

REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JUDICIAL REVIEW APPLICATION NO. E056 OF 2022

REPUBLIC.....APPLICANT

-VERSUS-

THE MEDIA COMPLAINTS COMMISSION RESPONDENT

AND

HON. AMBASSADOR UKUR YATTANI INTERESTED PARTY

EX-PARTE

- 1. NATION MEDIA GROUP**
 - 2. MANAGING EDITOR, BUSINESS DAILY**
 - 3. OTIATO GUGUYU**
-

JUDGMENT

1. The Applicants, have moved this court by way of a Notice of Motion dated 26th April 2022 under Articles 34 and 47 of the *Constitution*, Sections 8 and 9 of the *Law Reform Act*, Section 7 of the *Fair Administrative Action Act*, Section 42 of the *Media Council Act*, Section 3A of the *Civil Procedure Act*, and Order 53 Rule 3 and 4 of the *Civil Procedure Rules* wherein they seek the following orders:

- 1. *THAT this Honourable Court be pleased order that this application be fixed for hearing on priority basis.***

2. THAT this Honourable Court do issue the following orders of judicial review: -

a) An Order of certiorari removing to the to the High Court for purposes of being quashed the decision of the Respondent delivered on the 8th of March 2022 in Complaint No. 3 of 2021 and in particular the following orders:

i) That pursuant to Section 38(1) (a) of the Media Council Act 2013, the 1st and 2nd Respondents are directed to effect a correction by way of clarification as pertains to the headline in a subsequent story in the same newspaper.

ii) That costs shall be in the cause.

b) An Order of Prohibition prohibiting the Respondent from enforcing its decisions or instituting contempt proceedings based on the Respondent's decisions made on 8th March 2022 in Complaint No. 3 of 2021.

3. THAT costs of this Application be provided for.

4. THAT such other and further reliefs or orders as this Honourable Court may deem just and expedient to grant.

2. The Application is supported by a Statutory Statement, and a Verifying Affidavit evenly dated 17th April 2022. The Affidavit was sworn by *Sekeu Owino*, Head of Legal and Training for the 1st *ex-parte* Applicant.

3. It is the Applicants' case that the Summary Judgment dated 8th March 2022, and the Majority Judgment dated 10th March 2022 rendered by the Respondent - were procedurally unfair, the reasons given thereof

were not rational, and that the conduct in delivery of the decisions violated the legitimate expectation of the Applicants.

4. The Applicants are aggrieved and hold the view that an unfair procedure was adopted by the Respondent in arriving at the decision for the following reasons:

- i) By an email dated 8th March 2022 at 8:55 am, the Respondent rendered a judgment in *Complaint No. 3 of 2021, Hon. Ambassador Ukur Yatani v Nation Media Group & 2 Others* in favour of the Applicants and requested the parties to appear virtually at 12:00 before the Respondent;
- ii) When the parties subsequently appeared before the Respondent at the said 12 noon, the Respondent delivered a Summary Judgment in favour of the Interested Party therefore totally contradicting the earlier Judgment that had been sent via email. The Respondent then informed the parties they will share a fully detailed and reasoned decision by 10th March 2022;
- iii) On the same day, the Respondent shared the Summary Judgment with the parties by an email dated 8th March 2022 at 3:23 pm;
- iv) The Respondent did not give any good reasons why its judgment delivered by email dated 8th March 2022 at 8:55 am totally contradicted its Summary Judgment dated 8 March 2022;
- v) Additionally, a reading of the Minority Judgment does not show that it was prepared by a single Commissioner. The wording used throughout the entire Minority Judgment is "the

Commission" which implies that the Judgment was rendered by the entire Commission;

- vi) In addition, and contrary to its promise, the Respondent failed to deliver the fully detailed and reasoned decision by 10th March 2022 but shared two decisions, Majority Judgment and Dissenting Judgment, on 18th March 2022 following a complaint by the Applicants contained in the letter dated 17th March 2022. The decision was also shared outside the statutory timelines of 7 days pursuant to Section 37(6) of the *Media Council Act*;
- vii) The Respondent unlawfully and irregularly shared its Majority decision and Minority Decision on 18th March 2022 and irregularly backdated them to 10th March 2022;
- viii) The findings of the Respondent in the Majority Decision dated 10th March 2022 but shared on 18th March 2022 are inconsistent with the findings of the Respondent contained in the Summary Judgment read out on 8th March 2022 as regards the issue of qualified privilege; and
- ix) The procedure adopted by the Respondent in determining this matter violated the Applicant's right to a fair administrative action under Article 47 of the *Constitution*.

5. As to the decisions being irrational, the Applicants gave the following reasons:

- (a) The Summary Judgment at paragraph 14 indicates that the decision of the majority on whether the article was protected by qualified privilege was that the defence was lost once the

Interested Party supplied a reasonable explanation or contradiction. However, the Majority Judgment dated 10th March 2022 did not deal with the issue of whether the article was protected by qualified privilege;

- (b) The Summary Judgment and the Majority Judgment contained inconsistent findings. For instance, the Respondent at paragraph 14 of the Summary Judgment indicates that the article was not an accurate and fair report from copies or extracts from material published by a government. On the other hand, the contents of paragraph 50 of the Majority Judgment indicates that the article was an accurate rendition from the filings at the United States Securities Exchange Commission; and
- (c) The Judgment delivered via email on 8 March 2022 at 8:55 am and the Dissenting Judgment dated 10 March 2022 but shared on 18th March 2022 contain inconsistent findings regarding whether the heading of the article was accurate. This refutes the Registrar's response to the Applicants' letter dated 17th March 2022, that the Judgment dated 8th March 2022 was the Dissenting Judgment.

6. The Applicants is of the view that the Respondent's conduct violated the Applicants' legitimate expectation, for the following reasons:

- (a) Having shared an advance copy of the Judgment on 8th March 2022 at 8:55am that which was in favour of the Applicants and having informed the parties to appear virtually before the Respondent, the Applicants' expectation was that the judgment would be in their favour;

- (b) The Respondent violated the Applicants' legitimate expectation that the findings contained in the Majority Judgment dated 10th March 2022 and shared with the parties on 18th March 2022 would be similar to the findings contained in the Summary Judgment that had been shared on 8th March 2022; and
- (c) The Respondent violated the Applicants' legitimate expectation that the findings contained in the Dissenting Judgment dated 10 March 2022 and shared with the parties on 18th March 2022 would be similar to the findings contained in the judgment shared to the parties on 8th March 2022 at 8:55 am.
7. As a result of the foregoing, the Applicants feel like the Respondent are of the view that the Respondent failed to observe journalistic accountability in that, the heading of the impugned article was inaccurate and misleading.
8. Therein, under the orders and directions given by the Respondent, that the Applicants are required to publish a correction by way of a clarification - as pertains to the headline of the article - being a sanction for violating clause 2(11) of the Code of Conduct of Journalism.
9. According to the Applicant, that unless this Honourable Court intervenes, the Interested Party will proceed to enforce the orders and this will occasion irreparable harm, loss and/or grave prejudice to the Applicants offending the Applicants freedom under Article 34 of the *Constitution*.

10. The Respondent did not participate in this proceedings despite service being effected on them. Nonetheless, this Application was responded to by the Interested Party.
11. The Interested Party, responded opposes this Application through a Replying Affidavit dated 19th July 2022 deposed by *Paul J. Oyier*, the Communications Advisor to on the grounds that: The Applicant has not fit within the threshold to warrant the grant of the Orders sought; The Court lacks the requisite jurisdiction to engage in a factual inquiry on the contested questions of fact some of which have been raised by the Applicant for the first time before this Court; and, The Applicant is inviting this Honourable Court to engage in a merit review and subsume itself as though it was the Respondent and to proceed to exercise its powers and duties vested in it by the law.
12. The Interested Party maintained that the Respondent's decision is legal and in particular, compliant with the *Media Council Act, 2013*, and the Regulations made thereunder, as well as the *Fair Administrative Actions Act*.
13. To the Interested Party, the Applicant has neither articulated nor established any grounds to merit granting the judicial review orders sought and further, that there is no demonstration of how the Applicants' right to fair administrative action under Article 47 of the *Constitution* was violated.
14. The Interested Party denies that there was a contradictory decision delivered by the Respondent, as alleged by the Applicants. It is his position that on the 18th March 2022, the Respondent shared with the parties the detailed determination of the Complaints Commission

which entailed the Majority Determination dated 10th March 2022, the dissenting determination dated 10th March 2022, and the summary determination dated 8th March 2022.

15. According to the Interested Party the alleged decision in favour of the Applicant, was clearly explained by the Respondent to the Applicants to the effect that:

- i) The draft unsigned decision attached to the email sent on 8th March 2022 at 8:55am was sent erroneously and that the said judgement was still under deliberation and thus was not to be released to the parties prior to final approval and execution by the Complaints Commission;
- ii) The summary determination delivered on 8th March 2022 at 12:00pm and that the Commission was unable to reach a unanimous decision on the matter and therefore a majority decision and dissenting decision on the Complaint was reached;
- iii) The draft determination erroneously sent to the parties in advance is what was being discussed as the dissenting opinion; and
- iv) The members of the Commission do not write individual judgements and in light of the foregoing there are only two judgements in the matter being the majority determination and the dissenting Determination.

16. Notably, that, it only takes a cursory look at the Determinations to take cognizance that the majority determination is executed by five (5) out

of seven (7) Commissioners; while, the dissenting determination is only executed by two (2) out of seven (7) Commissioners. That in any case, the Commissioners render decisions on behalf of the complaints Commission, and not on their own behalf.

17. The Interested Party maintained that the Applicant is covertly inviting this Honourable Court to conduct a merit review of the determination of the Respondent, a mandate that can only be exercised by an appellate court and that a judicial review court does not assume appellate jurisdiction in a judicial review application and the Application should be dismissed with costs.
18. Parties filed their respective written submissions to support their cases; dated 2nd March 2023 for the Applicants, and 17th October 2022 for the Interested Party.
19. The Applicants' submissions were that the Respondent's decision in *Complaint No. 3 of 2021* was riddled with impropriety; the Respondent's actions were illogical, unfair, and an abuse of powers; and the said decisions ought to be quashed. Further, that the Respondent's decision violated Article 47 of the *Constitution*, and Section 4(1) and Section 7 of the *Fair Administrative Action Act, 2015*.
20. The Applicant further submits, that the decision was procedurally unfair, unreasonable, and unjustifiable for the Respondent to share the initial Judgment in favour of the Applicants, with the parties at 8:55am on 8th March 2022; and thereafter, deliver a summary Judgment in favour of the Respondent at 12:00 noon the same day.
21. The Applicant also is troubled by the fact that the Majority decision that was subsequently shared with the parties on 18th March 2022 was

contradicting the Summary Judgment delivered on 8th March 2022. That the Dissenting judgment was a judgment by the entire Commission as opposed to a minority of the Commissioners.

22. Reliance was placed on the cases of ***Republic vs. Complaints Commission, Media Council for Kenya & Another Exp Baraza Limited t/a Kenya Television Network (KTN) [2013] eKLR, Republic v National Police Service Commission Ex parte Daniel Chacha Chacha [2016] eKLR, Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others [2007] eKLR, Kenya Human Rights Commission vs. Non-Governmental Organizations Co-Ordination Board [2016] eKLR, Republic v Non-Governmental Organizations Co-ordination Board Ex-Parte Evans Kidero Foundation [2017] eKLR***, and ***General Medical Council vs. Spackman [1943] 2 All ER 337***.
23. On whether the Respondent's decision and reasoning in the Majority Judgment, and Summary Judgement was rational; the Applicants maintain and hold the position that the Respondent's lack of consistency in its Initial Judgment, Summary Judgment, and Majority Judgment making was unreasonable and irrational.
24. The Applicant is of the view that the Respondent's decision should be quashed on the basis of Section 7(2)(i) of *Fair Administrative Action*, and the cases of ***Republic v Public Procurement Administrative Review Board; Ex Parte Madison General Insurance Kenya Ltd; Accounting Officer (KEBS) & another (Interested Parties) Judicial Review Miscellaneous Application E039 of 2022, Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Others [2004]***

ZACC 15, and R v Chief Constable of Sussex, ex parte International Trader's Ferry Ltd.

25. The Applicant contended that the Respondent's conduct in delivery of the decisions violated the legitimate expectation of the Applicants in that the Respondent made a clear, and unambiguous indication in its Initial Judgment that it had made a decision in favour of the Applicants. Therefore, that the Applicants reasonably acquired a legitimate expectation which is enforceable against the Respondent, which the Respondent violated.
26. The Applicants averred that they had a reasonable and legitimate expectation that the Respondent would render a fair and reasonable decision, but the Respondent failed to do so and in the circumstances, its decision should be quashed. Relied on the cases of ***Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR, Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others [2014] eKLR, and Republic vs. Attorney General & Another Ex Parte Waswa & 2 Others [2005] 1 KLR 280.***
27. The Applicants maintained that they have demonstrated that the Respondent delivered a decision that was procedurally unfair, irrational, and devoid of legitimate expectation; and that the same should be quashed in the interest of justice.
28. Further, the Applicant believes that the Respondent and Interested Party should be prohibited from enforcing the Respondent's decision which is tainted with illegality as guided by the cases of ***Republic v Betting Control and Licensing Board & another Ex parte Outdoor***

Advertising Association of Kenya [2019] eKLR, and Local Government Board v. Arlidge {1915} AC 120 (138) HL.

29. The Applicant submits that the Respondent, Interested Party should be ordered to bear the costs of these proceedings.
30. The Interested Party, supporting his case in opposing the Application, submitted that the true purpose and intent of the Judicial Review Jurisdiction is limited to interrogation of the process leading to the decision of the quasi-judicial organ. Reliance was placed on the Supreme Court case of ***John Florence Maritime Services Limited & another v Cabinet Secretary Transport & Infrastructure & 3 others (Petition 17 of 2015) [2021] KESC 39 (KLR) (Civ) (6 August 2021) (Judgment)***, and ***Kenya Pipeline Company Limited vs. Hyosung Ebara Company Limited & 2 others [2012] eKLR.***
31. That threefold classification of grounds for judicial review upon which the court can intervene, and any one of which would render an administrative decision and/or action *ultra vires*. The grounds being: illegality, irrationality, procedural impropriety, and proportionality. Reliance was placed on the case of ***Council of Civil Service Unions vs Minister for the Civil Service (1985) AC 374.***
32. To the Interested Party, Applicants did not substantiate any ground of judicial review. They do not substantiate how the Respondent's decision has been tainted with any of the grounds for judicial review, instead, the Applicants anchor their Application on an alleged draft dissenting determination that was shared inadvertently by the Respondent, as explained. That the Application is only meant to deny the Interested Party the reliefs granted by the Respondent.

33. The Applicant posited that when a party prays for an order of certiorari, it must first be satisfied that the tribunal that made the decision had the authority to determine the questions affecting the rights of subjects; and secondly, it must be duty-bound to act judicially, and the right of appeal or alternative review will not preclude an applicant from seeking this remedy. ***Republic-v- Commissioner of Income tax ex parte SDV Transami (k) ltd (2005) 1EA 346*** case was relied on.
34. The prayer for Certiorari is premised on procedural unfairness especially with regard to how the Respondent's determination was issued to the parties. Procedural impropriety comprises two things: - procedural ultra vires where administrative decisions are challenged because a decision -maker has overlooked or failed to properly observe statutory procedural requirements and common law rules of natural justice and fairness. ***Republic v Cabinet Secretary for Interior & Co-ordination of National Government & another; Ex parte Applicant: Peter Adiele Mmegwa & another [2020] eKLR*** was relied upon.
35. The Interested Party stated that the Respondent accorded all parties a fair opportunity to be heard; and that procedural fairness can only be measured against the set procedure in the statute. Relied on the case of ***Council of Civil Service Unions v Minister for the Civil Service [1984] UKHL 9, [1985] 1 A.C. 374.***
36. In response to the Applicants' claim that their legitimate expectation was violated; the Interested Party contended that legitimate expectation is not anticipation. It is established from the foregoing that one cannot have a legitimate expectation as regards the outcome of a

Determination by a quasi-judicial tribunal. Reliance was on ***Gnct of Delhi -v- Naresh Kumar 175(2010) DLT*** case.

37. The Interested Party averred that the Applicants are praying for a writ of prohibition against their (Interested Party) future actions. That the writ of prohibition is meant to control an administrative body/tribunal that is not a court from exceeding 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.
38. That prohibition does not lie to correct the course, practice or procedure of an inferior tribunal or a wrong decision on the merits of the proceedings. That an order of prohibition can only be issued to the administrative body (Respondent) and not to parties to a suit (Interested Party). This was the holding in ***R -V- Local Government Board (1882) 10 QBD 309,321*** and ***Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [2022] eKLR, Kenya National Examination Council v Republic Ex Parte Geoffrey Gathenji Njoroge & 9 others [1997] eKLR***, and ***Republic v Principal Kadhi, Mombasa Ex-parties Alibhai Adamali Dar & 2 others; Murtaza Turabali Patel (Interested Party) [2022] eKLR***.
39. The Interested Party submitted that jurisdiction of a court is everything, without it, a court has no power to make one more step. Further, that Judicial Review is a special remedy concerned with the decision-making process, not with the merits of the decision itself. That the Honourable Court should not interfere with the factual findings of the Respondent since doing so, would be merit review and

thereby acting as an appellate court. The cases of *Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1*, *Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others consolidated with Civil Appeal No. 139 of 2017 County Government of Embu & Another vs. Eric Cheruiyot & 15 Others (unreported)*, *Republic vs Public Procurement Administrative Review Board; Principal Secretary, State Department of Interior; Ex Parte CMC Motors Group Ltd [2020] eKLR*, and *Energy Regulatory Commission v S G S Kenya Limited & 2 others [2018] eKLR* were relied upon.

40. The Interested Party contended that the issue of costs is envisaged under section 27 of the *Civil Procedure Act*. That, first, the award of costs is discretionary to the Court; Second, costs are awarded to the successful party unless he/she is guilty of any misconduct or there exists some other good reasons or cause for not awarding costs; Third, costs follow event. Reliance was placed on *Republic v. Rosemary Wairimu Munene (Ex parte Applicant) v. Ihururu Dairy Farmers Cooperative Society Ltd Judicial Review Application No. 6 of 2004* and *DGM v EWG [2021] eKLR*
41. I have considered the Application, responses thereto, annexures, submissions by counsel, and authorities cited. I find the issue for determination that arises is: **Whether the Applicant has met the legal threshold for granting of judicial review orders of certiorari and prohibition.**
42. The Applicants have sought for judicial review orders of certiorari against the decisions of the Respondent, and an order of prohibition against the Respondent.

43. The circumstances under which an order of certiorari and prohibition can be issued were explained in the Court of Appeal case of ***Republic v Kenya National Examinations Council ex parte Gathenji & Others, (1997) e KLR*** as follows: -

“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... 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.”

44. Judicial review jurisdiction, was discussed in the Ugandan case of ***Pastoli vs Kabale District Local Government Council & Others, (2008) 2 EA 300***, that:

*“In order to succeed in an application for Judicial Review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety: See **Council of Civil Service Union v Minister for the Civil Service [1985] AC 2**; and also **Francis Bahikirwe Muntu and others v Kyambogo University, High Court, Kampala, Miscellaneous Application Number 643 of 2005 (UR)**.*

Illegality is when the decision making authority commits an error of law in the process of taking the decision or making the act, the subject of the complaint. Acting without Jurisdiction or ultra vires, or contrary to the provisions of a law or its principles are instances of illegality....

*Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards: **Re An Application by Bukoba Gymkhana Club [1963] EA 478** at page 479 paragraph “E”.*

Procedural impropriety is when there is failure to act fairly on the part of the decision making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere

and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision. (Al-Mehdawi v Secretary of State for the Home Department [1990] AC 876)."

45. On the issue of procedural impropriety the Applicant raises a concern around the fact that it received what they considered a judgment - via an email dated 8th March 2022 at 8:55 am supposedly in their favour; and subsequently the Respondent delivered a summary judgment on the same date at 12:00pm in favour of the Interested Party, thus contradicting the earlier received supposed judgment. The latter was shared with the parties at 3:23pm on the same date via email.
46. From the records before this court, I have examined an email dated 18th March 2022 from the Respondent giving explanations and clarifications of the occurrence. It reads as follows:

"Dear Sirs,

We acknowledge receipt of your letter dated 17th March 2022 and wish to respond as follows;

- 1. That the draft unsigned judgement attached to the email sent to you on 8th March 2022 at 8:55am was sent erroneously. The said judgement was still under deliberation and thus was not to be released to the parties prior to final approval and execution by the Complaints Commission.***
- 2. As per the summary judgement delivered on 8th March 2022 at 12:00pm, the Commission was***

unable to reach a unanimous decision on the matter and therefore a majority decision and dissenting decision on the Complaint was reached.

3. The draft judgement erroneously sent to you in advance is what was being discussed as the dissenting opinion.

4. Please take note that members of the Commission do not write individual judgements and in light of the foregoing there are only two judgements in the matter.

5. We have attached the final majority decision and final dissenting decision of the Commission for your perusal and records.

6. We sincerely apologise for the confusion and anxiety caused by the error stated above.

Kind Regards

Registrar,

Complaints Commission."

47. From the reading of the explanation and clarification, it is clear that the erroneously sent draft unsigned judgment was still under deliberation by the Respondents, before arriving at a final decision/Judgment. The same does not amount to a judgment. Moreover, the Respondent shared with the parties a Summary Judgment, Full Final Judgment, and Dissenting Judgment and I am satisfied by the explanation and clarification given by the Respondent

of the occurrence in sending the wrong document/attachment in the 8th March 2022 8:55am email. The Respondents actions do not amount to procedural impropriety, and this ground as relied on by the Applicants fail.

48. The Applicant pegged its argument on the issue of irrationality, on the inconsistency and contradictions between the Summary Judgment and the Final Judgment; and also between the draft unsigned judgment and the Dissenting Judgment.
49. This argument would call for a review on merit of the case, which this court lacks such appellate jurisdiction. I do not find gross unreasonableness nor deficiency of logic and acceptable moral standards in the decisions taken by the Respondents. The ground of irrationality relied on by the Applicants fails.
50. Legitimate expectation was well discussed in the case of ***Kalpana H. Rawal v Judicial Service Commission & 4 others [2015] eKLR*** stating that,

“207. The doctrine of legitimate expectation was developed by English courts to hold rulers to their promises. In the 4th Edition, 2001 Reissue, of Halsbury’s Laws of England the authors at page 212, paragraph 92 explain the concept behind the development of the principle as follows:

“A person may have a legitimate expectation of being treated in a certain way by an administrative authority even though there is no other legal basis upon which he could claim such treatment. The expectation may arise either from a representation or promise made by the authority, including an implied representation, or from consistent past practice. In all instances

the expectation arises by reason of the conduct of decision maker and is protected by the courts on the basis that principles of fairness, predictability and certainty should not be disregarded.

The existence of a legitimate expectation may have a number of different consequences; it may give standing to seek permission to apply for judicial review, it may mean that the authority ought not to act so as to defeat the consequence of the expectation without some overriding reason of public policy to justify its doing so, or it may mean that, if the authority proposes to act contrary to the legitimate expectation, it must afford the person either an opportunity to make representations on the matter, or the benefit of some other requirement of procedural fairness. A legitimate expectation may cease to exist either because its significance has come to a natural end or because of action on the part of the decision maker.”

51. Further, the Supreme Court in the ***Communication Commission of Kenya & 5 Others vs Royal Media Services Ltd & 5 Others, (2014) e KLR*** further laid down the principles that govern a successful invocation of the doctrine of legitimate expectation as follows:

“[269] The emerging principles may be succinctly set out as follows:

- a. there must be an express, clear and unambiguous promise given by a public authority;*
- b. the expectation itself must be reasonable;*
- c. the representation must be one which it was competent and lawful for the decision-maker to make; and*

d. there cannot be a legitimate expectation against clear provisions of the law or the Constitution.” (Emphasis added)

52. Applying these principles to the instant matter, the Applicant cannot be said to have acquired legitimate expectation from the erroneously sent draft unsigned minority judgment, that the final decision would be in their (Applicants’) favour. There was no express, clear, and unambiguous promise given by a Respondent to the parties, and in particular, not to the Applicants.
53. In the end, the Applicants having failed to prove the grounds for the judicial review orders, the prayer for orders for certiorari and orders for prohibition cannot issue.

Order

The Notice of Motion dated 26th April, 2022 lacks merit and the same is dismissed with cost.

Dated, signed and delivered at Nairobi this 18th day of May 2023

.....
J. CHIGITI (SC)

JUDGE