REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 84 OF 2016

OKIYA OMTATAH OKOITI……..…1ST PETITIONER

NYAKINA WYCLIFE GISEBE……..……..2ND PETITIONER

VERSUS

THE PRESIDENT OF KENYA…….....1ST RESPONDENT

HON. ATTORNEY GENERAL……..……..2ND RESPONDENT

SHARAD RAO…….3RD RESPONDENT

RULING

Introduction

1. This Petition raises important yet interesting and difficult questions concerning the powers of the President to constitute a tribunal under Article 168(5)(b) of the Constitution. The questions arise out of the Judicial Service Commission's recommendation to the President to appoint a tribunal to investigate the allegations of misconduct on the part of a senior member of the bench.

2. The President acted on the recommendation but the President's action has now been faulted by the Petitioners on two fronts as being unconstitutional. The Petitioners have also moved the court for conservatory orders pending determination of the Petition.

3. The application for conservatory orders is contested.

Background facts

4. The facts are largely not in dispute.

5. I may restate the facts briefly as follows, having retrieved the same from the affidavits sworn by the 1st Petitioner in support of the application and the Petition as well as from the Replying Affidavit by the 3rd

Respondent.

6. Hon. Mr. Justice Philip Kiptoo Tunoi is a judge of the Supreme Court of Kenya. Prior to his appointment as a judge of the Supreme Court Mr. Justice Tunoi had been a judge of the High Court as well as the Court of Appeal. His career as a judge of the superior courts spans nearly thirty years.

7. In the year 2014 Mr. Justice Tunoi together with all the other judges of the Supreme Court, heard and delivered a judgment in Petitions No 18 and 20 of 2014 (Consolidated) filed in the Supreme Court. The parties involved were, amongst others the current Governor of the County of Nairobi Mr. Evans Odhiambo Kidero and the current Member of Parliament (National Assembly) for Kabete Constituency Mr. Ferdinard Waititu. The Petition was determined in favor of the former.

8. Apparently, in November 2014 some four or so months following the Petition's determination, an affidavit was lodged with the Chairman of the Judicial Service Commission. The affidavit alleged judicial impropriety and misconduct on the part of Mr. Justice Tunoi. Slightly over one year later, the Judicial Service Commission having internally investigated the allegations in the affidavit, returned the verdict that the allegations warranted further investigations by a tribunal to be constituted under Article 168(5)(b) of the Constitution. Needless to add, Mr. Justice Tunoi had denied all the allegations of misconduct.

9. Then on 23rd February 2016, the President of the Republic of Kenya who has been named herein as the 1st Respondent duly constituted the tribunal (" the Tunoi Tribunal") pursuant to the powers donated to the President by Article 168(5)(b) of the Constitution. By a Gazette Notice no. 4084 of even date, the President appointed the 3rd Respondent as the chairman. The President also appointed the other six members of the Tunoi Tribunal. By the same Gazette Notice the President suspended Mr.Justice Tunoi from exercising the functions of his office as a judge.

10. The 3rd Respondent as well as the other members of the Tunoi Tribunal save for Mr. Justice (Rtd) Jonathan Bowen Havelock took their respective oaths of office on 2nd March 2016. A day later the instant Petition was filed. Mr. Justice Tunoi was not made a party to these proceedings.

The Petitioners' case

11. The Petitioners who describe themselves as "residents of Nairobi City County [and] Law abiding citizens of Kenya, public spirited individuals and human rights defenders" state that they are aggrieved citizens. They state that the 3rd Respondent who is more than 70 years old is not suitable or qualified to be the chairperson of the Tunoi Tribunal. They rely on Articles 168(5) and 167(1) of the Constitution. They state further that by reason of the provisions of Article 2(4) of the Constitution, the 3rd Respondent's appointment is null and void for being ultra vires the relevant provisions of the Constitution.

12. The Petitioners accuse the Respondents of having violated the Constitution.

13. The 1st and 2nd Respondents are faulted by the Petitioners for having appointed the 3rd Respondent whilst knowing that the 3rd Respondent had attained and by-passed the cut off age for qualification to be appointed a judge. The 3rd Respondent is conversely accused by the Petitioners for accepting his appointment as the chairman of the Tunoi Tribunal, whilst knowing that he is not qualified by reason of the fact that he is above the qualification age of being appointed a judge and further that he is neither a judge of a superior court nor has he previously been a judge of a superior court .

14. The Petitioners also state that as the 3rd Respondent has been and still is the chair of the Judges and Magistrates Vetting Board, the 3rd Respondent is not suitable to chair the Tunoi tribunal as there is an apprehended bias.

15. The Petitioners ultimately seek substantive reliefs quashing the appointment of the 3rd Respondent as chairperson of the Tunoi Tribunal. Further orders directed at the 1st and 2nd Respondents to cause and

occasion the appointment of a new person to chair the tribunal constituted under Article 168(5)(b) to investigate the conduct of Mr. Justice Tunoi have also been sought by the Petitioner.

The Respondents' case

16. The Respondents' case may be gleaned from the Replying Affidavit of the 3rd Respondent sworn on 10th March 2016 and filed herein on 11th March 2016.

17. The Respondents contend that the 3rd Respondent is qualified to be a chairperson of any tribunal appointed under Article 168(5)(b) of the Constitution.

18. The 3rd Respondent does not deny that he is more than seventy (70) years old but asserts that age is not a factor nor a requirement in the appointment of judges but is only relevant at the point of retirement under Article 167 of the Constitution.

19. The Respondents contend that the retirement age of 70 years under Article 167(1) of the Constitution is only relevant when one has been appointed a judge but cannot be a criterion for appointment as a judge.

20. The Respondents do admit that the 3rd Respondent is the chairman of the Judges and Magistrates Vetting Board. The Respondents however point out that the fact of the 3rd Respondent having chaired the Judges and Magistrates Vetting Board cannot lead to a disqualification under Article 168(5)(b)(i) of the Constitution. The Respondents add that the only disqualification, even to any other member of the tribunal, is having been a member of the Judicial Service Commission in the preceding three (3) years.

Arguments in court

21. The parties made oral submissions before me on 11th March 2016.

22. The 1st Petitioner presented and urged the Petitioners' case while Mr. M. Ogosso argued the Respondents' case.

The Petitioners' submissions

23. Mr. Okiya Omtatah reiterated that the President had violated Article 168(5)(b)(i) of the Constitution. He asserted that there was need to protect the Constitution from being violated and that in appointing a person who had exceeded the constitutional age limit for serving as a judge of the superior court, the President erred.

24. Mr. Omtatah submitted that even though Article 166 did not provide for age as one of the qualifications for appointment as a judge, the Constitution had to be read as a whole and that meant inviting Article 167 of the Constitution which provides a mandatory retirement age of 70 years. Mr. Omtatah, in this regard, stated that it was simply not possible to be appointed a judge when you had already clocked the mandatory retirement age under the Constitution. For that reason and as it was not denied that the 3rd Respondent was more than 70 years of age, it was submitted that the 3rd Respondent was not qualified to chair the Tunoi Tribunal. For completeness, Mr. Omtatah added that the 3rd Respondent was not qualified to be appointed a judge of the superior court and had also not previously served as a judge of the superior court hence the need to disqualify him as chair of the Tunoi Tribunal.

25. Additionally, the Petitioners also submitted that a reading of Article 168(5)(b)(i) reveals that it was always the intention of the draftsmen of the Constitution that any person who had been a commissioner with the Judicial Service Commission be disqualified from being a member of any tribunal to investigate the conduct of a judge under Article 168 and make appropriate recommendations to the President. The argument was extended by the Petitioners to include and eliminate all such persons who had acquired any material information concerning judges of the superior courts and such persons were stated to include

members of the Judges and Magistrates Vetting Board.

26. While conceding that they had no information on the circumstances as well as the specific role played by the 3rd Respondent in the vetting of Mr. Justice Tunoi by the Judges and Magistrates Vetting Board, the Petitioners however contended that as it was admitted that the 3rd Respondent was the chairman of the Judges and Magistrates Vetting Board, it was clear that the 3rd Respondent could not be impartial in the eyes of the public as his new role entailed vetting Mr. Justice Tunoi again. This, it was contended would be inconsistent with the provisions of Article 50(1) of the Constitution which invite impartiality and independence.

27. The Petitioners urged the court to rely on the case of **U.S –v- Butler 297 U.S 1 [1936]** and juxtapose the appointment of the 3rd Respondent as chair of the Tunoi Tribunal against Article 168(5)(b)(i) of the Constitution.

28. The Petitioners finally urged me to exercise my discretion in their favor and grant the conservatory orders sought as the balance of convenience tilted in their favor. If not granted, concluded the Petitioners, the entire Petition would be rendered nugatory whilst on the other hand the Respondents stood to suffer no prejudice if the proceedings of the Tunoi Tribunal were stayed temporarily.

29. Instead, the Petitioners asserted that public interest would be better served as the entire proceedings of the tribunal would be rendered a waste if the Tunoi Tribunal proceeded to sit only to be later declared improperly constituted by the trial court after full hearing.

The Respondents' submissions

30. The Respondents' counsel Mr. Ogosso stated that the question before the court for determination was about the suitability and qualification of a chairperson under Article 168(5)(b)(i) of the Constitution. Counsel was clear that the question of the 3rd Respondent having chaired the Judges and Magistrates Vetting Board was quite irrelevant and could not be used to disqualify a person who otherwise qualified to be appointed under Article 168(5)(b). Counsel stated that the work of the Judges and Magistrates Vetting Board was limited to interrogating the conduct or misconduct of judges and magistrates during the period preceding August 2010.

31. Mr. Ogosso submitted that age was not one of the factors to be considered under Article 168(5)(b)(i) of the Constitution. He stated that age does not matter in the appointment of judges but only counts at the point of exit. Counsel added that if the framers of the Constitution had intended to make age a factor then the provisions of the Constitution would have specifically stated as much.

32. Mr. Ogosso then argued that a reading of Articles 166 and 168 of the Constitution clearly reveals that if one was qualified at one point in life to be appointed a judge of the superior court, he also qualified to be appointed a chairperson of the tribunal under Article 168(5)(b)(i) of the Constitution.

33. From the written submissions filed on 11th March 2016 on behalf of the Respondents, I also gathered that counsel was urging that the entire purpose of Article 168(5) was to secure individuals who had appropriate experience between them to make a weighty determination as to whether a judge should be removed from office and the provisions consequently envisage a person who has the experience either as a judge or would meet the qualification for appointment as a judge but not necessarily "age wise" as experience is not lost when one passes the retirement age. Counsel added that even in the case of the other tribunals, members' age is not a factor. The same applied to a tribunal appointed under Article 168 (5)(a) where once again age was not a factor.

34. For completeness, the Respondents argued that the Constitution could not have intended to prompt discrimination between a person who had served as a judge and was above 70 and one who was always qualified to be appointed a judge but was never appointed and was also above 70 years. Counsel stated that it should always be about merit and equality.

35. Counsel referred the court to the case of **Nyarangi & 3 Others –v- A.G [2008] KLR 688** for the proposition that rights and privileges defined on the basis of race, age, sex, nationality, religion or handicap effectively means discrimination.

36. The Respondents finally urged me to consider the plain and obvious meaning of the wordings of Article 168 without resorting to any other deeper method of interpretation. For this proposition counsel relied on the case of **Stephen Kimotho & 9 Others-v- A.G** & **Another NBI Misc. Application no 833 of 2004** where the court stated that

> ***"…This court cannot ignore the plain language of the Constitution on the right to life (s. 71) and bring in a wide interpretation that is not envisaged. If this court were to adopt the liberal interpretation that life under that Section means right to livelihood and right to live in dignity, then our courts would be flooded with applications from all Kenyans who live in deploring conditions in the slums;the jobless and many others."***

37. In concluding, counsel submitted that if a former judge could be a chairperson(s) even after retiring at age 70 then it also followed that as person who qualified to be a judge could be a chairperson even thought he had never been appointed as one but had now struck the age of 70.

Discussion and Determination

38. I have considered the submissions as well as all the affidavits filed herein.

39. In a nutshell, the current dispute revolves around the composition of the Tunoi Tribunal. The Petitioners say that it is not properly constituted while the Respondents contend it is. The Petitioners state that the 3rd Respondent is neither qualified nor suitable to be appointed as chairperson of any tribunal constituted under Article 168(5)(b). The Respondents on the other hand say the 3rd Respondent is both qualified and suitable.

40. It is not for the court at this stage of the proceedings to make a final determination as the court is currently only tasked with one core question: Are the Petitioners entitled to the conservatory orders sought?

Applicable principles

41. The principles which ought to guide the court when dealing with an application for conservatory orders have now been neatly established through various court decisions. In the case of **Kenya Small Scale Farmers Forum –v- Cabinet Secretary Ministry of Education, Science and Technology & 5 Others HCCP No. 39 of 2015 [2015] eKLR** this court summarized the principles as follows:

> ***"[30]…I would state the principles which govern a court considering an application for interim or conservatory relief to be the following:***

- ***The applicant ought to demonstrate a prima facie case with a likelihood of success and that he is likely to suffer prejudice as a result of the violation or threatened violation if the conservatory order is not granted: see Centre for Rights Education and Awareness & 7 Others –v- The Attorney General HCCP No. 16 of 2011. It is not enough to show that the prima facie case is potentially arguable but rather that there is a likelihood of success: see Godfrey Mutahi Ngunyi –v- The Director of Public Prosecution & 4 Others NBI HCCP No. 428 of 2015 and also Muslims for Human Rights and Others –v- Attorney General & Others HCCP No. 7 of 2011.***
- ***The grant or denial of the conservatory relief ought to enhance Constitutional values and objects specific to the rights or freedoms in the Bill of Rights: see Satrose Ayuma & 11 Others –v- Registered Trustees of Kenya Railways Staff Benefits Scheme [2011] eKLR and also Peter Musimba –v- The National Land Commission & 4 Others (No. 1) [2015] eKLR.***
- ***If the conservatory order is not granted, the Petition or its substratum will be rendered***

nugatory: see Martin Nyaga Wambora –v- Speaker of the County Assembly of Embu & 3 Others HCCP No. 7 of 2014.

- ***The Public interest should favour a grant of the conservatory order: see the Supreme Court of Kenya's decision in Gatirau Peter Munya –v- Dickson Mwenda Githinji & 2 Others [2014] eKLR.***
- ***The circumstances dictate that the discretion of the court be exercised in favour of the applicant after a consideration of all material facts and avoidance of immaterial matters: see Centre for Human Rights and Democracy & 2 Others –v- Judges and Magistrates Vetting Board & 2 Others HCCP No. 11 of 2012 as well as Suleiman –v- Amboseli Resort Ltd [2004] 2 KLR 589.***

42. In addition, in the case of **Kevin K. Mwiti & Others –v- Kenya School of Law & 2 Others [2015]eKLR** the court observed that the principle of proportionality also plays a role in the exercise of discretion whether or not to grant a conservatory order.

43. Have the Petitioners satisfied the criteria?

44. For starters and as already alluded to, at this stage of the proceedings I need not make any final or definitive findings of fact or law. That is for the trial court ultimately. The Petitioners, need only satisfy the court that they have a prima facie case with a likelihood of success and also demonstrate the prejudice they are likely to suffer if the conservatory orders are not granted. The Petitioners' case must however be one which is beyond being merely or potentially arguable.

45. The Petitioners' case and argument at the risk of being indicted for over-simplification may be summed up thus. The 3rd Respondent once vetted Mr Justice Tunoi and would be unsuitable to look into his conduct again. Secondly, it is contended that the 3rd Respondent who is above 70 years is disqualified by reason of his age from chairing the Tunoi Tribunal or, for that matter, any tribunal established and constituted under Article 168(5)(b) of the Constitution. The Petitioners contend that as judges must retire on attaining the age of 70 under Article 167, then the 3rd Respondent whom it is admitted has never previously served as a judge of the superior court and is now above 70 years can never be appointed a judge.

46. The first edifice of the Petitioners' argument is that the doctrine of impartiality and independence of dispute resolution forums would be completely eroded if the 3rd Respondent who has previously scrutinized the conduct of the Mr. Justice Tunoi under the auspices of the Judges and Magistrates Vetting Board was to again interrogate Mr. Justice Tunoi's conduct albeit under the umbrella of the Tunoi Tribunal. The second edifice is that the 3rd Respondent's age disqualifies him from being chair of a tribunal under Article 168(5).

47. On the issue of impartiality and independence, the Respondents contend that the role played by the 3rd Respondent as the chairman of the Judges and Magistrates Vetting Board, which Board in the Respondents' view was a specialist tribunal, would not affect the workings of the Tunoi Tribunal and neither could the 3rd Respondent be able to influence an independent tribunal which had six other members.

48. On the issue of age, the Respondents counter that age is not a determinant when it comes to appointment as a judge of the superior court. According to the Respondents, what matters are the qualifications prescribed under Articles 166(2) to 166(5) of the Constitution. Age only counts at the point of exit and not point of entry into service.

Constitutional indexation

49. The parties referred to the following constitutional provisions in the course of their oral arguments as well as in their respective pleadings.

Fair hearing

50.(1) Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body.

(2) …

Appointment of Chief Justice, Deputy Chief Justice and other Judges

166. (1)…

(2)Each judge of a superior court shall be appointed from among persons who-

a. ***hold a law degree from a recognized university, or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;***
b. ***possess the experience required under clause (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and***
c. ***have a high moral character, integrity and impartiality.***

3. ***The Chief Justice and other judges of the Supreme Court shall be appointed from among persons who have—***

a. ***at least fifteen years experience as a superior court judge; or***
b. ***at least fifteen years' experience as a distinguished academic, judicial officer, legal practitioner or such experience in other relevant legal field; or***
c. ***held the qualifications mentioned in paragraphs (a) and (b) for a period amounting, in the aggregate, to fifteen years;***

4. ***Each judge of the Court of Appeal shall be appointed from among persons who have—***

a. ***at least ten years' experience as a superior court judge; or***
b. ***at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or***
c. ***held the qualifications mentioned in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.***

5. ***Each judge of the High Court shall be appointed from among persons who have—***

a. ***at least ten years' experience as a superior court judge or professionally qualified magistrate; or***
b. ***at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or***
c. ***held the qualifications specified in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.***

Tenure of office of the Chief Justice and other Judges

167.(1) A judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years.

(2)….

(3)…

(4)…

(5)…

Removal from office

168.1)….

2. **….**
3. **….**
4. **…..**
5. ***The President shall, within fourteen days after receiving the Petition, suspend the judge from office and, acting in accordance with the recommendation of the Judicial Service Commission —***

a. **…**
b. ***in the case of a judge other than the Chief Justice, appoint a tribunal consisting of—***

i. ***a chairperson and three other members from among persons who hold or have held office as a judge of a superior court, or who are qualified to be appointed as such but who, in either case, have not been members of the Judicial Service Commission at any time within the immediately preceding three years;***
ii. ***one advocate of fifteen years standing; and two other persons with experience in public affairs.***

50. No doubt it behooves upon the court to consider the constitutional provisions. Of particular interest is Article 168(5)(b) which will have to be interpreted by the court and a constitutional meaning assigned.

51. On the first limb of the Petitioners' case, as to the 3rd Respondent having chaired the Judges and Magistrates Vetting Board and consequently unsuitable to chair a tribunal constituted under Article 168(5)(b), I must quickly state that I am not convinced that the Petitioners have demonstrated a prima facie case with any likelihood of success.

52. It is not in dispute that the 3rd Respondent chairs the Judges and Magistrates Vetting Board as established under the Vetting of Judges and Magistrates Act,2011. The Judges and Magistrates Vetting Board was held by the Supreme Court in both **Judges and Magistrates Vetting Board & 2 Others –v- Centre for Human Rights & 11 Others (SCK) Petition No. 13A of 2013 (Consolidated) [2014]eKLR** and **Judges and Magistrates Vetting Board –v- Kenya Magistrates & Judges Association & Others (SCK) Petition No. 29 of 2014 [2014] eKLR**, as a specialist tribunal mandated by the Constitution and statute law to investigate the suitability and competence of judges who were already serving judges as of August 2010. The (mis)conduct the Judges and Magistrate Vetting Board could investigate was limited to any mis(conduct) which chanced prior to August 2010.

53. Mr. Justice Tunoi's conduct was interrogated and vetted by the Judges and Magistrates Vetting Board in early 2012. A verdict on his suitability was returned on 25 April 2012:see the **1st Determination of the Board,2012** (at *http://www.jmvb.or.ke/downloads/determinations.pdf* [Accessed 22 March 2016]. That is just under four years ago. There is no evidence before me that the 3rd Respondent sat in any of the panels that vetted Mr. Justice Tunoi. Indeed, the Petitioners conceded that they are unaware of the role the 3rd Respondent played in Mr. Justice Tunoi's vetting.

54. Besides, even if at this preliminary stage I was to be swayed by the Petitioners' argument that the Constitution did not under Article 168(5) anticipate a situation where a person with information personal to the judge being investigated was a member or chair of the tribunal, I must also take cognizance of the fact that the same Constitution has a time limit to this impediment. One must not have been a member of

the Judicial Service Commission at any time within the immediately preceding three years. In the instant case, it is now common knowledge that Mr. Justice Tunoi was vetted by the Judges and Magistrates Vetting Board in 2012. That would mean nearly four years since the 3rd Respondent came across and brushed with Mr. Justice Tunoi's conduct.

55. Secondly, a close reading of Article 168 also reveals that fellow or colleague judges may be appointed as members, if not the chairperson, of a tribunal under Article 168 to investigate another judge. I have no doubt that judges constitute a small community. They know each other personally and well. When duty calls however, they are reasonably expected to be beyond reproach.

56. Put very shortly, on the face of the documents before me and in the circumstances of this case coupled with a cursory reading of Article 168(5)(b), I am not prima facie satisfied that an intelligent reasonable and impartial minded observer seized of all the relevant facts would apprehend partiality and want of independence in the circumstances.

57. The Petitioners appear to ride in better stead with, regard to the second edifice of their case.

58. In my view, their complaint that the 3rd Respondent is not suitable for appointment as chairperson of a tribunal under Article 168(5) of the Constitution is certainly not without merit. The Petitioners have urged me to use the analogy of the bookish observation of the law given in the U.S Supreme Court decision in **U.S –v- Butler 297 U.S 1 [1936]** that the court should when legislation is challenged on basis of unconstitutionality:

> ***"…lay the Article of the Constitution which is invoked besides the statute which is challenged and to decide whether the latter squares with the former".***

The Petitioners urged me to also simply lay the 1st Respondent's action of appointing the 3rd Respondent next to Articles 167 and 168 and return a verdict of unconstitutionality. Literally so put the Petitioners have a prima facie case. It does appear that the Constitution intended to have only judges or those who have been judges or those who qualify to be appointed to the office of a judge of the superior court, appointed as chair of a tribunal constituted by the President under Article 168 of the Constitution.

59. To determine whether the Petitioners prima facie case has a likelihood of success, the court is constrained to also consider the response to the Petitioners' claim. In these respects, the Respondents have contended that a holistic and purposeful reading of the Constitution would reveal that age is not a determinant for purposes of appointment under Article 168(5) (b) of the Constitution.

60. My preliminary view is that the structure and composition of a tribunal formed under Article 168(5) of the Constitution can easily lead one to develop and support the thesis that one of the intrinsic purposes of Article 168(5)(b) was to create a tribunal having functions compatible with a judicial office. The investigation contemplated and to be conducted by a tribunal under Article 168 are or must be of an intrusive quality. They basically involve litigation with the judge being investigated standing as an 'accused' person and the State leading the process, including any witnesses. The tribunal must then within a reasonable period of time return a "verdict" in the form of a recommendation to the President.

61. Article 168 does not also expressly make age a factor. Indeed, the fact that the Constitution has countenanced retired judges of the superior courts (Judges who are aged 70) actually being appointed to chair the tribunal, would appear to suggest that a person may be above the retirement age of 70 and still be the chairperson of the tribunal.

62. Age is also not an express criterion for purposes of qualifying for appointment as a judge under the criteria outlined in Article 166. However, it may be a latent requirement.

63. The response by the Respondents, to bluntly put it, is not light in weight as to be ignored at this stage of the proceedings.

64. In the end, this Petition certainly raises weighty and fundamental issues. There appear to exist constraints; both latent and patent when the President exercises his powers under Article 168(5).The trial court at the hearing of the Petition will have to nit-pick the constraints. While there is no doubt that the President must exercise the power personally without delegation and do so through a signed memorandum and in good faith, this court will have to identify the exact constraints that the President must not transgress. This court will have to specifically identify the qualifications that the appointees under Article 168(5)(1) must meet to ensure that the legality and composition of the tribunal is beyond rebuke.

65. In the current balance of two symmetrical positions advanced by the parties, counsel of prudence would dictate that the interim orders sought be denied for one of two reasons.

66. First, the party to be directly affected by the tribunal now being challenged is not a party to these proceedings. The said party being Mr. Justice Tunoi may very well raise the same issue at the very first sitting of the tribunal and attack the tribunal's competence as far as its composition and the suitability of any of its members are concerned. No doubt, the tribunal will be competent to determine such a question on the basis of the doctrine of *kompetenz-kompetenz*.

67. On this point, I take cue from the Court of Appeal's decision in the case of **Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others -v- Job Kilach [2003]eKLR**. The court was clear that where there are complaints raised against the suitability of a member of a judicial commission or its composition, then such complaints ought to be raised in the first instance before such a commission.

68. In **Judicial Commission of Inquiry into the Goldenberg Affair & 3 Others v Job Kilach (supra)** , the applicant faulted the appointment of the Chairperson of and the assisting counsel to a judicial commission. By way of a judicial review application the applicant sought leave to apply for orders to prohibit the continued further sitting of the chairperson and retainer of the assisting counsel. The High Court granted leave. The leave granted was also to operate as a stay of the commission's proceedings and sittings. On appeal, the court held that as the commission was a tribunal inferior to the High Court and thus amenable to the judicial review jurisdiction of the High Court, the leave was warranted. The court further held that leave should not have operated as a stay as even though the applicant had established a prima facie case and the complaints were 'serious', complaints as to the suitability of any member of a judicial tribunal ought always to be initially raised before the concerned tribunal.

69. I would give the current motion a similar approach.

70. Secondly, I am also not satisfied that it would be in the public interest to ground the proceedings and operations of the Tunoi Tribunal. It would not be proportionate to stall the process.

71. Public interest points to the fact that there is already a tribunal in place. The Petitioners' case is not as clear cut as to lead one to shut out the tribunal from its work. I am not insensate and unmindful to the fact that the Tunoi Tribunal has attracted some wide public interest by reason of what the tribunal has been enjoined to inquire into. It is about a grimy situation. I would let the tribunal proceed with its work rather than stall it.

72. It matters little for now that the Petitioners state that the Tunoi Tribunal, if allowed to proceed with its sittings, will be engaging in a hopeless venture. An act if void in law is void from the beginning. That view of the law is well represented by the statement of principle assigned to Lord Denning MR in **Macfoy v United Africa Company Ltd [1961] 3 All.E.R. 1169** when he observed thus:

> ***"If an act is void, then it is in law a nullity. It is not only bad, but incurably bad. There is no need for an order of the Court to set it aside. It is automatically null and void without more ado, though it is sometimes convenient to have the Court declare it to be so. And every proceeding which is founded on it is also bad and incurably bad. You cannot put something on nothing and expect it to stay there. It will collapse"***

73. The Tunoi tribunal will eventually collapse at the hearing of the Petition if after full interrogation the court vindicates the Petitioners and thinks no more of the points raised by the Respondents. The Petition may not, in other words, be rendered nugatory.

Conclusion and disposition

74. I have had to go into detail due to the nature of the orders which the Petitioners sought at this interlocutory stage. Some of the orders sought were mandatory in nature. The Petitioners have raised serious and weighty issues and indeed a prima facie case even if not a clear cut case, but at this stage of the proceedings it would not be appropriate to stay the operations of the Tunoi tribunal for the reasons already stated.

75. The totality of the circumstances in this case leads me to a rejection of the Petitioners' application. I answer the sole reserved question as to whether the Petitioners have met the criteria for the issuance of a conservatory order in the negative. I decline to exercise my discretion in favor of the Petitioners. The application for conservatory orders ought to be dismissed. It is hereby dismissed.

76. As to costs, I exercise my discretion and order that each party to bear its own costs of the application.

77. Orders accordingly

Dated, signed and delivered at Nairobi this 24th day March, 2016

J.L.ONGUTO

JUDGE

In the presence of :

The Petitioners in person

Mr. M. Ogosso for the Respondents