REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

MISCELLANEOUS APPLICATION NO. 470 OF 2009

IN THE MATTER OF THE TRUTH JUSTICE AND RECONCILIATION COMMISSION AND IN THE MATTER OF NATIONAL DIALOGUE AND RECONCILIATION COMMITTEE
AND
IN THE MATTER OF AN APPLICATION FOR JUDICIAL REVIEW FOR ORDERS OF CERTIORARI AND PROHIBITION

BETWEEN

REPUBLIC……………………………………APPLICANT

AND

TRUTH JUSTICE & RECONCILIATION

COMMISSION……….....................……..1ST RESPONDENT

MR. BETHWEL KIPLAGAT…….............2ND RESPONDENT

EX-PARTE
1. **HON. AUGUSTINE NJERU KATHANGU**
2. **HON. OTIENO MAK'ONYANGO**
3. **HON. KOIGI WA WAMWERE**
4. **ONEKA MNANAIR**
5. **STEPHEN MUSAU**
6. **SAMSON OJIAYO**
7. **PETER KIHARA YOUNG**
8. **MS. BEATRICE KAMAU**
9. **HON. MOSES MWIHIA**
10. **HON. KALEMBE NDILE - EX-PARTE APPLICANTS**

J U D G M E N T

THE APPLICATION

1. Pursuant to leave granted by this Court on 7th August, 2009 the ex-parte applicants moved this court by way of a substantive motion dated 24th August, 2009, and filed on 28th August, 2009 for orders of prohibition and certiorari. The motion which does not state

the law under which it is brought, seeks orders of Judicial Review in the following terms:

a) THAT an order of prohibition to issue prohibiting Bethwel Kiplagat from running the affairs of the Commission as Chairman or participating in the activities of the Commission.

b) THAT an order of certiorari to remove into the High Court and quash the oath of office of Chairman and Commissioner Bethwel Kiplagat taken on 3rd August, 2009.

c) THAT there be such other or further relief's as the court deems fair and expedient to grant in the circumstances.

d) THAT the costs of this application abide in the cause.

2. The application is grounded on the statutory
statement which was filed by the ex-parte applicants on 5th August, 2009 in support of the application for leave to apply for those orders of Judicial Review. The application is also supported by a verifying affidavit sworn by Augustine Njeru Kathangu on 5th August, 2009 and two further affidavits filed with leave of the court on 13th October, 2009. An attempt to amend the applicants' motion aborted when this court ruled that their application dated 13th October, 2009 seeking to amend the substantive motion was defective and misconceived.

THE FACTS AS STATED BY THE APPLICANTS

3. The ex-parte applicants are all members of a lobby group known as *"Kenyans against Impunity"*. This is a lobby group committed to the implementation of Agenda 4 of the National Accord. The ex-parte applicants are also all victims of state violence. They intend to seek justice through the Truth Justice & Reconciliation Commission (hereinafter referred to as the Commission). The Commission was set up under the Truth Justice & Reconciliation Act No. 6 of 2008 (hereinafter referred to as the TJRC Act). The ex-parte applicants are concerned that the TJRC Act has been violated by the Selection Panel in forwarding the name of Bethwel Kiplagat (hereinafter referred to as 2nd respondent), for appointment as chairman of the Commission. In their view, the 2nd respondent, on account of his past record, is unfit to be appointed as a commissioner and chairman of the Commission. He is alleged to have been involved in defending torture, abuse of judicial process, and policies of dictatorship in Kenya during the period he served as Ambassador of Kenya in the United Kingdom and Permanent Secretary in the Ministry of Foreign Affairs.

4. The ex-parte applicants further contend that the TJRC Act specifically excludes holders of public office, both serving and retired from membership of the Commission. This is because the actions of public officers are the subject of the investigations being undertaken by the Commission. The forwarding of 2nd respondent's name for appointment to the Commission was therefore against the spirit and letter of the TJRC Act. In addition the oath of office taken by 2nd respondent was null and void as it was taken before publication of the notice of his appointment in the Kenya gazette. Two of the ex-parte applicants Augustine Njeru Kathangu and Koigi Wa Wamwere, have deponed to their experience of the 2nd respondent's use of his positions as Ambassador and Permanent Secretary in the Ministry of Foreign Affairs to perpetuate torture and policies of the oppressive dictatorship regime that was in place at that time.

THE RESPONSE

5. The Commission and the 2nd respondent were initially both represented by the firm of Daly & Figgis Advocates. They responded to the motion through a replying affidavit sworn by 2nd respondent on 3rd September, 2009, and also a notice of preliminary objection filed on 4th September, 2009.

6. The gravamen of the reply is that the court has no jurisdiction to grant the orders sought in the application; the application does not disclose any recognized grounds for judicial review; and that the matters raised in the application are non-justiciable and not amenable to judicial review.

7. In his affidavit the 2nd respondent denies being aware of the breaches of the TJRC Act alleged by the ex-parte applicants. He maintains that he was properly gazetted as commissioner and chairman of the commission. He avers that the application is incompetent since the ex-parte applicants have not sought to have his appointment as commissioner or chairman of the Commission quashed. He contends that the proper procedure for removal of chairman or member of the Commission is set out under **Section 17** of the **TJRC Act**. That procedure having not been followed, judicial review cannot be used to supplant the specific statutory procedure provided for the removal of commissioners and chairman of the Commission.

8. The 2nd respondent further avers that he has not acted in excess of his jurisdiction nor has any action or decision been disclosed affecting legally enforceable rights of the ex-parte applicants, such as would attract an order of certiorari. He points out that the appointment of the commissioners or chairman of the Commission is neither a judicial nor quasi-judicial act amenable to judicial review. He swears that his appointment as commissioner and chairman of 1st respondent was thoroughly vetted and approved by the political organs of Government as well as a selection panel representative of various stakeholders and interest groups. He asserts that the persons responsible for the decision complained of, who are Parliament, the President and the Chief Justice of Kenya, are immune to the process of the court in relation to execution of their statutory, formal or official duties.

THE EXPARTE APPLICANTS' SUBMISSIONS

9. In support of the application, written submissions were duly filed by M/s Agina & Associates, who were the advocates for 1st to 10th ex-parte applicants. The 1st and 2nd ex-parte applicants who initially acted in person had also each filed written submissions. Mr. Wanyiri Kihoro who argued the matter on behalf of the ex-parte applicants highlighted their submissions. The gist of the submissions is well captured in the 7 issues identified in the submissions filed by M/s Agina & Associates. We can do no better than to reproduce them herein:

a) "The TJRC Act is incomplete and defective with certain referred to sections missing such that its mission can not be achieved.

b) That the TJRC Act is unconstitutional and in violation of certain sections of the Constitution and therefore void in that:-

- **It discriminates in its provisions contrary to section 82 (1) of the Constitution by allowing a class of Kenyans with truth and justice issues falling within 12th December, 1963 and 28th February, 2008 to raise them with the Commission while excluding other Kenyans with similar issues before and after the two dates from raising them.**
- **That the TJRC Act is in violation of Part IV of the Constitution of Kenya (Amendment) Act 1964 rendering it unconstitutional and in violation of human rights and international law as contained in various instruments where Kenya is a party.**

c) The Commission (sic) of the TJRC Act cannot be achieved because the Act cannot remedy matters which are legal and allowed by the Constitution, other statutes and laws.

i) Detention without trial which is allowed by section 70, 83 and 85 of the Constitution and the Preservation of Public Security Act 1960.
ii) Historic land dispossession of the coastal people as these are done and allowed under the Land Titles Act 1908.
iii) Kenya emergency land confiscations carried out under Forfeiture of Lands Ordinance 1953 as these are confirmed by section 75 of the Constitution.
iv) Human rights violations done in North Eastern Province and contiguous Areas before 1967 as these are legalized by the Indemnity Act 1974.
v) Human rights violations of Kenyans which are subject to exemptions given under the Official Secrets Act (Cap 187).
vi) Human Rights violations done in areas falling under the Protected Places Act (Cap 204) as no evidence can be adduced.
vii) Legal violations covered by sections 131 & 132 of the Evidence Act (Cap 80).

viii) Legal violations falling under the Public Order Act (Cap 56).
ix) Legal violations under sedition laws falling under the Penal Code (Cap 63).

d) That the TJRC Act is equivocal and ambivalent about the need for payments of compensation to the victims of past injustices.

e) That the TJRC Act was violated during its implementation by the Ministry of Justice and by Parliament and the Commission is void *ab initio*.

f) That other laws including interpretation and General Provisions Act were violated and abridged by public officials when constituting the Commission.

g) Other matter and arguments connected thereto, relevant, and incidental thereto."

10. With regard to the appointment of 2nd respondent it is submitted that the same goes against the TJRC Act because:
· He was a senior member of an oppressive regime whose wrong doings and numerous breaches of human rights are for investigation by the Commission.
· He has no record of any sustained struggles or fights for human rights in Kenya.
· The appointment violates **Section 10(6)(b)** of the TJRC Act.
· He has something to explain to the Commission regarding the disappearance of the late Robert Ouko.
· He lacks goodwill and public confidence to be able to promote reconciliation.

THE RESPONDENTS' SUBMISSIONS

11. Both the Commission and 2nd respondents relied on written submissions which were filed on 10th September, 2009 by the firm of Daly & Figgis, who were initially appearing for both respondents. Mr. Monari also made oral submissions on behalf of the Commission whilst Mr.McCourt made oral submissions on behalf of the 2nd respondent. The highlights of these submissions are summarized in the following points:

12. Firstly, the ex-parte applicants have not sought to quash the appointment of the 2nd respondent as Commissioner, and Chairman of the Commission. Without seeking to quash 2nd respondent's appointment, the ex-parte applicants cannot lawfully seek to prohibit the 2nd respondent from running the affairs of the Commission as chairman, or have him restrained from participating in the activities of the commission. In support of those submissions, counsel cited the case of ***Kenya National Examinations Council vs Republic ex parte G. G. Njoroge.*[1]**

13. Secondly, **Section 17** of the **TJRC Act** sets out a clear procedure for removal of the commissioners and chairman of the Commission. That procedure which is established by statute cannot be supplanted by judicial review. The case of ***Speaker of National Assembly vs. Karume*[2]** where it was held that **Order 53** of the **Civil Procedure Rules** could not oust clear constitutional and statutory provisions, was identified as a case in point.

14. Thirdly, the remedy of prohibition cannot lawfully issue in the instant case because there was no allegation in the pleadings that the 2nd respondent was acting in excess of his jurisdiction, or contrary to law. In addition an order of prohibition cannot cure the real or perceived breaches of the TJRC Act in the appointment of the 2nd respondent as prohibition cannot quash a decision which has already been made.

15. Fourthly, an order of certiorari can only issue if the decision complained of was made without jurisdiction or in excess of jurisdiction, or where the rules of natural justice are not complied with. In this case the ex-parte applicants' complaint is not the decision making process concerning the appointment of 2nd respondent, or that the appointment of 2nd respondent was made without jurisdiction or was unlawful. Rather, the complaint relates to the substantive merit of the choice of 2nd respondent as commissioner and chair of the Commission. The prayer for certiorari was therefore misconceived and

untenable in law.

16. Fifthly, the application before the court does not disclose any illegality, irrationality or procedural impropriety in the appointment or swearing in of the 2nd respondent. Therefore no recognized ground of judicial review has been disclosed. Moreover judicial review is not concerned with reviewing the merits of the decision in respect of which the application is made, but is concerned with the decision making process itself.

17. Further, certain executive, legislative or quasi-political matters are inherently non-justiciable, and therefore not amenable to judicial review. The appointment of the chairman or commissioners of the Commission was neither a judicial nor a quasi-judicial process. It is a matter exclusively in the realm of the political organs of Government. The determination of who is a proper and fit person to be appointed commissioner or chairman of the Commission is a matter best left to the political organs of Government. The case of ***Patrick Ouma Onyango & 12 others vs. Attorney General & 2 others*** [3] was cited in support of those submissions.

18. Finally, the persons who made the decisions complained of, that is, the appointment and swearing in of the 2nd respondent have not been made parties to the instant dispute. The said persons who are Parliament, the President and the Chief Justice are immune to the process of the court in relation to the execution of their statutory or official duties. Their decisions could not be upset by the court without unjustifiably offending the immutable constitutional doctrine of separation of powers.

ISSUES FOR DETERMINATION

19. The first task before us is to identify the issues for determination. As we have pointed out, the ex-parte applicants have not stated the provisions of the law under which the motion under consideration has been brought. Nonetheless, it is evident from the prayers sought that the ex-parte applicants are invoking the supervisory jurisdiction granted to this court by **Sections 8** and **9** of the **Law Reform Act** as well as **Order 53** of the **Civil Procedure Rules** to issue orders of judicial review. In particular, prayers (a) and (b) of the motion seek orders of prohibition and certiorari. In the circumstances, the issues raised are clear.

20. As regards the order of prohibition the issues are under what circumstances should it issue? What are the ex-parte applicants challenging, is it the merit or process of the 2nd respondent's appointment? What is the import of **Section 17** of the **TJRC Act** in setting out the procedure for removal of commissioners *viz a vis* the judicial review procedures? Who is the appointing authority in regard to the appointment of the 2nd respondent? Are orders of judicial review available against that authority? In the circumstances of this case would the order of prohibition be an appropriate remedy? Can an order of prohibition issue against the 2nd respondent without an order of certiorari first being issued to quash his appointment as commissioner and chairman of the Commission?

21. As regards the order of certiorari the issues are whether 2nd respondent was sworn before the gazette notice of his appointment was published and if so what effect does that have on the appointment of the 2nd respondent as the chairman of the Commission; whether an order of certiorari can issue against the appointing authority, and if so, whether an order of certiorari should issue to quash the oath of office of the 2nd respondent as commissioner and chairman of the commission.

22. Before we consider the issues arising from prayer (a) and (b) we wish to address prayer (c) of the motion. This is a general prayer through which the ex-parte applicant seeks "***such other further relief as the court deems fair and expedient to grant***". In their submissions the ex-parte applicants raised various pertinent issues which they contend fall under this general prayer. Such issues included: whether the TJRC Act is defective; whether the TJRC Act is unconstitutional; whether the TJRC Act violates other statutes, human rights and international law; whether the TJRC Act is discriminatory; the propriety and legality of the TJRC Act *vis a vis* the Constitution, and whether the operations of the TJRC Act are hampered by the Constitution and other statutes.

23. These are substantive issues of law. The question is whether such substantive issues of law can be raised through such a general prayer as adopted by the ex-parte applicants.

24. As already observed, the ex-parte applicants have invoked this court's supervisory jurisdiction for orders of judicial review. As pointed out such an application is anchored under **Sections 8** and **9** of the **Law Reform Act** Cap 26 Laws of Kenya and **Order 53** of the **Civil Procedure Rules**. The issues raised by the ex-parte applicants under the general prayer are substantive constitutional issues which in effect call for the invocation of this court's constitutional interpretive mandate as a constitutional court, under both the old Constitution (now repealed) and the current Constitution.

25. We appreciate that Article 22 of the Constitution which deals with enforcement of fundamental rights and freedoms provides that formalities relating to procedures, including commencement of proceedings should be kept to the minimum. Nonetheless we read Article 22 in conjunction with **Article 258** of the current **Constitution,** which givesevery person has a right to institute court proceedings when the Constitution has been contravened or is threatened with contravention. That, in our view, obliges an ex-parte applicant to clearly set out the acts and/or omissions that, in his or her view, contravene the constitution and also specify the provisions of the constitution that those acts or omissions contravene and the prayers or the reliefs he or she seeks. This is a legal requirement. Besides, the respondent must, through the ex-parte applicant's pleadings, be made aware of the ex-parte applicant's claim right from the beginning for it is from such pleadings that issues for determination arise and that is why each party is bound by its pleadings.[4] As a matter of fact no party is allowed to lead evidence on an issue that is not pleaded.[5] Only when the ex-parte applicant's claim is properly and clearly pleaded can the respondent be able to appropriately respond.

26. We are fortified in this view by **Order 53 Rule 4(1)** of the **Civil Procedure Rules 2010** which states as follows:
"Copies of the statement accompanying the application for leave shall be served with a notice of motion, and copies of any affidavits accompanying the application for leave shall be supplied on demand and no grounds shall, subject as hereinafter in this rule provided, be relied upon or any relief sought at the hearing of the motion except the grounds and the relief set out in the said statement."

27. If we understand the ex-parte applicants well, their main complaint is against the TJRC Act. In their view that Act is defective; is unconstitutional; violates other statutes on human rights and international law; is discriminatory; and its propriety and legality *vis a vis* the Constitution is questionable. With due respect, these are substantive constitutional issues which cannot be casually sprung up at the tail end of the proceedings during submissions as the ex-parte applicants in this matter have tried to do. One cannot seek the invalidation of an Act of Parliament in one's submissions without specific pleadings.

28. We note that the ex-parte applicants are concerned with human rights violations which occurred prior to 12th December, 1963, and after 28th February, 2008 which are not covered under the TJRC Act. It is arguable as to whether the legislature was right in excluding those violations. This issue and other equally pertinent issues which have been raised can only be determined in a properly pleaded case, preferably in a constitutional reference. The ex-parte applicants have, however, not done that. Save for the averments in the affidavit of James Dennis Akumu that the TJRC Act excludes alleged injustices committed to Kenyans before Independence and in that of Gacheke Gachihi that the injustices after 28th February 2008 are also excluded, the other affidavits of Otieno Mak'Onyango, Augustine Njeru Kathangu and Koigi Wamwere, attack the competence and suitability of the appointment of 2nd respondent as chairman of the Commission. No question has been raised in the ex-parte applicants' pleadings regarding the validity of the TJRC Act, nor have the ex-parte applicants specifically prayed that the court declares the TJRC Act or part thereof as null and void or ultra vires the Constitution. Thus, though we appreciate that the ex-parte applicants have raised pertinent constitutional issues in their submissions, this application as pleaded in the Notice of Motion does not provide an appropriate forum for the determination of those issues. The ex-parte applicants have not properly invoked this court's mandate as a constitutional court. In the circumstances we have no option but to decline the ex-parte applicants' plea in their counsel's submissions to declare the TJRC Act defective or unconstitutional.

29. We now turn to the other prayers in the ex-parte applicants' Notice of Motion for the judicial review orders of certiorari and prohibition. It is trite law that judicial review is a special jurisdiction which is neither civil nor criminal.[6] "Judicial review is concerned with the decision making process, not with the merits of the decision itself. … The court would only be concerned with the process leading to the making of the decision. How was the decision arrived at? Did the persons who made the decision have the power i.e. jurisdiction to make it? Were the persons affected by the decision heard before it was made? In making the decision, did the decision maker take into account relevant matters or did he take into account irrelevant matters?"[7] It is not an appellate court to consider merits of the impugned decisions.

30. Before we consider the prayers for the orders of certiorari and prohibition, we need to debunk what we consider an erroneous submission made by counsel for the respondents. They contended that for an act to be amenable to judicial review jurisdiction it must be judicial or quasi-judicial or against the rules of natural justice. That was the threshold set out in Lord Atkin's seminal statement in the case of **R Vs Electricity Commissionr.**[8] The scope of judicial review has since been extended to cover administrative acts. Quoting Lord Diplock's statement in **O'Reilly Vs Mackman**,[9] Platt Ag. JA (as he then was) stated in the case of **Kadamas Vs Muncipality of Kisumu**[10] that "whenever any person or body of persons has authority conferred by legislation" to make decisions that affect the rights of people, such authority is amenable to the judicial review jurisdiction." The Respondent's argument in this case that the appointment of the second Respondent is neither judicial nor quasi-judicial does not therefore avail them. Even a purely administrative act of a public officer purporting to discharge his public duty, would be amenable to judicial review.

PRAYER FOR CERTIORARI

31. The ex-parte applicants have moved the court for an order of certiorari to remove into the High Court and quash the *"oath of office"* of chairman and commissioner, taken by the 2nd respondent. This prayer is premised on the grounds that the oath of office was irregularly administered on the 2nd respondent and that the Selection Panel that proposed his name for appointment was not properly constituted.

32. The ex-parte applicants claim in paragraph 14 of their proposed amended statutory statement that the Episcopal Conference of Kenya and the National Council of Christian Churches of Kenya did not participate in the nomination of the 2nd respondent. Even if they had succeeded in amending the statement, it would not have taken them far as there is no merit in that contention. **Section 9(1)(a)** of the **TJRC Act** required religious organizations to be represented by two people. The National Assembly Departmental Committee Report dated 28th May 2009 shows that there were two representatives, one from the Supreme Council of Kenya Muslims and another from the Hindu Council of Kenya.

33. In his submissions before us, Mr. Kihoro for the ex-parte applicants referred us to the said National Assembly Departmental Committee Report and submitted that the Federation of Kenya Women Lawyers was not represented in that Panel. There is no merit in that contention either. There is no averment in either the ex-parte applicants' statement or the supporting affidavits that the Federation of Kenya Women Lawyers was not represented in the Selection Panel. The Respondents were therefore not put on notice on that contention so that they could appropriately respond. We cannot therefore accept Mr. Kihoro's submission from the bar that the Federation of Kenya Women Lawyers was not represented. As required by **Section 9(1)** of the **TJRC Act**, Kenya Private Sector Alliance (KEPSA) and the Federation of Kenyan Employers were both required to nominate one representative to that Panel. Mr. Kihoro did not tell us how come that KEPSA had two representatives in that Panel. One of the two names shown on that Report (most likely Mrs. Nancy Ikinu) as representing Kenya Private Sector Alliance (KEPSA) may very well have been a representative of Federation of Kenya Women Lawyers. In the circumstances we also dismiss that contention.

34. We now turn to the prayer to quash the oath of office of the second Respondent. The question we pose here is, what is an oath of office? Can it be subject of an order of certiorari? **Section 14** of the **TJRC Act** provides for an oath of office as follows:

"***14. (1) The chairperson, the commissioners and the secretary shall each make and subscribe to***

the oath or affirmation set out in the second schedule prior to embarking on the duties of the Commission.

(2) Every oath or affirmation by the chairperson, a commissioner or the secretary shall be –

(a) administered by the Chief Justice; and

(b) deposited with the Chief Justice and the secretary."

35. The 2nd schedule to the Act provides the actual wording of the oath to be taken. From the wording, the oath is simply an oath confirming the appointee's allegiance, upon appointment, to faithfully discharge his duties in accordance with the powers vested upon him. The administration of the oath comes immediately after the appointment but before embarking on any duties. There is no dispute that the second Respondent took this oath. The only issue that the ex-parte applicants have raised on it is that it was administered before the second Respondent's appointment. So in our view the determining factor is the date of appointment.

36. **Section 6** of the **1st schedule to the TJRC Act** provides that:
"The Minister shall forthwith forward the names of the persons nominated in accordance with paragraph 5 to the President who shall by notice in the Gazette, appoint there from four commissioners."

What does this provision mean? Is it providing for the appointment or the publication? In other words, what is important, is it the appointment or the publication of that appointment in the Gazette? Is the appointment by publication of notice in the Gazette. In our view this provision is concerned with the appointment and what is therefore important is the time or date of appointment which is when the President actually signed the instrument of appointment.

37. Government appointments are made in writing. As there is no proper way of knowing when the appointments have been made, the publication in the Kenya Gazette is notice and information to the public of the President's act of appointment. In this case the appointment of the respondent was published in the Kenya Gazette under Gazette Notice No. 8737 of 14th August 2009. The ex-parte applicants contend that the appointing authority put the cart before the horse by having the Chief Justice administer the oath of office to the second Respondent on 3rd of August 2009 before the appointment or publication on 14th August 2009. As in our view this is the fulcrum of the ex-parte applicant's prayer for the order of certiorari, we deem it necessary to set out Gazettee Notice No. 8737 in full.

38. It reads:

"GAZETTE NOTICE NO. 8737

THE TRUTH, JUSTICE AND RECONCILIATION COMMISSION ACT

(No. 6 of 2008)

APPOINTMENT OF COMMISSIONERS

PURSUANT to section 10 of the Truth, Justice and Reconciliation Commission Act (No. 6 of 2008), I, Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya appoint –

Amb. Bethuel A. Kiplagat – (chairman),
Betty Murungi (Ms.)
Tom Ojienda.
Margaret Wambui Ngugi Shava (Ms.)
Tecla Namachanja (Ms.)
Maj-Gen. (Rtd) Ahmed Sheikh Farah

International Experts:

Gertrude Chawatama (Ms.) – Zambia,
Berhanu Dinka – Ethiopia,
Ronald Slye – United States of America,

To be Commissioner of the Truth, Justice and Reconciliation Commission, for a period of two (2) years.

Dated the 22nd July, 2009

MWAI KIBAKI
President .”

It is clear from this Notice that the President signed the instrument appointing the Commission on 22nd July 2009. The second respondent was sworn on 3rd of August 2009. There is nothing wrong with the publication of the notice of appointment after administering the oath. Therefore the issue of putting the cart before the horse as contended by the ex-parte applicants has absolutely no basis.

39. Having found, although it was not pleaded, that the Selection Panel was properly constituted, and that there was nothing irregular about the administration of the oath, we do not need to go into the argument counsel for the respondent raised about the immunity of the President, the National Assembly and the Chief Justice in respect of their respective parts in the appointment of the second respondent. In the circumstances we dismiss the prayer for the order of certiorari.

PRAYER FOR PROHIBITION

40. From **Sections 9, 10** and **11** of the **TJRC Act** it is evident that the Minister for Justice, the selection panel, the National Assembly and the President all participated in the decision resulting in the appointment of the 2nd respondent pursuant to powers given by the TJRC Act. That being the case, the ex-parte applicants like all other citizens of this country had the legitimate expectation that the respective persons would exercise those powers in accordance with the statute. The ex-parte applicants would therefore be entitled to challenge the process by way of an order of judicial review if the powers given in the statute have been exceeded or exercised in a manner which is inconsistent with the statute.

41. The ex-parte applicants seek to have the 2nd respondent prohibited from running the affairs of the Commission as chairman or participating in any way in the affairs of the Commission. In considering the prayer for an order of prohibition, bearing in mind the purview of judicial review as stated above, the starting point is to consider the scope of the order of prohibition itself. That is, what does an order of prohibition do, and when does it issue? In the said case of ***Kenya National Examination Council[11]*** the Court of Appeal adopting **1 Halsbury's Laws of England 4th Edition page 37 paragraph 128** answered that question as follows:

“It is an order from the High Court directed to an inferior tribunal or body which forbids that tribunal or body to continue proceedings therein in excess of its jurisdiction or in contravention of the laws of the land. It lies, not only for excess of jurisdiction or absence of it but also for a departure from the rules of natural justice. It does not however, lie to correct the course, practice or procedure of an inferior tribunal, or a wrong decision on the merits of the proceedings.”

42. Being guided by the above, it is obvious 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 chairman or commissioner, or in contravention of the laws of the land, or against the rules of natural justice.

43. 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, is not a fit and proper 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.

44. 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 now *functus 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."

45. In this case the ex-parte applicants have not sought to quash the appointment of 2nd respondent. Therefore an order prohibiting 2nd respondent from running the affairs of the commission would not have any basis as long as the appointment of 2nd respondent remains in force. Secondly, the suit has been brought against the 1st and 2nd respondents. They are obviously persons interested in the appointment of 2nd respondent. However, they are not the body or tribunal who made the decision to select or nominate or appoint the 2nd respondent. The suit cannot stand against the 1st and 2nd respondent without the tribunal or body which made the impugned decision, being joined in the suit.

46. The appointment of the 2nd respondent was not a political act, exclusively in the realm of political organs of Government, nor did it concern matters of policy as counsel for the respondents contended. It is clear from the TJRC Act that the decision resulting in the appointment of the commissioners and chairman of the Commission was a process which involved several bodies. This included the Minister for Justice who constituted the Selection Panel, the Selection Panel which recommended persons to the National Assembly for nomination, the National Assembly which nominated persons for appointment, and the President who appointed the commissioners and chairman from the persons nominated. The ex-parte applicants have only complained about the Selection Panel which, as we have already found was properly constituted.

47. All these points show clearly that the ex-parte applicants are not challenging the decision making process in the appointment of the 2nd respondent. They are challenging the merit of the 2nd respondent's selection and nomination, being of the view that 2nd respondent was not a suitable person for nomination. As we have pointed out the remedy of prohibition does not deal with the merit of the decision but with the process. For this and other reasons already stated the remedy of prohibition as sought by the ex-parte applicants is therefore not available to them.

48. From the foregoing we come to the conclusion that in this matter we have no option but to dismiss this application with costs.

DATED, signed and delivered this 28th day of November, 2011.

J. W. MWERA
JUDGE

H. M. OKWENGU
JUDGE

D.K. MARAGA
JUDGE

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[1] [1997] e KLR
[2] [2008] 1 KLR 425
[3] [2005] e KLR
[4] Samuel Emuru Vs Ol Suswa Firm Ltd, Nakuru HCCA No. 6 of 2003.
[5] Wareham & Another Vs Kenya Post Office Savings Bank, [2004] 2 KLR 91.
[6] See Commissioner of Lands =Vs= Kunste Hotel Limited Nakuru Civil Appeal N. 234 of 1995 C.A.
[7] Kenya National Examination Council vs. Republic Ex-parte G. G. Njoroge & 9 others [1997] e KLR

[8] [1924] 1 KB 171

[9] [1982] 3 All ER 1129

[10] [1985] KLR 954

[11] Supra

[12] Supra