REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI

MILIMANI LAW COURTS

Miscellaneous Application 688 of 2006

KENYA COMMERCIAL BANK LTD ……APPLICANT
VERSUS

KENYA NATIONAL COMMISSION ON HUMAN RIGHTS……...RESPONDENT

JUDGMENT

The exparte Applicant Kenya Commercial Bank Ltd. filed the Notice of Motion dated 5th December 2006 pursuant to Order 53 Rule 3 Civil Procedure Rules and supported by a statement dated 15th November 2006, a verifying affidavit of Irene Metto of the same date, a supplementary affidavit sworn by 4th March 2008. Skeleton arguments and supplementary submissions filed on 13thApril 2007and 21st July 2008 respectively.

At the opening of the hearing, Mr. Ojiambo, Counsel for the Applicant indicated that they were abandoning prayers 1 and 2 of the Notice of Motion. The prayers that remain for determination are as follows:

3) An order of certiorari to remove, deliver upto the court and quash the Kenya National Commission on Human Rights (Complaints Procedures) Regulations 2005 Legal Notice 115/05) in their entirety;

4) An order of certiorari to quash Regulation 27 and part V of the said KNHCR (Complaints Procedure) Regulations 2005 (Legal Notice 115/05);

5) An order of certiorari to quash the proceedings of the KNHCR (with specific references to its complaints Hearing Panel) in complaint number KNHCR/CHP/2/2006 presided over by Commissioner Godana Doyo. being a complaint brought by Erastus Kariuki Waiyaki against the Applicant;

6) An order of prohibition to prohibit the KNCHR (with Reference to the complaints Hearing Panel) from

proceedings any further to hear complaint No.KNCHR/CHA I2/2006 presided over by Commissioner Godana Doyo. being a complaint brought by Erastus Kariuki Waiyaki against the Applicant.

7) An order of certiorari to remove, deliver up to the court and quash the decision of Commissioner Godana Doyo embodied in the ruling delivered on 27/10/06 in hearing Panel (complaint KN HCR/CH P/2/2006);

8) An order that the costs of this application be granted to the Applicant

The grounds upon which the motion is brought are found in the statement and are inter alia,

(1) That Regulation 27 of KNCHR Regulations, 2005 is ultra vires the KNCHR Act 2002;

(2) Regulations 27, 28 and part V of the KNCHR Regulations are ultra vires Sections 17 (b) (c) & (d) and 18 of the Act;

(3) Part V of the KNCHR Regulations is ultra vires Sections 77 (9) of the Constitution;

(4) That the regulations are contrary to the doctrine of separationpowers;

(5) That the Panel hearing KNCHR/CHP/2/2006 is ultra Regulations 27(1) as read with Regulation 27 (2) of the Regulations and lacks jurisdiction;

(6) That the Respondent breached the principle of proportionality by entertaining the Interested Party's complaint in 2006 when the compliant had occurred between 1982-1 987;

(7) That the Respondent breached the rules against bias because the Respondent had already formed the view that the Interested Party's claim was meritorious and had notified the Applicant of their intention to move the court under 5.84 (1) of the Constitution on behalf of the Interested Parties;

(8) That the ruling of the Panel was irrational as it ruled that proof of actual bias on the part of the arbiter was a necessary ingredient of the rule against bias;

(9) That the Respondent breached the applicant's legitimate expectation of a fair trial;

(10) That by implying that the Applicant was guilty before the matter was heard.
The applicant was denied right to equality of arms and the panel was not fair;

(11) That the decision was unreasonable and uncertain because the Regulations are defective and incapable of enforcement hence unreasonable.

The motion was opposed and a replying affidavit dated 8th March 2007 was sworn by Godana Doyo, a Commissioner in charge of the Redress Department of the Respondent and another affidavit by Mburu

Gitu, the secretary to the KNCHR, skeleton arguments filed in court on 6th February 2008. The Respondent was represented by Mr. Kaluu. The 1st Interested Party filed skeleton arguments dated 17th July 2008 and he appeared in person. Mr. Sitta urged the application on behalf of 2nd Interested Party who filed skeleton arguments on 9th May 2005 on behalf of the 2Interested Party.

In her affidavit Irene Mett, basically deposed on matters of information by the Counsel which have been captured in the grounds set out earlier in this judgment. To the said affidavit was annexed the KNCHR Act 2002 (KCB 2), the KNHCR Regulations 2005 (KCBI), the letter which was authored by Anthony Kuria, forwarding the ruling of the Commission (KCB 3) another letter to the Applicant dated 22nd February 2005: letter of 9th January 2006 (KCB 5) and other correspondence that was exhibited was marked as (KCB Ex 6-10). Evans Mose, a legal manager with the Applicant annexed as EM 2, a copy of the record of the proceedings before the hearing panel on 6th November 2006.

The genesis of this dispute is that the Interested Party, Erastus Kariuki Waiyaki was an employee of the Applicant. He was retired on 1st July 1987 on medical grounds. (see letter dated 14/8/07 exhibited by the 1st Interested Party authored by J.M. Ngove, for the Personnel Manager, KCB). The 1st Interested Party raised a complaint with the Respondent that he was dismissed unlawfully and in breach of his human rights and that the Commission wrote to the Applicant requesting the Applicant to consider reinstating the 1st interested party. The letter is dated 22nd February 2005 (KCB 4) authored by the legal Counsel. According to Mr. Ojiambo, by that time, the 1st Interested Party had not worked for the Applicant for about 18 years and there was no allegation of breach of human rights. That the Respondent again addressed the letter dated 9th January 2006 to the Managing Director KCB, alleging discriminatory treatment of the Interested Party and asked the Bank to compensate the Interested Party or they would file a petition on behalf of the 1S Interested Party. On 10th April 2001, in their letter, the Respondent observed that they are required to be impartial in such a matter. The Respondent then issued an appearance notice to the Applicant on 13th July 2006. It is the Applicant's case that a hearing between the Applicant and the 1st Interested Party adjudicated on by the Respondent would breach the rule against bias as there was real likelihood of bias since the Respondent had already taken a position by terming the termination discriminatory and the Respondent threatened to take court action on behalf of the 1st Interested Party. Counsel relied on the following case - **M ETROPOLIT AN PROPERTIES L TO V LAN NON (1968) 3 ALL ER** 304 where the court in considering the issue of bias. said that justice should both be done and bemanifestly seen to be done. In **HOMEPARK CATERERS V AG (2007) KLR 26,** the court observed that the test is not a actual bias but real likelihood of bias. Counsel also relied on **RESLEY V NRB CITY COUNCIL (2002) 1 EA 241** which involved City Council Valuation Rates where the Council purported to implement the rates before objections were made and when it noticed the problem it filed another notice asking the parties to go for objections. The court noted that the Council was telling the valuation court what to do when constituted forgetting that the court is a judicial forum. Counsel contended that the Respondent's attitude in this matter is similar to that of the City Council and the Applicant cannot expect a fair trial.

On the principle of proportionality, Counsel submitted that the Respondent was handling the 1 Interested Party's case 20 years after the event which was a breach of that principle. He relied on the case of **REP V JUDICIAL COMMISSION OF INQUIRY INTO THE COLDENBERG AFFAIRS ex parte SAITOTI**

MISC' APPLICATION 102/06 and Counsel urged that the Respondent must balance the rights of the Applicant as against those of the Interested Party since it is over 18 years since the termination of the 1st interested Party's services.
Mr. Ojiambo further submitted that when they appeared before the Panel, the Applicant raised an objection on the issue of bias but was overruled and the ruling was that they had to prove actual bias which was a misdirection in law and therefore the decision arrived at was so unreasonable that no other tribunal could have arrived at such a decision. For this contention, Counsel he relied on **DIRECTOR OF PENSIONS V COCKAR (2000) 1EA 38 and REP COMMISSIONER OF CO-OPERATIVES ex parte KIRINYAGA TEA GRO—W S -O RA WE A NGS &. C ED T SOCIETY L D (1999) 1 EA 245** where the courts quashed decisions for being unreasonable and which were made mala fides and the finding on jurisdiction does not bind this court. Reliance was also made on the case of **DESAI V WARSAMA (1967)EA 351** where it was held that a court cannot confer jurisdiction on itself and that if one address himself in law, he ceases to have jurisdiction.

It is also the Applicants case that the constitution of the KNCHR panel that heard the complaint was supposed to be composed of at least 2 persons, the chairman and legal Counsel and that the panel trying the Applicant offended Regulation 27 (2) (a' That in this case the chairman sat alone. Reliance was made on the case of **EQUATOR INN LTD V TOMASYAN (1971) EA 405** where the court held that the chairman had to be present before the tribunal has a quorum. In **GULLAM HUSSEIN S. VIRJI V PUNJA LILA (1959) EA 734,** the Court stressed the fact that statutory requirements in respect of a panel's composition have to be met.

It is also the Applicants case that the regulations are uncertain, unreasonable and irrational and are incapable of being enforced. That S.20 defines what an enquiry means while S.22 provides for the procedure at an enquiry. According to Mr. Ojiambo, those sections contradict the regulations relating to enquiries i.e. regulation 14 flouts rule of natural justice as it provides that the commission shall not publish or disclose matters of information given or received by it in confidence without prior consent of the informant. In his submission, counsel urged that the regulations including regulation S 21, 22, 27, 28 & 33 are all uncertain and defective and offensive to the concept of fair trial. Counsel relied on the case of STAFFORD BOROUGH JUSTICES EX PARTE ROSS (1 962) ALL ER 540 where the court observed that justice should not only be seen to be done but be manifestly seen to be done.

It was Mr. Ojiambo's further submission that it is not possible to severe the defective regulations from the good ones and all of them should be quashed. For that proposition counsel relied on the case of **DIRECTOR OF PUBLIC PROSECUTIONS V HUTCH INSON & ANOTHER (1991)LRC (Const) Pg 894** where it was held that the court had no jurisdiction to modify or adopt subordinate Regulation in order to bring it within the law maker's powers but that there were some situations when severance could be done so that the text remained grammatical and coherent, and that substance of what remained did not change the legislative purpose.

Counsel urged that Part V of the Rules -Regulations 27-37 be struck out. That since the regulations try to make a difference between an investigation and enquiry, it is not clear whether the Applicant was being

inquired into or was being investigated (Section 20 & 22).

The Applicant is seeking to have the subsidiary legislation quashed and further urged that in England, the Courts have quashed Regulations that tend to alter statute law. That Section 17 of the Act requires that Rules of natural justice and fairness be observed while the Regulation provide tothe contrary. That Section 5 (2) of the Act intended that there be a clear separation of process and one body cannot act as both investigator, prosecutor and executor and therefore the Regulations cannot stand.

Reliance was made on the case of **MIXNAMS PROPERTIES LTD V CHERTSEY URBAN DISTRICT COUNCIL (1963) 2 ALL ER 787 (9 798 E)** where the court held that subordinate legislative authorities can make only such changes to the law as parliament has expressly empowered them to make. In the case of **ALLISTAIR MALBAN V SUDNEY LEDERMAN & OTHERS (1985) 1FC 851** it was held people involved in investigations were excluded from the hearing in the tribunal and that in the instant case, the Commissioner who carries out investigations and also arbitrates breaches the rule against bias.

Mburu Gitu in his replying affidavit dated 8th March2007 deponed that he is the secretary to the KNCHR and is the custodian of all records since 2003. He deponed that the KNCHR (complaints procedures) Regulations 2005 were published on 16th September 2005 vide gazetted supplement No. 67/05 and the Applicant sought to quash them on 15th November 2006 after about 1year 2 months which offends Order 53 Rule 2 Civil Procedure Rules which provides that such challenge be made within 6 months. He also deponed that Regulation 35(2) of the Regulations permit a single Commissioner to hear and determine a complaint lodged with the Respondent and there is no basis for
quashing the proceedings and the ruling of Commissioner Godana Doyo who presided over the proceedings alone.

That the Commission has investigative jurisdiction in Human Rights Complaints and there is an internal mechanism for dealing with such complaints, which is screened. That preliminary enquiries are then made and after all evidence is assembled, it is placed before a panel for hearing to determine whether or not any human rights violations have occurred. That there are distinct departments dealing with investigations arid redress (adjudicative, jurisdiction) and there are “Chinese walls” erected to ensure that there is no interaction between the investigators and adjudicators. That Godana was not involved in any investigations. That the Respondent being **“any other adjudicating authority”** under S. 65 (1) & 77 (9) of the Constitution, is vested with powers of the court to order compensation or any other remedy for infringement of human rights and freedoms which is done by independent and impartial panels which is an alternative to the Respondent moving to the High Court under S. 84 of the Constitution. That after the hearing, parties agreed to file submissions 16thNovember 2006 but instead the Applicant moved to this court with the current application. That the issue of proportionality or delay in bringing the complaint would have been dealt with in the Commissioner’s ruling and cannot be addressed at this stage.

Mr. Godana Doyo in his replying affidavit agreed with Mr. Gitu on how the different departments at the Commission work independent of each other in order to enhance objectivity, impartiality and fairness in the adjudicating process. He deponed that he presided over the compliant by the Interested Party and it

was pending submissions when this application was made and that the Applicants never disclosed that fact to the court and that should be a matter of conjuncture what Mr. Godana's findings would have been in the matter.

In opposing the Notice of Motion, the Respondent argued that for an order of certiorari to avail the application seeking to quash the Regulations should have been made within 6 months of publication of the Regulations. That they were published on 16th September 2005 and it is not until 10th November 2006 that this application was filed over 16 months later. Counsel relied on the case of **AKO V SPECIAL DISTRICT COMMISSION OF KISUMU (1989) KLR 163** where the court held that under S. 9 (3) of the Law Reform Act, leave could not be granted unless the Application for leave was made inside the 6 months after the decision and that the said 6 months period could not be extended. Counsel urged that the Regulations are made within the KNHCR pursuant to S. 35 of the Act and the Preamble indicates that it is for protection of Human Rights. That the Applicant has not demonstrated how the Respondent exceeded its powers under S.35. That Section 16 of the Act provides for functions of the Commission and at paragraph (1) (a), the function is investigation on its own initiative or upon a complaint of human rights violations. That part V of the Regulations deals with investigations which are meant to facilitate the carrying out of the Commission's work and that it is upto the Applicant to demonstrate how they do not conform to the Act.

As to the complaint that Commissioner Godana should have set as a single Commissioner, it was submitted that Regulation 27 provides for composition of the hearing Panel and Commissioners are supposed to be appointed by the Chairman. That a single Commissioner sitting on the panel is not improper and if there he any defect it can be cured by Regulation 36 which provides that an irregularity arising from failure to comply with part V of the Regulation before a decision is Arrived at does not render the decision void. That such a situation of a Commissioner sitting alone was envisaged by that regulation. On the question of bias, counsel submitted that it does not arise because the regulations ensure that there are "Chinese walls" between the investigator and the arbitrator. That the wholesome reading of the regulation is that there is a process of investigation and another for initiating complaints. That section 19 of the Act gives Commission powers of a court, to issue summons to require attendances before the Commission, question any person in respect of any subject matter under investigations by the commission or require the person to disclose any information that relates to investigations and that the Commission does not give remedies but moves to court for the same. Counsel submitted that the issue of the commission being equated to the High Court does not arise because parliament could not have enacted a law which is contrary to the constitution. That in any event, S. 65(1) of the Constitution envisages the existence of a body which adjudicates on human rights issues which is similar to the high court. On proportionality, Counsel submitted that the issue is premature because Mr. Godana had yet not arrived at any decision and it all remains speculation as to what decision he could have made. Further, that the decision of Godana may have been wrong on the issue of Rias but that does not concern this court because Judicial Review is concerned with the decision making process but 'not the decision itself and that the order of certiorari cannot lie.

As for the lapse of time since the Interested Party was dismissed from KCB, Counsel submitted that

Regulations were promulgated on 16th September 2005 and it is only after then that they were able to come to court.

It is also the Respondent's submission that one cannot challenge the law by way of Judicial Review but that the decisions of Godana can be challenged in this manner. That the Respondent was accorded all requirements of natural justice as demonstrated by the annextures; i.e. letters ACP 4, 5 & 6 dated 11th February 2006. That in the 1st Petitioner's claim exhibited as part of KCB 6, dated 6th October 2006, which were agreed issues, they showed that there may have been a violation. That witnesses had testified and when awaiting submissions, the Applicant rushed to court and that these facts were not disclosed when leave was sought. That had the Applicant disclosed all the facts at the ex parte stage. leave may not have been granted.

Mr. Waiyaki, the 1st Interested Party who appeared in person filed submissions. He set out the history of his employment and sickness and how his services were terminated in June 1987 without being given a hearing and being denied a 2nd chance to be examined by a doctor. That at the time of his dismissal there were two rival unions representing workers who stayed with his case for over 5 years without taking it up. He then approached the Ministry of Labour, then Kituo cha Sheria but none took up the matter. That Kituo cha Sheria stayed with the matter for 6 years without taking action. He then approached the High Court to be allowed to file a pauper brief against KCB but he was not allowed. It was not until 2003 when the NCHR was set up that he approached them and they disclosed that he had been discriminated against on the basis of health and his Constitutional rights had been infringed. He was medically assessed by a panel chaired by Nelly Kitazi. He said that he retired out of ill health and he received his retirement benefits out of desperation. That what he suffered from was depression which was a curable disease and he should not have been retired.

Mr. Bitta, Counsel for the 2nd Interested Party submitted that they are only interested in 4 of the reliefs sought ie a b c & d. That a & b having been withdrawn they are concerned with c & d as to whether the Regulations can be quashed. He urged that S.65 of constitution empowers the Legislature to constitute other courts which must be subordinate to the High Court. That under S.16 of the KNHCR Act, the functions of the Commission are spelt out and that only an investigatory mandate is given to the Commission but not adjudication on disputes or on the act as a court of law. That Section 18 acts as a bridge between Section 16 and 19 and gives the Commission powers generally for performance of its functions. That powers conferred by Section 19 can only be in consonance with the functions of the Commission under S. 16. That S 25 of the Act then enumerates the steps that the Commission takes after conducting an enquiry ie Refer the matter to the Attorney General if it finds that there has been a violation or commence proceedings in the High Court under S.84 of the Constitution or make a recommendation to the affected party.

As to whether the Regulations can be challenged by way of Judicial Review Counsel associated himself with submissions made on behalf of the Respondent in that it should be under S.67 or 84 of the Constitution.

As to whether the Regulations are ultra vires the Act, Counsel urged that they arc not but that Regulations are limited to making provisions for the procedure to be adopted. He urged that it is wrong for a party to invoke the Constitution in a Judicial Review application. That the Regulations must be interpreted as to be in consonance with the Act. That if the definition is at variance with the Act, the Act takes precedence. That just because the Regulations may be widely interpreted does not render the Regulation null and void nor is it a fatal defect.

We have considered the affidavits filed both in support and in opposing the application, the annextures. submissions by counsel and authorities The KNCHR is a creature of the KNHCR Act, 2002. The preamble to the Act reads;

“An Act of parliament to provide for the establishment of the Kenya National Commission on Human Rights for the better promotion and protection of Human Rights and for connected purposes”. Section 3 of the said Act establishes and incorporates the Commission. It is a body corporate that can sue and be sued. Its functions are the promotion and protection of human rights under the Kenyan Constitution and other human rights as provided in international instruments to which Kenya is a signatory. The functions of the Commission are spelt out under Section 16 of the Act. The Section provides inter alia,

“S.16 The functions of the Commission shall be-

(a) to investigate, on its own initiative or upon a complaint made by any person or group of persons, the violation of any human rights;
(b) - (g)

(h) to investigate and conciliate complaints on its own initiative where the nature of the alleged human rights violation makes conciliation both possible and appropriate; and

For the Commission to be able to function. Section 35 of the Act mandates the Commission, with the approval of the Minister (A.G). To make Regulations prescribing anything which needs to be prescribed for the better carrying out of the functions and objectives of the Act. The powers of the Commission are set out under Section 19 of the Act. The said Section reads as follows:

“S. 19 (1) in the performance of its functions under this Act, the Commission shall have the powers of a court to –

(a) issue summons or other orders requiring the attendance of any person before the Commission and the production of any document or record relevant to any investigation by the Commission;

(b) question any person in respect of any subject matter under investigation before the Commission;

(c) require any person to disclose any information within such person's knowledge relevant to any investigation by the Commission.

(2) The Commission may, if satisfied that there has been infringement of any human rights or freedoms, order -

(a) The release of any unlawfully detained or restricted person; (b) the payment of compensation; or

(b) any other lawful remedy or redress.

(3) A person or authority dissatisfied with an order made by the Commission under Sub section (2) may appeal to the High Court within twenty one days of such order.

(4) An order of the Commission under Sub section (2) may be filed in the High Court by any party thereto in such manner as the Commission may, in Regulations made in consultation with the Chief Justice, prescribe and such party shall give written notice of the filing of the order to all other parties within thirty days of the date of the filing of the order.

(5) If no appeal is filed under Subsection (3), the party in favour of whom the order is made by the Commission may apply ex parte by summons for leave to enforce such order as a decree and the order may be executed in the same manner as an order of the High Court to the like effect

(6) A person who –

a) fails to attend before the Commission in accordance with any summons or order issued under subsection (1) *(a); i* or

(b) having attended before the Commission refuses to be sworn or make affirmation
Commits an offence and shall on conviction, be liable to a fine not exceeding twenty thousand shillings or to imprisonment for term not exceeding six months or both".

A reading of the above Section shows that the Commission has both investigative and adjudicative functions and we find that it is one of the subordinate courts envisaged under Section 65 (1) and 84 (3) of the Constitution and would therefore be subject to the Supervisory powers of the High Court.

It is the Respondents case that after receiving the complaint of alleged human rights abuse they carried out investigations from both the 1st Interested Party and the Applicant and having established that the complaint had substance and because the Applicant did not avail evidence to rebut the allegations, found it necessary to place the complaint before a panel for hearing to determine whether or not there was any violation of the 1st Interested Party's fundamental rights; it is the panel that the applicant challenges for breaching rules of natural justice, being biased, breaching the principle of proportionality and the applicant's legitimate expectation that they would get a fair hearing. The applicant also attacks

the Regulations made under the KNCHR Act, 2002 for being uncertain, unreasonable and irrational and should be struck out.

1. Statutory time Bar.

It is the Respondent's defence that the orders of certiorari are not available because the Judicial Review application was brought outside the 6 months period allowed by order 53 Rule 2 Civil Procedure Rules. That rule reads "2 leave shall not be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceeding for the purpose of its being quashed, unless tne pp ica ion or eave is made not Ia er han six months a er the date of the proceeding or such shorter period as may be prescribed by any Act; and where the proceeding is subject to appeal and a time is limited by lawfor the bringing of the appeal, the Judge may adjourn the application for leave until the appeal is determined or the time for appealing has expired"

What is sought to be quashed is the Regulations which are said to have been gazetted on 16/9/05 vide Gazette Supplement 67 of 2005 and yet this application was filed on 16/11/06, over a year after the gazettement. We do agree with the submission by Mr. Ojiambo and which submission we subscribe to, that Order 53 Rule 2 only relates to the challenge of formal orders set out under that rule that is judgments, decrees, orders etc. It does not apply to other decisions like this situation. This has been so held in **REP. VS. NATIONAL HOSPITAL INSURANCE FUND ex parte COTU. MISC. 1747/04 and REPUBLIC VS. JUDICIAL COMMISSION OF ENQUIRY INTO THE GOLDEN BERG AFFAIR ex parte MWALULU HCCC 1279/04.** In the latter case, the three Judge bench also held that the 6 month's limitation only applies to formal orders mentioned in Rule 2 and nothing else and that it does not apply to decisions which are null ab initio. In **ANISMINIC LTD *V* FOREIGN COMPENSATION COMMISSION (1969)2 AC 147** thecourt held that where a body lacks jurisdiction it cannot be said that there was a valid decision in the first place, for time to start running against certiorari. We hold that the 6 months limitation does not apply to the impugned Regulations.

2. Bias

It is the applicant's case that before they were served with a notice to appear before the KNHCR Panel, the Respondent had taken a stand and expressed a clear view that the 1st Interested Party's complaint had a sound legal basis and even demanded compensation for the said 1st Interested Party and therefore they could not adjudicate on it with impartiality.

The 1st Interested Party recalled that he referred his grievances to the Respondent in 2003 after he failed to get justice/help elsewhere.

We have seen the correspondence addressed to the Applicant by the Respondents before the setting up of the Panel.

(i) By the letter of 22/2/05 authored by Michael Okelo.

Assistant Legal Counsel for the Respondent, he requested the Applicant to discuss the possibility of

reinstating the 1st Interested Party to KCB. This was after a medical Board certified the 1st Interested Party fit provided he remained on medication.

(ii) In the letter dated 9th January 2006 (KCB 5) the Respondent set out the 1st Interested Party's medical history and findings of the Medical Boards and indicated that the 1St Interested Party was alleging that his retirement was discriminatory and contrary to rules of natural justice. The Respondent therefore put the Applicant on Notice that if the Applicant did not reply favorably with a view of compensating the 1st Interested Party. the Respondent would commence proceedings against the Applicant under S. 84 (1) of the Constitution to enforce the 1st Interested Party's fundamental rights.

(iii) In the letter dated 1st February 2006, the Respondent again wrote to the Applicant (KCS 6) a letter headed **'discrimination of Erastus Waiyaki on grounds of mental *illness*/'**Again this was a notice to the Applicant that if there was no reply to the letter of 9th January 2006, the Respondent would proceed with court action.

A reading of the above letters clearly shows that the Respondent had already been convinced from the information before it that the Applicant had breached the 1st Interested Party's rights and had acted contrary to rules of natural justice and that is why they were asking the Applicant to pay compensation to the 1st Interested Party or that there was sufficient evidence against the Applicant to sustain an application under S. 84 of the Constitution. Having made up their mind, thus, it is unlikely that the Respondent would be a fair arbiter and impartially adjudicate on a matter between the Applicant and the 1st Interested Party.

It is our view that, there was a real likelihood of the Respondent being biased in the matter following what they had come across during their investigation or inquiry as clearly set out in the above letters. The test here is not whether the Respondent would actually be biased but the impression it would have on right thinking people in society. In the case of **METROPOLITAN CO. LTD V LANNON & OTHERS (1968) 3 ALL ER 3 4,** the court had this to say;

"A man may be disqualified from sitting in a judicial capacity on one of these grounds. First, a direct pecuniary interest in the subject matter. Second, bias in favour of one side as against the other in considering whether there was a real likelihood of bias, the court does not look at the mind of the justice himself or at the mind of the chairman of the Tribunal, or whoever it may be, who sits in a judicial capacity. It does not look to see if there was a real likelihood that he would or did in fact favour one side at the expense of the other. The court looks at the impression which would be given to other people. Even if he was as impartial as could possibly be, nevertheless if right minded persons would think that, in the circumstances there was a real likelihood of bias on his part he should not sit."

Nyamu and Wendoh JJ applied the above test in **HOMEPARK CATIERERS LTD V. THE HON. *A.G.* & OTHERS PET 671/06.** In theinstant case, the Respondent claims to have put "Chinese Walls" between the different departments, investigative and adjudicative so that one hand has no idea what the other has done. However, the Respondent never attempted to demonstrate how that is achieved through

the Act and the Regulations or even practically.

There is no demonstration by the Respondent that Godana did not know the contents of the investigations carried out by the investigation department. Mr. Godana being an officer of the Respondent which carried out the investigations, any right thinking man could form the impression that he knew what transpired during the investigations and he would not be an impartial arbiter in a dispute between the Applicant and the 1st Interested Party. Section 17 (b) and (d) of the Act requires the Commission to observe the principle of impartiality and rules of natural justice. One of the tenets of natural justice is that no man can be judge in his own cause. This was the principle in the case of **HANNAN VBRADFORD CITY COUNCIL (1 70)2 ALL ER 69** where a school master stopped teaching and was given a notice terminating his employment following a meeting of the school's governors he city Council met to discuss whether to exercise the powers they had to prohibit the school master's dismissal and they chose not to exercise the said powers. Three of the school's governors sat on the Council Committee that made that decision. Although the 3 governors had not attended the governors meeting that decided to dismiss the school master, the court found that the rule against bias had been offended. In the instant case, Mr. Godana being an employee of the Respondent, by sitting as the judge in the Panel deliberating whether or not the Applicant had breached the 1 Interested Party's rights when they dismissed him was acting as judge in his own cause because the Respondent had carried out investigations, and had in fact decided that the Applicant was guilty. In fact one wonders what the said Godana was going to adjudicate on when the Respondent had already made its stand known. S. 25 of the Act allows the Respondent, after completing an enquiry, to commence proceedings in the High Court under S. 84(1) of the Constitution. Having made up their mind that the Applicant had contravened the 1 interested Party's rights, the Respondents should have proceeded under 5.25 (b) and not taken part in the adjudication. We adopt the holding in **R V SUSSEX JUSTICES ex parte CAY (HLC 1924)** where the court said of bias;

"It is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done"

We find that in the circumstances of this case, a right thinking man would have formed the impression that there was likelihood of bias and justice would not have been done. The proceedings in which Godana presided over attract the order of certiorari for purposes of their being quashed.

4. <u>Commissioner Godana's Decision on Bias</u>

On 27th October 2006, Commissioner Godana ruled on an objection which had been raised by the Applicant. It was to the effect that the Panel as constituted, by one single Commissioner, could not hear the matter as there was real likelihood of bias against the Applicant. The Commissioner dismissed the objection for reasons that the Applicant had not shown evidence of actual bias by the panel (MNO) It is the Applicant's submission that in arriving at that decision, the Commissioner had acted unreasonably and did not have jurisdiction to deal with the said matter, by finding that the test was whether there was actual bias and that the Commissioner failed to correctly address the law. In **R V JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDEN BERG AFFAIR AND OTHERS ex parte SAITOTI**

HMSC 102/06, the court observed that failure to address the law constitutes an error of precedent fact and goes to jurisdiction. It means that the Commissioner was unable to discharge his duty tinder the Act and for that reason having acted outside his jurisdiction that decision is amenable to the Judicial Review order of certiorari.
In that case the court referred to **JUD1CIAL REVIEW HANDBOOK 3RD ED BY MICHAEL FORDHAM at page 128** where he says at paragraph 49.1

"If a public body considers the factual trigger to exist when in truth it does not exist, the body in proceeding to exercise a function which in truth is beyond its powers. This justifies the court in investigating for itself the key question of fact on all available materials. Accordingly, errors of fact are not just reviewable but correctable." The court continued to observe that if the finding of the court is perverse or where the Commissioners have misdirected themselves on law by a misunderstanding of the statutory language or otherwise, that determination cannot stand and the court has power to intervene. We agree with the finding in the **SAITOTI CASE** that such a finding which is flawed calls for intervention of this court to have that decision quashed by certiorari. The decision of Godana on Bias must be quashed by order of certiorari.

5. Constitutio of the Hearing Panel
It is the Applicants case that the composition of the panel was ultra vires Regulation 27(1) as read with Regulation 27(2). On the other hand, the Respondents contend that Regulation 35 (2) allows a single Commissioner to hear a complaint lodged with the Respondent. Regulation 27 provides for establishment of the Hearing Panel. It reads;-

"Reg 27 (1) The Chairperson or a Commissioner designated by the chairperson for that purpose, shall, whenever advised by the Legal Services

Department, establish a complaints hearing Panel for a particular complainant or group of complainants.
2) A hearing panel established under sub Regulation (1)shall consist of,
(a) a presiding Commissioner and such number of Commissioners appointed by the chairperson;
(b) the legal Counsel; and
(c) such member of the Legal Services Department as appointed by the Secretary."
On the other hand Regulation 35(2) which the Respondent relies on reads;
"35 (2) where in the cause of hearing a complaint, a hearing penal made up of more than one Commissioner, for any sufficient reason, is not fully constituted in terms of these Regulations, the remaining Commissioner shall request the chairperson or a Commissioner designated by the chairperson for that purpose to replace the absent Commissioners."

The Applicant contends that at the first appearance for hearing, they were informed that the hearing would be presided over by one arbiter. We have considered Regulations 27 (1) & (2) and 35 (2). The chairperson establishes the hearing panel under Regulation 27 (1 & 2) which comprises the presiding Commissioner, and others appointed by the chairperson, legal counsel and members of the Legal

Services Department. That Regulation envisages a panel consisting of more than one Commissioner, legal Counsel and other staff. Regulation 35 (2) comes into play during the course of the hearing when for good reason, there is need to replace the absent Commissioners. There is no provision for the sitting of one Commissioner on the panel.

Regulation 35 (2) does not apply here because right from the on set, only one Commissioner was appointed to preside over the dispute and the issue of replacement does not arise. The appointment of Godana, a single Commissioner to preside over the dispute out rightly contravenes Regulation 27 (1) & (2) and is unlawful. It is the duty of
the Respondent to ensure that the requirements of the panel's composition are met i.e. Regulation 27. They cannot constitute the panel contrary to provisions of the law. In that regard, we do agree with the decision of the court in **EQUATOR INN VTOMASYAN (1971) EA 405** that the properly constituted quorum started hearing a dispute where one was seeking a refund of rent. The chairman purported to visit the premises alone and on appeal, the court held that the Chairman of the Rent Restriction Board sitting alone had no power to order a refund of excess rent paid and had no power to hear and determine the application. In this case we find that Mr. Godana had no power to sit alone on the panel presiding over the dispute between the Applicant and the 1st Interested Party, as it is offends clear provisions of the law. The Respondent purported to rely on Regulation 36 which provides that an irregularity resulting from a failure to comply with any provision of this part or any direction of the hearing panel before it has reached its decision shall not of itself render any proceedings void. We find that Regulation 36 cannot remedy that omission because the composition of the Panel having been specifically provided for is a fundamental Provision which should ideally have been in the Act. Those proceedings presided over by Godana contrary to statute call for intervention of this court by way of judicial review.

6. Whether the regulations made under the KNCHR are uncertain, unreasonable and irrational.
As pointed out earlier in this judgement, the KNCHR (Complaints procedures) regulations, 2005 are promulgated undersection 35 of the parent Act. They are meant to facilitate the carrying out of the Commissions functions under the Act; Regulations are not meant to confer any jurisdiction under the Act but are supposed to be limited to procedure. At the hearing, Mr. Ojiambo indicated that they would no longer pursue prayer 1 & 2which sought to quash the KNCHR Act 200" (Prayer 1).and section 1 9 (2of the Act (prayer 2)what the applicant therefore seeks to quash is the KNCHR (Complaints Procedures) Regulations, 2005 in their entirety (prayer 3) and regulation 27 and part V of the Regulations.

As pointed out by Mr. Ojiambo, we do find some inconsistencies in the regulations. Regulation2 defines a "hearing panel" to mean a complaints hearing panel established under regulation 28. It is clear from a reading of regulation 28 that it does not establish any hearing panel, but provides for procedures to be adopted by the panel. It is Regulation 27 which establishes the complaints hearing panel and reads.

"R27 (1) the chairperson or a commissioner designated by the Chairperson for that purpose, shall whenever advised by the legal services Department, establish a complaints hearing panel for a particular

complaint or group of complaints.

(2) A hearing panel established under sub-Regulation (1)shall consist of-

(a) A presiding commissioner, and such number of commissioners appointed by the chairperson;

(b) The legal counsel; and

(c) Such members of the Legal Services Department as appointed by the Secretary.

Regulation 28 then goes on to provide for the procedure to be adopted by the panel. Regulation 28 reads;

"Regulation 28 (1)The hearing panel shall hear complaints referred to it by the Legal Services Department;

(2) upon a complaint being referred to the hearing panel for determination, the hearing panel shall forthwith issue a notice to the concerned parties informing them that a complaints hearing panel has been formed for purposes of hearing the complaint and requiring them to enter appearance;

(3) ……..8"

We do agree with the Applicant's submission that the definition given in Regulation 2 that the panel is the one set under Regulation 28is incorrect and misleading as no hearing panel is set up under that Regulation but under Regulation 27.

We are also of the view that Regulation 27 is ultra vires the Act because it has no underpinning in the Act. Creation of a hearing Panel is a very important aspect of the Act. The setting up of a hearing Panel should have been provided for under S. 25 of the Act which provides for steps that should be under taken after the inquiry is completed where the inquiry discloses violation of Human Rights. Regulations which should basically provide for procedure cannot be made to displace the substantive law under the Act. Regulation 27 is hanging with no foundation in the Act and we find that it is ultra vires the Act. We also agree with the Applicant's submission that an inquiry is defined in Regulation 2 as an inquiry under Section 20 of the Act. However, a reading of Section 20 reveals that that Section does not deal with inquiries but investigations. Section 20 provides for utilization of public servants in investigations pertaining to an inquiry. Section 22 provides for procedure to be adopted upon a person lodging a complaint of human rights violation and how an inquirywill be undertaken. Again the definition under Regulation 2 is quite misleading and leads to uncertainty in the Act and the Regulations. The Act and Regulations make it clear that an investigation is different from an inquiry so that Regulation 20's definition cannot possibly be referring to investigation when it means an inquiry. There is obvious disparity between the provisions of the Act and the Regulations.

We also agree with the Applicants submission that Regulation 14 offends the rules of natural justice. That Regulation provides as follows;

“Reg. 14 the Commission shall not disclose or publish matters or information given or received by it in confidence without the prior consent of a party or informant”

It meansthat even if a Commissioner is in possession of information received from one of the parties to the dispute which may have a bearing on the outcome of the dispute, he cannot divulge it. This is irrespective of the fact that that information may even influence the decision of that Commissioner.

In **RV STAFFORD BOROUGH JUSTICES ex parte ROSS (1962) 1 ALL ER 540. A** document whose contents were not known was handed over to the justices at the moment of their retirement. It was held that the same should be quashed because it could not be ascertained whether the chairman had been influenced by the note and the conviction was
In therecent decision in **REP V THE INQUIRY INTO GOLDENBERG AFFAIRS ex parte ERIC CHERUIYOT KOTUT, HMISC 416/06 NYAMU, WENDOH AND DULU JJJ** came across quite a similar scenario where the Commission, towards the end of its deliberations accepted minutes of a meeting of the Central Bank of Kenya without allowing the Applicant access to them or allowing him to cross examine the witnesses on them and the same was used in the findings against the Applicant. The court held that the said minutes were admitted contrary to the rules of natural justice and were also unlawful as they were contrary to the Act that set up the Commission and the Commission was found to be guilty of procedural impropriety and their decision based on that evidence rendered null and void and was correctable by Judicial Review by having it quashed. We hold that Regulation 14 offends the rues of natural justice, the spirit of the Act under S. 17 which provides that rules of natural justice be observed and it should be quashed by certiorari.

The applicant prays for quashing of Regulation 27 and part V of the Regulations generally. The question is, if Regulation 27 is quashed, can the rest of Part V stand or can it be severed from that Part V. In **DPP V HUTCHINSON (1991) LRC 894** some by laws were found to be ultra vires the Act and the court found that they were severable from the Act. On appeal the Supreme Court laid down some guidelines regarding such situations when subordinate legislation is ultra vires the parent Act. The court held,

“The court has no jurisdiction to modify or adopt subordinate legislation in order to **bring it within the lawmaker’s powers. However, the court may sever the excessive part of the legislation if;**

(a) The text remained grammatical and coherent after severance, and

(b) **The substance of what remained was essentially unchanged in its legislative purpose, operation, and effect i.e. it was unaffected by and independent of the part severed.**

In the instant case, we have found Regulations 27 and 28 to be inconsistent with the provisions of the Act and are therefore uncertain and unenforceable. Regulation 27 is the foundation of Part V of the

Regulations because it creates the hearing panel. Part V is referred to as **"COMPLAINTS HEARING PANEL'.** If it is quashed nothing would be left of Part V as Regulations that follow are pegged on the existence of the Panel set up under Regulation 27. We are of the view that if Regulation 27 is quashed, it will go with the whole of Part V because the other Regulations would be unenforceable.

Of the panel set up under regulation 27. We are of the view that if Regulation 27 is quashed, it will go with the whole of part V because the other regulations will be unenforceable.

For that reason we hereby quash Regulation 27 with the rest of Part V because it would not make sense to remain with Regulations 28-37. The Applicant also seeks the quashing of all the Regulations made under the Act generally. Counsel however only made specific attack on Regulation 2, 14, 21, 22, 27, 28 and 33. We have already found that all Regulations under Part V cannot stand because they are pegged on Regulation 27 which has to be quashed for being ultra vires the Act. We have also considered the effect of Regulation 14 above, it contravenes rules of natural justice and stands contrary to section 17 of the Act and must be quashed for being ultra vires the Act. Regulation 21 provides for the carrying out of further investigations by the Legal Services Department. Again we find that this Regulation seems to make substantive provisions which are not underpinned in the Act. Section 20 gives powers relating to investigations by public servants or any other agency, of the Government; Section 21 provides for the preparation of

reports by the Respondent to present to the President. S. 22provides for the lodging of a complaint and conduct of an inquiry. Regulation 21 should have been envisaged or underpinned under S. 20 of the Act but it is a new provision standing on its own, giving powers to the Legal Services Department. We find that it is ultra vires the Act, and must be struck off. Regulation 22 flows from Regulation 21 in that it provides for the keeping of each investigation as a report and taking appropriate actions under S.25 of the Act. We find that it is also ultra vires the Act. Though the Applicant sought to have all the Regulations to be quashed, we decline to do so because the Applicant did not demonstrate how each of them was offensive. This court can only deal with those before it.

7.Legitimate Expectation

The Applicant complaints that theirlegitimate expectation of a fair trial has been thwarted because of all the reasons raised by them that there is a real likelihood of bias by the Commissioner sitting as a judge in his own cause; because the Panel as constituted is unlawful, and because the Regulations are uncertain, defective and unenforceable.

As we pointed out earlier, S. 17 of the Act provides that Rules of natural justice will be observed by the Respondent in the performance of its functions which include investigation of human Rights Violations. The Applicant expected to be given a fair hearing and all tenets of natural justice to be observed but from our observations above, we find that the same have been flouted by the Respondent by their own conduct of prejudging the Applicant, being a judge in its own cause; by Regulation 14 breaching rules of natural justice; by the Commissioner committing errors of precedent fact. We also find that the Applicant's Legitimate Expectation that they would get a fair hearing from the Respondent was

breached.

8. The Principle of Proportionality

It is also the Applicant's complaint that the Respondent was in breach of the above principle which was considered in the ex parte **SAITOTI CASE (supra).** The court said,

"An appropriate balance must be maintained between the adverse effects which an administrative authority decision may have on the rights, liberties, or interests of the person concerned and the purpose which the authority is seeking to pursue."
(Quoted from the Committee of Ministers of Europe 1980). The Applicant urged that by entertaining Erastus Waiyaki's complaint in respect of matters that occurred between 1982 and 1987, about 20 years ago, the Commission was in breach of the above principle. On this point, we do agree with the Respondents submission that no decision had yet been made by the Respondents Panel and it would be speculation to find that the Commission had not balanced both interests. The invocation of that principle by the Applicant is premature and we cannot make any finding on it.

9. Original Jurisdiction of the High Court – Obiter

Before we make our conclusions, we are compelled to make this observation. This court is concerned that the KNCHR Act is in some way inconsistent with S. 84 (2) of the Constitution which confers exclusive Original jurisdiction in the High Court covering all of Chapter 5 on Fundamental Rights and Freedoms. The KNCHR Act purports to give Original Jurisdiction to the Human Rights body with a right of appeal to the High Court under 5.25 of the same Act. This is in conflict with S. 84 of the Constitution. However since the Applicant had abandoned the prayer to declare the Act unconstitutional because of the manner this application was presented to court ie by Judicial Review, instead of under the Constitutional provisions, we shall not for now enter where we have not been invited. However, we do request the Hon. the Attorney General to look into those provisions.

In conclusion, we find that the Respondent's actions fall under the three requirements for invoking Judicial Review orders which are impropriety of procedure, irrationality and illegality and therefore attracts the courts intervention. We have found that if the Respondent proceeds with hearing the complaint, there is real likelihood of bias; by Commissioner Godana committing an error of precedent fact: the hearing panel was unlawfully constituted; the Respondent purported to act as judge in their own cause and all these are correctable by Judicial Review orders.
We therefore grant prayer 3 in part for reasons given in the judgment and quash Regulation 2, 14, 21 and 22 of the KNCHR

Regulations, 2005. we also grant prayer 4, quashing Regulation 27 and part V of the KNCHR Regulations 2005.

We also grant prayer 5 & 7, quashing the proceedings in the KNCHR/CHP/2/2006 presided over by Commissioner Godana Doyo and the decision of the said Godana embodied in the ruling delivered on

27th October 2006 respectively.

We also grant prayer 6 prohibiting the Respondent from proceeding with hearing the complaint in KNCHR/CHP/2/06. We direct that each party bears their own costs.

Dated and delivered this 19th day of December 2008.

J.G. NYAMU
JUDGE

R.P.V. WENDO
JUDGE

G.A. DULU
JUDGE