REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA

AT NAIROBI

MILIMANI LAW COURTS

Misc Appli 372 of 2006

WILFRED KARUGA KOINANGE …….……. APPLICANT

V E R S U S

THE COMMISSION OF INQUIRY INTO GOLDEN BERG COMMISSION ……. RESPONDENT

R U L I N G

This Ruling relates to an application brought by way of a Chamber Summons dated 31st July, 2006 but filed under a Certificate of Urgency of the same date and both filed on 1st August, 2006. The Application first went before Lady Justice Aluoch who for the reasons she gave declined to certify the application as one suitable for hearing during the High Court Vacation and directed that the same be placed before a Judge of the Constitutional and Judicial Review Division of the High Court at the beginning of the new term on 18-09-2006.

After the beginning of the New Term on 18-09-2006, the matter was placed before the Hon. Mr. Justice Nyamu, the Presiding Judge of the Constitutional and Judicial Review Division before whom Mr. A.R. Rebello appeared, and submitted on, the urgency of the application, particularly of the impending hearing on 24th October, 2006 of the various Criminal cases facing the Applicant in the Subordinate Court, and of which cases, the Applicant seeks orders of prohibition to prohibit the Attorney-General from prosecuting the Applicant on the basis of the evidence gathered under the Report of the *Judicial Commission of Inquiry Into the Goldenberg Affair*, and another order to quash adverse decisions, findings, comments, remarks, and insinuations contained in the said Report that are damaging to the Applicant.

The Presiding Judge of the Division did not only certify the application as urgent but also directed that the Application be served upon the Respondent, and that is how Mr. L.M. Kangatta, learned State Counsel was present in Court on 3.10.2006 when this matter came before me, and proceeded to be heard *inter partes* although under Order LIII rule 1 (2), the application is made *ex parte and is usually heard ex parte.* I say usually because there are no words either in equivalent provision in England under a similar Order 53 of the English Civil Procedure Rules which expressly prohibit the hearing of such an application *inter partes.*

As Mr. Rebello learned Counsel for the Applicant commenced his submissions Mr. Kangatta sought the court's permission to raise a preliminary point of law, that the Application was time-barred by virtue of Section 9 of the Law Reform Act, (*Cap. 26)*, Laws of Kenya.

I ruled that the point be raised in his reply to the Applicant's Counsel submissions for leave to bring judicial review proceedings for the following orders that-

(1) an order of *Certiorari* to remove into this Honourable High Court the report of the Judicial Commission of Inquiry into the Goldenberg Affair and to quash the adverse decisions, findings, comments, remarks, and insinuations contained in the said Report that are damaging to the Applicant,

(2) an order of prohibition directed at the Honourable Attorney-General and/or the Commissioner of Police or any other authority, body or persons and each of them from asserting, preferring criminal charges against or prosecuting the Applicant in connection with or touching upon any matters (s) the subject of the Report of the Judicial Commission of Inquiry into the Goldenberg Affair or otherwise,

(3) an order of prohibition directed at the Hon. the Chief Magistrate and any other Magistrate from hearing, proceedings with or making any judgement in any Criminal Case and/or any criminal charges relating to or otherwise connected with or touching upon any matter the subject matter of the Report of the Judicial Commission of Inquiry into the Goldenberg Affair and Criminal Case Number 518 and 519 of 2006,

(4) the leave granted herein do operate as a stay of any and all decisions of the Attorney-General, the Commission of Police and any other authority, body or persons from preferring Criminal Charges against or prosecuting the Applicant in connection with or touching upon matters(s) the subject of the report of the Judicial Commission of Inquiry into the Goldenberg Affair until the determination of the Notice of Motion for Orders of Certiorari and Prohibition,

(5) the costs of this Application be in the cause,

(6) such further or other relief as this Honourable Court may deem just and fit to grant,

The Application was premised upon the grounds set out thereon namely-

(1) the Applicant seeks the protection of the Constitution and the law,

(2) the applicant seeks the protection of this Honourable court against oppressive and vexatious prosecution in several Criminal cases in respect of the same events;

and several other grounds which related to the hearing of the application during the Vacation and why it should be heard expeditiously which reasons have now been spent, as the application has been certified, and has been heard, hence this Ruling.

The Application for leave to bring judicial review proceedings for the above-captioned orders was also supported by the Affidavit Verifying the Facts in the Statement sworn on 31st July, 2006 by the Applicant, Wilfred Karuga Koinange (the Applicant).

The Applicant is a highly qualified man. He is a Medical Doctor. He is a *Member of the Royal College of Physicians (UK) 1970. DECT Prague* in 1970, and a *Fellow of the Royal College of Physicians Edin*. 1984. His Curriculum vitae runs into not less than six (6) pages attached to the Affidavit Verifying the Facts. He has had an illustrious carrier in the Public Service. He was Director of Medical Services between 1979-1987, and Permanent Secretary, Ministry of Research Science & Technology between 1987-1990, and Permanent Secretary Ministry of Research Science & Technology between 1987-1988, and Permanent Secretary Ministry of Industry between 1988-1990, and Permanent Secretary, Ministry of Agriculture between 1990-1991.

What is however of concern to the matters at hand is his stewardship as Permanent Secretary, Office of the Vice-President and Ministry of Finance, Permanent Secretary, to the Treasury between 1991-1992, and Permanent Secretary, Ministry of Finance, Permanent Secretary to the Treasury between 1992-1994.

On the application for leave to bring judicial review proceedings for the several prayers of *Certiorari* and *Prohibition* it is necessary to recall Mr. Rebello's arguments.

RE: LIMITATION

On the question of Limitation under Section 9 of the law Reform Act, Mr. Rebello argued that the Applicant's application was not time-barred by the six months limitation period established by the said section. His case was that the limitation period commences to run from the date of presentation of the Report, and not the date of conclusion of the hearings or proceedings of the Inquiry under the Commissions of Inquiry Act, (*Cap. 102, Laws of Kenya).*

Further, Mr. Rebello argued, even if there was limitation to bar an action for certiorari, there was no limitation in respect of a prayer for an order of Prohibition.

Mr. L.M. Kangatta argued to the contrary that limitation period for purposes of bringing an application for judicial review orders commenced to run from the date of the termination of proceedings of the Judicial Commission of Inquiry, and not on the date of presentation of the Report. I shall revert to this issue in my consideration of the application as a whole.

OF THE ORDERS OF PROHIBITION

To support the Applicant's quest to bring proceedings for an order of prohibition, Mr. Rebello narrated the tribulations the Applicant has undergone since leaving office in 1994. The starting point is perhaps the Applicant's own Affidavit.

(1) The Applicant admits in paragraph 12 of the Affidavit Verifying the Facts that he made three (3) payments of Kshs.5.8 Billion to Goldenberg International Ltd. He does not therefore deny this.

(2) On 13.12.1994, the Law Society of Kenya filed a private prosecution against the Applicant in Private Prosecution No. 1 of 1994.

(3) the Charges related to the said three payments, which had been the subject of a departmental investigation and had also been the subject of a Inquiry by the IMF/World Bank which was in 1993 monitoring payments made by the Government (para 16 of the Verifying Affidavit).

(4) That private prosecution was terminated by the Attorney-General on the grounds that he would prosecute where he is satisfied that there is enough substantial and reliable evidence to sustain a prosecution (para 17).

(5) On 5th January, 1995, the Applicant was charged together with Kamlesh Mansuklal Pattni in Criminal Case No. 46 of 1995 with 3 counts of stealing contrary to Section 275 of the Penal Code.

(6) On 19-05-1995 the aforesaid charges were withdrawn under Section 87 (a) of the Criminal Procedure Code, and the Applicant was charged in Criminal Case No. 2208 of 1995 where the charge contained 50 counts and of which the applicant was charged only on three (3) of those counts.

(7) On 7-08-1995 at the hearing of Criminal Case No. 2208 of 1995 the charge sheet was substituted by a new charge sheet to include 93 counts although the Applicant continued to be charged on only three (3) counts Nos 91, 92 and 93 thereof.

(8) When Chief Magistrate denied the Applicant's Counsel's objection to the 93 counts one of the accused Elphas Riungu appealed against the 93 Counts.

(9) In a Ruling delivered in 1997, Elphas Riungu the Applicant's Co-accused was successful but the Attorney-General had already terminated Criminal Case No. 2208 of 1995 on 12th November, 1996.

(10) On 16th July, 1997, the Applicant pleaded not guilty to the three (3) counts of stealing contrary to Section 275 of the Penal Code alleged to have been committed by the three payments of Ksh.5.8 billion in Criminal Case Number 1474 of 1997.

(11) Hearing of Criminal Case No. 1474 of 1997 commenced on 3rd March, 1998, and went on from day to day and by the time the hearing was halted, the prosecution had called 25 witnesses.

(12) The hearing of Criminal Case No. 1474 of 1997 was halted by the appointment of Director of Public Prosecution Mr. Bernard Chunga to the office of Chief Justice, and the Presiding Magistrate Uniter Kidula to Mr. Chunga's former office of Director of Public Prosecutions.

(13) On 7th July, 1999, Accused No. 1 and 5th in this case (Cr. Case No. 1474 of 1997) obtained a stay of the case under High Court Misc. Criminal Application No. 810 of 1999, and the case was mentioned on a monthly basis pending the hearing of an appeal filed by the 1st and 5th Co-accused of the Applicant.

(14) On 25th August, 2003 the Hon. Attorney-General

sought to enter Nolle Prosequi to terminate the prosecution in Criminal Case No. 1474 of 1997 but it was common understanding between Mr. Rebello for the Applicant and Mr. Kangata that the Chief Magistrate did not act on the Nolle Prosequi and the Application to the High Court in Misc. Criminal Application No. 810 of 1997 has to-date not been heard, because in the interim, His Excellency the President and Commander-in-Chief of the Armed Forces of Kenya appointed a "Judicial Commission of Inquiry" Into the Goldenberg Affair" on 24th February, 2003 under (Gazette Notices Nos 1237 and 1238).

(15) The Report of the Judicial Commission of Inquiry into the Goldenberg Affair was transmitted to the H.E. the President per letter the date of which was hand scribbled 3rd February 2006, but was apparently published by the Government Press in October, 2005.

(16) Following the release of the Report of the Judicial Commission of Inquiry Into the Goldenberg Affair, the Hon. Attorney-General ordered further investigation in relation to the payment of Kshs.5.8 billion paid allegedly for jewellery and gold exports compensation. The Report of such investigations recommended that Eight (8) suspects, including the Applicant be charged with the offence of theft of Kshs.5.8 Billion and the further offences of –

(i) Conspiracy to Defraud Contrary to Section 317 of the Penal Code.

(ii) Conspiracy to commit a felony contrary to Section 393 of the Penal Code.

and in respect of the suspects who held public office including the Applicant, they be charged with the additional charges of -

(i) Abuse of office Contrary to Section 101 (1) of the Penal Code,

(ii) Fraud (Breach of Trust Against the Public) contrary to Section 127 of the Penal Code;

(iii) Alternatively to (ii) neglect to perform official duty contrary to section 128 of the Penal Code.

17. Following the release of that statement, the Applicant was charged with 6 others in Criminal Case No. 518 of 2006 with 3 counts of Conspiracy to commit a Felony contrary to Section 393 of the Penal Code with three alternative counts of conspiracy to defraud.

18. The Case (Criminal Case No. 518 of 2006) was set for hearing on 24th & 25th May, 2006 but was temporarily stayed by the Hon. Court of Appeal on the application of the first Accused Kamlesh Pattni,

19. Following the stay of Criminal Case No. 518 of 2006 the Applicant was on 17th March, 2006, charged in Criminal Case No. 519 of 2006 together with 3 others with (3) Counts of Abuse of office contrary to Section 101 (1) of the Penal Code and one Count alleging breach of trust against the Public Contrary to Section 127 of the Penal Code, and the case (No. 519/2006) is part heard.

In summary, therefore, Mr. Rebello, learned Counsel for the Applicant submitted, it is prima facie an abuse of the criminal law procedure to charge the Applicant in separate Courts running parallel to each other, and that there were currently three such cases running parallel to each other namely:-

(1) Criminal Case No. 1474 of 1997 which is part-heard.

(2) Criminal Case No. 518 of 2006 which has been temporarily stayed by the Court of Appeal;

(3) Criminal Case No. 519 of 2006 which is part-heard.

Said Counsel also submitted that in all the three cases, the bundles of documents are identical, as also is the list of witnesses, with minor or immaterial variations (See paragraph 59 of the Affidavit Verifying the Facts)

Counsel finally submitted that the Applicant relies upon the provisions of Section 77 (1) of the Constitution, and the decision of the Constitutional Court in *REPUBLIC –VS- THE JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR HON. MR. JUSTICE OF APPEAL S.O. BOSIRE, PETER LE PELLEY, SC. EX PARTE Professor George Saitoti*, and concluded that this was a proper case for the grant of leave to bring judicial review proceedings. It was not a frivolous application.

On the question of Prohibition Counsel submitted that the proceedings were still on-going against the Applicant, and the issue of limitation does not apply to the prayer for prohibition. Only the High Court has the supervisory authority over the proceedings in the subordinate or lower court, and prayed for leave to be granted.

In response to the Applicant's Counsel's Case, Mr. L.M. Kang'atta, State Counsel raised the issue of Limitation, that under Order LIII rule 2, leave shall not be granted to apply for an order of certiorari to remove any judgement, order, decree, conviction or other proceeding for the purpose of being quashed unless the application for leave is made *not later than six* months after the date of the proceedings or such shorter period as may be prescribed by any Act;

The issue therefore was when did the proceedings of the Judicial Commission of Inquiry come to an end. Is it the date the Commission concluded its proceedings or is it the date when the Commission presented its Report to the President at State House on 3rd February, 2006.

Relying upon paragraphs 44 and 45 of the Applicant's Affidavit Verifying the Facts, Mr. Kangatta submitted that the Commission commenced its proceeding on 31st March, 2003 and concluded the same on 10th February, 2005 after hearing evidence from 102 witnesses, including the Applicant himself, and not on 3rd February, 2006 when the Report was presented to H.E. the President.

Counsel submitted that presentation of the Report is not a proceeding in terms of Order LIII, rule 2 of the Civil Procedure Rules. At best the presentation of the Commission's Report was a mere ceremony as these were judicial proceedings and that it would be stretching the mind and the meaning of proceedings to suggest that the Commission held proceedings at State House during the presentation of the Commission's Report.

Mr. Kang'atta concluded that the Commission's proceedings were concluded on 10th February, 2005 as deponed by the Applicant at paragraph 44 of the Affidavit Verifying the Facts, that is after all Counsel had made their submissions. Consequently filing of the Application on 1st August, 2006, that is more

than one year after the conclusion of the Commission on 10th February, 2005 was fatal under Order LIII, rule 2 of the Civil Procedure Rules, which requires every application for leave to seek an order of certiorari must be made within 6 months. Rule 2 is mandatory. Leave shall not be granted for orders of Certiorari.

There is no provision for extension of time under Order LIII, and even if there was such a provision for extension, leave for extension had to be sought and be granted. No such application has been made under Order LIII or under the inherent power of the court.

On the question of leave to seek orders of prohibition, learned Counsel for the Respondent submitted that an order of Prohibition goes hand-in-hand with an order of Certiorari, and an order of prohibition will not lie unless there is first an order of Certiorari, for the same are granted for lack or excess of jurisdiction or simply acts contrary to law. Unless leave was granted to bring proceedings for an order of Certiorari, none should be granted in respect of an order of prohibition.

On the issue of stay if leave were granted, it was Mr. Kang'atta's argument again, that unless leave was first granted to seek orders of Certiorari and Prohibition no order of stay could issue.

Counsel submitted that the case *CONNELLY –VS- DIRECTOR OF PUBLIC PROSECUTIONS [1964] 2 ALL E.R.* 401 upon which the Applicant's Counsel relied for an order of a stay if leave was granted, was an appeal and was decided after the court had the benefit of reviewing evidence presented to the trial court that the subsequent proceedings ought to have been stayed. Unlike in that case, there is no evidence, in this application. It is for the trial Court to hear such evidence. This Court does not have the benefit of either the subsequent investigations after the Commission's Report or indeed the proceedings of that Commission in order to come to a decision to stay the proceedings in those cases.

On the question of delay in bringing the charges Mr. Kang'atta submitted that the issue of delay concerned the outcome of a prosecution. The delay itself is not a bar to a prosecution, hence there is no limitation in criminal cases.

On the question of the multiplicity of charges, it is the accused person's privilege that he meets or is charged with as a few counts as possible. The parallel charges were brought as a result of the breaking up of the original 93 Counts for if the Counts were not broken up, then with the additional three charges, the Applicant would have been charged with not 93, but 100 charges, and prohibition would not be the answer, nor would it be a guide to the High Court's supervisory jurisdiction over the lower courts as to the manner in which they should proceed.

With those submissions Mr. Kang'atta prayed that the Applicant's application be dismissed with the addition that if leave is granted, such leave shall not operate as a stay in respect of Criminal Case No. 519 of 2006, brought into court on 16.03.2006 and in which six witnesses have already given evidence.

Those were the respective Counsel's arguments, they lend themselves to these issues being formulated-

1. Does the limitation period begin to run in proceedings arising from a Judicial Commission of Inquiry, from the date when the last Counsel makes his submissions or when the Commission has heard the last witness, or does the limitation period begin to run from the date of the presentation of the Commission's Report to the President?

2. Should leave be granted to bring Judicial review application for orders of certiorari and prohibition?

3. If leave is granted should such leave operate as a stay and if so in respect of what cases?

4. Is the multiplicity of counts a ground for granting leave to commence judicial review proceedings?

5. Who should bear the costs of this application?

OF LIMITATION

Section 9 (3) of the Law Reform Act (Cap 26, Laws of Kenya) provides that in the case of an application for an order of certiorari to remove any judgement, order or decree conviction or other proceedings for the purpose of being quashed, leave shall not be granted unless the application for leave is made not less than six months after the date of that judgement order, decree, conviction or other proceedings or such shorter period as may be prescribed under any written law.

The said provision is reproduced in Order LIII rule 2 of the Civil Procedure Rules.

The Report of the Judicial Commission of Inquiry on the Goldenberg Affair was the culmination of the proceedings of the Inquiry. To determine whether the limitation period for purposes of bringing judicial review proceedings runs from the end of the proceedings of the Inquiry, or the presentation depends principally on the construction on firstly the mandate of the Commission under the Act, and the Terms of Reference under which the Commission was established.

Section 3 (1) of the Commissions of Inquiry Act (Cap 102, Laws of Kenya) empowers the President whenever he considers it advisable to do so, to issue a commission under the Act appointing a Commissioner or Commissioners and authorizing him or them or any specified quorum of them, to inquire into the conduct of any public officer or the conduct or management of any public body, or into any matter into which an inquiry would, in the opinion of the President, be in the public interest.

And Section 3 (2) thereof provides that every Commission shall specify the matter to be inquired into, and shall direct where and when the inquiry shall be made and the report thereof rendered,……

Finally Section 7(1) of the Act sets out the duty of a Commissioner after taking the prescribed oath, to make a full, faithful and impartial inquiry into the matter into which he or they are 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 if so required by the President, to furnish to the President a full record of the proceedings of the commission.

Under Section 7 (2) of the Act, the commissioner, if so directed by the commission, may include in his report recommendations as to any matter into which he is commissioned to inquire or any matter arising or connected with his inquiry.

My understanding of the total effect of Sections 3 (1) & (2) 7 (1) & (2) of the Commissions of Inquiry Act is that the commission is completed not when the inquiry proceedings are completed but rather when the commissioner or commissioners hand in their written Report to the President. As the collation of the information gathered during the proceedings takes time, the report would only be ready quite sometime after the last of the proceedings of the Inquiry. This being so, although the Cover page of Judicial Commission of Inquiry into the Goldenberg Affair is date marked October 2005 (probably as the date when it was printed), the correct position in law is that although proceedings ended on 10th February, 2005, the report was finally printed in October, 2005, but it was not handed over to the President in terms of both Sections 3 and 7 of the Commissions of Inquiry Act until 4th February, 2006, the date scribbled at the bottom of the transmittal letter, which though printed was left undated perhaps for goods reason, a date to State House is often not promptly secured.

For purposes of limitation under section 9 (3) of the Law Reform Act, and Order LIII rules 2 & 7 of the Civil Procedure Rules, the period does not run from the date of the end of the proceedings but from the date of the handing in of the Report of Inquiry to the President. That date is 4th February, 2006, and the limitation period of six (6) months prescribed under the Law Reform Act and the Rules thereunder expired on 3rd August, 2006. The Application herein having been dated 31st July, 2006, and filed on 1st August, 2006 was just within the period by three (3) days.

My answer to the point raised by Mr. L.M. Kang'atta learned Counsel for the Respondent is that the application herein was not time-barred under the provisions of the said Law Reform Act, and the rules thereunder.

In my opinion the issue of the multiplicity of counts in the charge is a matter which has been taken care of by the splitting of the charges, and institution of the various charges in the several Courts, and is in my opinion not a ground for granting leave to bring Judicial review either for orders of certiorari or prohibition. There is no indication that by splitting the charges and counts, the Respondent is in breach of the principles established in the case of *GITHUNGURI –VS- REPUBLIC [1986] K.L.R.* 1 or the *Saitoti* Case wherein it was held *inter alia* that it was unfair to hold the Applicants, Githunguri and Hon. Professor Saitoti to criminal proceedings some twelve (12) and fifteen (15) years later. Besides Hon. Professor George Saitoti on the principle of separation of powers as established under Section 12 of the *National Assembly* (*Powers and Privileges*) Act, *(Cap. 6, Laws of Kenya*) which has its foundation in Section 57 of the Constitution which relates to powers, privileges and immunities of the National Assembly, Hon Professor George Saitoti could not be prosecuted for that what Parliament had resolved, and the further principle in international law that agreements between nation states, and among or with institutions of which nation states are parties, must be carried out in good faith *pacta sunt servanda* and could not be_reneged at will. There is no similar assurance at domestic law (*like in Githunguri*) or International Law (*like in Hon. Professor George Saitoti)* that he would not be prosecuted or any other privilege to which this Applicant is subject.

The Applicant's Counsel sought to find solace on the principle of *stare decisis,* that like matters must be decided in like manner. In other words, this court should grant leave as it was done in the Saitoti Case, the case of Eric Kotut, or Joshua Kulei all previous such applications arising from the Judicial Commission of Inquiry into the Goldenberg Affair.

Having considered this argument, I reject it on two grounds, the ground of *stare-decisis,* itself and secondly on the grounds of *public interest*.

The public interest principle in matters of litigation whether civil or criminal is often expressed in the *Latin* phrase *interest reipublicae ut sit finis litium.* (It is the concern or interest of the state that lawsuits should not be protracted). The state represents a community of individuals, who all contribute to the welfare of the state. In the wider context therefore, it is in the interest of the state, the community of Kenyans and all persons living within the territorial boundaries of Kenya, and perhaps beyond, that lawsuits including criminal prosecutions which particularly impinge upon the welfare of the state and therefore the community within the state be prosecuted in a sequence and within a reasonable time and not by way of a multiplicity of suits, motions, motions over other motions and sometimes cross-motions.

The multiplicity of such motions is but gerry-mandering through the court corridors contributing nothing but delays in the dispensation of justice to the individual accused or applicant and also the community of Kenyans because the issues raised, like in this case, and the previous applications, whether or not the disbursement of KShs.5.8 billions was legal or illegal, should be determined in a proper trial, and should not be stayed by the court merely because they relate to issues raised 4,8, 12 or more years ago.

The doctrine of *stare decisis* is predicated upon the principle of precedent under which it is necessary for a court to follow earlier judicial decisions when the same facts arise again in litigation. The phrase *stare decisis* literally means, "*stand by things decided"*

At page 144, Blacks Law Dictionary explains – *stare decisis as follows:*

"This doctrine is simply that when a point or principles of law has been once officially decided or settled by the Ruling of a competent court in a case in which it is directly and necessarily invoked, it will no longer be considered as open to examination or to a new ruling by the same tribunal or by those which are bound to follow its adjudications, unless it be for urgent reasons and exceptional cases."

I am with respect of the opinion that there is no binding judicial principle in an application whether or not to grant leave to institute judicial review proceedings. Each application has to be decided upon its peculiar facts. To hold otherwise would be tantamount to saying that such applications are granted as a matter of course. They are not. The only qualification to this view is the holding of the Court of Appeal in the case of "*Njuguna Vs. Minister of Agriculture*, that the Court granting leave is not required to go into the application in any depth. The court is only required to see whether the Applicant has established an arguable or prima facie case.

The Applicant has not in my opinion established an arguable or a *prima facie* case to warrant the grant of leave to institute judicial review proceedings for orders of *certiorari* to quash those aspects of the Report of the Judicial Commission of Inquiry into the Goldenberg Affair, or for orders of "*prohibition*" to prohibit the Attorney General from prosecuting the Applicant on those matters. On the contrary the Applicant has expressly admitted he disbursed or authorized the disbursement of Kshs.5.8billion to Goldenberg International Limited. That is a matter which in my humble and respectful view, the Applicant can best acquit himself by explaining to the trial court, not the Judicial Review Court.

In saying this, I am mindful of the fact that unlike either Prof. Saitoti whose matters are decided, or Eric Kotut former Governor of the Central Bank of Kenya or Joshua Kulei, whose matters are pending the Applicant was the Permanent Secretary to the Ministry of Finance, Permanent Secretary to the Treasury (of Kenya) and was under the Audit and Exchequer Act (*Cap.412 of the Laws of Kenya*) Paymaster-General of the Republic. There are no allegations that he would not receive a fair hearing albeit protracted as we observed in the Saitoti case, that the matters concerning payments to Goldenberg International Limited are subject of *extensive, intensive* and *comprehensive investigations* which are of necessity protracted and long. The Applicant may well be exculpated from any alleged theft or any wrong doing.

Finally, I observe that Nairobi Chief Magistrate Criminal Case Nairobi 1474 of 1997 subject of a Constitutional Reference is still pending, whereas Nairobi Criminal Case No. 518 of 2006 has been stayed by the Court of Appeal, and Nairobi Chief Magistrate's Court Criminal Case No. 519 of 2006 was partly heard and is pending.

In the premises therefore I decline to grant any of the prayers sought and dismiss with costs the Notice of Motion dated 31st July, 2006 and filed on 1st August 2006, and I direct that other than those cases which have been lawfully stayed, pending further orders of court, pending cases which are not so stayed be prosecuted with utmost urgency in compliance with the provisions of Section 77(1) of the Constitution of Kenya.

These shall be orders accordingly.

Dated and delivered at Nairobi this 16th day of October, 2006.

M.J. ANYARA EMUKULE

JUDGE