish judge faxed an INTERPOL arrest warrant to London and Pinochet was arrested later that evening. Pinochet's lawyers argued that as Pinochet was head of state at the time of the alleged crimes he was immune from the jurisdiction of British courts. The Divisional Court ruled Pinochet had state immunity

By a 3–2 majority (Lord Nicholls, Lord Hoffmann and Lord Steyn against Lord Slynn and Lord Lloyd) the House of Lords ruled that Pinochet did not have state immunity.

Pinochet moved to challenge the ruling .A petition was brought to request that a judgment of the House be set aside because the wife of one their lordships, Lord Hoffmann, was as an unpaid director of a subsidiary of Amnesty International which had in turn been involved in a campaign against the applicant, and as a party.

Held: The House is unfettered by statute in its freedom to correct an injustice it had itself created. No financial interest was involved. Here there was a distinction between the two arms of the Amnesty International organisation, but that was not sufficient. Lord Hoffmann was an officer of the charitable arm, and that was sufficient to make him a party to the case. The maxim 'nemo judex in sua causa' was to be applied. The fact that a person has the necessary training and qualifications to resist any tendency towards bias is not relevant when considering whether there was an appearance of bias. The decision was set aside.

Lord Browne-Wilkinson said: 'My Lords, in my judgment, although the cases have all dealt with automatic disqualification on the grounds of pecuniary interest, there is no good reason in principle for so limiting automatic disqualification. The rationale of the whole rule is that a man cannot be a judge in his own cause. In civil litigation the matters in issue will normally have an economic impact; therefore a judge is automatically disqualified if he stands to make a financial gain as a consequence of his own decision of the case. But if, as in the present case, the matter at issue does not relate to

money or economic advantage but is concerned with the promotion of the cause, the rationale disqualifying a judge applies just as much if the judge's decision will lead to the promotion of a cause in which the judge is involved together with one of the parties.' and

'It is important not to overstate what is being decided. It was suggested in argument that a decision setting aside the order of 25 November 1998 would lead to a position where judges would be unable to sit on cases involving charities in whose work they are involved. It is suggested that, because of such involvement, a judge would be disqualified. That is not correct. The facts of this present case are exceptional. The critical elements are (1) that A.I. was a party to the appeal; (2) that A.I. was joined in order to argue for a particular result; (3) the judge was a director of a charity closely allied to A.I. and sharing, in this respect, A.I.'s objects. Only in cases where a judge is taking an active role as trustee or director of a charity which is closely allied to and acting with a party to the litigation should a judge normally be concerned either to recuse himself or disclose the position to the parties. However, there may well be other exceptional cases in which the judge would be well advised to disclose a possible interest.'

Lord Hutton said: 'there could be cases where the interest of the judge in the subject matter of the proceedings arising from his strong commitment to some cause or belief or his association with a person or body involved in the proceedings could shake public confidence in the administration of justice as much as a shareholding (which might be small) in a public company involved in the litigation.

A distinction must be drawn between actual bias, usually difficult to prove, and apparent bias which is the more frequent complaint. If there is actual bias, the disqualification is automatic. It is is apparent bias disqualification depends on the nature of the bias

13.1. Test of apparent bias

13.2. Automatic disqualification

The judge or decision maker has a pecuniary or other proprietary interest in the subject of the case[14]. This rule is applied rigorously

The judge or decision maker is a party to, or has an interest in the subject matter of the case even if it is not pecuniary case[15].

[14] The King v. Sussex Justices Ex parte McCarthy 1924] KB 256 [1923] EWHC KB 1

The rule on automatic disqualification has been the subject of much criticism and it is proposed that there should be a demonstration of the likelihood of bias in both cases

13.3. Where there is no automatic disqualification

Several tests have been proposed

- Real likelihood of bias test
- Real possibility of bias test
- Real danger of bias test
- Fair minded Observer test
- Well informed observer test

The House of Lords has settled for the fair minded/well informed observer test

Lawal vs Northern Spirit Ltd 2003 UKHL 35

The case concerned a leading counsel, a Recorder, who had been appointed by the Lord Chancellor to serve as a part-time judge in the Employment Appeal Tribunal. He was briefed to appear before the EAT which included several lay members who had previously sat with him in his role as a judge. The test of bias was laid down was 'whether the fair minded and informed observer, having considered the facts, would conclude that there was a real possibility that the tribunal was biased. Applying the test, the House of Lords concluded that it was reasonably possible that the observer might consider that the recorder's submissions would carry particular weight, perhaps sub-consciously, with the lay members with whom he had sat in the past

The EAT subsequently changed its rules and prohibited judges who had served part-time from appearing before lay members with whom they had previously sat

[15] R v Bow Street Metropolitan Stipendiary Magistrate Ex parte Pinochet Ugarte (No.2)) [1998] UKHL 41; 3 W.L.R. 1456 (H.L. 1998)

The fair minded and well informed observer test is not without criticism. It is unclear how much knowledge the observer must have. The rule was developed to increase public confidence in the administration of justice but its application can be as troublesome as the other now discarded tests

Fanciful allegations of bias

R vs Carmbone Ex parte Pearce 1955 1 QB 41

The English court of appeal warned of the danger of entertaining fanciful allegations of bias against decision makers on the 'flimsiest of pretexts of bias ' and against the 'erroneous impression that it is more important that justice should be appear to be done than that it should infact be done'

13.4. Matters which will not found an objection of bias

Locabail (UK) vs Bayfield Properties Ltd 2000 2 WLR 870 CA

While every case must turn on its merits, certain objections of bias will not be entertained. Objections on the basis of religion, ethnic origin, gender, age, class, means or sexual orientations of the judge will not do. Nor, ordinarily, would the judges educational, social, employment or service background, nor his political associations, professional associations, membership of social, sporting, or charitable bodies, or previous judicial decisions or vies expressed in text books, lectures, or articles, nor the fact that he had , in the past received instructions from a party or a party's representative be relevant. But a history of personal animosity between a judge and a member of the public associated with the case or counsel may disqualify a judge.

Though the principles in this case apply to judicial decision makers, they can be applied mutatis mutandis to the context of administrative decisions.

13.5. Necessity

In some instances, it may be that barring a person with an apparent bias may lead to undesirable outcomes, as for example, an inability to replace the decision maker since no one else is empowered to act. In such instances, natural justice gives way to necessity.

Dimes

Having set aside the decision of the Chancellor on the basis of apparent bias, the House of Lords now had to determine the cases on their merits. A rule of procedure required that the Chancellor must sign an order for enrollement before the matter

could be placed before their Lordships. Their Lordships held that the Chancellor could sign the enrollement as no one else was authorised to do so.

The Judges vs AG for Saskatchewan 1937 53 TLR 464

The government for Saskatchewan called upon the court to determine whether the salaries of judges were liable to income tax. The Privy Council confirmed that the judges could sit on the decision on the grounds of necessity

13.6. Statutory Dispensation

Statute can dispense with the rule against bias. This typically happens in the case of necessity but parliament sometimes goes beyond necessity. If the words are clear, the courts will dispense with the requirement. As expected, however, the courts

13.7. Waiver

A party to a decision can waive a valid objection to possible bias. Absent necessity, many decision makers disqualify themselves without waiting for an objection and even where objection is clearly waived.

13.8. Effects of bias

Should bias be established, the decision is voidable at the option of the party affected. The decision is not void ab initio. Some text writers are however of a contrary view and find the decisions void

14. Error apparent on the face of the record

14.1. Error of Law as a ground for Judicial Review:

14.2. What Constitutes record

15. Unreasonableness

Associated Provincial Picture Houses Ltd. v Wednesbury Corporation [1948] 1 KB 223

In 1947 Associated Provincial Picture Houses was granted a licence by the Wednesbury Corporation in Staffordshire to operate a cinema on condition that no

children under 15, whether accompanied by an adult or not, were admitted on Sundays. Under the Cinematograph Act 1909, cinemas could be open from Mondays to Saturdays but not on Sundays, and under a Regulation, the commanding officer of military forces in a neighbourhood could apply to the licensing authority to open a cinema on Sunday.

The Sunday Entertainments Act 1932 legalized opening cinemas on Sundays by the local licensing authorities "subject to such conditions as the authority may think fit to impose" after a majority vote by the borough. Associated Provincial Picture Houses sought a declaration that Wednesbury's condition was unacceptable and outside the power of the Corporation to impose.

The Court held that it could not intervene to overturn the decision of the defendant simply because the court disagreed with it. To have the right to intervene, the court would have to conclude that:

- in making the decision, the defendant took into account factors that ought not to have been taken into account, or
- the defendant failed to take into account factors that ought to have been taken into account, or
- the decision was so unreasonable that no reasonable authority would ever consider imposing it.

The court held that the decision did not fall under any of these categories and the claim failed

Per Lord Greene MR

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

16. Remedies

There are four remedies in judicial review

- Declaration
- Certiorari
- Mandamus
- Prohibition

The Constitution of Kenya 2010[16] and the Fair Administrative Action Act[17] have added conservative orders, injunction, structural interdicts and monetary compensation.

16.1. Certiorari

Grounds for Award of Certiorari:

- Ultra Vires Doctrine

- Error of Law on the Face of the Record

- Breach of Principles of Natural Justice

Certiorari is Discretionary; therefore may not issue where:

There is Alternative Remedy

And will readily issue where alternative is not practical

The Applicant is Somehow to blame (e.g. unreasonable delay)

The Effect may not be practically useful or may have undesirable consequences.

Application seeks to protect a privilege (not a right):

Applicant has no Locus Standi

Kenya National Examinations Council –vs- Republic Exparte Geoffrey Gathenji Njoroge & Others - Civil Appeal No. 266 of 1999

[16] Article 23
[17] Section 11(1) FAAA

An order of certiorari quashes a decision already made and will issue if the decision is made without or in excess of jurisdiction, or where the rules of natural justice are not complied with.

16.2. Prohibition

Ismael S. Mboya & 2 others -vs- Mohammed Haji Issa & another - Civil Appeal No. 232 of 2004

"We are minded that an order of prohibition is one issued by the High Court to forbid an inferior tribunal or body from carrying out a quasi-judicial function which that inferior body has no jurisdiction to do or that it cannot do it in excess of its jurisdiction-See Kenya National Examination Council –vs- Republic- Exparte Geoffrey Gathenji Njoroge & 9 others (supra). Prohibition orders look to the future and prohibit what is intended to happen before it is done, but it cannot be issued to affect what has already been done."

16.3. Mandamus

Halsbury's Law of England, 4th Edition Volume paragraph 89-90:-

"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. "The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

Kenya National Examination Council vs Republic, Exparte Geoffrey Gathenji & 9 Others, Nairobi Civil Appeal No. 266 of 1996

"The next issue we must deal with is this: What is the scope and efficacy of an ORDER OF MANDAMUS" Once again we turn to HALSBURY'S LAW OF ENGLAND, 4th Edition Volume 1 at page 111 FROM PARAGRAPH 89. That learned treatise says:-"The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their

office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right and no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual."

At paragraph 90 headed "the mandate" it is stated:

"The order must command no more than the party against whom the application is made is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty leaves discretion as to the mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way."

What do these principles mean" They mean that an order of mandamus will compel the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed……."

"Prohibition looks to the future so that if a tribunal were to announce in advance that it would consider itself not bound by the rules of natural justice the High Court would be obliged to prohibit it from acting contrary to the rules of natural justice. However, where a decision has been made, whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice, an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made; it can only prevent the making of a contemplated decision…Prohibition 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. It does not, however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings…The order of mandamus is of a most extensive remedial nature, and is, in form, a command issuing from the High Court of Justice, directed to any person, corporation or inferior tribunal, requiring him or them to do some particular thing therein specified which appertains to his or their office and is in the nature of a public duty. Its purpose is to remedy the defects of justice and accordingly it will issue, to the end that justice may be done, in all cases where there is a specific legal right or no specific legal remedy for enforcing that right; and it may issue in cases where, although there is an alternative legal remedy, yet that mode of redress is less convenient, beneficial and effectual. The order must command no more than the party against whom the application is legally bound to perform. Where a general duty is imposed, a mandamus cannot require it to be done at once. Where a statute, which imposes a duty, leaves discretion as to the

mode of performing the duty in the hands of the party on whom the obligation is laid, a mandamus cannot command the duty in question to be carried out in a specific way…These principles mean that an order of mandamus compels the performance of a public duty which is imposed on a person or body of persons by a statute and where that person or body of persons has failed to perform the duty to the detriment of a party who has a legal right to expect the duty to be performed. An order of mandamus compels the performance of a duty imposed by statute where the person or body on whom the duty is imposed fails or refuses to perform the same but if the complaint is that the duty has been wrongfully performed i.e. that the duty has not been performed according to the law, then mandamus is wrong remedy to apply for because, like an order of prohibition, an order of mandamus cannot quash what has already been done…Only an order of certiorari can quash a decision already made and an order of certiorari will issue if the decision is without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with or for such like reasons. In the present appeal the respondents did not apply for an order of certiorari and that is all the court wants to say on that aspect of the matter."

Geoffrey Kiragu Njogu v Public Service Commission & 2 others [2015] eKLR

The appellant, an assistant chief was dismissed from the public Service vide a letter dated 8th January 2008.Following his acquittal firm a related criminal case the District commissioner verbally asked him to resume service. The appellant was by letter dated 7th December 2012 informed of the decision not to reconsider his case. The appellant sought to quash the letter of 7th December 2012 rather than the one of 8th January 2008.

Held, only the order of 8th January could competently placed before the court for purposes of it's being quashed

17. New terminology in England

In England the remedies have been renamed as follows

- Quashing orders (formerly known as orders of certiorari),
- Prohibiting orders (formerly known as orders of prohibition),
- Mandatory orders (formerly known as orders of mandamus

18. The discretionary nature of the remedies

"The remedies of quashing orders (formerly known as orders of certiorari), prohibiting orders (formerly known as orders of prohibition), mandatory orders (formerly known as orders of mandamus)…are all discretionary. The Court has a wide discretion whether to grant relief at all and if so, what form of relief to grant. In deciding whether to grant relief the court will take into account the conduct of the party applying, and consider whether it has not been such as to disentitle him to relief. Undue delay, unreasonable or unmeritorious conduct, acquiescence in the irregularity complained of or waiver to the right to object may also result in the court declining to grant relief. Another consideration in deciding whether or not to grant relief is the effect of doing so. Other factors which may be relevant include whether the grant of the remedy is unnecessary or futile, whether practical problems, including administrative chaos and public inconvenience and the effect on third parties who deal with the body in question, would result from the order and whether the form of the order would require close supervision by the court or be incapable of practical fulfilment. The Court has an ultimate discretion whether to set aside decisions and may decline to do so in the public interest, notwithstanding that it holds and declares the decision to have been made unlawfully. Account of demands of good public administration may lead to a refusal of relief. Similarly, where public bodies are involved the court may allow 'contemporary decisions to take their course, considering the complaint and intervening if at all, later and in retrospect by declaratory orders."18

Republic -vs- Mwangi S. Kimenyi Ex-Parte Kenya Institute for Public Policy and Research Analysis (KIPPRA) - Civil Appeal 160 of 2008

"Judicial review remedies are discretionary and the Court has to consider whether they are the most efficacious in the circumstances of the case. Judicial review is in the purview of public law, not private law."

19. Exclusion of judicial review

Legislature may grant the executive wide discretionary powers which may prevent or have the effect of excluding judicial review. Some of the clauses used are as follows:

(a) "Where it is shown to the satisfaction of the President
(b) if the Minister has reasonable cause to believe

Sometimes statutes exclude the courts power of judicial Review. A provision which excludes the power of judicial review is christened an 'ouster clause' Courts view ouster clauses with suspicion and guard their jurisdiction with jealousy. But the courts have accepted that parliament does have the power to exclude the remedy of

[18] Halsbury's Laws of England 4thEdn. Vol. 1(1) para 12 page 270

Judicial Review. In the celebrated case of Anisminic Ltd vs Foreign Compensation Commission [1969] 2 AC 147, [1968] UKHL 6, [1969] 1 All ER 208, [1969] 2 WLR 163 the court was called upon to determine the meaning of an ouster clause.

The plaintiffs brought an action for a declaration that a decision of the Foreign Compensation Commission was a nullity. The Commission replied that the courts were precluded from considering the question by section 4(4) of the 1950 Act which provided: 'The determination by the Commission of any application made to them under this Act shall not be called in question in any court of law.' The respondent said these were plain words with one meaning: 'Here is a determination which is apparently valid: there is nothing on the face of the document to case any doubt on its validity. If it is a nullity, that could only be established by raising some kind of proceedings in court. But that would be calling the determination in question, and that is expressly prohibited by the statute.'

Held: This was rejected. All forms of public law challenge to a decision have the same effect, to render it a nullity. The decision of the Commission was wrong in law, and therefore a nullity, rather than a 'determination' within the protection of the ouster clause.

Gladys Mwaniki (Regional Club) & 6 others v Gordon Oluoch & 7 others

The petitioners filed a constitutional reference to contest the decision of the Kenya Taekwondo Association to select participants to the All Africa Games. The petitioner's argued that the conduct of the association was arbitrary and discriminatory and denied them a chance to participate in the games in violation of their constitutional rights. They sought a declaration that the selection process was unconstitutional, null and void. They also sought damages for breach of their rights. The respondents objected to the jurisdiction of the court. They argued that the Sports Act provides a procedure for resolution of such disputes and the dispute should have been taken to the Sports Tribunal.

There is no express power conferred upon the Tribunal to award damages sought by the petitioners in this petition. It is therefore clear that a Tribunal's power must be conferred by the Statute establishing it which statute must necessarily set out its powers expressly since such Tribunals have no inherent powers. Unless its powers are expressly donated by the parent statute, it cannot purport to exercise any powers not conferred on it expressly.

Gladys Mwaniki (Regional Club) & 6 others v Gordon Oluoch & 7 others [2015] eKLR

The High Court accepted that it is possible for parliament to limit the courts power on Judicial Review through the use of an ouster clause. The court cited with

approval several local and foreign cases accepting the legality and constitutionality of ouster clauses such as

- Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728,
- The Speaker of the National Assembly vs. Karume [2008] 1 KLR 426 (EP),
- Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887,
- Diana Kethi Kilonzo & Another vs. IEBC and 10 Others Constitutional Petition Number 359 of 2013 [2013] KLR ,
- Francis Mutuku vs. Wiper Democratic Movement – KENYA & 2 Others [2015] eKLR, Narok County Council vs. Trans Mara County Council & Another Civil Appeal No. 25 of 2000,
- Safmarine Container N V of Antwerp vs. Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010
- **Constitutional Petition Number 359 of 2013 Diana Kethi Kilonzo & Another vs. IEBC and 10 Others e[2013] KLR** and **Francis Mutuku vs. Wiper Democratic Movement – KENYA & 2 Others [2015] eKLR**, the Court should allow the bodies established by law to perform their roles
- **Diana Kethi Kilonzo vs. IEBC and 2 Others** (supra):
  We note that the Constitution allocated certain powers and functions to various bodies and tribunals. It is important that these bodies and tribunals should be given leeway to discharge the mandate bestowed upon them by the Constitution so long as they comply with the Constitution and national legislation. These bodies and institutions should be allowed to grow. The people of Kenya, in passing the Constitution, found it fit that the powers of decision-making be shared by different bodies. The decision of Kenyans must be respected, guarded and enforced. The courts should not cross over to areas which Kenyans specifically reserved for other authorities."
- **Pasmore vs. Oswaldtwistle Urban District Council [1988] A C 887** where an obligation is created by statute and a specific remedy is given by that statute, the persons seeking the remedy is deprived of any other means of enforcement.
- **The Speaker of the National Assembly vs. Karume [2008] 1 KLR 426 (EP),** where there is a specific procedure provided for redress of grievances, that procedure ought to be strictly followed.
- **Safmarine Container N V of Antwerp vs. Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010**
  It is not only the Constitution that can limit/confer jurisdiction on the court but that any other law may by express provision confer or limit that jurisdiction. In his decision the learned Judge relied on Article 159 of the Constitution. Clause (2)(c) of the said Article provides that in exercising judicial authority, the courts and tribunals shall be guided by the principle that alternative forms of dispute resolution including reconciliation, mediation, arbitration and traditional dispute resolution mechanisms

shall be promoted. Courts and Tribunals cannot be said to be promoting alternative dispute resolution mechanisms when they readily entertain disputes which ought to be resolved in other legal forums.

In Gladys Mwaniki (Regional Club) & 6 others , the court found that the statute did not provide an alternative remedy and in any event, the alternative forum lacked the jurisdiction to grant the relief sought by the applicants.The court held that for an ouster clause to be accepted certain conditions must be met

- The language of the statute ousting the jurisdiction of the court must be clear. There will be no ouster by implication
- The alternative remedy must be adequate

Republic vs. Public Procurement Administrative Review Board & Another Ex Parte Selex Sistemi Integrati Nairobi HCMA No. 1260 of 2007 [2008] KLR 728, ouster clauses are effective as long as they are not unconstitutional, consistent with the main objectives of the Act and pass the test of reasonableness and proportionality. In the said case the learned Judge recognised that the Court's jurisdiction may be precluded or restricted by either legislative mandate or certain special texts.

Safmarine Container N V of Antwerp vs. Kenya Ports Authority Mombasa High Court Civil Case No. 263 of 2010

Where the ouster clause leaves an aggrieved party with no effective remedy or at all, it is my view that such ouster clause will be struck down as being unreasonable

20. Exhaustion of remedies

Republic v Kenya National Examination Council ex parte H N G Suing as a friend and Parent of A H N [2016] eKLR Odunga J

Because judicial review remedies are discretionary, the courts would not ordinarily grant orders on judicial review unless a party has exhausted an adequate alternative remedy. See **Gladys Mwaniki (Regional Club) & 6 others v Gordon Oluoch & 7 others [2015] eKLR**

21. Reasons for the decision

This is now a requirement of the law[19] and may only be departed from in exceptional reasons.[20] The reasons must be furnished in writing to the person affected by the decision.

Priscillah Wanjiku Kihara v Kenya National Examination Council (KNEC) [2016] eKLR Odunga J

Failure to give reasons means no good reasons

22. Procedure

23. Impact of the constitution of Kenya 2010

See article by Elisha Ongoya

[19] Article 47 CoK 2010 Section 6(4)FAAA
[20] Section 6(5) FAAA