REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

PETITION NUMBER 337 OF 2013

BETWEEN

HON. MR. JUSTICE JOSEPH MBALU MUTAVA..........PETITIONER

VERSUS

ATTORNEY GENERAL……..……..………………1ST RESPONDENT

THE JUDICIAL SERVICE COMMISSION…..…. 2ND RESPONDENT

JUDGEMENT

Introduction

1. The Petitioner, **Hon. Mr. Justice Joseph Mbalu Mutava,** is a High Court Judge. Following the promulgation of the current Constitution, the Petitioner was one of the High Court judges who were appointed, on the recommendation of the Judicial Service Commission, the 2nd Respondent herein, following a competitive and transparent process, by H E the President of the Republic of Kenya.
2. What provoked this petition was the decision made by the 2nd Respondent on 20th May 2013 to petition H. E. the President under the provisions of **Article 168(4)** of the Constitution for the Petitioner to be suspended and a Tribunal set up to investigate his conduct following complaints made against him by various parties.
3. The 1st Respondent is the Attorney General and the Principal Legal Adviser to the Government of the Republic of Kenya and is sued in this Petition on behalf of the President.
4. The Commission is a constitutional commission established under Article 171 of the Constitution tasked with amongst other functions, recommending to the President persons to be appointed as Judges. The 2nd Respondent shall be referred to hereinafter as “the Commission”.

The Facts

5. Sometime in the year 2012, various complainants lodged complaints with the Commission in respect of court cases that had been heard and/or determined by the Petitioner while sitting at the High Court of Kenya at Milimani in his capacity as a Judge. Following these complaints, the Commission, on 1st December 2012, pursuant to the provisions of Article 168 of the Constitution and section 14 of the ***Judicial Service Act***, appointed a Committee chaired by **Hon. Justice**

Smokin Wanjala and comprising Commissioners **Rev (Dr) Samuel Kobia**, **Prof Christine K. A. Mango, Mr. Titus J. K. Gateere** and **Mrs. Florence Mwangangi**; Legal researchers, **Mr. Richard Kibor** and **Ms Nancy Nyamwamu**; and the Deputy Registrar, **Mr. John Tamar** (hereinafter referred to as the Committee) to investigate the complaints against the Petitioner.

6. After making the said inquiry, the Committee submitted a report to the Commission in which it found that the threshold had been met in the complaints arising from **Nairobi High Court Misc. (JR) Application No.305 of 2012, *Republic Vs Attorney General and 3 others, Ex Parte Kamlesh Mansukhal Damji Pattni*; Nairobi HCCC No.705 of 2009, *Sehit Investments Ltd Vs Josephine Akoth Onyango & 3 others*; and Nairobi HCCC No.5 of 2012, *East African Portland Cement Company Ltd Vs. P.S Ministry of Industry & Others.***
7. The Commission deliberated upon and adopted the Committee's report in a meeting held on 17th May 2013 and resolved to send a petition to the President under the provisions of Article 168(4) of the Constitution to set up a Tribunal to investigate the conduct of the Petitioner. Pursuant to the provisions of Article 168(5)(b) of the Constitution, the President vide Gazette Notice No.7492 and 7493 dated 30th May 2013, suspended the Petitioner as a Judge of the High Court and appointed a Tribunal composed of a Chairperson and 4 members to investigate the Petitioner's conduct. Subsequently, vide Gazette Notice No.8279 dated 17th June 2013, the President amended the membership of the Tribunal as specified in Gazette Notice No.7492 by adding two new members to the said Tribunal.
8. Being aggrieved by the decision of the Commission to petition the President to suspend and appoint the said Tribunal to investigate his conduct, the Petitioner instituted this petition on 28th June, 2013, seeking the following orders:

1. **A declaration that the entire proceedings regarding the various complaints lodged with the 2nd Respondent against the Petitioner and the subsequent report thereto were flawed, biased, malicious and violated the Petitioner's fundamental constitutional Rights inter-alia his right to fair administrative action and are therefore null and void ab initio and are hereby set aside forthwith.**
2. **A declaration that the Report by the 2nd Respondent pursuant to its investigation proceedings against the Petitioner on the various complaints raised against the Petitioner does not meet the threshold of Article 168 (4) of the Constitution of Kenya and is therefore invalid, null and void ab initio and is hereby set aside.**
3. **A declaration that the Petition sent to the President of the Republic of Kenya on 20th May 2013 by the 2nd Respondent pursuant to Article 168 (4) of the Constitution of Kenya was pre-mature, irregular, invalid, null and void and the same is hereby set aside forthwith.**
4. **A declaration be and is hereby issued that the Tribunal appointed by the President of the Republic of Kenya on 31st May 2013 vide a Special Issue Gazette Notice Vol CXV-No. 82 carrying Gazette Notice No. 7492 is irregular, invalid and unconstitutional for failure to meet the mandatory requirements of Article 168 (5) (b) (i-iii) of the Constitution of Kenya, 2010 and the said Tribunal is hereby disbanded.**
5. **A declaration be and is hereby issued that the Gazette Notice No. 7492 dated 31st May 2013 is invalid, unconstitutional and is therefore quashed, annulled and/or set aside forthwith.**
6. **A declaration be and is hereby issued that the decision of 29th May 2013 by the President of Kenya suspending the Petitioner to discharge his duties as a Judge of the High Court of Kenya is annulled and set aside and the Petitioner is hereby ordered to resume duties as Judge of the High Court of Kenya forthwith.**
7. **A declaration be and is hereby issued that any adjustment of the Petitioner's remuneration and benefits pursuant to the suspension of the Petitioner by the President of the Republic of Kenya be and is hereby reversed and the Petitioner be reinstated to his full remuneration and benefits. Any deductions already effected be and are hereby refunded to the Petitioner.**
8. **A declaration be and is hereby issued that the President of the Republic of Kenya cannot appoint another Tribunal under Article 168 (5) (b) (i-iii) of the Constitution of Kenya to investigate the conduct of the Petitioner pursuant to the petition dated 20th May 2013 by the 2nd Respondent in view of the fact that the fourteen (14) days period provided under the said**

Article 168 (5) (b) (i-iii) of the Constitution of Kenya has since lapsed and cannot be extended without first amending the Constitution of Kenya.

9. **A declaration be and is hereby issued that the President of the Republic of Kenya cannot appoint two (2) additional persons or any other additional persons to serve as member (s) of the Tribunal already appointed in view of the fact that the constitutional set time limit of fourteen (14) days period provided under the said Article 168 (5) (b) (i-iii) of the Constitution of Kenya has since lapsed and the same cannot be extended unless and until the Constitution is amended in that respect.**
10. **A declaration be and is hereby issued that the Secretary to the Cabinet of the Government of Kenya and Head of Public Service, Mr. Francis T. Kimemia or any other person howsoever other than the President of the Republic of Kenya has no mandate, constitutional or otherwise, to interfere with, deal, direct and/or act in any manner whatsoever in respect of the Tribunal herein and an injunction be and is hereby issued restraining the said Francis T. Kimemia or any other from interfering, meddling, directing and /or acting in any other way in respect of the Tribunal and further that his proposal that Mr. Morris Kaburu be appointed as a legal consultant and/or assisting counsel for the Tribunal be and is hereby annulled.**
11. **The Respondents to pay the Petitioners costs of these proceedings in any event.**

<u>**The Petitioner's Case**</u>

9. The Petitioner's case is set out in his petition and the supporting affidavit sworn on 28th June 2013, as well as a supplementary affidavit sworn on 15th October 2013 and filed in Court on 18th October 2013. He has also filed written submissions dated 1st November, 2013.
10. It was the Petitioner's case that following the appointment of the Committee, the Committee heard oral evidence from the various complainants and the Petitioner and further received written responses from the Petitioner on diverse dates until March 2013. At the end of the said hearing the Committee cleared the Petitioner of the allegations of corruption, bias, incompetence and misconduct in eight (8) complaints investigated while recommending that the President appoints a tribunal to investigate the conduct of the Petitioner in respect of the said three (3) complaints.
11. However, it was contended by the Petitioner that the Committee did not disclose to him the complaints which were to be referred to the Tribunal for investigation but informed the Petitioner that he would receive its full report and recommendations on or before 20th May 2013. The Petitioner contends that this has never been done despite numerous requests made on his behalf.
12. According to the Petitioner, the conduct of the investigations and proceedings by the Committee leading to the decisions made in respect of the complaints brought before it is highly suspicious and questionable since the same were marred with unexplainable undue delay, interference and manipulation by complainants, and in particular the Law Society of Kenya, with the sole intention of terminating the Petitioner's career for personal vendetta in clear violation of the Petitioner's constitutional right to free and fair administrative action and in breach of the ***Judicial Service Act No. 1 of 2011*** (hereinafter referred to as the Act).
13. Through his learned counsel, **Mr Nyachoti,** the Petitioner submitted that the period of three months taken between the conclusion of the hearing by the Commission and submission of its report to the President constitutes inordinate, undue and/or unreasonable delay considering the nature of the cases and taking into account the various interests involved in such matters and that this was contrary to the Act which establishes the Commission, and mandatorily requires the Commission in section 13 thereof to "be guided in the discharge of its responsibilities by the principles contained in the Constitution and in the Act" as well as section 3(d) of the said Act which requires the Commission "to facilitate a judicial process that is committed to the expeditious determination of disputes."
14. It was therefore submitted that the intention of the drafters of the said Act was to deliberately incorporate the principles enunciated by the Constitution into the Act so as to ensure that all provisions of the said Act are in accordance with the Constitution hence in the exercise of its functions/powers, the Commission must fully abide by and/or comply with the mandatory provisions of the Constitution including articles 47 and 50 of the Constitution of Kenya, 2010. In support of this submission the Petitioner cited the decision by **Majanja, J** in <u>**Geothermal**</u>

Development Company Limited vs. Attorney General and 3 Others [2013] eKLR, where the learned judge held that all statutory provisions in force must be read under the beam of the rich values and principles enshrined under the Constitution.

15. According to the Petitioner, one of the many functions of the Commission under **Article 252** of the Constitution is to conduct investigations on its own initiative or upon receiving a complaint from a member of the public, and in discharging the said function, the Commission is required by the Act to expeditiously investigate and dispose of such complaints not only in the interest of the Petitioner but also in the interest of the complainants and the public at large which requires judicial services to be rendered by the Petitioner as a Judge of the High Court of Kenya without any interference and/or impediments. Prolonging the decision, it was submitted, was very prejudicial, unjust and unfair to the Petitioner, the complainants and to the members of the public at large. Relying on the same case of **Geothermal Development Company Limited vs. Attorney General and 3 Others** (supra) in which **Dry Associates Ltd v Capital Markets Authority and Another, Petition No. 328 of 2011 (Unreported)** was cited, the Petitioner submitted that Article 47 enshrines the right of every person to fair administrative action and enunciates various values and principles of public service including "(c) responsive, prompt, effective, impartial and equitable provision of services" and "(f) transparency and provision to the public of timely, accurate information" and further, that the said Article is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm of common law to be measured against the standards established by the Constitution.
16. According to the Petitioner, the Commission's findings and decision were based on untested evidence since neither the Petitioner nor his Advocate were allowed to cross-examine any of the witnesses who testified before the Committee and as such, the alleged petition was unfair, malicious, biased, unjust and devoid of any merit at all. Since the Committee was incapable of making any *prima facie* finding on the merits of the complaints levelled against him based on untested evidence, the Petitioner contended that it was not in any position to recommend the formation of a Tribunal as it did since the suspension of a Judge and formation of a Tribunal presupposes thorough probe of the allegations made so as to preserve the integrity and standing of the office and of the institution of the Judiciary.
17. It is the Petitioner's case that the conduct of investigations by the Commission against a Judge is not exclusively governed by Article 168 of the Constitution but rather by the entire Constitution and as such, Article 47(2) of the Constitution which provides for the right to fair administrative action and particularly the right to be given written reasons for an action applies to all proceedings before the Commission.
18. According to the Petitioner, since under the Constitution the right to be heard is no longer just a rule of natural justice but is now a constitutional principle, it applies in equal measure to all proceedings, investigations and hearings whether judicial, quasi-judicial or administrative. To the Petitioner, what constitutes a right to fair trial is expressed under Article 50(k) which provides that "Every accused person has the right to a fair trial, which includes the right to adduce and challenge evidence" which right is further buttressed in section 3(g) and (h) of the ***Judicial Service Act*** which expressly pronounces the objects and purposes of the said Act.
19. The Petitioner relied on **Kenya Anti-corruption Commission vs. Lands Limited and Others Nairobi Misc. App. 583 of 2006** cited in the **Geothermal Development Company Limited vs. Attorney General and 3 Others** (supra) to argue that the right to fair hearing is of fundamental importance to our system of justice and even when not expressed specifically in any law, the supreme position of the Constitution must be implied in every Act; and especially, the right to due process. Since his universal right to be heard as protected under the Constitution and by the rules of natural justice were infringed by the Committee, the Petitioner submitted that the proceedings and investigations conducted by the Committee ought to be declared null and void for being unconstitutional.
20. The Petitioner alleges that despite the fact that the findings and decision of the Committee are yet to be communicated to him, the ***Saturday Nation*** had on 11th May 2013 published a detailed report attributed to the 2nd Respondent wherein it was reported that the Committee, in its decision of 9thMay 2013, cleared the Petitioner of all complaints that had been considered. On 25th May, 2013, the same newspaper published an extensive report, which publication was described as the decision of the Commission on the investigations, specifying details of the proceedings before the

committee and the recommendations it had made on each of the complaints against the Petitioner.

21. To the Petitioner, the manner in which the 2nd Respondent allowed the said media house to report on its investigations as well as its decision and recommendations without first availing a copy of the same to the Petitioner is an outright breach of his fundamental rights and a clear demonstration of bias, collateral bad faith and malice and ulterior motives to the detriment of the Petitioner.
22. The Petitioner contended that, in light of the two (2) separate articles of the said newspaper, it is apparent that there are two (2) reports and/or decisions arrived at by the 2nd Respondent from the same investigation and set of facts, neither of which the Petitioner has received in spite of the several requests therefor, a further demonstration of bias, malice, ulterior motives, subversion of justice by the Commission and a deliberate intention to infringe on his constitutional right to fair administrative action enshrined in article 47(2) of the Constitution. Further Article 168(4) of the Constitution demands that the 2nd Respondent must be satisfied that any petition or complaint before it against a sitting Judge must disclose a ground for removal of a Judge from office under Article 168(1) of the Constitution before any Petition can be sent to the President to constitute a Tribunal. Taking into account the fact that there was a report which exonerated the Petitioner, it was submitted that there was no basis at all to recommend and petition the President to constitute a Tribunal to investigate the conduct of the Petitioner.
23. In the Petitioner's view, the failure to avail the report and recommendations to him has breached his constitutional right to be given the reasons behind the decision of the Committee and that of the Commission in making a recommendation to the President for the formation of the Tribunal.
24. The Petitioner submits that in his letter dated 29th May 2013 suspending the Petitioner and informing him of the establishment of the Tribunal to investigate his conduct, the President indicated that the decision of the Commission leading to the establishment of the Tribunal had been communicated to the Petitioner by the Commission on a separate letter. He contends that since both the Commission and the President assured him, it is misleading, false, and malicious for the Commission to aver that there was no obligation on the Commission to communicate its findings to him; that it is indeed contradictory and inconsistent for the Commission to aver that it was not under an obligation to communicate its written report on the findings on his conduct to him whereas the same Committee had actually already communicated the oral form of the Report when he physically appeared before the said Committee on 17th May 2013 for the delivery of its findings and decision; and that the blatant refusal by the Committee to communicate its written report to him as earlier assured demonstrates impunity, bad faith and a malicious hidden agenda against him.
25. The Petitioner states that when he took up these issues with the Chief Justice of the Republic of Kenya and Chairman of the Commission, the Commission through its Secretary wrote a letter dated 4th June 2013 and indicated that the said proceedings and report were to be delivered by the Tribunal which is now in place. The Petitioner avers that he also took up the issue of the report with the Chairman of the Tribunal who responded that the Tribunal was expecting to receive the said report from the Commission so as to avail the same to the Petitioner's Advocates, which was not done.
26. The Petitioner concludes, from all the foregoing, that it is manifestly clear that the Commission and its Investigating Committee acted in blatant disregard and/or breach of the Constitution of Kenya and the Act by denying the Petitioner fair administrative action without any justification whatsoever; and that the Petitioner is now justifiably apprehensive that there is no genuine and reliable report at all regarding the investigation in the first instance. In his view, Article 168(4) of the Constitution demands that the Commission must be satisfied that any petition or complaint before it against a sitting judge must disclose a ground for removal of a Judge from office under Article 168 (1) of the Constitution of Kenya before any petition can be sent to the President to constitute a Tribunal. Since, from the report appearing in the Nation Newspaper on 11th May 2013, which the Petitioner genuinely and reasonably believes was obtained from the Commission, the Commission did not make any finding on the three (3) alleged complaints or point out any specific ground under clause (1) of Article 168 of the Constitution that has been found against him, there was no basis at all to recommend to and petition the President to constitute a Tribunal to investigate the conduct of the Petitioner.
27. The Petitioner is also aggrieved by the manner of appointment of the Tribunal established to

investigate his conduct. He contended that the Tribunal as initially constituted and established by the President vide **Gazette Notice No. 7492** published on 31st May 2013 in **Special Issue Gazette Notice Vol. CXV-No. 82** consisting of only five (5) members was in violation of the mandatory requirements of Article 168(5)(b) of the Constitution and was therefore null and void *ab initio*. Consequently, **Gazette Notice No. 8279,** published on 19th June 2013 in **Special Issue Gazette Notice Vol. CXV – No. 91** cannot cure an existing illegality. To the Petitioner, an illegal and/or unlawful legal notice cannot be amended by a subsequent legal notice and as such, the purported appointment of the two (2) additional members to the Tribunal by the President through **Gazette Notice No. 8279** of 19th June 2013 was therefore improper, illegal and/or unlawful. He asserts that the said ***Gazette Notice No. 8279*** was a fresh, separate and distinct notice and was not an amendment and/or corrigendum to ***Gazette Notice No. 7492*** published on 31st May 2013 in ***Special Issue Gazette Notice Vol. CXV-No. 82,*** and that there are two (2) separate and distinct Tribunals in place appointed by the President under Article 168(5)(b) of the Constitution to carry out the same functions of investigating his conduct as a Judge of the High Court of Kenya since the President lacked the power, mandate and/or authority under the Constitution or under any other written law for the time being in force in Kenya to appoint the two (2) additional members to the Tribunal outside the mandatory constitutional time limit of fourteen (14) days set by Article 168(5)(b) of the Constitution of Kenya, 2010 as all constitutionally set time frames are very strict and the same having been set by the people of Kenya. It follows therefore, in his view, that the two (2) Tribunals constituted by the President are incompetent and neither of them can properly sit to investigate and/or probe the conduct of the Petitioner.

28. The Petitioner argues that since only the initially appointed five (5) members of the Tribunal were sworn into office on 21st June 2013, the Respondents' position that all the seven (7) members of the Tribunal were sworn into office is untrue, malicious and a mere falsehood intended to mislead the Court and steal a match on the Petitioner. He argues that the Tribunal lacks capacity and legal sanctity and sacredness to sit, deliberate and/or discharge its constitutional mandate of investigating his conduct as intended by the President and he submits that if permitted to commence its proceedings, deliberations, and any further investigations of the Petitioner as intended, the proceedings of the Tribunal will be contrary to the fundamental law of the land and irregular in all respects; will expose the Petitioner to unwarranted prejudice to his detriment; and its proceedings will be in gross violation of the express provisions of the Constitution and will deprive the Petitioner of his fundamental constitutional right to fair administrative action and investigation by a legally recognised tribunal under the Constitution. He therefore urges this Honourable Court to firmly enforce the Constitution with regard to the composition of the Tribunal and the timelines for the formation of the Constitution.

29. According to the Petitioner, Article 168(5) specifically requires the President to suspend a judge and appoint a Tribunal of seven (7) members within fourteen (14) days of receipt of the petition from the Judicial Service Commission. In his view, the use of the joining word "and'' requires that both the two (2) actions of suspension and appointment be done within fourteen (14) days of receipt of the petition from the 2nd Respondent. In the Petitioner's view, it is important to note that the word "and" has been used in two (2) ways in the same sentence. The first use of the word "and" in the same sentence denotes that the two (2) obligations of suspending and appointing a Tribunal must both be done by the President within fourteen (14) days of receipt of the petition from the Commission and not later than that since the words "fourteen days" precedes both the two (2) obligations and therefore combines the two (2) obligations into a single action; and therefore, both obligations must be done within fourteen (14) days.

30. Secondly, the word "and" has been used with a comma after it for purposes of emphasis on the two (2) actions which are required to be carried out by the President either simultaneously or concurrently but within fourteen (14) days. According to the Petitioner, if the framers of the Constitution had intended that the fourteen (14) days apply only to 'suspension' and not 'appointment', then the phrase "within fourteen days" in the sentence would have been placed just after the words "suspend the judge from office". Alternatively, there would have been two (2) separate and distinct paragraphs; one for suspension within (14) days and the other for appointment of the tribunal within a time to be decided by the President at his discretion.

31. It was therefore submitted that the President is under very strict obligations under Article 168(5)

(b) of the Constitution to suspend and appoint a Tribunal within fourteen (14) days and these obligations are strictly time-bound and mandatory. By suspending the Petitioner nine (9) days after receipt of the recommendation of the Commission and appointing 5 members of the Tribunal instead of 7, twelve (12) days after receipt of the petition on 31st May 2013, the purported subsequent appointment of two (2) additional members to the Tribunal on 19thJune 2013 so as to comply with the provisions of Article 168(5)(b) of the Constitution of Kenya was not within the required constitutional time limit of fourteen (14) days but was actually done thirty-one (31) days after receipt of the petition by the President.

32. To the Petitioner, the corrigendum Gazette Notice of 19th June 2013 purporting to appoint two (2) additional members to the Tribunal can only be treated as an amendment to the Gazette Notice of 31st May 2013 if it had been published within the constitutionally provided time limit of fourteen (14) days. However, it was actually published seventeen (17) days after the expiry of the aforesaid time limit and as such the said Gazette Notice is a strange document and can only be considered in isolation.

33. It was further submitted on behalf of the Petitioner that the time limit of **fourteen (14) days** donated to the President by the Constitution is mandatory and cannot be extended and/or varied by any person without amendment to the Constitution since the said provision employs the use of the word **"shall"** to denote two (2) mandatory obligations (suspend and appoint within fourteen (14) days) which are bestowed upon the President. If the President fails to fully comply within the stipulated fourteen (14) days and the said time lapses, then the President has no other known remedy under the Constitution and indeed under any other law for the time being in force in Kenya. The only realistic option for the President would be to amend the Constitution so as to extend the said time, and in support of this line of submission, the Petitioner relied on the decision of the Supreme Court in **Raila Odinga vs. Independent Electoral and Boundaries Commission &Others (2013) eKLR (Petition No. 5 of 2013)** and **Gladwell Wathoni Otieno & Another vs. Ahmed Issack Hassan & 3 Others [2013] eKLR**.

34. In the Petitioner's view, the *ratio decidendi* underlying the strict application of constitutional timelines to elections cases must be applied with equal measure to the constitutional timelines for suspension and appointment of a Tribunal to investigate the conduct of a judge since the people of Kenya in enacting the Constitution determined that expedition and finality is equally important on the question of the suspension and removal of a judge.

35. According to the Petitioner, by a letter dated 5th June 2013, the Secretary to the Cabinet and head of Public Service, **Mr. Francis Kimemia**, while admitting that the tribunal as constituted is incompetent and therefore unable to discharge its functions as intended by the President, purported to request the Attorney General to propose two (2) additional names for appointment to the Tribunal in an attempt to cure an existing illegality. The Petitioner contends that the Secretary to the Cabinet and head of Public service lacks jurisdiction to deal with matters regarding the appointment of a Tribunal pursuant to Article 168 of the Constitution since this is the sole mandate of the President which cannot be delegated. To the Petitioner, the said letter further shows the manipulations involved in the appointment of the Tribunal since the same letter suggests that a **Mr. Morris Kaburu** who works in the office of the Secretary to the Cabinet be appointed as an additional Assisting Counsel to reinforce the already appointed counsel.

36. The Petitioner further averred that on 18th June 2013, he wrote a letter to the Chief Justice of the Republic of Kenya and Chairman of the Commission regarding the validity, competence and legal standing of the Tribunal that had been appointed by the President and requested the Chief Justice to reinstate him to office in his capacity as a Judge of the High Court of Kenya in view of all the above but in his letter dated 19th June 2013, the Honourable Chief Justice indicated that he had no jurisdiction to reinstate the Petitioner to office as requested and directed the Petitioner to pursue his remedies with the Tribunal or the High Court for redress, hence this Petition. He prayed that the Petition be peremptorily allowed as prayed against the Respondents.

The First Respondent's Case

37. On behalf of the 1st Respondent, the following grounds of opposition were filed:

1. **The appointed Tribunal is the right forum for the Petitioner to challenge the recommendations made by the 2nd Respondent and hence this application and petition are an abuse of the court process hence the Respondents prayer that the same be dismissed.**
2. **The Court in granting the orders sought both in the application and the petition herein would be undermining the constitutional framework envisaged to deal with the question surrounding the allegations against the Petitioner and in any event the Petitioner can seek redress against any recommendations of the Tribunal before the Court.**
3. **The Petitioner/Applicant is guilty of material non-disclosure this application having been filed approximately one week after a corrigendum amending the membership of the tribunal was published in the Kenya gazette Vol.CXV – No.91 0f 19th June, 2013 carrying gazette notice No. 8279.**
4. **The application for conservatory orders as couched is tantamount to seeking a mandatory injunction which is in contradistinction to the prayers as captured on the face of the application.**

38. The 1st Respondent also filed a replying affidavit sworn by **Stella Munyi**, an advocate of the High Court of Kenya employed as a Senior Deputy Chief Litigation Counsel in the Office of the Attorney General.
39. According to the 1st Respondent, following proceedings by the Judicial Service Commission and receipt of a petition on removal from office of the Petitioner, in exercise of powers bestowed upon his office pursuant to the provisions of Article 168(5) of the Constitution, the President vide letter dated 29th May, 2013 suspended the Petitioner from office as a judge pending investigation and, vide Gazette Notice No.7492 published on 31st May, 2013 in special issue Gazette Notice Vol. CXV-No. 82, appointed a tribunal composed of five (5) members to conduct an inquiry in to the matter.
40. Further to the foregoing, the President vide Gazette Notice No. 8279 published in special issue Gazette Notice Vol. CXV – No. 91 of 19th June, 2013 amended the earlier membership by adding two members to make a full tribunal of seven members as per the requirement under Article 168(5)(b) and it was only after the full tribunal of seven members was appointed that the members took oath of office on or about 21st June, 2013. The Respondent contends that the Petitioner having instituted this petition on 28th June, 2013, approximately ten days after the issuance of the corrigendum of 19th June, 2013 and seven days after swearing in of the Tribunal, wilfully failed and/or neglected to disclose to the Court that a corrigendum had been done and that the Tribunal had been legally established and procedurally sworn into office.
41. According to the 1st Respondent, Gazette Notice No. 8279 published in Special Issue Gazette Notice Vol. CXV – No. 91 of 19th June, 2013 issued by the President amending the earlier membership by adding two members to make a full tribunal of seven members was a corrigendum to the earlier Gazette Notice No.7492 published on 31st May, 2013 in Special Issue Gazette Notice Vol. CXV-No. 82 and as such, the Petitioner's allegation that the Gazette Notice No. 8279 is a fresh and distinct tribunal is untenable.
42. The Chief Justice and President of the Supreme Court of Kenya, according to the 1st Respondent, on the 21st June, 2013 swore into office all the seven members of the tribunal appointed to investigate the Petitioner being **Justice David Maraga**, **Justice David Majanja**, **Lawrence Mute**, **Patricia Mbote (Prof)**, **Jedidah Ntoyai**, **Justice Maureen Odero** and **Omesh Kapila**, the Lead Counsel **Nazima Malik**, the joint secretaries **Mugure Gituto** and **Joel Makori** hence the Petitioner's allegation that only five members were sworn into office on 21st June 2013 is untrue and is false and intended to mislead the Court.
43. It was averred, however, that the assisting Counsel, one **Emmanuel Bitta**, a Principal Litigation Counsel at the Office of the Attorney General was not present for the swearing in on 21st June, 2013 as alleged by the Petitioner as he was at the East Africa Court of Justice at Arusha, Tanzania, attending to Appeal No. 3 of 2012**, Mary Ariviza & Anor vs. The Attorney General of the Republic of Kenya**. In the Respondent's view, the Gazette Notice No. 8279 published in Special Issue Gazette Notice Vol. CXV – No. 91 of 19th June, 2013 is legal and the tribunal has been

properly constituted and the contention by the Petitioner that the tribunal was appointed outside the stipulated time line of 14 days is not in consonance with the spirit and objectives of the Constitution.

44. In the submissions filed on behalf of the 1st Respondent, it was contended that under Articles 47 and 50 of the Constitution, the essential components of fairness in any administrative hearing are reasonable advance notice, reasonable opportunity to be heard and an impartial, competent and independent decision maker. As such, the requirement for fair administrative action and hearing is meant to ensure that a party has the opportunity to present their case in conditions without substantial disadvantage compared to the other party. In this regard, the right to equality before courts and tribunals also requires equality of arms which means that the same procedural rights are to be provided to all the parties unless distinctions are based on law and can be justified on objective and reasonable grounds.

45. It was further submitted that Article 168 of the Constitution does not require the Commission to hear the Petitioner before sending the petition to the President as the hearing will be done by the Tribunal appointed by the President. In the 1st Respondent's view, though Rule 14 of Schedule II of the ***Judicial Service Act, 2011*** provides that a Judge who is under investigation shall be allowed to cross-examine witnesses, the provision applies only at the tribunal stage; and that at the Commission's Committee, there is no legal provision that requires such a judge be allowed to cross-examine witnesses. In support of this position the 1st Respondent cited **Kenya National Examinations Council vs Republic & Kemunto Regina Ouru & others [2010] KLR, Michael Fordham, Judicial Review Handbook; 4th Edition at pg. 1007, Justice Amraphael M. Msagha vs Chief Justice of the Republic of Kenya & 7 Others [2006] eKLR, Maxwell Vs Department of Trade & Industry [1974] QB 523, Wiseman vs. Borneman [1971] AC 297** and **Halsbury Laws of England, Fifth Edition, 2010, Volume 61 at para. 639 .**

46. It was therefore submitted on behalf of the 1st Respondent that the Petitioner has not been denied his right to fair hearing as he has the opportunity at the tribunal since the Commission's role was to verify whether the petition forwarded to it raises sufficient grounds for removal of the judge and its decision is a preliminary one pending the full investigation by the tribunal hence the Commission is not required to hear the Petitioner before it makes its recommendations to the President.

47. On the argument that the failure by the Commission to disclose to the Petitioner the 3 complaints referred to the Tribunal for investigation was prejudicial, it was submitted that this argument cannot stand because, at the very beginning, the Petitioner was made aware of all the complaints lodged against him and having been told the complaints he was cleared of, he must have known which complaints were recommended for investigation by the Tribunal. Moreover, since the Petitioner and his lawyer were present during the hearings and all the relevant documents were forwarded to them and the report was read in his presence during the delivery of the ruling, it was submitted that the Petitioner has no justification in claiming he is being prejudiced by the failure to be furnished with the report.

48. In any case, it was submitted, the appointed Tribunal will, at the opportune time release the report to him to enable him prepare his defence properly hence this cannot be a sufficient ground for nullifying the Commission's proceedings as the appointed Tribunal is the best forum to deal with any issues that he may have.

49. With respect to the legality of the establishment and constitution of the Tribunal, it was submitted that the basic institutional framework enabling the enjoyment of the right to a fair trial is that proceedings in any matter are to be conducted by a competent, independent and impartial tribunal established by law. The term "law" denotes legislation passed by the habitual law-making body empowered to enact statutes or an unwritten norm of common law, depending on the legal system. Since the tribunal established to investigate the Petitioner was formed pursuant to Article 168(5) of the Constitution and section 31 of the ***Judicial Service Act***, the tribunal was legally established.

50. With respect to the period in which the Tribunal ought to be established, it was the 1st Respondent's position that the time limit applies in regard to the suspension of the Judge and not establishment of the tribunal. In understanding the intention of the time limit of fourteen days, it was contended that the constitutional provisions should be interpreted purposively and in his

view, where the conduct of a judge is being questioned, the judge should be suspended immediately in order to pave way for investigations and also maintain the public confidence in the judiciary, that he cannot conduct court proceedings when his conduct is being questioned, and this position is supported by Article 73 of the Constitution which specifies that the authority assigned to a state officer is a public trust to be exercised in a manner that vest in the state officer the responsibility to serve the people rather than rule them. Citing **Whiteman vs. Als of Trinidad and Tobago [1991] 1 L.R.C (Const.) 536 at pg 551** it was submitted that the language of the Constitution falls to be construed not in a narrow and legalistic way but broadly and purposively so as to give effect to its spirit and that this is particularly true of those provisions which are concerned with the protection of human rights.

51. The 1st Respondent, however submitted that if the Court finds that the time limit of fourteen days also applies to the establishment of the Tribunal, the Tribunal was established within the time stipulated as it was appointed on 31st May, 2013. The corrigendum of 19th June, 2013 was only to amend the earlier Gazette Notice. Again, if the court finds that the tribunal was appointed outside the time stated, it was the 1st Respondent's submissions that this is a matter of procedure and form which has been cured by Article 159 of the Constitution. Since the Constitution should be interpreted purposively, the setting of time is only for purposes of ensuring the exercise is done without undue delay and the court in exercising its judicial authority under Article 159(2) of the Constitution, is called upon to disregard procedural technicalities. The court should therefore pay due regard to the content and not form and time is an issue of form since the Petitioner has not demonstrated any prejudice he will suffer in case the Tribunal proceeds to investigate him as once he is cleared, he can get his remuneration and benefits in full.
52. It was averred that the Tribunal which had been earlier established and consisted of five members did not take oath of office nor perform any duties until all the members were duly appointed. This argument, according to **Mr Muiruri** who appeared with **Ms Mbilo** for the 1st Respondent, is based on the principle of relation back as all the seven members were sworn in on the same day that is 21st June, 2013 even before this petition was filed.
53. On the issue of reinstatement of the Petitioner, it was contended that this can only be dealt with once the Tribunal carries out the investigation and gives a report. On the issue of the suspension of the Petitioner pending the proceedings of the tribunal, it was submitted that the Petitioner was suspended by the President from office as a judge pursuant to the provisions of Article 168(5) of the Constitution which provision requires the President to suspend the judge within fourteen days of receiving the petition for removal of the judge from the Commission. Since the authority bestowed upon the office of a state officer is a public trust that should be exercised diligently, a judicial officer occupies a special and revered position which must be protected both in public and private life, so as not to bring the judicial service generally, into disrepute.
54. The 1st Respondent submitted therefore that in order to ensure the reputation of the judicial service is maintained and public confidence is enhanced, there is need to immediately suspend a judicial officer whose conduct has been questioned and carry out investigations on the same. Thus the suspension is in order and once the judge is cleared by the tribunal he can get back his job as it is an interim measure to protect the confidence and image of the judiciary. In support of this submission, the 1st Respondent relied on the case of **Justice Amraphael M. Msagha vs Chief Justice of the Republic of Kenya & 7 Others** (supra).
55. It was the 1st Respondent's view that the Petitioner's claims are unfounded and the Respondents have properly executed their mandate; that the Petitioner should pave way for the Tribunal to carry out the investigations and in case he is aggrieved, he has an opportunity to come back to the Court for other orders; and that any claims he has against the Commission can properly be dealt with by the Tribunal.

The Second Respondent's case

56. On behalf of the 2nd Respondent, Commission, a replying affidavit sworn by **Winfrida Mokaya**, the Commission's Registrar on 22nd October, 2013 was filed.
57. According to the Commission, in discharge of its functions under Article 168(1) of the Constitution, it does not determine whether a judge should be removed but only recommends to

the President that a tribunal should be set up to determine whether or not a judge of the superior courts should be removed.

58. The Commission, it was averred, received 11 complaints from **Vivo Energy Kenya Limited**, the late **Zulfikar Alilbhai Advocate**, **Nicholas Okwachu Juma**, **Mr. Peter Nganga Muiruri**, two complaints by the firm of **Havi and Company Advocates**, **E. K. Mutua & Co. Advocates**, **A. B. Patel and Patel Advocates**, the firm of **Ngatia & Associates**, **Ms Rose Mulwa** and one other complaint in respect of various matters.

59. Pursuant to section 14 of the ***Judicial Service Act***, the Commission appointed a committee chaired by **Hon. Justice Smokin Wanjala** and comprising Commissioners **Rev (Dr) Samuel Kobia**, **Prof Christine K. A. Mango, Mr. Titus J. K. Gateere** and **Mrs. Florence Mwangangi**; Legal researchers, **Mr. Richard Kibor** and **Ms Nancy Nyamwamu**; and the Deputy Registrar, **Mr. John Tamar** to inquire into the matter given the seriousness of the allegations.

60. The said Committee, though not conducting a criminal trial of the Petitioner with the objective of establishing his culpability to the standards required in a criminal trial, invited 30 witness to assist it in establishing the veracity of the allegations against the Petitioner. It was further clarified that the Committee was also not sitting on appeal or reviewing the judgements and rulings delivered by the Petitioner and as such did not delve into the merits or otherwise of the judicial decisions relating to the complaints levelled against him but was, subject to the decision of the full Commission, simply tasked with seeking to ascertain whether or not *prima facie* there was merit in the complaints warranting recommendation for the setting up of a Tribunal.

61. After considering, deliberating on and evaluating the complaints and the testimonies presented by the witnesses as well as the Petitioner's response, the Committee established that the threshold had been met in the complaints arising from **Nairobi High Court Misc. (JR) Application No.305 of 2012, Republic Vs Attorney General and 3 others, Ex Parte Kamlesh Mansukhal Damji Pattni; Nairobi HCCC No.705 of 2009, Sehit Investments Ltd Vs Josephine Akoth Onyango & 3 Others; and Nairobi HCCC No.5 of 2012, East African Portland Cement Company Ltd vs. P.S Ministry of Industry & Others.**

62. The Committee further established that the acts and omissions complained of on the part of the Petitioner, if proven, would constitute a breach of the Judicial Service Code of Conduct and Ethics and in the Commission's view, the report of the committee, which was deliberated upon and adopted by the Commission in a meeting held on 17th May 2013 which resolved to send a petition to the President under the provisions of Article 168(4) of the Constitution, disclosed sufficient grounds under the said Article. According to the deponent, the Petitioner was not cleared of all the complaints as alleged.

63. In the deponent's view, Article 168(4) of the Constitution only allows the Commission to consider the petitions and complaints against the Petitioner and as the inquiry is only preliminary, to allow the Petitioner to cross examine the witnesses would amount to usurping the role of the tribunal. It was further deposed that since there is no requirement under Article 168(4) of the Constitution that the deliberations and findings of the Commission should be communicated to the judge against whom a complaint has been lodged, the Petitioner's right to fair administrative action has not been violated in any way by the Commission. It was averred that in making its recommendation to the President, the Commission has therefore discharged its constitutional mandate lawfully, fairly and impartially.

64. Thereafter, the Petitioner was suspended as a Judge of the High Court and a tribunal appointed to investigate his conduct by the President vide Gazette Notice No.7492 and 7493 dated 30th May 2013 under powers conferred by Article 168(5)(b) of the Constitution. Further, vide Gazette Notice No.8279 dated 17th June 2013, the President in exercise of the powers conferred by Article 168(5)(b) of the Constitution, amended the membership of the tribunal as specified in Gazette Notice No.7492 by adding two new members hence the tribunal as currently constituted meets the requirements set out in Article 168(5)(b) (i)-(iii) the Constitution.

65. To the Commission, the Constitution has to be interpreted in a manner that promotes its objectives and values and the contention by the Petitioner that the members of the tribunal could only be appointed within fourteen (14) days is contrary to the provisions and spirit of the Constitution; and that in any case, the Petitioner has not demonstrated how the tribunal as currently constituted will violate his rights and it is premature and speculative for the Petitioner to allege violation of the Constitution by the tribunal before it commences its sittings.

66. It was further contended that the Chief Justice has no power to reinstate the Petitioner to office as demanded in the Petitioner's affidavit and this is so because once the Commission made its recommendation to the President to appoint a tribunal to inquire into the conduct of the Petitioner, the Petitioner's reinstatement or removal has to await the determination by the tribunal as provided for in Article 168(4) of the Constitution.
67. It was therefore the Commission's case that it had neither violated any of the Petitioner's constitutional rights nor violated any of the Articles of the Constitution in exercising its mandate under Article 168(4) of the Constitution.
68. To the Commission, the three months it had taken in arriving at its decision in the circumstances of the case was reasonable. Although Article 168(4) of the Constitution does not prescribe a time frame within which the Commission is to undertake the preliminary inquiry, Article 259(8) thereof contemplates a reasonable time while section 20 of the Judicial Service Act empowers the Commission to regulate its own procedure and that of its committees and reserves the inherent power of the Commission to make such decisions as may be necessary for the ends of justice or to prevent abuse of its process. It was submitted therefore that the Petitioner has not demonstrated how the constitutionally mandated preliminary enquiry process violated his rights.
69. The Commission contended that the Petitioner was accorded an opportunity to respond to the allegations levelled against him which response was taken into account by the Commission and as the inquiry was preliminary in nature, to allow the Petitioner to cross-examine the witnesses would amount to usurping the role of the tribunal. In support of this submission the Commission relied on the case of **Nancy Makokha Baraza vs. Judicial Service Commission & 9 Others [2012] eKLR**. The Commission was of the view that it was neither inquiring into the culpability of the Petitioner nor delving into the merits or otherwise of the decisions from which the complaints against the Petitioner emanated. The Commission cited the decisions in **Wiseman & Another vs. Boreman & Others [1969] 3 All ER 275 at 277** and **Lewis vs. Heffer & Others [1978] 3 All ER 345** in support of the submission that the Commission did not breach the Petitioner's right to a fair hearing and the right to cross-examination as alleged. It was reiterated that there is no requirement under Article 168(4) of the Constitution that the deliberations of the Commission be communicated to the Judge against whom the complaint has been lodged since the petition is to the President. Reliance was placed in support of this submission on **Justice Amraphael M. Msagha vs Chief Justice of the Republic of Kenya & 7 Others** (supra).
70. With respect to the procedure followed by the President in setting up the Tribunal, it was submitted that the provisions of Article 165(8) of the Constitution must, under Article 259(1) thereof, be interpreted in a manner that upholds the Constitution. Further support for this submission was sought from **Ndyanabo vs. Attorney General [2001] 2 EA 485 at 493** and **Njoya & Others vs. Attorney General [2004] 1 EA 194 at 206**. If so interpreted, it was contended that the narrow interpretation advanced by the Petitioner that the members of the tribunal could only be appointed within fourteen (14) days would be contrary to the spirit of the Constitution. In any case, it was argued, no prejudice was demonstrated by the Petitioner that the tribunal as constituted would violate his rights, an allegation which is premature and speculative.
71. In his oral address **Mr Muite**, Senior Counsel who led **Mr Issa Mansour** on behalf of the Commission, submitted that the Commission was exercising a mandate given to it under Article 168(4) of the Constitution and not under Article 47 which deals with administrative actions. In other words, the Commission was exercising a constitutional as opposed to an administrative mandate. Learned Senior Counsel submitted that it was a misconception to argue that where the Commission is seeking to reach a prima facie case, the rules of natural justice must apply.
72. According to him, the 14 days only applied to suspension of the Judge and there is no requirement that the Tribunal be established within a similar period. In his view, the insertion of a comma after the word "and" connotes two independent clauses so that the suspension is one while the appointment of a Tribunal is another, in which event the timelines for setting up the Tribunal would be guided by the provisions of Article 259(8) of the Constitution which applies to situations when no timelines are prescribed.
73. In **Mr Muite's** view the issue of the membership of the Tribunal ought to be approached from the angle of the intention of the drafters of the Constitution. He posed the question as to what would happen in the event of the death of some of the members of the Tribunal, whether or not the Tribunal would in such an event cease to operate. In his view, such an interpretation would be

absurd; that even if the interpretation was that the appointment was outside the stipulated period, the consequences ought to be directed to the person who has violated the provisions of the Constitution.

74. With respect to the letter from the Secretary to the Cabinet, **Mr Kimemia,** addressed to the President which is impugned by the Petitioner, it was submitted that since the same was only pointing out the relevant provisions of the Constitution, there was nothing offensive about it or in its recommendations taking into account his experience in the public affairs as the head of Public Service. In order to enhance public confidence in the judiciary, it was submitted that the Tribunal ought to carry on with its duties

75. It was therefore the Commission's position that the Petition neither discloses a violation of any of the constitutional rights of the Petitioner nor a violation of any of the Articles of the Constitution in the exercise of the Commission's mandate under Article 168(4) of the Constitution and the Petition should be dismissed with costs to the Commission.

Issues for Determination

76. Upon consideration of the respective cases and submissions of the parties to this petition as set out above, we take the view that the following issues arise for our determination:

    i. **Whether the provisions of Article 47 of the Constitution are applicable to the Judicial Service Commission in exercising its mandate under Article 168(4).**
    ii. **If the answer to i) above is in the affirmative, whether the 2nd respondent violated the Petitioner's rights under Article 47 of the Constitution.**
    iii. **Whether the 14 day timeline provided under Article 168(5)(b) of the Constitution applies to both the suspension of a judge upon presentation of a petition for his removal to the President by the JSC and appointment of a tribunal by the President, or just to the suspension of the judge.**
    iv. **If the time period applied to both, whether the tribunal as appointed is void ab initio.**
    v. **What relief(s) (if any) to grant the Petitioner.**

Principles of Interpretation

77. We are called upon in this matter to resolve the controversy before us by considering, first, the application of Article 47 of the Constitution and secondly, providing an interpretation of the provisions of Article 168(5)(b) with regard to the removal of a judge. **Article 259(1)** of the Constitution has set out the principles that should guide how the Constitution is construed. The Article provides as follows:

> ***(1) This Constitution shall be interpreted in a manner that –***
>
> ***(a) promotes its purposes, values and principles;***
>
> ***(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***
>
> ***(c) permits the development of the law; and***
>
> ***(d) contributes to good governance.***

78. The Court of Appeal of Tanzania in **Ndyanabo v Attorney General** **[2001] 2 E.A. 485 at 493** the Court of Appeal of Tanzania stated as follows with regard to constitutional interpretation:

> ***"First, the Constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavour to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in time with the lofty purposes for which its makers framed***

> ***it. So construed, the instrument becomes a solid foundation of democracy and rule of law. As was correctly stated by Mr Justice EO Ayoola, a former Chief Justice of The Gambia, in his paper presented at seminar on the Independence of the Judiciary, in Port Louis, Mauritius, in October 1998: A timorous and unimaginative exercise of the judicial power of constitutional interpretation leaves the constitution a stale and sterile document.' Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner, thereby jealously protecting and developing the dimensions of those rights and ensuring that our people enjoy their rights, that our young democracy not only functions but also grows, and that the will and dominant aspirations of the people prevail. Restrictions on fundamental rights must be strictly construed…"***

79. In **Whiteman vs. Als of Trinidad and Tobago [1991] 1 L.R.C (Const.) 536 at pg 551,** the Privy Council held on the question of interpretation of the Constitution that:

> ***"the language of the Constitution falls to be construed, not in a narrow and legalistic way but broadly and purposively so as to give effect to its spirit and that this is particularly true of those provisions which are concerned with the protection of human rights."***

80. Even in liberal interpretation, the court has held that a liberal and not an overly legalistic approach should be taken to constitutional interpretation. The Constitution should not be regarded as an empty vessel to be filled with whatever meaning the Court might wish from time to time, but that is constrained by the language structure and history of the constitutional text, by constitutional traditions and by the history, traditions and underlying philosophies of the society. (See **Karua vs. Radio Africa Limited T/A Kiss Fm Station and Others Nairobi HCCC NO. 288 of 2004 [2006] 2 EA 117; [2006] 2 KLR 375).**
81. It has also been held that in construing the Constitution, regard must be had to the language and the wording of the Constitution so that where there is clearly no ambiguity the Court has no reason to depart therefrom. This was the holding in **Ngare vs. Attorney General and Another [2004] 2 EA 217. (See also Republic vs. El Mann [1969] EA 357; Njoya & Others vs. Attorney General and Others [2004] 1 EA 194 (HCK) and Njogu vs. Republic [2000] LLR 2275 (HCK)**.
82. The other key principle in interpreting the Constitution is the principle of harmonization: that all the provisions bearing upon a particular subject be construed as a whole, without any one provision destroying the other but each sustaining the other, as was held in the case of **Olum & Another vs. Attorney General (1) [2002] 2 EA 508** and **Tinyefuza v Attorney General, Constitutional Appeal No. 1 of 1997.**
83. In **Kigula and Others vs. Attorney-General [2005] 1 EA 132** the Uganda Court of Appeal sitting as a Constitutional Court held that the principles of constitutional interpretation are as follows (1) that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions and that the widest construction possible, in its context, should be given according to the ordinary meaning of the words used; (2) that the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other; (3) that all provisions bearing on a particular issue should be considered together to give effect to the purpose of the instrument; (3) that a Constitution and in particular that part of it which protects and entrenches fundamental rights and freedoms are to be given a generous and purposive interpretation to realise the full benefit of the rights guaranteed. (See also **Gideon Mwangangi Wambua v IEBC & 2 Others, Mbsa Election Petition Number 4 of 2013** as per Odunga J.).
84. It is with these principles in mind that we now proceed to consider the issues at hand.

Whether Article 47 of the Constitution is Applicable

85. The Petitioner contends that the proceedings by the Commission violated his right to fair administrative action and fair hearing. The Commission on the other hand argues that Article 47 of

the Constitution on fair administrative action are inapplicable and that the applicable provisions is Article 168 of the Constitution.

86. **Article 47** of the Constitution provides for the right to fair administrative action in the following words;

> ***(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.***
>
> ***(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.***
>
> ***(3) Parliament shall enact legislation to give effect to the rights***

87. In the academic text by S.A De Smith on **Judicial Review of Administrative Action, Third Edition** (1973) Stevens and Sons Limited, at page 60 it is stated that the term administrative refers to broad areas of governmental activity in which the repositories of power may exercise every class of statutory function, and that an administrative act cannot be exactly defined but includes the adoption of a policy, the making and issue of a specific direction and the application of a general rule to a particular case in accordance with the requirements of policy, expediency or administrative practice.

88. As to what constitutes fair administrative action, the Constitutional Court of South Africa in its decision in **President of the Republic of South Africa and Others v South African Rugby Football Union and Others (CCT16/98) 2000 (1) SA 1,** at paragraphs **135 -136** held as follows with regard to similar provisions on just administrative action in section 33 of the South African Constitution:

> ***"Although the right to just administrative action was entrenched in our Constitution in recognition of the importance of the common law governing administrative review, it is not correct to see section 33 as a mere codification of common law principles. The right to just administrative action is now entrenched as a constitutional control over the exercise of power. Principles previously established by the common law will be important though not necessarily decisive, in determining not only the scope of section 33, but also its content. The principal function of section 33 is to regulate conduct of the public administration, and, in particular, to ensure that where action taken by the administration affects or threatens individuals, the procedures followed comply with the constitutional standards of administrative justice. These standards will, of course, be informed by the common law principles developed over decades…"***

89. The South African Constitutional Court further clarified in the said case that the test for determining whether conduct constitutes "administrative action" is not the question whether the action concerned is performed by a member of the executive arm of government. What matters is not so much the functionary as the function. Further, that the focus of the enquiry as to whether conduct is "administrative action" is not on the arm of government to which the relevant actor belongs, but on the nature of the power he or she is exercising.

90. In the present case the constitutional powers of the Commission under Article 168(2) - (4) are as follows:

> ***"(2) The removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission.***
>
> ***(3) A petition by a person to the Judicial Service Commission under clause (2) shall be in writing, setting out the alleged facts constituting the grounds for the judges removal.***

(4) The Judicial Service Commission shall consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President."

91. In our view the functions of the Commission in the exercise of these powers are administrative in nature as they involved a decision making process that would affect the rights of the Petitioner and are therefore subject to Article 47 of the Constitution.

Whether the 2nd Respondent violated the Petitioner's rights under Article 47

92. Having found that the provisions of Article 47 were applicable to the exercise by the Commission of its actions under Article 168 of the Constitution, we now proceed to consider whether the Commission violated the Petitioner's rights in this respect. The questions for determination are whether:

(i) the Commission in the performance of this administrative function was culpable of undue delay in determining the complaints against the Petitioner;

(ii) the Petitioner had a right to cross-examine witnesses;

(iii) the Commission had a duty to avail to the Petitioner a report of its findings and written reasons for its decision;

(iv) there was external interference with the Commission's investigation that was prejudicial to the Petitioner.

93. We shall proceed to examine and determine these questions in light of both the constitutional requirements as well as applicable common law principles from which the right to fair administrative action is derived.

Whether there was undue delay by the Commission

94. The requirement for an expeditious hearing in Article 47 of the Constitution must of necessity be read together with the requirement of efficiency in the conduct of administrative functions, as one of the key reasons for quick and timely administrative action is to ensure that no undue prejudice is suffered by any person affected by the said actions. In determining whether an action is expeditious, the context and circumstances in which such action is being undertaken is therefore relevant both in evaluating whether in the circumstances the action was timeous, and also in light of any adverse effects on the person affected by the decision. Factors to be taken into account in determining the level of expeditiousness will include the type and complexity of the action being undertaken, and the conduct and diligence of all the parties involved.
95. In the present petition the Commission explains the time taken to reach its decision as having been necessitated by the need to interview 30 witnesses so as to verify the complaints made against the Petitioner. The requirement of expeditious and efficient administrative action by the Commission has therefore to be evaluated in the light of this circumstance. We also note in this regard that a constitutional imperative is placed on the Commission to be satisfied that a petition or complaint made to it discloses a ground for removal of a judge. It is therefore also critical that the substantive elements of the administrative actions are given due attention so that the probity of proceedings and the quality of the decisions, are not compromised.
96. An appropriate balance therefore has to be struck between the right to an expeditious hearing and the substantive elements of the right to a fair administrative action. In the circumstances of this petition we find that the period of three months taken to consider the complaints made against the Petitioner and to examine witnesses was in our view not only expeditious and efficient, but also reasonable in light of the possible ramifications of the decision made by the Commission.

Right to cross-examine witnesses

97. We have considered the various arguments made on this issue. It is now settled that it is a fundamental principle of justice and procedural fairness that no person is to be condemned unless the person has been given prior notice of the allegations made against him or her, and a fair opportunity to be heard. In **Halsbury Laws of England, 5th Edition 2010 Vol. 61** at para. 639, it is stated as follows with regard to the right to be heard:

> **"The rule that no person is to be condemned unless that person has been given prior notice of the allegations against him and a fair opportunity to be heard (the audi alteram partem rule) is a fundamental principle of justice. This rule has been refined and adapted to govern the proceedings of bodies other than judicial tribunals; and a duty to act in conformity with the rule has been imposed by the common law on administrative bodies not required by statute or contract to conduct themselves in a manner analogous to a court."**

98. In our local context the application of the rules of natural justice have been considered in the Court of Appeal in **Onyango Oloo vs. Attorney General [1986-1989] EA 456**:

> **"The principle of natural justice applies where ordinary people would reasonably expect those making decisions which will affect others to act fairly and they cannot act fairly and be seen to have acted fairly without giving an opportunity to be heard...There is a presumption in the interpretation of statutes that rules of natural justice will apply and therefore the authority is required to act fairly and so to apply the principle of natural justice...To "consider" is to look at attentively or carefully, to think or deliberate on, to take into account, to attend to, to regard as, to think, hold the opinion... "Consider" implies looking at the whole matter before reaching a conclusion...A decision in breach of the rules of natural justice is not cured by holding that the decision would otherwise have been right since if the principle of natural justice is violated, it matters not that the same decision would have been arrived at...It is improper and not fair that an executive authority who is by law required to consider, to think of all the events before making a decision which immediately results in substantial loss of liberty leaves the appellant and others guessing about what matters could have persuaded him to decide in the manner he decided."**

99. In terms of the conduct of the proceedings he Court of Appeal then proceeded to observe as follows:

> **"...In the course of decision making, the rules of natural justice may require an inquiry, with the person accused or to be punished, present, and able to understand the charge or accusation against him, and able to give his defence. In other cases it is sufficient if there is an investigation by responsible officers, the conclusions of which are sent to the decision-making body or person, who, having given the person affected a chance to put his side of the matter, and offer whatever mitigation he considers fit to put forward, may take the decision in the absence of the person affected. The extent to which the rules apply depends on the particular nature of the proceedings...It is not to be implied that the rules of natural justice are excluded unless Parliament expressly so provides and that involves following the rules of natural justice to the degree indicated...Courts are not to abdicate jurisdiction merely because the proceedings are of an administrative nature or of an internal disciplinary character. It is a loan, which the Courts in Kenya would do well to follow, in carrying out their tasks of balancing the interests of the executive and the citizen. It is to everyone's advantage if the executive exercises its discretion in a manner, which is fair to both sides, and is seen to be fair...Denial of the right to be heard renders any decision made null and void ab initio."**

100. The rules of natural justice and the obligation to hear the other party was reaffirmed in **Central**

Organisation Of Trade Unions Vs. Benjamin K Nzioka & Others Civil Appeal No. 166 of 1993 where the Court of Appeal expressed itself as follows:

> **"This principle of law is well settled and was recently reaffirmed in the ruling of this court in Central Organisation of Trade Unions (Kenya) and Benjamin K. Nzioka and Others Civil Application No. NAI 249 of 1993 (108/93) (UR) in the following words:**
>
> **"As a concept, it is derived from the Latim maxim 'audi alteram partem' which in English means 'hear the other party'. This rule obliges a judges or an adjudicator faced with the task of making a choice between two opposing stories to listen to both sides. He should not base his decision only on hearing one side. In the case of a judge he should give equal opportunity to both parties to present their cases or divergent view points. And in doing so, should hold the scales fairly and evenly between them".**

101. It has been argued that the role of the Commission was to conduct a preliminary hearing so as to determine if there was a *prima facie* case made, and that in any event the Petitioner would have a hearing at the Tribunal that has been set up to investigate him. Our response to this argument is two fold. Firstly, the Commission was under an obligation to verify the complaints made against the Petitioner and that the constitutional threshold for the removal of the Petitioner of a judge had been met. The Constitution requires the Commission under Article 168(4) to be satisfied that a complaint or petition discloses a ground for removal of a judge. This constitutional standard of in our view can only be achieved by a systematic and careful evaluation of the evidence before the Commission, to enable it reach a decision whether the evidence before it merited the formation of Tribunal to consider the Petitioner's removal.

102. This court in **Nancy Makokha Baraza v Judicial Service Commission & 9 others [2012] *e*KLR,** stated as follows in this regard:

> **"It is therefore clear that where the proceedings for the removal of a judge is by way of a petition, the Commission is under a duty to consider the same and only send the Petition to the President on being satisfied that it discloses a ground or grounds for removal. Accordingly the Commission is not a conveyor belt but plays the role of a sieve in the process. In order for the Commission to be satisfied that the complaints against the Judge merits a petition to the President to suspend the Judge and form a Tribunal, it is only fair and just that it evaluates the complaint before doing so. How else can it dismiss the complaint without evaluating the same? Such evaluation, with greatest respect to Dr. Khaminwa, does not mean the same thing as the inquiry as contemplated under Article 168(7) (b).............In our view, both the principles of Legitimate expectation and natural justice dictate that before the Commission sends a petition to the President, it must evaluate the veracity of the allegations made against a judge in order to satisfy itself that the complaints merit forwarding to the next stage. The position would be intolerable if the Commission's only role in the process of the removal of a judge was that of a messenger assigned the unenviable task of sending all manner of complaints levelled against a Judge to the President."**

103. Similar sentiments were made by the Privy Council in **Evan Rees and Others vs. Richard Alfred Crane [1994] WLR**, as follows:

> **"It is also in their Lordships' view clear that the Commission is not intended simply to be a conduit pipe by which complaints are passed on by way of representation. …….. The Commission before it represents must, thus, be satisfied that the complaint has prima facie sufficient basis in fact and must be sufficiently serious to warrant representation to the President, effectively the equivalent of**

impeachment proceedings. Both in deciding what material it needs in order to make such a decision and in deciding whether to represent to the President, the Commission must act fairly."

104. It is thus our finding in this regard that the Commission is obliged and under a duty under the principles of common law and the provisions of Article 47 of the Constitution to discharge its constitutional mandate and administrative functions in a procedurally fair manner.

105. Secondly, procedural fairness is required regardless of the nature of the inquiry; it is not the nature of the inquiry that determines whether the rules of natural justice will be followed. Contrary to the commission's contention, the fact that it was involved in preliminary inquiry did not absolve it from the need to comply with procedural fairness under article 47 of the constitution. We agree with the position of the court in **Nancy Makokha Baraza v Judicial Service Commission & 9 others** (supra) that it is not for the Commission to make definitive findings whether the allegations made against the Petitioner have been proved or not. However, it is our view that it is for the investigating body, in this instance the Commission to set out the parameters of its inquiry in a preliminary investigation; nonetheless it will still be obliged to observe procedural fairness irrespective of the scope of its inquiry in light of the Constitutional requirement of Article 47.

106. We will now examine the key question of whether the procedural fairness was applied by the Commission in the circumstances of this petition. What constitutes procedural fairness in any hearing depends on the circumstances of each particular case. This position is also established in the application of the rules of natural justice under common law. W.R. Wade & C.F. Forsyth in their text, ***'Administrative Law'*** 10th edition (2009) Oxford University Press, at page 420 remark as follows:

> **"The requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter to be dealt with and so forth. To the same effect is a passage, much cited, in a speech of Lord Bridge in the House of Lords [Lloyd v McMahon [1987] AC 625 at 702]**

'My Lords, the so-called rules of natural justice are not engraved on tablets of stone. To use the phrase which better expresses the underlying concept, what the requirements of fairness demand when any body, dJUDGE

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> **omestic, administrative or judicial, has to make a decision which will affect the rights of individuals depends on the character of the decision-making body, the kind of decision it has to make and the statutory or other framework in which it operates. In particular, it is well-established that when a statute has conferred on any body the power to make decisions affecting individuals, the courts will not only require the procedure prescribed by the statute to be followed, but will readily imply so much and no more to be introduced by way of additional procedural safeguards as will ensure the attainment of fairness'."**

107. As stated by **Michael Fordham, Judicial Review Handbook; 4th Edition at pg. 1007:**

> **"procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".**

108. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of Appeal delivered itself as follows:

> **"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."** [Underlining ours].

109.What then were the circumstances of and procedures applied in this petition? Complaints had been made against the Petitioner which were being investigated by the Commission with a view to determining whether they raised grounds for a recommendation that a Tribunal be set up to consider the Petitioner's removal from office as a judge. At stake was the Petitioner's position as a judge as well as his reputation and character in light of the constitutional standards set for the removal of a judge under Article 168(1) of the constitution. It is our view that in such circumstances where a particular administrative action is likely to lead to removal from a public office, and indeed in this case a constitutional office, and has serious ramifications in terms of integrity and future employment of a public officer, it is paramount that some minimum standards of fair action and hearing are met.

110. It is not disputed in this petition that the Petitioner was given notice and copies of the complaints made against him. It is also not disputed that the Petitioner was given an opportunity to respond to the said complaints. What is being disputed is the procedure used in the conduct of the said hearing by the Commission, and the Petitioner's argument in this regard is that he ought to have been allowed to cross-examine witnesses.

111.Judicial opinion is divided on the requirement for cross-examination of witnesses as forming part of procedural fairness. It is also not necessary that strict rules of evidence be applied in such inquiry. It is generally agreed that a hearing can be in any form, whether by way of written representations or an oral hearing. However, when it comes to cross-examination of witnesses, a distinction is made between oral hearings and other forms of hearings in this regard.

112.As observed by W.R. Wade & C.F. Forsyth in their text, **'Administrative Law'** 10th edition (2009) Oxford University Press, at page 433 in this regard:

> **"Where an oral hearing is given, it has been laid down that a tribunal must (a) consider all relevant evidence which a party wishes to submit; (b) inform every party of all the evidence to be taken into account, whether derived from another party or independently; (c) allow witnesses to be questioned; (d) allow comment on the evidence and argument on the whole case.**

113.Several cases are cited by the two authors in support of this proposition, including **Osgoode vs Nelson (1872) LR 5 HL 636** where the House of Lords held that there exists a duty before exercising the power of dismissal to give an officer an opportunity of knowing the charges and of the evidence in support of them and of producing such evidence as he desired to produce.

114.The cited text by the two authors extensively reproduces part of the decision in **R vs Deputy Industrial Injuries Commissioner ex. P. Moore (1965) 1 Q.B 456 at 490.** The court in that case observed the rules of natural justice required the commissioner to listen fairly where a hearing as been requested or there is a hearing whether requested or not, to the contentions of all persons who are entitled to be represented at the hearing, in particular allowing both parties to comment on or contradict any information that he had obtained.

115.In addition the court relied on the House of Lords decision in **Board of Education vs Rice (1911) A.C 179** where Lord Loreburn LC said:

> **"that a decision-making body should not see relevant material without giving those affected a chance to comment on it and, if they wish, to controvert it, is fundamental to the principle of law (which governs public administration as much as it does adjudication) that to act in good faith and listen fairly to both sides is 'a duty lying upon everyone who decides anything'."**

116.From our examination of the pleadings and evidence by the Petitioner and the Commission, it is

evident that an oral hearing was held in which the Commission called 30 witnesses to give evidence in relation to the complaints made against the Petitioner. The Petitioner gave written responses to the complaints made against him. The Commission does not state whether it informed the Petitioner that it was inviting the thirty witnesses, or of the content of their testimony, and no evidence to this effect was produced. The Commission stated in its replying affidavit sworn on 22nd October 2013 by its Registrar, **Winfrida Mokaya**, that having considered the complaints and evaluated and deliberated on the testimony presented by witnesses and the Petitioner's response, it established that the constitutional threshold had been met in three of the complaints.

117. However, it is apparent from the material before us that the Petitioner was neither accorded an opportunity to cross examine the witnesses nor to comment on the testimony of those witnesses whom the Commission stated it relied on to meet the constitutional threshold. While it is the position that the technical rules of evidence do not strictly apply to such situations it is imperative that any evidence relied upon by the Commission should have been availed to the Petitioner to comment upon.

118. Our findings therefore on the issue of the cross-examination of the witnesses are two. Firstly we are of the view that while the Commission did notify the Petitioner of the complaints made against him, it breached its duty to provide adequate notice and disclosure of the testimony of witnesses that appeared before it to the Petitioner. Secondly, it is also our view specifically on the requirement of cross-examination that in the event that a body whether undertaking a preliminary investigation or a full-fledged hearing opts to call witnesses in its hearings, then it must as part of procedural fairness not only inform all the parties involved of the witnesses and their testimony, but also provide an opportunity to any party affected by that testimony to contest it within the parameters of the inquiry being undertaken either by way of cross examination or by allowing him an opportunity to comment on it.

119. We take the view that our findings above are supported by the requirements under Article 168(4) of the Constitution that the Commission is ***satisfied*** that a petition or complaint meets the threshold set by the Constitution. The catchword in the section is that the Commission must be ***"satisfied"***. For the Commission to be said to have been satisfied, it is our view that it must consider all the relevant factors, and all relevant factors cannot be said to have been considered unless a person is furnished with allegations made against him or her and he or she is afforded an opportunity to respond thereto.

120. We have considered the decision in **Nancy Makokha Baraza v. Judicial Service Commission & 9 Others** (supra) in relation to the issue of cross examination and are of the view that the circumstances of this case are distinguishable from that case in this regard. In the said case, the Petitioner, the Deputy Chief Justice and the Vice President of the Supreme Court, was afforded an opportunity to testify before the subcommittee and was thereby availed an opportunity to comment on the testimonies of the witness. There is no evidence in the case before us that the Petitioner was afforded a similar opportunity.

Failure to avail report and to give reasons

121. The Petitioner avers that the failure by the Commission to avail the report of its recommendations to the Petitioner contravenes Article 47(2) of the Constitution of Kenya, 2010. The question is whether the Commission was bound to give its written report or reasons in writing for arriving at its decision to the Petitioner. The Commission is one of the constitutional Commissions recognised under the provisions of Article 248. The Commission is established under Article 171 and its functions, as set out under Article 172(1)(c) include to "appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;, include recommending to the President persons for appointment as judges." In addition, the Commission just like all other constitutional commissions and independent offices is required, under Article 249, to amongst other things promote constitutionalism, protect the sovereignty of the people and secure the observance by all State organs of democratic values and

principles.

122. It is an express requirement under Article 47(2) of the Constitution that reasons must be given for any actions that will adversely affect the rights and fundamental freedoms of a person. We note from the provisions of Article 168(5) and (6) that the consequences of the recommendation by the Commission to the President to form a Tribunal to investigate the conduct of the Petitioner is to suspend the judge and deprivation of half of his remuneration and benefits and if allegations against him are proven removal from office. Clearly the decision of the Commission had major ramifications on the rights of the Petitioner and he was entitled to reasons under Article 47(2).

123. We note that the response by the Commission to the Petitioner's request for a report and reasons for its decisions was that the same would be availed by the Tribunal. We again reiterate our concerns that the Commission's obligation to observe the constitutional provisions on fair administrative action and procedural fairness cannot be predicated on the fact that a recommendation was made for the appointment of a Tribunal. We emphasise that the Commission's constitutional obligations exist whether or not a recommendation for formation of a Tribunal is made.

124. In our view it is clear that as long as person's right or fundamental freedom is likely to be adversely affected by the administrative action, he or she is entitled to be given the reasons for the action. In addition in implementing the provisions of the Constitution the Commission is guided by the values of Article 10 which include the value of good governance, transparency and accountability. Giving reasons for actions undertaken by a constitutional body is in our view a key hallmark of good governance, transparency and accountability. In this case, it is our finding and we hold that the Commission had a duty to furnish the Petitioner with the reasons for its decision that it abdicated this constitutional duty.

Whether there was external influence

125. The Petitioner complains that the conduct of investigations and proceedings by the Commission were marred by undue delays, interference and manipulation by the complainants and in particular the LSK. With regard to media publicity and the right to fair hearing, the court in **<u>William S.K. Ruto & Another v Attorney General, HC Civil Suit No. 1192 of 2005</u>** where it was stated as follows;

> **"The applicants will be tried by qualified, competent and independent judicial officers who are not easily influenced by statements made by politicians to the press. In our country today, such statements are the order of the day and it is our view that the courts will rise above such utterances. We find no basis for the applicant's fears. In Kamlesh Pattni v AG Misc. App. No. 1296/1998, the court held as follows:-"Media publicity per se does not constitute of itself a violation of a party's right to a fair hearing."**

126. The court in **<u>Deepak Kamani v AG Civil Appeal (Application) 152/2009</u>** reached a similar finding on allegations of pre-trial publicity."

127. We are of the view that the issue being raised of whether the publicity surrounding the complaints made against the Petitioner led to bias on the part of the Commission can only be addressed by considering whether a reasonable and informed observer would conclude that there was a possibility that the Commission would in the said circumstances be biased.

128. In addition in **<u>Nancy Makokha Baraza v. Judicial Service Commission & 9 Others (2012) eKLR</u>** it was held that publicity alone does not vitiate proceedings unless it is shown that the coverage was such that the Commission is likely to have been influenced or affected by the media reports provoked by the incident.

129. We find that the allegations of the Commission being compromised by external forces and that

its decision was driven by bad faith have not been proved. There was no substantive evidence placed before the court to show that the Commission was influenced by these external forces and not the complaints and testimony made before it. Furthermore, newspaper evidence is of little probative value and as such cannot be solely relied on to resolve the issue raised by the Petitioner.

Whether the 14 day Period Applies to Both Suspension of a Judge and Appointment of Tribunal

130. The next issue for consideration is whether the 14 day period provided under Article 168(5) of the Constitution applies to both the suspension of a judge upon presentation of a petition for his removal to the President by the Commission and appointment of a tribunal by the President, or just to the suspension of the judge.

131. The constitutional provisions relating to the 14 day period for suspension and appointment of a Tribunal are founded in **Article 168** which provides as follows:

> ***(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) in the case of the Chief Justice, appoint a tribunal consisting of—***
>
> ***(i) the Speaker of the National Assembly, as chairperson;***
>
> ***(ii) three superior court judges from common-law jurisdictions;***
>
> ***(iii) one advocate of fifteen years standing; and***
>
> ***(iv) two other persons with experience in public affairs; or***
>
> ***(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***
>
> ***(iii)two other persons with experience in public affairs.***

132. The controversy before us on this issue centres primarily on the interpretation of sub article (5)(b) of the Article. The Petitioner contends that the additional two members of the tribunal were not appointed within the required constitutional time limit of fourteen (14), days but 31 days after receipt of the petition by the President. He submits therefore that the Tribunal appointed to investigate his conduct was unconstitutional, null and void *ab initio* and lacks the legal standing to probe him. The Respondents on the other hand argue that the fourteen days period in Article 168(5) did not apply to the appointment of the Tribunal and that the appointment could be made within a reasonable time under article 259 of the constitution.

133. In dealing with this issue, we consider it from two perspectives. The first relates to the use of the word ***'and'*** with a comma placed after it in Article 168(5)(b), on which we have heard extensive argument by the 2nd Respondent. The second relates to the use of the word ***'shall'*** in the said Article, and whether it denotes a mandatory obligation on the President from which there can be no deviating.

134. Article 168(5)(b) requires that ***"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….”, appoint a tribunal constituted in accordance with the provisions of the Article. The Article thus imposes two obligations on the President: that he suspends the judge, and that he appoints a Tribunal to investigate his conduct. Article 168 is divided into three by three commas, with the respective phrases indicating on whom the duty lies, the period within which the duty in question is to be performed, and what the duty or obligation is.

135. The President is under a constitutional obligation to suspend the judge in question within the fourteen day period, and under a further obligation to constitute a tribunal to investigate the judge. The comma placed after the word 'and' suggests that the appointment of the tribunal shall be made **after** the suspension of the judge. The question is whether the Article also requires that the Tribunal be appointed within the fourteen day period from receipt by the President of the Petition from the Commission.

136. In our view, the use of the word ***'and'*** in the provision requires a conjunctive rather than disjunctive reading of the sub article, so that the fourteen (14) day period applies to both the suspension and the appointment of the tribunal. We therefore agree with the Petitioner that the fourteen (14) day period applies both to the suspension of the judge and the appointment of the tribunal. We believe that a wholesome reading of the provisions of Article 168 and a consideration of the context and purpose of the provision can only lead to the conclusion that it was the intention of the framers of the Constitution that the process of removal of a judge should be expedited, which requires that its commencement and conclusion be as time bound as possible.

137. We take this view because, first, it is to be noted that once the petition is presented, the President is under an obligation to suspend the Judge and such suspended judge loses part of his benefits, including part of the remuneration. Article 168(6) states that, ***"Despite Article 160 (4), the remuneration and benefits payable to a judge who is suspended from office under clause (5) shall be adjusted to one half until such time as the judge is removed from, or reinstated in, office."*** Due to the clear prejudice being caused to a judge in such circumstances it is necessary that the process of removal be undertaken without unnecessary delay.

138. Secondly, it is clear that the process contemplated by Article 168 is intended to proceed expeditiously. Sub article **7(b)** of the Article requires the tribunal once appointed to "***inquire into the matter expeditiously and report on the facts and make binding recommendations to the President."*** Sub article (8) requires that a judge who is aggrieved by the decision of the tribunal has ten (10) days within which to appeal to the Supreme Court**.** Sub article **(9)** likewise provides the timeline within which the President is to act upon the recommendations of the tribunal as follows:

> ***The President shall act in accordance with the recommendations made by the tribunal on the later of—***
>
> ***(a) the expiry of the time allowed for an appeal under clause (8), if no such appeal is taken; or***
>
> ***(b) the completion of all rights of appeal in any proceedings allowed for under clause (8), if such an appeal is taken and the final order in the matter affirms the tribunal's recommendations.***

139. Taking these provisions into account, it is clear that the intention behind the provisions of Article 168 was to have an expedited proceeding with stipulated predictable timelines for the investigation into the conduct of a judge leading to his or her removal or reinstatement. In holding thus, we are mindful of the great public interest in having the question of credibility and suitability of a judge determined as soon reasonable cause arises so as to restore public confidence in the administration of justice.

140. Furthermore taking the constitutional provision on leadership and integrity contained in Article

73 into account, it cannot have been the intention that the period be left open-ended, with only the suspension taking place within the fourteen (14) day period. The sooner the question of a judge's integrity is resolved and the credibility of the institution and/or its holder restored, the better.

141. Our conclusion is that it is the constitutional intention that the process of removal of a judge proceeds expeditiously. Such an interpretation is one which would respect the values and principles of the Constitution set out in Article 10 which include good governance, transparency and accountability.

142. We also find that, contrary to the assertion by the Commission, Article 259(8) is not applicable. This Article provides as follows:

> ***If a particular time is not prescribed by this Constitution for performing a required act, the act shall be done without unreasonable delay, and as often as occasion arises.***

In our view, the said provision applies only where a particular time is not prescribed. Article 168(5) of the Constitution expressly provides the time within which the President is to suspend the Judge and appoint a Tribunal.

143. We therefore find and hold that the fourteen day period provided in Article 168(5) applies to both the suspension of a judge and appointment of a tribunal to investigate his conduct.

Whether the Tribunal Appointed by the President is void ab initio.

144. Which brings us to the final issue for our consideration: whether the tribunal appointed by the President is void *ab initio*. A determination of this issue is predicated on a consideration of the use of the word ***'shall'*** in Article 168(5)(b). The Petitioner contends that the use of the word makes the obligation on the President to suspend the judge and appoint a Tribunal within fourteen days mandatory, and that the failure to do so renders the acts of the President null and void. The contention by the 1st Respondent was that the appointment of the Tribunal was a matter of form and procedure which could be cured by the corrigenda under Article 159 of the Constitution. The Commission, on its part, argues that there was no time limit for the appointment of the Tribunal and that such appointment could be done within a reasonable time under Article 259(8) of the Constitution. Having found that the appointment of the Tribunal ought to have been done within the fourteen day period and that a specific time within which the tribunal ought to be appointed was provided, we find the argument by the Commission untenable.

145. The 1st Respondent contends that the provisions of Article 168(5)(b) are matters of form and procedure, technicalities which can be cured under Article 159 of the Constitution. If we understand the 1st Respondent correctly, his contention raises the question whether the provisions of Article 168(5)(b) are mandatory, as contended by the Petitioner, or directory, and therefore capable of being cured by way of a corrigenda.

146. In considering this aspect of the matter, we bear in mind the observations in **Kigula and Others vs. Attorney-General (supra)** that it is now widely accepted that the principles which govern the construction of statutes also apply to the interpretation of constitutional provisions. We shall therefore consider the holdings in various decisions from jurisdictions with systems of law similar to ours to arrive at a determination of the circumstances in which the use of the word ***'shall'*** is deemed mandatory or directory.

147. What emerges from a consideration of these decisions is that while the word ***'shall'*** is ordinarily interpreted as mandatory, it will be considered as directory depending on the text and context thereof; and that a statute will be deemed as directory or mandatory having regard to the purpose and object it seeks to achieve. See **M/S. Sainik Motors, Jodhpur and Others vs The State of Rajasthan 1961 AIR 1480, 1962 SCR (1) 517; C. Ramasamy vs The Assistant Engineer W.P. No. 18868 of 2013; State of U.P. v. Baburam Upadhya AIR 1961 SC 751,** and F. A. R.

Bennion Statutory Interpretation, A Code, Fourth 4th Edition, Page 34. Failure to comply with a mandatory requirement invalidates the act done; where it is merely directory, the thing done will be unaffected though there may be sanctions imposed on the person affected.

148. The context of this petition and the reasons for an expeditious hearing of a petition for the removal of a judge has already been explained and dealt with elsewhere in this judgement.

149. Timelines, whether statutory or constitutional are, in our view, meant for the taking of various steps in the proceedings so as to achieve just, fair and quick resolution of the matters in question. In other words, timelines, particularly constitutional time limit, are not matters of form and mere technicalities but serve a useful purpose in the administration of justice.

150. The Supreme Court has held in **Raila Odinga vs. Independent Electoral and Boundaries Commission &Others (2013) eKLR (Petition No. 5 of 2013)** (supra) that "this timeline is constitutional and not negotiable."

151. It is therefore imperative that constitutional timelines be adhered to strictly and the Court ought not to readily treat as directory provisions of the Constitution couched in prima facie mandatory terms. To do so, in our view, may open the way for public officers to deliberately ignore constitutional timelines for ulterior purposes. Where there are clear constitutional timelines to be adhered to, the Court will not sacrifice the said timelines for the sake of expediency.

152. In this respect we associate ourselves with the decision in **Nancy Makokha Baraza vs. Judicial Service Commission & 9 Others** (supra) that:

> **"It is important to clearly understand the role of the President. On receipt of the petition from the Commission, the President has no option but to act within fourteen days to suspend the Judge and appoint a tribunal. The word used is "shall' which connotes that it is mandatory that the President must suspend the Judge and appoint a Tribunal within the stipulated period. Therefore the President's powers are restricted by this provision and there is no room for manoeuvre."**

153. For the reasons set out above, we believe that our answer to the issue whether the Tribunal appointed by the President is void *ab initio* must be in the affirmative. It is a fact that the petition was presented by the Commission to the President on 20th May 2013. Using the method provided for computation of time under **Article 259(5)**, the fourteen days' period lapsed on Monday 3rd June 2013.

154. It is not in dispute that the first five (5) members, having been appointed on the 31st May 2013, were appointed within the timeline set by the Constitution. However they did not meet the constitutional requirement in terms of the number of members under Article 168(5)(b)(i)(ii) and (iii) of the Constitution which requires 7 members. The appointment of the two remaining members was made vide Gazette Notice No. 8279 published on 19th June 2013, 31 days after the presentation of the petition to the President and therefore fell outside the mandatory constitutional period of 14 days. The appointment of the two additional members could not cure the invalidity of the tribunal of five members appointed on 31st May 2013.

Conclusion

155. We have found that the Commission was under a constitutional obligation to observe the requirements of Article 47 of the Constitution; and that it violated the Petitioner's constitutional rights guaranteed under Article 47 of the constitution by failing to avail to him the testimony of the witnesses who gave evidence it relied on in reaching its decision; and/or an opportunity to comment on the said testimony. We have also found that the Commission's failure to give him written reasons for its decision or a copy of its report on a matter with grave implications for his

fundamental rights was a violation of his rights under Article 47(2) of the Constitution. In the circumstances, its petition to the President to suspend him and appoint a tribunal to investigate his conduct did not meet the constitutional threshold. Consequently, his suspension on the basis of the petition to the President was unconstitutional.

156.We have also found that, even had the Commission not been in breach of the provisions of Article 47, the appointment of a tribunal by the President was done in violation of the express constitutional provisions with respect to time, and was therefore unconstitutional. In the circumstances, we must determine the present petition in favour of the Petitioner.

Reliefs

157.Having made the foregoing findings the next issue for determination is what remedies should the Court grant in the circumstances of this case.

158.Article 23(3) of the Constitution provides that "in any proceedings brought under Article 22, a Court may grant appropriate relief, Including"....declaration of rights, injunction, conservatory order, a declaration of invalidity of any law that denies, violates, infringes, or threatens a right or fundamental freedom in the Bill of Rights and is not justified under Article 24, an order for compensation; and an order of judicial review.

159.In addressing itself to the question of appropriate relief in Article 23 of the Constitution the court in **Nancy Makokha Baraza vs. Judicial Service Commission & 9 Others** (supra) the court expressed itself as follows:

> **"Article 23(3) empowers this Court in any proceedings brought under Article 22, to grant appropriate reliefs. Article 2(4) on the other hand ordains that any law, including customary law that is inconsistent with this Constitution is void *to the extent of the inconsistency*. It is therefore our view that where any provision is contrary to the Constitution, only the inconsistent portion is to be declared void. In the case of Minister of Health and Others vs. Treatment Action Campaign and Others (Ibid), it was stated at page 249 as follows:**
>
> **"Section 38 of the Constitution contemplates that where it is established that a right in the Bill of Rights has been infringed a court will grant 'appropriate relief'. It has wide powers to do so and in addition to the declaration that it is obliged to make in terms of s 172(1)(a) a court may also 'make any other order that is just and equitable' (s 172(1)(b))…Appropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a *mandamus* or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights…The courts have a particular responsibility in this regards and are obliged to 'forge new tools' and shape innovative remedies, if needs be, to achieve this goal…Nor would it necessarily be out of place for there to be an appropriate order on the relevant organs of state in South Africa to do whatever may be within their power to remedy the wrong here done to Mohamed by their actions, or to ameliorate at best the consequential prejudice caused to him. To stigmatise such an order as a breach of the separation of state power as between the Executive and the Judiciary is to negate a foundation value of the Republic of South Africa, namely supremacy of the Constitution and the rule of law. The Bill of Rights, which we find to have been infringed, is binding on all organs of state and it is our duty to ensure that appropriate relief is afforded to those who have suffered infringement of their constitutional rights".**

160.The Court in ***Nancy Baraza case*** continued to state as follows:

> **"On that note we wish to comment briefly on the orders granted by the Court in Ole Keiwua's Case and Mbogholi's case. Those cases were decided before the promulgation of the Constitution of Kenya, on 27th August 2010. The defunct Constitution, as we have already observed was very limited in terms of scope of the remedies available. The New Constitution gives the court wide and unrestricted powers which are inclusive rather than exclusive and therefore allows the court to make appropriate orders and grant remedies as the situation demands and as the need arises…..We are, therefore, of the view that Article 23(3) of the Constitution is wide enough and enables as to make appropriate reliefs where there has been an infringement or a threat of infringement of the Bill of Rights…"**

161.In deciding on the appropriate orders to grant we are cognisant of the fact that the position of a judge under our Constitution is a position of trust. It requires that there should be full public confidence in the holder of the office, otherwise the decisions emanating from an office in which there is no confidence would not help to advance the rule of law. In the present case, allegations have been made with regard to the conduct of the Petitioner which put to question his suitability as a judge. For as long as these allegations, which the Commission deemed serious enough to warrant the referral of the issue to the President for constitution of a tribunal to investigate remain uncleared, there can be no confidence in the Petitioner as a judge were he to be re-instated. In the interest of the administration of justice and in the interest of the Petitioner, the complaints against the Petitioner should be investigated and a finding made one way or the other.

162.It is with these considerations in mind that the orders that commend themselves to us are as follows:

1. ***We declare that the entire proceedings undertaken by the Respondents regarding the various complaints lodged with the 2nd Respondent against the Petitioner violated the Petitioner's fundamental constitutional Rights to fair administrative action as guaranteed under Article 47 of the Constitution in so far as the Petitioner was not furnished with the testimonies of the witnesses who testified in support of the said complaints and or given an opportunity to comment thereon, and for failure by the 2nd Respondent to give the Petitioner written reasons for its decision.***
2. ***We hold that the suspension of the Petitioner on the basis of the petition to the President by the Commission which was arrived at in violation of Article 47 was unconstitutional and invalid and is hereby set aside together with any consequential actions and/or decisions.***
3. ***We declare that the Tribunal purportedly appointed by the President Gazette Notice dated 31st May 2013 published in Special Issue of the Kenya Gazette Vol CXV-No. 82 and in Gazette Notice No. 8279 dated on 17th June 2013 Special Issue Gazette Notice Vol. CXV – No. 91 is invalid and unconstitutional for failure to meet the mandatory requirements of Article 168 (5) (b) (i-iii) of the Constitution.***
4. ***We accordingly quash the Gazette Notice Gazette Notice dated 31st May 2013 published in Special Issue of the Kenya Gazette Vol CXV-No. 82 and in Gazette Notice No. 8279*** *dated on 17th June 2013* ***Special Issue Gazette Notice Vol. CXV – No. 91 together with the consequential proceedings, decisions and/or actions taken pursuant thereto forthwith.***
5. ***We direct the 2nd Respondent to expeditiously commence de novo the process of investigating and determining the complaints leveled against the Petitioner in compliance with all applicable provisions of the constitution.***
6. ***Taking into account our determination herein we make no order as to costs.***

163.We take this opportunity to express our appreciation to counsel who appeared in this petition for their well-researched arguments and submissions. If we have not referred to all the decisions referred to us, it is not out of lack of appreciation for their industry.

Signed and Dated at Nairobi this 17th day of February 2014.

MUMBI NGUGI	**P NYAMWEYA**	**G V ODUNGA**
JUDGE	**JUDGE**	**JUDGE**

Signed, Dated and delivered at Nairobi this 17th day of February 2014

JUDGE

G V ODUNGA

In the presence of

Mr Nyachoti for the Petitioner

Mr. Muiruri for the 1st Respondent

Mr. Issa for the 2nd Respondent