REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI (NAIROBI LAW COURTS)

Miscellaneous Civil Application 666 of 2008

IN THE MATTER OF AN APPLICATION OF OR JUDICIAL REVIEW FOR

AN ORDER OF CERTIORARI

AND

IN THE MATTER OF THE REPORT OF THE TRIUBUNAL OF INQUIRY TO INVESTIGATE THE CONDUCT OF PUISNE JUDGE TOM MBALUTO

AND

IN THE MATTER OF TRIBUNAL MATTER NO. 2 OF 2007

AND

IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA

IN THE MATTER OF THE REPUBLIC

VERSUS

THE TRIBUNAL OF INQUIRY TO INVESTIGATE THE CONDUCT OF PUISNE JUDGE TOM MBALUTO

HON. LADY JUSTICE JESSIE LESIIT

HON. LADY JUSTICE HANNAH OKWENGU

HON. MR. JUSTICE JACTON OJWANG

HON. MR. JUSTICE FESTUS AZANGALALA

HON. MR. JUSTICE LUKA KIMARU……...RESPONDENTS

EX-PARTE

TOM-MBALUTO…….APPLICANT

RULING

The Ex parte applicant herein in Tom Mbaluto a former judge of the High Court of Kenya, who has filed this chamber summons dated 30/10/08 seeking leave of this court to apply for orders of certiorari to remove into this court and quash the decision made on 2/5/08 by the Tribunal of inquiry to investigate the conduct of Justice Tom Mbaluto, and recommend his removal from the office of Puisne Judge for misbehavior in Tribunal matters No. 1 and 2 of 2007.

The 1st Respondent was named as the Tribunal of Inquiry to Investigate the Conduct of Puisne Judge Tom Mbaluto and the members were Hon. Lady Justice Jessie Lesit (Chairperson) Hon. Lady Justice H. Okwengu, Hon. Mr. J.B Ojwang, Hon. Mr. Justice F. Azangalala and Hon. Mr. Justice L.Kimaru, (the Respondents)

The prayers sought are as follows:

1. THE APPLICANT, the Hon. Mr. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision made on 2nd May 2008 by the Tribunal of Inquiry comprising of the Hon. Lady Justice Jessie Lasit (Chairperson), Hon. Lady Justice H. Okwengu, Hon. Mr. Justice J.B. Ojwang, Hon. Mr. Justice F. Azangalala and Hon. Mr. Justice L Kimaru to investigate the Conduct of Puisne Judge Tom Mbaluto (Tribunal Matters No. 1 and 2 of 2007) recommending that the Applicant, the Honourable Mr. Justice Mbaluto, be removed from the office of Puisne Judge for misbehavior.

2. THE APPLICANT, the Hon Mr. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of inquiry comprising of the Hon. Lady Justicce Jessie Lesiit (Chairperson), Hon. Lady Justice H. Okwengu, Hon. Mr. Justice J.B. Ojwang, Hon. Mr. Justice F. Azangalala and Hon. Mr. Justice L Kimaru to investigate the conduct of Puisne Judge Tom Mbaluto (Tribunal matters No. 1 and 2 of 2007) that the standard of "beyond reasonable doubt" would not be appropriate for the purpose of an inquiry under section 62(5) of the Constitution;

3. THE APPLICANT, the Hon. Mr. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the Hon. Lady Justice Jessie Lesiit (Chairperson), Hon. Lady Justice H. Okwengu, Hon, Mr. Justice J.B. Ojwang, Hon. Mr. Justice F. Azangalala and Hon. Mr. Justice L. Kimaru to investigate the conduct of Puisne Judge Tom Mbaluto (Tribunal matters No. 1 and 2 of 2007) that the standard of proof must be much higher than that of the "balance of probabilities", but lower than that of "beyond reasonable doubt"

4. THE APPLICANT, the Hon. Mr. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision ad finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the Hon. Lady Justice Jessie Lesiit (Chairperson), Hon. Lady Justice F. Azangalala and Hon. Mr. Justice K Kimaru No. 1 and 2 of 2007) the applicable standard of proof was that known as "clear and convincing standard of proof, which is a standard lesser than proof beyond reasonable doubt, but higher than proof by preponderance of evidence"

5. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the Hon. Lady Justice Jessie Lessit to Investigate the Conduct of Puisne Judge Tom Mbaluto (Tribunal Matters its (Chairperson), Hon, Lady Justice H. Okwengu, Hon. Mr. Justice J.B. Ojwang, Hon. Mr. Justice F. Azangalala and Hon. Mr. Justice L. Kimaru to Investigate the Conduct of Puisne Judge Tom Mbaluto (Tribunal Matters No. 1 and 2 of 2007) that though the direct evidence in support of allegation of bribery had a narrow base taken together with the apparent partial manner in which in which influenced by factors other than the evidence before him in Kisii High Court Civil Case No. 10 of 1990, Gichanbati Mwita Mairo –vs- Sarara Matongo

Sigore.

6. THE APPLICANT, the Hon, Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the Hon. Lady Justice Jessie Lessit to Investigate the conduct of Puisne Judge Tom Mbaluto (Tribunal Matters its (Chairperson), Hon. Lady Justice H. Okwengu, Hon. Mr. Justice J.B. Ojwang, Hon. Mr. Justice F. Azangalala and Hon. Mr. Justice L. Kimaru to Investigate the Conduct of Puisne Judge Tom Mbaluto (Tribunal Matters No. 1 and 2 of 2007) that all the circumstances, taken together with the direct evidence of bribery, lead to the conclusion that the applicant's partiality was the result of an inducement, and, therefore, accepts Sarara's evidence and finds that the Applicant did indeed, receive a bribe from GICHAMBATI Mwita Mairo in Kisii High Court Civil Case No. 10 of 1990, Gichambati Mwita Mairo –vs- Sarara Matongo Sigore.

7. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the Hon. Lady Justice Jessie Lessit of Investigate the conduct of Puisne Judge Tom Mbaluto (Tribunal matters its (Chairperson), Hon. Lady Justice H. Okwengu, Hon. Mr. Justice J.B. Ojwang, Hon. Mr. Justice F. Azangalala and Hon. Mr. Justice L. Kimaru to investigate the Conduct of Puisne Judge Tom Mbaluto (Tribunal Matters No. 1 and 2 of 2007) that there was clear and convincing evidence, which establish misbehaviour which is of such gravity as to justify the removal of the Applicant from office.

8. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of inquiry comprising of the Hon. Lady Justice Jessie Lessit to Investigate the Conduct of Puisne Judge Tom Mbaluto (Tribunal Matters its (Chairperson), Hon, Lady Justice H. Okwengu, Hon. Justice J.B. Ojwang, Hon. Mr. Justice F. Azangalala and Hon. Mr. Justice L. Kimaru to Investigate the Conduct of Puisne Judge Tom Mbaluto (Tribunal Matters No. 1 and 2 of 2007) the Applicant had used his office as a Puisne Judge improperly or to confer an undue benefit upon Gichambati Mwita Mairo the plaintiff in Kisii High Court Civil Case No. 10 of 1990, Gichanbati Mwita Mairo –vs- Sarara Matongo Sigore.

9. THE APPLICANT, The Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision

and finding made on 2nd May 2008 by the Tribunal of inquiry comprising of the Hon. Lady Justice Jessie Lessit to Investigate the conduct of Puisne Judge Tom Mbaluto (Tribunal Matters its (Chairperson), Hon, Lady Justice H. Okwengu, Hon. Mr. Justice J.B. Ojwang, Hon. Mr. Justice F. Azangalala and Hon. Mr. Justice L. Kimaru to Investigate the conduct of Puisne Judge Tom Mbaluto (Tribunal Matters No. 1 and 2 of 2007) that there was an element of dishonesty and culpability on the part of the Applicant in delivering the judgment in favour of Gichambati Mwita Mairo, the plaintiff in Kisii High Court Civil Case No. 10 of 1990, Gichambati Mwita Mairo –vs- Sarara Matongo Sigore.

10. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the Hon. Lady Justice Jessie Lessit to Investigate the conduct of Puisne Judge Tom Mbaluto (Tribunal Matters its (Chairperson), Hon. Lady Justice H. Okwengu, Hon. Mr. Justice J.B. Ojwang, Hon. Mr. Justice F. Azangalala and Hon. Mr. Justice L. Kimaru to Investigate the Conduct of Puisne Judge Tom Mbaluto (Tribunal Matters No. 1 and 2 of 2007) that the Applicant delivered the judgment in Kisii High Court Civil Case No. 10 of 1990, Gichambati Mwita Mairo –vs- Sarara Matongo Sigore with the intention of inflicting injury upon Sarara Matongo Sigore, the defendant therein.

11. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the Hon. Lady Justice Jessie Lessit to investigate the conduct of Puisne Judge Tom Mbaluto (Tribunal Matters No. 1 and 2 of 2007) that the applicant delivered the judgment in Kisii High Civil Case No. 10 of 1990, Gichambati Mwita Mairo –vs- Sarara Matongo Sigore with the knowledge that he had no power to declare that Sarara Matongo Sigore, the defendant, was holding a parcel of land in trust for the benefit of Gichambati Mwita Mairo, the plaintiff therein.

12. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the Hon. Lady Justice Jessie Lessit to investigate the conduct of Puisne Judge Tom Mbaluto (Tribunal Matters its (Chairperson), Hon. Lady Justice H. Okwengu, Hon. Mr. Justice J.B. Ojwang, Hon. Mr. Justice F. Azangalala and Hon. Mr. Justice L. Kimaru to investigate the conduct of Puisne Judge Tom Mbaluto (Tribunal Matters No. 1 and 2 of 2007) that the Applicant while making the declaration that the defendant, Sarara Matongo Sigore was holding a parcel of land in trust

for the benefit of the plaintiff, Gichambati Mwita Mairo had calculated to produce injury to the said Mtongo Sigore, the defendant in Kisii High Court Civil Case No. 10 of 1990, Gichambati Mwita Mairo –vs- Sarara Matongo Sigore.

13. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the Hon. Lady Justice Jessie Lessit to investigate the conduct of Puisne Judge Tom Mbaluto (Tribunal Matters its (Chairperson), Hon. Lady Justice H. Okwengu, Hon. Mr. Justice J.B. Ojwang, Hon. Mr. Justice F. Azangalala and Hon. Mr. Justice L. Kimaru to INVESTIGATE THE Conduct of Puisne Judge Tom Mbaluto (Tribunal Matters No. 1 and 2 of 2007) that the plaintiff's claim in Kisii High Court Civil Case No. 10 of 1990, Gichambati Mwita Mairo –vs- Sarara Matongo Sigore could not have succeeded as any other that would have been made touching the said parcel of land could not be enforced against the well known maxim of natural justice, that a party should not be condemned unheard.

14. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the Hon. Lady Justice Jessie Lessit to Investigate the conduct of Puisne Judge Tom Mbaluto (Tribunal Matters its (Chairperson), Hon. Lady Justice H. Okwengu, Hon. Mr. Justice J.B. Ojwang, Hon. Mr. Justice F. Azangalala and Hon. Mr. Justice L. Kimaru to investigate the conduct of Puisne Judge Tom Mbaluto (Tribunal Matters No. 1 and 2 of 2007) that it was strange that a trust was declared in a matter where it had neither been pleaded nor evidence adduced in support thereof, and on land which is a first registration in the names of the defendant and another in Kisii High Court Civil Case No. 10 of 1990, Gichambati Mwita Mairo –vs- Sarara Matongo Sigore.

15. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the Hon. Lady Justice Jessie Lessit to Investigate the Conduct of Puisne Judge Tom Mbaluto (Tribunal Matters its (Chairperson), Hon. Lad Justice H. Okwengu, Hon. Mr. Justice J.B. Ojwang, Hon. Mr. Justice F. Azangalala and Hon. Mr. Justice L. Kimaru to Investigate the Conduct of Puisne Judge Tom Mbaluto (Tribunal Matters No. 1 and 2 of 2007) that it was a grave shortcoming on the part of the Applicant not to appreciate that an international boundary was involved, and a claim touching the same would, of necessity, require the technical evidence of surveyors.

16. THAT the costs of this application be provided for.

The application is premised on a 184 paragraphed supporting verifying affidavit dated 30/10/08, a further verifying affidavit dated 30/10/08, a further verifying affidavit dated 18/12/08. The Applicant was represented by Ms Kethi Kilonzo of Kilonzo and Co. Advocates.

In exercise of its discretion, this court directed that the application for leave be heard inter partes. The Respondents appeared and Mr. Mbuthi Gathenji came on record on their behalf but did not file any reply and requested to be exempted from addressing the court in reply to the application or attending court during the arguments. The court however directed that counsel be present when the application was urged by Ms Kethi.

Ms Kethi relied on grounds found in the body of the chamber summons to support the application at paragraphs 9 (a-u) and the statement of facts which are inter alia, that the Tribunal acted ultra vires its jurisdiction under S 62 (5) of the Constitution and Gazette Notice 9532 of 2006; it made several errors relating to the standard of proof applicable to an inquiry under S 62 (5) of the Constitution; by failing to give the Applicant the benefit of doubt as regards the uncertainty of the date he allegedly received a bribe that the Tribunal made errors that excluded evidence of crucial witnesses: that the Applicant acted in bad faith by ignoring evidence of several witnesses; by failing to consider and resolve the credibility of the Applicant by ignoring the evidence of witnesses on the Applicants goods character; that the Tribunal acted irrationally and unreasonably in finding the evidence of Sarah Matongo to be credible and that the Tribunal breached the Applicants legitimate expectation that it would apply the principles laid down in the report and Recommendations of Hon. P.N. Waki J.A. that there is need to protect a Judge from incredible accusation without protecting judges who have been corrupt. It is the contention of the Applicant that this court has jurisdiction under S 60 of the Constitution, to supervise the manner in which the Tribunal exercised the mandate conferred upon it under S 62 (5) (b) of the Constitution and Gazette Notice 9532 of 2006.

In addition to the above, Ms Kethi submitted that since the Respondent did not file any replying affidavit, or grounds, the facts as presented by the Applicant are uncontroverted. That at this stage the Applicant does not want to prove or demonstrate that there is evidence in support of all grounds in the chamber summons. that this being a threshold stage, it is sufficient for the Applicant to demonstrate that he has a probable case and that that the affidavits and statement contain sufficient grounds and evidence for the grant of leave.

That the Tribunal had warned itself of the extent of its jurisdiction which was limited to inquire into the complaints made by the Hon. The C.J. tot eh president that it adopted the decision in ***HON. JUSTICE AM RAPHEAL MBOGHOLI MSAGHA V NRB HMIS 1062/2004.*** Where the court held that a Tribunal set up under S 62 (5) can only investigate the representations made to the president. That in this case, the Tribunal in making its decision converted itself to a court of Appeal and heard the complaints made in ***H.C.C 10/90 GICHAMBATI MWITA MAIRO V SARARA MATONGO SIGORE.*** That the Tribunal

should also have taken into account S 6 of the Judicature Act that gives a judge of the High Court immunity from personal liability for an error or judgment made within jurisdiction. That the findings of the Tribunal on the above indicates that the Tribunal took into account irrelevant and extraneous matters when it concluded that the Applicant took a bribe not on the basis of evidence but on the reasoning that if they were in the same position, they would have arrived at a different decision. Counsel urged that errors are subject to Judicial Review and that this being a Constitutional Tribunal under S 65 of the constitution, it was subject to the supervisory jurisdiction of this court under S 123 of the constitution. Reliance was made on the ***MSAGHA MBOGHOLI (J)*** Case supra: ***KIPKALYA KONES V REP ex parte KIMANI WANYOIKE*** where the court said that a Constitutional body is subject to the High Court under S 123 (8) of the Constitution. That in the ***MBOGHOLI*** case, the court felt the Tribunal is inferior to the High Court. Counsel urged the court to grant leave and the other issues be resolved at the Notice of Motion stage. The impugned decision was made by the Tribunal appointed by the president under S 62 (5) of the Constitution. That subject reads

> ***"If the Chief Justice represents to the president that the question of removing a puisne judge under this section ought to be investigated then;***
>
> ***(a) the president shall appoint a Tribunal which shall consist of a chairman and four other members selected by the President from among persons-***
>
> ***(i) who hold or have held the office of judge of the High Court or Judge of Appeal; or***
> ***(ii) who are qualified to be appointed as judge of the High Court under section 61 (3); or***
> ***(iii) upon whom the president has conferred the rank of senior counsel under S 17 of the Advocates Act; and***
> ***(iv) the Tribunal shall inquire into the matter and report on the facts thereof to the president and recommend to the president whether that judge ought to be removed under the section".***

The impugned decision was made by the Tribunal which is a creature of the Constitution and so in the High Court. The question is does this court have supervisory jurisdiction over the Tribunal? First of all, it is proper that this court consider its jurisdiction under S 65 of the Constitution and Ss 8 and 9 of the Law Reform Act and order 53 Civil Procedure Rules. Under S 65 (2) of the Constitution the High Court has jurisdiction to supervise any Civil or criminal proceedings before a subordinate court or court martial and may make such orders. issue such wrights or give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by these courts. The question is whether the Tribunal set up under S 62 (5) is a subordinate court envisaged under S 65 (2) of the Constitution? S 123 (1) of the Constitution defines what a subordinate court means. It states,

"Subordinate court" means a court of law in Kenya other than

(a) the High Court;

(b) a court having jurisdiction to hear appeal from the High Court, or

(c) a court martial".

As observed above, the Tribunal is a creature of the Constitution and it can not possibly fall under the description of a subordinate court. It would be at par with the High Court which is also a creation of the Constitution because the jurisdiction in Judicial Review is conferred by an Act of parliament, that is S 8 and 9 of the Law Reform Act. Judicial Review is the Law concerning control by the High Court of the powers and procedure of administrative authorities and bodies discharging public functions. Through Judicial Review, the High Court exercises its supervisory jurisdiction over the proceedings and decision of inferior courts, tribunals and other bodies that perform public functions Michael Fordham QC in his book Judicial Review Handbook 5th Ed. Says,

"2.1 supervising public authorities. Judicial Review is a central control mechanism of administrative law (public law) by which the judiciary take the historic constitutional responsibility of protecting against abuses of power by public authorities. It is an important safeguard which promotes the public interest, assists public bodies to act lawfully and ensures that they are not above the law, and protects the rights and interest of those affected by the exercise of public authority power".

This court has been moved under order 53Civil procedure Rules which provides the procedure by which an aggrieved party can move the court for Judicial Review orders, the substantive law being S 8 and 9 of the Law Reform Act. The jurisdiction of this court under Order 53 Civil procedure Rules is the supervision of subordinate courts, public authorities and tribunals.

It is the Applicant's contention that this court has supervisory powers over Constitutional bodies under S 123 (8) of the Constitution.

That provision reads as follows;

"(8) no provision of this constitution that a person or authority shall not be subject to the direction or control of any other power or authority in the exercise of any functions under this Constitution should be considered as preventing a court from exercising jurisdiction in relation to any question whether that person or authority has exercised those functions in accordance with this constitution or any other law".

The above section is a limitation on the exercise of power by the Constitutional body or Officer so that if the power is exercised outside its/his mandate or the body abuses its power then the High Court has the power to intervene. In ***WEHLIYE V REP IKLR 837***, Nyamu, Kasango and Makhandia JJ in determining a challenge to the Attorney General's powers under S 26 of the Constitution to enter a nolle prosequi, held that the Attorney General had acted capriciously and oppressively in presenting the nolle prosequi

when the trial was about to come to an end ad if allowed, it would amount to an abuse of process of the court. The nolle prosequi was held to be invalid and unreasonable. Similarly in ***ALIELO V REP (2004) 2 KLR,*** Onyancha J held that the High Court had the inherent supervisory jurisdiction to ascertain that the Attorney General's powers or discretion to enter a nolle prosequi exercised. S 26 of the Constitution gives the Attorney General inherent power to institute criminal proceedings and S 26 (8) provides that the exercise of such powers will not be subject to the discretion or control of any other person or authority. However under S 123 (8) a limitation is introduced that these powers should be exercised judiciously. The exercise of the powers/discretion can be challenged on account of abuse of power, malice or improper motive.

In the ***KIPKALYA KONE CASE*** there was a challenge on the exercise of power by a constitutional body, the Electoral Commission of Kenya, which is created under S 41 (9) of the Constitution. The Court of Appeal said

> ***"in the exercise of its functions under the Constitution the commission shall not be subject to the discretion of any other person or authority yet the commission is still amenable to the supervisory jurisdiction of the High Court which jurisdiction can be exercised by the High Court through the process of judicial Review"***

Citing S 123 (8) of the Constitution, the court further said,

> ***"the provision is clearly intended to ensure the rule of law, which it is court is the primary duty of the courts to enforce, is complied with by all organs of the state, and no state organ is permitted to say that the Constitution confers on it powers the exercise of which can not be questioned by the courts. The public Service Commission for example, is also a creation of section 106 of the Constitution under S 106 (12) specifically provides that***
>
> ***"subject to this chapter, the Commission shall in the exercise of its functions under this constitution, not be subject to the discretion or control of any other person or authority".***
>
> ***That provision, however, has never been a bar nor has it ever been pleaded as a bar to the power of the High Courts, for example, quash the decision of the body by way of certiorari where it is shown that an order of certiorari where ought to issues. The point we are making is that the commission i.e. E.C.K. is amenable to the jurisdiction of the High Court and in appropriate circumstances, the High Court will intervene in its decision making process through the process of Judicial Review".***

Citing S 123 (8) of the Constitution, the court further said,

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of the court to enforce, is complied with by all organs of the state, and no state organ is permitted to say that the constitution confers on it powers the exercise of which can not be questioned by the courts. The public service Commission for example, is also a creation of section 106 of the Constitution under S 106 (12) specifically provides that

"Subject to this chapter, the Commission shall in the exercise of its functions under this Constitution, not be subject to the discretion or control of any other person or authority".

That provision, however, has never been a bar nor has it ever been pleaded as a bar to the power of the High Courts, for example, quash the decision of the body by way of certiorari where it is shown that an order of certiorari ought to issue. The point we are making is that the commission i.e. E.C.K. is amenable to the jurisdiction of the High Court and in appropriate circumstances, the High Court will intervene in its decision making process through the process of Judicial Review".

In the ***MBOGHOLI*** case (supra) the court held that a tribunal established under the provision of S 62 (5) of the Constitution is a tribunal inferior to High Court but is not a subordinate court as envisaged by S 65 of the Constitution. The court did not explain anything further on how the Applicant could move the court. I have also considered the case of ***BARNWELL V AG (1994) 3 LRC 30***, a case from Guyana which involved removal of judge from office. Article 226 of the Guyana Constitution has a provision like our S 106, that the Commission was not subject to the direction, control or authority of anyone, and the court held that S 226 (6) of the Constitution which precluded the court form questioning any function performed under the Constitution, did not oust the courts jurisdiction in Judicial Review proceedings to determine the limits of the function of the Commission. What is common in all the above decisions is that this challenge to the Constitutional exercise of powers by the various bodies were made by way of Constitutional applications not by way of Judicial Review. This application has arisen due to alleged abuse of Constitutional power. It is my view that a party moving the court would need to come under the constitutional provisions but not under order 53 Civil procedure Rules.

The courts have now recognized that there is Constitutional Judicial Review under S 123 (8) of the Constitution and one choosing to challenge a decision by a Constitutional body/officer pursuant to this section must move under the constitutional provisions. Under the Constitution the court has a wide discretion to grant any orders, issue writs or give directions as it may consider appropriate for purposes of ensuring that justice is done (e.g. S 65 and 84.

In this case, apart from the decision of the Tribunal, the president did act on the Tribunal's representations and removed the Applicant from office. I note that there is no challenge to that action. However, as early as 19th century, the US Supreme Court in the celebrated decision by CJ. John Masharls in ***MARBURY V MADISON 5 US 137 (1803),*** recognised that judicial power extended to all cases even those arising from the Constitution and are subject to the court's supervisory powers. I do agree with Miss Kethi's

submissions that S 123 (8) of the Constitution gives this court powers to supervise public authorities and persons exercising Constitutional powers or any other power under written law. In the case of ***SIMON NGANGA MBUGUA V THE RETURNING OFFICER KAMUKUNJI CONSTITUENCY IN NAIROBI AND ECK*** MIS. APP. 13/2008 Nyamu and Wendoh JJ acknowledged that no person or authority is immune from this court's jurisdiction under S 123 (8) of this Constitution not even the Tribunal set up under S 62 (5) of the Constitution. The court said:

> ***"This section is indeed the cog upon which the principles of constitutionalism, separation of powers and rule of law turn".***

In the ***Simon Mbugua case***, (supra) the court had been urged that it had no jurisdiction to entertain a Judicial Review application brought under S 8 and 9 of the Law Reform Act and order 53 Civil Procedure Rules because in that case the challenge was on the 53 Civil procedure Rules because in that case the challenge was on the exercise of power by the Electoral Commission of Kenya under S 34 of the National Assembly and Presidential Election Act Cap 7 Laws of Kenya. However, in the Nairobi ***MISC. APP. NO. 18/08 ILICHAMUS COMMUNITY V REGISTERED OFFICIALS OF ODM, PNU, ODMK, KANU AND RANGAL EMEGURAN and 30 others*** the Applicant sought an application by way of Judicial Review against the Electoral Commission of Kenya, challenging the Electoral Commission of Kenya's Constitutional power to nominate members of parliament. The court dismissed the application on grounds that it should have been brought as a Constitutional Application but not by way of Judicial Review. What I am saying is that though no person or authority can be immune from the jurisdiction of this court by way of Judicial Review, the Applicant has not approached this court in the proper manner. The Applicant is challenging the Constitutional powers of the Tribunal and should have come by way of an Originating Notice of Motion under the Constitutional provisions. The court has not been properly moved under the appropriate law and this court's jurisdiction is not therefore properly invoked to grant the orders sought.

The second reason why the orders sought in the chamber summons can not be granted is because the chamber summons as framed is defective and incompetent. In Judicial Review, the Applicant first moves the court by way of a chamber summons seeking leave to commence Judicial Review proceedings in his own name. it is after leave has been granted that the Republic takes over the proceedings which are brought in the name of the Republic on behalf of the aggrieved party, the ex part Applicant by way of notice of motion. In the instant case the chamber summons has been brought in the name of the Republic. The formatting of Judicial Review application has to be strictly observed in compliance with order 53 Civil Procedure Rules. An application for leave is made to a judge in chambers under Rule 1 (2). At this stage the Republic can not be brought in this application as an Applicant. In the ***FARMERS BUS SERVICE V TRANSPORT LICENSING APPEALS TRIBUNAL (1959) EA 779*** the East African Court of Appeal held that a Judicial Review application has to be brought in the name of the Republic and must be properly intituled. Order 53 Rule 3 (1) provides that once leave is granted, then within 21 days or as directed by the court, the Applicant has to file a Notice of Motion. The Court did set out the format of

Judicial Review application from the time of seeking leave which is by way of a chamber summons and brought by the Applicant after leave is granted, the notice of motion is brought in the name of the Republic. In ***JOTHAM MULATI WELAMONDI V the CHAIRMAN ECK & OTHERS (2002) IKLR 486*** J.Ringera agreed with the court in the FARMERS BUS case (supra) and struck out an application that did not comply with the requirements that the notice of motion be brought in the name of the Republic, whereas the chamber summons is brought in the name of the ex parte Applicant. The Republic can not move the court for leave as has been done in this application as the Republic only comes in after leave of the court has been granted. The application is therefore incompetent and is for striking out. The court also went ahead to demonstrate how Judicial Review applications should be formatted both at leave stage and at Notice of Motion stage.

For the above reason this application is incompetent and will be struck out in any event.

For reasons that this court has not been properly moved to grant the orders sought, the court will not bother to look at the merits of the application and the result is that the chamber summons is struck out with costs to be borne by the applicant.

Dated and delivered this 18th day of September 2009.

R.P.V. WENDOH

JUDGE

Present

Ms Kethi Kalonzo for Applicant

Mr. Kipkogei for Respondents

Court clerk - Muturi