REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JUDICIAL REVIEW DIVISION

JR MISC. APPLICATION NO. 647 OF 2009

IN THE MATTER OF AN APPLICATION BY HON. WILLIAM RUTO SEEKING LEAVE TO COMMENCE JUDICIAL REVIEW PROCEEDINGS OF CERTIORARI

AND

IN THE MATTER OF KENYA NATIONAL COMMISSION ON HUMAN RIGHTS ACT, 2002

AND

IN THE MATTER OF KENYA NATIONAL COMMISSION ON HUMAN RIGHTS ON THE CAUSE OF POST ELECTION VIOLENCE IN KENYA 2007-2008

AND

IN THE MATTER OF THE RELAUNCH ON 17TH JULY, 2009 OF A REPORT BY KENYA NATIONAL COMMISSION ON HUMAN RIGHTS CHRISTENED "ON THE BRINK OF THE PRECIPICE: A HUMAN RIGHTS ACCOUNT OF KENYA'S POST 2007 ELECTION VIOLENCE"

REPUBLIC .....APPLICANT

AND

THE KENYA NATIONAL COMMISSION

ON HUMAN RIGHTS.....RESPONDENT

EX-PARTE
HON. WILLIAM RUTO

JUDGEMENT

THE PARTIES

The Honourable William Ruto is the Member of Parliament for Eldoret North Constituency. He is the Ex-parte Applicant in this case and will henceforth be simply referred to as the Applicant. He is, however, not a run-of-the-mill Member of Parliament. He aspires to be the President of the Republic of Kenya. This is a man who evokes both revulsion and adoration in equal measure. Some view him as abrasive, ambitious and an uncompromising character. Others equate him to a Nandi king of the days of yore. This matter concerns the alleged violation of the Applicant's rights. In the eyes of this court, however, the Applicant is first and foremost a human being entitled to protection of the law. As a citizen of this country, he is also expected to obey the laws of the land.

The Respondent is the Kenya National Commission on Human Rights (hereinafter simply referred to as the Commission) and is a creature of Section 3 of the Kenya National Commission on Human Rights Act No. 9 of 2002 (hereinafter simply referred to as the Act). For purposes of information, the Act was repealed and replaced by the Kenya National Commission on Human Rights Act, 2011 which through Section 3 established a successor commission pursuant to the provisions of Article 59(4) of the Constitution. In this Judgment we will confine ourselves to the repealed Act.

In accordance with Section 16 of the Act, the functions of the Commission are:-

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

(b) to visit prisons and places of detention or related facilities with a view to assessing inspecting the conditions under which the inmates are held and make appropriate recommendations thereon;

(c) to inform and educate the public as to human rights for the purpose of enhancing respect for such rights by means of a continuing programme of research, publication, lectures and symposia and by such other means as the Commission may deem fit;

(d) to recommend to Parliament effective measures to promote human rights, including provision of compensation to victims of violations of human rights or their families;

(e) to formulate, implement and oversee programmes intended to inculcate in the citizens of and other persons resident in Kenya, awareness of their civic responsibilities and an appreciation of their rights and obligations as free people;

(f) to act as the chief agent of the Government in ensuring the Government's compliance with its obligations under international treaties and conventions on human rights;

(g) to encourage the efforts of other institutions working in the field of human rights and co-operate with such other institutions for the purpose of promoting and protecting human rights in Kenya;

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

(i) to perform such other functions as the Commission may consider necessary for the promotion and protection of human rights.

THE BACKGROUND

Following the General Elections held in December, 2007 Kenya was engulfed in unprecedented violence which is now commonly known as post-election violence. It was only after the intervention of the international agencies that an agreement was reached between the two leading presidential contenders namely President Mwai Kibaki and Prime Minister Raila Odinga. That is when a resemblance of calm

descended upon the country. The Commission acting on its statutory mandate decided to collate information on violation of human rights which took place during the post-election violence. The Commission came up with a report titled **'ON THE BRINK OF THE PRECIPICE: A HUMAN RIGHTS ACCOUNT OF KENYA'S POST-2007 ELECTION VIOLENCE.'** The report named the Applicant as one of the planners, financiers and perpetrators of the violence. The report by the Commission was first unveiled in August, 2008 and re-launched on 17th July, 2009. The report was presented to the President of the Republic of Kenya, the Commission to Investigate the Post Election Violence (CIPEV) commonly known as the Waki Commission and made available to the public through the Commission's website.

THE PLEADINGS

The Applicant is aggrieved by the inclusion of his name by the Commission in the report hence the filing of the chamber summons seeking leave and the notice of motion dated 30th November, 2009 seeking the following orders:-

1. THAT an order of Certiorari do issue to forthwith remove to the High Court so as to Quash and annul the decision of the Respondent made in a report entitled "On the brink of the precipice: A human rights account of Kenya's Post election violence" that the applicant participated and or was involved in the said violence.

2. THAT an order of certiorari do issue to quash and annul the decision made by the Respondent in the report titled "On the brink of the precipice: A human rights account of Kenya's Post election violence" alleging that the Applicant was involved in aspects of the post election violence by way of planning, inciting, meeting and financing the election violence.

3. THAT costs for this application be provided for.

The application is supported by grounds on its face, a statutory statement dated 6th November, 2009, a verifying affidavit sworn by the Applicant on 6th November, 2009, a supplementary affidavit sworn by Mr. William Kipkemboi Rono on 16th November, 2010 and all the annexures to the affidavits.

The Respondent opposed the application by way of an affidavit sworn on 21st June, 2010 by Mr. Mohammed Hallo the Secretary to the Commission.

THE APPLICANT'S CASE

It is the Applicant's case that:-

(1.) The Commission

(a) breached the rules of natural justice by naming him as a planner, financier and perpetrator of the post-election violence without giving him an opportunity to be heard,

(b) denied him the right to the protection of the law and the right to be presumed innocent unless adjudged otherwise by a competent court, and

(c) violated his legitimate expectation that he would be heard before being condemned.

(2.) The Commission acted without jurisdiction in that:-

(a) it had no jurisdiction to make a decision on evidence with no probative value,

(b) it had no jurisdiction to make an adverse finding against the Applicant without affording him an

opportunity to be heard, and (c) it had no jurisdiction to adversely mention the Applicant before affording him the opportunity of a fair judicial process i.e. cross-examination of witnesses and an opportunity to adduce evidence and call witnesses in his defence.

(3.) The Commission's report is unreasonable as per *Wednesbury unreasonableness* because:-

(a) on its face the material gathered by the Commission could not reasonably justify the adverse findings made against the applicant.

(b) it applied double standards in its investigations by giving other people an opportunity to be heard while denying him such a right, and

(c) in a predetermined manner the Respondent violated the Applicant's rights and injured his image and reputation.

(4.) The report of the Commission was prepared for an improper purpose in that:-

(a) it was not made for a legitimate purpose of protecting and promoting the human rights of any individual, and

(b) it was malicious, defamatory and made to attract attention and donor support and give an unfair advantage to the Applicant's political competitors.

(5.) The Commission's report is recklessly wanton and is not supported by any reasonable evidential material and is therefore oppressive, unfair, unjust, unreasonable, irrational and an abuse of statutory powers.

THE RESPONDENT'S CASE

Through the replying affidavit of Mr. Mohammed Hallo, the Respondent is opposing the application on the following grounds:-

(1.) The Commission did not make any decision known to the law but only made recommendations and there is therefore no decision to be quashed by way of judicial review.

(2.) The report did not name any "perpetrators" to be investigated by the Attorney General and the Kenya Police Force but only named "alleged perpetrators" and even gave a cautionary statement that the persons mentioned were not guilty and further investigation needed to be carried out by the relevant agencies.

(3.) The Applicant was invited to make representations as a regional leader and actually gave his views to the Commission.

(4.) The Applicant was denied an opportunity to question the Commission's informants and respond to the allegations made against him for fear that such a step would have fuelled animosity and possibly promote more violence.

(5.) That public interest demanded that the Commission documents, the character and scope of the human rights violations that occurred during the post-election violence and the anonymity of the witnesses and non-disclosure of information was paramount.

(6.) That the Applicant would have an opportunity to confront the evidence gathered were he to face criminal charges.

(7.) That the Commission acted fairly and did not discriminate against the Applicant.

(8.) That the rules of natural justice were not applicable since the report "is not a result of a judicial or quasi-judicial inquiry, neither does it make conclusive findings of criminal or other culpability for the applicant to allege that in compiling it, the respondent violated the rules of Natural Justice or that a decision had been made against him without him being accorded a hearing."

(9.) That the report was made in conformity with the Commission's mandate and statutory obligations.

(10.) That the applicant's application is statute barred.

THE FACTS

From the pleadings and other material placed before the court and from a reading of the report, it is clear that the Commission in its report named the Applicant as an alleged planner, financier and perpetrator of the post-election violence. The evidence also shows that the Applicant was called during the investigations to present his views on the post-election violence and he actually presented his views to the Commission. The evidence further shows that the report was distributed far and wide and has received extensive media coverage.

THE PRINCIPAL ISSUES FOR DETERMINATION BY THE COURT

We have gone through the application, the statutory statement, all the affidavits and annexures thereto, the written submissions and the authorities relied upon by the parties. Having done so, we have come to the conclusion that the key issues for determination are as follows:-

1. Whether Section 33 of the Act ousts this court's supervisory jurisdiction.

2. Whether the report amounts to a decision which can be challenged by way of judicial review.

3. Whether the delay in filing the instant proceedings violated the six months Rule prescribed by Section 9 of the Law Reform Act and Order 53 Rule 2 of the Civil Procedure Rules.

4. Whether the Commission in preparing the report violated the applicant's rights.

5. Whether the Commission acted in bad faith, maliciously and unreasonably.

6. Are the reliefs sought the most efficacious remedies?

7. Whether costs should be awarded and if so who should bear the costs.

ANALYSIS & DETERMINATION

The issues for determination are interrelated and we expect that at the end of this judgment, we will have addressed each of them satisfactorily.

Before proceeding to decide upon the merits of the contentions raised on behalf of the parties, it is necessary to deal with and dispose of the preliminary objections raised on behalf of the Respondent as to the sustainability of the proceedings and the jurisdiction of the court to determine the issues raised therein.

The Commission has raised several preliminary points regarding the competence of the instant proceeding's including the issue of whether the impugned report amounts to a decision which can be quashed by orders of certiorari. It has also challenged the court's jurisdiction to entertain and determine the issues in dispute we propose to deal with the issue of jurisdiction first because jurisdiction is everything. Jurisdiction is the authority of the court to determine issues in accordance with the law. A

court which has no jurisdiction must down its tools. It is upon determination and ascertainment of jurisdiction that a court embarks on deciding the issues at stake between the parties. It is the bridge the court must cross before it determines all other issues. Jurisdiction is the wings that fly the court and it is the engine that propels the court in the right direction. It is the Alfa and Omega that enables a court to make a determination of the dispute between the parties. The Commission's challenge is premised on Section 33 of the Act which states as follows:-

"No suit or other legal proceeding shall lie against the Commission or any commissioner or any person acting under the direction of the Commission or appointed to serve on a subcommittee of the Commission in respect of anything which is done in good faith or intended to be done in pursuance of this Act or of any regulations or order made hereunder or in respect of any report, paper or proceedings of the Commission."

The said section states that no suit or legal proceeding shall lie **in respect of anything which is done in good faith or intended to be done in pursuance of the Act.** Our understanding of this provision is that no suit shall lie against the Commission where the act or omission complained of has been done in good faith or in pursuance of the Act. If a party comes to court and alleges bad faith and none compliance with the Act then Section 33 will no longer come to the aid of the Commission. The Commission becomes exposed to litigation where it does anything in bad faith or where it does anything outside the Act. This court is therefore entitled to put the report of the Commission under a microscope and make a decision whether the naming of the Applicant in the report was done in good faith and in pursuance of the Act.

The catch words under Section 33 are that anything which is done in good faith or intended to be done in pursuance of the Act or any regulations or order made thereunder in respect of any report, paper or proceedings of the Commission cannot be challenged in any legal proceedings. The question we pose here is who determines whether an act is done in good faith or is intended to be done in pursuance of the Act? In our view there must be a body that must regulate and ensure that the Commission's acts are done in good faith. That body in our view must have been intended to be the High Court in the exercise of its supervisory jurisdiction. It does not lie in the mouth of the Commission to say that its actions and omissions must remain protected and without challenge by any party or supervision from the High court. For the Commission to be clothed with immunity from the reach of the High court, its actions and omissions must first of all be done in good faith and in pursuance of the Act. A plain reading of Section 33 does not, in our view, oust the jurisdiction of the High Court. The role of the High Court is to stand between an aggressor and an aggrieved party. It is only upon investigation based on evidence that the court can determine whether the allegation or grievance by a party is sufficient or sustainable against the opposite party. In our view, nobody is immune from the supervisory jurisdiction of the High Court. The hand of the High Court is long enough to reach any party within the boundaries of Kenya. A person who commits transgressions or illegal acts against a citizen of this country cannot be heard to say that he is out of reach of the High Court.

The Commission being a statutory body falls under the supervisory jurisdiction of this court. We do not believe that Parliament in creating the Commission unleashed an untamable monster on the people of Kenya. This court has always been reluctant and will continue to be reluctant to abdicate its supervisory jurisdiction even where an Act of Parliament purports to oust the court's judicial review jurisdiction. Public bodies need the monitoring of the courts least they injure citizens and abuse their rights in the guise of performing statutory obligations and/or administrative functions.

In **ADMINISTRATIVE LAW** by Sir William Wade 7th edition at Page 727 it is stated that:-

"Acts of Parliament frequently contain provisions aimed at restricting and sometimes eliminating judicial review in various forms and these provisions must now be investigated."

Addressing the same issue the court in **BRADBURY V. ENFIELD BOROUGH COUNCIL** (1967) 1 W.L.R 1311 observed that:-

"I find it very settled that the remedy of certiorari is never to be taken by any statute except by the most

clear and explicit words."

Judicial review policy was that certiorari would be granted to quash an act or decision which was ultra vires, even in the face of a statute saying expressly that no certiorari should issue in such a case. It must be stressed that there is a presumption against any restriction of the supervisory powers of the High Court.

This court refuses to allow a statute to interfere with its supervisory jurisdiction especially where there are claims that a body had acted in excess of its jurisdiction, otherwise bodies like the Respondent would become a law unto themselves. The court will continue to exercise its supervisory jurisdiction and grant appropriate judicial review remedies where necessary.

The purpose of judicial review is to ensure that the individual is given fair treatment by the authority to which he has been subjected.

With regard to the remedy of certiorari, the court only quashes decisions which have been made by a competent authority. It must be understood or appreciated that it is not the business of the court to quash anticipated, contemplated or speculated decisions.

As we have already stated, we believe that Section 33 of the Act does not completely oust the jurisdiction of the courts but if we are wrong on that score then we hold that the said Section cannot oust this court's supervisory jurisdiction. We therefore find that this court has jurisdiction to hear, determine, reverse, confirm, annul and modify the decisions of inferior tribunals and administrative bodies like the Respondent.

The second issue is whether the Commission in its report made any decision that can be quashed. It was submitted on behalf of the Commission that the report only contains recommendations to law enforcement agencies and it cannot therefore be said that there was any finality in the report that can be said to have affected the rights of the Applicant. Mr. Pheroze Nowrojee learned counsel for the Respondent submitted that if the recommendations were to be acted upon by the law enforcement agencies there will be opportunity to accord the Applicant the due process of the law. It was further submitted on behalf of the Respondent that by attacking the report the Applicant is trying to prevent investigations into post-election violence and this amounts to an act of impunity. The Commission also submitted that public interest should take precedence over the Applicant's complaints and grievances.

The question for our determination is whether the Commission made a determination which is prejudicial and detrimental to the rights of the Applicant. It is only after it is demonstrated that a decision has been made and secondly that the decision is detrimental to the aggrieved party that the court's supervisory jurisdiction can be properly invoked. The ability of the court to intervene on behalf of the Applicant depends on two essential and fundamental factors namely; the existence of a decision and its prejudicial effect on the affected party.

It has been contended by the Respondent that the result and consequence of the report is that no decision was made against the Applicant and that he is only mentioned as an alleged perpetrator. The Respondent accuses the Applicant of changing the words and interpreting part of the document without considering the whole effect and import of the report. Mr. Nowrojee, further submitted that any person reading the report would know from the outset that no adverse findings were made against the Applicant or anybody else. Mr. Katwa Kigen learned counsel for the Applicant on his part submitted that the Report amounted to a decision as it contained definite findings that the Applicant was among the persons who allegedly participated in activities connected with the post election violence and that he should be further investigated by other law enforcement Agencies. It was the Applicant's position that those findings adversely affected the Applicants rights as they injured his image and reputation as a politician.

The question for our determination is whether the Commission made any deliberate act with some specificity against the Applicant.

Looking at the report in its entirety, it is clear that the Commission found that the Applicant played a role

in the occurrence of the post-election violence. The Commission admits in paragraph 4 of the replying affidavit that it carried out investigations in accordance with the provisions of Section 16 of the Act. That means it was carrying out its statutory mandate. The **MACMILLAN ENGLISH DICTIONARY FOR ADVANCED LEARNERS** states that to investigate is "**to try to find out the facts about something in order to learn the truth about it."** The Commission therefore wanted to find out the truth about the violation of human rights during the post-election violence period. At the end of investigation it prepared a report which concluded that the Applicant was among the alleged organizers, financers and perpetrators of the post-election violence. This was a clear and specific finding by the Commission and there is no doubt that it was adverse to the Applicant. It was a finding that affected the rights of the Applicant and in our view it amounted to a decision which is amenable to judicial review.

We now turn to a consideration of the issue whether the Commission violated any of the Applicant rights. The Applicant in his pleadings and submissions contended that in compiling the report, the Respondent had violated his rights particularly the right to a fair hearing. It is the Applicants position that the Respondent violated the rules of natural justice. One of the cardinal principles of natural justice is that no man should be condemned unheard. This principle is clearly brought out in the 4th Edition Vol. 1 (1) paragraph 84 at pages 157-158 of **HALSBURY'S LAWS OF ENGLAND** in the following words:-

"Implicit in the concept of fair adjudication lie two cardinal principles, namely, that no man shall be a judge in his own cause (*nemo judex in causa sua*), and that no man shall be condemned unheard (*audi alteram partem*). These two principles, the rules of natural justice, must be observed by courts, tribunals, arbitrators and all persons and bodies having the duty to act judicially, save where their application is excluded expressly or by necessary implication."

The Commission submitted that the Applicant was given an opportunity to give his views on the post–election violence. The Applicant admits that he indeed gave his views to the Commission on the violence. The Commission appears to be saying that the fact that the Applicant appeared before it means that he had been given an opportunity to be heard. Can one say that what happened amounts to a hearing? It is clear that the Applicant was not informed what had been alleged by witnesses against him that he had contributed to the occurrence of the violence. He was not shown any evidence connecting him to the violence. The Applicant was therefore not confronted with any accusations and neither was he given a chance to tell his side of the story, in as far as those accusations were concerned. It is important to note that the Commission was enjoined by Section 17 of the Act to observe the principle of impartiality, rules of natural justice and fairness. Even where Parliament has not specifically entrenched in an Act the requirement for observance of the rules of natural justice by an administrative body, the courts will always expect an administrative body to apply the principles of natural justice in its operations. That is to say, that the courts will always read into an Act of Parliament the principles of natural justice. Only in very rare circumstances, as we shall demonstrate shortly, will the courts allow an administrative body to get away with partial or non compliance with the principles of natural justice.

The Commission has told this court that it was not prudent at the time it carried out its investigations to reveal its sources of information to the Applicant. The Commission claims that it feared revealing the names of the witnesses to the Applicant and other persons adversely mentioned as this may have escalated the violence.

We must state that courts do not operate in a vacuum and nor should they close their eyes and ears to what is happening in the society. Courts should always try to give life to the aspirations of the societies in which they live in. We are aware that the Commission carried out investigations immediately after the National Accord was signed by the two protagonists President Mwai Kibaki and Prime Minister Raila Odinga. The tensions on the ground had not fully ebbed and it would have been risky to reveal the names of the witnesses to the people who had been named as the perpetrators of the violence. We therefore agree with the Commission that it was not prudent at that particular point in time to confront the Applicant with the statements of the witnesses and the particulars of those witnesses. Our view finds support in judicial review practice. Writing at page 268 of the 8th Editionof **GARNER'S ADMINISTRATIVE LAW,** B. L. Jones & K. Thompson state that:-

"In some situations the normal application of the *audi alteram partem* rule, requiring that the citizen should know the case against him, may be modified in view of the need to preserve the confidentiality of sources of information, or more widely, simply to keep certain kinds of matters secret in the public interest."

The authors also observe that considerations of national security have been held to limit very substantially the obligations of *audi ateram partem.*

In our opinion the Commission was not obligated to hear all the persons mentioned in the report. To do so would have endangered their source of information and would have been prejudicial to the recommended further investigation to be carried out by the relevant Government agencies we are consequently unpersuaded by the submission of the Applicant that he was entitled to an opportunity to be heard and to be confronted with all the evidence, witnesses and exhibits that may have been gathered against him. Due to public interest, public security and safety, it was not reasonable or permissible for the commission to confront every person mentioned with the evidence and allegations presented to it. In our view, that would have caused more harm to the citizens of this country. The prevailing circumstances did not permit the Commission to comply strictly with the rules of natural justice. In our view therefore, the commission in this particular case was justified in not strictly complying with the rules of natural justice.

We were also invited by the Applicant to find that the Commission's report was founded on and driven by malice. The Applicant did not place before this court any evidence to show malice on the part of the Commission. A party who alleges malice must prove it. We agree with Mr. Nowrojee's submission that the Commission was exercising a statutory mandate in compiling the report. We find and conclude that in the absence of any evidence demonstrating the existence of malice, the commission carried out its work in good faith. We are unable to agree with Mr. Katwa Kigen learned counsel for the Applicant on the issue of malice. The report did not target any particular individual. Equally there is no evidence that in undertaking the report, the Commission was actuated by malice or ulterior motive prejudicial to the applicant. There is no evidence that the Commission discriminated or treated the applicant in a different manner from the other alleged perpetrators of the post election violence.

The Applicant has asked for orders of certiorari. Section 9(3) of the Law Reform Act and Rule 2 of Order 53 of the Civil Procedure Rules provides that no leave shall be granted to apply for an order of certiorari to remove any judgment, order, decree, conviction or other proceedings to the High Court for purposes of being quashed unless the application is made not later than six months after date of that judgment, order, decree, conviction or other proceeding.

The Commission has invited this court to find that the Applicant's application is barred by the operation of the law since this application was filed over fifteen months after the report was unveiled in August, 2008. The Applicant on his part argues that the delay was not unreasonable and in the alternative that time should start running from the date of the re-launch namely 17th July, 2009.

We will start by deciding whether the Applicant is challenging the report unveiled in August, 2008 or the report as re-launched on 17th July, 2009. The Commission maintains that the report being challenged was released in August, 2008 and since the Applicant is praying for orders of certiorari then the application is barred by statute the same having been filed in November, 2009. The Applicant has however urged us to find that the re-launched report is the one under attack and the Applicant filed his application within six months from 19th July, 2009 being the date of the re-launch. In the alternative the Applicant invites us to find that the application is not statute barred since the report is not a judgment, order, decree, conviction or other proceedings and is therefore not subject to the six months rule.

The parties are agreed that the report was first unveiled in August, 2008. It is also not disputed that the report was in the public domain from the time it was launched. The media gave the report extensive coverage. The parties are also agreed that what happened on 19th July, 2009 was a mere re-launch of the report. Whatever had been said about the Applicant in the report did not change when the report was re-launched. The report which the Applicant therefore seeks to quash is the report unveiled in August, 2008. We do not believe that the Applicant is telling us to quash the re-launched version of the report and leave

the original version of the report unveiled in August, 2008 intact. Mr. Nowrojee learned counsel for the Respondent submitted that the Applicant brought the present application too late in the day and that the delay is unreasonable, inordinate and unexplained. We entirely agree with Mr. Nowrojee that the present application was filed too late in the day and that the Applicant did not offer any explanation as to why he did not challenge the report within the stipulated time. The applicant was supposed to file his application within six months from the date the report was unveiled. We make this finding because in our view the report was covered by the 6 months rule in that though it is not a judgment conviction or order it is covered in the category of other proceedings. In our view, applications for judicial review ought to be made promptly. Undue and inordinate delay in applying for judicial review is a major factor for consideration by the court in deciding whether or not to grant judicial review remedies. Even where an application discloses meritorious grounds for the grant of judicial review orders, the application can be rejected if there is evidence that the person seeking the orders sat on his rights and failed to seek relief in good time and with due diligence

Whoever wants to challenge the action of a public body is therefore expected to move to court promptly once the decision is made. On this view we are persuaded by the opinion of Lord Hope of Craighead in the House of Lords decision in the case of **REGINA v. LONDON BOROUGH OF HAMMMERSMITH AND FULHAM (RESPONDENTS) AND OTHERS EX PARTE BURKETT AND ANOTHER (FC) (APPELLANTS) [2002] UKHL 23**. Where he said the following on the need for an applicant to move the court promptly:-

"On the other hand it has repeatedly been acknowledged that applications in such cases should be brought speedily as possible. Ample support for this approach is to be found in the well-known observations of Lord Diplock in *O'Reilly v Mackman* 2AC 237, 280-281 to the effect that the public interest in good administration requires that public authorities and third parties should not be kept in suspense for any longer period than is absolutely necessary in fairness to the person affected by the decision; see also *R v Dairy Produce Quota Tribunal for England and Wales, Ex p Caswell [1990]* 2AC 738. But decisions as to whether a petition should be dismissed on the ground of delay are made in the light of the circumstances in which time was allowed to pass. As Lord President Rodger put it in *Swan v Secretary of State for Scotland 1998* SC 479,487:

"It is, of course, the case that judicial review proceedings ought normally to be raised promptly and it is also undeniable that the petitioners let some months pass without starting these proceedings. None the less, in considering whether the delay was such that the petitioners should not be allowed to proceed, we take into account the situation in which time was allowed to pass."

In Ex p Caswell [1990] 2AC 738,749-750 Lord Goff of Chieveley said that he did not think that it would be wise to attempt to formulate any precise definition or description of what constitutes detriment to good administration. As he pointed out, interest in good administration lies essentially in a regular flow of consistent decisions and in citizens knowing where they stand and how they can order their affairs. Matters of particular importance, apart from the length of time itself, would be the extent of the effect of the relevant decision and the impact which would be felt if it were to be reopened."

The Applicant before us has not offered any explanation as to why he did not file this case immediately the report was released in August, 2008. We can safely say that the Applicant did not move to court with sufficient speed to protect his rights. The report has been adopted and used by third parties. We think the Applicant is asking us to assist him capture a quarry that is already deep in the bush. Even if we are to grant him the orders he seeks, the damage is already done and the orders may not serve any useful purpose. This court should not issue orders in vain. The report was used by the Waki Commission to reach its findings and make recommendations. Judicial review remedies are discretionary in nature. However the court should exercise such discretion judiciously taking into account the circumstances of each particular case. In the case before us, we find that the orders sought are not deserved. We therefore do not find any merit in the application dated 30th November, 2009 and we hereby dismiss the same.

Issues of great public interest have been raised and addressed in this case. We therefore do not find it just

to award costs to any of the parties.

Dated and signed at Nairobi this 4th day of May , 2012

M. WARSAME **C. GITHUA** **W. KORIR**

JUDGE **JUDGE** **JUDGE**