



**REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (NAIROBI LAW COURTS)**

Misc Civ. Appli. 416 of 2006

ERIC CHERUIYOT KOTUT..... APPLICANT

V E R S U S

JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIRS:

HON. MR. JUSTICE OF APPEAL S.E.O. BOSIRE, HON. JUSTICE NZAMBA

KITONGA, AND PETER LE PELLY S.C..... RESPONDENT

J U D G M E N T

This Notice of Motion was filed on 3rd August, 2006 under Order 53 of the Civil Procedure Rules (**Cap. 21**) and the Law Reform Act (**Cap 26**) by Okoth & Kiplagat Advocates on behalf of the Applicant, Eric Cheruiyot Kotut. The Notice of Motion was dated the same date and was filed pursuant to leave granted by the court on 28th July, 2006. The orders sought in the application are -

1. ***Judicial Review by way of an order of certiorari to remove into this court and quash the remarks, decisions and findings contained in the report of the Judicial Commission of Inquiry into the Goldenberg Affair submitted to the President of the Republic of Kenya H.E. Mwai Kibaki on the 3rd February, 2006, in so far as they adversely relate to the role of Mr. Eric Cheruiyot Kotut, as more specifically summarized in the statutory statement filed herein.***
2. ***Judicial Review by way of an order of Prohibition directed to the Attorney-General and/or any other person prohibiting the filing and prosecution of any criminal charges against Eric Cheruiyot Kotut in respect of the Goldenberg Affair pursuant to the Report of the Judicial Commission of Inquiry into the Goldenberg Affair released to the President of the Republic of Kenya on the 3rd February, 2006 or otherwise.***
3. ***Costs in this application.***

The application was supported by the **STATEMENT** and **VERIFYING AFFDIAVIT** filed with the application for leave.

In compliance with the court's orders granting leave, the substantive Notice of Motion was filed on 3rd August, 2006. However, there were some two criminal cases already pending in Nairobi Chief Magistrate's Criminal cases No. 518 of 2006, and 519 of 2006 against the Applicant with respect to the same Goldenberg Affair. When the above cases came up for hearing, the learned magistrate decided that the orders of stay granted by Emukule J at the leave stage, did not affect those two cases and that the two

cases would have to proceed to hearing.

Because of the above ruling of the magistrate, on or about 21st September, 2006, the applicant's counsel filed a Notice of intention to Amend the Notice of Motion under order 53 rule 4(2) of the Civil Procedure Rules. It was filed with an Amended Statement, Notice of Motion, and an Affidavit in support of Amendment.

The Notice of intention to amend was strenuously opposed by the Counsel for the Respondents. On 23rd May, 2008, we made a ruling allowing the Amended Notice of Motion and also gave orders that the leave granted will operate as a stay in relation to Chief Magistrate's Criminal Case Nos. 518 and 519 of 2006, which stay was to remain in force until determination of the judicial review application.

The Notice of Motion as amended prayed for orders of -

1. ***Judicial Review by way of an order of certiorari to remove into the court and quash the remarks, decisions and findings contained in the report of the Judicial Commission of Inquiry into the Goldenberg Affair submitted to the President of the Republic of Kenya H E Mwai Kibaki on the 3rd February, 2006, in so far as they adversely relate to the role of the Applicant Eric Cheruiyot Kotut, as more specifically summarized in the statutory statement annexed hereto.***
2. ***Judicial Review by way of an Order of Prohibition directed to the Attorney-General and/or any other person prohibiting the filing and prosecution of any pending or further criminal charges against the Applicant Eric Cheruiyot Kotut in respect of the Goldenberg Affair pursuant to the Report of the Judicial Commission of Inquiry into the Goldenberg Affair released to the president of the Republic of Kenya on the 3rd February, 2006 or otherwise, including the further prosecution of the Applicant in criminal case number 518 and 519 of 2006 already pending before the Chief Magistrate's Court, Nairobi..***
3. ***Costs of this application.***

There was also filed an Affidavit in Support of Amendment and an Amended Statement both dated 18th September, 2006, skeleton arguments filed on 15th January 2007 and 11th July 2008, and lists of Authorities. Mr Simani and Mr Okoth Oriema argued the motion on behalf of the Applicant.

The grounds upon which the application is brought is as listed in the Amended Statement that-

1. ***The Commission based its decisions on material that was not put to the applicant Mr Eric Cheruiyot Kotut during the inquiry in gross contravention of rules of natural justice.***
2. ***On many aspects, the Commission reached sweeping conclusions adverse to the Applicant Mr Eric Cheruiyot Kotut in complete disregard of the clear and uncontroverted evidence that was before it.***
3. ***The Commission placed reliance upon evidence that had been totally discredited before it and was of no probative value at all, to draw adverse conclusions against the Applicant.***
4. ***The Commission treated the Applicant Mr Eric Cheruiyot Kotut discriminatively by accepting as truth against him the testimony of witnesses it had discredited as liars even when the truth of such testimony was seriously questioned and doubted by the Commission itself.***
5. ***The Commission deliberately ignored or overlooked cogent evidence of the positive and decisive steps taken by the applicant Mr. Eric Cheruiyot Kotut to stop the Vices as and when they were discovered, and instead wrongly credited other persons with the actions.***
6. ***The Commission drew many adverse conclusions against Mr Eric Cheruiyot Kotut which***

could not be supported by the evidence on its records.

- 7. The Commission was discriminatively selective in many or all the evidence that tended to favour the applicant.*
- 8. The Commission failed to properly appreciate and evaluate the evidence before it leading to conclusions with respect to the alleged role of Mr Eric Cheruiyot Kotut in the so called Goldenberg affair.*
- 9. The Commission made adverse remarks, findings and decisions relating to the Applicant based upon material errors of fact.*
- 10. The Commission made the said adverse remarks, findings and decisions in disregard, ignorance and/or misunderstanding of established and relevant facts. The errors of fact are not unsubstantial or insignificant.*
- 11. The Commission also committed manifest errors in the assessment of the evidence before them. The errors did influence the making and content of the said adverse remarks, findings and decisions.*
- 12. The Commission's adverse remarks, findings and decisions based upon wrong facts are a cause of injustice remediable by this Honourable Court.*
- 13. The Commission has taken into account irrelevant considerations and also failed to base its decision on evidence.*
- 14. The Commission has acted in a manner that constitutes unfairness. In addition thereto, if the Commission had not made those fundamental errors the Commission would have absolved the Applicant of any blame. In arriving at such decisions the Commission has acted in breach of the rules of natural justice.*
- 15. The Commission was wrong and acted contrary to law in accepting matters which were actually wrong in arriving at its decision.*
- 16. The Commission was wrong and acted contrary to law in rejecting unchallenged evidence which corroborated the submissions of the Applicant. By its various errors of law and fact, the Commission has failed to arrive at a just and fair determination on the matters before it as related to the Applicant.*
- 17. The Commission has at its said remarks, findings and decisions arrived at unsustainable conclusions of fact. The same constitutes an error in law.*

In response to the Notice of Motion, the Attorney-General filed a replying affidavit sworn by **EMILY KAMAU, Senior Principal State Counsel**, skeleton arguments dated 11th January 2007 and 11th July, 2008 and lists of Authorities on 8th November, 2006. Mr Kang'ata appeared for Respondent and the Attorney General. In summary, it is deponed in the said replying affidavit *inter alia*-

§ *That the deponent was of the view that with regard to paragraph 6 of the verifying affidavit sworn on 26th July, 2006, the court would not be able to determine, or question the factual merits of the Commission's findings as regards the Applicant without first carrying out a thorough examination of the entire verbatim record of the Commission's proceedings.*

§ *That a careful examination of the entire verbatim record of proceedings shows that the Commission's findings regarding Eric Cheruiyot Kotut (the applicant) are well founded and based on the totality of the evidence.*

§ *In reference to paragraph 3 (j), (k), (l) and (m) of the verifying affidavit it was evident from the*

testimonies of Dr Koinange, Elphas Riungu and Mrs Bretta Mutunga that when Dr Koinange wrote the first letter dated 19th April, 1993 to the Governor of the Central Bank, instructing him to debit the Paymaster General's Account with Kshs. 1.8 billion and to credit the same to the KCB Account at Central Bank, Mr Cheruiyot Kotut was present in Dr Koinange's office, and that Mr Kotut was privy to what was going on.

§ That there was nothing to show that the Commission was discriminative in the way it evaluated and treated evidence touching on Mr Kotut.

§ That where there may be errors of fact, in view of the totality of evidence adduced before the Commission, such errors were inconsequential and could not affect the propriety of the final findings.

§ That the court cannot appreciate the propriety of the Commission's findings on merely the short excerpts that the applicant had singled out in the application.

§ That in further answer to paragraph 6 (j) of the Verifying affidavit, it was misleading for the applicant to swear that the Commission's findings that the applicant was involved in payment of Kshs.5.8 billion was based on Dr Koinange's testimony while it was clear from paragraph 652 of the report and the verbatim record that the finding is founded on the evidence of Dr Koinange, Mr E Riungu and Mrs Bretta Ndululu Mutunga.

§ That the credibility and value of witness evidence is best left to the Commission or the trial court because this court does not have the benefit of listening to and observing the demeanor of those witnesses.

§ That there is no basis in law or fact for the contention that the Applicant will not receive a fair trial after more than 13 years and that it is only in a few instances specified by statutes where there is a time limitation in a criminal case.

§ That the reasons why the Attorney-General opposed the prosecution by the Law Society of Kenya are evident in the affidavit of Bernard Chunga sworn on 22nd December, 1994 in that the Attorney-General would discharge his Constitutional duty once enough evidence to sustain a criminal charge was availed to him.

§ That it was now apparent that the evidence adduced before the Commission revealed much more than was known in 1994 and that the Attorney-General subsequently ordered further investigations as a result of which the applicant was charged in Criminal Cases Nos. 518 of 2006 and 519 of 2006; It was therefore not correct to say that the Applicant was charged without further investigations.

§ That the Commission was entitled to arrive at the conclusions that it did, and did not act in breach of any law.

§ That even if the court were to find that the Commission's findings were flawed as alleged, the court would only have jurisdiction to quash those findings/recommendations, but would have no jurisdiction to quash the evidence at the Commission's hearings or other and further evidence that may have come to light after investigations subsequently ordered by the Attorney-General.

§ That regardless of any shortcomings that may be found in the Commission's findings and recommendations, the Attorney-General cannot rightly be stopped from prosecuting the Applicant or any other person, where enough evidence is available, and that whether such evidence exists is a matter that can only be determined by the trial court.

§ That the court cannot issue orders of prohibition against the Attorney-General unless the Attorney-General has done something in respect of the Applicant which has the effect of compromising the Applicant's right to a fair trial under section 77 (1) of the Constitution or is acting in bad faith. None of the above two requirements have been shown or suggested against the Attorney-

General and therefore there is no basis for prohibiting the Attorney-General from prosecuting the applicant even where evidence is available to warrant such prosecution.

§ **That at no time did the Attorney-General promise the applicant that he would not be prosecuted on matters touching on the Goldenberg Affair, therefore the case of GITHUNGURI v REPUBLIC [1986] KLR I would not apply.**

§ **That it had not been shown or suggested that with regard to the Applicant, the Attorney-General had abused or is about to abuse his Constitutional power to prosecute under Section 26 (3) of the Constitution.**

That the Notice of Motion should be dismissed

The Applicants Submissions

It was the Applicant's submission that there were fundamental errors in the Commission's report which amounted to a breach of the rules of natural justice. It is contended that at paragraphs 634 to 641 of the Report, the Commission analysed the contents of the Central Bank of Kenya Board Minutes (1988-1993) and condemned the applicant on the same, while the said minutes were received by the Commission on the last day of the public hearing and were not availed to the Applicant though his advocate had severally demanded to be allowed access to the said minutes. The effect of this was a blatant breach of the most basic principle of natural justice – that a person should know the case he is facing and be heard in respect of the same. The failure to allow the Applicant or his advocate an opportunity to be heard on the minutes, which were then used to condemn the applicant, offended the natural justice maxim- "*audi alteram partem*"- or hear the other side. Reliance was placed on the case of **RIDGE v BALDWIN (1964) AC 40**; that a person should be heard before being condemned, the case of **FAIRMONT INVESTMENTS LTD v SECRETARY OF STATE FOR ENVIRONMENT (1976) 1 WLR 1255**, at pages 1260, 1265 – 1266; that it was wrong to confirm an order on facts where an individual had no opportunity to show whether they were erroneous and the case of **KANDA v GOVERNMENT OF MALAYA (1962) AC 322, at page 337** where it was held that if the right to be heard is to be real, right or worth anything, it must carry with it the right of the accused to know the case which is made against him. It was contended that the failure to give the applicant an opportunity to be heard on the said minutes led the Commissioners to completely misconstrue the contents of the minutes.

It was contended further, that in failing to give the applicant an opportunity to respond to the contents of the minutes, the Commission directly contravened Section 3 (3) (a) (i) and (ii) of the Commissions of Inquiry Act (**Cap. 102**), under which the Commission was constituted, which amounted to procedural impropriety correctable by Judicial Review. Reliance was placed on the case of **CIVIL SERVICE UNION v MINISTER FOR CIVIL SERVICE (1985) AC 374; AT PAGE 564**; in which it was held that failure of a tribunal to observe procedural rules laid down by statute amounted to procedural impropriety in the case of **RE RACAL COMMUNICATIONS LTD (1981) AC. 383** it was held that an authority acts unlawfully, if it fails to fulfil a statutory duty.

That therefore, the Applicant was condemned unheard contrary to the rules of natural justice on the basis of misconstrued and hence erroneous facts, and in direct contravention of express statutory procedures (**hence unlawfully**); and also condemned on the basis of irrelevant considerations and by ignoring relevant considerations. As a consequence, it was contended that the offending paragraphs 634 to 641, as well as the conclusions they led to, which were discernible from paragraphs 642 to 651, ought to be lifted into this court and quashed and be expunged from the report.

The second point relates to errors of fact and law. It was contended that the findings were based on fundamental errors of material facts which had a direct influence on the findings. These fundamental errors were firstly on the issue of the Commissioning of the Price Waterhouse Investigations whose report was produced as Commission Exhibit 10. In this regard, though the oral and written evidence before the Commission showed that Price Waterhouse investigations were ordered by the applicant as evidenced in exhibit 111 E and exhibit 60, as well as the Commission's proceedings of 9th December 2003, the

Commission at paragraph 589 of the report in exculpating the former Minister for Finance Hon. Musalia Mudavadi from blame, stated that the Minister caused the audit report to be conducted, while no such evidence existed. Paradoxically, at paragraph 531, the Commission had acknowledged that the investigations were commissioned by the Applicant and the said investigations had revealed significant fraudulent activities of Goldenberg International Ltd. and Exchange Bank Ltd. It was contended that the aforesaid errors made the Commissioners ask themselves the wrong questions which rendered their conclusions a nullity.

The next complaint on errors was with regard to the dismantling of the Goldenberg Infrastructure. In paragraph 647 and paragraph 588, the Commissioners stated that there were several irregular things which occurred and they were intended to benefit Goldenberg International Ltd. and Exchange Bank. The Commission concluded that the applicant avoided taking decisions and that Professor Saitoti and the applicant supported the activities of Goldenberg International Limited. It was contended that these were erroneous conclusions, as the Commission did not cite any specific incidences to support their findings, and in fact ignored clear and uncontroverted evidence before it showing the exact opposite, in that the Applicant was actually the person who commissioned the Price Waterhouse investigations which unveiled the illegal activities of Goldenberg Ltd. and Exchange Bank Ltd. It was also the Applicant who suspended the Managers of both the Banking Department and Foreign Department of Central Bank of Kenya pending further investigations. The evidence on record also established that it was the applicant who ordered criminal investigations into why a circular dated 4th July 1993 prohibiting direct credit to banks was breached in favour of Exchange Bank; ordered liquidation of Exchange Bank Ltd. as soon as there was sufficient available evidence; and ratified the rejection of waiver of condition 5 in the letter dated 5th November, 1990 from Goldenberg International Ltd., which would have favoured the said Goldenberg International Ltd.

The 3rd complaint is an error regarding the alleged meeting between the applicant and the Vice President/Minister for Finance, and Mr Mbindyo on or around 1st November, 1990. It was contended that the Commission made sweeping statements that the applicant was among the first people to be notified of the Goldenberg International Ltd. proposal for assistance, and that he was in a meeting with Mr. Mbindyo and Professor Saitoti leading to Mr Mbindyo's letter of 1st November, 1990. This was an error because the uncontroverted evidence before the Commission was that the applicant was outside the country at the time and could not possibly have attended such a meeting. The Commission's conclusions were therefore without justification and unreasonable.

It was submitted that a decision was unlawful if the maker left out of account relevant matters or took into account irrelevant matters as in our present case. That was the holding in the case of **REPUBLIC v HOME SECRETARY, EX- PARTE VENEABLES (1981) AC 407**, and in the case of **RE RACAL COMMUNICATIONS LTD (1981) AC 383**. It was also emphasized that the principle of irrationality applied in our present case with regard to the conclusions of the Commission.

The fourth complaint was that there was an error in the Commission's findings regarding protection of Mrs Mwatela. It was contended that what was stated by the Commissioners at paragraph 648, that the applicant dodged the issue of receipt of foreign exchange and shifted responsibility to other officers, and that he was not decisive in protecting Mrs Mwatela from intimidation, was not founded on the evidence before the Commissioners. Mrs Mwatela's own statement and her subsequent oral testimony contradicted those findings of the Commission. In addition, the Commissioners failed to consider the applicant's extensive testimony and statements as well as other witnesses' testimonies which demonstrated, among other things, that the meeting of 7th May, 1991 was an impromptu meeting which could not be a basis for a formal decision to change procedures and policies.

It was contended that no change of procedures and policies for receiving foreign exchange was at all effected and that Mrs Mwatela's memorandum to her boss was not copied to the applicant so he never got to see it. Further that the officers who consulted in the matter did so in a free and informal atmosphere and there could be no issue of dodging issues or shifting responsibility by the applicant. It was contended that the Commission wrongly connected the applicant with the issue of the foreign exchange licence to

Goldenberg International Ltd. and as a result wrongly concluded that the Governor (*the applicant*) allowed a relaxation of the terms of the Exchange Control Notice following the said meeting of 7th May, 1991. That the Commission's conclusion was contrary to the actual evidence as Exchange Control Notice No. 13 was never altered at any time, nor were there any instructions to waive any of its requirements. In addition, the applicant was not involved in granting of the foreign exchange licence to Goldenberg International Ltd. The absence of any waiver of the procedures was confirmed by the fact that after the meeting of 7th May, 1991 the Exchange Control Department still confirmed to City Bank that there was no change in the requirements, and that the procedures for CD 3 forms had never changed. It was contended that in fact Commercial Banks and not the Central Bank of Kenya were the authorized dealers under the *Local Manufacturers (Export Compensation Act (Cap. 482))*, and that even an additional requirement, introduced administratively by Mrs Mwatela, was ignored by the Customs Department which was the responsible authority under the Act.

The fifth complaint related to an error on miscomprehension of facts relating to Open Market Operations Treasury Bills. It was contended that the letter by the applicant dated 9th March, 1993 was written pursuant to a policy involving the Treasury and the International Monetary Fund, and that the decision by the Treasury to transfer Kshs.5.8 billion to Treasury Bills Account was made in November, 1993 long after the applicant had left the Central Bank of Kenya. The open policy decision made at the beginning of March, 1993 involving the International Monetary Fund and the Treasury, could not have been designed to accommodate the strange decision made in November, 1993 to transfer the payments to Treasury Bills Account.

It was further argued that, Mr Werunga who effected the payments, gave unchallenged testimony that the Principal Accounts Controller, Mr J M Oyula, called him from the Treasury about a week after the payment and specifically instructed him to transfer the payment from PMG main account to Deposit 7, which showed that Mr. Koinange's evidence relating to the applicant, which was found by the Commission to be riddled with contradictions, was not true. Therefore, the Commission did not only fail to consider relevant facts, but also based their conclusions on no evidence other than that which was tainted with perjury.

The sixth complaint was on errors on misapprehension and misrepresentation of facts relating to the transfer of Mr Mumelo. It was contended that the Commissioners sweepingly insinuated that the applicant transferred Mr Mumelo with an ulterior motive, yet the unchallenged evidence was that the applicant suspended Mr Mumelo to facilitate investigations on a crucial topic of the inquiry. The Commission, therefore, reached a very negative conclusion against the applicant on the basis of no evidence and ignored the unchallenged evidence which amounted to a blatant abuse of their Judicial discretion. Reliance was placed on the case of *REPUBLIC v NORTHUMBRLAND COMPENSATION APPEAL (1952) page 825*, in which it was held that tribunals should not abuse their discretion.

In summing up the issue of issues the counsel submitted that numerous findings against the applicant were not supported by any evidence, were unlawful and amounted to an abuse of discretionary power. These errors in law rendered the findings of the Commission to be null and void. Reliance was placed on the case of *AUTHORITY OF BENDLES MOTORS LTD v BRISTOL CORPORATION (1963) IWL 247* for the contention that findings not based on evidence were null and void.

It was contended that the Commission erred in finding that all witnesses testified that the applicant was in Dr. Koinange's office on 19th April, 1993, while the key witness, Mr T Werunga who effected all payments, never stated that the applicant was in Dr Koinange's office. In fact he stated emphatically that Mr Riungu who gave him (**Werunga**) the letter authorizing the transfer of Kshs.1.8 million informed him that the said letter had only been seen by Mr Riungu and Dr Koinange alone. It was also contended that Mr Arap Bii who received the monies at Kenya Commercial Bank, testified that when he went to Dr Koinange's office he met Mr Riungu, and Mr Pattni. That in any event, if the applicant had been a party to the 3 transactions, some evidence would have emerged from the Central Bank of Kenya of his having been involved. Such evidence was clearly lacking.

Both Dr Koinange and Mr Riungu, who were involved in the matters, had recorded statements earlier and were even charged in court. They however, did not mention the applicant's name until the Commission of Inquiry more than 10 years later in circumstances in which they needed to deflect blame from themselves. It was contended also that Bretta Mutunga was brought in to testify at the Commission after the applicant had completely exonerated himself of the false allegations, and that she could not remember many vital events. That as Governor of the Central Bank of Kenya, the applicant, had no legal, or administrative mandate to approve payments at the Treasury. The applicant was also not involved in vetting or approving Government payments either at the Treasury or the Banking Hall of the Central Bank of Kenya. There was therefore no basis for the Commission to sweepingly and without any evidence conclude under paragraph 651 of the report, that the Governor and his Deputy knew that Goldenberg International Ltd. used Forex C for "*capital flight*" and did nothing.

On *ultra vires*, it was submitted that the Commission failed to take into account relevant considerations, which led the Commission in arriving at baseless findings, which rendered those findings to be made in excess of or outside the Commission's powers.

It was contended that the findings of the Commission were not supported by any facts or evidence. The said findings were not supported by the fact that it was the applicant who commissioned the Price Waterhouse investigations. The findings were also not supported by the uncontroverted evidence of the applicant's passport which showed that the applicant was actually out of the country at the time of the alleged meetings. Further, that it was in fact the applicant who ordered police investigations. In addition, there was no requirement and the Governor (*the applicant*) was not involved in vetting or approving government payments in the Banking Hall. That Mr Werunga's evidence and testimony clearly explained the events of 19th April, 1993 and the payment of Kshs.5.8 billion and the persons involved, which did not include the applicant. In any case, Koinange's and Riungu's testimonies regarding the events of 19th April, 1993 had inconsistencies. That was also clear from the evidence that it was the applicant who took action to liquidate Exchange Bank and also appoint statutory managers for Pan African Bank and Post Bank Credit. That was also the applicant who refused to grant approval to Goldenberg International Ltd for waiver of the precondition for export compensation. That it was clear from the evidence that the Central Bank of Kenya had no statutory role in processing payments or paying export compensation, which was the function of the Customs Department. Therefore the findings of the Commission were not based on clear evidence and facts before it, and were therefore *ultra vires*.

It is also contended that the Commission took into account irrelevant considerations. On this point reliance was placed on the case of ***ANISMINIC LTD v FOREIGN COMPENSATION COMMISSION (1969) 2 AC 147 at page 195 and the case of SHORT v POOL (1996) Ch. 66 at page 90***, wherein, Warrington LJ expressed the view that no public body can have statutory authority to act in bad faith, or consider irrelevant grounds, and that any such unauthorized act is *ultra vires*. That, in a number of instances, irrelevant considerations and erroneous decisions taken were injurious to the applicant.

These included the taking into account of the Central Bank of Kenya Board Minutes which were not put to the applicant and were used to condemn him, as well as the reliance on Mbindyo's, Pattni's and Riungu's false testimonies. There was also the over reliance by the Commission on totally wrong conclusions drawn from the impromptu meeting of Central Bank of Kenya Managers held on 7th May, 1993. The Commission also erred in its acceptance of Dr Koinange's false testimony that the Government/International Monetary Fund policy measure aimed at neutralizing excess government expenditure using Open Market Operations Treasury Bills, was designed to cover for Treasury's illegal payments. The Commission's reliance on Mbindyo's false testimony that he met with the applicant and Professor Saitoti prior to writing the letters of 1st November, 1990, was also an error. All these established that the Commission acted *ultra vires*.

It is the applicant's case that the Commission acted unreasonably. It was contended that the Commission's findings which had no relation whatsoever to the evidence were unreasonable, irrational, *ultra vires*, unlawful, and offended the principle of reasonable expectation as envisaged in the case of ***ASSOCIATED PROVINCIAL PICTURE HOUSES -v WEDNESBURY CORPORATION (1948) 1 KB 223*** where the court held that a tribunal was expected to act reasonably and rationally. Some of the

glaring examples of unreasonableness or irrationality were the Commission's conclusion that massive frauds could not possibly have taken place without the Chief Executive Officer knowing. It was contended that, to the contrary, when the applicant became suspicious, he launched investigations and took measures to combat the frauds, including disciplinary measures against senior managers, police investigations, liquidation of banks, and placing of banks under statutory management. There was no evidence that the applicant did nothing to stop irregularities which were intended to benefit Goldenberg International Ltd, no evidence that the applicant manipulated junior officers, no evidence that at the meeting of 7th May, 1991 the rules relating to the identification and monitoring of proceeds of foreign export compensation were relaxed. Therefore the findings of the Commission were unreasonable, irrational and unlawful.

With regard to the right to fair trial it was contended that, by reason of the numerous errors of fact and law and the unreasonable treatment of the applicant leading to serious findings in the report authored by a Judge of Appeal and 2 Senior Counsel, and which has received wide national and international publicity, there was reasonable apprehension on the part of the Applicant, and there would be reasonable apprehension on the part of fair minded and informed members of the public, that no trial of the applicant would be unaffected by the report and its errors. It was further contended that the applicant, accordingly, would not expect or receive a fair trial in terms of section 77 (1) of the Constitution of Kenya.

It was also contended that the basic requirement that justice should not be done but manifestly and undoubtedly be seen to be done, could not be met. This was because firstly, the trial of the applicant after the alleged complaints occurred more than 13 years earlier could not be a trial within a reasonable time, Secondly, the facts, documents and witnesses to be relied upon, had been available to the Attorney-General for more than 13 years, and the same Attorney-General had in fact in 1995 terminated Chief Magistrate's Criminal Private prosecution No. 1 of 1994 against the applicant. The said Attorney-General did nothing till after the report of the Commission, though he preferred charges against several other persons after extensive police investigations. It was merely after the Commission's report that the Attorney-General instituted Chief Magistrate Criminal case No. 518 and 519 of 2006 against the applicant and had also threatened to institute more cases all based on the seriously flawed and defective report. Reliance was placed on the case of **REPUBLIC v SUSSEX JUSTICES, EX PARTE McCATHY (1924) I KB 256** to support the principle that justice should not only be done, but should manifestly and undoubtedly be seen to be done.

It was contended that the Attorney-General had the opportunity to take over and carry on prosecution of Chief Magistrate Criminal Case No. 1 of 1994, or even institute another case, if he had a basis. His present action, therefore was not within reasonable time. The Attorney-General had lost his right to so act against the Applicant due to the inordinate and inexcusable delay. Reliance was placed on the case of **GITHUNGURI v REPUBLIC (1986) KLR 1** and the case of **REPUBLIC v PATTNI HCCC 229 of 2003** where it was held that where there is inordinate delay the Attorney-General may lose his right to prosecute. Further, there was no evidence that any investigations were done by the police beyond what was contained in the report, as documents relied upon and witnesses in the pending criminal cases (Nos. 518 and 519 of 2006) were the same as were in the Commission, which meant that the Attorney-General's action was a clear contravention of Section 26 of the Constitution.

Further the above counsel submitted that the Attorney General terminated that case on the basis that he needed time to carry out investigations. The Central Bank Board Minutes now relied upon, which covered the period 1987 to 1994, were actually available at that time in 1994. In addition, according to the Hansard report of 11th April, 1996, the Attorney-General gave the police a deadline of 15th May, 1995 to complete investigations, and after completion of the said investigations, he charged some people but not the applicant.

Though there was ample uncontroverted evidence that it was the applicant who commissioned the Price Waterhouse Auditors to carry out an investigation and make a report, the Commission erroneously gave the credit for the same to Hon. Mudavadi.

With regard to use of documents referred to, counsel submitted that they sought leave of court to bring

further documents, which leave was granted. Therefore, there was no basis for the objections raised to crucial documents such as the letter to the IMF and the Hansard report. Counsel contended that Order 53 of the Civil Procedure Rules was complied with.

On the objection to the format of the application that the Attorney-General was not named as a party, it was contended and emphasized that the objection was frivolous. The objection goes to form rather than substance as the Attorney-General was in fact the person who was served with all papers.

Counsel also submitted that this application was well founded. That, though section 80 and 81 of the Constitution might not have been specifically invoked, Constitutional remedies were available under judicial review proceedings. On this counsel sought to rely on the **GITHUNGURI** case (supra), and the **SAITOTI** case (supra).

On legitimate expectation, it was contended that the Judicial Commission of Inquiry, having been established by statute, was expected to adhere to fairness, and base its decisions on evidence, regardless of whom such evidence favoured. The Commission was required to ignore irrelevant evidence and give reasons for accepting or rejecting the same. It was contended that the Commission did the converse of the above. Therefore the Commission's actions were illegal and their findings a nullity. Reliance was placed on the case of **REPUBLIC v IMMIGRATION APPEALS TRIBUNAL – EX PARTE SINGH (1986) 1 WLR 910** in which the court held that a tribunal should not act in a manner that would frustrate why it was set up.

In particular, it was emphasized that the Attorney-General failed to carry out his own independent investigations and merely placed reliance upon the recommendations contained in the flawed Commission's recommendations. It was contended that after the Attorney-General intervened and terminated private prosecution No. 1 of 1994 on the basis that there was no evidence against the applicant, police completed investigations in May, 1995 and the Attorney-General charged persons against whom evidence existed, but did not charge the applicant. In addition, the Solicitor-General, on behalf of the Attorney-General wrote a letter on 27th July, 1998 to the International Monetary Fund stating that no criminal wrongdoing had been revealed by police investigations against the applicant. The Attorney-General only charged the applicant in Chief Magistrate's Criminal Case Nos. 518 and 519 of 2006 after giving a press statement, following the release of the Commission's report, stating that the government had fully accepted the Commission's recommendations and had set out to implement the same. Therefore the Attorney-General relied on the Commission's report.

In responding to the Respondent's submissions on non-joinder of the Attorney General to these proceedings, it was urged that the Attorney-General filed responses and was prosecuting this present application on behalf of the respondent through the Attorney-General's special prosecutor. That in any event under Order 53 Rule 6 of the Civil Procedure Rules anybody could be heard in Judicial Review proceedings without necessarily being named as a party. In the present case, the Attorney-General had actually been served had appeared and filed responses and participated fully in the proceedings. It was also urged that once the Notice of Motion was brought in the name of the Republic it was not necessary to join the Attorney-General as a party, as the Attorney-General appeared in the Commission proceedings as **amicus curae**. The court was urged, if it so wished, to allow an amendment of the Notice of Motion to join the Attorney-General as a party in terms of Order 53 rule 4 of the Civil Procedure Rules and that that could even be done at the hearing.

The court was asked to grant certiorari orders to quash offensive paragraphs in the report, that is, paragraphs 199, 202, 634- 641, 642, 643-654 and 847 (h). It was also requested that prohibition orders be issued against the Attorney-General or any other person preventing him/them from continuing to further prosecute Chief Magistrate Criminal Cases Nos. 518 and 519 of 2006 against the applicant or from instituting and prosecuting any further charges against the applicant in relation to the Goldenberg affair pursuant to the report or otherwise.

On jurisdiction, it was contended that the court had jurisdiction to grant orders of certiorari and prohibition in exercise of its inherent powers under section 84 (3) and 123(8) of the Constitution. It was

also contended that the respondent's counsel had admitted that the prosecution of the applicant was based on paragraph 652 of the Report, which paragraph was an erroneous finding. It was also contended that the verifying affidavit should be read in total, not individual paragraphs in isolation.

On the substance of the Commission's report it was submitted that in view of the numerous breaches of law and statutory procedural requirements and principles of natural justice, the Attorney-General should not institute criminal charges against the applicant on the basis of the flawed report and findings.

With regard to amendments to the Notice of Motion, it was contended that it was desirable for the court to allow an amendment of the Notice of Motion so that the stay orders granted could specifically apply to the already pending cases, that is Chief Magistrate's Criminal Cases no. 518 and 519 of 2006.

Mr Oriema for the applicant submitted that the Commission was appointed under an Act of Parliament, the Commissions of Inquiry Act (**Cap. 102**), and the Commission actually appreciated this in their report. Therefore, if the Commission went outside the powers conferred on them, and breached principles of natural justice this court had the jurisdiction to intervene. Counsel cited the cases of **FAIRMONT v SECRETARY OF STATE FOR ENVIRONMENT (1976) IWL R 1255**; where it was held that it was wrong to confirm an order on facts where an individual had no opportunity whether they were erroneous as well as the case of **KANDA v GOVERNMENT OF MALAYA (1962) AC 322** – where it was held that if the right to be heard is to be a real right worth anything, it must carry with it the right of the accused to know the case which is made against him and emphasized that the recommendations of Commission herein were made without the applicant being given an opportunity to respond. This was because, counsel argued that the applicant had voluntarily appeared before the Commission, was in the dock and testified for about a month and was able to deal with all issues which were put to him. However, the Board Minutes of Central Bank of Kenya which were used to make an adverse report on him were neither availed to him nor his counsel.

Counsel submitted that the Commission actually analysed the evidence, and agreed with the explanation of the applicant. However, when the Commission stated that the Treasury Permanent Secretary could not pay out monies without the knowledge of the applicant, that was an error as there was no evidence to support that conclusion. Counsel contended that the criminal cases commenced later against the applicant were based on a flawed process in which the applicant was not given an opportunity to explain his side of the story.

Counsel further submitted that under sections 3 and 7 of the Commission of Inquiry Act, the Commission had a duty to make a full and impartial inquiry. The report to be submitted to the President had to be a full record. Counsel submitted that the inquiry would only be full if documents relied upon were availed; it would be faithful only if notice of the said documents, was given to the applicant and would be impartial only if all parties were given an opportunity to be heard. Counsel urged that though the Commission Chairman had made a directive that the applicant be availed relevant documents that order was not complied with. On the contrary, documents were in fact later relied upon by the Commission in violation of the principles of natural justice, which was enough reason for this court to grant the orders of certiorari. This was also the basis for the applicant seeking for orders of prohibition against the Attorney-General, since the Attorney-General was acting on the same flawed report to prosecute the applicant.

In response to the submissions of Counsel for the respondent, Mr Simani submitted that the application was well founded and that important issues had not been responded to. Counsel submitted that counsel for the respondent had in fact agreed that the Attorney-General relied on the Commission's report to bring the two pending criminal nos. 518 and 519 of 2006 cases against the applicant. Counsel contended that the Commission actually ignored the evidence of Mr Werunga and others. That since Mr Werunga was the person who made the payments, his evidence should not have been ignored without giving reasons. These payments, counsel submitted, were the basis for the two criminal cases. Counsel further submitted that one could not separate the Commission's report from its proceedings. In addition, it was not true that the court had to read the whole report before making a decision on the offensive paragraphs. Counsel also submitted that the verifying affidavit should be read as one complete document.

Lastly, counsel submitted that the Commission failed to make a faithful report, to accord a fair hearing, ignored favourable evidence to the applicant, took into account irrelevant evidence, was not impartial and unfair, and failed to meet the applicant's legitimate expectation.

The Respondent's Case

The respondent (***the Attorney-General***) contended that the applicant's application was founded on two limbs. Firstly, the perceived shortcomings of the Goldenberg Commission's Report. Secondly, the alleged failure or long delay by the Hon Attorney-General in instituting criminal charges against the applicant. That the Applicant was questioning the integrity of the Commission's findings as contained in its Report, and was also questioning the propriety of any criminal charges and prosecution of the Applicant, in view of his rights to a fair trial within a reasonable time as provided for under Section 77 (1) of the Constitution.

On the merits of the Commission's findings it was contended that there was actually material evidence to support the Commission's findings regarding the applicant, if one studied the entire verbatim record of the Commission's proceedings. That, even if the Commission's findings were found to be tainted and were quashed by the court, that would not be a proper basis for stopping the Attorney-General from instituting criminal charges against the applicant, unless it was shown that the Attorney-General was merely executing the Commission's findings.

It was contended that it was clear from the Attorney-General's press statement dated 10th February, 2006 that the Attorney-General had in fact directed that further investigations be carried out by the police. Therefore, the police carried out further investigations resulting in the applicant and others being charged in criminal cases Nos. 518 and 519 of 2006. Consequently, it could not be said that the Attorney-General intended to exercise the powers conferred upon him by section 26 (3) of the Constitution arbitrarily.

It is also contended that, even if the Commission cleared the applicant of any wrong doing, the Attorney-General would still be at liberty to have the applicant prosecuted if, in his opinion, there was enough evidence to warrant a prosecution. Lastly, that the Attorney-General could only be prohibited from prosecuting if it was shown that he was acting in excess of or in abuse of the powers conferred on him under Section 26 (3) of the Constitution, which was not the case.

As to the right to fair trial within a reasonable time, it was contended that the Commissioners did not purport to pronounce the applicant guilty of any criminal offence. In any case, no trial magistrate would be expected to be influenced by the generalized findings of the Commission regarding the culpability of the applicant. That the Attorney-General's objection to the Law Society of Kenya's initiated private prosecution, was because the Law Society of Kenya was obliged to first avail whatever material evidence they had to the Attorney-General. They could only go to court if the Attorney-General failed to act. Lastly, it was contended that the requirements of Section 77 (1) of the Constitution regarding the right to a fair trial within a reasonable time only applied in cases where someone had already been charged in court. The time for fair trial did not start to run before a person was charged.

With regard to the principle in the cases of ***GITHUNGURI -VS- REPUBLIC*** (*supra*) and the case of ***REPUBLIC v PATTNI*** (*supra*), that the Attorney-General may lose the right to prosecute, it was submitted that that would only arise in situations where the Attorney-General had decided not to prosecute a person. In our present case however, the Attorney-General had never made a decision not to prosecute. It was contended that the court could quash the Commission's report/findings, but it could not quash the evidence in the Commission's proceedings. In addition, the applicant had not alleged any abuse of authority by the Attorney-General, as all the applicant's grievances herein were directed at the Commission, not against the Attorney General. If the complaints were to be directed at the Attorney-General, the Attorney-General should have been made a party.

Mr Kang'ata for the Respondent, submitted that in proceedings such as these or judicial review parties who were targeted in the proceedings, such as the Attorney-General must be joined as parties. Counsel submitted that it was important to demonstrate what complaint was alleged and against which named

party. That would enable the said party to respond to the application. Counsel submitted that the failure to name the Attorney-General as a party was a fatal defect to the application, as that failure prejudiced him in a way that he was not able to respond properly to the application. Counsel contended that, even the two cases targeted to be prohibited Criminal Cases Nos. 518 and 519 of 2006, were not mentioned in the application but were mentioned in the further written submissions. Counsel submitted that the Attorney-General was not sure whether he was in these proceedings to defend the report, or his conduct.

With regard to the proposed amendments, it was contended that the proposed amendments were not occasioned by any new matter arising out of the affidavit of any other party to the application, as contemplated by Order 53 rule 4(2) of the Civil Procedure Rules. Therefore, the applicant should not be allowed to rely on any grounds, or seek any relief except the grounds and reliefs set out in his initial statement dated 26th July, 2006.

Counsel further contended that in these proceedings, there were two causes of action, the complaint regarding the inquiry on the one hand, and the conduct of the Attorney-General, on the other hand, which were confusing. Counsel submitted that, if the Attorney-General was being pursued in respect of the exercise of his powers under Section 26 of the Constitution, then he should have been named as a party, to enable him account for his conduct. Counsel contended that the **SAITOTI** case (*supra*) was different from the present case, because the Attorney-General was found to have acted contrary to the doctrine of separation of powers. Counsel contended further that in the **SAITOTI** Case, (*supra*) the issue was the conduct and findings of the Commission not the conduct of the Attorney-General. Counsel submitted that, to the extent that the Attorney-General was sought to be prohibited from carrying out his functions outside the report of the Commission, this application was fatally defective and it should be struck out.

Still on the issue of form of the application, Counsel submitted that what was before the court was the Amended Notice of Motion dated 18th September, 2006. However, in that Amended Notice of Motion, the applicant was **CHERUIYOT** and not the **REPUBLIC** as required by the law. That defect could be a typing error or inadvertence, but it rendered the application fatally defective, hence the application should be struck out. Counsel contended that it was not material whether the error was detected late in the day or even detected by the court. Since it was not a minor error, the application has to be struck out as the error could not be corrected.

On jurisdiction, Counsel submitted that the jurisdiction of this court was derived from section 60 of the Constitution. Counsel contended that, in these judicial review proceedings, the court was not exercising criminal or civil jurisdiction, but rather, “**such other**” jurisdiction. Such other jurisdiction, counsel contended was found in the Constitution under section 65, 67 and 84 of the Constitution, section 8 of the Law Reform Act (**Cap. 26**), as well as Order 53 of the Civil Procedure Rules. Counsel contended that it was not proper to combine judicial review reliefs and reliefs under section 84 (2) of the Constitution in the same cause, especially where the court had not been properly moved under the specific legal provisions applicable to section 84(2) of the Constitution. Counsel contended that the mixing of the two types of reliefs in the same Judicial Review application was fatal to the application. Counsel sought to rely on the case of **REPUBLIC v COMMISSIONER OF POLICE EX- PARTE KARIA (2004) 2 KLR 506** where it was held that it was improper for an applicant to combine a judicial review application and a constitutional application.

Counsel submitted that, though the prayer for certiorari arose from the alleged errors in the Commission’s proceedings and report, the prayer for prohibition did not flow from the said report. Counsel contended that two separate applications should have been filed. Counsel submitted that, to the extent that the prayers sought against the Attorney-General related to his exercise of powers under section 26 of the Constitution, the said powers could only be questioned in the context of section 123 of the Constitution. It was Counsel’s position that the applicant had not discharged his burden of demonstrating to the court that in Chief Magistrate criminal cases Nos. 518 and 519 of 2006, the Attorney-General had acted contrary to the Constitution or breached any law. Counsel further argued that delay alone could not be a threat to a fair trial. In any case, except in rare cases, there was no time bar to the Attorney-General in bringing criminal proceedings. Counsel sought to distinguish the **GITHUNGURI** case (*supra*) on the basis that, in that particular case, there was a promise made by the Attorney-General not to prosecute.

Specifically on the prayer for prohibition, counsel submitted that the applicant had not brought himself within the **GITHUNGURI** case (*supra*) Counsel contended that it had not been demonstrated that the Attorney-General wished to prosecute the pending two cases on the basis of the Commission's report. Counsel contended that the applicant did not establish that there were no further investigations after the Commission's report. In any case, this court had no jurisdiction to examine the further evidence as that was for the trial court. On this counsel sought to rely on the case of **MEIXNER & ANOTHER v ATTORNEY-GENERAL 2005 2KLR 189**, where the Court of Appeal held that it was the trial court which was best equipped to deal with the quality and sufficiency of evidence. Counsel further submitted that, since the applicant did not seek to quash the Commission's proceedings, the Attorney-General could actually prosecute on the basis of evidence from the proceedings.

On the request for orders of certiorari, counsel submitted that all the applicant had done was to try to find faults in certain paragraphs of the Commission's report, which he wanted this court to quash. Counsel contended that the court was being asked to examine the evidence limited to the alleged offending paragraphs, which was akin to this court sitting on appeal and substituting the Commission's findings with the findings of this court. Counsel contended that, that could not be a function of a judicial review court. Secondly, it was not possible to establish the faults without this court looking at the entire record of the proceedings. Counsel submitted that, though Mr Werunga did not testify that the applicant was in Dr Koinange's office for the meeting, other witnesses present said so. The fact that Mr Werunga did not mention the applicant, was not good ground for quashing the finding of the Commission. Even the fact that Mr Arap Bii did not mention the applicant as having attended the meeting was no ground for quashing the Commission's findings.

On the merits of the Commission's findings, counsel submitted that the error of the Commission in misconstruing the testimony of Mr Werunga was merely an error on the face of the record. On the letter to the IMF signed by Hon Nyachae and Justice Ringera, (**then Solicitor General**), counsel submitted that, at that time, the relevant evidence had not been availed to the Attorney-General.

Counsel also submitted that in the **SAITOTI** case, the prayers sought were specific. The applicant therein relied on technical advice to approve extra compensation for gold export. That was the reason why the Attorney-General was prohibited from prosecuting him. Counsel contended that the whole report with regard to **Saitoti** would not stand. Counsel submitted that the question of a fair trial herein was not directed on the Commission, but on the Attorney-General which was wrong.

Counsel also submitted that the parts of the written submissions which were not based on documents filed, and should therefore be struck out. These, counsel contended, included written submissions regarding publication of the Commission's report in the media, and the contention that the Commission was presided over by a Senior Judge of Appeal and two Senior Counsel. Counsel contended that, though the proceedings were reported in the press, the report of the Commission was not. Counsel also attacked the introduction, in the written submissions, of the letter to the IMF, which in his view, could only be introduced by way of further affidavit in accordance with the provisions of Order 53 rule 4 (2) of the Civil Procedure Rules. Counsel contended that the letter to IMF did not give any assurance to the applicant that he would not be prosecuted. Counsel also submitted that the letter for payment of Kshs.5.6 billion was written on the applicant's advice on 19th April, 1993.

Counsel urged us to find firstly, that the Judicial Commission of Inquiry's report was well founded, except for minor deficiencies which could be attacked. Secondly, that with regard to the applicant, the report was not tainted. Thirdly, that a case had not been made for the grant of prohibition orders against the Attorney-General.

I

FORM OF THE APPLICATION

Although the point concerning the form of the Amended Notice of Motion was raised by the Court, the Respondent's Counsel did all the same take it up and submitted that the application before us was

incompetent in stating in the heading the name of the Applicant instead of the Republic as the Applicant. However, it should be noted that this Court gave leave to amend the Notice of Motion dated 3rd August, 2006 on 23rd May, 2008 and the amendments allowed or approved did not include the inclusion of the name of the Applicant in place of the Republic. Surely any amendment without leave of court is ineffective. We agree with the learned Counsel for the Applicant Mr Oriema that the subsequent inclusion of the name of the Applicant in the heading of the Amended Notice of Motion was an inadvertent error or typing error. In any event all approved amendments are the only additions to the original Notice of Motion which remains intact and it had the Republic as applicant. Procedurally we hold that amended pleadings relate back to the Original pleading. We hold that after leave to amend the Notice of Motion the Court has one pleading not two.

We therefore hold that nothing turns on this objection and we find and hold that the Amended Notice of Motion is deemed to have the heading of the Original Notice of Motion and that the application is competent and properly before us. The objection is therefore overruled.

2

WHETHER THE ATTORNEY GENERAL SHOULD HAVE BEEN JOINED IN A CONSTITUTIONAL APPLICATION

The first point to note is that this application has been principally aimed at attacking the Commissions Report in so far as it affects the Applicant. Commissions of Inquiry are subject to judicial review by the High Court and therefore an applicant invokes the statutory judicial review jurisdiction namely the Law Reform Act (Cap 26) and Order 53 of the Civil Procedure Rules when challenging such inquiries. The second point to note is that issues of whether a trial is within a reasonable time and what a fair trial is, are constitutional issues but it would be irrational and unreasonable to ask an applicant who is relying on the grounds arising from the Commission's Report to bring a separate constitutional application in order to canvass or ventilate the constitutional issues touching on issues of a fair trial. Under s 3 of the Judicature Act (Cap 8) this Court is obligated to exercise its jurisdiction in accordance with the Constitution in every matter that is brought before it. In addition issues of fair trial are issues which stem from the inherent jurisdiction of the Court. As the Applicant's principal challenge is based in judicial review and is targeted at the Report and how that report is said to have affected the process of a fair trial it would be inappropriate to ask an applicant to bring a separate Constitutional application based on the same facts. It should also be noted that the Honourable the Attorney General is the Chief Legal Advisor to the Government of Kenya and he is presumed to have been involved in the events leading to the appointment of the Commission, including having advised on its appointment. He also attended all Commission sessions or proceedings as *amicus curiae*. In addition he was served with the judicial review application both as the Attorney General, and as an affected party in the judicial review application and also as Counsel of the Commission or Commissioners. In judicial review proceedings it is not necessary to join all the parties provided the applicant serves all affected or interested parties. Under Order 53 rule 3(3), an applicant is required to swear a special affidavit concerning service of the application on all affected parties. We therefore hold that the Attorney General is properly on record both in his own right and as an affected party under the judicial review proceedings and as counsel for the Commission and/or Commissioners. In other words the issue of a fair trial can still be dealt with by the court even outside the pre-requisites of s 77(1) of the Constitution because the court is the final arbiter of the public interest and the issue of a fair trial is the heart of any court proceedings. Without embracing the ideals of a fair trial a court loses its substratum and is left with the four walls!.

Turning to the substance of the objection, the point raised by *Mr Kangatta*, it is not novel, it was raised in both *GITHUNGURI II* case [1986] I KLR and in the *HON GEORGE SAITOTI* case (cited in these proceedings) and it is important to consider the reasoning especially in the *GITHUNGURI CASE*. At pages 12 and 13 the Court addressed the issue as under:-

“The Applicant’s complaint is not that the court hearing his case will not be an independent and impartial court established by law as envisaged in Section 77(1). His complaint clearly is that the hearing of the case against him will not be within a reasonable time, and also that he shall not be

afforded a fair hearing. Without meaning to cast any aspersion on any trial officer in this contest we interpret the expression “fair hearing” to mean a “square deal” and also as being synonymous with a fair trial because so many years have elapsed.”

In some countries the power to prevent an abuse of process of the Court or to stop a prosecution because it is oppressive and vexatious is to be found in the common law and it also exists in the inherent powers of the Court. The great importance of this power is illustrated by it being statutorily enacted in Section 84 of the Constitution. It is a pre-requisite of the exercise of the power that at least one of the three conditions, specified in section 77(1) should exist. The applicant contends that part of those pre-requisites exist in his case, ie. No hearing within a reasonable time, secondly, not a fair hearing in the sense stated above.”

Even if none of the pre-requisites exist as required by Section 77(1) it would still be open to this Court to say under its inherent powers, and also by virtue of the provisions of the Judicature Act Cap 8, that it would not be in the public interest sometimes also referred to as public policy to allow the prosecution launched against the applicant to continue and issue Orders of Prohibition to stop it. It is as much in the public interest that breaches of the law should be punished as is to ensure that in the process of doing so, the people are not bashed about so that they lose respect for the law. If the law falls into disrepute it will have a shattering effect upon the society’s sense of security of their personal freedom and property. The Court is the final arbiter of how the public interest is to be preserved.”

We fully endorse the reasoning in the cases cited above. We cannot therefore see any basis for not giving the reliefs sought if merited because of the technical points raised by the Respondents Counsel. In addition this Court has a supervisory jurisdiction under s 65 of the Constitution and is entitled to move on its own motion to stop any unfair trial taking place in the lower courts. The issue of a fair trial is central to this Court’s supervisory jurisdiction. The Learned Counsel has relied on a string of cases, some of which have been handed down by some members of this Panel starting with the case of *HON LADY JUSTICE NAMBUYE v THE HONOURABLE THE CHIEF JUSTICE OF KENYA Misc Civil Application No. 764 of 2004*. However, in the *HON NAMBUYE* case all the principal reliefs sought (if any) were all based on the Constitution namely the role of the CJ and the right of hearing under s 62 of the Constitution including the status of the Tribunal. An application for judicial review was brought and the Court held that the same was incompetent and that it should have been brought under the relevant Constitutional provisions. The Court quite rightly held inter-alia that, it could not review the Chief Justice’s constitutional role under s 62 of the Constitution pursuant to its jurisdiction under the Law Reform Act. The unbroken thread in all the other cases cited is that the applicants sought reliefs stemming from the Constitution by way of judicial review applications. The cited cases are therefore distinguishable from this case. The Attorney General need not have been specifically joined as a party.

In the result, the objection on the mode of accessing the court is dismissed.

3

WHETHER THERE WAS BREACH OF RULES OF NATURAL JUSTICE STEMMING OR ARISING FROM THE COMMISSION’S REPORT

The Respondents have been unable to counter or explain the Applicants complaints, as to why towards the end of the Commissions deliberations the Commissioners allowed the production of critical minutes which subsequently formed the basis of some of the most adverse findings and recommendations against the applicant. The Commission used the minutes as a basis of considering the role of the applicant in the Goldenberg affair and it has not denied that the material was never availed to the applicant and in respect of which no opportunity was availed to the applicant to be able to present his case concerning the minutes. It is trite administrative law that any decision reached contrary to the rules of natural justice is void and therefore any decision reached by the Commissioners using the Minutes is void.

The very use of the minutes as set out above breached sections 3(a)(i) and (ii) and section 7 of the

Commissions of Inquiry Act (Cap 102). To the extent that the Commissioners used the Minutes, they are clearly guilty of procedural impropriety which is correctable by judicial review as well put by Lord Diplock in the case of *CCSU v MINISTER FOR CIVIL SERVICE (1985) AC 374* at 410. By the use of the minutes the Commissioners also acted unlawfully and contrary to the Act creating it, namely the Commissions of Inquiry Act. The use of the Minutes contravened s 7 of the Act and also violated the legitimate expectations of the Applicant to the effect that a judicial proceeding would afford him an opportunity to cross-examine on the minutes and to present his case on them. In other words, no reasonable opportunity of being heard was given to the applicant as regards the minutes. Thus in the case of *Re RACAL COMMUNICATIONS LTD 1981 AC 383* it was held as under:-

“an authority acts unlawfully if it fails to fulfil its statutory duty.”

In quashing the recommendations we will be walking in the footprints of *B. SURINDER SINGH KANDA v GOVERNMENT OF THE FEDERATION OF MALAYSIA (1962) AC 322* at page 323 where it was held:-

“secondly, that failure to supply the applicant with a copy of the report of the board of inquiry, which contained matter highly prejudicial to him and which had been sent to and read by the adjudicating officers before he sat to inquire into the charge amounted to a failure to afford the appellant “a reasonable opportunity of being heard” in answer to the charge within the meaning of article 135 (2) of the Constitution and a denial of natural justice.”

With respect, the Commissioners had a responsibility of addressing themselves on the relevant law and in particular to the need to accord the right of hearing as regards the minutes. It is common ground that the Commissioners did rely on the minutes without affording the applicant an opportunity of being heard. This lapse on the part of Commission or Commissioners is also in our view a breach of the legitimate expectation of the applicant, who having submitted to its jurisdiction reasonably expected, the conduct of the proceedings of the Commission, would accord him the opportunity of seeing, and cross examining on materials being used against him and further that the Commissioners would follow their own gazetted rules on adverse comments. With respect, allowing the production of adverse evidence, at the end of the Commission’s deliberations without affording either the applicant or his Counsel an opportunity as set out above, did breach the legitimate expectations of the applicant in two ways, namely, that the Commission’s proceedings would be done as per the rules and that the due process would be accorded. If the Applicant had foreknowledge that either the published rules of the Inquiry or the due process would not be followed, they had the option of not taking part in its proceedings. However because the rules of the Commission were published and gazetted and basically the Commission represented in advance that the rules would be adhered to, the applicant did take part in the proceedings as per the record. We find that they had cause to strongly object and also question the last minute inclusion of adverse evidence contrary to his legitimate expectations as regards the conduct of the proceedings. The Commission or the Commissioners are in clear breach of its or their statutory duty to act fairly as per section 7 of the Commissions Inquiry Act.

We find fault on the part of the Commission or the Commissioners on these grounds as well and on the high authority of the CCSU CASE cited elsewhere in the judgment holdings (1) and (2):

“1. That executive action was not immune from judicial review merely because it was arrived and in pursuance of a power derived from common law, or prerogative, rather than a statutory source, and a Minister acting under a prerogative power might, depending on its subject matter, be under the same duty to act fairly as in the case of action under a statutory power.

“2. That the applicants would apart from considerations of national security have had a legitimate expectation that unions and employees would be consulted before the minister issued her instruction of 22 December 1983 and accordingly the decision-making process would be unfair by reason of failure to consult them and would have been amenable to judicial review.”

We therefore find that failure to involve the applicant or his Counsel with the last minute production of

the minutes which the Commissioners subsequently relied on, in formulating their findings and recommendations, was a breach of the Commissioners duty to act fairly as required under s 7 of the Act and the omission also violates the applicant's legitimate expectation to have been given an opportunity to challenge the minutes. We note from the record that, the applicant's Counsel had queried the last minute procedure of admitting the minutes without any follow up by the Commissioners and the Commissioners proceeded to close the proceedings, before the opportunity was availed. There is evidence that Counsel for the applicant did immediately raise the issue but nothing was done except the closure of the proceedings thereafter.

4

WHETHER THERE ARE ERRORS OF FACT AND LAW

(i) Board minutes

As regards the admission, acceptance, use and reliance on the Central Bank of Kenya board minutes referred to in (3) above apart from being a breach of the Rules of Natural Justice, it further constituted taking into account irrelevant considerations in that, failure to allow any challenge on the minutes rendered them irrelevant and their use unlawful. Their use further constituted breach of the Commissioners own terms of reference and therefore the Commissioners were guilty of a serious procedural impropriety, and a breach of statutory procedure relevant to the Commission's work. All those lapses or actions render the relevant portions of the Commissions Report which rely on the Minutes and which refer to the applicant amenable to the judicial review orders of certiorari.

The offending paragraphs of the report are 634 to 641 including the accompanying conclusions from paragraphs 642 - 651.

(ii) Commissioning of the Price Water House Investigations leading to a report produced at the Commission as Exhibit 60.

While the Commissioners had the sole discretion to give whatever weight they deemed fit to the evidence before them, the Commission could not in law ignore relevant evidence on any material fact including acting in a manner that patently ignores the weight of evidence as recorded by the Commissioners. The Commission's exhibit 111E PAGE 2 AND EXHIBIT No 60 as well as the Commission's verbatim proceedings of 9th December 2003 page 68, 69 the Commission conclude at paragraph 589 of the report in an apparent attempt to absolve or clear a former Minister for Finance that he commissioned the investigations and the report. In the same breath at paragraph 531, the Commissioners acknowledge that the report which made significant revelations of the fraudulent activities of Goldenberg International Ltd and the Exchange Bank Ltd had been commissioned by the applicant. The Commissioners' conclusion on these two paragraphs, constitute an obvious irrationality.

We have studied the Commissions Report and the proceedings touching on this and agree with the applicant that indeed this is an important error of fact by the Commissioners.

Our finding on this is that where such an obvious but important error of fact is made whether made deliberately or inadvertently, lead us to two inescapable conclusions. Firstly, that due to the error the Commissioners could have asked themselves the wrong questions, and that when an authority asks the wrong questions its decision is a nullity in law. In support of this see the case of **RE/RACAL COMMUNICATIONS LTD (1981) AC 383**. Secondly, that such an error is clear evidence of bias as defined in the **HON SAITOTI** case where again the Commission had as regards the same Minister omitted to show when the change of guard as between the two Finance Ministers took place and the date was important in apportioning the blame between the two, the court had to order that the date be inserted in the Report and that Commission's Report be read together with the change of guard date inserted! The significance of the change of guard date in the **SAITOTI** case was that it was clear to the court that contrary to the Commissions Report that the Goldenberg affair empire collapsed after the first Minister i.e. **HON SAITOTI** had left office the empire flourished in fact under the nose of the second Minister.

The Commissioners were giving credit as here, to the second Minister contrary to the weight of evidence recorded by them. Surely this substantial error cannot be said to have been due to inadvertence because it is on a matter central to the Commissioners terms of reference.

We therefore find that this error of fact leads us to the inescapable conclusion of the existence of bias, in that credit is denied the applicant and heaped on an undeserving Minister contrary to the facts and evidence before the Commissioners. Considering that it is the applicant who appointed investigations upon which hang the entire scandal and its first revelation, the Commissioners bias becomes clearly manifest. We find that no one has the right to exercise statutory power in bad faith.

(iii) Dismantling of the Goldenberg Infrastructure

Again as in (ii) above, a perusal of the proceedings and report reveals that the Commission's conclusions continued in para 647 of the Report, were not supported by any evidence. This Commission's finding is to the effect that during the applicant's and the then Minister for Finance's tenure of office, several irregular things were happening intended to benefit Goldenberg International Ltd and the Exchange Bank but the applicant and the Minister did nothing and that the applicant avoided taking decisions on matters touching negatively on the two bodies. See also para 588 of the Report.

The above conclusions, findings or observations were made against the applicant, in the face of clear evidence before the Commission which pointed to the applicant having been the originator of the investigations into the Goldenberg affair and this should have naturally led to the opposite conclusion. We find that this conclusion was entirely irrational and Wednesbury unreasonable in that no other equivalent body could have reached the conclusions on the same facts and also for the following reasons:

- (a) That the PWC Report which apparently constitutes one of the most authoritative sources that unveiled the Goldenberg International Ltd and the Exchange Bank activities at the Central Bank and other banks was commissioned as stated above by the applicant - see paragraph 531 of the Report, vide his letter of 18th May 1993 which was the Commission's exhibit 111E page 2 and verbatim proceedings of 9th December, 2003 page 6867.
- (b) That it was the applicant who took measures to suspend the managers of both the Banking Department and the Foreign Department of the CBK who were suspected to have assisted suspect banks with questionable transactions. The suspensions were made by the applicant pending investigations which the applicant also commissioned - see Ex 111E page 5 and 6.
- (c) That it was the applicant who ordered criminal investigations into the reasons surrounding the breach by the Exchange Bank and another, of a circular of 4th July 1993 which prohibited direct credit to banks. The action taken appears in the Commission's Exhibit 111 E page 14.
- (d) It is the applicant who ordered the liquidation of the Exchange Bank Ltd as per the Commission's Exhibit 111 E page 10 and verbatim proceedings of 9th December 2003 page 6870.
- (e) By a letter of 5th November 1990 the Goldenberg International sought a waiver of condition (5) which would have favoured GIL as against other applicants and the applicant turned it down.

From the above, we find no evidence to support the conclusion contained in paragraphs 647 and 588 of the Report as against the applicant. Our finding on this is that it is improper and unlawful for a decision maker to leave out relevant matters or to take into account irrelevant matters. In the circumstances of this case such findings or observations unsupported by any evidence and which ignore relevant matters are also evidence of bias and with respect to the Commissioners, this led them to act irrationally in that no reasonable tribunal of the same stature would have come to the same findings observations or conclusions in the face of the evidence availed to them as set out in (a) to (e) above.

We therefore adopt as good law the finding in the case of **REPUBLIC v HOME SECRETARY *exparte***

VENABLES (1998) AC 407 and also in the **RE RECAL** case cited earlier to the effect that a decision is unlawful if the maker leaves out of account relevant matters, or takes into account irrelevant matters.

(iv) Alleged Meeting between the Applicant, with Vice President and Minister for Finance and the then Permanent Secretary on 1st November 1990.

The Commissioners at para 642 observed that there was an understanding among the 3 at the meeting to flout regulations and the law for an agreed purpose.

The conclusion was made by the Commission despite their having clear and uncontroverted evidence of inter alia the applicant's passport clearly indicating that he was outside the country on the above date and during the entire period referred to - see Commission Exhibit 154 (bb) and verbatim report of 24th July 2004 page 14401, and the applicant could not possibly have received the notification of GIL proposals contained in the letter of 1st November, 1990 as he was out of the country during the entire period.

Our finding on this is that this error attracts judicial review interventions based on bias, failure to take into account relevant considerations or taking into account irrelevant considerations, together with irrationality and therefore the findings of the cases cited in (iii) above apply with equal force.

The applicant has also challenged the evidence, observations and conclusion by the Commissioners on his alleged lack of protection of Mrs Mwatela and alleged harassment - Commission Exh 111 page 17, verbatim of 9th December, 2003 page 6833. The applicant has further alleged misapprehension of facts relating to Open Market Operations (OMO) of Treasury Bills para 420 of the report to the effect that the policy decision in March 1993 to neutralize excess government expenditures using OMO Treasury Bills was intended to cover for Kshs 5.8 Billion illegal payments by Treasury to GIL whereas the letter of 9th March 1993 by the applicant was written pursuant to a policy involving the Treasury and the International Monetary Fund. The Commission's conclusion on this was an obvious error of fact concerning the Kshs 5.8 Billion payments because while the policy as stated above, was formulated in March 1993, the payments of Kshs 5.8 Billion were effected in November 1993 and therefore the policy between the Treasury and the IMF contrary to the Commission's conclusion, had nothing to do with the payments of Kshs 5.8 Billion unless of course the IMF was involved and this would have been ridiculous and untenable. Moreover, the mode of payment as carried in paras 384 page 8481 of the Commission's verbatim proceedings of 11th February 2004, the person who effected payment clearly indicated he was instructed by the Treasury to transfer the payment to **PMG** main account Deposit 7.

The observations by the Commissioners concerning the reasons for the transfer of Mr Mumelo as per para 646 are unsupported by evidence in that it is clear from Exhibit No 111E page 5 that he had been transferred by the applicant.

Concerning the meeting of 19th April 1993 in the Permanent secretary's office where the applicant is said to have approved the transfer of Kshs 1.8 billion from PMG account to the Kenya Commercial Bank account the man who made the payments Mr Werunga, (since converted into a prosecution witness) had testified that Mr Riungu who gave him the letter and instructed him to pay told him that the letter had only been seen by him (Riungu) and Dr Koinange alone and that Mr Werunga was now the 3rd person - see Exhibit No 132 page verbatim of 11th February 2004 page 8478.

This evidence notwithstanding, the Commissioners relied on shaky evidence of the two accomplices Dr Koinange and Mr Riungu and the shaky memory of Dr Koinange's secretary. The Report sets out the Commission's own observations of the evidence of the three witnesses. They did so without any explanation and contrary to clear uncontroverted evidence of the witness, Mr Werunga who made the actual payments and who never mentioned the applicant at all as having been present. This conclusion by the commission was also made despite the fact that as Governor of the CBK, the applicant, had no legal or administrative mandate to approve payments at the Treasury and in his position he could not be involved in vetting or approving Government payments either at the Treasury or in the Banking Hall of the CBK and that no bank official sought his intervention and moreover there was no documentary

evidence in support of the applicant's involvement.

We also find no evidence in support of the sweeping statements by the Commission appearing in paras 643 and 651.

(V) Effect of failure by Respondents to controvert assertions by the Applicant

It is important to note and observe that apart from a half hearted challenge by the respondents Counsel of the applicants contentions pertaining to paragraph 652 of the Report, all the other challenges by the applicant as per the application before us and as outlined above which we have ourselves checked as against the contents of the Commission's Report and proceedings, have not been controverted either by demonstrating the existence of any other available evidence or by way of submissions based either on the report or the Commission's full report which was availed to the Court. The Respondent's affidavit in reply by Emily Kamau has not responded to the applicant's specific averments or contentions concerning the said errors.

The unavoidable conclusion is that either the Attorney General and the Commissioners accept the position as set out by the applicant in these proceedings, or that the contentions and challenges were too overwhelming for the Attorney General and the Commissioners to rebut!

The court therefore finds that all the factual errors of fact and law as set out in the application have been proven and hence the court's conclusion on the reason for its intervention as above.

5

WHETHER THE COMMISSION ACTED ULTRA VIRES ITS MANDATE AS AGAINST THE APPLICANT

On this we accept in full the applicant Counsel's submission that the Commissioners failed to take into account relevant considerations and that the Commissioners did take into account irrelevant considerations in the instances specified.

The Commissioners' lapses, omissions, errors of fact and law all defy inadvertence or slip ups due to the sheer number of errors, their materiality and their effect on the final conclusion reached. We regard them as serious errors and our conclusion is that the Commission did act ultra vires its mandate as submitted by the applicant and not rebutted or controverted by the respondent by way of affidavit evidence or otherwise. A report with such errors as set out cannot be said to be full, faithful or impartial as set out in s 7 of the Commissions of Inquiry Act. The Commission further acted unreasonably and irrationally as submitted by the applicants counsel Mr Oriema. The paragraphs which fall under this heading are paragraphs 643, 644 and 647 of the Report.

When a tribunal, while engaged in a proper inquiry departs from the rules of natural justice, or asks itself the wrong questions or takes into account matters it should not take into account, it thereby steps out of its jurisdiction because by so doing it turns its inquiry into something which Parliament did not direct and all these lapses render its purported decisions or recommendations to be nullities as was held in the *ANISMINIC LTD v FOREIGN COMPENSATION COMMISSION (1969) 2 AC 147 at 195*. In this regard we accept as good law the holding of *Warrington LJ* in the case of *SHORT v POOL (1996) Ch66 at 90* where he observed:-

“No public body can have statutory authority to act in bad faith or on irrelevant grounds and any such act is unauthorized and ultra vires.”

It is also clear from the above analysis of the challenges against the Commission that the Commissioners did in fact make several major adverse findings against the applicant which had no relation whatsoever to the evidence before them or which substantially contradicted such evidence before them. To the extent this happened as outlined elsewhere in this judgment, we find the Commissioners findings unreasonable,

irrational, ultra vires and unlawful and further that they went counter to reasonable expectations as defined and expressed in both the cases of *ASSOCIATED PROVINCIAL PICTURES HOUSES v WEDNESBURY CORPORATION (1948) IKB 223* and the *CCSU v MINISTER FOR CIVIL service* cited elsewhere in this judgment.

It is important to emphasize that the Court is fully aware that it is not in law entitled to substitute its own decisions in place of those of the Commissioners but where the grounds for judicial review arise, the Commission's findings are not immune to the Court's scrutiny and orders. On the court's right to review especially questions of fact and law *Michael Fordham JUDICIAL REVIEW HANDBOOK* paras 38 and 39 has clearly laid the basis for intervention as under:-

“In relation to factual matters, intervention by the reviewing court is warranted where there is: (1) an incorrect finding as to precedent fact; or (2) an irrational conclusion of fact.”

“Generally speaking, factual questions are seen alongside questions of discretion as matters within the public body's field of judgment, to be subjected only to soft review. This stance is fortified by the realization that public bodies are perfectly well-equipped to deal with questions of fact; and that the legislature has entrusted such matters to them. As always, however, all is not deference. In the first place, the infirmities of the fact/law distinction no doubt provide ready scope for a reviewing court anxious to intervene. There are even hints of factual error being characterized as ‘ultra vires’. More respectably perhaps, the critical balance is found in a traditional two-tiered review whereby a factual matter may be either be: (a) a hard-edged question which the body is not entitled to get wrong (precedent fact); or (b) a soft question which the body is not entitled to get ‘badly wrong’ (irrationality).”

It is clear to us that going by the findings set out above and summarized below the court is fully entitled to intervene on the two grounds set out above which are (a) an incorrect finding as to precedent fact; or (b) an irrational conclusion of fact.

6

THE GROUNDS FOR COURT INTERVENTION

- (1) Central Bank Minutes never availed to the applicant and used to support findings and recommendations.
- (2) Except at the final stage of the inquiry, the Report clearly indicates that all major findings had not established the applicant's involvement. It is the unlawful last minute use of the unchallenged minutes which were used to justify the final recommendations. See paragraphs 634 – 654.
- (3) The Commission's misinterpretation and misdirection on the Central Bank policy which was done in consultation with the World Bank and the Commission's patently erroneous conclusion that the change of monetary policy was aimed at covering up the scandal and in particular the payment of Kshs 5.8 billion when the policy was announced in March and the Bills were paid in November. We find no rational link – see paragraph 639.
- (4) Conclusion that the applicant had played a role in the Goldenberg proposal whereas at the material time the commission had what appears to be watertight evidence of the applicant's absence abroad. The scheme was approved and implemented in his absence – see paragraph 642 of the report, the letter of the scheme approved by the then PS Mbindyo on 1st November, 1990 was written in the absence of the applicant.
- (5) A reading of several parts of the report reveal repeated findings by the Commission that there was no documentary evidence connecting the applicant, and the final conclusion attributing his involvement contradicts all previous findings as recorded in the Report. A judicial inquiry should have some respect for facts and evidence and we find that they had no basis for the challenged conclusions. Similarly, there

was no evidence in support of the conclusion that the applicant relied on junior officers. He was in charge of policy and he should have been nailed on this on the strength of any available facts or evidence – see paragraph 643 of the report.

(6) The Commission ignored Bank Practice Operations Manuals and the principle of delegation aimed at detecting any irregularities at every level which clearly located the departmental and individual roles concerning the challenged transactions. It was clearly unreasonable to have assessed the applicant's involvement on any other yardstick except the manuals.

(7) The Commissioners' finding that the applicant avoided taking decisions on matters touching on Exchange Bank when the Commission had before it evidence;

- That the applicant instituted criminal investigations into why the Central Bank circulars were violated in favour of the Exchange Bank.

- That the applicant commissioned a special Audit of Exchange Bank and related banks by Price Waterhouse Coopers.

- That the applicant suspended senior managers who appeared to be assisting suspect Banks including heads of banking and foreign departments at the Central Bank of Kenya.

- It is the applicant who ordered the liquidation of the Exchange Bank Limited when evidence pointed to irregularities

(8) Concerning the applicant's alleged involvement in the payment of Kshs5.8 billion at paragraph 388 the Commissioners state that Dr Koinange's (an alleged accomplice) evidence was riddled with inconsistencies, but at paragraph 652 notwithstanding the inconsistencies identified by the Commissioners themselves, they went on to assert that on the basis of accomplice evidence of Dr Koinange, Mr Riungu and Dr Koinange's secretary, the applicant must have been involved in the transaction. All this flies in the face of the evidence of Mr Werunga and Mr Arap Bii. This conclusion was reached in the face of contrary evidence as follows:

- Mr Werunga who did the actual payment never saw the applicant on 19th April 1993 in Dr Koinange's office.

- Mr Arap Bii former KCB General Manager to whom the payments were made testified that he never saw the applicant.

- Dr Koinange's own evidence to the Public Accounts committee that:

“At no time did I know or believe that the payments I authorized were illegal. The payments were discussed and agreed on in the Treasury with the Minister and senior officials of the Treasury including the financial Secretary and the Paymaster General.....”

- Police statement by Mr Riungu in 1994 did not connect the applicant to the alleged meeting.

- Mr Riungu had further stated in his police statement that the instructions to pay had been wholly given by the accounting officer and nothing further was needed for purposes of the execution of the instructions to pay.

- Although the report suggested that the applicant as Governor should have known about the big payment of Kshs 5.8 billion because of its sheer size or magnitude of the amount involved, the Commissioners had evidence to the contrary that the payments was split into 3 tranches and the payment made over 3 months and therefore the individual payments did not stand out as unusual in banking terms as there were even bigger contemporaneous payments, which had nothing to do with the scandal, and which were being paid in the normal banking business or operations and the bank procedures did not

demand or require the applicant's role as the Chief Executive – see paragraph 654.

(9) The report to the IMF jointly prepared by the AG and the then Minister for Finance absolved the applicant of any criminal involvement save for possible negligence for which the applicant was relieved of his job.

All in all, we are compelled to reach the inescapable finding that there is clear evidence of bias, the asking of the wrong questions, and reliance on irrelevant considerations or failing to take into account relevant considerations, failure to base findings on evidence and finally the existence of serious breach of the rules of natural justice, and denial of the applicant of legitimate expectations in the conduct of the proceedings. All these are grounds for intervention by the court. The proof of any one of the grounds as outlined does provide the basis for the court's intervention and the grant of the relief sought by the applicant against the findings in the report. The sad thing to the court is the fact that it is unfortunately not faced with one or two flaws but with numerous flaws, each of which warrants the court's intervention in law.

We further find that failure to give reasons for the conclusions and recommendations as against the applicant and failure to rely on evidence for conclusion and recommendations is also a ground of intervention in judicial review. The enumerated turning points also reveal lack of application of the principle of proportionality by the Commissioners and a clear breach of their central mandate under section 7 of the Act creating the Commission.

The grounds available to the court for intervention cover the entire spectrum of the judicial review grounds namely the "3 Is" – illegality, irrationality and impropriety of procedure. Nearly every known ground of intervention is available due to the interlinks and overlaps throughout the entire spectrum of grounds. Indeed in terms of grounds of intervention the matter before us is a close rival of only one other case decided by the same court and touching on the report three and a half years ago.

Perhaps as regards the ground of illegality we should point out that our finding is that the Commissioners are in our opinion in clear breach of its statutory duty under section 7 of the Commission of Inquiry Act Cap 102. The findings, conclusions and recommendations are ultra vires the section which states:

"It shall be the duty of a commissioner after making and subscribing the prescribed oath to make a full, faithful and impartial inquiry into the matter into which he is commissioned to inquire to conduct the inquiry in accordance with the directions contained in the commission and in due course, to report to the President in writing the result of the inquiry and the reasons for the conclusions arrived at and also if so required by the President to furnish to the President a full record of the proceedings of the Commission".

We find that in the light of what is contained in the turning points, which are up to nine in number, the report as relates to the applicant and submitted to the President cannot be said;

- (a) to be full
- (b) to be faithful
- (c) to be impartial.

6

RIGHT TO A FAIR TRIAL

As stated at the outset and for the avoidance of doubt, we must state that in the exercise of its judicial review jurisdiction the court is also bound by the Constitution, as per section 3 of the Judicature Act. In addition it has inherent powers to prevent oppressive and vexatious use of its proceedings or abuse of its process whether contemplated or real and that the inherent powers to do so are neither by virtue of the

Constitution or statute. They are there because the court must always function as a court of law and must at all times have the ability to do justice in all situations. A Court has inherent powers to prevent abuse of its process and to safeguard the right of a fair hearing.

It follows therefore that it is unacceptable that this court should have asked the applicant to bring a separate Constitutional application in order to be heard on the issue of fair trial. It is the sole preserve of the Court in all situations to ensure a fair trial.

The Respondents' Counsel has submitted that the Commission Report's findings have nothing to do with criminal cases No. 518 and 519 before the Chief Magistrate's Court and that the Attorney General did conduct further investigations and that the charges in the two cases are based or grounded on the further evidence. This is hardly convincing in that the applicant was charged within 2 months of the publication of the Inquiry Report and after the Attorney General in two press releases had said that the Government had accepted the recommendations of the Inquiry Report. The exhibited press releases by the Attorney General which were published on 10th February 2006 and 15th March, 2006 respectively and exhibited in Emily Kamau's affidavit filed in reply on 8th November, 2006 clearly state:

- (i). The Government accepts the Commission's recommendations (AG's Press Report of 10th February 2006).**
- (ii). That in the AG's view certain offences had been committed by named individuals including the applicant.**
- (iii). The Attorney General purported to give instructions concerning the conduct in a related matter pending in the Constitutional Court.**

The Attorney General did not convince the Court that it was reasonable to suggest that the Investigations Team could have found further evidence in between the two Press releases and the date of the institution of the two charges namely CM No 518 and 519 of 2006. An argument was advanced that the new evidence became available within days of the publication of the Report, yet the same evidence remained unvaluable for over 15 years, of what we presume, continuous investigations by the Police or any other investigators. We pose the question why did the Attorney General go public concerning the Government's acceptance of the Commission's recommendations if there was anything further to be done concerning the publicly accepted recommendations? Our finding on this is that the charges in the two criminal cases as against the applicant are based on the recommendations of the Commission's Report. The argument that further evidence was obtained by the Attorney General is an afterthought to found charges against the Applicant on the basis of a flawed report but claim that those charges are based on further evidence by the Investigation Team which this court cannot question. The Attorney General's press releases and the long inaction of the so called Investigating Team for over 15 years clearly point to full reliance by the Attorney General on the Commission's Report in charging the applicant. There cannot be any other reasonable conclusion given the facts. After what he called final investigations as set out elsewhere in this judgment the Hon Attorney General had informed the IMF that the Applicants involvement if any was of possible negligence.

As found elsewhere in this judgment, there are numerous errors of fact and law which led to the recommendations upon which the charges in the two criminal cases are grounded. The learned counsel for the Respondent concedes that the Goldenberg Inquiry proceedings received both national and international extensive media coverage. However, he disputes that the Inquiry Report did receive international publicity and that the publicity did not prejudice the applicant or his chances of having a fair trial. He has also argued that the issue of publicity was not raised in the statement. On this our finding is that since it is common ground that the proceedings did receive both national and international publicity it follows that the same could reasonably be presumed to have happened as regards the product of the inquiry, namely the Commission's Report and its recommendations. The fruit of the proceedings was the actual report and its conclusions.

The unavoidable conclusion and finding is that due to the status of the Commission's Report and its

recommendations and the wide national and international publicity, the applicant has reasonable apprehension and also there would also be reasonable apprehension on the part of any fair minded and informed members of the public that no trial of the applicant, would be unaffected by the report and its errors and that the applicant cannot be afforded a “square deal” or a fair trial under the long shadow of a flawed Report and its recommendations. Yes, we agree that our judicial officers are professionals and are well trained including those in the lower courts but the role of training is only relevant to the issue whether the courts trying the cases or likely to try any other cases against the applicant have been properly established by law and are independent and impartial. However, the concept of a fair trial encompasses much more than training of judicial officers in that it is a process which starts long before the actual trial. For example we find the press releases by the Honourable the Attorney General, extremely self serving and at the same time extremely prejudicial to the subsequent trial of the applicant for the reason that such a high placed public official, a professional and a constitutional job holder, found it fit, in the public interest perhaps, to publicly state that the applicant had committed known offences. In our view the press releases have the potential of literally converting the trial, as against the applicant into a press trial and whereas the presumption of innocence constitutionally begins after the charge against an accused, the press releases and the wide publicity they received did in practical terms, impair the applicants presumption of innocence on the ground. Indeed, in a related matter, heard three and half years ago, after the court had handed down a verdict that was not expected by the media and some sections of public opinion, the hostility against the verdict, was apparent to at least two of the judges in this panel. The hostility obviously stemmed from pre judgments by the media and the public due to the extensive publicity. Without in any way casting aspersions on the judicial officers in the lower court it would not be realistic to expect them to be unaffected by a report of the status discussed in this judgment and even if they remain unaffected, there will still be a reasonable apprehension in the mind of a reasonable person that a fair trial would not be achieved or attained as per the almost universal principles set out in the **REGINA v SUSSEX JUSTICES Ex-parte McCathy (1924) IKB 256** to the effect that justice must not only be done but must be manifestly seen to have been done. The infrastructure of safeguards of a fair trial in a legal system, which result in varying verdicts, is as important as the verdicts, because upon this is the system judged, and confidence in it reposed or compromised in the eyes of the society at large. Perception of justice in a judicial process is as important as justice itself - it is the lifeline of judicial systems because it is on this that the Society’s confidence in the system hangs.

Moreover the matters upon which the charges are based or any likely charges took place over 15 years ago and the charges instituted over five years ago with the following as the background:-

- (1) The documents, witnesses and facts upon which the charges are based, have been available or should have been available to the Attorney General nearly 13 years ago. Charges were brought five years ago and the prosecution is still in process. All these factors militate against the attainment of a fair trial.
- (2) The Honourable the Attorney General had successfully sought the termination of CM Criminal private prosecution No 1 of 1994 in 1995 (13 years earlier) and apparently did nothing concerning the so called new investigations until the Commission’s Report was commissioned and published in a new Government Administration. At this point he had preferred charges against other accused persons except the applicant. He is now doing so now nearly 13 years later, using the same evidence whereas he could have taken over the Private Prosecution No 1 of 1994. Investigative institutions such as the police must do their work or be made to do their work. There can never be a substitute for the police in any civilized system. Commissions of Inquiry can never be substitutes for police! Even after a publicly declared deadline that the police conclude investigations by May 1995, they had not done so. Can any reasonable person believe that they became smarter and patriotic after the publication of the Commission’s Report? No way!
- (3) In 1995 the Honourable Attorney General gave a deadline to the police to conclude their evidence in May 1995 yet after the deadline nearly 13 years later, he confidently and very conveniently purports to start prosecutions based on alleged new evidence. We find no major distinction between the happenings here with those in the **Hon Saitoti** case or for that matter the earlier case of **GITHUNGURI v REPUBLIC (1986) KRL - and R v PATTNI HCC 229/03**. We therefore find that the Attorney General’s action is not within a reasonable time as required under s 77(1) of the Constitution and that in the

circumstances described the applicant cannot have a fair trial. It is significant to observe that the Attorney General's offers no reasonable explanation to the inordinate delay in taking action, and in the circumstances we find that the delay is also prejudicial to the Applicant's right to a fair trial.

(4) As the charges are based on a flawed Commission's Report as against the applicant, which flaws cover nearly every known ground in judicial review, such a trial would not be fair or seen to be fair both using the Kenya standards of what a fair trial is and the standards of a fair trial as defined in the international instruments ratified by Kenya - see the case of **R v CHIEF MAGISTRATE'S CITY HALL Ex-parte SENNICK Misc Civil Application No. 615 of 2005**.

(5) The Attorney General in the exercise of his powers under s 26 of the Constitution cannot reasonably be said to have been unaffected by the flawed Report in the circumstances.

In our judgment we find that the applicant cannot possibly be accorded a fair trial for the following reasons:

(a) Although the presumption of innocence constitutionally commences when an accused is charged, in practical terms the pre-trial events such as the extensive media coverage both local and international on the Commission findings, including adverse comments by the Hon Attorney in the press releases seriously erode or compromise the presumption of innocence, which in this case amounts to only a "paper" presumption of innocence as regards the applicant.

(b) The same factors as in (a) above do offset the principle of equality of arms on the part of the applicant. Thus, it cannot reasonably be said where at the trial an applicant starts off his defence with a weighty but erroneous report hanging over his head the principle of equality of arms has not been upset in practical terms. The Commission's Report does in a substantial way impair, compromise and erode the principle of equality of arms without which a trial cannot be said to be fair. His defence is in practical terms prejudiced by the Report and it cannot reasonably be said that he would have a "square deal" in the trials facing him. Justice must not only be done but it must be seen to have been done. A court such as this is not concerned with the possible guilt of the applicant but with the process being used to try him. The two are in our view distinct and what we have done is to apply the constitutional safeguards on due process without which a fair trial can never be assured or attained. The inquiry proceedings where Commissioners came up with a flawed report against an applicant and in which the applicant had to spend money on his defence in both the Inquiry and the trial we find that this does considerably erode the balance intended to be maintained under the principle of equality of arms. Looked at from all standpoints the Report casts a very long shadow pointing to possible lack of a fair trial. Many reasonable onlookers would wonder after the unequivocal press releases of the Hon Attorney General concerning the guilt of the applicant and findings in the Report whether it was possible to accord the applicant a fair trial. In our view, the work of the police concerning investigations cannot be taken over by a Commission of Inquiry without giving rise to serious prejudice to any intended subsequent Court trials, especially when the Commission's Report is flawed as against an accused. One might not doubt the wisdom of the Executive in setting up Commissions of Inquiry on grounds of public interest, especially political public interests, but one cannot fail to clearly see the judicial disaster some of them bring to bear on the attainment of a fair judicial process thereafter. This is what has happened here and the chances of a fair trial are extremely remote. The Attorney General made his bed let him lie on it! Evidence should be collected as per the relevant law by independent investigators and accused persons speedily prosecuted on that basis. There cannot be any shortcuts. This is what was contemplated by the Constitution. Awaiting for a flawed Commission report for over a decade in order to institute criminal proceedings, is to say the least a serious lapse of duty and the totality of the findings above, lead us to the irresistible conclusion namely - a serious miscarriage of justice would result if we were to look the other way.

The Goldenberg Inquiry was a judicial inquiry for all practical purposes. When the applicant submitted to its jurisdiction he rightly expected it to adhere to its statutory mandate and its terms of reference and in particular to accord to the applicant the right of hearing concerning all matters adverse to him. But as it has been clearly shown the Report was flawed as regard the applicant in critical matters as set out elsewhere in this judgment. The applicant's legitimate expectation to a fair hearing in respect of the two

charges or any new charges based on the same facts was thwarted by the Commission. In addition we are of the view that, on the ground, a flawed judicial inquiry did in a practical way deny the applicant equality of arms in the subsequent trials. Indeed in practical terms the applicant is being subjected to a semblance of double jeopardy in terms of preparedness in the two matters. It is also our considered view that a flawed judicial inquiry report did in a big way erode the constitutional presumption of innocence in the subsequent court cases because the applicant as an accused started off the subsequent court trials with flawed recommendations hanging over his head in trying to defend himself as against the State which had publicly announced through its Attorney General that it had fully accepted the Commission's Report! In our view, had the Attorney General taken the applicant to court after police investigations and we see no reason why he could not have done so, a fair trial would have resulted. In addition this would have ensured proper balance of arms, and would have safeguarded the presumption of innocence in the subsequent trials. The principles and safeguards of a fair trial could have been given practical effect or meaning. The concept of fair trial is not an abstract concept. It must have a practical meaning in every situation. Adverse pronouncements of a senior official and flawed findings of a Commission of Inquiry do in our view tilt the balance in favour of the State long before the actual trial. The presumption of innocence must not only have a literal constitutional existence, but must be there in practical terms. Any pre-trial erosion of the principle must never be tolerated by the Court. A fair trial must not only be seen in terms of an accused person's court appearance before a trained magistrate but must manifestly be there in practical terms and any pre-trial adverse or prejudicial inroads or lapses must be given proper weight by the court and their impact on the actual trial carefully considered.

Although the safeguards of a fair trial are well known and documented after an accused is charged in court, the pretrial process has many imponderables which must be counterbalanced by the court against the trial safeguards to ascertain if a fair trial can be attained. For example an accused person who is ushered into a courtroom immediately after an inquiry, which is flawed as against him and adverse to him, cannot be fully protected by a presumption of innocence or the apparent existence of the equality of arms in a subsequent trial. The existence of a flawed inquiry, adverse public pronouncements by a public official and the media publicity which accompanied the Inquiry, would deprive the applicant of a fair trial, because he starts the trial as the underdog in practical terms. In a situation such as the one before this court, it would be difficult for even a trained magistrate to maintain the constitutional balance of power between the State and the individual. It is only the High Court both as the constitutional supervisor of the lower courts and the foremost guardian of the Constitution that can, demand, secure and guarantee the necessary balance, and where as in this case the balance tilts against the applicant, stop the trial.

At this time and age, a constitutional court cannot ignore the pretrial processes because for the concept of a fair trial both before and after the charging, to have practical meaning, the entire process must be joined together by an unbroken thread of fairness. Where this thread is broken at any point the courts should be on guard, because the ultimate fruit of the entire process cannot possibly be good.

In this matter the applicant has literally staggered into the Court with a load on his head, of interalia, a flawed inquiry report against him, hostile public pronouncements by a public official together with wide media coverage of flawed recommendations. The question is: Is he likely to have a "square deal," or be said to have equality of arms with the State? The answer must be a resounding no, hence this court's intervention.

The learned Counsel for the Respondent did argue that the issues of publicity of the Inquiry Report and the impact of publicity were never specifically raised in the Statement and ought to be excluded. In our view the concept of a fair trial does include both issues and the issue whether or not the applicant can be afforded a fair trial was raised in the statement.

Blacks Law Dictionary 6th edition has explained what trial by media is and its effect on the concept of a fair trial as follows:-

“the process by which the news media in reporting an investigation of a person on trial leads its readers to act as judge and jury in determining guilt, liability or innocence before the person is tried in a judicial forum. Failure to protect accused from inherently prejudicial publicity may

constitute deprivation of right and impartial trial as guaranteed by due process clause of Fourth Amendment.”

In other words trial by media is a phrase popular in the late 20th century, and early 21st century to describe the impact of television and newspaper coverage on a person’s reputation by creating a widespread perception of guilt regardless of any verdict in a court of law. Courts of law deal with affairs of men, and it would be absurd for them to ignore the role of media in the pretrial process and during the trial.

In our view although Counsel for the respondents has disputed that the report itself received wide media coverage he admits that the Inquiry proceedings did receive considerable domestic and international media coverage. With respect the contention lacks substance, in that it is the verdict of the Commission which constituted the fruit of the proceedings and therefore separating the two is like splitting hairs. In our view although we have a trained magistracy which is capable of shielding the proceedings from the media impact and other pronouncements of a senior government official such as the Hon the Attorney General, the Goldenberg Inquiry was no ordinary matter and we think that it would be unrealistic to rule out its impact on the court process taking into account the status of the Goldenberg Inquiry. We find that the flawed Report as against the applicant was inherently prejudicial and deprives him of a fair trial.

We hold that where an inquiry takes evidence including that of a person who is subsequently charged in a court of law and such an Inquiry report is found to be seriously flawed as regards the accused, the Inquiry report itself does give rise to a presumption of prejudice and therefore the subsequent trial cannot reasonably be expected to be fair. Actual proof of prejudice would not be needed.

In the case of *IRVIN v DOUD 21366 US 717 (1960)* the Supreme Court struck down a state conviction solely on the basis of pretrial publicity. The publicity of the Hon Attorney General press releases and the Inquiry report findings were in our view pervasive and prejudicial to the requirements of a fair trial.

Again as held above the Inquiry itself accompanied by the media reports on the flawed findings and recommendations, as we have found, did constitute the “real trial” of the applicant and the state should content itself with it. Thus in the case of *RIDEAU v LOUISIANA 373 us 723 (1963)* the Supreme Court reversed a conviction arguing that a televised confession of guilt of the accused was the “real trial.”

The flawed findings of the Inquiry Report did to a very big extent encroach on the lower court’s territory and this should have been foreseen by the Hon Attorney General before the Inquiry was set up. The flawed report in our view is likely to deny the lower court even with a trained magistracy its primary purpose - that is, adjudicating in an objective, calm and solemn courtroom setting. Sadly in our view all inquiries except where terms of reference address this, would where adverse findings and recommendations have been made, accompanied by pervasive publicity or trial by newspapers are likely to result in the denial of the lower courts purpose in the subsequent trial. Although the facts are different we agree with the principle enunciated in the case of *SHEPPARD v MAXWELL 384 US 33 (1966)* that the courts must guard their role from being encroached upon thereby failing to accord the accused persons fair trials.

In addition, when a flawed report and its recommendations have received such wide publicity we find that although it is the function of the court to adjudicate on the basis of the facts and evidence adduced in the actual court, the adverse findings and recommendations are likely to result, if they have not already done so, in a public prejudgment of the guilt of the applicant which situation derogates from the principle that justice must not only be done but also seen to have been done. In our view it is necessary for the court to intervene, where as in the case, there is a risk that the trial would be unfair by reason of the flawed recommendations and findings and also because of the possible effect of the adverse publicity.

Perhaps we should make it clear that press freedom is a cherished freedom in all genuine democracies but when the issue in court, is the conflict between the concept of freedom of speech and the requirements

of a fair trial other things being equal the later should prevail. While it has not been demonstrated how the lower court has so far addressed the above essentials, we have no hesitation in stating that the chances of the bigger picture as it applies to the concept of a fair trial and its values, being overlooked by the lower court appear real to us - the risk is there. In the New Zealand Court of Appeal case of ***GISBORNE HERALD CO LTD v SOLICITOR GENERAL 1995 - 3 NZLR 563*** the values of a fair trial were stated as under:-

“Contempt is directed to the protection of the public interest in the due administration of justice by an impartial court. Fair trial values are a protection both for the public in respect to the generality of cases as well as the particular case and to the accused in the particular case. Fair trial is not a purely private benefit for an accused. The public’s confidence in the integrity of the justice system is crucial. The law of contempt is concerned with preventing prejudicial publicity rather than minimizing its impact at trial.”

In our judgment, the flawed findings and recommendations together with accompanying adverse publicity did deny or likely to deny the applicant well in advance, the right to a fair trial and we cannot do better than re-echo the words of Chief Justice Warren in the case of ***ESTES v TEXAS 381 us 532 (1965)*** where massive pre-trial publicity was held to have denied the accused the due process of law and that **“no procedure or occurrence which threatened the right of a fair and reliable verdict could be tolerated.”**

Finally we find that imputations such as those carried by the press releases of the Honourable the Attorney General do undermine the values and principles of a fair trial. The flawed report and its findings and recommendations as against the applicant, are inherently prejudicial to a fair trial as opposed to being potentially prejudicial. In the latter case proof of actual prejudice would have been necessary. The wide media coverage of the Inquiry and the pre-trial media coverage, the imputations of the State official, the flawed findings and recommendations of the inquiry do create substantial risk of prejudice in the subsequent trials and we further find that these factors do have the cumulative effect of undermining in practical terms the principle of equality of arms and its application and it would be unsafe for the Court not to intervene, to prevent what in our view would be a serious miscarriage of justice.

Any power which is not properly used results in abuse of power. In our judgment the public interest intended to be achieved by the establishment of Commissions of Inquiry should be reconsidered by the Executive and the impact of such Commissions on any intended judicial process put on the scales. Thus, while it is not in doubt that the Commissions could serve the public interest in political terms, they have the potential effect of subverting the` course of justice in existing trials or future trials.

To the court, the attainment of a fair trial is a greater public interest than anything else and this is what we must uphold. All in all, the cumulative effect of the grounds intervention set out in this judgment must result in this court granting the reliefs sought.

CONCLUSION

For the reasons set out above we have no hesitation whatsoever, in quashing the offending paragraphs in the Commission’s Report. The Report is accordingly removed into this Court and we forthwith quash the Report in so far as it adversely refers to the applicant or to the extent of its reference to the applicant herein in paragraphs 199, 202, 212, 634, 641, 642, 643- 654 and 847 (h) and quashing orders are forthwith issued accordingly.

In addition we forthwith grant orders as prayed in the Amended Notice of Motion dated 3rd August, 2006 and for the sake of clarity and avoidance of any doubt orders of prohibition shall immediately issue against the Attorney General or any other person prohibiting him and/or his agent from continuing to prosecute the applicant in CM Criminal Case No. 518 and 519 of 2006 or by instituting or presenting any further charges against the applicant in relation to the Goldenberg affair.

It is so ordered.

DATED and delivered at Nairobi this 21st day of November, 2008.

J G NYAMU

JUDGE

R WENDOH

JUDGE

G DULU

JUDGE