



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
JUDICIAL REVIEW DIVISION
JR. CASE NO.7 OF 2012

**IN THE MATTER OF AN APPLICATION BY THE TRUTH JUSTICE AND
RECONCILIATION COMMISSION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW
ORDERS OF MANDAMUS AND PROHIBITION**

AND

**IN THE MATTER OF TRUTH JUSTICE AND
RECONCILIATION ACT (NO.6 OF 2008)**

TRUTH JUSTICE AND RECONCILIATION COMMISSIONAPPLICANT

VERSUS

THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA...1ST RESPONDENT

BETHWEL KIPLAGAT2ND RESPONDENT

RULING

The applicant is a Commission with a body corporate with perpetual succession and common seal capable of suing and being sued, taking, purchasing or otherwise acquiring, holding, charging or disposable of moveable or immovable properties. The Commission is established under the Truth Justice and Reconciliation Act No.6 of 2008. The 1st respondent is the Chief Justice of the Republic of Kenya while the 2nd Respondent is the Chairman of the applicant. The Act provides as to the manner, qualification, appointment and removal of the Commissioners. The 2nd respondent's appointment was published in the Kenya Gazette Notice No.8737 of 14/08/2009 together with 8 other Commissioners. The instrument appointing the Commissioners was signed by the President on 22/07/2009. The 2nd respondent was sworn on 3/08/2009. After the appointment, Gazettement and swearing in of all the Commissioners, the Commission commenced its work in performance of its functions and/or mandate. Thereafter a dispute arose as to the suitability and/or credibility of the 2nd respondent as a Chairman of the Commission, culminating in the filing of High Court Misc.470 of 2009. The said matter was heard and determined by a bench of 3 judges in a judgment delivered on 28th November, 2011. It appears the dispute involving the Chairman did not end there.

On 12th April 2010 the Chairman joined all other 8 Commissioners and signed a letter to the Ministry of Justice requesting the establishment of a tribunal to investigate the allegations against the 2nd respondent. The letter concluded;

“We write this letter to you on the basis of a unanimous decision we have taken as a Commission at our meeting this afternoon on 12th April 2010. We write to request this tribunal so that the Commission may move forward with its work.”

On 2nd November 2010 the 2nd respondent released a signed media statement where he welcomed the decision of the then Chief Justice in appointing a tribunal to ascertain the truth concerning the allegations that were made against him. In order to allow the Tribunal to carry out its mandate the 2nd respondent stepped aside from his day to day responsibilities at the Commission.

On 2nd December 2010 the former Chief Justice of the Republic of Kenya **His Lordship Evans Gicheru** appointed a tribunal to inquire into the conduct of and suitability of **Bethwel Kiplagat** as the Chairman of the Commission. Upon the appointment of the tribunal, the 2nd respondent filed an application with the tribunal challenging among others the jurisdiction of the tribunal to investigate his past conduct. Nevertheless, the tribunal held that it had jurisdiction to proceed with the inquiry.

The 2nd respondent then moved to the High Court in HC Misc. Civil application No.95 of 2011 and sought to challenge the proceedings at the tribunal by way of judicial review orders. In a ruling dated 27th April 2011, the High court granted order of stay against the proceedings at the tribunal pending the hearing and determination of the substantive application for orders of certiorari, prohibition and mandamus. The orders of stay issued by the High Court came into effect before the tribunal could finalize its task and compile its report with recommendations. Before the expiry of the six months period, the Commission sought for an extension of the period from the Chief Justice but the latter declined the same stating that it is not reasonable to extend the mandate of the tribunal before High court Misc. Civil application No.95 of 2011 is heard and concluded. On the 1st day of December 2011, the 2nd respondent withdrew the said case.

It is the contention of the applicant that the 2nd respondent withdrew his legal challenge and given that the tribunal is yet to be reconstituted or a new one to be appointed by the chief justice so that it can complete its work, it is clear that substantive issues whether the 2nd respondent should remain as a member of the Commission has yet to be determined pursuant to the rule of the law. It is submitted on behalf of the applicant that despite verbal and written request by the commission, the Chief Justice has so far failed and/or declined to reconstitute the tribunal or constitute a new tribunal to investigate and make a report with recommendations on the conduct of the 2nd respondent particularly on allegations that his past conduct erodes and compromises his legitimacy and credibility to chair the Commission.

It is the contention of the applicant that the Chief Justice is statutorily mandated under section 17(2) of the Truth Justice and Reconciliation Act to constitute a tribunal to investigate the conduct of the chairman of the Commission where a question as to his removal arises as it occurred in the circumstances herein. It is also contended by the applicant that it is arbitrary, unreasonable and without any justification for the Honourable the Chief Justice to decline or ignore to reconstitute or appoint a tribunal to investigate the conduct of the chairman especially after the latter had stepped aside for such investigations to be carried out.

It is also the position of the applicant that the Chairman has not been cleared by any competent tribunal of the allegations leveled against him which led to his stepping aside. The commission has not been served with order of the court nor received any official communication from the 2nd respondent, the relevant ministry, Office of the President or any other relevant authority directing that he has been cleared and should resume his duties. It is also the position of the tribunal that the 2nd respondent has already appeared before the Commission as a witness with respect to the Wagalla massacre and that he has been adversely mentioned in the statements and public hearings. It is contended that the Commission will still

be calling the 2nd respondent as a witness in connection with the hearings on political assassinations and land grabbing. And that if he participates before he is cleared, he will put the tribunal into disrepute if he participates as a commissioner and chair of the commission.

It is also contended that since the stepping aside of the 2nd respondent, the Commission has continued with its work smoothly and will commence its hearing all over the country and that the 2nd respondent is a hindrance to the fulfillment of the Commission's mandate. Consequently, the applicant filed the Chamber Summons application dated 10th January 2012 seeking the following orders;

(2) Leave is hereby granted to the applicant to apply for the following Judicial review Orders:-

(a) An order of Mandamus compelling the 1st Respondent to appoint a Tribunal, pursuant to section 17(2) of the Truth Justice and Reconciliation Commission Act, to investigate and compile a report with recommendations on the conduct of the 2nd Respondent particularly on the allegations that the past conduct of the 2nd respondent erodes and compromises his legitimacy and credibility to chair the Truth Justice and Reconciliation Commission (the applicant herein); his past is riddled with unethical practices and absence of integrity; he has been involved in, linked to, or associated with incidents considered to be abuse of human rights; has already testified and will still be summoned as a witness in the same matters that the Applicant is mandated to investigate.

(b) In the alternative and without prejudice to prayer 2(a) above, an order of Mandamus compelling the 1st Respondent to reinstate and/or reconstitute the Tribunal appointed on the 2nd December, 2010 (vide Gazette Notice No.15894) to investigate and compile a report with recommendations on the conduct of the 2nd Respondent, particularly on the allegations that the past conduct of the 2nd respondent erodes and compromises his legitimacy and credibility to chair the Truth Justice and Reconciliation Commission (the applicant herein); his past is riddled with unethical practices and absence of integrity; he has been involved in, linked to, or associated with incidents considered to be abuse of human rights; has already testified and will still be summoned as a witness in the same matters that the Applicant is mandated to investigate.

(c) An order of prohibition to prohibit/restrain the 2nd Respondent from acting and/or resuming office as the Chairman and Commissioner of the Applicant and/or entering the offices of the Applicant and offices of the Applicant's Commissioners, resuming his duties as the Chairman of the Applicant, threatening and intimidating the staff of the Applicant and/or interfering in any manner whatsoever with the operations and functions of the applicant until a finding or recommendations is made by the competent tribunal clearing him of any allegations made against his conduct as to the legitimacy and credulity to chair the Applicant.

3. The grant of leave hereby operates as a stay of the appointment of the 2nd respondent as Chairman and Commissioner of the Applicant and/or acting or ensuring the officers of the Applicant and offices of the applicant's Commissioners, resuming his duties as the Chairman of the Applicant, threatening and intimidating the staff of the applicant and/or interfering in any manner whatsoever with the operations and functions of the applicant pending the hearing and determination of the Applicant's substantive application or until the court otherwise directs.

4. The costs of this application e provided for.

5. Such other, further orders or incidental orders or directions as the Honourable Court shall deem just and expedient.

The 2nd respondent filed grounds of opposition contending that the issues for determination in this matter were raised directly and substantially in High court Misc. Civil application 470 of 2009 wherein judgment delivered on 28th November 2011. Both the applicant and 2nd respondent were parties to the said suit which was heard and fully determined in the 2nd respondent's favour. The position advanced by the

applicant is inconsistent with the position it had advanced in High Court Misc. Civil application No.470 of 2009. The suitability of the 2nd respondent to occupy the position of the Chairman to the Commission was directly and substantially raised in High Court Misc. Civil application No.95 of 2011 where the applicant was also a party. At the time the said suit was being withdrawn the advocate for the applicant did not object to the withdrawal or even warned on the implication of the withdrawal.

It is also the position of the 2nd respondent that the reconstitution or appointment of a tribunal to inquire into the 2nd respondent's conduct will face the same jurisdictional hurdles that inspired the honourable court to suspend the operations of the original tribunal.

The application for leave and whether leave to operate as a stay was heard on 11th January 2012 by his **Lordship G.B.M. Kariuki**. In a ruling delivered on 13th January 2012 the judge considered all the issues and ordered that the application be heard *interpartes* and served upon the respondents. The court was of the view that it is in the interest of justice that a decision be made after *interpartes* hearing as the court will have a better and complete picture of the matter. It is as a result of the decision by His Lordship **G.B.M. Kariuki** that the application for leave and whether leave to operate as a stay was heard before me on 6th February 2012. The applicant reiterated the averments in the supporting affidavits, further affidavits by Commissioner **Margaret Shava** on behalf of the Commission. The position of the 2nd respondent is clearly captured in the grounds of opposition and written submissions filed before court.

The question for my determination is whether the applicant is entitled to the orders sought. Secondly whether the applicant is entitled to bring the present application against the respondents. Thirdly and most importantly whether the provisions of section 17 (2) of Act No.6 of 2008 empowers the Chief Justice to appoint a tribunal in respect of the allegations raised against the 2nd respondent.

The 1st prayer is an order of mandamus to compel the 1st respondent to appoint a tribunal. Mandamus is ordinarily understood as command issuing from High Court directed to any person requiring him to do some particular thing therein specified which appertains to his office and is in the nature of a public duty. Mandamus was introduced to prevent disorder or failure of justice. There must be a demand for justice and a refusal as a condition precedent for issuing mandamus. The essential features of mandamus are;

- (1) The applicant must have a legal right
- (2) The respondent should be having a legal duty.
- (3) The applicant has no other alternative remedy.
- (4) The matter is filed bonafide and in good faith.
- (5) It is a discretionary remedy.
- (6) A court cannot sit as a Court of appeal or substitute its own decision for that of the authority in which the statute has vested the discretion.
- (7) It can be issued where a statutory authority while exercising or discharging his or her duties had not act independently.
- (8) Directions cannot be issued to compel an authority to exercise discretion, legislative in character.

(The list is not exhaustive)

It is clear that the applicant is seeking an order of mandamus to compel the honourable Chief Justice to appoint a tribunal pursuant to section 17(2) of the Truth Justice and Reconciliation Act to investigate and

compile a report with recommendations on the conduct of 2nd respondent particularly on allegations that the **past conduct of the 2nd respondent erodes and compromises his legitimacy and credibility** to chair the Truth Justice and Reconciliation Commission. It is contended by the applicant that the **past conduct of the 2nd respondent is riddled with unethical practices and absence of integrity. That the 2nd respondent has been involved, linked to or associated with incidents considered to be abuse of human rights.**

The first issue to be addressed is whether the applicant is empowered to bring the present matter against the respondents. Under section 3(2) (a) the Commission is a body corporate with perpetual succession capable of suing and being sued. It is therefore clear that the commission can sue and can be sued on matters relevant to its functions and objectives. The objectives and functions of the Commission is clearly spelt out under section 5 and 6 of Act No.6 of 2008. The question is whether the Commission and/or the Commissioners have a valid and legitimate cause of action, complaint or relief redress remedy against the respondents. In legal parlance, cause of action is understood to connote a situation or state of facts that entitles a party to maintain an action in a court or tribunal, a group of operative facts giving rise to one or more basis for suing, a factual existence that entitles one person to obtain a remedy in court from another person. As earlier pointed out it is the legal right allegedly violated or infringed which gives rise to a claim or cause of action. In essence a person seeking legal remedy should have suffered a legal injury by reasons of violation of a right which is maintainable and sustainable against the respondents. It is pertinent and important to understand that a person alleging a legal wrong or a legal injury must be;

- (a) Any person acting on his own interest,
- (b) Anyone acting in the public interest.

The complaint or cause of action of the applicant is that the 2nd respondent's **past conduct erodes and compromises his legitimacy and credibility to chair the Truth Justice and Reconciliation Commission.** Secondly his past is riddled with unethical practices and absence of integrity. Thirdly he had been involved/linked to or associated with incidents which are considered to be abuse of human rights. It is on the strength of such allegations that an order of mandamus is sought against the Chief Justice to order him to exercise his statutory duties under section 17(2) of Act No.6 of 2008.

Indeed it is necessary for me to state that nobody should be allowed to indulge in wild and reckless allegations besmirching the character and authority of others without prove and/or evidence. It is also the duty of the court to stop mischievous cases seeking to assail for oblique motives, causes of action which are meant to quash executive and parliamentary decisions made in consideration and examination of all relevant matters.

The second issue is that the central issue raised in the present application was directly and substantially in issue in High Court Misc. Civil Application No.470 of 2009. That both the present applicant and the 2nd respondent were parties and were bound by the outcome of the said suit. In High Court Misc. Application 470 of 2009, a bench of three judges considered an application seeking an order of prohibition, prohibiting the 2nd respondent from running the affairs of the commission as a chairman or participating in the activities of the Commission.

After considering the rival submissions, the court was of the view that sections 9, 10 and 11 of the Truth Justice and Reconciliation Act, allowed the Minister for Justice, the selection panel, the National Assembly and Parliament to participate in the decision, resulting in the appointment of the 2nd respondent. The court concluded that the 2nd respondent like all other citizens of this country had the legitimate expectation that the respective persons would consider and exercise their powers in accordance with the statute. As to whether to prohibit the 2nd respondent from running the affairs of the Commission, as the Chairman or participating in any way into the affairs of the commission the court had this to say;

“It is obvious that the ex parte applicants must establish that the 2nd respondent is running the affairs of the commission either without any jurisdiction or in excess of his jurisdiction as a chairman or commissioner or in contravention of the laws of the land or against the rules of natural justice.

None of these things form the ex-parte applicants’ complaint. Their complaint is not the manner in which the 2nd respondent is running the affairs of the Commission. Their complaint relates to the actual appointment of the 2nd respondent to the commission. The ex-parte applicants are appalled that the 2nd respondent who, in their view, its not a fit and pro0per person to be appointed a commissioner has been appointed not only as a commissioner but also chairman of the Commission. They are questioning the recommendation by the Selection Panel and nomination of 2nd respondent for appointment as commissioner and chairman of the Commission. This is what, in the view of the ex-parte applicants, makes the 2nd respondent’s assumption of duties untenable to them.

Several issues arise, Firstly, the selection and nomination of 2nd respondent has already gone through the final stage which is the appointment by the President. Thus the appointment of the 2nd respondent has already taken effect such that the appointing authority is not *fucntus officio*. Once again as was stated by the Court of Appeal in Kenya Examination Council: [12]

“Where a decision has been made whether in excess or lack of jurisdiction or whether in violation of the rules of natural justice an order of prohibition would not be efficacious against the decision so made. Prohibition cannot quash a decision which has already been made. It can only prevent the making of a contemplated decision.”

As was stated by the honourable judges in the above decision, the appointment of the 2nd respondent was not a political decision. The decision resulting in the appointment of the commissioners and the chairman of the commission was a process which involved several bodies as clearly spelt out under section 9 of the Act No.6 of 2008. Section 9(1) provides;

9.(1) For the purposes of this At, the Minister shall constitute a selection panel consisting of-

(a) two people jointly nominated by a joint forum of religious organizations comprising-

(i) The Kenya Episcopal conference;

(ii) the national council of Churches of Kenya;

(iii) the Evangelical Alliance of Kenya;

(iv) the Hindu Council of Kenya;

(v) the Seventh Day Adventist Church; and

(vi) the Supreme Council of Kenya Muslims;

(b) One person nominated by the Law Society of Kenya;

(c) One person nominated by Federation of Kenya Women Lawyers;

(d) One person jointly nominated by the Central Organization of Trade Unions and the Kenya National Union of Teachers;

(e) One person nominated by the Association of profession Societies of East Africa;

- (f) One person nominated by the Kenya National Commission on Human Rights;**
 - (g) One person jointly nominated by the Kenya private Sector Alliance and the Federation of Kenya Employers; and**
 - (h) One person nominated by the Kenya Medical Association.**
- (2) The function of the selection panel shall be to nominate persons for appointment as commissioners in accordance with the First Schedule.**
- (3) Members of the selection panel shall elect a chairperson and vice-chairperson of the selection panel from amongst their number.**
- (4) the chairperson and vice-person elected under subsection (3) shall be persons of opposite gender.**

Section 10(6) provides as follows;

“Notwithstanding the provisions of subsection 5 no person shall be qualified for appointment as a commission unless such person;

- (a) is of good character and integrity**
- (b) has not in any way been involved, implicated, linked or associated with human rights violations of any kind or in any matter which is to be investigated under this Act.**
- (c) Shall be impartial in the performance of the functions of the commission under this Act and who will generally enjoy the confidence of the people of Kenya.”**

It is not the case of the applicant that the commissioners were not subjected to the provisions and requirement under section 10 at the time of the 2nd respondent’s appointment. If that were the position, they too would be questioning the integrity of the panel, Parliament and the President who appointed them in accordance with the law and having satisfied the criteria and requirement set by the interviewing panel. It can only be assumed that all the commissioners including the 2nd respondent were persons of good character, integrity and were not in any way involved, implicated, linked or associated with human rights violations of any kind.

The 2nd respondent contends that prior to his appointment as a commissioner and as a chairman he was exposed to rigorous and lengthy process which involved the selection panel, the National Assembly and the President. He was also questioned and vindicated in High Court Misc. case No.470 of 2009.

It is now contended the question as to the suitability and credibility of the 2nd respondent ought to be investigated and determined by a tribunal. The allegations were conclusively and finally determined. It is also clear that the allegation since not determined were unproven allegations. As a matter of good practice and prudence, all allegations against a person seeking a public office ought to be raised and determined before the person is appointed to the office. It was incumbent upon the selection panel and Parliament to assess the integrity and suitability of an individual before his/her name is submitted to the President. I reckon that can only be done when the information or evidence is available for scrutiny and consideration.

The third question which is of fundamental importance is whether a person who passed all the machinery for assessment and evaluation can be subjected to a fresh process on matters which ought to have been raised at the time he sought the public office. The allegations raised against the 2nd respondent ought to have been raised prior or before his appointment to avoid the apparent existence of double jeopardy. Section 17 provides for the removal of Commissioners and states as follows;

17. (1) Without prejudice to section 16, the chairperson or a commissioner may be removed from office by the president –

(a) for misbehavior or misconduct;

(b) if the chairperson or commissioner is convicted of an offence involving moral turpitude but not sentenced to a term of imprisonment;

(c) if the chairperson or commissioner is unable to discharge the functions of his office by reason of physical or mental infirmity; or

(d) If the chairperson or commissioner is absent from three consecutive meetings of the Commission without good cause but shall not be removed except in accordance with this section.

(2) where the question of the removal from office of the chairperson or a commissioner arises under subsection (1) –

(a) the Chief Justice shall, by notice in the Gazette, appoint a Tribunal which shall consist of a chairperson and two other members selected by the Chief Justice from among persons who hold or have held office as judges of the High Court;

(b) the Tribunal shall inquire into the matter and report on the facts to the Chief Justice and recommend whether the chairperson or the commissioner ought to be removed from office and the Chief Justice shall communicate the recommendations of the Tribunal to the President.”

It is clear that under section 17(1) the Chairperson or a Commissioner may be removed from office on the grounds stated therein. And shall not be removed except in accordance with section 17. Where the removal of the chairman arises, the Chief Justice is required to appoint a tribunal to inquire into the matter and recommend whether the chairman ought to be removed from office.

The powers of the Chief Justice under section 17(2) can only be exercised when any of the circumstances under section 17(1) is proved to have arisen.

In the Gazette Notice No.15894 of 2nd December 2010 signed by **Hon. Evans Gicheru** the former Chief Justice, the Tribunal appointed were to investigate;

(a) The conduct of the chairman including but not limited to the allegations that the chairman’s past conduct erodes and compromises his legitimacy and credibility to chair the Commission, his past is riddled with unethical practices and absence of integrity, he has been involved in, linked to or associated to incidents considered to be abuse of human rights likely to be, a witness in the same matters that the Commission is mandated to investigate.”

It is the same issues that the applicant is seeking this court to compel the 1st respondent to appoint a tribunal or an order to reinstate or reconstitute the tribunal appointed through that gazette notice.

The Simple and straightforward question is whether the former Chief Justice and the current Chief Justice would have jurisdiction to investigate the **past conduct of the Chairman of the Commission**. For the honourable Chief Justice to be compelled, there must be a statutory duty which he failed, neglected or refused to perform. The powers to be performed by an authority must emanate or arise from a statutory provision. In my view the honourable Chief Justice can only be compelled when it is proved that he has a statutory duty or obligation that empowers him to form or reconstitute a Tribunal and that the Chief Justice refused to exercise a legal duty where a demand has been made.

In my understanding the purpose is to remedy the defects of an omission or commission of a public authority, so that justice may be done because there is specific legal right and a specific legal remedy for enforcing that right. There must be a general duty imposed upon the honourable chief Justice to

perform a statutory function and that the statute leaves no discretion as to the mode of performance. It is elementary that an order of mandamus will compel the performance of a public duty which is imposed on a person by a statute and where that person or body of persons have failed to perform the duty to the detriment of a party who has a legal right and who expects the duty to be performed.

The question is whether there is evidence to show that the 1st respondent has refused the performance of a public duty which is imposed upon him by a provision of Act No.6 of 2008 and whether the applicant is entitled to come and ask the High Court for a mandamus. In determining whether to grant an order of mandamus, the High Court would be entitled to consider and determine the facts and satisfy itself whether in the circumstances there is a duty which the Chief Justice failed to perform or refused to adhere. In my understanding the public duty imposed by a statutory provision is the consideration and determination of whether to grant the orders sought. The power to grant or refuse the exercise of a provision must be vested in the Chief Justice for the court to consider whether there is refusal or not.

As a general rule, no order of mandamus requiring a person to do or abstain from doing any act can be granted unless there is an express provision permitting or allowing the person to perform or abstain from the said act. It is the person seeking the performance of a duty to demonstrate that indeed the law imposes an obligation upon the person to be compelled and that he has refused to exercise the statutory duty in total disregard of the functions of his office. And that the refusal is prejudicial or detrimental to the person seeking the performance. To the extent of sounding simplistic and being a criminal trial, when a person is bound to prove the existence of any fact, it is generally said that the burden of proof lies on that entity or person. This court can only exercise a public law jurisdiction in accordance with the set down principles for the grant of judicial review orders.

I agree that the 2nd respondent or any commissioner can be removed for misbehavior or misconduct. I hasten to add that the misbehavior or misconduct must have arisen at the time the commissioner or the Chairman assumed office. Act No.6 of 2008 has a commencement date of 9th March 2009 and the Chairman of the Commission means the Chairman appointed under section 10 of the said Act. The Act cannot address the conduct, acts, and/or omissions of any Commissioner who was appointed in accordance with the Act.

There is no evidence or proviso under Section 17 that enables or entitles the Chief Justice to appoint a tribunal to investigate, inquire and determine the past conduct of the 2nd respondent. The section is very clear and it imposes no requirement that the past conduct of the 2nd respondent can be investigated by a Tribunal appointed by the Chief Justice. It is my determination that there is no statutory power imposed upon the Chief Justice of the Republic of Kenya to appoint a tribunal to investigate and inquire into the past conduct of the 2nd respondent or any other commissioner. The role of the Chief Justice is to follow and exercise his statutory and constitutional powers within the parameters and boundaries of the law. The Hon. Chief Justice cannot assume a power which is not given or donated to him by section 17 of Act No.6 of 2008.

The question of ordering the Chief Justice through an order of mandamus cannot arise and is not available to this honourable court. There has been no failure on the part of the Chief Justice to carry out his duty and/or functions under section 17(2) of Act No.6 of 2008. It is also my determination that the former Chief Justice had no powers, authority and/or jurisdiction to appoint a tribunal to inquire into the past conduct of the 2nd respondent. Consequently, there is no need to consider whether an order of prohibition can be granted against the 2nd respondent.

This court is duty bound to interpret, uphold and enforce the provisions of the relevant Act No.6/2008, otherwise there would be no need/reason for having those provisions in the first place. If Parliament in its wisdom did not provide for an inquiry or investigation into the past conduct of a Commissioner, then the intention must clearly be read and interpreted to be so. No stretching of argument can justify the inquiry and/or investigation into the past conduct of the 2nd respondent after he was legally appointed and assumed office. The 2nd respondent cannot also disrupt and/or destroy the work of the Commission, for he holds one vote.

One important point which I think is important is whether the applicant was entitled to bring the present application. Clearly this application is a manifestation of how the judicial process has been abused from time to time by filing of frivolous applications where there is no claim or relief that entitles a party to do so. The present application must have been instigated by fellow Commissioners of the 2nd respondent. It was not right for the Commission to invoke the jurisdiction of the court in a matter where the controversy itself is no longer sustainable. It was the duty of the Commission to understand and ensure that the controversy once settled by the authoritative decision of the High Court should not be re-opened unless there are extraordinary reasons for doing so. The applicant has not disclosed any legal wrong or legal injury caused to the Commission or Commissioners by reason of the 2nd respondent. You can only invoke the assistance of the court for purposes of providing judicial redress to the person wronged or injured so that the legal wrong or injury caused to such a person does not go un-redressed or justice is done to him.

In recent times, there has been increasing instances of litigations by Commissions without any reference to the office of the Attorney General. This court has to devise a number of strategies to ensure that, that attractive brand of litigation should not be used or allowed to be used for suspicious products of mischief. One strategy is that before a Commission files a suit, it must seek advice, guidance and concurrence of the honourable the Attorney General in respect of the issues it wants the court to address and determine. Where such guidance and advice is not sought and/or obtained, the court would have to take further steps to ensure public resources are not wasted on frivolous and useless litigations.

I think exemplary costs as a deterrent against frivolous and vexatious public interest litigations must be a mechanism which can be employed in such circumstances. It is depressing to note on account of cases like the present one initiated by fellow Commissioners, innumerable days and time are wasted, the time which otherwise could have been spent on disposal of cases by genuine litigants. Though as courts we spare no efforts in fostering and developing liberal and broadened litigation, yet we cannot avoid but express our opinion that while genuine litigants with legitimate grievances relating to matters which is dear to them must be addressed, the meddlesome interlopers having absolutely no grievances for personal gain or as a proxy of others or for extraneous motivation break the queue by wearing a mask of public interest litigation and get into the court corridors filing vexatious and frivolous cases. This criminally wastes the valuable time of the court and as a result of which genuine litigants standing outside the court in a queue that never moves thereby creating and fomenting public anger, resentment and frustration towards the courts resulting in loss of faith in the administration of justice.

I will like to make it clear that I am not saying that applicant cannot ask the court to interpret or address a particular issue which they feel is important for the performance of its statutory function and objectives. There could also be flaws and lacuna in the way the 2nd respondent is going back after he agreed to step aside for allegations against him to be investigated and determined. What I am saying is that the applicant could and should have sought the opinion and advice of honourable Attorney General by listing of all relevant issues and seeking a cogent and clear request, reconsideration of their mandate in view of the return of their Chairman. It is not for fellow Commissioners or the Commission to question the return of the Chairman and put obstacles and hurdles into the path of his return when none of the allegations have been considered, investigated and determined.

In conclusion it is my determination that the applicant had no legal capacity or authority to bring the present application against the respondent. The application was brought without due consideration and regard for the legal provisions that were cited by the applicant to compel the 1st respondent and to stop the 2nd respondent from performing an alleged statutory function. Consequently, the application is dismissed with costs against the applicant. The costs shall be personally borne by the commissioners of applicant.

Dated, signed and delivered at Nairobi this 24th day of February 2012.

M. WARSAME

JUDGE