**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI (NAIROBI LAW COURTS)**

**Miscellaneous Civil Application 1298 of 2004**

**IN THE MATTER OF AN APPLICATION BY HONOURABLE MR. JUSTICE MOIJO MATAIYA OLE KEIWUA, JUDGE OF APPEAL AND PRESIDENT OF THE EAST AFRICAN COURT OF JUSTICE FOR JUDICIAL REVIEW AND FOR THE ORDERS OF CERTIORARI, PROHIBITION AND MANDAMUS**

**IN THE MATTER OF: THE CONSTITUTION OF KENYA**

**IN THE MATTER OF: THE JUDICATURE ACT, CAP.8 OF THE LAWS OF KENYA**

**IN THE MATTER OF: THE ADVOCATES ACT, CAP. 16 OF THE LAWS OF KENYA**

**IN THE MATTER OF: THE CIVIL PROCEDURE ACT, CAP.21 LAWS OF KENYA**

**IN THE MATTER OF: THE LAW REFORM ACT, CAP.26 LAWS OF KENYA**

**IN THE MATTER OF; THE LOCAL GOVERNMENT ACT, CAP.265 OF THE LAWS OF KENYA**

**IN THE MATTER OF: THE GOVERNMENT LANDS ACT, CAP.280 OF THE LAWS OF KENYA**

**IN THE MATTER OF: THE REGISTRATION OF TITLES ACT, CAP.281 OF THE LAWS OF KENYA**

**IN THE MATTER OF: THE TRUST LANDS ACT, CAP.288 OF THE LAWS OF KENYA**

**IN THE MATEFR OF: THE REGISTERED LAND ACT, CAP.300 OF THE LAWS OF KENYA**

**IN THE MATTER OF: THE WILDLIFE (CONSERVATION AND MANAGEMENT) ACT, CAP 376 OF THE LAWS OF KENYA**

**IN THE MATTER OF: GAZETTE NOTICE NO.8828 OF 2003, DATED 10TH DECEMBER 2003 AND PUBLISHED IN A SPECIAL ISSUE OF THE KENYA GAZETTE ON THE 11TH DECEMBER 2003**

**IN THE MATTER OF: GAZETTE NOTICE NO.95 OF 2004, DATED 6TH JANUARY 2004**

**IN THE MATTER OF: UNDATED DOCUMENT ENTITLED "IN THE TRIBUNAL TO INVESTIGATE THE CONDUCT OF JUDGES OF APPEAL MOIJO M. OLE KEIWUA AND P. N. WAKI TRIBUNAL MATTER NUMBER 2 OF 2004 IN THE MATTER OF INVESTIGATION OF THE CONDUCT OF HONOURABLE MR. JUSTICE MOIJO M. OLE KEIWUA LIST OF ALLEGATIONS" DRAWN BY ONE MBUTHI GATHENJI COUNSEL ASSISTING THE TRIBUNAL PURPORTED TO BE UNDER RULE 8(2) OF THE RULES OF PROCEDURE OF THE TRIBUNAL TO INVESTIGATE THE JUDGES OF APPEAL PUBLISHED UNDER GAZETTE NOTICE NUMBER 95 OF 6 JANUARY 2004 AND LAID BEFORE THE TRIBUNAL UNDER SECTION 62(5) AND 64(3) OF THE CONSTITUTION OF KENYA (2001)**

**IN THE MATTER OF: DOCUMENT ENTITLED HEARING NOTICE DATED 6TH SEPTEMBER 2004 EMANATING FROM**

**"TRIBUNAL TO INVESTIGATE CONDUCT OF JUDGES OF APPEAL (G. N. No.8828 of 2003)"**

**IN THE MATTER OF:**

**THE REPUBLIC.....APPLICANT**

**VERSUS**

**THE HONOURABLE THE CHIEF JUSTICE OF KENYA…..…..1ST RESPONDENT**
**MR. JUSTICE (RTD) AKILANO MOLANDE AKIWUMI.....…...2ND RESPONDENT**
**MR. JUSTICE BENJAMIN PATRICK KUBO....…….....……..3RD RESPONDENT**
**JOE OKWACH ……..…….…….....…….……4TH RESPONDENT**
**PHILIP NZAMBA KITONGA…….....…….5TH RESPONDENT**
**WILLIAM SHIRLEY DEVERELL…….....…….……...…6TH RESPONDENT**
**(THE 2ND TO 6TH RESPONDENT BEING THE PERSONS APPOINTED AS CHAIRMAN AND MEMBERS RESPECTIVELY OF THE TRIBUNAL TO INVESTIGATE THE CONDUCT OF JUDGES OF APPEAL)**
**MBUTHI GATHENJI (AS COUNSEL ASSISTING THE TRIBUNAL TO INVESTIGATE THE CONDUCT OF JUDGES OF APPEAL)……..7TH RESPONDENT**

**JUDGEMENT**

Following widespread and persistent allegations of corruption in the Judiciary for some years, the Hon. the Chief Justice of the Republic of Kenya appointed the Integrity and Anti-Corruption Committee of the Judiciary on 19th March, 2003. The terms of reference of the committee were as follows: -

**(i) investigate and report on the magnitude of corruption in the Judiciary;**

**(ii) identify the nature, forms and causes of corruption:**

**(iii) find out the level of bribery in monetary terms;**

**(iv) report on the impact of corruption on the performance of the Judiciary;**

**(v) identify corrupt members of the Judiciary and recommend disciplinary or other measures against them;**

**(vi) recommend strategies for the detection and prevention of corruption in the Judiciary; and**

**(vii) address any other related matters.**

The members of the above committee were as follows: -

- **Hon. Justice Aaron Gitonga Ringera – Chairman**
- **Hon. Justice J W Onyango Otieno - Member**
- **Hon. Mrs. Wanjiru Karanja - Member**
- **Hon. Mrs. Margaret W Muigai - Secretary**

The Committee is popularly referred to as the **Ringera** Committee.

The Committee carried out its work and submitted its report to the Hon. The Chief Justice on 30th September, 2003. In the report a number of Judicial Officers were implicated in allegations of corruption, misbehavior, and unethical conduct. The applicant was one of the judges indicted in the **Ringera** Committee Report On receipt of the report, the Hon. Chief Justice made a representation to the President **H.E. Hon. Mwai Kibaki** to form a Tribunal. H.E the President vide Gazette Notice No. 8828 dated 10th December, 2003 appointed a Tribunal to investigate the applicant's conduct under section 62(5) and 64(3) of the Constitution.

The members of the Tribunal were as follows:-

- **Justice (Rtd) Akilano Molande Akiwumi**
- **Justice Benjamin Patrick Kubo**
- **Joe Okwach**
- **Philip Nzamba Kitonga**
- **William Shirley Deverell**

The Tribunal gazetted its Rules of Procedure vide Gazzette Notice No. 95 in a special issue of the Kenya Gazette published on 6th January, 2004.

Subsequently, vide Gazette Notice No. 377 dated 19th January, 2004 H.E. The President appointed Mr. **Mbuthi Gathenji,** as assisting counsel and **Margaret Nduku Nzioka** as secretary to the Tribunal.

The applicant was suspended from performing his functions as a Judge of Appeal on 15th October, 2003. By the time of his suspension, the applicant was also the President of the East African Court of Justice. The record shows that the applicant was admitted to the roll of the Advocates of the High Court of Kenya on 21st May, 1973. In March 1973 he employed in the Attorney General's office as a State Counsel subsequently rising to the position of Deputy Chief Litigation Counsel. In 1993 the applicant was appointed a Puisne Judge of the High Court of Kenya. He served in that position until 1998, when he was promoted to the Court of Appeal.

Following the suspension of the applicant and the appointment of the Tribunal to investigate his conduct, the applicant exchanged several letters with the Tribunal requesting for the allegations and the summary of the evidence as were drawn by the Tribunal in satisfaction of its mandate. The applicant did not receive favourable response. However, sometimes in September 2004 he was served with an undated list of allegations that were according to the Tribunal to form or constitute the subject matter of the investigations before the Tribunal. The applicant being aggrieved by the decision of the Tribunal approached the High Court to address and determine the dispute between him and the Tribunal. It suffices to say that the dispute before us is not limited to the dispute between the applicant and the Tribunal. It extends to the failure of the Ringera Committee and the Chief Justice to accord the applicant an opportunity to question the complaints levelled against him and to put his side of the story before a representation was made to the President.

In a Chamber Summons dated 30th September, 2004 the applicant sought leave to commence judicial review proceedings. In a ruling by **Ibrahim J**., the applicant obtained leave to commence judicial review proceedings. In his ruling granting leave, **Ibrahim J**. stated, inter alia,

> **"…. Without doubt the application before this court is probably the first of its kind in the history of our legal system in which a judge of the Court of Appeal has brought such an application to contest and oppose tribunal to investigate the conduct of Judges of Appeal from commencing their proceedings. It has been a momentous era in the Judiciary since the publication of the Ringera**

> **report and it is not surprising that the ramification theory could lead to an application of this nature.**
>
> **At this stage I do find this application raises on a prima facie basis very serious and fundamental issues relating to the manner in which the Tribunal has conducted itself and in particular the timing of the hearing and whether there is inordinate delay or not, the framing of the charges, mode of service and all other allegations made…… there is no way that one can disregard the sensitivity of this application considering its nature and parties involved. It could be a test of the independence of our judiciary and the extent to which our jurisprudence has developed in so far as due process and the rule of law is concerned. Of greater importance is the rights of the applicant to articulate his grievances before the High Court of Kenya before he possibly faces the biggest challenge to his livelihood and career."**



Having been granted leave to commence judicial review proceedings, the applicant filed the Notice of Motion dated 8th October, 2004 seeking the following orders-

**(a)** **CERTIORARI** to call up into the Honourable Court

and to quash the decision issued and given by the 2nd Respondent as Chairman of the "**Tribunal to Investigate Conduct of Judges of Appeal" and dated the 3rd day of September, 2004 being a "Hearing Notice"** commanding the Applicant herein, Honourable Mr. Justice Moijo Mataiya Ole Keiwua, to appear at the Tribunal at 10 a.m. on the 4th October, 2004 and at any adjourned session thereof;

**(b)** **CERTIORARI** to call up into the Honourable Court and to quash the decision of the 7th Respondent as Counsel Assisting the Tribunal to draw and lay

an undated list of allegations number from **"Allegation Number one" up to "Allegation Number Ten" before the "Tribunal to Investigate Conduct of Judges of Appeal"** which list is vexatious, unconstitutional, outside the mandate of a Tribunal under section 62 of the Constitution of Kenya, illegal and does not flow from any representation made to His Excellency the President by the 1st Respondent in the manner envisaged by the Constitution of Kenya and the common law embodied in the Constitution of Kenya properly interpreted and applied;

(c) **PROHIBITION** to prohibit the 2nd and 3rd, 4th, 5th and

6th Respondents, being respectively the Chairman and the members of the "Tribunal to Investigate the conduct of Appeal Judges", from commencing, or if they shall have commenced, from continuing, to carry on the investigation into the conduct of the Honourable Mr. Justice Moijo M. Ole Keiwua whether as Tribunal matter Number 2 of 2004 and under the List of Allegations laid before them by the 7th Respondent or otherwise under Gazette Notice No. 8828 of 2003 and pursuant to Gazette Notice No. 95 of 2004, such investigation being without jurisdiction, unconstitutional in most respects and illegal in other respects and in breach of the rules of natural justice.

d. **PROHIBITION** to prohibit the 2nd and the 3rd, 4th, 5th and 6th Respondents, being respectively the Chairman and members of the "Tribunal to Investigate the Conduct of Appeal Judges", from commencing, or if they shall have commenced, from continuing to carry on investigation into the conduct of Honourable Mr. Justice Moijo M. Ole Keiwua whether as Tribunal Matter Number 2 of 2004 and under the List of Allegations laid before them by the 7th Respondent or otherwise under Gazette Notice No. 8828 of 2003 and pursuant to Gazette Notice No. 95 of 2004, such investigation being contrary to the legitimate expectations of the Applicant Judge herein who had been informed by the Registrar of the High Court that before the Tribunal could be established he would be afforded the opportunity to rebut any evidence or allegation against him concerning his behavior as a Judge.

e. **PROHIBITION**, in the alternative to prayers (c ) and (d), to prohibit the 2nd, 3rd, 4th, 5th and 6th Respondents by themselves, their agents, servants, officers from commencing or continuing or carrying on any investigation, inquiry, report and recommendations concerning the Honourable Mr. Justice Moijo Mataiya ole Keiwua whether in accordance with the Terms of Reference and the Constitution of Kenya as urged by Mbuthi Gathenji Counsel Assisting the Tribunal or otherwise and more specifically to prohibit investigations, inquiry, report and recommendation.

1. On allegation Number one **"That while a judge of the Court of Appeal you abused your office as a judge and conducted yourself in a manner inconsistent with the dignity of a judicial officer"** because the allegation is founded on unconstitutional grounds and frivolous and vexatious grounds some of which are an abuse of the process of the court, the principal legal adviser to the Government, the Attorney General, having advised the 7th Respondent that the allegation involving High Court Civil Suit 1565 of 2000 which raises constitutional issues and was not ever heard by Honourable ole Keiwua or Honourable Rimita is outside the mandate of the Tribunal.

2. On allegation Number Two **"That while Judge of the Court of Appeal you influenced and interfered with the cause of Justice"** because the allegation is founded on unconstitutional grounds and is frivolous and vexatious and an abuse of the Court process, the principal legal adviser to the Government, the Attorney General, having advised the 7th Respondent that the allegation involving High Court Civil Suit 1565 of 2000 and other cases connected therewith including High Court Miscellaneous Civil Application No. 1271 of 2002 which raise constitutional issues and was not ever heard by Honorable ole Keiwua or Honourable Rimita are outside the mandate of the Tribunal and in any case the Tribunal lacks jurisdiction to sit in appeal or review of the High Court of Kenya in its special jurisdiction of judicial review.

3. On Allegation Number Three **"that while judge of Court of Appeal you abused your office and conducted yourself in a manner inconsistent with dignity of a judicial officer"** because the allegation is founded on unconstitutional grounds and is frivolous and vexatious and an abuse of the court process, the principal legal adviser to the Government, the Attorney General, having advised the 7th Respondent that the allegation involving Nakuru Chief Magistrate's Court Criminal Case No. 1445 of 2000 and Nairobi Chief Magistrates' Court Case No. 2157 of 2000 Republic Vs. Livingstone Kunini Ntutu and other case connected therewith raise constitutional issues and was not ever heard by Honourable ole Keiwua and are outside the mandate of the Tribunal.

4. On Allegation Number Four **"That your integrity, conduct, and moral standing as a Judge of the Court of Appeal is not above reproach in view of reasonable fair-minded and informed persons"** because the allegation refers to periods prior to the appointment of Honourable Mr. Justice Moijo ole Keiwua as judge and long after he had been appointed a judge of appeal all on the studious recommendation of the constitutional body, the Judicial Service Commission, and in any case the Terms of Reference for the Tribunal relate to "allegations that the said Judges of Appeal have been involved in corruption, unethical practices and absence of integrity in the performance of their duties" and the allegations do not arise out of and do not relate to and are not connected to the performance of the duties of judge.

5. On Allegation Number Five **"That as a judge you have not conducted yourself in a way that is consistent with the dignity of the judicial office and have put your integrity into question"** because the allegation concerns the direct allocation of L.R. No. 209/13239 which was the subject of High Court of Kenyan proceedings Civil Case No. 302 of 1997 and ended up in the Court of Appeal. The decisions thereon were final and no criminal activity is alleged so that the Honourable Mr. Justice Moijo M. ole Keiwua could be charged with any criminal offence after the civil proceedings were finalized.

6. On Allegation Number Six **"That as a judge you have not conducted yourself in a way that is consistent with the dignity of the judicial office and have put your integrity into question"** because the allegation concerns the direct allocation of L.R. no. 209/13239 which was the subject of High Court of Kenya and Kenya Court of Appeal proceedings. The decisions thereon were final. No criminal activity is alleged so that the Honourable Mr. Justice Moijo M. ole Keiwua could be charged with any criminal offence after the civil proceedings were finalized. The principal legal adviser to the Government, the Attorney General had given independent advise to the Commissioner of Lands concerning the matter and it is now outside the mandate of the Tribunal especially as these are matters that the Judicial Service Commission must have considered or is assumed to have considered in recommending the Honourable Mr. Justice Moijo M. ole Keiwua for promotion to Judge of Appeal.

7. On Allegation Number Seven **"That you failed to perform your judicial duties including the delivery of reserved decision effectively, fairly and with reasonable promptness"** because the person who was alleged to have complained one Mr. John Savage has already complained to the 7th Respondent that he will not be appearing at the Tribunal and he at no time accused Honourable Mr. Justice Moijo M. ole Keiwua of corruption or other impropriety; moreover the matter of the alleged complaint has been dealt with by the 1st Respondent under the appropriate Civil Procedure Rules as Mr. John Savage had wanted.

8. On Allegation Number Eight **"That you conspired and collude with among others Mr. Steve Musalia Mwenesi, Perrie Hennessey, and Mr. Mohammed Nyaoga to defeat the cause of justice"** because the allegation relates to the period "1992 and 1998" and yet the Honourable Mr. Justice Moijo M. ole Keiwua was not appointed a Judge until December 1993. If there was conspiracy then the 1st Respondent ought to have arranged for the Honourable Mr. Justice Moijo M. ole Keiwua and his alleged co-conspirators to be charged with criminal offences; the Tribunal lacks jurisdiction.

9. On Allegation Number Nine **"That you abused your position of Judge and failed to observe the basis standard of decorum befitting a judge of the High Court of Kenya" because the allegation relates to the period "1992 and 1998"** and yet the Honourable Mr. Justice Moijo M. ole Keiwua was not appointed a Judge until December 1993. If there was failure to observe that basic standard and decorum befitting a Judge of the High Court then the matter should have gone to the Court of appeal and the Tribunal lacks mandate concerning the course and management of the suit the subject of the allegation. Moreover the allegation does not state or show that the matter of the proceedings in which the Honourable **Mr. Justice Moijo M. ole Keiwua** lacked decorum was reported to the 1st Respondent for the 1st Respondent to make any representation thereon under section 62 (4) of the Constitution and thereby invoke the Tribunal jurisdiction and powers. The allegation is oppressive to the Judge, an abuse of the court process and scandalizes the standing not only of the 1st Respondent but the Honourable **Mr. Justice Moijo M. ole Keiwua**.

10. On allegation Number Ten **"That while engaged as a state Counsel in the Attorney-General's Chambers and later as Judge of the High Court of Kenya, you deliberately and unlawfully obstructed and frustrated the payment of legitimate claims to a contractor who had declined to give you a bribe of Kshs.3 million"** because on the evidence the Honourable Mr. Justice Moijo M. Ole Keiwua has never handled any file relating to Jomeka Civil Engineering Contractors the alleged complainant and the allegation is scandalous, vexatious and calculated merely to embarrass the Honourable Mr. Justice Moijo M. Ole Keiwua; it was never reported to the 1st Respondent for the 1st Respondent to make representation thereon and thereby invoke the jurisdiction of the Tribunal.

f. **MANDAMUS** directing the 1st Respondent to observe and follow the Constitution of Kenya in letter and spirit and the common law embodied therein relating to the rules of natural justice, if there is any question of the removal of the

Honourable **Mr. Justice Moijo M. Ole Keiwua** to be investigated under the Constitutional of Kenya.

For the purposes of our determination we need to narrate the following which we think is pertinent for the issues before us. One day before filing the Chamber Summons that is 29th September, 2004 a Notice to the Registrar was filed together with a **Statement of Relief and Grounds for seeking relief.** Also filed was a **Verifying Affidavit** sworn by the applicant. The said affidavit is a long affidavit comprising of 318 paragraphs with several annextures marked as **"MMOKI**" which include a copy of an affidavit sworn in London on 5th December, 2003 by **Nassir Ibrahim Ali** described as Chairman and Chief Executive Officer World Duty Free Limited. Also filed was a **Verifying Affidavit** sworn by one **Kipeen Ole Saiyalel** on 29th September 2004. Another verifying Affidavit sworn by one **Tompoi Ole Keiwua** on 29th September, 2004 and a **Verifying Affidavit** sworn on 29th September, 2004 by **Stephen Musalia Mwenesi** were filed. Lastly, an **Affidavit** sworn by **Jackson Tompoi Ole Saikah** was filed.

The **Statement** gives the description of the applicant, the reliefs sought and states that the applicant shall rely on his own verifying affidavit and the verifying affidavits of **Tompoi Ole Keiwua**, **Stephen Musalia Mwenesi** advocate and **Kipeen Ole Saiyalel**. The statement also gives the grounds on which the relief is sought. The verifying affidavit of the applicant depones, inter alia, to his qualifications, professional and work experience, and the circumstances, as far as he knew, of his suspension. The verifying affidavit of **Kipeen Ole Saiyalel** depones that he was visited by some Anti Corruption Commission officers who asked him about a case involving **Olkiombo Limited** and **Kununi Ole Ntutu**.

The verifying affidavit of **Mr. Mwenesi** advocate states that he never colluded with the applicant and others as alleged by the tribunal vide allegation No.8. On the other hand the verifying affidavit of **Tompoi Ole Keiwua** states that on 3rd September, 2004 in the afternoon some people went to the official residence of the applicant intending to serve documents from the Tribunal.

When the Notice of Motion was filed, a number of responses were filed. The first was a replying affidavit sworn on 6th December, 2004 by **Mbuthi Gathenji** the 7th respondent which was filed on 7th December, 2004.

The replying affidavit of **Mbuthi Gathenji** challenged the contents of the verifying affidavit of the applicant and emphases that the deponent is a stranger to allegations made by **Jackson Tompoi Ole Siaka** and allegations made against **Hon. Ole Ntutu.** It was admitted in the said affidavit that it was true that the Tribunal had come across an affidavit sworn by **Nassir Ibrahim Ali** and that investigations were being carried out. It was also admitted that **Kipeen Ole Saiyalel** was interviewed by investigators from the Tribunal and his evidence found relevant.

The affidavit of **Stephen Kanyinke Ole Ntutu** denies that the deponent was a party or made a complaint to the **Ringera** Committee. The affidavit of **Sylvester Kitilai Ole Ntutu** denies that the deponent had met the applicant after the applicant was suspended. The affidavit of **Margaret Nduku Nzioka** on the other hand states that the Tribunal to Investigate Court of Appeal Judges was properly appointed and had powers to make rules for conduct for its business. That the Tribunal made rules and served a hearing Notice on the applicant under Rule 8(1). That Rule 3 was not breached, as such breach could only occur after commencement of the Tribunal's proceedings.

After the Notice of Motion was filed, the matter was placed before the Hon. The Chief Justice for directions as ordered by **Ibrahim J.** at the time he granted leave. On 9th December, 2004 the Hon. The Chief Justice appointed **Nyamu** and **Ibrahim JJ** to preside over the matter. On the 15th December 2004 **Nyamu J** *(as he then was*) disqualified himself from hearing the matter. Consequently, the matter was referred back to the Chief Justice to appoint another bench. On 9th June 2005 the Chief Justice nominated **Lesiit, Wendoh and Emukule JJJ** to preside over the hearing of the matter.

On the 13th June, 2005 when the matter came up before **Lesiit, Wendoh and Emukule JJJ**, learned counsel for the applicant, **Mr. Mwenesi**, raised the issue of the replying affidavits filed by **Ole Ntutu** brothers He also objected to affidavit sworn by **Margaret Nduku Nzioka** on 15th December, 2004. In essence learned counsel for the applicant requested the court to expunge the three affidavits from the record as they were filed by unknown parties. In addition, counsel sought leave to respondent to the affidavit sworn by **Mr. Mbuthi Gathenji** on 6th December, 2004. The application was opposed by **Mr. Gathenji**.

In a ruling delivered on 14th June, 2005 the High Court had this to say-

> **"We were asked by Mr. Ombwayo, learned Counsel for the 1st to 6th Respondents to strike out these Affidavits, as being improperly on the record, and having been drawn by M/s Katwa & Co. advocates, counsel who are not on record for any of the parties. We will however not strike them out. Firstly we think that these affidavits are in support of Mr. Mbuthi Gathenji's Affdiavit, and ought to remain on record. Secondly, although they have been drawn by counsel who is not on record in these proceedings, we think that this is a mere irregularity only which goes to the form, and not the substance of this matter."**

The High court went further to state-

> **"For these same reasons we will allow the applicant to respond thereto, and do so within TEN (10) DAYS from the date of this Ruling. Although the applicant fails in all other grounds adduced by Mr. Mwenesi, we allow the application for adjournment to enable the applicant to respondent if necessary, to any new grounds which may have been raised in the affidavits of Stephen Ole Ntutu and Sylvester Ole Ntutu respectively."**

The applicant was definitely aggrieved by the decision of the High Court. He filed an appeal to the Court of Appeal. In the meantime he filed a further affidavit on 24th June, 2005.

The appeal was heard before **Tunoi, Bosire** and **O'Kubasu JJJA**. In a ruling delivered on 11th July, 2008, the court overturned the decision of the High Court on the affidavits, and also ordered that the case be heard by another bench, other than **Lesiit, Wendoh** and **Emukule JJJ**. In addressing the issue of the affidavits the court had this to say-

> **"From what is on record it cannot be denied that Ole Ntutu brothers were not parties in the proceedings before the superior court or in the Constitutional Tribunal. It is**

**significant to note that the two affidavits were prepared by an advocate who was not on record in the notice of motion. Again the affidavits were sworn before Mr. Gathenji had sworn his affidavit and yet they are being described as being in support of Mr. Gathenji's affidavit. How could they support a document which was not yet in existence? We also found it rather interesting that while Mr. Ombwayo objected to these affidavits when the matter was argued in the superior court he changed his stand when he reached this Court and was of the view that the affidavits should remain on record.**

**A question of expunging an affidavit of a non party was raised and dealt with in the recent decision of this Court in Jassir Singh Rai & Others Vrs Tarlochan Singh Rai & Others in Civil Application No. NAI 307 of 2003 (unreported) especially in the ruling of Bosire J.A.**

**In that case as in this one, a person who was not a party in the litigation filed an affidavit to respond to certain allegations made against him. Objection was raised to that affidavit. This Court ruled, that while the Constitution and public policy demanded that a person should not be condemned unheard; there is another equally important issue of public policy that there be an orderly dispensation of justice. It is the duty of the Court to balance the conflicting issues. We think that it was highly irregular and improper for the Ntutu brothers to have filed these affidavits. We think that the Superior Court improperly took a lenient view of the matter by allowing those affidavits to remain on record.**

**Although this was an interlocutory appeal the vigour and anxiety with which all counsel appearing before us argued the matter made us feel that there was something the parties to this appeal are not willing to reveal. We say so because what provoked this appeal was a very simple order of the superior court. Indeed, the appellant was granted an adjourned as requested and was granted leave to file replying affidavits. Additionally, there would have been no basis for this appeal had the superior court not said that the affidavits were filed in support of Mr. Gathenji's affidavit which as we said earlier had not been filed. Besides as we have stated above the Ntutu brothers were not parties and never sought leave of the Court to file the affidavits.**

**We have given the background to this matter as regards the affidavits of the Ntutu brothers. These affidavits were sworn by two people who were not parties to the proceedings in the superior court. Moreover, the two did not seek leave of the Court to be joined as parties and they purported to swear affidavits in support of yet to be sworn affidavit of Mr. Gathenji in our view the Ntutu brothers would qualify as busy bodies who had no business in swearing and filing these affidavits. In doing so, they betrayed themselves as person with some vendetta against the appellant and were ready to go to any length to crucify the appellant with or without any justification. For those reasons we would order that the affidavits of the two Ntutu brothers be and are hereby expunged from the record.**

**In view of the foregoing, this appeal is allowed to the extent that the affidavits of the non-parties Stephen Kanyinke Ole Ntutu and Sylvester Kitilal Ole Ntutu sworn on the 19th November, 2004 as well as the appellant's replying affidavit**

> **sworn on the 24th June, 2005 are expunged from the record of the superior court. Costs of the appeal are awarded to the appellant. The Notice of Motion shall proceed to hearing in the superior court before any judges excluding Lesiit, Wendoh and Emukule, JJ. These shall be our orders."**

After the Court of Appeal's ruling, the matter was referred back to the Chief Justice to nominate another bench to hear and conclude the matter. The Chief Justice appointed **Okwengu, P.K. Kariuki** and **Warsame JJJ** in place of the bench which was disqualified by the Court of Appeal.

The matter then proceeded for hearing and in the middle of the hearing the counsel for the applicant sought an assurance that the bench as constituted was comfortable in dealing with the matter. In particular **Lady Justice Okwengu** who was involved in another Tribunal which investigated **Mbaluto, J**. and which recommended his removal as a High Court Judge. **Mr. Mwenesi** contended that in a matter that was pending before the High Court involving **Mbaluto J**. he intended to raise or canvas the same or similar issues as in this case. As a result, **Okwengu J.** disqualified herself and the Chief Justice appointed **Khamoni J**. in place of **Okwengu J**. On 8th July, 2009, **Khamoni J**. also disqualified himself on the grounds that it will be very difficult for him to be impartial and the matter was referred back to the Chief Justice.

On 2nd November, 2009 the Hon. The Chief Justice appointed the present bench. On 14th December, 2009 the matter proceeded to hearing. We completed the hearing of the arguments for the parties on 18th December, 2009 and reserved our decision.

In the arguments that were presented before us which were written or oral, the parties raised the following issues. The first issue is the preliminary objections raised by the 1st to 6th respondents. In these objections, the respondents attacked the statement and verifying affidavits to the chamber summons for leave and contended that the verifying affidavits and statement were not filed with the Chamber Summons.

To this objection counsel for the applicant responded that the 1st to 6th respondents misinterpreted the applicable rule which uses the word "***accompanying***". It was counsel's contention that the word "***accompanying***" was adjectival. The same is synonymous with the word supplementary, associated, complementary, and additional. It was the contention of

counsel that this meant that the documents accompanying the Chamber could exist before, simultaneously, or after the Chamber Summons comes into existence. Therefore, there was no basis for attacking the leave granted on that objection as contended by the 1st to 6th respondents.

Counsel for the applicant also faulted the procedure used for attacking the leave granted by way of preliminary objections. Counsel submitted that the attack on the leave granted should have been by way of a formal application. Reliance was placed on the case of **Judicial Commission Of Inquiry Into The Goldenberg Affair & 2 Others Vs John Kilach Civil Application Nairobi 77 of 2003 (UR 40/03)** delivered on 9th April 2003 wherein the court of Appeal analyzed the case of **R Vs Secretary Of State For The Home Department & Another, Ex-Parte Herbage (No. 2) (1987) 1All ER 324**on the procedure for challenging grant of leave. Counsel emphasized that the procedure to challenge leave should either be by way of a formal application to the Judge who made the order granting leave or by way of an appeal.

The second objection by the 1st to 6th respondent was that the High Court lacked jurisdiction to entertain the applicant's application. Counsel for the 1st to 6th respondents submitted that this objection by the Respondents was firstly that the office of the Chief Justice which was a Constitutional Office could not be questioned when exercising its powers as administrator of the judiciary through the High Court exercising powers under the Law Reform Act ***(Cap 26)*** and the Constitution. Secondly, that to question the procedure adopted by the Tribunal was an affront to the President who donated power to the Tribunal to make rules of procedure. In short to challenge the tribunal was tantamount to challenging the President. The respondents counsel relied on the decision of **Nyamu J** *(as he then was)* **In The Matter of Lady Justice Roselyn Naliaka Nambuye – High Court Misc. application No. 764 of 2004** wherein the court came to the conclusion that there was immunity both to the Chief Justice and the President from being sued.

In response, the applicant's counsel submitted that the applicant had raised issue with the Chief Justice herein as the administrator of the Judiciary and not as a Judge of the High Court. If the Chief Justice made recommendations to the President under section 62 of the Constitution, he was not exercising Judicial powers and was therefore not immune from suit or proceedings through judicial review under the inherent power of the High Court. The mandamus order sought against the Chief Justice was justified because such an order was

available where there was a legal right to act and there is no specific, equally convenient and effective remedy for default. Therefore, it was necessary for the Chief Justice to have informed the applicant of the representations he made to the President in line with the decision in the case of **Hon. Justice Amraphael Mbogholi Msagha Vs The Hon. The Chief Justice of The Republic of Kenya & 7 Others – Hc Misc. Application No. 1062 of 2004** wherein the court held that the only questions to be investigated by the Tribunal are those disclosed in the Chief Justice's representations to the President. It was emphasized that the Chief Justice should have at least filed an affidavit to show this court that he indeed made representations to the President that the allegations served on the applicant by the 2nd to 6th respondents were the allegations to be investigated.

On the issue of the Presidential Immunity, counsel for the applicant submitted that the President was not made a party because he was not "***directly affected***" by the matters presented to the court. Counsel emphasized that the attack on the Chairman and the Tribunal was not an attack on the President. He submitted that the applicant was not querying the President's right or power to sign any Gazette Notice. He was however, concerned with the Chief Justice's failure to observe the rules of natural justice and the Tribunal Chairman's and members' apparent lack of jurisdiction under section 62 of the Constitution. The applicant also contested the allegations drawn by Assisting Counsel in apparent violation of the published instrument appointing the Tribunal, namely Gazette Notice No. 8828 of 2003. In any case, in terms of section 60 and 123(8) of the Constitution the High Court has constitutional powers to examine the exercise of powers and jurisdiction of authorities established by the Constitution including the President of the Republic. Counsel maintained that section 14 of the Constitution cannot be used to immunize the President as the protection covers only criminal or civil actions, and judicial review proceedings are neither civil nor criminal proceedings as was held in the case of **The Commissioner of Lands Vs Kunste Hotel Limited Civil Appeal No. 234 of 1995**.

It was emphasized that in cases relating to Tribunals where there was no right of appeal, such tribunals were under a common law duty to act fairly and should be subject to judicial review. Reliance was placed on the case of **R Vs Civil Service Appeal Board (1992) Law Reports of the Commonwealth 941**. Counsel submitted that the Chief Justice and the Tribunal were therefore subject to judicial review and it did not matter if the Tribunal was appointed by the President. Counsel also contended that in the case of **Republic Vs The**

**Judicial Commission into the Goldernberg Affair & 2 Others ex-parte Hon. Professor George Saitoti – H.C. Misc. Application No. 206 of 2006 Nyamu** J *(as he then was),* **Wendoh J**, and **Emukule J** held that the commission was a judicial body and though it had made its report and recommendations to the President of the Republic, it was subject to the Judicial Review jurisdiction of the High Court.

Several cases were cited by counsel for the applicant on the issue of the availability of the prayer of mandamus against the Chief Justice, including the case of **Padfield Vs Minister of Agriculture, Fisheries and Food and Others (1968) I All Er 694 and the case of R Vs Commissioner Of Lands & The Minister Of Lands – Ex Parte Coast Aquaculture Ltd – HC Misc. Civil Application No. 55 of 1994 (Msa).** It was contended that the decisions showed that mandamus was available against the Chief Justice as applied for herein by the applicant.

With regard to the third objection that the application should have been brought by way of a Constitutional reference, counsel for the applicant contended that sections 67 and 84 of the Constitution prescribed the procedure for bringing constitutional references to the High Court. Section 62 of the Constitution was not part of or associated with the above two sections, unless the matter was purely one of enforcement of fundamental rights of an affected judge. In the present case, counsel argued, the applicant was concerned with the procedures adopted by the Tribunal and the Chief Justice and the Assisting Counsel in going about their tasks. The matter was therefore to be brought by way of judicial review application for the High Court to determine whether lawful authority was abused. All persons in Kenya had the unquestionable administrative law remedy of judicial review. Reliance was placed on the cases of **Githunguri Vs Republic (1986) KLR I, And Republic Vs The Judicial Commission of Inquiry into the Goldernberg Affair & 2 Others - Ex- Parte Prof. George Saitoti – HC Misc. Civil application No. 206 of 2006.**

With regard to the Gazette Notice No. 8828 of 2003 counsel for the applicant submitted that it did not comply with the special requirements of section 62 of the Constitution. Counsel submitted that under section 62, the mandate of the Tribunal was required to limit itself to the representation of the Chief Justice. Counsel emphasized that in **Hon. Amraphael Mbogholi Msagha Vs The Hon. Chief Justice of The Republic of Kenya (supra)** the court found that the words "***including but not limited to***" were unconstitutional and ultra vires section 62 of the Constitution.

Counsel argued that the letter of 5th January, 2004 from the Chairman of the tribunal to the applicant's counsel talked of "**allegations to be formulated**" and service of allegations and summary of evidence be done only after the Assisting counsel had completed gathering evidence, which showed clearly that the Tribunal was acting beyond its mandate. In any case, counsel contended that under section 62 and 64 of the Constitution, a Judge can only be investigated on misbehaviour or inability to perform the functions of his office not "***conduct***". It was also submitted that the suspension under section 62 of the constitution is not suspension from office, but suspension from performance of the functions of duties. And therefore it was submitted that a suspended judge was entitled to full pay and privileges. We were urged to draw guidance from the cases of **Clark Vs Honourable Amanda Vanstone [2004] Gca 1105 (27th August 2004); Anstone Vs Clark [2005] FCAFC 189 (6th September, 2005); And Lawrence Vs Attorney-General (Grenada)[2007] UKPC 18** (26th March 2007). Counsel also urged us to be guided by the fact that Kenya was a party to the UN Basic Principles on the Independence of the Judiciary, 1985 which provides, inter alia, that-

> **17. A charge or complaint made against a Judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The Judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.**
>
> **18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties.**
>
> **19. All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct.**
>
> **20. Decisions in disciplinary suspension or removal proceedings should be subject to an independent review. This principle may not apply to the decisions of the highest court and those of the legislature in impeachment or similar proceedings.**

Counsel also invited us to be guided by the ***Commonwealth (Latimer House) Principles*** on the Accountability of and the Relationship between the three branches of Government (2005) published by the Commonwealth Secretariat – which gives guidance to member states when dealing with discipline and removal of judges, as well as the publication ***Judges on Trial*** - a-study on the appointment and accountability of the English Judiciary (1976) by **Shimon Shetreet** of the Hebrew University of Jerusalem.

On the complaint that the Chief Justice did not take action before the establishment of the Tribunal under section 62 of the Constitution by the President, counsel submitted that the Chief Justice should have confronted the applicant before making any representations to the President. Counsel relied on the **Report and Recommendations of The Tribunal to Investigate the Conduct of The Hon. Mr. Justice P N Waki JA** (August 2004) wherein the Tribunal observed: -

> **"Although no procedure is laid down in the Constitution regarding the making of such representation to the President, should the Chief Justice in the process of satisfying himself whether he should make a representation, not first seek a response of the affected Judge to the complaint of misconduct? The rules of natural justice in our view, demand that, that should have been done..... The procedure for removal of a judge from office is now well settled by the Privy Council decision in the well known case of** REES AND OTHERS Vs CRANE (1994) I All ER".

Counsel submitted that the applicant was actually given a copy of the **Ringera** Committee Report by the Registrar of the High Court on the instructions of the Chief Justice. It was clear that the report recommended "***appropriate disciplinary process***". Counsel contended that for magistrates it would include a show cause letter why he/she should not be dismissed, which was done. However, there was no communication to applicant prior to the formation of the Tribunal. Counsel contended that the Assisting Counsel should have brought the above shortcomings to the attention of the Tribunal, since he did not state that he drew or formulated the allegations against the applicant from representations made by the Chief

Justice to the President. It was contended therefore that the orders of mandamus in prayer (f) and prohibition in prayer (e) should be granted.

On the issue as to whether the allegations drawn by the 7th respondent flow from the representations made by the 1st respondent, counsel submitted that no representations of the Chief Justice were produced or referred to in court. In any case, counsel contended that allegation No. 8 could not possibly arise from the **Ringera** Committee report. Counsel argued that none of the allegations drawn by the Assisting Counsel related to the performance of the applicant as a Judge of Appeal as was envisaged under the Gazette Notice. The only allegation that related to the conduct of the applicant as a Judicial Officer was in respect of the period that he served as a Puisne Judge of the High Court. Even that charge is said to be still under investigation. Counsel therefore urged us to grant the prohibition sought under prayer (e) and the certiorari sought under prayer (b), as well as the prohibition sought against the 2nd and 6th respondents under prayer (d).

Counsel contended that the applicant reasonably expected that the respondents would only investigate the allegations made against him at the date the President published Gazette Notice No. 8828 of 2003 to wit those in the **Ringera** Committee report.

In response to the submission of the applicant's counsel **Mr.Ombwayo** for the 1st to the 6th respondent relied on the replying affidavit filed on 15th December, 2004 sworn by **Margaret Nduku Nzioka** described as Chief Parliamentary Counsel Attorney-General's Chambers and Secretary to the Tribunal Investigating the Conduct of Judges of the Court of Appeal. In the said affidavit, it was deponed, inter alia, that the said Tribunal was mandated to investigate Judges of Appeal **(*namely Justice Moijo M Ole Keiwua and Justice P N Waki*)** on allegations that the said Judges had been involved in corruption, unethical practices and absence of integrity in performance of their functions, and make recommendations expeditiously to the President; that the President gave the Tribunal powers to regulate its own procedure; that the Tribunal made Rules of Procedure on 23rd December, 2003 pursuant to the powers conferred on the Tribunal by the President under section 62 and 64 of the Constitution of Kenya; that a hearing notice was issued upon the applicant by the Chairman to the Tribunal within the terms of Rule 8(1) of the Rules of Procedure of the Tribunal; that the Tribunal had not breached rule 3 of its Rules of Procedure as alleged as such breach could only occur after commencement of the proceedings; and that the deponent had been told by the 2nd to 6th respondents that the said respondents did not avail to the press or the public any information

related to the subject of investigation of the applicant as alleged in paragraph 13 of the grounds relied upon by the applicant.

**Mr. Ombwayo** submitted that the court could not avail the applicant the right to question the exercise of constitutional powers and duties of the Chief Justice and other respondents in an application for Judicial review. He contended that such challenge could only be done through a Constitutional reference.

Learned State Counsel further submitted that the orders of mandamus was not available and such orders could not issue to correct past occurrences but only where a legal duty was to be performed. In our present case, the Chief Justice had already performed his duties, therefore orders of mandamus could not issue against him.

Furthermore counsel argued, the power of the court to issue Judicial Review orders was derived from an Act of Parliament and could not be used to challenge the exercise of Constitutional functions of the Chief Justice in making representations to the President. It was also contended that this court did not have powers to grant the orders sought because it would be an affront to Presidential immunity as provided for under the Constitution. In any case, the President was also not joined as a party, therefore orders cannot be issued against his actions.

Reliance was placed on the case of **Republic Vs Hon. Chief Justice of Kenya & 5 Others – Nairobi HC Misc. Application No. 764 of 2004** ***(Nambuye case).*** It was submitted that granting the orders sought would offend the principle of separation of powers because it will be interfere with functions of the executive. It would curtail the executive authority of the President which authority was vested by virtue of the provisions of section 23 of the Constitution. Reliance was placed on the case of **R Vs Attorney General of Kenya – Ex-Parte Mau Mau – NBI HC Misc. Application No. 1063 of 2004**.

Lastly learned, State Counsel submitted that the application did not comply with the provisions of Order 53 of the Civil Procedure Rules It was therefore incompetent. Counsel argued that the Statement and the Verifying Affidavits were not filed with the Chamber Summons as required by law, and that the said Verifying Affidavit and Statement did not accompany the Chamber Summons as required by law.

The 7th respondent submitted that the Chamber Summons for leave offended the provisions of Order 53 rule 1 of the Civil Procedure Rules, as the Statement and Supporting Affidavits were filed one day before the filing of the Chamber Summons. He argued that the Chamber Summons was not accompanied by the Statement and the Verifying Affidavit as

required by law, hence leave was wrongly granted and the Notice of Motion is fatally defective. He contended that the **Civil Appeal in Court of Appeal No. 77 of 2003** ***(UR 40/03)*** **Judicial Commission of Inquiry Into Goldenberg Affair and Others Vs Job Kilachi** did not state that, during the hearing to the Notice of Motion, an irregularity concerning granting leave cannot be raised and determined in the main Motion.

He also submitted that he was wrongly joined in the proceedings as a party. He further submitted that as Assisting Counsel he was neither a member of the Tribunal nor making any decision that could be subject to Judicial Review orders. Drawing a list of allegations was not making a decision. It was the function or responsibility of the Tribunal on the first day of session to decide on the challenges on legality, regularity or competence. He relied on Tribunal Matters involving **Hon. Justice Roselyne Nambuye and Hon. Mbogholi Msagha** where the issue of the assisting counsel and the drawing/framing of the list of allegations were raised among others.

He submitted also that the exercise of the President's prerogative under section 62 of the Constitution to gazette the mandate of the Tribunal could not be challenged through judicial review proceedings. He contended that the use of the words "***including and not limited to***" was not inconsistent with the provisions of section 62 of the Constitution. He contended that in the case of **Hon. Justice Amraphael Mbogholi Msagha -Vs- the Hon. Chief Justice and 7 others HC Misc. Application No. 1062 of 2004** – a declaration to interpret and expunge the wording stated above was never sought.

In short it is the case of the applicant that we grant the orders sought with costs, while it is the case of the respondents that the case of the applicant does not meet the test for the grant of the orders sought. The respondents urged us to dismiss the application with costs.

We have considered the application, the affidavits in support and in reply to the Motion under our determination. We have also considered the lengthy arguments and the authorities that were presented before us by the learned counsels who appeared for the applicant and the respondents in this matter. As a starting point we are grateful to **Mr. Mwenesi**, **Mr. Ombwayo** and **Mr. Mbuthi Gathenji** for their industry and well reasoned arguments on behalf of their clients. It is important to state that this is a unique matter with fundamental implications on the jurisprudence of this country on exercise of constitutional powers affecting a judge, the Chief Justice and a sitting President of this country. We say so because we shall answer fundamental issues raised before us concerning the rights of the

applicant, the powers of the Chief Justice and whether it is possible to sue a sitting President for breach of constitutional issues. It suffices to say that we shall answer each of the questions that were put before us but if we do not answer certain issues it is not out of disrespect to the parties and the advocates but we found the issues not pertinent to tilt the scales of justice in this matter.

The first issue for our determination is the preliminary objection raised by **Mr. Ombwayo** learned counsel for the 1st to the 6th respondents. The objection is that the applicant has not complied with the provisions of Order 53 rule 1 (2) of the Civil Procedure Rules. **Mr. Ombwayo** submitted that applications for judicial review in Kenya are based on the Law Reform Act Cap 26 Laws of Kenya which donates power to the rules committee to make rules of procedure. Order 53 rule 1 makes provisions that an application for leave shall be made *exparte* to a judge in chambers and shall be accompanied by a statement setting out the name, description of applicant, the reliefs sought, and grounds on which it is sought and by an affidavit verifying the facts relied on. Rule 4 makes a provision for the pleading to be relied on at the hearing of the Notice of Motion. This rule is clear in stipulating that any relief not sought in the statement shall not be entertained at the hearing of the Motion. He contended that the statement that was filed by the applicant did not comply with Order 53 rules 2 and 4 of the Civil Procedure Rules making the application fatally defective.

In reply **Mr. Mwenesi** learned counsel for the applicant was of the view that the preliminary objection is an attack on the grant of leave to apply for judicial review. Thus the respondent ought to have made a formal application to the judge who granted leave or appeal to the Court of Appeal soon after leave was granted or soon after the application for judicial review was made and served on the respondents. He therefore urged us to disregard the objection since there was no application that was made by the respondents before the judge who granted leave at the first stage.

We have considered the objection and in our view this is a procedural issue which cannot derail and/or affect the substantive jurisdiction of the High Court in matters like the one before us which are of great public importance and interest. We are aware that judicial review concerns the inherent and supervisory jurisdiction of the High Court and is incumbent upon the High Court to ensure that its doors are open to the largest possible litigants who may have been aggrieved by the decision making authority of the person or institution with the power to make judicial or quasi judicial determinations. In any case there is no application

before us to set aside the leave granted by **Ibrahim J** on 30th September 2004. **Ibrahim J** granted leave and ordered that the said leave shall operate as a stay. In his ruling he says that upon reading the statement and affidavits, he is satisfied with the pleadings of the applicant. We cannot therefore at this stage rule or make a determination that the leave which was granted by **Ibrahim J** was improper and in contravention of Order 53 rule 1.

The statement and various affidavits verifying the facts were filed on 29th September 2004 together with the requisite notice to the Registrar while the chamber summons for leave was filed on 30th September 2004. In our view **Mr. Ombwayo** was relying on the word 'accompanying' as a basis of his objection to the statement and affidavits that were filed by the applicant. In our understanding the word accompanying is that the statement and the verifying affidavit supplement the chamber summons application for leave. The affidavit and the statement are additional and complementary to the Chamber Summons and where they are lodged a day before the Chamber Summons that does not change or alter the validity of the Chamber Summons. In any case **Ibrahim J** considered and was alive to the fact that the Chamber Summons, the statement and affidavits were filed on two different dates. After considering the above he made a determination by granting leave. We have no jurisdiction at this stage to question leave that was granted by **Ibrahim J** and if the respondents were aggrieved, they should have made an appropriate application before him or appeal against his decision to the court of Appeal.

In the **Civil application No. 77 of 2003 The Judicial Commission of Inquiry into the Goldenberg Affair and 3 others versus Job Kilach** the Court of Appeal addressed its mind to the issue that was raised before us and held as follows:

> **"We think this is sufficient authority for an appeal from "an order made by the High Court under Order 53 of the Civil Procedure Rules. It is to be noted the section simply says "an order" not "prerogative order" or any such qualifications. So the right of appeal is statutorily available in Kenya as it is available in England.**

**We are equally mindful of the words of MAY, L. J. in the same case of Exparte HARBAGE. He is recorded as saying:**

**"The next point to make is that although an appeal does lie to this court against an ex-parte order made by a judge of the High Court by virtue of S. 16(1) of the Supreme Court Act, 1981, nevertheless in his judgment in that case Sir Donaldson MR [1983] 3 All E.R. 589 at p. 593 said:**

**"As I have said, exparte orders are essentially provisional in nature. They are made by the judge on the basis of evidence and submissions emanating from one side only. Despite the fact that the applicant is under a duty to make full disclosure of all relevant information in his possession whether or not it assists his application, this is no basis for making a definite order and every judge knows this. He expects at a later stage to be given the opportunity to review his provisional order in the light of the evidence and argument adduced by the other side and, in so doing, he is not hearing an appeal from himself and in no way feels inhibited from discharging or varying his original order. <u>This being the case, it is difficult, if not impossible, to think of circumstances in which it would be proper to appeal to this court against an exparte order without first giving the judge who made it or, if he was not available, another High Court, Judge an opportunity of reviewing it in the light of argument from the defendant and reaching a decision".</u> (Underling added).**

**We wish to make some comments with respect to the remarks of Sir Donaldson, M. R. quoted above. First we note that the ex parte order before Sir Donaldson was an**

**Anton Piller order. Such orders can be made ex parte, not because the rules provide that they be made ex parte but because of the urgency of the matter. The same situation applies in our exparte injunctions and like Sir Donaldson, we cannot think of a situation where a party would be allowed to come to this Court before going to the judge who made the ex parte order for an injunction with a view to persuading him to set aside the order. The usual practice in dealing with applications for interlocutory injunctions, whether they be Anton Piller injunctions or what else, is to hear such applications interpartes. Ex parte orders are granted only in exceptional circumstances. But with respect to applications for leave to apply for prerogative orders, the rules of Order 53 provide:**

**"53(1) No application for an order of mandamus, prohibition or certiorari shall be made unless leave therefore has been granted in accordance with this rule.**

**(2) An application for such leave as aforesaid SHALL BE made ex parte to a judge in chambers, and…..".**

**So that the only procedure provided under the rules for making an application for leave to apply for a prerogative order is that the application:**

**"…shall be made ex parte to a judge in chambers…".**

**That is totally different situation from other applications where the normal practice is to make the application inter partes unless there be some special reason for making the application ex parte. Lord Justice May, in ex parte**

> **Harbage (quoted the remarks of Sir John Donaldson in WEA RECORDS LTD VS VISIONS CHANNEL 4 LTD & OTHERS [1983] 2 all E.R. 589 without appreciating that Sir John Donaldson was not dealing with an application for leave to apply for prerogative orders; Sir John Donaldson was dealing with application for an Anton Piller injunction."**

We are in total agreement with the sentiments expressed by the Court of Appeal in the above decision and we think the objection is belated and misplaced. We must therefore say that we have refused to follow the suggestion by **Mr. Ombwayo,** learned State counsel who raised the objection concerning whether the application before us is proper or not. We make a finding that the application that is before us is proper having been filed after leave was correctly and properly granted. It is in the interest of justice that procedural lapses should not be invoked to defeat applications unless the lapse went to the jurisdiction of the court or is likely to cause substantial injustice or prejudice to the opposite party. There was no substantial injustice or prejudice that may have been suffered by the respondents as a result of what they have termed as procedural lapses committed by the applicant. In our view the administration of justice requires that the substance of disputes should be investigated and decided on their merits. And that any procedural error or lapses should not be used by a party to defeat the case of the other party unless there is evidence that he has suffered or is likely to suffer substantial injustice or prejudice. We think there is no injustice or prejudice that was suffered by the respondent as a result of applicant's failure to file all the documents on the same day and to ensure that the application for leave was accompanied by a verifying affidavit and statement of facts.

Finally nothing could possibly take away the court's inherent power to do justice. To allow the objection would not inspire confidence and good sense in the administration of justice. The judicial basis of the court's jurisdiction is the authority to uphold, to protect and fulfill the judicial functions of administration of justice according to law in a regular, orderly and effective manner and to the best interest of justice. We think justice demands that we dismiss the objection raised by the respondents.

The second objection is that the High Court has no jurisdiction to entertain this application because one of the respondents on the Motion for judicial review is the Chief Justice whose office is constitutional and that he cannot be questioned in the exercise of his powers as administrator of the Judiciary by the High Court exercising powers derived from the Law Reform Act and not the Constitution. Secondly to question the procedure adopted by the Tribunal is an affront to the President who donated power to the tribunal to make rules of procedure. In essence to question the members of the tribunal is to challenge the President in exercise of his constitutional powers.

We think we should consider the issue of the President and whether to sue the members of the tribunal amounts to suing the President and whether it is permissible to sue the President in contravention of his powers under the constitution or failure t o observe the rule of law. It was submitted before us by **Mr. Ombwayo** that to challenge the Chairman of the tribunal is equivalent to filing a suit against the President. It is an indirect way of challenging the Presidential powers under the Constitution. He relied on the decision of **Nyamu J** *(as he was then)* in High Court Miscellaneous application No. 764 of 2004 In the matter of **Lady Justice Roselyn Nambuye** to assert the immunity of President from suit. **Mr. Ombwayo** also referred us to section 14 of the Constitution.

In the **Nambuye** case **Nyamu J** *(as he was then)* held:

> **"Finally the application brought by way of a judicial review application has purported to challenge the Presidents Constitutional power under the section although the President has not been made a party. The court cannot make orders against a third party who has not been joined. The challenge to the exercise of the presidential powers is therefore incompetent and any challenge to the Gazette Notices and the consequential relief is incompetent for this reason as well as non joinder and also in the fact of S 14(2) of the Constitution.**
>
> **Again as reasoned above as regards the Chief Justice the exercise of Presidential powers under the Constitution cannot be challenged by way of Judicial review at all**

**because judicial review jurisdiction is derived from an Act of Parliament and is not entrenched in the Constitution unlike India and the United States where Judicial review jurisdiction has been specifically conferred under the respective Constitutions in Kenya the jurisdiction is statutory. The relief sought is also incompetent for this reason as well."**

In order to understand and appreciate what has been termed as absolute Presidential immunity, it is essential to reproduce section 14;

**14(1) No criminal proceedings whatsoever shall be instituted or continued against the President while he holds office, or against any person while he is exercising the functions of the office of President.**

**14(2) No civil proceedings in which relief is claimed in respect of anything done or omitted to be done shall be instituted or continued against the President while he holds office or against any person while he is exercising the functions of the office of President.**

**14(3) Where provision is made by law limiting the time within which proceedings of any description may be brought against any person, a period of time during which a person holds or exercises the functions of the office of President shall not be taken into account in calculating any period of time prescribed by that law which determines whether any such proceedings as are mentioned in subsection (1) or (2) may be brought against that person."**

Our legal system is primarily intended or designed to give effective remedies and reliefs whenever the Constitution of Kenya is threatened with violation. If an authority entrusted to safeguard/protect our constitution drags its feet or fails to observe fundamental part of the constitution involving the right of an individual or a group of people, is it right for the court to say that a transgressor is a sitting President and is out of our reach therefore you are helpless and without any remedy? We state with a firm conviction that as a part of reasonable, fair and just procedure to uphold the constitutional guarantees, the right to a fair trial entails a liberal and dynamic approach and not rigid and rudimental ways in order to ensure the grievances of an individual are addressed by the court no matter the name and the identity of the transgressor.

We must also add that it is for the judges to give meaning to a particular section of the law and to bring out as far as possible what the legislature intended to achieve. It is through the process of giving meaning to a particular section of legislation that gives the court powers to appreciate and understand the intention of the legislature. Of course the judge is handicapped because he cannot go into the minds of the drafters, and the men and women who enacted our laws. Indeed the judge can only do what is humanely possible, in that regard the interpretation may not be 100% proof. However, we must go as far as possible in pursuit of our mandate in breathing life into a particular provision of the law. We agree that the process of interpretation and assigning a particular meaning to the intention and spirit of the law, is a difficult mandate solely left for the judges. However, it is the process of the interpretation of a statute or a particular section which constitutes the most creative and thrilling function of a judge. We thrive on that creativity, that curiosity and that dynamism to think outside the box in order to find the truth in our daily judicial responsibility.

It is also important to understand that judicial review orders have their roots in administrative law and are designed to check excesses of administrative judicial or quasi judicial bodies inferior to the High court.

The question is whether the President or presidency is inferior to High Court. It is the position of the respondents that this application is barred or removed from the purview of judicial review by section 14(2) of the Constitution which is designed to preclude suits against a sitting President when he exercises his constitutional functions. And that it cannot be circumvented by suing other persons acting pursuant to the exercise of such powers. It was further contended that what is under attack is the President's action in appointing a tribunal

pursuant to section 62(5) of the Constitution and this cannot be camouflaged by suing the respondents. This case now presents the claim that the President of Kenya is shielded by absolute immunity from litigation. The issue therefore for our determination is whether a sitting President enjoys absolute or partial immunity. We agree that the Office of President is a special and unique office, which has immense and numerous powers and responsibilities. In our view these powers and responsibilities are so vast and important that the President must always direct his undivided time and attention to his duties and responsibilities for the sake of protecting the interests of the public.

There is an argument that the official and un- official acts of the President cannot be questioned by judicial or the legislative branch of Government because the President enjoys executive privilege with Presidential immunity. Presidential immunity is the power and authority that a President has to declare that his or her discussions, deliberations and communications are confidential and secret, therefore out of the reach of the jurisdiction of the High Court.

In the debate on Presidential immunity, **Fredrick Jayweh** in a paper delivered on 25th March 2008 had this to say;



**Arguments for Absolute Presidential Immunity**

> **On the one hand, many Western and African political leaders are arguing that for a nation's president to have the power to successfully conduct the affairs of his or her country, he or she has to have absolute, presumptive immunity. In exercising the duties and responsibilities of his or her office, a president of any country needs to have unlimited, absolute immunity from all civil and criminal suits. Successful conduct of the office of the presidency requires presidential privilege and absolute immunity. In keeping within the scope and limitation of his or her authority and office, a president needs not be under any apprehension relative to the motive that controls his or her official or unofficial conduct in administering the affairs of the State. That is, when acting as the president, the conduct**

**of a president needs not and should never become a subject of judicial review. Any attempt to question the conduct of a president will cripple the proper and effective administration of the State. To lend the judiciary the power to adjudicate the official or unofficial acts of a president is unlawful under the constitution. Hence, a president needs not and must never become restrained by any law or made accountable to any court to answer to any civil or criminal action for his or her official and unofficial actions. To act otherwise will amount to a flagrant violation of the constitution of a state or nation. Presumptive and absolute immunity is representative of good governance in any state. Those in support of absolute presidential immunity contend that constitutionally, the legislative, judiciary, and executive branches of a government are independent and should remain independent of each other at all times. Therefore, the actions of current and former presidents cannot be questioned by any court. *Please see Spalding v Filas (1869), Clinton v. Jones, Nixon v. Titzgerald (1982), and Article 61(a) of the Liberian Constitution, (1986), relative to Presidential and Immunity.***

**Arguments against Absolute Presidential Immunity**

**While many people believe in absolute presidential immunity, this issue has always been and remains, contentious because there are also many who believe in the doctrine of limited presidential power and control in a nation. Historically, presidential privilege has always conflicted with the doctrine of separate but equal distribution of powers amongst the legislative, judicial, and executive branches of government. Those who believe in and support the doctrine of the separation of powers have**

**argued that the powers of the legislative, judicial, and executive branches of a government constitutionally are separated but must remain coordinated and distributed equally amongst the three branches of government. Anything short of this shall woefully amount to the abuse of power by a president. Advocates of limited presidential power and restricted privilege further argue that while the Constitution distributes and diffuses powers amongst the legislative, judicial and executive branches of a nation's government in order to better secure liberty and justice, it also commands coordination and interdependence amongst the three separate but equal branches of government for the purpose of equal justice and better governance. The doctrine of separation of powers conflicts with the granting of absolute and unrestricted power to a president. Allowing a president to have absolute power could conflict with the provision of equal justice and human rights in any developed and developing society. It could be a troubling and terrifying environment if unrestricted and unchecked powers were to be granted to a former or current president. Therefore, there must always be checks and balances on the powers of a president regardless of if he or she is a president of the Western World or in the troubled environment of Africa. The president and other government officials are also subject to the same laws that apply to all citizens.**

**Since granting unlimited and unchecked powers to a president cannot be accounted for and sustained under the doctrine of the separation of powers, there is no precedent for such occurrence. Some argue that to compel a current or former president to appear before a court to account for his**

> **or her unofficial and unlawful actions might appear to leave a nation and its executive branch of government without a president. However, it is the power and province of the courts to say what the law is. Therefore, the legislative, judicial and executive branches of a government must always act as checks and balances of a former or current president's acts. Anything short of this is equal to asking a nation, Western or African, to place its president above the rule of law, equal justice, and the respect for human rights. Please see Marbury v. Madison (1803), Baker v. Carr, Youngstown Sheet & Tube co v. Sawyer, Article III, Sections, I and II, P15, and the Liberian Constitution Articles 65 and 66."**



It is clear in our minds that the President is always vested with certain important and unrestricted political powers. In exercise of such powers the president is to use his own discretion. However, the President always remains accountable to his country as a political agent. To support and assist the president in performance of his day to day duties and responsibilities, constitutionally he is given the power and authority to appoint certain officers. These officers shall act by the President's authority and in conformity with his orders. It is therefore clear that these officers' acts are the acts of the President because the officers are merely the President's political organs through whom the President will and pleasure are communicated and carried out.

The question therefore is whether all persons charged with duties and responsibilities to carry the express and implied political will of the President are immune from actual judicial review when they are said to be acting not as prescribed by law. There is a view that when acting politically and not as provided for and prescribed by the law all executive appointees' actions can only be examined politically and not legally because their acts are covered and provided for under political question doctrine which states that being political acts they are non justiciable and not reviewable by a court. It is our view that when the law proceeds to impose on the executive legally prescribed duties and responsibilities, the performance of

which depends upon the enhancing or handling of public interest, the political officers of the executive must act consistent and according to the laws of the land.

In our view the performance of certain duties and responsibilities is dependent upon individual rights and responsibilities hence the duty to act consistently with and according to the law. If public officers including the President fail to act, and their failure harms the interests of the public and rights of individual citizens, we think their action or omissions are subject to judicial review. The point we are making is the protection given to the President under section 14 of the constitution cannot be absolute and is only meant to protect the interest of the wider citizens who have a stake in the presidency or who have elected the president to be the symbol of unity and protection of collective and individual rights of all citizens. In the case of **Jean Kamau & another v Electoral Commission &I 2 others Misc. application No.193 of 1998** *(unreported)* **Aluoch, Mbogholi and Mitey JJJ** held;

> **"The provisions of section 14 of the Kenya Constitution are in the plainest language. They contain no ambiguity. The purport thereof is that no suit of whatever nature may be commenced or continued against a sitting President of the Republic of Kenya. It would be mischievous for anyone to attempt to go round these express provisions of the law and attempt to goad the court to vest in itself a power not conferred upon it by the constitution. We entirely agree with the counsel for the 2nd respondent that this court has jurisdiction to summon a sitting president only when the issue of his election as a President arises. The jurisdiction is expressly provided in section 10(2) of the Constitution."**

In another decision by **Githinji J** *(as he was then)* in the case of **Abdul Karim Hassanally & another v Westsco (K) Limited & 2 others HCCC No. 1338 of 1997** *(unreported)* he held;

> **"The constitution is the will of the people. I do not think that the constitutional provisions protecting the President**

**from legal proceedings can be said to be against public policy."**

We must restate that the constitutional provisions protecting the President from legal proceedings can be said to be against public policy when it is used in a manner likely to affect the interest of an individual or issues concerning human rights and environmental protection which is meant for the greater public good. It is therefore, the duty of the High Court in that regard to say what is the law and those who apply the rule of absolute immunity must of necessity expound and interpret the rule in a broad manner likely to benefit the interest of the wider public. And when two interest conflict with each other the court must decide on the operation of each. If the courts are to regard the constitution for the benefit of the citizens, it cannot be said the President is superior to the Constitution and to any other legislation.

The rationale for official immunity applies where only personal and private conduct by a president is at issue. It means that there shall be no case in which any public official can be granted any immunity from suit from his unofficial acts. There has been argument that unless immunity is available, the threat of judicial interference with executive branch through judicial review orders, potential contempt citations and sanctions would violate separation of powers principle. It is also alleged that the fear of answering to court for his actions would impair or limit the president's discharge of his constitutional powers and duties. On our part we think the President being a public servant represents the interests of the society as a whole. The conduct of his official duties may adversely affect a wide variety of different individuals each of whom may be a potential source of current or future controversy. In some quarters the societal interest in providing the President with maximum ability to deal fearlessly and impartially with the public at large has long been recognized as an acceptable justification for official immunity. The immunity for the President in such circumstances is meant to forestall an atmosphere of intimidation that will conflict with his resolve to perform his designated functions in a principled fashion.

In this case what the President did was to comply with his constitutional responsibilities under section 62(5) of the Constitution. The President after receiving a representation from the Chief Justice as to the question of removal of the applicant appointed a tribunal whose mandate was to investigate the complaints that were raised against the applicant. The President is not a party to the proceedings before us and we think there was

no need to make the President a party to the proceedings before us. In any case it is our position that the President occupies a unique position in our constitutional scheme. He is expected to perform certain duties and responsibilities either directly or indirectly. And in so far as the President appointed the tribunal and in so far as he is not a party to the proceedings before us, we cannot be in a position to say there was an omission that was directly committed by the president.

The question therefore is whether there is a provision that gives the President an absolute immunity from any kind of civil and criminal prosecution. We have set out trend that was followed by the judges in Kenya but on our part we do not subscribe to their positions. Section 123(8) provides as follows;

> **"No provision of this Constitution that a person or authority shall not be subject to the direction or control of any other person or authority in the exercise of any functions under this Constitution shall be construed as precluding a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this Constitution or any other law."**

In our mind the provisions of the constitution cannot be read and interpreted in isolation. We are aware that an argument founded on the spirit of the constitution, is always attractive for it has a powerful appeal to the sentiments and emotions. However, the court has to gather the spirit of constitution from the language of the constitution and from the wholesome reading of all the provisions in order to understand whether there is a conflict or whether there is a complementary or supplemental intention in all the sections. But one cardinal and essential foundation of interpretation of the constitution is that a Constitution is to be construed in the same way as any other legislative enactment. And the words of the constitution are to be used in their natural and ordinary sense. In **Barnes v Jarvis, (1953) 1 W.L.R.L. 649 Lord Goddard C. J.** said:

> **"A certain amount of common sense must be applied in construing statutes. The object of the Act has to be considered;"**

**Tindal C. J.** in **Warburton v Loveland (1832), 5E.R. 499**, a case decided in 1832 held;

> **"Where the language of an Act is clear and explicit, we 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."**

As was stated in **Kunste** case, judicial review proceedings are neither civil nor criminal proceedings and therefore cannot possibly fall within the ambit of section 14(2) of the Constitution and are therefore excluded from the protection afforded therein to the President against civil proceedings. The proceedings before us are in the nature of judicial review proceedings. In any case it is our finding that a party affected by the decision of a sitting president can rightly and legitimately seek the intervention of the High Court for redress or remedy by way of judicial review or by way of constitutional declaration. For example if the President purports to sack a constitutional office holder without going through the provisions of the constitution, the affected officer can approach the High Court by way of judicial review so that the High Court can quash the illegality. We have seen a situation where sitting judges were purportedly sacked by the Executive in particular in Pakistan and other developing countries without subjecting the said judges through the mechanism provided by the constitution. We therefore think a party or a constitutional office holder who is wrongly or illegally sacked by a sitting President can approach the High court by way of judicial review for redress.

In our mind immunity as enshrined under section 14 of the Constitution serves the public interest in enabling the president to perform his designated functions effectively without fear that a particular decision may give rise to personal liability. It has been argued that to compel the President or to subject him to legal process would be contrary to the doctrine of separation of powers. The doctrine of separation of powers is concerned with allocation of the official powers among the three co- equal branches of our

Government. However the mutuality of the three branches calls for checks and balances. Separation of power doctrine, recognizes or requires that a branch does not allocate power to itself or a branch does not impair another in the performance of its constitutional duties. We are aware that the Succession Act Cap 160 was enacted by parliament in 1972 but our late **President Kenyatta** declined to assent to it or set the commencement date until 1st July 1981 when **President Moi** assented or set the commencement date. In our humble view if a situation like that prevails or obtains the High court in its supervisory jurisdiction has powers to intervene and grant adequate remedy for the transgression that may have been committed by the President. We therefore think that the spirit and intention of our constitution did not impose a blanket immunity that a sitting President cannot be sued for failing to observe the law or failing in his responsibility to do an act.

Section 14 of the Constitution was intended to prevent politically motivated harassing litigants and frivolous litigation against a sitting President. It was not meant to give the President an absolute immunity for all kinds of transgressions and violations. It is our humble view that a sitting President can be subjected to a process of a court when there is a clear violation of fundamental rights and environmental issues. The point we are making is that if a sitting president pertinently and grossly contravenes a clear provision of the Constitution, he cannot be shielded from the intervention of the court by way of judicial review or declarations under section 84 of our Constitution.

As a matter of constitutional practice it is of course well known that the President is not above the reach of the courts and cannot be put in a situation where he is above the constitution. We must add that the courts have no power to review the exercise of powers by the President provided that the President is acting within the scope of his powers and within the confines of the constitution. And that he is within the legal nature of the exercise of his powers and responsibilities. No doubt the courts have powers to restrict and review decisions made by a sitting President which is in contravention of the Constitution and which is against public interest and policy. We hold that there was nothing wrong in the applicant suing the respondents since their decision which was made or which would be made is likely to affect his rights and interests. We think we have answered the respondents' contention that to sue the respondents would be to sue the President which is in contravention of section 14(2) of the Constitution. We have also answered that the President exercises his powers either directly or indirectly through public officials who would be responsible for their acts and omissions.

As regarding the Chief Justice of the Republic of Kenya, it was contended before us by **Mr. Obwayo** learned State counsel that this court cannot avail the applicant the right to question the exercise of his constitutional powers and duties as Chief Justice in an application for judicial review. He contended that the applicant ought to have filed a constitutional reference and not a judicial review application as in the present case. It is the position of **Mr. Ombwayo** that the orders sought against the Chief Justice cannot be issued because the Chief Justice is a judge of the High Court of Kenya and Court of Appeal. He further contended that orders that are sought by the applicant can only be issued against subordinate courts, administrative bodies and Court Martials and not against a judge exercising his constitutional mandate. In essence **Mr. Ombwayo** contended that the orders of mandamus sought against the Chief Justice does not lie. He also stated that the powers of the court to issue judicial review orders is derived from an Act of Parliament while the powers of the Chief Justice to make a representation to the President is derived from the Constitution. Consequently this court has no powers to issue judicial review orders against the Chief Justice when exercising his constitutional powers. In support of his contention he referred us to **High Court Miscellaneous application No.764 of 2004 - In the matter of Lady Justice Roselyn Naliaka Nambuye versus The Chief Justice and 5 others** which was similar to the matter under our determination. Answering the same question as the one put before us by **Mr. Obwayo, Nyamu J** *(as he was then)* in a ruling dated 22nd April 2005 had this to say;

> **"Although the Chief Justice does occupy the pinnacle of Judicial hierarchy in the administrative structure, as a judge he is one among equals because the concept of independence of judges does encompass the principle that Judges are independent of each other. In some cases a determination by the Chief Justice of certain questions and his liberty to ply into Judges affairs would compromise that independence.**
>
> **It seems to me that failure to confer on the Chief Justice here in Kenya and even in Tobago a specific right to hear complaints against Judges and to make a determination on them as the first port of call was**

**deliberate on the part of the Framers of our Constitution perhaps in the deference to this principle. Hence in the case of Trinidad & Tobago the first right of hearing is conferred on the Legal Services Commission and where the Chief Justice is a member and the second right of hearing is conferred on the Judicial Committee ie the Privy Council and in the case of Kenya on the Tribunal where the Chief Justice is not a member. The ideal situation in Kenya would be the Judicial Service Commission as the first port of call and the Tribunal as second call.**

**In interpreting the Constitution one must take into account the words used and whether or not they are ambiguous because the spirit of the Constitution must derive from the words used and not those implied.**

**I find no ambiguity in the words used in s 62 of the Constitution. Consequently I find as follows:-**

**(1)** **The only constitutional right of hearing is conferred by s 62(5) by virtue of the appointment of a Tribunal and the applicant has not been denied that right. In fact she has participated in the Tribunals hearings. I find that as regards the proceedings at the tribunal the applicants legitimate expectation is that of being accorded a fair hearing and there is nothing to show that this has not been accorded.**

**(2)** **This application having been brought under the Judicial Review jurisdiction this court cannot avail the applicant the right to question the mode of the exercise of the Constitutional powers and duties by the Chief Justice to**

> **make a representation to the President under S 62(5). In exercising his powers under this section the Chief Justice who doubles up as a High Court Judge and a Court of Appeal judge does so as a Judge and judicial review jurisdiction does not apply to a Judge of the High Court or any other Judge. It only applies to subordinate court administrative bodies, and court marshals. This is a trite law. A mandamus cannot therefore in law lie against the Chief Justice and it cannot also lie in respect of a legal duty already performed. The claim against the Chief Justice is therefore clearly misconceived in law."**

The applicant's reply is that the Chief Justice is subject to the rule of law and expected to be fair under the law. In that regard if the Chief Justice by conduct or words written or spoken violates fundamental rights under the constitution or veers from proper and acceptable conduct and demeanour under the law, an aggrieved party would have recourse to unlimited and original inherent power of High Court for redress. It is also the case of the applicant that when the Chief Justice is making representation to the President under section 62 of the Constitution he is not exercising judicial powers and therefore cannot be immune from suit or from proceedings for judicial review. And even then, the Chief Justice is not permitted or expected to be a law unto himself.

In answer to the question that the Chief Justice is not amenable or is immune from civil litigation, it is our view that the Chief Justice is immune from being sued in the ordinary courts for matters that are directly related with exercise of his judicial functions. However, the Chief Justice is the head of Judiciary which is the third arm of Government and by virtue of that position he exercises ministerial duties in the day to day running and management of the judiciary. In that regard the Chief Justice in exercise of his ministerial duties is not acting as a judge in a court of law. In exercise of his powers under the constitution, it cannot be said that the Chief Justice is only a judge of the High Court and Court of Appeal. Apart from being a Judge of the High Court and Court of Appeal he is at the pinnacle of the Judiciary and for that matter he is the administrative head of the Judiciary. Indeed it cannot be said that in making a representation to the president under section 62(5) of the Constitution the Chief

Justice is exercising his judicial function. To the contrary he is exercising his constitutional and administrative functions and in that regard he is amenable to the supervisory jurisdiction of the High court and is subject to judicial review orders.

In our view the Chief Justice wears three hats; **(1) Judicial, (2) administrative & ministerial (3) Constitutional.** In exercising his powers as a judge, he makes judicial determinations in matters that are filed by parties.

He is immune from litigation and out of the reach of the supervisory duties of the High Court. In any case, there are opinions that even in exercising his judicial functions, he is amenable to the supervisory jurisdiction of the High Court. See the decision in the case of **Home Park Caterers Limited vs AG & others Petition No.671 of 2006** where a bench comprising of **Nyamu J** *(as he was then)*and **Wendoh J** recused and/or disqualified **Justice Ojwang** from proceeding with the matter. We do not subscribe to that position but it means there is a school of thought which shows that a decision made by a judge even in his judicial duties is amenable to correction and intervention of the High Court in its supervisory jurisdiction. In that case the Honourable judges posed the question who is the guard of the guards? In their answer they said that the High Court in its supervisory jurisdiction can remedy and redress any grievances that is suffered or is likely to be suffered by the individual no matter the person involved. In that regard therefore, with profound respect there is an apparent contradiction in the two decisions ***(see Nambuye case supra)*** where **Nyamu J** (as he was then) was involved. If we follow the latter decision that was made by **Nyamu** and **Wendoh JJ** then the Chief Justice in exercise of his judicial functions cannot hide or escape from the jurisdiction of the High Court.

Secondly the Chief Justice is the administrative head of the Judiciary and as a result of that capacity he exercises ministerial powers and is therefore subordinate to the High Court. In addition the Chief Justice is the Chairman of the Judicial Service Commission (JSC) and being the Chairman of the JSC, any decision made either collectively or alone by himself, is subject to the supervisory jurisdiction of the High Court. It is therefore wrong to say that the Chief Justice is immune from litigation and that a person aggrieved cannot seek the intervention of the High Court to remedy an injustice or an illegality committed by the Chief Justice either alone or through the Judicial Service Commission. It is our firm conviction that in exercise of his administrative powers, the Chief Justice is amenable to the jurisdiction of the High Court.

Thirdly, the Chief Justice exercises constitutional functions as provided in our constitution. In exercise of his constitutional functions, he is required to ensure that the rule of law is adhered to and observed in its strict sense. What we have in mind is that when an issue of removal of a judge arises, the Chief Justice exercises a constitutional function and in ensuring that there is compliance with his mandate and responsibility, he is obliged to follow and/or observe the wholesome requirement of the constitution. In making a representation to the President, the Chief Justice cannot act the way he wants but must be guided by the requirement of section 62. We shall answer the requirement and legitimate expectation that an aggrieved party expects from the Chief Justice in matters involving the removal of a judge in the latter part of this judgement. It suffices to say in exercise of his constitutional mandate, the Chief Justice is amenable to the supervisory jurisdiction of the High Court. We therefore think that the objection that the Chief Justice in exercise of his constitutional functions is immune from litigation is untenable and unacceptable.

In conclusion we cannot sustain the contention by **Mr. Ombwayo** that the Chief Justice in exercise of his constitutional functions is immune from litigation and out of reach of the High Court's supervisory jurisdiction.



We now wish to address another preliminary objection raised by the 7th respondent which is that he was wrongly and improperly joined into these proceedings. We have read the allegations against the 7th respondent who is assisting counsel of the Tribunal. We have also read his reply to allegations that were made against him. In our understanding the role of the assisting counsel is to assist the tribunal to execute its mandate properly and he does not participate in any decisions that are made by the tribunal. The establishment of a tribunal is a constitutional requirement under section 62 of the Constitution. The role of the assisting counsel is not mentioned at all in the constitution. He is appointed by the President to enable the tribunal perform its duties and responsibilities. There is no evidence to show that the assisting counsel has a personal interest in the matters that are before the tribunal. There are allegations of bias and partiality against the assisting counsel but the question is whether there is evidence to sustain that contention. As pointed earlier the assisting counsel will not participate in the decision making process and he is not a member of the tribunal. He assists the tribunal in leading and presenting evidence.

The appointment of the assisting counsel is necessary for the proper and smooth function of the tribunal. And if he was not appointed, it would be difficult and practically

impossible for the tribunal to function or to perform its mandate. In one of his affidavits, the 7th respondent avers that he is not aware of any malicious campaign to misuse him or the tribunal falsely, unlawfully or otherwise to tarnish the name of the applicant and that the matters before the tribunal would be adjudicated in accordance with the constitution, the rules of procedure and any evidence will be availed in accordance with the said rules and rules of natural justice. He also stated that his role before the tribunal is bona fide and in accordance with his profession and oath of office.

Having read the averments by **Mr. Mbuthi Gathenji** and the fact that his role is to assist the tribunal in the performance of its function, we think he was wrongly joined into these proceedings. We agree with the contention by the 7th respondent that he is not a member of the tribunal as he was not gazetted as a member. His role is to assist and he remains a servant of the tribunal in the performance of its mandate. It is our position that the 7th respondent is not an authority, public or quasi body to make a decision in the matter affecting the applicant. It is also true that the assisting counsel does not investigate, does not make a report and/or make an order against the respondent.

The 7th respondent is supposed to lead evidence before the tribunal and ensure that the applicant is supplied with the relevant allegations and supporting information in respect of the representation that is the subject of investigation before the tribunal. It is therefore our finding that the 7th respondent was wrongly and improperly joined into the proceedings that is the subject of our determination. We sustain his objection and hold that it was an error on the part of applicant to join the 7th respondent in a matter where his role was only limited to assisting the tribunal.

The next issue is the interpretation of section 62 of the Constitution as regards the representation that was made to the President by the Chief Justice of the Republic of Kenya and whether the rules of natural justice were complied with. It is clear that a judge may only be removed from office in accordance of section 62 of the Constitution. Section 62 (1), (2) (3) (4) (5) and (6) of the Constitution provide as follows;

> **(1) Subject to this section, a judge of the High Court shall vacate his office when he attains such age as may be prescribed by Parliament.**

**(2) Notwithstanding that he has attained the age prescribed for the purposes of subsection (1), a judge of the High Court may continue in office for so long after attaining that age as may be necessary to enable him to deliver judgement or to do any other think in relation to proceedings that were commenced before him before he attained that age.**

**(3) A judge of the High Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehavior, and shall not be removed except in accordance with this section.**

**(4) A judge of the High Court shall be removed from office by the President if the question of his removal has been referred to a tribunal appointed under subsection (5) and the tribunal has recommended to the President that the judge ought to be removed from office for inability as aforesaid or for misbehavior.**

**(5) If the Chief Justice represents to the President that the question of removing a puisne judge under this section ought to be investigated the-**

**(a) The President shall appoint a tribunal which shall consist of a chairman and four other members selected by the President among persons-**

**(i) Who hold or have held the office of judge of the High Court or judge of appeal, or**

**(ii) Who are qualified to be appointed as judges of the High Court under section 61(3); or**

**(iii) Upon whom the President has conferred the rank of Senior Counsel under section 17 of the Advocates Act;**

**And**

**(b) The tribunal shall inquire into the matter and report on the facts thereof to the President and recommend to the President whether that judge ought to be removed under this section.**

> **(6) Where the question of removing a judge from office has been referred to a tribunal under this section, the President, acting in accordance with the advice of the Chief Justice, may suspend the judge from exercising the functions of his office and any such suspension may at any time be revoked by the President, acting in accordance with the advice of the Chief Justice, may suspend the judge from exercising the functions of his office and any such suspension may at any time be revoked by the President, acting in accordance with the advice of Chief Justice, and shall in any case cease to have effect if the tribunal recommend to the President that the judge ought not to be removed from office."**



It was submitted before us by **Mr. Mwenesi** learned counsel for the applicant that the Chief Justice acted in excess of his powers under section 62 and this court ought to intervene as a result of the illegality committed by the Chief Justice. He contended that his client, a Court of Appeal Judge enjoys security of tenure, a protected status and that the failure of the Chief Justice to follow the provisions of section 62 violated the Constitutional rights of the applicant to a fair hearing. It is the case of the applicant that he was not afforded an opportunity to be heard and defend himself before the representation was made to the President.

In our understanding it is the case of the applicant that section 62(3) of the Constitution provides the legal machinery for removal of a judge from office and one can only be removed when the Chief Justice complies strictly and correctly with the relevant provisions of the Constitution. In exercise of his powers, the Chief Justice of the Republic of Kenya must act fairly and can only do so by hearing the Judge who is implicated. It is also the case of the applicant that the Constitution ought to be construed in accordance with the principles of fair play which include rules of natural justice and that the applicant being a holder of a prestigious office ought to have been given a hearing before any adverse action had been taken against him since a resulting action would have a devastating effect on his professional career, his dignity, his status before the society and his personal and social standing in the

eyes of the society and his peers. In essence it was alleged that the process resulting to the appointment of the tribunal was grossly and patently in violation of the clear provisions of the Constitution. It was further argued that the Chief Justice performs administrative functions and that it is a requirement of administrative law that the rules of natural justice should be observed by the Chief Justice in discharge of his duties under section 62 of the Constitution. And that the applicant had a legitimate expectation that the Chief Justice will comply with the rules of natural justice before he made a decision to make a representation to the President to put in motion the removal of the applicant.

**Mr. Mwenesi** further submitted that under section 62(5) of the Constitution, the Chief Justice has a duty to make a representation to the President and this must be written and the applicant ought to have known the facts of the representation before it was made. He alleged that the applicant was not confronted with any facts or complaints that would form the basis of the representation that was made to the President. It is also contended that the failure of the Chief Justice to give a written representation to the President was in breach of the doctrine of separation of powers and that the representation allegedly made to the President did not comply with the provisions of section 62(5) of the Constitution. In essence it is the case of the applicant that under section 62(5) of the Constitution, the President can only set up a tribunal when he is in possession of a written representation from the Chief Justice containing the details of all the allegations against the judge and the basis of the said allegations. It is also the case of applicant that the Chief Justice may have wrongly construed the Constitution's silence on hearing to be accorded to a Judge who is likely to face a tribunal before making his representation to the President.

On the other hand it was submitted before us by **Mr. Ombwayo** that the Chief Justice was not expected to do more than what he did in making a representation after receiving several complaints against the applicant. He stated that section 62 clearly shows that a Judge may be removed from office for misbehavior or inability and that can only be done under provisions of section 62(4) and (5) of the Constitution. It was contended that the role of the Chief Justice is to make a representation after concluding that the complaints raised against the judge were within the purview of his removal and that his role is limited to making a representation to the President.

It was argued by **Mr. Ombwayo** learned State counsel that there is no requirement under section 62 of our Constitution that the Chief Justice and the President would accord the

applicant a hearing before a tribunal is formed to investigate and enquire into the complaints that were raised against him. He stated that in any case the applicant would get a fair hearing at the tribunal and that there is no basis for the complaints raised against the Chief Justice that he was not accorded a fair hearing before a representation was made. He relied on the case of **Republic v the Honourable Chief Justice of Kenya & others -** *Exparte* **Lady Justice Nambuye - High Court Misc. Application No.764 of 2004** where **Nyamu J** held that the right to a hearing is provided for at the tribunal stage and the Chief Justice was not constitutionally mandated to conduct an inquiry unlike the **Guyana** case where the Judicial Service Commission conducts the first hearing and the tribunal does the second. He also relied on the **Mbogholi** case **High Court Miscellaneous Case No.1062 of 2004**where it was held;

> **"We observe firstly that the rules of natural justice "*audi alteram partem*" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days of the British Empire. Secondly we recognize and observe those principles wherever there is no statutory or constitutional law to the contrary. Under the Judicature Act *(Chapter 8 Laws of Kenya)* , the High Court, the Court of Appeal and all subordinate Courts are enjoined to exercise their jurisdiction in conformity with-**
>
> **(a) The Constitution**
>
> **Subject thereto, all other written laws, including Acts of Parliament of the United Kingdom cited in Part 1 of the Schedule to the Act, modified in accordance with Part II of that Schedule;**

> **(b) Subject thereto and so far as those written laws do not extend and apply, the substance of the common law and doctrines of equity….**
>
> **It follows therefore that where there is a statute or written law, the common law principles have application in accordance with the provisions of the statute or the written law. In this matter, the applicable law is itself the Constitution of Kenya. It expressly provides for the manner in which a judge may be removed from his tenured office.**
>
> **So once again, we find and hold that the suspension of the Applicant is in the words of Mergarry J. in JOHN –VS- REES (supra), a holding operation, pending inquiries by the Tribunal into the question of removal of the Applicant from his office of judge and not a final punishment, as a suspension from the Law Society for instance after being found guilty of some malpractice. No rules of natural justice were therefore violated."**



We are alive to the fact that a Judge is a Constitutional office holder and shall hold that office until he attains such age as may be prescribed by Parliament. However, the law is very clear that a judge can be removed from office if a situation arises where he is unable to perform the function of his office or for misbehavior, misconduct or unethical behavior. We think a Judge who involves himself in corruption or unethical behavior would not be in a position to perform the functions of his office for that would be contrary to his oath of office and his judicial mandate which is to hear and decide cases impartially and to the best of his ability without any interference whether monetary or otherwise.

We can therefore say that corruption or related complaints against a judge is a factor that there exists circumstances that would make him unable to perform his constitutional functions as a judge. A Judge can be removed from office by the President if the question of his removal has been referred to a tribunal and the tribunal has recommended to the President that the judge ought to be removed from office for inability or for misbehavior. The process of

removal of a Judge is between the judicial and the executive arm of the Government. It is the Chief Justice who represents to the President that the question of removal of a Judge under section 62 (5) of the Constitution has arisen and the President ought to appoint a tribunal to investigate the allegations.

We think it is important to consider the appointment of a Judge, before we consider his removal. Section 61(2) provides;

> **"The puisne Judges shall be appointed by the President acting in accordance with the advice of the Judicial Service Commission."**

Section 61(3) lists the qualifications that must be present before a person can be appointed as a judge of High Court. Our understanding of section 61(2) is that a Judge is appointed after the President has received advice that a particular person is fit and competent to hold the office of a Judge and that advice is usually given by the Judicial Service Commission. The word used under section 61(2) are that **"shall be appointed by the President"** and it shows the President has no option once he is in receipt of an advice from the Judicial Service Commission that an individual is fit to be appointed as a Judge.

Under section 68(2) the Judicial Service Commission in exercise of its function under the Constitution is not subject to the direction or control of any other person or authority. The decision of the Commission is to be made in concurrence of a majority of all the members thereof.

The case before us concerns the removal of a Judge of Court of Appeal as a result of complaints received by the **Ringera** committee which collected information concerning judicial officers and the general day to day running of the whole judiciary. The question that came to our mind is whether the Judicial Service Commission's input was a requirement before a representation was made by the Chief Justice to the President. We are saying so because the applicant was appointed in accordance with the advice given by the Judicial Service Commission that he is competent and eligible to hold office. In a situation where the decision of his appointment is being reversed because of allegations of corruption and competency, we ask whether it was necessary to seek the advice and concurrence of the Judicial Service Commission before a representation was made to the President.

It is plain and indisputable that under our Constitution an action cannot be carried out by an authority which is arbitrary or irrational and if it is carried out, it would be clearly invalid. It has also been held that an administrative discretion cannot be surrendered if the surrender takes the form of agreeing in advance to exercise it in a particular way or of pre-judging the way in which it shall be exercised. A plain reading of the Constitution shows that a judge is appointed on the advice of the Judicial Service Commission. We agree that a Judge holds office with security of tenure and one may argue that the power of JSC is limited when it comes to undertaking disciplinary measures against a Judge.

In case of **James vs Common Wealth of Australia [1936] A. C. 578 Lord Wright** had to say;

> **"A Constitution must not be construed in a narrow or pendantic manner and that construction must be beneficial to the widest possible amplitude of its powers must be adopted, or that a broad and liberal spirit should inspire those, whose duty is to interpret the Constitution."**



As a universal requirement the disciplinary procedure though not detailed and comprehensive is provided under the Constitution. Nevertheless, it is the Chief Justice as the Chairman of the JSC that has mandated the **Ringera** committee to conduct investigations and receive complaints concerning judicial officers.

We therefore think that the party that started or instigated the process that resulted in the receipt of the complaints and allegations against the applicant, ought to have been the first branch that ought to have authorized the next step. When a question arises as to the removal of a Judge, we think it was essential to seek and obtain the advice, guidance, contribution and direction of the same body that gave the advice to the President that it was okay to employ him in the first instance.

One may argue that even legitimate expectation does not spring from the written words of the Constitution, the courts cannot invent it because the JSC and/or the Chief Justice cannot promise what the Constitution has not given them. Our answer to that kind of contention is that the Constitution should be interpreted and construed in a broad, liberal and purposeful manner so that the values and the principles therein are worth the intentions and objectives intended for. We think that a particular provision or section of the Constitution

cannot be treated in isolation from the other provisions of the Constitution. That would be a narrow definition of the Constitution. A Judge is a Constitutional office holder and that is why the Constitution affords him tenure of office unless he is removed from office through the mechanisms provided under the Constitution.

The intention of Parliament was to afford the Judge the dignity of office to enable him perform his duties and that the security of his office can only be lost through a machinery known under our laws. We agree that disciplinary proceedings against a Judge are of a special nature which cannot be equated to a criminal charge as **Mr. Mwenesi** seems to submit or suggest. As stated the Constitution lays the framework upon which the removal of a judge may be investigated, the rules of procedure is left to the Judicial Service Commission in the first stage. The successive steps must not be considered separately but also as a whole. The question must always be whether looking at statutory procedure as a whole, each separate step is fair to the persons affected.

In this case there is no evidence that the JSC ratified the report that was made by the **Ringera** committee before the Honourable the Chief Justice exercised his constitutional powers to make a representation to the President. It is to be remembered that the Honourable the Chief Justice is the chairman of JSC and if complaints were made or received against the applicant it was not surprising or unusual that he should be the conduit pipe for transmission of the complaints to the President to appoint a tribunal under section 62(5) of the Constitution. In **Foulks on Administrative Law (7th Edition) 1990** the writer at page 198 stated;

> **"An act will be ultra vires where it is done by the wrong person. Or a power can be exercised only by the person on whom it is conferred."**

In our understanding the role of the JSC is to determine whether the act complained about is of the nature and degree to qualify as misbehavior, misconduct or unethical behavior sufficient to set in the processes that may lead to an adverse representation being made by the Honourable Chief Justice to the President. We will also add that another critical function of the JSC is that upon receipt of an allegation of misbehavior or misconduct of a judicial officer, it is to evaluate it in order to ascertain whether it should be advanced to the next stage, the act of removal exercise of a Judge under section 62. Looked at objectively, the JSC by a

careful and thorough examination of the facts is required to extract what the issues have been and the material facts found in relation to the complaint and considered germane to a proper and balanced exercise of the JSC's discretion to make or not to make an adverse representation to the President that the question of removing a Judge from office ought to be investigated. Such an examination would in our view, include seeing and hearing the complainant and the Judge separately for that would serve to inform and enhance a balanced and proper evaluation of the circumstances that has arisen which is likely to lead to removal of a Judge.

It transpired that the Honourable Chief Justice did not consult (in the absence of any evidence to the contrary) the JSC nor gave the applicant an opportunity to be heard on his reply to the adverse allegations that were to form a basis for a representation to the President and subsequent investigations by a tribunal.

In **CCSU v the Council of Civil Service Unions [1984] 3 All E.R.935 Lord Diplock** said that the courts will interfere only where a decision has no rationale basis or is so outrageous in its denial of accepted moral standards that no sensible person who has applied his mind to the question to be decided could have arrived at it. From the record, it is not clear whether the Chief Justice informed the JSC or had any discussions or deliberations and consultations with the said body before he made the representation to the President. In our humble view the authority and/or the powers of the Chief Justice to make a representation is derived firstly from a decision reached by the JSC and secondly his powers under the Constitution. The two situations or instances cannot be divorced from each other in that the Chief Justice has to seek the mandate and authority of the JSC before he purports to exercise his powers under section 62(5) of the Constitution.

We also think that section 61(2) and 62(5) have to be read together with section 68 of the Constitution in instances where the removal of a Judge has risen. The only sensible and practicable way to attend to the case of applicant who had a complaint or complaints raised against him, was to invite him to answer the charges and thereafter determine the weight and the quality of the complaints tabled against him before authorizing the Chief Justice to make a representation to the President. That was not done and it is the case of applicant that the Chief Justice by-passed the JSC and made a representation to the President before confronting him and giving him an opportunity to be heard on the allegations that were leveled against him.

It is the case of the applicant that it was not within the powers of the Chief Justice to do so and that he cannot derive any authority from the non-existence of a clear procedure in the Constitution. We think the sentiments by the applicant has merit. We say so because nothing would have been more simpler for the Chief Justice to confront the applicant either through the JSC or after he was sanctioned by the JSC to start the process of the removal of applicant. Having addressed our minds to the issue of appointment, we think that it was necessary to seek the advice, guidance and contribution of the entity that initially gave and whose advice was relied upon at the time when the applicant was appointed.

The next point for our determination is the issue of natural justice and whether the failure by the Chief Justice to confront the applicant with allegations before he made a representation to the President is fatal to the subsequent proceedings that is before the tribunal. The issue of natural justice has attracted a lot of debate and controversy among lawyers, judges and scholars in its interpretation, implementation and its effect on any proceedings that was carried out in breach of the same. Article 17 of the **United Nations Basic Principles on the Independence of Judiciary**states as follows:

> **"A charge or a complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter in its initial stage shall be kept confidential unless otherwise requested by the judge."**

The starting point is that section 62 of the Constitution does not provide for procedure or mechanism that has to be adopted or followed in instances where the removal of a Judge has arisen. Section 62(5) provides that if the question of removal a Judge has arisen, it is incumbent upon the Chief Justice to make a representation to the President so that a tribunal can be appointed to investigate the basis and the reasons for the allegations in order to establish whether the Judge can be removed or otherwise. Section 62(5) does not say whether the representation should be in writing or not. It also does not say whether it is mandatory or otherwise to give the affected Judge a copy of the representation before the President appoints the tribunal whose mandate would be to inquire and/or investigate the basis of the allegations that has brought about the removal of the Judge. In circumstances where there is no clear

provision or where a provision is silent on the procedure to be adopted, it is incumbent upon the courts to ensure that it breathes life into the Constitution or a particular enactment. It has been argued by the respondents that the Chief Justice can gather evidence in any way provided it is legal and he only needs to satisfy himself that prima facie there is a basis of making a representation to the President. And since the **Ringera** committee was an internal mechanism within the Judiciary as established by the Chief Justice in response to widespread complaints of corruption within and among the rank and file of the Judiciary.

The Chief Justice in his ministerial capacity as the head of Judiciary, receives and is entitled to receive all manners of reports, and if he finds that a particular case prima facie discloses a misbehavior within the threshold of section 62, then he is obliged to make a representation to the President without any reference to the affected party.

In the case of **Local Government Board v Arlidge [1915] AC 120** it was held;

> **"The minister at the head of a board is responsible to Parliament like other ministers. He is responsible for not only for what he himself does but for all that is done in his department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to get his material vicariously through his officials and he has discharged his duty if he sees that they obtain these materials for him properly. To try and extend his duty beyond this and to insist that he and other members of the board should do everything personally would be to impair his efficiency. Unlike a judge in a court he is not only at liberty but is compelled to rely on assistance of his staff."**

As was rightly pointed out by the bench in the **Mbogholi** case, the Chief Justice in exercise of his ministerial duties is not acting like a Judge in a court of law where he is expected to receive and consider and make decisions alone and to the exclusion of the parties and his assistants. However, the Chief Justice in exercise of his ministerial responsibilities, can rely on his staff, the Judges and other judicial officers working within the Judiciary in satisfaction of a particular duty or responsibility. In essence the Chief Justice is empowered to delegate his powers directly or indirectly to officers working within the Judiciary so as a

particular goal or task that is necessary for that delegation is achieved and/or implemented. It is our determination that the Chief Justice and/or the JSC were perfectly within their powers to appoint the **Ringera** committee and assign any duty or task that was necessary for the smooth and orderly administration of justice. We think the **Ringera** committee was a creation of the Office of the Chief Justice and/or the Judicial Service Commission and were perfectly within their terms to collect information concerning corruption affecting individual or particular group of judicial officers.

The **Ringera** committee was perfectly and clearly acting within its mandate when it compiled the report that has affected the applicant in this case. In receiving the report from the **Ringera** committee, the Chief Justice was exercising ministerial powers and in implementing the report as in this case when he made a representation to the President, he was exercising constitutional powers conferred under section 62 (5) of the Constitution. To that extent we find there was nothing wrong in the Chief Justice appointing the **Ringera** committee with special mandate as stated in its mandate. Secondly there was no impropriety or illegality that was committed by the Chief Justice in receiving the report and putting mechanism in its implementation. The question that arises is whether the Chief Justice violated the rights of the applicant in exercise of his constitutional responsibility under section 62(5) by making a representation to the President.

In the case of **Anisminic v Foreign Compensation Commission [1969] 1 All E.R. 208**, the court addressed the absence of jurisdiction and the failure to follow the rules of natural justice. **Lord Reid** had this to say;

> **"But there are many cases where, although the Tribunal had jurisdiction to enter on the enquiry, it had done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. (……) it may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it. It may have refused to take into account**

> **something that it was to take into account. Or it may have based its decision on some matter which under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."**

We have been invited by **Mr. Ombwayo** learned State Counsel that we should apply the doctrine of jurisdictional or collateral or preliminary question in determining whether a breach of rule of natural justice can vitiate the decision of the Chief Justice to make a representation to the President. According to this doctrine, if mistake relates to the state of affairs that exist were intended for the good of the decision, the court will intervene only if it thinks the required state of affairs does not exist. The question is what is the jurisdictional effects or collateral effect of the breach of the rules of natural justice?

In the case of **General Medical Council v Sparckman [1943] 2 All E.R. 337** it was held;

> **"If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision."**

The issue of the application of the rules of natural justice is a matter which has brought about considerable amount of debate among lawyers and scholars and we cannot in this judgement purport to say this issue is settled in terms of its implication, effect and ramification. There is a substantial body of opinions not restricted to the legal profession which would like to see administrative machinery brought under judicial review control for remedying acts of maladministration as distinct from excess or abuse of legal power. We think that such a proposal would constitute a revolutionary departure from the tradition of our conservative legal system and would it seem inevitably invite a great deal of debate among lawyers and the general public. We are saying so because the executive would be uncomfortable and jittery with constant intervention by the courts. In that context we need to reiterate the position expressed by the Court of Appeal in **Civil application No. 43 of 2006 Dr. Christopher Ndarathi Murungaru v Kenya Anti Corruption Commission & Attorney General**.

**"Lastly, before we leave the matter, Professor Muigai told us that their strongest point on the motion before us is the public interest. We understood him to be saying that the Kenyan public is very impatient with the fact that cases involving corruption or economic crimes hardly go on in the courts because of applications like the one we are dealing with. Our shot answer to Professor Muigai is this. We recognize and are well aware of the fact that the public has a legitimate interest in seeing that crime, of whatever nature, is detected, prosecuted and adequately punished. But in our view, the Constitution of the Republic is a reflection of the supreme public interest and its provisions must be upheld by the courts, sometimes even to the annoyance of the public. The only institution charged with the duty to interpret the provisions of the Constitution and to enforce those provisions is the High Court and where it is permissible, with an appeal to the Court of Appeal. We have said before and we will repeat it. The Kenyan nation has chosen the path of democracy; our Constitution itself talks of what is justifiable in a democratic society. Democracy is often an inefficient and at times a messy system. A dictatorship, on the other hand, might be quite efficient and less messy. In a dictatorship, we could simply round up all those persons we suspect to be involved in corruption and economic crimes and simply lock them up without much ado. That is not the path Kenya has taken. It has opted for the rule of law and the rule of law implies due process. The courts must stick to that path even if the public may in any particular case want a contrary thing and even if those who are mighty and powerful might ignore the court's decisions. Occasionally, those who have been mighty and powerful are the ones who would run to seek the**

> **protection of the courts when circumstances have changed. The courts must continue to give justice to all and sundry irrespective of their status or former status. What orders should we make in the motion before us?"**

We must state that the rules of natural justice are not engraved on tablets of stones. However, fairness demand that when a body has to make a decision which would affect a right of an individual it has to consider any statutory or other framework in which it operates. In particular it is well established that when a statute has conferred on a body the power to make decision affecting individuals, the courts will not only require the procedure prescribed to be introduced and followed by way of additional safeguards as that will ensure the attainment of fairness. In essence natural justice requires that the procedure before any making decision authority which is acting judicially shall be fair in all circumstances.

In **Tellis vs Bombay Municipal Corporation [1987] LRC (Constitution) 351 Chandrachand C.J.** said at page 376;

> **"The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons."**

At page 375 he said;

> **"The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be show to exist, when so**

> **required, the burden being upon those who affirm their existence."**

For a long time the courts have without objections from Parliament supplemented the procedure that had been laid down in a legislation where they have found that to be necessary for that purpose. We must add that before this unusual kind of power is exercised, it must be clear that the statutory procedure is insufficient to achieve justice and that to require additional steps would not frustrate the apparent purpose of legislation. We think additional procedural safeguards will only ensure the attainment of justice in instances where the statute in question is inadequate or does not provide for the observance of the rules of natural justice. As the authorities would show the courts took their stand several centuries ago, on the broad principle that bodies entrusted with legal powers could not validly exercise it without first hearing the person who was going to suffer as a result of the decision in question. This principle was applied to administrative as well as to judicial acts and to the acts of individual ministers and officials as well as to the acts of collective bodies such as justices and committees. The hypothesis on which the courts built up their jurisdiction was that the duty to give every victim a fair hearing just as much a cannon of good administration is unchallengeable as regard its substance.

The courts can at least control the preliminary procedure so as to require fair consideration of both sides of the case. Nothing is more likely to conduce to good administration. Natural justice is concerned with the exercise of power that is to say with acts or orders which produce legal results and in some way alter someone's legal position to his disadvantage. See **Sir William Ward in Administrative Law 6th Edition [1988] page 496**.

In the recent case of **Job Kilach Civil application No.77 of 2003** *(unreported)* our Court of Appeal had this to say;

> **"We said at the beginning of this ruling that the Goldenberg affair has haunted this nation and its courts since the early 1990s. Like every-one else, we really wish that the "Affair" could be speedily solved. But we in Kenya pride ourselves that we are a democratic nation and we operate democratic institutions. Democracy, as is well**

> **known, is normally a messy, and often times, a very frustrating way of governance. In this respect, dictatorships are more efficient and if the Judges and Magistrates running these courts were allowed to operate as dictators, we would have simply told Mr. Kilach:**
>
> ***"You and your kind have bothered us more than enough. You now must shut up and accept what has been given to you".***
>
> **Unfortunately for us, and probably for the nation, we cannot do that. The Respondent went to the High Court. The High Court was under a duty to hear him."**

In our understanding the Court of Appeal is saying that as apart of a reasonable, fair and just procedure the court has a cardinal duty to uphold the constitutional guarantees, the right to fair hearing which entails a liberal and dynamic approach in order to ensure the rights enjoyed by an individual is not violated because there is no particular safeguards provided under section 62 that deals with the removal of a Judge in instances where there is a complaint against him. In **Mbogholi** case the Honourable Judges **Lesiit, Wendoh and Anyara Emukule JJJ** were confronted with the same and/or similar question as the one before us that there was breach of the rule of the natural justice by the Chief Justice of the Republic of Kenya. It is the case of the applicant that the Chief Justice may have misconstrued the Constitution's silence on the hearing to be accorded to a Judge before making his representation to the President. We shall show later that in the celebrated case of **Barnwell v AG [1994] 3 LRC** a **Guyana** case that involve removal of a Judge from office and the court found that the Judicial Service Commission should have heard the Judge before making its representation to the President. It is the case of the applicant that the Chief Justice should have done the same as in the **Barnwell** case. In **Roselyn Nambuye** case it was the decision of **Nyamu J** *(as he was then)* was that the right to a hearing is provided for at tribunal stage and the Chief Justice was not constitutionally mandated to conduct an inquiry unlike the **Guyana** case. In the **Mbogholi** case the Honourable Judges answering the question whether the Honourable **Mr. Justice Mbogholi** was entitled to a hearing before the Chief Justice and to

be confronted with allegations of complaints before the matter was remitted to the President to appoint a tribunal the Judges held;

> **"The applicant's contention under this score (of the breach of the rules of natural justice) is that the failure by the Honourable the Chief Justice to accord him the right to a hearing before making a representation to His Excellency the President was a contravention of his fundamental rights to a fair hearing within a reasonable time before an independent and impartial court or adjudicating authority established by law. ……we observe firstly that the rules of natural justice** *audi alteram partem* **hear the other party and no man/woman may be condemned unheard are deeply rooted in English common law and have been transplanted by reason of colonialisation of the globe during the hey-days of the British empire. Secondly we recognize and observe those principles apply whenever there is no statutory or constitutional law to the contrary. ….."**



The honourable Judges quite rightly recognized that the rules of natural justice are the bedrock of the rule of the law and administration of justice. They ruled that you must hear the other party before you make an attempt to condemn him and that requirement is deeply rooted in common law. We do not think that the common law principles of natural justice was transplanted by virtue of colonialisation but we received it as a result of the development of the principles of law which had a good foundation as a basis for administering justice between the parties. We have not applied the common law because Kenya is a former colony of the British empire and we think that it was a misconception to say that the common law principle of natural justice were transplanted because they were imposed by the British empire. At page 42 of the **Mbogholi** case the honourable Judges stated;

> **"It follows therefore where there is a statute or written law the common law principles have applications in accordance with the provisions of the statutes or the written law. In this**

> **matter the applicable law is itself the Constitution of Kenya. It expressly provides for the manner in which a Judge may be removed from his tenured office."**

In the opinion of the Judges in the **Mbogholi** case the rules of the natural justice was not applicable and was not violated because the constitution expressly provided for the manner in which a Judge may be removed from his office. However, the Judges recognized that the common law principles of natural justice have an application in accordance with the provisions of the statutes and written law. With profound respect to the Honourable Judges in the **Nambuye** and **Mbogholi** cases as in the present case the question is what is the effect when the Constitution is silent as to the procedure to be adopted when the question of the removal of judge arises? In our own opinion when the Constitution is silent it has to be interpreted in broad and liberal manner so that an injustice that has resulted from the silence or ambiguity does not remain without remedy or redress.

The question whether the applicant would be accorded a hearing is not provided for under the Constitution. The role of the tribunal is to inquire into the matter and report on the facts thereof to the President and recommend to him whether a Judge ought to be removed from office. In our view the Constitution as stated does not provide that the tribunal has to hear the applicant on the contents of the allegations that are subject to its inquiry and/or investigations. However, as a matter of good sense and as a public authority likely to make a decision the tribunal ought to confront the applicant with allegations, lead evidence by presenting witnesses before the tribunal where the applicant will have the opportunity to test the veracity and the weight of the evidence that were made against him. On the same breadth the applicant would have the assistance of an advocate who would be in a position to adequately present his side of his story or defence before the tribunal. It is mandatory for the tribunal to give the applicant an opportunity and to observe strictly the rules of natural justice. If there is no requirement that provides that the tribunal will hear the applicant under section 62, is it safe to conclude that it was mandatory as a matter of good sense to confront the applicant with allegations before a representation was made to the President? If the question of removing a Judge from office has arisen, and a representation has been referred to the President under section 62(5) of the Constitution, the President is to suspend the Judge from performing the functions of his office and any such suspension is to be revoked at any

time after he has received a favourable recommendation from the tribunal he formed to investigate the conduct of the Judge. The President in appointing a tribunal acts on advice and on a representation that is given to him by the Chief Justice of the Republic of Kenya. The Chief Justice is the head of the Judiciary while the President is the head of the Executive. Therefore in order for the independence of the Judiciary to be enhanced and protected, it is essential for the Chief Justice to give a written representation containing the details of allegations, witness statements and the reason why the Judge ought to be removed from office. This serves to enhance the possibility that the tribunal appointed by the President is not put in a situation where it solicits and/or puts in an investigative process in order to gather evidence to sustain the charges of misconduct against the Judge.

We think the misconduct that is to be investigated by the tribunal arises out of the gazette notice that appointed the tribunal and the representation given to the President by the Chief Justice for onward transmission to the tribunal for consideration and deliberation. As was rightly pointed out in the **Mbogholi** case, the tribunal is not empowered to institute charges or lay complaints or make allegations or put in process investigation mechanisms against a judge other than what was provided in the gazette notice by the President read together with the representation that was made to him.

It has been alleged that there is no legal or constitutional requirement for the Chief Justice to hear the applicant prior to making representation to the President. It suffices to say that there is no evidence to show the allegations or complaints against the applicant were properly placed before the Judicial Service Commission for deliberation and consideration before the Chief Justice took the action of making a representation to the President. In making a representation to the President, the Honourable the Chief Justice is wearing a constitutional hat. And in triggering the committee that received and compiled the report against the judicial officers and in particular the applicant, the Chief Justice was exercising his administrative ministerial powers. As the chairman of the JSC the Honourable the Chief Justice is also wearing the hat of administrative authority. In essence the constitutional responsibility of the Chief Justice in making a representation to the President under section 62(5) of the Constitution is preceded by his administrative ministerial powers.

In order for him to be vested or assume the power to exercise disciplinary control over Judges, the first step of administrative authority has to be exercised by the Chief Justice either through the JSC or alone by inviting the affected Judge to respond to the complaints that were

raised against him. The preferment of charges against the applicant in respect of the complaints gathered by the **Ringera** committee was to be followed by the holding of an inquiry and not the exercise of the constitutional powers of the Chief Justice in straight away making a representation to the President. We think the holding of an inquiry or observing the rules of natural justice are prerequisite or conditional to the exercise of the Chief Justice's constitutional powers under section 62(5).

The **Ringera** committee recognized the importance of complying with the principles of natural justice before any disciplinary mechanism was put in place. The committee was categorical that it was mandatory to confront affected officers with the charges and complaints against them before any criminal or disciplinary measures were undertaken. In its report, the committee had these to say;

Paragraphs;

**6:1:1 In the premises, we have decided to include in this report only those members of the Judiciary in respect of whom we found the allegation of corruption, misbehavior, or want of judicial ethics credible.**

**6:2:1 Due to the sensitivity of the matter under inquiry and the fact that the officers affected have not had the advantage of being confronted with the 'evidence' against them and are entitled to the due process of the criminal law and/or the appropriate disciplinary process, we think it is inappropriate to include names of those officers in this main report. We have decided to disclose the names of the officers and the allegations and a summary of the evidence against them together with our findings thereon in a separate schedule to this report which is not for dissemination to the public.**

**6:3:1 For the Judicial Officers implicated in Judicial corruption, misbvehaviour, and want of ethics and whose names are in**

> **Part A of the schedule, we recommend that the Chief Justice recommends immediate prosecution and/or initiates administrative disciplinary action as appropriate in the circumstances unless the Officers concerned voluntarily relinquish their Judicial offices."**

It may not be clear under section 62 that the applicant is not entitled to a hearing prior to the representation to the President. However, we think the representation is such a grave and serious matter with severe consequences of likely to remove a Judge from office. Therefore, it is mandatory for the Judge to be given a hearing either by the JSC or by the Chief Justice before a representation was made to the President. In this case there is no evidence that the **Ringera** committee gave the applicant an opportunity to answer the charges that were made against him before they compiled a report in order to test whether the allegations were frivolous or otherwise. We are saying so because Judges operate in a crucible controversy where emotions run high, the ambiance is often hurried, adversarial, confrontational and the inevitable disappointed side or perhaps both sides is deep and personal. We also state that the sensitive nature of litigation in this country makes it apparent that real or feigned outrage can be a reaction to thoughtless or relatively harmless comment. In that regard Judges are pursued vigorously by men and women who delight in taking aim at judicial targets to lead to public trial, which is intended and/or calculated to disturb judicial independence. It therefore seems correct to hold that judicial office holders participation in the initial stages of the disciplinary process is a pre-condition to be observed prior to the decision to make or not to make the adverse representation to the President.

The Judge ought to be heard by the JSC prior to the commencement of the removal exercise. And it is not less sensitive than the period commenced by the complaint and ending with the decision of making a representation to the President. It has been argued before us that there is no provision in the Constitution that says that the Judge ought to be heard prior to representation being made to the President. Our answer is that the Constitution does not clearly and cannot clearly displace the duty to hear a person like the applicant who will face serious charges concerning his profession and ultimately his standing before the society. The Constitution is only silent on the matter and a presumption is that the Legislature did not intend to deny natural justice to the applicant or to any other Judge. The rules of natural

justice are an obligation given to a decision maker to first give the affected party an opportunity to reply or rebut the complaints. The precise nature of the opportunity and the scope thereof are to be determined according to the prevailing circumstances and in particular to the exigencies and the urgency required at the time when the officer is called upon to make an opinion. In **R v Whalen [1974] 17 CCC at page 217** it was held;

> **"Justice after all is not confined to the acts of law, parliament or the legislatives. It is not to be found constrained with legalistic frameworks of formal police investigations of arrest and charge. Justice must be alive and allowed to live within the community."**

It is clear that the Chief Justice may have assumed or either accepted that the complaints made to him against the applicant were sufficiently established or that at any rate he considered that they were sufficiently serious to warrant reference/representation to the President to form a tribunal. If he thought he was entitled to refer the matter to the President, he should have given the applicant an opportunity to deal and/or answer the complaints against him. Under section 62(5) of the Constitution the Chief Justice has a duty to make a representation to the President and this must be in written form and the applicant ought to have known these facts before the representations were made. It is the contention of the applicant that no such facts had been known to him so that he could know the nature of complaints he faces before the tribunal. We think that the Honourable the Chief Justice cannot wake up one morning and say he is making a representation to the President on the conduct of ***'Justice John'*** without first confronting him with the charges and giving him an opportunity to rebut the same. Justice will certainly require that he should consult and seek the advice of the JSC and on the same breadth the judge should be given a right to see and reply to the complaints raised against him which is likely to lead to his suspension and eventual removal through tribunal. The Chief Justice had powers and/or jurisdiction to make a representation to the President in instances or when a situation arises for the removal of a judge. However, in this case he had done or failed to do something in the course of his mandate which is of such a nature that his decision is a nullity. He made a decision which he had no power to make by failing to give the applicant an opportunity to be heard in accordance with the principles of natural justice. The Chief Justice may have acted in perfect good faith, he may

have misconstrued the provisions giving him power to act but ultimately he omitted to deal with the question remitted to him by virtue of his office and the expectation of the applicant.

Of course the law is very clear that when construction of interpretation of a particular section of the law is misconceived or ill advised, there are three grounds of attack namely; illegality involving an error of law which becomes ripe for discussion within the framework of judicial review. The other two grounds are irrationality and procedural impropriety. By illegality as a ground of judicial review, it means the decision maker did not understand correctly the law as regulated in decision making power and failed to give effect to it. In the result we think the submission of the learned State counsel that the applicant would after all be given a hearing at the tribunal is a misconception of the law, breach of the rules of natural justice and were in contravention of the legitimate expectation of the applicant to be entitled to a fair hearing before a representation was made to the President. We think that the constitution must be construed to include the rules of natural justice and the Judge being a holder of an important position in the society, should have been given a hearing before any adverse action was taken against him.

The term natural justice, the duty to act fairly and legitimate expectation have no much difference but are generally flexible and interchangeable depending on the circumstances and the context in which they are used. We can do no more than refer to the words **De Smith & Brazier in Constitution and Administrative Law (6th Edition) 1999** at page 557;

> **"The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under a duty to *"act judicially"*, they were applied originally to courts of justice and now extend to any person or body deciding issues affecting the right or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The content of natural justice is therefore flexible and variable.**
>
> **All that is fundamentally demanded of the decision-maker is that his decision in its own context be made with due regard**

> **for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case. Nevertheless some judges prefer to speak of a duty to act fairly rather than a duty to observe the rules of natural justice, often the terms are interchangeable. But it is perhaps now the case while a duty to act fairly is incumbent on every decision-maker within the administrative process whose decision will affect individual interests, the rules of natural justice apply only when some sort of definite code of procedure must be adopted, however flexible that code may be and however much the decision-maker is said to be master of his own procedure. The rules of natural justice are generally formulated as the rule against bias *(nemo judex in sua causa)* and in respect of the right to a fair hearing *(audi alteram partem).*"**



**Professor Hotop** on **Principles of Australian Administrative Law, [6th Edition] 1985 at page 180** he made a bold statement as hereunder:-

> **"A recently developed and potentially very broad concept that has been held to attract natural justice is that of "legitimate expectation". The true extent of the notion that an expectation may be the foundation of a right to compel the observers of the principles of natural justice has not yet been fully worked out stated with precision. It may generally be said that to cover any situation where the circumstances are such as to give the individual an expectation based on reasonable ground to receive or not be deprived of, some right, liberty, prestige, or other interests, or that the relevant authority will exercise or not exercise its powers in relation to his or her interests in a particular way."**

It is reasonable to say that the applicant's legitimate expectation emanate from the fact that he was not confronted with the **Ringera** report, he was not given an opportunity by the Chief Justice or the JSC to answer the charges that were leveled against him in the **Ringera** report, that the Chief Justice did not give him an opportunity to answer the charges against him before he exercised his constitutional responsibility under section 62(5) of the Constitution and lastly the tribunal did not give him the nature of the charges and complaints immediately it was gazetted but was given to him one year down the line. In our view if the applicant was given an opportunity in our situation which was likely to lead to loss of his status as a Judge of Appeal, reputation, position, power and his prestige before the society, he was expected to be given an opportunity to rebut the attacks that were leveled against him. It was reasonably contemplated that the Chief Justice would give the applicant an opportunity before he made a representation without the knowledge of the applicant. The failure to follow the procedural requirements of the rules of natural justice is a factor in favour of the applicant. **Craig on Administrative Law, 2nd Edition, [1989] at page 206** states;

> **"The absence of a substantive right to a particular benefit should not lead to the conclusion that procedural rights are inapplicable and the term legitimate expectation should not be manipulated to reach this end. It is however also clear that the concept of legitimate expectations like many concepts can be used in more than one way, it does not have to be given a restrictive interpretation, thus more recent cases have in principle at least given a broader meaning to that term, utilizing it as the foundation for procedural consultation rights to be given to immigrants, workers and local authorities. Thus if an individual is to be deprived of a benefit which was enjoyed in the past and which he could legitimately expect to continue or he has received assurance from the decision maker that such a benefit will not be withdrawn without giving him some opportunity to argue the contrary, then in either instances an opportunity for the individual to make representations will be accorded."**

It has been argued that there was no precedent that was to be followed or that would guide the Chief Justice since this was the first time in the Kenyan history the issue of the removal of a judge has arisen.

**In Barnwell vs Attorney General [1994] 3 C.L.R., the Chief Justice of the Republic of Guyana** held;

> **"Judges have been removed from office on very few occasions. The Judicial scandal of the late thirteenth century involved the corruption, due to low pay, of many officials. Edward 1 appointed a Comission of Inquiry which led to the dismissal of two out of three judges of the Court of King's Bench and four out of five judges of the Court of Common Pleas. Sir William De Thorpe, Chief Justice, was convicted of accepting bribes in 1350 and removed from office. Lord Chancellor Bacon suffered the same fate for similar reasons in 1621. In 1725 Lord Chancellow Maccelefield resigned after being convicted of selling offices in the Court of Chancery. Lord Westbury resigned in 1865 after abuses in the administration of bankruptcy were revealed."**

He also cited **David Pannick CPC in his book "judges" 1887** at page 89;

> **"Judges of the High Court and the Court of Appeal hold that office during good behavior, subject to a power of removal by Her Majesty on an address presented to Her by both Houses of Parliament. Similar provisions apply to Law Lords. Such protection of judicial tenure dates from 1700. The object of all this was to protect the judges, not from Parliament, but from the arbitrary and uncontrolled discretion of the Crown. Sir John Barrington, a Judge of the High Court of Admirally in Ireland, was removed from office by these means in 1830 after being convicted of**

> **appropriating for his own use funds paid into court. Since 1830 several other judges have been accused in the Houses of Parliament of misconduct but no judge has been removed from office by these means since that date" (1830)."**

On our part we think that the **Ringera** committee was set up by the Chief Justice as a result of widespread corruption and complaints against judicial officers. The committee was set up because there was a problem within the Judiciary and that it was reasonably expected that some members of the Judiciary would be indicted after the committee had finalized its report. In such circumstances it was necessary to put in place mechanism to safeguard and protect persons who may have been indicted in that report. In our view it is not enough to say that this was the first time such a matter had arisen and that there was no procedure to be followed. To our mind the rules of natural justice are to be applied in all situations unless there is evidence to show the circumstances did not warrant the appliance and compliance of the said principles. In particular there was no emergency that could have warranted contravention or breach of the rules of natural justice. It was not a matter of life and death that as a result of the complaints against the applicant, the Chief Justice was obligated to immediately make a representation to the President to appoint a tribunal without giving the applicant an opportunity to answer the charges or to know the nature of the charges that were made against him.

**Professor William Dray in Philosophy of History [1964] at page 6**had this to say;

> **"Historical explanations too aims at showing that the event in question was not a matter of chance but was expected in view of certain antecedent or divination but rational scientific anticipation which rests on the assumption of general loss."**

The concept of natural justice is based on desirability and necessity for propriety and good faith on the part of public officials towards other citizens not to depart from a course of action which the affected party had been led to believe or expect to be pursued or adopted. What we are saying is that the applicant as a Judge of Appeal and who has been applying in his daily course of duty the principles of natural justice believes or expected that the Chief Justice or the **Ringera** Committee would pursue or adopt the rules of natural justice in case where there

was a complaint or allegations of impropriety, misbehavior or misconduct made against him. In our view a departure from the rules of natural justice a legitimate expectation was or is likely to affect the rights and interests of the applicant. Such a departure without due and adequate notice and with appropriate opportunity to be heard resulted in miscarriage of justice.

In the **Guyana case of Barnwell v Attorney General [1994] 3 LRC Page 30** it was held;

> **"It is common knowledge to all students of administrative law that the duty to act fairly has been exhaustively discussed and its principles stated. As usual however the problem lies, most times in the application of the principles and identification of situations and circumstances that are to the purpose. But first this passage from Professor Riggs on legitimate expectation and procedural fairness in English Law 1998 which demonstrates the interrelationship between legitimate expectation and duty to act fairly."**
>
> > **"Since the landmark decision of Ridge v Baldwing 1963] 2 All ER 66, handed down by the House of Lords in 1963, English courts have been in the process of imposing upon administrative decision makers a general duty to act fairly. One result of this process is a body of case law holding that private interests of status less than legal rights may be accorded procedural protection against administrative abuse and unfairness. As these cases teach a person whose claim falls short of a legal right may nevertheless be entitled to some kind of hearing if the interest at stake rises to the level of a legitimate expectation. The emerging doctrine of legitimate expectation is but one aspect of the duty to act fairly but its origin and development reflect many of the concerns and difficulties accompanying the broader judicial effort to promote administrative fairness. As such it provides a useful**

> **window through which to view judicial attempts to mediate between individual interests and collective demands in the modern administrative state."'**

It is clear that there was a duty or an obligation on the part of the **Ringera** committee and secondly on the part of the Honourable the Chief Justice to act fairly towards the applicant before the administrative and judicial decision was made or undertaken. There is no difficulty that was canvassed before us or brought to our attention in applying the principles of law pertaining to the duty to act fairly. The case laws that we have referred, is replete with mentions of fairness or duty to act fairly. And that right cannot be deprived from the applicant in the absence of any evidence showing that it was impossible or impracticable to accord the applicant the right he deserved and the principles of natural justice and legitimate expectation as a judge who has been fulfilling that mandate.

As stated there is very little difference or no difference between the principles of natural justice, legitimate expectation and the duty to act fairly. And in so far as there was contravention of those traditional and jurisdictional issues, then it can be safely concluded that the Chief Justice had no jurisdictional powers to make a representation to the President. Equally it is our view that the President had no jurisdictional powers to appoint a tribunal when he was not in possession of a written representation from the Chief Justice of the Republic of Kenya. We say so because the constitutional powers of the President emanate from the fact that he is in possession or has received a representation from the Chief Justice under section 62(5). There was therefore no basis for the President to appoint a tribunal when he was not supplied with a written representation showing the instances of misconduct or misbehavior that was committed by the applicant and that was to be investigated by the tribunal.

The question is what is the consequence of breach of rules of natural justice. The idea of natural justice is one which the High Court have long recognized. So far this idea is satisfied by giving both sides to a dispute an opportunity of being heard, there should be no difficulty in ensuring observance of the rules. In order to ensure that in cases where the right of the individual was in question the decision was not taken without proper investigations into both sides of the question. This could be achieved by invoking the rule that both sides should be heard before the administrative decision was reached. In short any person whose rights

were affected by an official decision was entitled to advance notice and a fair hearing before an impartial judge or a decision making authority. It is our position that natural justice requires that the procedure before any decision making authority which is acting judicially shall be fair in all the circumstances.

The question is not whether the applicant would be accorded a fair hearing before the tribunal but whether he was afforded an opportunity by the **Ringera** committee and the Chief Justice before the matter of his removal was referred to the President for exercise of his powers of section 62(4), (5), and (6) of the Constitution. The answer to that question depends not upon the fact that the tribunal would be in a position to accord the applicant the right to a fair hearing but upon the steps that were taken by the **Ringera** committee and the Chief Justice. We have found that the steps taken by the **Ringera** committee, the Chief Justice in exercise of his administrative ministerial powers and his constitutional powers, did not accord the applicant a fair hearing and did not comply with the mandatory provisions of the rules of natural justice. The question is whether a reasonable, objective and informed person with the correct facts and applicable law would reasonably conclude that the **Ringera** committee and the Honourable the Chief Justice were not entitled to observe the rules of natural justice. The answer to that question is that it was reasonably anticipated and the duty was mandatory. It must never be forgotten that the application and observance of the rules of natural justice is a fundamental prerequisite for a decision. In our mind a decision maker should never hesitate or sidestep the rules of natural justice on the pretext that the affected party would be accorded that right at a later stage.

As stated earlier, we have noted that the honourable Judges who were involved in the **Nambuye** and **Mbogholi** cases, were of the view that the affected Judges were not entitled to a hearing before a representation was made to the President as in any case they would get a hearing before the tribunal. Judges may be tempted to refuse relief on the ground that a fair hearing could have no difference to the result but we reiterate that in principle it is vital that the procedure and the merits should be kept strictly apart since otherwise the merits may be prejudiced unfairly by violating the rules of natural justice. **Lord Wright** in **General Medical Council** *(supra)* held that;

> **"If the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same**

> **decision would have been arrived at in the absence of the departure from the essential principles of justice. The decision must be declared to be no decision."**

It is therefore clear where there is a failure of disallowance of fair hearing procedures, the result is that the decision is to be declared no decision. In **John v Rees [1969] 2 All ER 274 at page 309 Megarry J**

> **"It may be that there are some who would decry the importance which the courts attach to the observance of the rules of natural justice. "When something is obvious, "they may say, "Why force everybody to go through the tiresome waste of time involved in framing charges and giving an opportunity to be heard? The result is obvious from the start. "Those who take this view do not, I think, do themselves justice. As everybody who has anything to do with the law well knows, the path of the law is strewn with examples of open and shut cases which, somehow, were not; of unanswerable charges which, in the event, were completely answered; of inexplicable conduct which was fully explained; of fixed and unalterable determinations that, by discussion, suffered a change. Nor are those with any knowledge of human nature who pause to think for a moment likely to underestimate the feelings of resentment of those who find that a decision against them has been made without their being afforded any opportunity to influence the course of events."**

That above position was reiterated in the case of **Rees & others v Crane [1994] 1 All ER** when it was held;

> **"The Commission was not intended simply to be a conduit by which complaints are passed on by way of seriousness of**

> **the charges against the respondent, including misbehavior, the publicity surrounding the respondent's suspension and the appointment of the Tribunal of inquiry, and the damage to the respondent's reputation and position as a judge, the respondent had not been treated fairly and ought to have been given the opportunity to reply to the charges before the representation was made to the President so that suspicion and damage to his reputation would be avoided if he rebutted the charges."**

Consequently we agree with the proposition that the applicant had no notice of the complaints that were raised against him and that were made to the **Ringera** committee. And secondly that he was not accorded or given ample or adequate opportunity to respond to the allegations in the complaints and clearly on the uncontroverted evidence by the applicant, we think there is remarkable merit in his proposition. We agree with the applicant that he had no prior intimation of the charges that are subject of inquiry or investigation before the tribunal. He was not given or allowed ample opportunity to respond to the said allegations. It is therefore correct and proper to conclude that the applicant was denied a fundamental right which we are abound to restore. In our opinion the applicant was entitled to purposeful, protective and participative procedural mechanism that should have been reasonably matching the risks flowing from the representation and subsequent investigations by the tribunal. It is unsatisfactory to say that the applicant would after all receive a hearing before a tribunal. That is a separate matter. However, the arbitrary withdrawal of the applicant's participation in the preliminary process that were based on legitimate expectation and prior to the decision by the Chief Justice to make an adverse representation against the applicant, was a nullity and contrary to the law governing entitlement to legitimate expectation hence the decision of the **Ringera** committee and the Chief Justice were acts which were *ulra vires* null and void *abinitio* in so far as the applicant is concerned.

The last issue for our determination concerns the tribunal that was established by the President to enquire or investigate the complaints that were raised against applicant. It is the contention of the applicant that the tribunal was not clothed with proper jurisdiction on the grounds that the representation that was made to the President and which is the subject of its

powers was made in contravention of the rules of natural justice. He also attacks the allegations drawn by the assisting counsel in an apparent violation of the published instruments appointing the tribunal namely gazette notice No.8828 of 2003. It is the case of the applicant that the grounds concerning the jurisdiction of the tribunal are matters clearly touching directly on the concern of officers who were appointed by the President. On the other hand it was submitted by the advocates appearing for the respondents that there was no impropriety, omission or otherwise that was committed by the tribunal.

The applicant herein is a Court of Appeal Judge in the Republic of Kenya, is a respondent in the proceedings before the tribunal established under section 62 of the Constitution. The said tribunal was established through gazette Notice 8828 of 2003 by the President of the Republic of Kenya. The Gazette Notice reads as follows;

> **"WHEREAS the question has arisen that the conduct of the Judges of Appeal Moijo M. Ole Keiwua and P. N Waki ought to be investigated.**
>
> **NOW THEREFORE, in exercise of the powers conferred by sections 62 (5) and (6) and 64 (3) of the Constitution of Kenya, I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya appoint-**
>
> **Justice (Rtd) Akilano Molande Akiwumi**
> **Justice Benjamin Patrick Kubo**
> **Joe Okwach**
> **Philip Nzamba Kitonga**
> **William Shirley Deverell**
>
> **To be members of a tribunal to investigate the conduct of judges of Appeal Moijo M. Ole Keiwua and P. N Waki.**
> **Justice (Rtd) Akilano Molande Akiwumi shall be the Chairman of the tribunal and its mandate shall be-**
>
> **To investigate the conduct of judges of Appeal, Moijo M. Ole Keiwua and P. N. Waki, <u>including, but not limited to</u>, the allegations that the said judges of Appeal**

**have been involved in corruption, unethical practices and absence of integrity in the performance of the functions of their office.**

**To make a report and its recommendations thereon to me expeditiously. In the meantime, the said Judges of Appeal stand suspended from exercising the functions of their office with immediate effect.**

**The tribunal shall have all the powers necessary for the proper execution of its mandate including power to-**

**Determine the times and venue of its meetings; and**
**To regulate its own procedure.**
**Gazette Notice No.7280 of 2003 is revoked.**
**Dated the 10th December, 2003.**

**MWAI KIBAKI**
**President**



The 7th respondent was appointed through Gazette Notice No.377 of 20th January 2004 as a counsel to assist the tribunal appointed to investigate the conduct of the applicant. In a Gazette Notice No.95 of 6th January 2004, the tribunal promulgated rules that were necessary for the smooth performance of its functions as mandated by the President under section 62(5) and 64(3) of the Constitution. The role of the assisting counsel was indicated as;

**Shall present evidence relating to investigation.**
**To serve on each of the subject of investigation a hearing notice at least 14 days before the date of the hearing.**

**That he shall draw up a list of allegations against the applicant together with a summary of the evidence in support of the allegations and shall serve the document containing the allegations and the summary of the evidence on the subject of the investigation at least 14 days before the date of the hearing.**

> **And any other thing that was necessary and reasonable for the smooth operation of the duties and responsibilities of the tribunal.**

It is important to understand the issues that triggered the complaints against the tribunal. The applicant wrote a letter dated 23rd December 2003 to the Chairman of the tribunal and in that letter he complained that they did not have any inkling as to the reasons why he was being investigated other than what had been widely reported in the press. He complained that if the press reports were true, then the tribunal rules had been violated since there was a calculated design to try, find him guilty, condemn and remove him through the press before he was heard by the tribunal. He also complained that the Permanent Secretary for Ethics and Governance had acknowledged that there had been a leakage of the **Ringera** report.

In a letter dated 5th January 2004 the Chairman of the tribunal replied to the allegations that were set out by the applicant in his letter dated 23rd December 2003. The Honourable chairman stated that the rules of the tribunal provided for the service on the affected judges of Appeal of allegations to be formulated against them together with a summary of the related evidence that will form the basis of the tribunal's investigations not press reports or other sources. It is important to reproduce **paragraph 3** of that letter which states as follows;

> **"The service of the allegations and the summary of the related evidence can obviously only be done after the assisting counsel of the tribunal has completed gathering the relevant information regarding the conduct of the affected judges of appeal in accordance with the mandate of the new tribunal and are set out in the Gazette Notice No.8828 of 10th December 2003. Thereafter the affected judges of appeal will also be given reasonable time to prepare their answers to the allegations and to gather related rebuttal evidence. All this will take some time, but you can be assured that the new tribunal will begin its investigations as practicable after the foregoing steps have been taken. The new tribunal is not involved as you have alleged in a scheme**

> **to harass and hound the affected judges of appeal out of office unheard."** *(underlining ours).*

In another letter dated 10th March 2004, the applicant complained that HCCC No.1565 of 2000 and the whole court record concerning that case has been removed or forwarded to the tribunal without notice to the parties and he found that to be strange. The letter stated in part;

> **"If our client or any other party in the proceedings is being investigated by the tribunal concerning the case justice in all its hues and soundings requires that we be put on notice. In any case if any facts were necessary for your tribunal our reading of relevant laws show that you should have heard those facts from the honourable the Chief Justice before the tribunal was set up. To purport to inquire into the facts without participation of the parties in this suit is highly prejudicial and in our humble submission a contravention of the constitution and a subversion of justice."**

The tribunal replied through a letter dated 17th March 2004 and confirmed that the file had been released by the High Court Registrar to the assisting counsel of the tribunal for purposes of investigations of certain matters before the tribunal. The tribunal also confirmed that the said file had been returned to the High Court registry.

In a letter dated 21st April 2004, the applicant complained that some persons had gone to his home in **Nkorrikorri** in Narok District alleging to be from the tribunal, to investigate his conduct and that they were in the process of gathering evidence for presentation to the tribunal in order to remove him from the Judiciary. The applicant complained that the procedure adopted by the tribunal was strange because the tribunal has no investigative powers. The applicant also contended that any inquiry and/or investigations into matters of facts concerning him could only be done with his participation and if the contrary was done, it was highly prejudicial, a contravention of his constitutional rights and an attempt to subvert the course of justice. In that letter the applicant made a warning to the tribunal that he will

take out relevant proceedings for prohibition if an apology or a suitable explanation for the apparent harassment was not received. In the last paragraph of that letter, the applicant stated;

> **"It is most unfortunate that to date the Honourable Mr. Justice Ole Keiwua has no knowledge of what it is about his conduct that your tribunal has been established to investigate into."**

In our understanding the applicant was questioning that the tribunal had exceeded its powers by making attempts to gather evidence and assuming that it had powers to investigate and collect fresh evidence against the applicant other than what was contained in the representation that was made to the President. Indeed the applicant was questioning that he was not supplied with any allegations or charges that were to form the basis of his inquiry before the tribunal.

In a letter dated 30th April, 2004 the Secretary of the tribunal confirmed that investigators attached to the tribunal did visit **Nkorrikorri** in Narok District on 16th April 2004. The Secretary stated that the purpose of the visit was to gather relevant information to facilitate the tribunal's investigations relating to the applicant which was yet to start. However, the chairman confirmed that the evidence to be gathered was not to secure the removal of the applicant. In the last paragraph of that letter the tribunal stated;

> **"As the chairman informed you in his letter of 5th January 2004 <u>service of the allegations and the summary of related evidence can only be done after the information gathering process is completed</u>. The said process is nearly completed now and it will be possible to serve the honourable judge shortly. Thereafter the honourable judge will be allowed reasonable time to prepare his response to the allegations and to gather related rebuttal evidence before the commence of investigations**."*(emphasis ours)*

In a letter dated 5th May 2004, the applicant wrote as follows;

> **"We are surprised. We are shocked. We are amazed.**
>
> **If your Lordship's tribunal is not concerned with the question of the Honourable Justice Ole Keiwua's removal under section 62 of the Constitution of Kenya then our client will resist any service of any allegation which the tribunal has been gathering evidence for or on since the tribunal was appointed."**

What the applicant was saying is that it was wrong on the part of the tribunal to engage in a process of gathering evidence that would sustain a conviction or otherwise against the applicant. And that his removal and any inquiry by the tribunal should be within the boundary and/or parameters of section 62(5) of the Constitution. In essence the applicant was alleging that the jurisdiction of the tribunal in inquiring into his conduct was limited to the representation by the Chief Justice to the President alleging the question of his removal has arisen and ought to be investigated. In that letter the applicant informed the tribunal that it has misdirected itself in law and in fact. The applicant also demanded a true copy of the representation by the Honourable the Chief Justice to His Excellency the President under section 62(5) of the Constitution. He also informed the tribunal that its conduct to engage in a process of investigations and collection of evidence was manifestly illegal and unconstitutional.

It is the position of the applicant that the tribunal misdirected itself to send alleged investigators to inspect land boundaries and gather other evidence to sustain his removal and that the conduct of the tribunal was in contravention of the provisions of the Constitution. He also stated that such illegalities were intended to demean any noble purpose that the Chief Justice may have had in advising and making representation to the President to appoint a tribunal to investigate the truth or otherwise of the complaints that was received by the Chief Justice and handed over to the President.

In a letter dated 30th August 2004 the applicant complained that he had not received any reply to his letter of 5th May 2004. And that one year since the tribunal was appointed he had not received the representations that were the subject of the tribunal's inquiry. He also

question whether the tribunal was acting in good faith. The tribunal replied through a letter dated 3rd September 2004 which stated in part;

> **"The position of the tribunal has not changed as far as the mode of its operations is concerned. I categorically deny that the procedure adopted by the assisting counsel involves a scheme to harass the affected judges and to engage in illegalities. With respect to your objections to the visit of our investigators to the field you are perfectly entitled to raise the issue in the cause or within the hearing of the tribunal. In my view it will be premature and ulra vires to the rules to engage in deliberations of matters that are reserved for the decision of the tribunal. If you wish to challenge any evidence or manner in which it was obtained the proper forum is the tribunal. You will then be at liberty to express your wisdom on law and facts."**



The inference of the above letter is that the tribunal was engaged in an operation to collect evidence in order to sustain its objectives as assumed under Gazette Notice No.8828 of 2003. In that Gazette Notice the mandate of the tribunal was indicated to be;

> **To investigate the conduct of the applicant but not limited to the allegations that the said judge had been involved in corruption, unethical practices and absence of integrity in the performance of the function of his office.**

We have no evidence to show that the applicant was supplied with charges showing that he was involved in corruption, unethical practices and was unable to perform the functions of his office since the representation that was made to the President was not exhibited before us. In our mind the jurisdiction and powers of the tribunal emanate from whether they were given legal and constitutional power by the President. In this case there was no representation that was shown to us to make us believe that the President had powers to appoint a tribunal. In the absence of a representation that was handed over to the President, the President had no

powers to empower the tribunal to engage in an investigation and inquiry. The role of the tribunal was to establish whether the issues and complaints that were contained in the representation made to the President, was enough or not enough to sustain the removal of the applicant under section 62 (4), (5) and (6) of the Constitution. We think that the tribunal misdirected itself by assuming that it had powers to carry out an investigation process and frame its own charges against the applicant. The powers of the tribunal was limited or conditional upon the charges that were the subject of the representation that was made to the President. The representation arises from the **Ringera** committee's recommendations. And anything that was outside the **Ringera** report and outside the representation made to the President by the Honourable the Chief Justice, could not be a basis for inquiry or investigation by the tribunal.

The tribunal misconstrued the words in the gazette notice but not limited to by purporting to gather evidence and engaging investigators to the field to sustain what they were calling charges against the applicant. That power was *ulra vires* their mandate and therefore illegitimate and an illegality. We also made a finding that the President had no powers to empower a tribunal to conduct an inquiry or investigation other than or outside the representation he received from the Honourable the Chief Justice. In essence the powers of the President was conditional and restricted to the representation he received from the Chief Justice in exercise of his powers under section 62 (4) and 62(5)(a) is concerned.

The President had no powers to direct the tribunal to investigate the conduct of the applicant by using the words ***'including but not limited to'***. We find the inclusion of the said words in the gazette notice No.8828 of 2003 was in contravention of constitutional powers of the President as enshrined under section 62 of our Constitution. That was a manifest and patent contravention of our Constitution. By extension the engagement of the tribunal in a mandate outside the provisions of the Constitution was also an illegality and unconstitutional. In our humble view the issues to be investigated by the tribunal should only comprise those complaints and/or questions that were contained in the representation made to the President and not the general conduct of the applicant as a whole. The tribunal was not given an open ended mandate but their powers and jurisdiction were only within the boundaries of the representation that were made to the President and as in the gazette notice. The tribunal cannot arrogate itself powers to frame issues which were not before the **Ringera** committee and which were not subject of the representation and subsequent gazette

notice No.8828 of 2003. The assisting counsel had no powers to frame charges or engage in an investigation process and place the results before the tribunal because that would be open to abuse and witch-hunting. Besides, the applicant would find it difficult to know and prepare the case he would be facing before the tribunal.

Our interpretation of section 62(4) and (5) is that the tribunal can only inquire into facts presented to it and make a finding thereon. It is not open to the tribunal to engage in investigations in order to frame other charges and complaints against a judge who is their subject. In the **Nambuye** case the Honourable judges having been confronted with the same problem gave a comprehensive answer in the following words;

> **"contrary to the submission by Professor Muigai that once a Judge is under investigation, any other issue relating to his suitability to hold office cannot be blocked otherwise there would be need for several tribunals to be set up against the same judge to investigate each complaint, we are of the view that the only issue to be placed before the Tribunal is the representation by the Chief Justice to the President which gave rise to or formed the basis of the question of removal of a judge before setting up the Tribunal. It is therefore not open to the Tribunal or the Assisting Counsel to frame any other issues beyond that which formed the basis of representation to the President for removal of a judge. It would become a free-fall for all manner of calumny against a hapless judge, and contrary to the provisions of Section 62(5) of the Constitution which clearly predicates the removal of a judge upon the existence of a *question* necessitating the setting up of a Tribunal to inquire into that *question* – not any other question which did not form the substance of the representations to the President. The inclusion of the phrase *"including but not limited to"* is clearly inconsistent with the said Section 62(5) of the Constitution and we would expunge it from the Tribunal's**

**mandate under Gazette Notice No.8829 dated 10th December, 2003, and published on 11th December, 2004."**

The court's supervisory duty is to see that the tribunal takes its mandated route in undertaking its responsibility according to the laws of the land and the rule of natural justice. We think the conduct of the tribunal in engaging in an investigative process and in failing to act on the representation which was made to the President by the Chief Justice was inconsistent and in contravention of section 62 (4), (5) and (6) of the Constitution. As a result of that contravention it exceeded its mandate resulting in a gross unconstitutionality of its mandate. Consequently we are satisfied that in all the circumstances the applicant was not treated fairly by the tribunal hence the hearing notice dated 3rd September 2004 and the undated allegations numbering 10 were all unconstitutional and outside the mandate of the tribunal under section 62 of the Constitution. We make a finding that the allegations did not flow from the representations that were made to His Excellency the President by the Chief Justice in a manner envisaged under the Constitution of Kenya and the common law as interpreted and applied by the Kenya Judiciary. We think the allegations which were drawn by the assisting counsel against the applicant were made without jurisdiction and therefore unconstitutional and in breach of the rules of natural justice. We sincerely think the applicant was right in taking out the Motion dated 8th October 2004. The applicant as a result of the reasons stated hereinabove is entitled to the orders specified below.

In conclusion we think we should make few observations in this matter. We find this case standing in a place of its own in our jurisprudence. It is distinguishable from the **Nambuye** and **Mbogholi** case because **Justice Nambuye** and **Justice Mbogholi** were quite rightly given the complaints against them and were aware of what they would face at the tribunal. We think the Chief Justice, the President and the Tribunal failed to observe the basis requirement of the law. Fundamental guarantees of fair trial empowers judges to resolve disputes between parties, interpret and apply the law of the land. In performance of that privilege or honour the judges define peoples' rights, duties, powers responsibilities, obligations and liabilities. They also define and determine the definition of vast amount of public and private resources and correct erroneous actions of public officers. We think that is what applicant has urged us to do. We must state that generally people have believed in the righteousness and fairness of judicial process. We think we must reciprocate the trust and the

confidence of the public by demonstrating a great sense of responsibility and integrity in the discharge of the mandate given. It is the applicant's case he deserves to be given that right notwithstanding the fact that he is a judge and that he says that he is no different from the common criminals that we accord that right in our daily mandate. We are not in any way saying that the applicant is a criminal but what we are saying is that he is telling us to enforce the same rights we give to all litigants who appear before.

Our answer is that Judges must be independent, courageous but must also maintain high standards of integrity, honest, efficiency and impartiality against and to all persons who appear before court with their grievances for redress. It is through maintenance of high standards that we give confidence and assurance to persons who appear before us that their disputes will be resolved in accordance with the rule of law no matter their positions and cause of action. It is our duty to interpret the laws which to a lay man is a body of complex and incomprehensible enactment for lawyers and law scholars to juggle about in an attempt to complicate and defeat a somewhat easy and straightforward cause of action. We think the applicant is saying that he expects this court to restore his priceless treasure to his profession and dignity. As the facts and law disclose, we think we are obliged to do that.

Having considered all the points raised by the counsel for both sides and the authorities referred to us, we are satisfied that in all the circumstances the applicant was not treated fairly, impartially and properly. He ought to have been told of the allegations made to the **Ringera** committee and given a chance to deal with them in whatever way necessary for him to make a reasonable reply. He was also entitled to get a copy of the allegations and an opportunity to reply before a representation was made to the President. In this case even after he was suspended and a tribunal formed he was not given a copy of the allegations that were made against him. One year down the line from the time he was suspended the complaints and or the charges were not framed. The tribunal after its appointment purportedly engaged in a process unknown to the Constitution thereby violating the constitutional rights of the applicant. We therefore think the whole process against the applicant from the start to the time he knocked the doors of justice he was exposed to great injustice and outright illegality. We are bound to correct the injustice and the illegality suffered by the applicant.

**Mr. Justice Moijo Mataiya Ole Keiwua** a Judge of Court of Appeal you have invited us to be unrelenting, novel, firm and innovative in the resolve to secure justice for you. We think we have shown remarkable firmness and unrelenting resolve to do justice no matter who

is involved. You have also invited us to shield and defend your rights under our Constitution. We think we also did that because we are guided by the facts and the law. You have also put a question to us whether Kenya has a working Constitution that protects the rights of people through a fair and free judiciary. We also think we have answered that question in the affirmative.

You have alleged that the current system is hell bent in removing you from office because you have participated in a decision against the current President. We have shown that we are not guided by extraneous issues in addressing the merits of your case. In this decision, we have kept the hope burning for many Kenyans who seek that ***justice shall be our shield and defender***. We do so by granting orders as prayed; (a), (b), (c), (d) and (f) of the Notice of Motion with no orders as to costs.

Dated, signed and delivered at Nairobi this **20th day of April 2010**.

**MUGA APONDI**

**JUDGE**

**GEORGE DULU**

**JUDGE**

**MOHAMED WARSAME**

**JUDGE**

Judgement read, signed and delivered in open court.

**In the presence of:-**

Mr. Mwenesi for the Applicant

Mr. Omwayo for the 1st – 6th Respondents

No appearance for the 7th Respondent