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

Misc Appli 1062 of 2004

HON. JUSTICE AMRAPHAEL MBOGHOLI MSAGHA…..…….. APPLICANT

V E R S U S

1. **THE HON. CHIEF JUSTICE OF THE REPUBLIC OF KENYA …..…1ST RESPONDENT**
2. **THE REGISTRAR HIGH COURT OF KENYA.....…...…….2RD RESPONDENT**
3. **HON. JUSTICE (RTD) ABDUL MAJID COCKAR…...…...……..3RD RESPONDENT**
4. **HON. JUSTICE JOHN MWERA ……..…….4TH RESPONDENT**
5. **HON. JUSTICE LEONARD NJAGI…….....…....……5TH RESPONDENT**
6. **JUSTICE DANIEL MUSINGA…….....……..……....……..6TH RESPONDENT**
7. **HON. JUSTICE ISAACK LENAOLA…….....……7th h RESPONDENT**
8. **HON. ATTORNEY-GENERAL…….....…….8TH RESPONDENT**

J U D G E M E N T

On 19th March 2003, the Hon. the Chief Justice of Kenya appointed the Integrity and Anti-Corruption Committee of the Judiciary with Justice Aaron Ringera as the Chairman (***herein after referred to as "****the Ringera Committee."*) The terms of Reference of the Committee were in summary '**to investigate allegations of corruption in the Judiciary and recommend disciplinary or other curative measures'**. The Ringera Committee presented its recommendations to the Hon. the Chief Justice on 30th September 2003. In the Report, some judicial officers were implicated in corruption, misbehaviour, and unethical behaviour and under Section 62 (5) of the Constitution the Chief Justice presented his findings to the President. On 15th October 2003 Hon. Justice AMRaphael Mbogholi Msagha ***(Applicant herein***) and other judges were suspended and a Tribunal was appointed by the President to investigate their conduct.

It is the Applicants contention that he has not been furnished with the Chief Justice's representation to the President in order to determine the legality of the Tribunal as required under Section 62 (5) of the Constitution. As a consequence, the Applicant filed the Originating Summons dated 10th August 2004 under Sections 67 (1) and 84 (1) and of the Constitution of Kenya (Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2001 in which the Applicant alleges breach of his Fundamental Rights and Freedoms and seeks seventeen declarations. They are as follows;-

1. A declaration that the appointment of the Tribunal vide Gazettee Notice No. 8829 dated 10th December 2003 and published on the 11th December 2003 was ultra vires the provisions of Section 62 (5) (a) of the Constitution of Kenya and a violation of the Applicant's Fundamental Rights and Freedoms under Section 74 (1) of the Constitution of Kenya.

2. A declaration that the appointment of the Tribunal was not in conformity with Sections 62 (1), (4) and (5) of the Constitution of Kenya and a violation of the Applicant's Fundamental Rights and Freedoms under Section 74 and 77 of the Constitution of Kenya;

3. A declaration that the Applicant's suspension from office, vide Gazettee Notice No. 7283 dated 15th October 2003, was in breach of the Constitution of the Republic of Kenya and is a violation of the Applicant's Fundamental Rights and Freedoms under Section 74 and 77 of the Constitution;

4. A declaration that the appointment of the Tribunal to investigate the conduct of judges vide Gazette Notice Number 8829 of 11th December 2003 was in breach of Section 62 (5) of the Constitution of Kenya;

5. A declaration that the 1st Respondent, The Honourable Chief Justice is obliged by law to observe the Rules of Natural Justice in the exercise of his Constitutional duty under Section 62 (5) of the Constitution of the Republic of Kenya;

6. A declaration that the 1st Respondent is obliged by law to act fairly and reasonably in the exercise of his Constitutional Rights under Section 62 (5) of the Constitution of the Republic of Kenya;

7. A declaration that the representation of the 1st Respondent, The Honourable Chief Justice to the President under Section 62 (5) in respect of the Applicant, if any, leading to the appointment of the Tribunal investigating the conduct of judges vide Gazette Notice No. 8829 of 1st December 2003 was in breach of the Applicant's right to a fair hearing;

8. **A declaration** that the Representation of the 1st Respondent, The Honourable Chief Justice to the President under Section 62 (5) in respect of the Applicant, if any, leading to the appointment of the Tribunal investigating the conduct of judges vide Gazette Notice No. 8829 of 11th December 2003 was a nullity;

9. A declaration that the content of the Representation of the Chief Justice to the President under Section 62 (5) (b) of the Constitution is the foundation and basis of any Tribunal of Inquiry under Section 62 (5) (b);

10. A declaration that the failure of the Tribunal to present to the Applicant the Representation of the Chief Justice to the President under Section 62 (5) of the Constitution is contrary to procedural fairness;

11. **A declaration** that the acts of the third, fourth, fifth, sixth, and seventh Respondents in formulating the Rules of the Tribunal to investigate the conduct of the Judges under Gazette Notice No. 96 of 26th January 2004 was a violation of the Constitution of the Republic of Kenya;

12. A declaration that the formulation of allegations drawn by assisting Counsel for the Tribunal, Philip Kipchirchir Murgor on the 20th February 2004 under the order of the third, fourth, fifth, sixth and seventh Respondents is a violation of Section 62 (5) and Section 62 (5) (2) of the Constitution of the Republic of Kenya;

13. A declaration that the letter dated 27th October 2003 from the Registrar of the High Court of Kenya suspending the emoluments of the Applicant is a contravention of Section 104 of the Constitution of Kenya and a violation of the Applicants Fundamental Rights and Freedoms under Sections 74 (1), 75 (1) and 77 of the Constitution of Kenya;

14. A declaration that the letter dated 27th October 2003 by the First and Second Respondents in relation to the Applicant-

- Suspending the salary of the judges the subject of the Tribunal with effect from 15th October 2003,

- Recalling all Government Property including wigs and robes,

- Recalling all law books and vehicles,

- Ordering the vacation of the official residence; and subsequent acts in pursuance thereof are unconstitutional and a violation of the Applicant's rights and legitimate expectation under Section 104 of the Constitution and amounts to inhuman treatment, degrading within the meaning of Section 74 (1) of the Constitution of the Republic of Kenya;

15. A declaration that the Applicant's Constitutional rights to a protected status reputation, position, prestige, power and property as a Puisne Judge under the Constitution of the Republic of Kenya have been violated;

16. A declaration that the Applicant's legitimate expectation as a Puisne Judge under the Constitution of the Republic of Kenya has been violated; and

17. A declaration that only the Honourable Court of Appeal can by law engage in the exercise of quashing the legality of a High Court order or judgment;

The grounds upon which the Originating Summons is predicated are found in the body of the application. They are ***inter alia-***

(a) That the Applicant was appointed as a Puisne Judge of the High Court on 27th May 1987;

(b) That as a judge of the High Court the Applicant may only be removed from office of Puisne Judge of the High Court in accordance with the provisions of Section 62 of the Constitution;

(c) That Section 62 (3) of the Constitution of Kenya on tenure of judges of the High Court provides that;-

"a judge of the High Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbahaviour, and shall not be removed except in accordance with the section."

(d) That the provisions of Section 62 (4) require that a judge shall be removed from office by the President if the question of his removal has been referred to a Tribunal appointed under Subsection 5 of Section 62 of the Constitution and the Tribunal has recommended to the President that the judge ought to be removed from office for inability as aforesaid or for misbehaviour;

(e) That Section 62 (5) of the Constitution requires as a condition precedent the Chief Justice of the Republic of Kenya to represent to the President that "***the question of removing a Puisne Judge under Section 62 (3) ought to be investigated;"***

(g) That Section 62(5) (b) mandates the Tribunal appointed by the President to inquire into the matter and Report the facts thereon to the President;

(h) That the First Respondent in breach of his

Constitutional duty under Section 62 (5) (b) failed to exercise his Constitutional duty to inquire into allegations against the Applicant and delegated the same to the In-House Committee herein referred to as

"***the Ringera Committee***" to investigate allegations against the judges;

(i) That the First Respondent in breach of his Constitutional duty under Section 62 (5) (b) failed to exercise his Constitutional duty to inquire into allegations against the Applicant and used the Ringera Report as a basis for making a representation under Section 62 (5) (b) to the President;

(j) That the Ringera Committee Report was made without observance of the Rules of Natural Justice;

(k) That the representation under Section 62 (5) (b) to the President was made without observance of Rules of Natural Justice;

(i) That the First Respondent in advising the President to appoint a Tribunal and or suspend a judge carries a quasi-judicial and disciplinary duty and has a duty to act fairly and observe Rules of Natural Justice;

(j) The First Respondent's duty under Section 62 (5) being a Constitutional Authority, quasi-judicial and disciplinary one is not delegatable;

(k) The First Respondent's action is in breach of the principle of the independence of the judiciary;

(l) That the First Respondent's action is in breach of the security of tenure of the Applicant and judges in general;

(m) That the function and mandate of a Tribunal established under Section 62 (5) of the Constitution is to investigate the issue of removal and not a judge's conduct in the exercise of judicial proceedings;

(n) That the Tribunal has embarked on an unconstitutional exercise of questioning the basis of High Court decision in breach of the Constitution of the Republic of Kenya Section 64 which establishes the Court of Appeal as a Superior Court of record, which has jurisdiction and powers in relation to appeals from the High Court as may be conferred on it by law;

(o) That the formulation of the allegations by the Counsel assisting the Tribunal is a collateral and unconstitutional challenge to the High Court;

(p) That the formulation of the allegation by Counsel assisting the Tribunal is a violation of the Judicature Act Cap 8 Laws of Kenya.

The Originating Summons is also supported by a 56 paragraphed Affidavit sworn by the Applicant, dated 10th August 2004 and filed in court on same date and a Supplementary Affidavit dated 22nd February 2006, filed in court on same date.

The Originating Summons was opposed and the Respondents only filed grounds of opposition on 26th January 2005. The grounds are as follows;-

1. The application is misconceived as it does not precisely set out the provisions of the Constitution alleged to have been infringed and the manner in which they are alleged to be infringed as required by law;

2. The application does not raise Constitutional questions that are reviewable under Section 84 of the Constitution;

3. The rights claimed by the Applicant do not rise from the Constitution and are not enforceable by this court;

4. The Applicant is not entitled to any of the remedies sought in the application;

5. The application is unmeritorious, frivolous, vexatious and an abuse of the process of court.

Applicant's Submissions

The Applicant's case was urged by Mr. Ochieng Oduol Counsel for the Applicant. His first submission is that the Applicant's Originating Summons is not opposed as the Respondents did not file any reply as per requirements of Order 36 Civil Procedure Rules. He said that Order 36 Civil Procedure Rules does not recognize the filing of grounds of opposition and the document filed as grounds is unknown in law and therefore the Originating Summons stands unopposed.

In the alternative, Counsel urged that even if grounds were valid, they are limited to technical legal points but do not address the factual depositions made by the Applicant and therefore the facts contained in the Applicant's Affidavits remain unchallenged. He relied on the case of **GENERAL MULINGE V LAKESTAR INSURANCE CO. LTD. H.C. 1275/01,** where Justice Ringera observed that filing of grounds limits one to technical legal points and an Affidavit is necessary to contest the facts.

The Applicant annexed various newspaper cuttings to his Supplementary Affidavit at paragraph 4 as regards what steps the Chief Justice took after receiving the Ringera Report. Counsel submitted that by going public, threatening judges to resign within 10 days and telling the judges that they knew themselves, is a subversion of the Constitution which the Chief Justice swore to uphold. He said that the Chief Justice acted in excess of his powers under the Constitution and the court should intervene. Counsel further urged that as a judge of the High Court, the Applicant enjoyed security of tenure, a protected status, and his being mentioned in the Report violated his prestige, popularity and hence violated his '***Constitutional Rights'*** as a judge. He said that the Report did not mandate the Chief Justice to intimidate the judges but should have observed the Rules of Natural Justice.

The Applicant contends that he was not afforded an opportunity to be heard and defend himself before the Committee nor did he know the findings of the Committee.

Mr. Oduol submitted that Section 62 (3) of the Constitution provides the only legal machinery for removal of a judge from office and one can only be removed for misbehaviour, inability to perform the functions of his office. The threats by Chief Justice and intimidations by the Attorney General were therefore unconstitutional.

Counsel also urged that in the exercise of his powers under Section 62 (5) of the Constitution the Chief Justice must act fairly and can only do so by hearing the judge who is implicated. Though the Applicant requested to be heard, he was not accorded an opportunity. It was urged that the Constitution must be construed to include Rules of Natural Justice and the judge being a holder of an important position in society should have been given a hearing before any adverse action was taken against him and that such an action will have a devastating effect which would cause prejudice to the judge as it will never be remedied. Counsel relied on the case of ***BARNWELL V AG (1994) 3 LRC*** a Guyana case, that involved removal of a judge from office and the court held that because of the judge's status, Rules of Natural Justice had to apply.

Mr. Oduol submitted that the process leading to appointment of a Tribunal was flawed because the Applicant-

1. was not given a hearing by the Ringera Committee;

2. was not given a hearing and chance to defend himself by the Chief Justice. The Chief Justice only heard the complaints made to the Ringera Committee and asked the judges to resign and that amounts to breach of Rules of Natural Justice.

It is the Applicant's contention that Section 62 (5) of the Constitution does not allow the Chief Justice to delegate his functions. Counsel said that the Chief Justice holds his office by virtue of his unique qualities and skills and had the Constitutional mandate to investigate and was in breach of the doctrine '***delegatus non potest delegare'***. Reliance on the Committee's Report was abdication of his duties and the investigations were ***ultra vires*** Section 62 (5) of the Constitution and hence null and void. Counsel said that the Chief Justice totally relied on the Committee's Report as the contents thereof form the basis of the allegations levelled against the Applicant at the Tribunal. Counsel said that the Committee has no place in the Constitution, that the Chief Justice should have received Reports, confronted the judge and given him a chance to state his case before the Chief Justice could make representations to the President. It was further argued that the Chief Justice performs administrative functions and administrative law requires that Rules of Natural Justice be observed and the Applicant, a High Court judge who applied these Rules in the discharge of his duties could not be denied the same.

Mr. Oduol urged that it is the Applicant's legitimate expectation that Rules of Natural Justice would be complied with under the Constitution. He submitted that the Chief Justice should have acted carefully as the consequences of his decision would be grave for indeed the judge's salary were stopped, the Applicant was asked to vacate his residential house, Chambers and return any property belonging to the Government. Counsel urged that this act was contrary to Section 104 of the Constitution which provides for Constitutional office holder's benefits that should not be altered to their detriment. Yet upon suspension, the benefits were withdrawn and that amounts to inhuman and degrading treatment of the Applicant. It is the legitimate expectation of a judge on appointment that in the event of any adverse action being taken against him, procedural fairness will be complied with. Counsel asked that for these reasons the court should grant the 14th declaration and find that there was no decision made at all. Further to the above, it is the Applicant's contention that the Chief Justice gave an undertaking that he would hear the Applicant on the allegations made but none was given and the Applicant had a right to challenge all decisions made subsequent to the undertaking as the Applicant had expected to be heard.

Mr. Oduol said that under Section 62 (5) of the Constitution, the Chief Justice has a duty to make representation to the President and these must be written facts not verbal and the Applicant ought to have known these facts before the representation was made. No such facts have been made known to the Applicant so that he can know which case he faces before the Tribunal. Counsel said that even in ordinary courts, the charge and copy of witness's statements are given to the accused before the trial.

Further to that, Counsel submitted that there was breach of the doctrine of separation of powers in that the Chief Justice failed to follow procedure before handing over the matter to the Executive. By the Attorney General and Minister commending what the Chief Justice was doing, it was interference from the Executive and Counsel urged the court to find that the representation under Section 62 (5) of the Constitution must be written, fairly arrived at and available to the subject judge.

It was submitted that under Section 62 (5) of the Constitution the Tribunal can only inquire into facts presented to it and make a finding thereon and it is not open to the Tribunal to ***start framing other facts***. Counsel gave an example of the disparity in the facts before the Committee over HCC 2931/1997 in which the Applicant was alleged to have received Kshs.1.6 million and page 154-157 of the bundle which are allegations before the Tribunal and which are quite different issues from those contained in the Committee's Report. It is unconstitutional Counsel submitted, for Mr. Murgor to have arrogated to himself powers to frame issues which were not before the Committee and place them before the Tribunal because that would be open to abuse or witch hunting. Besides the Applicant would not know what case he would be facing before the Tribunal. Counsel urged the court to find that the Tribunal can only proceed to consider representations which they were appointed to enquire into.

It is the Applicants further submission that under Section 62 (5) of the Constitution, the President can only set up a Tribunal to investigate inability to perform his functions and misbehaviour and there is no provision that a Tribunal be set up to investigate a judge's conduct as Gazette Notice 7282 of 2003 purported to do. It is Mr. Oduol's submission that the notice should have been specific otherwise investigating into the general conduct of the Applicant can be open to witch hunt. According to Counsel, enquiring into the conduct of the Applicant is beyond the mandate of the Tribunal under Section 62 (5) of

the Constitution.

Mr. Oduol submitted that by the President empowering the Tribunal to come up with Rules for the Tribunal, he was re-writing the Constitution because the Constitution expressly gives the power to write the Rules to the Chief Justice. He submitted that the Gazette notice is unconstitutional, null and void and so are the Rules that have been formulated.

Mr. Oduol heavily relied on the **BARNWELL CASE.** He said principles set out in that case are persuasive to this case as Section 197 (5) of the Guyana Constitution is in '***pari materia***' with Section 62(5) of our Constitution.

Mr. Oduol said that the Chief Justice may have misconstrued the Constitution's silence on the hearing to be accorded to a judge before making his representation to the President. In **BARNWELL'S CASE** the court found that the Judicial Service Commission should have heard the judge before making its representation to the President which the Chief Justice should have done in this case.

On constitutional interpretation Mr. Oduol relied on the following cases amongst others;

1. **BARNWELL CASE** which he said is on all fours with the present case, and the principles set out therein should guide this court in this case.

2. **NJOYA & OTHERS V AG (2004) 1 EA 194 (P 204-5)** where the court held that the Constitution should be viewed in a broad, liberal and purposeful way in order to give effect to the values and principles of the Constitution.

3. **NDYANABO V AG (2001) 2 EA 485** where

Samatta C.J. held that the provisions touching on fundamental rights have to be interpreted in a broad and liberal manner, jealously guarding and protecting those rights and ensuring that people enjoy their rights.

Counsel finally prayed that the court do make the declarations sought under Section 84 of the Constitution as prayed in the Originating Summons.

Respondent's Submissions

Prof Githu Muigai, Counsel for the Respondents in rebutting the Applicant's submissions in his opening address, identified three issues for determination. They are as follows;-

(a) whether the Applicant's case raises any constitutional questions under Section 84 of the Constitution;

(b) whether the Chief Justice acted constitutionally in recommending to the President that the Applicant be investigated by a Tribunal;

(c) whether the Applicant is entitled to any of the remedies sought in the application.

On the first issue, Counsel cited the case of **PROF JULIUS MEME V REP (2004) 1 KLR 637** in which the case of **ANARITA KARIMI NJERU V REP (No 1) (1979) KLR 154** was relied upon and where the court held that in a Constitutional reference, there had to be the following two components that are necessary;

(i) that the Applicant sets out with precision what right has been violated;

(ii) that the Applicant sets out in what manner the said right has been violated;

Prof Muigai said that although many complaints have been made about the conduct of several people and even if the people behaved discourteously, yet the test in such a case is that the conduct should have

violated a vested constitutional right. He said that the court enforces specific rights under Section 84 of the Constitution, restricted to Sections 70 and 83. Counsel said that every complaint must be pegged to a specific provision of the Bill of Rights but that prayers 10, 15, 16 and 17 are not pegged to any and that even if they were so, they are to consider the evidence and determine whether such rights are protected.

On the question of whether the Chief Justice acted unconstitutionally in advising the President to set up a Tribunal to investigate the conduct of the Applicant, Counsel submitted that the Chief Justice was not expected to do more than he did. Counsel urged that a judge is but one of the Constitutional Office holders and the intention of Parliament was to afford him dignity of the office to enable him perform his duties and that the security is not intended to be for life. Section 62 limits it to an age prescribed by an Act of Parliament, and the Judicature Act (***Cap.8)*** currently limits the tenure to 74 years of age. Counsel said that Section 62(3) of the Constitution recognizes the removal of a judge from office for misbehaviour or inability and that is done under provisions of Section 62 (4) and (5) and also that under Section 62 (4) the President's only role is to act on the findings of the Tribunal whereas all the Chief Justice does is to present the complaint to the President.

There is no requirement that the President and Chief Justice hear the Applicant. The reason for that is that the hearing would follow at the Tribunal. Counsel said that if the Applicant had not been notified of the charges at the Tribunal, the witnesses and statements of witnesses provided, then he would move to the court under Section 77(1) of the Constitution.

Counsel said that the Applicant is undergoing disciplinary proceedings of a special nature which cannot be equated to a criminal charge as Mr. Oduol seemed to suggest. Safe-guards are granted to the judge under the Constitution and it is the Chief Justice who receives the complaints and triggers off the enquiry. Counsel said that in the Kenyan situation it was not possible for the Chief Justice to call each judge and hear what he had to say of the complaint.

In the case of ***REPUBLIC -Vs- HON. CHIEF JUSTICE OF KENYA & OTHERS EX PARTE ROSELINE NALIAKA NAMBUYE HC MISC APPLICATION 764 of 2004*** a case arising from the same Ringera Committee Report, J. Nyamu held that the right to a hearing is provided for at the Tribunal stage and the Chief Justice was not constitutionally mandated to conduct an inquiry unlike the Guyana case where the Judicial Service Commission conducts the 1st hearing and the Tribunal does the 2nd.

On the submission that the Gazette Notice that appointed the Tribunal is unconstitutional, Counsel urged that it is not ***ultra vires***. He said the Tribunal is set up to find out whether or not the allegations against the Applicant are true and cannot therefore be inhuman. The Tribunal will act independently and determine the case based on evidence and the law. There was no legal defect in the Gazette Notice.

In rebuttal to what the Tribunal should enquire into, Prof Muigai urged that once a judge is under investigation, any other issue relating to his suitability to hold office cannot be blocked otherwise there would be need for several Tribunals to be set up against the same judge to investigate each complaint. He submitted that it is the entire conduct of the Applicant which would be under investigation and should be dealt with at once and the judge can thereafter resume duty like in the instance of Hon. Waki, Judge of Appeal.

On the question of whether the Rules of Procedure made by the Tribunal are unconstitutional, Prof Muigai argued that no constitutional provision has been violated nor have the Applicant's rights been violated. Counsel urged that the President is not an expert in such matters and the Constitution does not deal with detail and it is only the Tribunal which is entrusted with the duty of investigation which has to come up with the Rules.

On the question of whether the Chief Justice delegated his Constitutional powers to the Ringera Committee, it was submitted that the Chief Justice can gather evidence in any way provided it is legal and he only needs to satisfy himself that prima facie, there is an allegation of some wrong doing. Counsel compared the work of the Chief Justice with that of a prosecutor who brings a charge against an accused once he is satisfied that there is a probable cause but not proof beyond any doubt, which remains for the

court. In any case, Section 62 of the Constitution of Kenya does not spell out the manner in which the Chief Justice should satisfy himself that there is need for investigation.

Prof. Muigai submitted that Mr. Phillip Murgor was appointed as Counsel to assist the Tribunal and he rightly brought up all the complaints against the Applicant. Though one complaint can trigger off an enquiry, the enquiry can be broadened and any other complaints brought up.

In rebuttal to the submission that the suspension of the Applicant pending the ruling of the Tribunal is unconstitutional, it was submitted that the President has the prerogative to do so under Section 62 (6) of the Constitution and there is no known Constitutional right known as ***protected status or prestige that*** can be violated.

Prof Muigai said that in any event, the issue is rendered moot because all privileges were restored to the Applicant.

In conclusion, Counsel urged the court to disregard the case of **BARNWELL** which originates from Guyana, whose Constitution is different from the Kenyan one and in any event Guyana's Constitution was not availed to the court for comparison. He urged the court to adopt the persuasive decision of J. Nyamu in the **NAMBUYE CASE.**

In a brief reply, Mr. Oduol asked the court to disregard the Respondents' Counsel's submissions because they were not based on facts. He further urged the court to find the **BARNWELL CASE** to be persuasive and ignore the **NAMBUYE CASE** because the latter case relates to Judicial Review and yet the court in that case held that when dealing with Judicial Review it had no jurisdiction to entertain Constitutional issues. And yet Counsel submitted that court went ahead to determine Constitutional issues when it had no jurisdiction and that therefore that judgment is not binding upon this court.

After carefully considering the submissions of Counsel, cases and references made, we are of the view that the issues that arise and which we shall consider in our judgment are as follows:-

(i) Whether the Applicant's fundamental rights and freedoms under Sections 70-83 (inclusive) of the Constitution have been violated.

(ii) whether the Chief Justice delegated his constitutional mandate to the Ringera Committee under-

(a) is there a laid down procedure for the conduct of investigations,

(b) should the Chief Justice have conducted investigations himself?

(iii) whether the Chief Justice is in breach of the rules of natural justice in respect of the Applicant;

(iv) whether the Applicant's legitimate expectation has been violated;

(V) whether the Respondents are in breach of Section 62 of the Constitution under –

(a) the First Respondent's powers under Section 62 of the Constitution;

(b) suspension of the Applicant and consequences;

(c) whether the Gazette Notice setting up the Tribunal is unconstitutional;

(vi) the Applicants remedies;

(vii) summary;

(viii) conclusion;

(ix) who bears the costs of this Application?

Before considering the weighty subject of the removal of a judge from office under Section 62 of the Constitution, and the associated issue of whether the issue to be investigated should only comprise those questions referred by the Chief Justice in his representation to the President and not the conduct of a judge as a whole, it is necessary in our view to dispose of four preliminary issues. ***Firstly*** whether or not the Originating Summons is opposed. ***Secondly*** whether the alleged intimidation of the Applicant as reported in the daily press at the time, violated any vested right of the Applicant. ***Thirdly*** whether a tribunal appointed by the President under Section 62 (5) of the Constitution is a Court for purposes of Section 67 (1) and 84 (3) of the Constitution. ***Fourthly***, whether the application raised constitutional issues under Section 84 (1) of the Constitution as those provisions are the bedrock or foundations of the Applicant's Originating Summons dated and filed on 10th August, 2004.

(1) OF WHETHER THE ORIGINATING SUMMONS IS OPPOSED AND THE FILING OF GROUNDS OF OPPOSITION

Counsel for the Applicant submitted that since the Respondents failed to file any Replying Affidavit, then the Applicant's Originating Summons was unchallenged. Counsel relied upon the case of ***GENERAL D.K. MULINGE –VS- LAKESTAR INSURANCE CO. LTD.*** *(H.C.C.C. NO. 1275 OF 2001)* (s*upra)* that filing of grounds of opposition limits one to technical legal points, and an Affidavit is necessary to contest facts.

The concept of filing grounds of opposition is derived from Order L, Rule 16 of the Civil Procedure Rules, admittedly a provision not provided for in Constitutional applications. However as the Court found in the case of **MEME -VS- REPUBLIC** *(supra)*, the principles found in the process of civil procedure may be borrowed and applied as principles where appropriate in constitutional applications. Such for example is the case with the use of Affidavits in support of Chamber Summons and Notice of Motion Applications without express incorporation of Order XVIII (***Affidavits)***, or that any such Chamber Summons or Motion shall be supported by an Affidavit. Such is the case for instance today with applications for conservatory orders under rule 20 of the Constitution of Kenya (Supervisory Jurisdiction and Protection of Fundamental Rights and Freedoms of the Individual) Practice and Procedure Rules, 2006 (L.N. No. 6 of 2006).

Whereas grounds of opposition may and are usually technical and legal in nature, they in effect do, technically and therefore legally rebut any matter of a factual nature. In any event in this particular matter the Applicant's Supporting Affidavit(s) are anything but factual. It is contentious, and grounds of opposition are in our respectful view, an effective answer thereto.

In the case of ***STEPHEN KIMOTHO & 9 OTHERS –VS- ATTORNEY-GENERAL & 30 OTHERS (H.C. Misc. Application No. 833 of 2004)***, also a Constitutional reference brought by former employees of Kenya National Assurance Co. (2001) Ltd. Nyamu, J. set aside a default judgement entered in disregard of the filed grounds of opposition, and held that a Court cannot ignore grounds of opposition in entering judgement in constitutional matters.

In our respectful view therefore, the Applicant's Originating Summons is effectively opposed by and under the grounds of opposition.

(II) OF ALLEGED INTIMIDATION ATTRIBUTED TO THE CHIEF JUSTICE AND ATTORNEY-GENERAL AND MINISTER FOR JUSTICE AND CONSTITUITIONAL AFFAIRS.

We are of the view that reports attributed to the Chief Justice, the Attorney-General, or the Minister for Justice and Constitutional Affairs of the time were made in their ministerial capacities in response to questions concerning the suspension of judges, a matter of great public interest. It cannot be said that such remarks however discourteous they may have been violated any vested right of the Applicant; or will influence or are likely to influence the decision of the Tribunal appointed to investigate the question relating to removal of the Applicant.

(III) OF WHETHER A TRIBUNAL APPOINTED BY THE PRESIDENT UNDER SECTION 62 (5) OF THE CONSTITUTION IS A SUBORDINATE COURT.

This issue was not directly addressed by either Counsel to this application. We raise it in order to give this application a wholistic answer taking into account the magnitude of the question of removal of a judge and the fact that Section 67 of the Constitution was relied upon as a basis of the application. Sections 62 (5), 67(1) (2) and 84(3) of the Constitution provide as follows-

Section 62 (5) -

"(5) ***If the Chief Justice represents to the President that the question of removing a Puisne Judge under this Section ought to be investigated, then-***

(*a) the President shall appoint a tribunal which shall consist of a Chairman and four other members selected by the President from among persons –*

(i) who hold or have held the office of Judge of the High Court or Judge of Appeal; or

(ii) who are qualified to be appointed as judges of the High Court under Section 61 (3); or

(iii) upon whom the President has conferred the rank of Senior Counsel under Section 17 of the Advocates Act; and

(b) the tribunal shall inquire into the

matter and report on the facts thereof to the President and recommend to the President whether the Judge ought to be removed under this section."

And Section 67 (1) & (2) says:-

67 (1) ***Where a question as to the interpretation of this Constitution arises in proceedings in a subordinate court and the court is of the opinion that the question involves a substantial question of law, the Court may and shall if a party to the proceedings so requests, refer the question to the High Court.***

(2) ***Where a question is referred to the High Court in pursuance of subsection (1), the High Court shall give its decision upon the question and the Court in which the question arose shall dispose of the case in accordance with that decision.***

Chapter IV (the ***JUDICATURE)*** of the Constitution divides the subject, the Judicature, into Parts 1 & II. Part I deals with the establishment of the High Court and the Court of Appeal (***Sections 60-64 inclusive),***

Part 2 of Chapter IV of the Constitution is entitled "***other Courts"*** and Section 65 (1) provides-

" **65 (1**) ***Parliament may establish courts subordinate to the High Court and courts-martial, and a court so established shall subject to this Constitution, have such jurisdiction and power as may be conferred on it by any law,***

(2) The High Court shall have jurisdiction to supervise any civil or criminal proceedings before a subordinate court or courts-martial and may make and give such directions as it may consider appropriate for the purpose of ensuring that justice is duly administered by those courts;

(3) The Chief Justice may make rules with respect to the practice and procedure of the High Court in relation to the jurisdiction and powers conferred on it by subsection (2)"

The subordinate courts established by Parliament pursuant to the said provisions of Section 65 of the Constitution are Magistrates Courts – presided over at any time by a Resident Magistrate, Senior Resident Magistrate, Principal Magistrate, Senior Principal Magistrate or by a Chief Magistrate, pursuant to the provisions of the Magistrates Court's Act, ***(Cap 10 Laws of Kenya***). Courts-Martial are established pursuant to the provisions of Part VIII (Sections 84-114) of the Armed Forces Act, (***Cap 199, Laws of Kenya***).

And Section 84 (3) & (4) of the Constitution provide:-

"***(3) If in proceedings in a subordinate court a question arises as to the contravention of any of the provisions of Sections 70 to 83 (inclusive), the person presiding in that court may, and shall if any party to the proceedings so requests, refer the question to the High Court unless, in his opinion, the raising of the question is merely frivolous and vexatious;***

(4) Where a question is referred to the High Court in pursuance of subsection (3), the High Court shall give its decision upon the question and the court in which the question arose shall dispose of the case in accordance with that decision."

For purposes of Section 84 (3) of the Constitution, no issue has arisen from a subordinate court relating to a violation of the Applicant's fundamental rights or freedoms of the individual. No decision is therefore called for under Section 84 (4) of the Constitution.

In view therefore of the clear provisions of section 65 of the Constitution, and the establishment of the subordinate courts under the ***Magistrates Act***, and the Court Martial under the ***Armed Forces Act,*** and the Industrial Court, (under Section 17 of the ***Trade Disputes Act Cap. 234 Laws of Kenya)*** we find and hold that a tribunal established under the provisions of Section 62 (5) of the Constitution is a tribunal inferior to the High Court but it is not a subordinate court as envisaged by section 65 of the Constitution. We also therefore find and hold that reference by the Applicant in the Originating Summons to section 67 (1) and 84 (3) of the Constitution is incompetent, and this Application would fail on that ground also.

IV OF WHETHER THE APPLICANT'S FUNDAMENTAL RIGHTS AND FREEDOMS OF THE INDIVIDUAL WERE VIOLATED AND WHETHER THE APPLICATION RAISED A CONSTITUTIONAL ISSUE UNDER SECTION 84(1) OF THE CONSTITUITION.

(a) ***Of the breach of the rules of natural justice***.

The Applicant's contention under this score is that the failure by Hon. the Chief Justice to accord him the right to a hearing before making a representation to His Excellency the President was a contravention of his fundamental rights to a fair hearing within a reasonable time before an independent and impartial court or adjudicating authority established by law, contrary to Section 77 (1) and 77 (9) of the Constitution and that contravention amounted to inhuman treatment (contrary to Section 74), deprived him of property (his office of judge) (contrary to Section 75) and was discriminatory against him by a person acting in authority in the performance of the functions of a public office (contrary to Section 82) all of the Constitution and was also contrary to the rules of natural justice.

In support of these contentions, Mr. Ochieng Oduol learned Counsel for the Applicant submitted that the Constitution should be interpreted broadly to encompass these propositions. He relied upon the case of ***WHITEMAN -VS- ALS OF TRINIDAD AND TOBAGO [1991] I L.R.C.*** (Const.) 536 at page 551, where the Privy Council held on the question of interpretation of the Constitution that:-

"***the language of the Constitution falls to be construed, not in a narrow and legalistic way but broadly and purposively so as to give effect to its spirit and that this is particularly true of those provisions which are concerned with the protection of human rights."***

Mr. Oduol also relied upon the cases of ***REV. NJOYA & OTHERS*** *(supra)* ***and NDYANABO –VS- ATTORNEY-GENERAL*** (***supra)***, to the same effect.-

Mr. Oduol also referred to us many cases arising out of judicial review proceedings from decisions of ministerial or administrative bodies on the right to a hearing before his suspension including –

WISEMAN -VS- BARNEMAN [1969] 3 ALL E.R. 275 where Lord Wilberforce said:-

"***At one end the decision may be merely that of administrative authority that a prima facie case exists for taking some actions or proceedings as to which the person concerned is to be taken in due course to state his case; at the other, a decision that a prima facie case has been made out may have substantive and serious effects as regards the person affected, as by removing him from an otherwise good defence or by exposing him to a new hazard, or as when he is prevented, however temporarily, from taking action when he wishes to take …….. In the present case, the decision of the Tribunal may have denied the tax payer the opportunity of eliminating in limine, a claim which may otherwise have to be fought expensively through a chain of courts"***

Counsel also relied upon the dicta of ***Lord Denning in R. Vs. Race Relations Board*** *ex parte* Setrarajan [1976] I ALL ER. 12 where he said -

'***Where fairness requires…… depends on the nature of the investigation and the consequences that it may have on persons affected by the investigations, should be told of the case against him and afforded a fair opportunity of answering it…."***

At page 20 in the Report of the Tribunal Established to investigate the conduct of the Appellate Judge Waki said:-

"***Waki was never given opportunity to question Kharshid Butt or put his side of the story to the Ringera Committee."***

In ***RIDGE –VS- BALDWIN [1963] 2 ALL ER. 66***, it was observed of the principles of natural justice that:-

An essential requirement for the performance of any judicial or quasi-judicial function is that the decision-makers observe the principles of natural justice"

and the Court at page 102 said-

"***a decision is unfair if the decision-maker deprives himself of the views of the person who will be affected by the decision."***

The consequences of the breach of the principles of natural justice were stated by Lord Wright in GENERAL ***MEDICAL COUNCIL -VS- SPARCKMAN [1943] 2 ALL E.R.*** 337 at 345 as follows:-

"***If indeed the principles of natural justice are violated in respect of any decision, it is indeed immaterial whether the same decision would have been arrived at in the absence of the departure from essential principle of justice. The decision must be declared to be no decision."***

In ***LEWIS –VS- HEFFER & OTHERS [1978] 3 ALL ER***. 345 Lord Denning said at page 355 –

"***Where suspension was made as a holding operation pending enquiries the rules of natural justice did not apply because the suspension was a matter of good administration."***

In ***JOHN –VS- REES*** referred to in the case of ***LEWIS -vs- HEFFER (****supra****),*** Mergarry J. held that they were, he said at page 364-

"***Suspension is merely expulsion*** *protanto.* **Each is *penal and each deprives the member concerned of the enjoyment of the rights of membership of offices. Accordingly in my judgement the rules of natural justice prima facie apply to any such process of suspension in the same way that they apply to* expulsion."**

Those words apply no doubt to suspensions which are inflicted by way of punishment as for instance a member of the Bar is suspended from practice for six months or when a Solicitor is suspended from practice. But they did not apply to suspensions which are made as a *holding operation pending inquiries.*

Very often irregularities are disclosed in a government department or in a business house and a man may be suspended on full pay pending inquiries. Suspicion may rest on him and he is, suspended until he is cleared of it. No one so far as I know, has ever questioned such a suspension on the ground that it would not be done unless he is given notice of the charge and opportunity of defending himself and so forth. The suspension in such a case is merely done by way of good administration. A situation has arisen in which something must be done at once. The work of the Department or the office is being affected by rumours and suspicion, the others will not trust the man. In order to get back the proper work he be suspended. At that stage the rules of natural justice do not apply."

We observe firstly that the rules of natural justice "***audi alteram partem***" hear the other party, and no man/woman may be condemned unheard are deeply rooted in the English common law and have been transplanted by reason of colonialisation of the globe during the hey-days we of the British Empire. Secondly we recognize and observe those principles apply wherever there is no statutory or constitutional law to the contrary. Under the Judicature Act ***(Chapter 8 Laws of Kenya),*** the High court, the Court of Appeal and all subordinate Courts are enjoined to exercise their jurisdiction in conformity with-

(a) the Constitution,

(b) subject thereto, all other written laws, including Acts of Parliament of the United Kingdom cited in Part 1 of the Schedule to the Act, modified in accordance with Part II of that Schedule;

(c) subject thereto and so far as those written laws do not extend and apply, the substance of the common law and doctrines of equity….

It follows therefore that where there is a statute or written law, the common law principles have application in accordance with the provisions of the statute or the written law. In this matter, the applicable law is itself the Constitution of Kenya. It expressly provides for the manner in which a judge may be removed from his tenured office.

So once again, we find and hold that the suspension of the Applicant is in the words of Mergarry J. in ***JOHN –VS- REES*** (*supra*), a holding operation, pending inquiries by the Tribunal into the question of removal of the Applicant from his office of judge and not a final punishment, as a suspension from the Law Society for instance after being found guilty of some malpractice. No rules of natural justice were therefore violated.

(b) **OF whether the Application raises a Constitutional issue under Section 84 (1) of the Constitution.**

Section 84 (1) provides-

(1) ***Subject to subsection (6) if a person alleges that any of the provisions of Section 70 to 83 (inclusive) has been, is being or is likely to be contravened in relation to him (or, in case of a person who is detained, if another person alleges a contravention in relation to the detained person), then, without prejudice to any other action with respect to the same matter which is lawfully available, that person (or that other person) may apply to the High Court for redress.***

(2) The High Court shall have original jurisdiction-

(a) to hear and determine an application made by a person in pursuance of subsection (1);

(b) to determine any question arising in the case of a person which is referred to it in pursuance of subsection (3);

and may make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing or securing the enforcement of any of the provisions of Sections 70 to 83 *(inclusive).*

Section 84 of the Constitution gives these rights namely:-

(a) the right to move the court or the right of access to court;

(b) the right to hear and determine the alleged contraventions

(c) the right by the court to enforce the Bill of Rights *(Chapter V)* ***by making such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing those rights as set out in Section 70-83*** *(inclusive)* ***of the Constitution.***

A person alleging a breach or contravention of Chapter V rights carries a heavy burden of proof to be discharged by that person or an Applicant. This has been the theme in most cases, including-

(1) ***CYPRIAN KUBAI -VS- STANLEY KANYONGA MWENDA*** (Nairobi High Court Misc. Application No. 612 of 2002 (*unreported)* Khamoni J. struck out an application and said-

"***An Applicant moving the court by virtue of Sections 60, 65 and 84 of the Constitution must be precise and to the point not only in relation to the Section, but also to the subsection and where applicable, the paragraph or sub-paragraph of the Section set out of 70-83, allegedly contravened plus the relevant act of that contravention so that the Respondent knows the nature and extent of the case to enable the respondent prepare accordingly and also know the exact and nature of the case it is handling…."***

(2). ***In*** *ANARITA KARIMI NJERU –VS- REPUBLIC (No. 1) [1979] K.L.R. 154****, Trevelyan and Hancox JJ held-***

"***We would however again stress that if a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with reasonable degree of precision that of which he complains, the provision said to be infringed and the manner in which they are alleged to be infringed."***

3. In *DR. KORWA ADAR & OTHERS –Vs- ATTORNEY-GENERAL* **the court cited the earlier case of** MATIBA –*VS- ATTORNEY-GENERAL* High Court Misc. Application No. 666 of 1990-

"***An Applicant in an application under Section 84 (1) of the Constitution is obliged to state his complaint the provision of the Constitution he considers has been infringed in relation to him and the manner in which he believes they have been infringed. Those allegations are the ones which if pleaded with particularity invoke the jurisdiction of this court under the Section. It is not enough to allege infringement without particularizing the details and the manner of infringement."***

4. In *AMERICAN CONSTITUTIONAL LAW 2nd* **Edition by Lawrence Tribe, the author states at page 67-**

'***A litigant must now demonstrate regardless of the actual existence of claimed injury or its subjective importance an individualized harm imparting upon him and of a tangible concrete nature."***

5. Similarly in **AMERICAN CONSTITUTION AND LAW** page 68-

"***In order for a claim to be justiciable ….it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted. In part the extent to which that is a real and substantial controversy is determined under the doctrine of "****standing"* ***by an examination of the sufficiency of the state of the person making the claim, to ensure that the litigant has suffered an actual injury which is fairly traceable to challenged action and likely to be redressed by the judicial relief requested. The substantiality of the controversy itself – an aspect of the appropriateness of the issues for judicial decision ….. "and the actual hardships …. of denying the litigants the relief sought." Examination of the contours of the controversy is regarded as necessary to ensure that the courts do not overstep their constitutional authority by issuing advisory opinions."***

6. And in ***MATALINGA & OTHERS -VS- ATTORNEY-GENERAL*** *[1972] E.A. 518*, where the Attorney-General contended that the declarations sought were not justiciable Simpson J. held-

"***that before a declaration can be granted there must be a real and not a theoretical question in which the person raising it must have a real interest and there must be someone with a present interest in opposing it with great care and caution, the same ought to apply to constitutional applications."***

Sections 74 (1) and 77 (9) of the Constitution provide as follows:

"74 **(1)** ***No person shall be subject to torture or to inhuman or degrading punishment or other treatment;***

(2) ***Nothing contained in or done under the authority of any law shall be held to be inconsistent with or in contravention of this Section to the extent that the law in question authorizes the infliction of any description of punishment that was lawful in Kenya on 11th December, 1963."***

And Section 77 (9) provides-

"***77 (a) A Court or other adjudicating authority prescribed by law for the determination of the existence or extent of a civil right or obligation shall be established by law and shall be independent and impartial; and where proceedings for such a determination are instituted by a person before such a court or other adjudicating authority, the case shall be given a fair hearing within a reasonable time."***

We will demonstrate that suspension of a judge is expressly authorized by Section 62 (6) of the Constitution which specifically provides that a judge may be suspended from exercising the functions of his office, and the suspension may be revoked by the President, in each case on the advice of the Chief Justice.

We will show that suspension is not torture as envisaged by Section 74 (1) of the Constitution. We will uphold the submission by Professor Muigai learned Counsel for the Respondents that the Applicant is undergoing proceedings of a special nature which cannot be equated to a criminal charge as Mr. Oduol suggested. And we will find and hold that the Applicant was not subjected to unlawful punishment by his suspension nor has any of his rights been contravened under Section 84 (1) of the Constitution.

(V) OF THE ALLEGED BREACH OF SECTION 62 OF THE CONSTITUTION AND RULES OF NATURAL JUSTICE.

(a) ***Of cessation of office of judge***

Learned Counsel for the Applicant argued that the Hon. the Chief Justice failed in his duty as head of the Judiciary to fully satisfy himself of a prima facie case of serious misconduct on the part of the Applicant before making any representation to the President, that the Hon. the Chief Justice failed to act fairly by exposing the Applicant to condemnation, scorn and lowering his reputation among members of

society before ascertaining the validity of the allegations, that the magnitude of the suspension, though not considered to be a punishment of the Applicant, has far reaching effects on every part of the Applicant's life including mental, physical, social, economical and profession aspects. Section 62 provides as follows-

62 (1) ***Subject to this Section a judge of the High Court shall vacate his office when he attains such age as may be prescribed by Parliament,***

(2) Notwithstanding that he has attained the age prescribed for the purposes of Subsection (1) a judge of the High Court may continue in office for so long as after attaining that age as may be necessary to enable him deliver judgement or to do any other thing in relation to proceedings that were commenced before him before he attained that age,

(3) A judge of the High Court may be removed from office only for inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause), or for misbehaviour, and shall not be removed except in accordance with this Section.

(4) ***A Judge of the High Court shall be removed from office by the President if the question of his removal has been referred to a tribunal appointed under subsection (5) and the tribunal has recommended to the President that the Judge ought to be removed from office for inability as aforesaid or for misbehaviour.***

(5) If the Chief Justice represents to the President that the question of removing a Puisne Judge under this Section ought to be investigated, then-

(*a) the President shall appoint a tribunal which shall consist of a Chairman and four other members selected by the President from among persons –***

(i) who hold or have held the office of Judge of the High Court or Judge of Appeal; or

(ii) who are qualified to be appointed as judges of the High Court under Section 61 (3); or

(iii) upon whom the President has conferred the rank of Senior Counsel under Section 17 of the Advocates Act; and

(b) ***the tribunal shall inquire into the matter and report on the facts thereof to the President and recommend to the President whether the Judge ought to be removed under this section;***

(6) Where the question of removing a Judge from office has been referred to a tribunal under this Section, the President, acting in accordance with the advice of the Chief Justice, may suspend the Judge from exercising the functions of his office and any such suspension may at any time be revoked by the President, acting in accordance with the advice of the Chief Justice, and shall in any case cease to have effect if the Tribunal recommend to the President that the Judge ought not to be removed from office."

Our understanding of the above provisions of Section 62 of the Constitution is that a Puisne judge once appointed into office, unless removed as provided for under the Constitution continues to hold office until he either-

(i) retires at the prescribed age;

(ii) resigns his office;

(iii) dies in office;

(iv) is removed from office;

(1) Retirement at the prescribed age.

This requires no comment

(2) Cessation of office by resignation.

The concept of cessation of office by resignation is buttressed by the principle of mutuality of interest, that is, if a judge wishes to leave office, the employer represented by the Judicial Service Commission of which the Chief Justice is Chairman cannot demand specific performance even if he is a holder of a constitutional officer. We believe that cessation of office by resignation, to name but a few, has had precedent in respect of the first indigenous Chief Justice of Kenya, the late Kitili Mwendwa who voluntarily resigned from office of Chief Justice, and indeed the immediate former Chief Justice Bernard Chunga who retired from the office of Chief Justice in either case before attaining the age of 68 in respect of the late Kitili Mwendwa and 74 years of age in respect of the immediate former Chief Justice, Bernard Chunga.

(3) Cessation of Office by death

Cessation of office through death is a natural phenomenon and requires no comment.

(4) Cessation of office by removal

If a Judge does not either die in office or resign therefrom, his office may be vacated by his removal in accordance with the provisions of the Constitution. The Judge may only be removed for-

(i) inability to perform his functions of judge (whether arising from infirmity of body or mind or from any other cause), or

(ii) misbehaviour.

(5) Conditions for Removal of a Judge

A Judge may only be removed from office by the President on the following conditions-

(i) ***if the question of his removal has arisen;***

(ii) a tribunal has been appointed in terms of section 62 (5);

(iii) the tribunal has carried out an inquiry into the matter and has reported on the facts thereof; and recommended to the President whether the Judge ought to be removed.

The question we ask ourselves is how does the question of removal of a judge for misbehavior arise? Or put differently what is the basis of the representation by the Chief Justice to the President? These questions gave us some anxiety.

(b) On how the question of removal arises and alleged delegation of responsibility by the Chief Justice to the Ringera Committee.

Again**,** learned Counsel for the Applicant argued that the Hon. Chief Justice had no powers to delegate a constitutional duty to the Committee, that is a duty which only he, the Chief Justice can exercise. Counsel for the Applicant urged that it is always assumed that a recipient or holder of a constitutional office has been chosen for his unique qualities and suitability of the task in mind. He cannot delegate and the maxim ***delegatus non potest delegare*** applies; that members of the Committee had no authority therefore to investigate the conduct of Judge as no authority was conferred upon them legally, and that consequently the investigations and consequential recommendations and actions are ***ultra vires*** section 62 (5) of the Constitution and are null and void. Counsel also concluded on this point

that the adoption of the Report based upon an inaccurate conception of his powers under Section 62 (5) of the Constitution, and the decision is ultimately a nullity.

Learned Counsel relied on the speech of Lord Reid in ***ANISMINIC –VS- FOREIGN COMPENSATION COMMISSION*** [1969] I ALL ER. 208 at 213-

'…..***But there are many cases where, although the Tribunal had jurisdiction to enter on the enquiry, it had done or failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity. (…….). It may have made a decision which it had no power to make. It may have failed in the course of the inquiry to comply with the requirement of natural justice. It may in perfect good faith have*** misconstrued ***the provisions*** giving it power to act ***so that it failed to deal with the question remitted to it. It may have refused to take into account something that it was to take into account. Or it may have based its decision on some matter which under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive."***

Lord Diplock in ***COUNCIL OF CIVIL SERVICE UNIONS -VS- MINISTER FOR THE CIVIL SERVICE [1985] L.R.C***. (const. 948 at 1026-1027, in what in administrative law might be considered a sound illustration of the logical sequences of actions based on an initial step which is declared to be a nullity said-

"***Successive steps, which depended on the initial step for their establishment and validity must themselves fail if the first step was stillborn…… I say specifically that the representation by the JSC was a nullity; so were the appointment of the Tribunal and the suspension of the Appellant."***

In answer to this point we agree with Professor Muigai's submission on behalf of the Respondents, that the Chief Justice can gather evidence in any way provided it is legal, and he only needs to satisfy himself that prima facie, there is an allegation of some wrong doing.

Our view of the matter is that the Ringera Committee was an internal mechanism within the Judiciary as a whole established by the Chief Justice in response to widespread complaints of corruption within and among the rank and file of the Judiciary. The terms of the Committee were to ***investigate*** allegations of corruption in the Judiciary and recommend disciplinary or other curative measures. It was not to investigate the conduct of any particular judge or judicial officer. In his ministerial capacity as head of the Judiciary, the third arm of Government, the Hon. the Chief Justice receives, and is entitled to receive all manner of reports, some complimentary and others not so complimentary of judges and other judicial officers under his charge.

In the case of ***LOCAL GOVERNMENT BOARD –VS- ARLIDGE [1915] A.C. 120*** (H.C) Viscount Haldane L.C. said at page 133…..

"***The Minister at the head of a Board is responsible to Parliament like other Ministers. He is responsible not only for what he himself does but for all that is done in his Department. The volume of work entrusted to him is very great and he cannot do the great bulk of it himself. He is expected to get his material vicariously through his officials, and he has discharged his duty if he sees that they obtain these materials for him properly. To try and extend his duty beyond this and to insist that he and other members of the Board should do everything personally would be to impair his efficiency. Unlike a judge in a court he is not only at liberty but is compelled to rely on the assistance of his staff……."***

Similarly, the Chief Justice in exercise of his ministerial duties is not acting like a judge in a Court of law where he will have to receive and consider the evidence and make his decision alone. In the exercise of his ministerial duties, the Chief Justice must rely on his staff, the judges and other judicial officers within his Department, the Judiciary. In carrying out such other administrative tasks which the Chief Justice may assign to a judge, or other judicial officer the judge and other judicial officer so assigned with a task is not being called upon to decide upon any matter brought to their attention, they are merely gathering and compiling information for presentation to their appointor to use as he pleases in his

discretion. It cannot therefore be said that, that judge or committee breaches any rules of natural justice by compiling their report and forwarding the results or findings of their task to the Hon. the Chief Justice. Nor can it be said that by appointing such committee the Chief Justice has delegated his duty. If the Chief Justice were to say to the Committee or other judge or judicial officer that after compiling their report they were to forward it to the President then the Chief Justice and the Committee would clearly be acting outside the provisions of the Constitution.

This clearly, is not what happened in this case. The Committee received complaints, compiled its report and forwarded it to the Chief Justice who studied and alone determined as he is constitutionally mandated to do, that the report had material which warranted representations to be made to the President to set up a tribunal to conduct an inquiry into the question of the removal of a judge for his conduct.

In the circumstances we find and hold that there was neither a breach of the rules of natural justice in the conduct of Ringera Committee, nor a delegation by the Hon. the Chief Justice of his functions to the said Committee.

(b) ***Of the Separation of Powers and Independence of the Judiciary.***

On this score, Mr. Ochieng Oduol learned Counsel for the Applicant's case was that by making representations to the President to set up a tribunal to investigate the question of the removal of the Applicant, the Chief Justice as head of the Judiciary was playing into the hands and control of the Executive, in violation of the principles of the separation of powers between the Legislature (said to be supreme), the Executive, and the Judiciary a division clearly established under the Constitution.

Again our view of the matter is that the Chief Justice is both a Judge of the High Court, and a Judge of the Court of Appeal. He is technically a first among equals, ***primus inter pares***. In the exercise of his ministerial powers, he is careful and maintains a cool aloofness in adherence to the doctrine not merely of the separation of powers between the three arms of government but also of the independence of the judiciary and of each judge.

In the typical Westminster model, the Legislature enacts laws, often not formulated by itself, but by the Executive which also formulates and implements its policies and decisions based on those laws. The Judiciary interprets those laws, and the decisions or judgments of the Judiciary are in turn implemented by the Executive Branch of Government through for instance the prison service system. The model maintains checks and balances as well as controls on each branch of Government.

The doctrine of separation of powers is however much wider than the Westminster model of the Legislature, the Executive and Judiciary. The doctrine of the independence of the Judiciary entails that no one judge may interrogate the other of either his decision or conduct as each judge is strictly independent of the other in his or her decisions and judicial conduct.

In our view therefore if the Hon, the Chief Justice being the first among equals were to donate to himself the power "***to fully satisfy himself of a prima facie case of serious misconduct on the part of the Applicant before making any representation to the President"*** he would be arrogating to himself and assuming quite unconstitutionally, powers which the Constitution does not confer upon him. We do not wish to speculate what the answer of the Hon. the Chief Justice would be if in purporting to satisfy himself fully of a prima facie case of serious misconduct, if the Judge accused of misbehaviour were to confront him with the question – "***on what constitutional authority are you asking me these questions?"***

It would in our respectful view not be an adequate answer by the Hon. the Chief Justice to say "***in my ministerial authority***" for even that ministerial authority must have a legal, let alone like in this case, a constitutional foundation. It is not enough to say that the Constitution is a living and organic document or as Lord Wright said in ***JAMES –VS- COMMON WEALTH OF AUSTRALIA*** [1936] A.C. 578 – "***that a Constitution must not be construed in a narrow or pendantic manner and that construction must be beneficial to the widest possible amplitude of its powers must be adopted, or that a broad and liberal spirit should inspire those, whose duty is to interpret the Constitution."***

Whereas we agree that a broad and liberal spirit should inspire the interpretation of the Constitution, we however believe that the broad and liberal spirit is to be found in the spirit of the language of the Constitution itself. In this regard we would in interpreting Section 62 (5) of the Constitution adopt and apply the language of the Chief Justices of India in the formative years of the Indian Constitution.

Firstly in the case of ***A.K. GOPALAN –VS- THE STATE*** [1950] SCR 88, 120 (50), A Sc. 27 – where Chief Justice ***Kania*** said:-

"***from the language used and what one may believe to be the spirit of the Constitution cannot prevail if not supported by the language which therefore must be construed according to well established rules of interpretation uninfluenced by an assumed spirit of the Constitution. Where the constitution has not limited, either in terms or by necessary implication, the general powers conferred upon the Legislature, the court cannot limit them upon any notion of the spirit of the Constitution,"***

And secondly in ***CENTRAL PROVINCE CASE 19590 FC R 18 (***39) AFC – Gwyer Chief Justice of India said:-

" ***A broad and liberal spirit should inspire those whose duty is to interpret the Constitution but I do not imply by this that they are free to stretch or pervert the language of the enactment in the interests of any legal or Constitutional theory or even for purposes of supplying omissions or correcting supposed errors. A federal court will not stretch but only derogate further its position if it seeks to do anything but declare the law, but it may rightly reflect that a constitution of a Government is a living and organic thing which of all instruments has the greatest claim to be construed*** *ut res magis valeat quam pereat* ***(i.e "It is better for a thing (****the law****) to have effect than to be made void)."***

In the instant case a construction or interpretation which would give the Hon. the Chief Justice power to hold his own inquiry to satisfy himself of a ***prima facie case of misbehavior*** would violate not only the clear provision of the Constitution, but also the principle that it is better that the law should have effect than to give an interpretation which is void. There is in Section 62 (5) of the Constitution provision for the observance of the rules of natural justice, and a suspended judge has a full opportunity to put his case before the lawfully constituted tribunal.

We therefore find and hold firstly that it would be contrary to the principles of judicial independence for the Chief Justice to hold an inquiry of his own to satisfy himself of a prima facie case of serious misconduct, and secondly that the principles of natural justice in relation to the Applicant have not been violated.

(VI) OF FAIR HEARING BEFORE AN INDEPENDENT AND IMPARTIAL ADJUDICATING AUTHORITY

The Applicant's Counsel's contention that the Applicant has not been accorded a fair hearing by an independent and impartial tribunal is not tenable because-

(a) where the question of the removal of a Puisne judge arises for reasons of either inability to perform the functions of his office (whether arising from infirmity of body or mind or from any other cause) or for misbehaviour, the President is required to appoint a tribunal under Section 62 (5) of the Constitution.

(b) by Gazette Notice Number 8829 of 11th December, 2003 and Gazette Notice No. 96 of 6th January, 2004, the President established a tribunal to inquire into the question of the removal of the Applicant for misbehaviour and the tribunal published the rules of the tribunal.

(c) Section 69 of the Interpretation and General Provisions Act, (Cap 2) of the Laws of Kenya provides –

"***69. the production of a copy of the Gazette Notice containing a written law or notice shall be prima facie evidence in all courts and for all intents and purposes whatsoever of the due making and the tenor of the written law or notice."***

(d) there is no challenge that the said Gazette Notices are defective or that there is no power in the President to appoint a tribunal pursuant to the provisions of Section 62 (5) of the Constitution;

(e) there is no allegation or contention that the tribunal is improperly constituted;

(f) the Applicant has not presented himself before the Tribunal.

In Professor Muigai's submission again, there is no requirement that the Applicant be heard by the President or the Chief Justice. The reason for that is that the Applicant will be heard by or at the Tribunal.

In ***TELLIS –VS- BOMBAY MUNICIPAL CORPORATION*** [1987] LRC (Constitution) 351 Chandrachand C.J. said at page 376,

"***The right to be heard has two facts, intrinsic and instrumental. The intrinsic value of that right consists in the opportunity which it gives to individuals or groups, against whom decisions taken by public authorities operate, to participate in the proceedings by which those decisions are made, an opportunity to express their dignity as persons."***

and before that passage at page 375 said-

"***The ordinary rule which regulates all procedures is that persons who are likely to be affected by the proposed/likely action must be afforded an opportunity of being heard as to why that action should not be taken. The hearing may be given individually or collectively, depending upon the facts of each situation. A departure from this fundamental rule of natural justice may be presumed to have been intended by the Legislature only in circumstances which warrant it. Such circumstances must be shown to exist, when so required, the burden being upon those who affirm their existence."***

The foregoing observations by Chief Justice Chandrachand are quite appropriate. They are however only applicable if the Tribunal established under Section 62 (5) of the Constitution fails to hear the Applicant, and therefore, breaches the rules of natural justice. Unless and until the Applicant presents himself before the Tribunal he cannot be heard to say that he has not been heard or plead that he has not been granted an opportunity to be heard by an independent and impartial tribunal. In the premises therefore, we find and hold that the Applicant's contention that he has not been accorded a fair and prompt hearing before an independent and impartial tribunal lacks in legal foundation and is therefore baseless.

(VII) OF THE REPRESENTATIONS TO THE PRESIDENT AND LEGALITY OF THE RULES FORMULATED BY THE TRIBUNAL AND FORMULATION OF ALLEGATIONS DRAWN BY PHILIP KIPCHIRCHIR MURGOR ASSISTING COUNSEL.

(A) *Of the Legality of the Rules of the Tribunal*

Mr. Oduol contended that the President in empowering the Tribunal to draw up rules for the Tribunal was re-writing the Constitution because the power to make rules is entrusted to the Chief Justice and consequently submitted that Gazette Notice Number 8829 of 2003 was unconstitutional null and void and so are the Rules.

We have already observed above that by virtue of Section 69 of the Interpretation and General Provisions Act, Gazette Notice Nos. 8829 of 10th December, 2003 was duly made and was not unconstitutional. By virtue of the said Gazette Notice, the Tribunal made the Rules of procedure which were published under Gazette Notice No. 96 of 6th January, 2004.

Mr. Oduol learned Counsel for the Applicant contended that the said Gazette Notice No. 96, and the rules thereunder are null and void because they were not made by the Chief Justice.

We found this submission a little strange because nowhere under Section 62 of the Constitution is there a power conferred upon the Chief Justice to make rules for a Tribunal appointed by the President to investigate the question of the removal of a judge. The power of the Chief Justice to make representations to the President under Section 62 to inquire into the question of the removal of a judge must not be confused with the power of the Chief Justice to make rules under Section 65 (3) and 84 (6) of the Constitution with respect to the supervisory jurisdiction of the High Court over subordinate courts, and the High Court's original jurisdiction with respect to alleged contravention of any of the provision of the Bill of Rights, Chapter V of the Constitution.

The Constitution lays the framework upon which the question of the removal of a judge may be investigated, the rules of procedure, which is a detail is left to the President, the person who appoints the tribunal. This is the common practice today, where the principal legislation establishes a tribunal, and the tribunal or board is left to determine its own procedure. This is true of the oldest public corporations in this country, such as the Industrial and Commercial Development Corporation established under the Act of that name, (***Chapter 445 Laws of Kenya***) where it is expressly provided in Section 14 (5) that the Corporation shall regulate its own procedure. So do the latter day development authorities, Ewaso Ngiro North River Basin Development Authority Act ***(Cap. 447***) S. 5 (g), and Ewaso Ngiro South River Basin Development Authority (Cap. 447) Section 5 (9) and so also other development authorities Kerio Valley Development Authority (Cap. 441) Section 5 (8), to Lake Basin Development Authority (Cap. 442) Section 5 (8). More at home is the Cooperative Tribunal set up under the Cooperative Societies Act, 1997 which has power to promulgate its own rule. And so also the Environmental Tribunal.

Thus Allan in ***Law In the Making 7th Edition*** says at page 542 "***the framework of this legislation is, entirely at the will of the sovereign Parliament; the details are both devised and carried into effect by the executive, subject to both constitutional controls, both*** *de jure* ***and de facto, through Parliament which debates and amends proposed legislation and judicial review."***

As the power to appoint a tribunal lies with the President, the President does also have the power to empower the tribunal to establish and regulate its own procedure.

In the circumstances therefore we would accept and agree with Professor Muigai's learned counsel for the Respondents submission that Gazette Notice No. 8829 dated 10th December, 2003 and issued on 11th December, 2003, and Gazette Notice No. 96 of 2004 issued on 6th January, 2004 are not ***ultra vires*** the Constitution. The tribunal was set up to inquire into the allegations against the Applicant in accordance with the express provisions of the Constitution and cannot therefore be unconstitutional.

(B) Of the Representations and Subject of Inquiry.

The Applicant's contention was that under Section 62 (5) of the Constitution the Tribunal can only inquire into facts presented to it and state a finding thereon, and it is not open to the Tribunal to frame issues arising from other facts unconnected with the representations made to the President and arising from the findings of the ***Ringera Committee***. Counsel urged that it was unconstitutional for Assisting Counsel to frame issues which were not before that ***Committee*** and place them before the Tribunal because that would be open to abuse or witch-hunting.

One of the declarations sought by the Applicant was that only the Court of Appeal can by law engage in the exercise of quashing the legality of a High Court order or judgement.

Our view of this submission is that if the question of a judgement passed or an order made by a judge is, or constitutes part of the representation made by the Chief Justice to the President to appoint a tribunal to inquire into the question of the removal of a judge, then the tribunal so appointed has the power and constitutional mandate to inquire into that question, and in doing so, the Tribunal is not acting as an appellate court.

Under Gazette Notice Number 8829 of 2004 aforesaid, the mandate of the Tribunal is expressed as "***shall be to*** investigate into the conduct of the Applicant (***among others), "including, but not limited to" the***

allegations that the Applicant has been involved in corruption, unethical practices and absence of integrity in the performance of the functions of his office."

Contrary to the submission by Professor Muigai that once a Judge is under investigation, any other issue relating to his suitability to hold office cannot be blocked otherwise there would be need for several tribunals to be set up against the same judge to investigate each complaint, we are of the view that the only issue to be placed before the Tribunal is the representation by the Chief Justice to the President which gave rise to or formed the basis of the question of removal of a judge before setting up the Tribunal. It is therefore not open to the Tribunal or the Assisting Counsel to frame any other issues beyond that which formed the basis of representation to the President for removal of a judge. It would become a free-fall for all manner of calumny against a hapless judge, and contrary to the provisions of Section 62 (5) of the Constitution which clearly predicates the removal of a judge upon the existence of a ***question*** necessitating the setting up of a Tribunal to Inquire into that ***question*** – not any other question which did not form the substance of the representations to the President. The inclusion of the phrase "***including but not limited to"*** is clearly inconsistent with the said Section 62 (5) of the Constitution, and we would expunge it from the Tribunal's mandate under Gazette Notice No. 8829 dated 10th December, 2003, and published on 11th December, 2004.

We would therefore grant declarations numbers 9 and 12 of the Applicant's Originating Summons dated and filed on 10th August, 2004 limited to the expunging of the said phrase only.

(VIII) OF LEGITIMATE EXPECTATION

The principle of legitimate expectation lies in the proposition that where a person or a class of persons has previously enjoyed a benefit or advantage of procedure which, on reasonable grounds, seemed likely to be continued as a standard way or guide, with respect to the resolution or disposal or certain questions a claim of legitimate expectation may arise.

Put differently, ***legitimate expectation is but*** one variant aspect of the duty to act fairly and natural justice is but a manifestation of a broader concept of fairness.

See such cases as ***O'KELLY VS. MACKMAN [1982] 3 ALL ER. 1124, COUNCIL OF CIVIL SERVANTS UNION –VS- MINISTER FOR CIVIL SERVICE [1985] A.C. 374,*** OR it be a representation, or past practice, as happened in ***R Vs. SECRETARY OF STATE FOR THE HOME DEPARTMENT exp. KHAN [1985] I ALL ER. 40***, in which Parker L.J. was willing to hold that a Home Office Circular as respects adoption procedures for foreign children generated a legitimate expectation that the procedure therein would be followed and that the Minister could not resile from them without affording the Appellant a hearing.

In the ***Barnwell*** case the basic tenet of ***Bishop C.J***. and indeed ***Kennard and Churaman*** JJA was that where the Judicial Service Commission should properly make an adverse representation against a judge, thereby making it necessary for His Excellency the President to constitute a tribunal of inquiry, the justice of the situation demanded safeguards at an early stage, prior to the sitting of the Judicial Service Commission to consider its decision.

In ***WISEMAN -VS- BORNEMAN [1969] 3 ALL ER. 275 at 277*** – 8 the court said that the term "***natural justice***" and the phrase "***duty to act fairly***" have no difference but are flexible depending on the circumstances or context – ***COUNCIL OF CIVIL SERVICE UNIONS –VS. MINISTER OF THE CIVIL SERVICE [1985] AC. 374.***

Discussing this very point de Smith and Brazier in ***CONSTITUTIONAL AND ADMINISTRATIVE LAW (6th Edition,*** 1989) say at (pages 557-558).

"**The rules of natural justice are minimum standards of fair decision-making imposed by the common law on persons or bodies who are under a duty to "***act judicially***". They were applied**

originally to courts of justice and now extend to any person or body deciding issues affecting the right or interests of individuals where a reasonable citizen would have a legitimate expectation that the decision-making process would be subject to some rules of fair procedure. The content of natural justice is therefore flexible and variable.

All that is fundamentally demanded of the decision-maker is that his decision in its own context be made with due regard for the affected parties' interests and accordingly be reached without bias and after giving the party or parties a chance to put his or their case. Nevertheless some judges prefer to speak of a duty to act fairly rather than a duty to observe the rules of natural justice, often the terms are interchangeable. But it is perhaps now the case while a duty to act fairly is incumbent on every decision-maker within the administrative process whose decision will affect individual interests, the *rules of natural justice* **apply** *only when some* **sort of definite code of procedure must be adopted, however flexible that code may be and however much the decision-maker is said to be master of his own procedure. The rules of natural justice are generally formulated as the rule against bias** (*nemo judex in sua causa*) **and in respect of] the right to a fair hearing** [*audi alteram partem*]."

Counsel for the Applicant submitted following the ***Barnwell case***, that in a general sense therefore; natural justice is seen as being concerned with those processes which were used or ought to be used by a public body or official to arrive at a decision which affects the interests of an aggrieved person. Within the parameters of that concern have arisen special areas of consideration that include legitimate expectation, and procedural fairness and the duty to act fairly. In the words of Bishop C.J. and Kennard J.A., -"***a decision maker could be estopped from acting contrary to a legitimate expectation arising from a benefit, advantage or previous practice expected to continue until withdrawn in a procedurally correct matter, the judge had a legitimate expectation arising from the Commission's previous procedure of hearing him and accordingly the respondents were estopped from not treating him the same way."***

A careful reading of ***Barnwell's*** case shows however that Judge Barnwell's legitimate expectation was based upon two previous appearances before the Judicial Service Commission as provided in the Constitution of Guyana, when he was able to repel accusations against himself. In the third incident as well as he expected and quite rightly, we might add, that the advantage he had enjoyed or been accorded to him to explain his side of the complaint against him before the Judicial Service Commission of that country made representations to the President on the question of his removal would be accorded him once again.

Legitimate expectation is therefore a variant of the expected right to a hearing. The basic argument on behalf of the Applicant was that he expected a hearing before representations are made to the President for appointment of a tribunal to inquire into the conduct of the judge.

While we concede as our brother Hon. Mr. Justice Nyamu did in the case of ***HON. LADY JUSTICE NAMBUYE –VS- HON. THE CHIEF JUSTICE OF KENYA & 5 OTHERS*** (***Misc. Application No. 764 of 2004***) that a hearing of a judge before representation are made to the President would be the ideal practice, such an expectation is not reasonable in terms of the Constitution of Kenya where there is established procedure for inquiry into questions for removal of a judge. We therefore reject this ground of the Applicant's case.

Our brother Hon. Mr. Justice Nyamu quite rightly rejected the five steps suggested by Counsel in the ***Nambuye case*** which should be followed by Hon. the Chief Justice before any representation for removal of a judge is made to the President. On our part we urge that in any future constitutional dispensation or reform,- before any representation is made to the President to appoint a Tribunal to investigate into the question of removal of a judge some form of hearing be accorded to a judge before any representation is made to the President. We suggest that a "***Judges Inquiry Act"*** be enacted, if not, then the following procedure be entrenched in any amendments to the Constitution comprising-

(1) Stage one –Complaint of misconduct against a judge is received by the Chief Justice, who

satisfies himself that the misconduct or misbehaviour is a matter fit for reference to the Judicial Service Commission,

(2) Stage Two – The Chief Justice refers the matter to the Judicial Service Commission to investigate the complaint – the investigation may be administrative or a Board of Inquiry –and makes recommendations to the Chief Justice that the complaint raises sufficient grounds for representation to the President to appoint a Tribunal. A Judge is granted a right of hearing,

(3) Stage three – the Judge having been confronted with the complaint by the Chief Justice answers to the Judicial Service Commission during the inquiry stage,

(4) Stage Four – Determination by the Judicial Service Commission that Judge A be removed or the Judicial Service Commission dismisses the complaint, matter ends here,

(5) Stage Five – Section 62 (5) of the Constitution now takes charge when the Chief Justice through the Judicial Service Commission makes a representation to the President that a tribunal be set up and it starts the Inquiry or investigation.

We do not say that all of these steps may be put in place, but that at least a provision for advance information to a Judge be put in place in the Constitution. In this regard analogy may be drawn from the many safeguards to public officers provided for under the Service ***Commissions Act (Cap 185, Laws of Kenya*)** where there are elaborate procedures accorded to a public officer including an appeal against his dismissal to the Public Service Commission, and even a second appeal after the lapse of one year since the dismissal of a previous appeal.

However as currently provided we find and hold in terms of Section 62 (5) of the Constitution that it would not be either a reasonable or a legitimate expectation for a judge to contemplate a hearing beyond that which is provided for in that provision. It is the only opportunity to be heard provided for in the Constitution.

IX. OF THE PROTECTED STATUS, REPUTATION, POSITION AND OF WHETHER THERE IS PROPERTY IN THE TENURED OFFICE OF JUDGE AND DEPRIVATION THEREOF IS CONTRARY TO SECTION 75 OF THE CONSTITUTION.

The Applicant's contention here is best captured in the words of Bishop C.J. in the case of ***Barnwell -V- Attorney-General [1994] 3 C.L.R. 30***, and since any paraphrase of ours would do violence to the language of Bishop Chief Justice of the Republic of Guyana in the said case, we will do justice to his words if we reproduced them here in full where he said at pages 39-40 of his judgement-

"***Disclosure that a judge has been suspended from office has a prime news element that is universal. The public within the particular state or territory from which the announcement emanated and beyond, becomes interested in receiving the details. Some are curious, others are concerned. However the common reason underlying both types of interest lies in the fact that the official act of suspending a judge is a rare occurrence. Society attributes honour, if not veneration, learning if not wisdom, together with detachment, probity, prestige and power to the office of judge and it may be that the incumbents are regarded as imbued with an aura, similar to that of a "****priestly caste"* ***so great are the social expectations and obligations that bear on that responsible position, the role and functions related to it. In the circumstances, it is not unreasonable to propose that suspension of a judge engenders disgrace and dishonour to him and even if eventually he should be cleared of the allegation made against him the social stigma caused by the suspension is never wholly eradicated."***

Since Mr. Ochieng Oduol learned Counsel for the Applicant herein placed much reliance on the ***Barnwell case***, and in particular upon the foregoing description of the lofty and respected position of a judge in society, we further draw from the history narrated in the same judgement by the Chief Justice of Guyana where he cites David Pannick Q.C. and Fellow of All Saints, Oxford, in his book "***JUDGES***" 1987, at page 89:-

"***Judges have been removed from office on very few occasions. The Judicial scandal of the late thirteenth century involved the corruption, due to low pay, of many officials. Edward* 1 *appointed a Commission of Inquiry which led to the dismissal of two out of three judges of the Court of King's Bench and four out of five judges of the Court of Common Pleas. Sir Williams De Thorpe, Chief Justice, was convicted of accepting bribes in 1350 and removed from office. Lord Chancellor Bacon suffered the same fate for similar reasons in 1621. In 1725 Lord Chancellor Maccelefield resigned after being convicted of selling offices in the Court of Chancery. Lord Westbury resigned in 1865 after abuses in the administration of bankruptcy were revealed "***

Of the sanctions against judges the same learned author continues at pages 89-90.

"***Judges of the High Court and the Court of Appeal hold that office during good behaviour, subject to a power of removal by Her Majesty on an address presented to Her by both Houses of Parliament. Similar provisions apply to Law Lords. Such protection of judicial tenure dates from 1700. The object of all this was to protect the judges, not from Parliament, but from the arbitrary and uncontrolled discretion of the Crown. Sir John Barrington, a Judge of the High Court of Admirally in Ireland, was removed from office by these means in 1830 after being convicted of appropriating for his own use funds paid into court. Since 1830 several other judges have been accused in the Houses of Parliament of misconduct but no judge has been removed from office by these means since that date" (1830).***

So far as our research could show, we have found no precedent of removal of judges in this country, Uganda or Tanzania, during the entire colonial period (Kenya), Protectorate (Uganda) and Trusteeship (Tanganyika) (Tanzania) to 1977 when the East African Community collapsed after ten years operation and when Kenya and those countries shared the Court of Appeal for Eastern Africa.

The Applicant's contention here is that he has property, in the tenured or protected status of a Puisne Judge. He cannot be removed from office at the whim or fancy of any one. The procedure for his removal must be followed. Two issues are raised by this pleading, firstly, whether there is property in a tenured or secured office of a "***judge"*** and secondly whether due procedure was followed in the decision to suspend the Applicant.

We have already found and held that the Applicant was lawfully suspended. We are called here to determine whether the offices of "***judge"*** is "***property"*** which can only be taken away be virtue of section 75 of the Constitution.

Counsel for the Applicant relied upon ***Wade on Administrative Law*** Pages (561-562) where the said learned author says-

"***A line has to be drawn between the office which gives its holder a status which the law will protect specifically, on the one hand, and on the other hand a mere employment under a contract of service. "Offices" used*** *in old times to be looked upon as a form of property,* ***which could be held and recovered in specie, if the holder was wrongfully removed, he could obtain restoration by mandamus, or he might be granted prohibition or an injunction. Nowadays he can also obtain a declaration that his removal was void and that he is therefore still in office, as was done in RIDGE –VS BALDWIN (supra) since his remedy operates specifically. In other words, he is removable only by due and lawful exercise of the power of removal failing which he remains legally in office……. If an office holder is removed without a hearing in a case where he has a right to one, he can recover his office specifically. But if in similar situation, a mere servant is dismissed, his dismissal remains legally effective and there is no remedy by which he can compel his employer to continue to employ him."***

In ***DURAYAPPAY –VS- FERNANDO [1967] 2 ALL ER***. 152 at page 156, the Privy Council through Upjohn L.J. said of the '***audi alteram" principles,***

"***In their Lordships' opinion there are three matters which must be born in mind when considering whether the principle should be applied or not."*** These three matters are –

a. *first* what is the nature of the property, the office held, ***status enjoyed or services to be performed by the complainant or in justice***,

b. *secondly,* ***in what circumstances or on what occasions are the persons claiming to be entitled to exercise the measure of control entitled to intervene,***

c. *Thirdly,* ***when a right to intervene is proved, what sanctions, in fact, is the latter entitled to impose on the other.***

"***It is only on a consideration of all matters that the question of the application of the principle of*** *audi alteram partem* ***can properly be determined."***

The Applicant's Counsel claimed in his skeletal submissions that the office of "judge" is "property" which cannot be compulsorily "acquired" except in accordance with due process, and subject to fair and prompt compensation under Section 75 of the Constitution, the relevant of which reads-

"**75 (1)** ***No property of any description shall be compulsorily taken possession of, and no interest in or right over property, of any description shall be compulsorily acquired, except where the following conditions are satisfied –***

(a) the taking of possession or acquisition is necessary in the interests of defence public safety, public order, public morality, public health, town and country planning or the development or utilization of property so as to promote the public benefit, and

(b) the necessity therefore is such as to afford reasonable justification for the causing of hardship that may result to any person having an interest in or right over the property, and

(c) provisions is made by a law applicable to that taking of possession or acquisition for the prompt payment of full compensation."

We could write a whole thesis on what "***property"*** is. We do not propose to do so. Instead we will draw examples from the use of the expression ***in its*** ordinary usage as a common English word, its use in company law in relation to borrowing and charging of the "***property***" of a company and uncalled capital, the use of the word in Bankruptcy Statutes and in Wills. "**Property is not a term of art, but a common English word, which must be taken in an ordinary sense."**

In ***re Earnshaw*** – ***Wall*** [1894] 3 Ch. 156, the word "***property***" is used in different senses. It may denote either objects of proprietary rights, such as pieces of land, domesticated animals and machines, or the proprietary rights themselves. In common instance it is usually employed in the former sense, but in the language of jurisprudence in the latter. Property in the sense of proprietary rights, may exist in relation to physical objects, or to intangible things such as debts or patent rights."

In Company law, a company usually provides in its memorandum and articles power to borrow on a charge of its uncalled capital…… and to charge "***the undertaking and all the property whatsoever and wherever both present and future"*** with payment of the sum advanced. Although uncalled capital may be called "***property***" yet it is a property of a very peculiar description …. It is not a debt, it is a right to make a call and create a debt, and it is rather stretching the meaning of the word "property" to make it include a right such as that. So property in company law will not include "***uncalled capital***" ***Re Russian Spratts Patent Ltd Johnson -Vs- Russian sprats Potent Ltd. [***1898] 2 ch. 149, per Lindley MR. at page 152.

In the Bankruptcy Act, ***[Cap 53]*** "***property"*** includes money, goods, things in action, land and every description of property whether movable or immovable and whether situated in Kenya or elsewhere; and also obligations, easements and every description of estate, interest and profit, present or future, vested or contingent, arising out of an incident to property as defined above. This is by far the widest description of the term "***property."***

Similarly in ***Wills*** the term "***property***" is used at large in the most comprehensive sense as indicative and descriptive of every possible interest which a party can have. The question in these cases is whether the terms used are descriptive of the interest which the testator had or descriptive of the particular estate. If they are descriptive of the particular estate, one construction would prevail; and if they are descriptive of the interest which he has in that estate then another construction would prevail.

Those are, we believe, sufficient examples to show that although the office of "***judge***" is a tenured office, it is not in modern day constitutional law, looked upon as a "***form of property."***

The colonial judge held office not at the pleasure of the Crown, but so long as he was of good behaviour or conduct in terms of the unwritten constitution, code and ethics of that high office. Where a judge fell short of that standard he was removed not at will, but in accordance with the determination of a tribunal comprised of his peers. His office did not therefore constitute a "***property"***

In his submissions to us, Professor Muigai was on the point when the said that a judge is but one of the constitutional office holders and the intention of the Constitution and Parliament was to accord him dignity of office to enable him perform his duties and that the security is not intended to be for life when Section 62 limits it to an age prescribed by Parliament and is currently under the ***Judicature Act*** (***Cap 8***) limited to 74 years of age. Besides section 62 (3) of the Constitution recognizes the possibility of removal of a judge from office for misbehaviour or inability (***due to infirmity of mind or body***).

In modern day constitutional law, therefore, the office of judge is not regarded as a "***property"*** in which we or any one judge has a proprietary interest in the sense of physical object like land, domesticated animals, or machines or other proprietary rights or even intellectual property. The office of judge is more of a calling, of the "***priestly caste***" ***(as Bishop C.J. said in the Barnwell case***), a privilege which is held in high esteem by society and in which every holder of that office is beckoned and called upon to discharge the functions of that office in accordance with the highest and noblest ethics and standards be-fitting to the office.

We therefore find and hold that the office of judge is not a "***property***" in terms of section 75 (1) of the Constitution, which can be compulsorily acquired and be subjected to fair and prompt compensation in terms of the provisions of the Land Acquisition Act, Chapter 295 Laws of Kenya.

Having so held in relation to the question of whether the "***office***" of judge is not a property within the provisions of Section 75 of the Constitution, we also hasten to add that a judge is entitled to the restoration of his office of judge and the President is bound to restore him in terms of the provisions of Section 62 (6) of the Constitution if the Tribunal recommends to the President that the judge ought not to be removed from office, or if earlier, the suspension is revoked by the President in accordance with the advice of the Chief Justice.

X. OF UNCONSTITUTIONALITY OF THE SUSPENSION OF EMOLUMENTS BY THE REGISTRAR CONTRARY TO SECTION 104 OF THE CONSTITUTION

Section 104 of the Constitution provides as follows-

(1) ***There shall be paid to the holders of offices to which this section applies such salary and such allowances as may be prescribed by or under an Act of Parliament.***

(2) The salaries and any allowances payable to the holders of the offices to which this section applies shall be charged upon the Consolidated Fund.

(3) The salaries and allowances payable to the holders of the offices to which this section applies and his other terms of service (other than allowances that are not taken into account in computing, under any law in that behalf, any pension payable in respect of his service in that office) shall not be altered to his disadvantage after his appointment).

(4) When a person's salary or other terms of service depend upon his option, the salary or terms for which he opts shall for the purposes of subsection (3) be deemed to be more advantageous to him than for which he might have opted.

(5) This Section applies to the offices of judge of the High Court, Court of Appeal, members of the Public Service Commission, members of the Electoral Commission and Attorney-General and Auditor-General."

The Applicant's Counsel submitted and contended that the act of the Registrar of the High Court to suspend the Applicant's salary with effect from 15th October, 2003, the recall of all law books and motor vehicles from him and the order to the Applicant to vacate Government house was a violation of section 104 of the Constitution.

The short answer to this issue was that given by Professor Muigai, the issue was rendered moot as all the privileges were restored to the Applicant and this is now a non issue.

In the long term the answer to this submission, lies in the provisions of the ***Constitutional Offices (Remuneration)*** Act, (***Cap 423 Laws of Kenya)*** that is the law enacted by Parliament pursuant to the provisions of Section 104 (1) of the Constitution above. The relevant provisions of the Act for the purposes of this judgement are-

Section 2 (1) – (2) which say-

" **2** (1) ***The salaries to be paid to the holders of the offices specified in the first column of the Schedule being the offices mentioned in section 104 of the Constitution shall, with effect from the 1st July, 1985, be at the annual salary scales or rates specified in relation to those officers in the second column of that schedule.***

PROVIDED ***that where a salary scale is specified the holder of the office shall be paid such salary within that scale as the President may determine.***

(2) The holders of the offices specified in the first column of the Schedule shall be paid such allowances as may be determined from time to time by the president.

We observe firstly that a judge under suspension remains legally in office until the Tribunal submits its recommendation that he be removed from office. In this respect we agree with the opinion of our brother Hon. Mr. Justice Nyamu in ex parte Lady Justice Roselyne Nambuye ***(Misc. Application No. 764 of 2004***). In the absence of any contrary provision in either the Constitution or the ***Constitutional Offices Act***, a judge under suspension is entitled to his salary until the Tribunal submits its Report to the President.

We consequently find and hold that it was contrary to Section 104 of the Constitution for the Registrar of the High court to withhold the Applicant's salary with effect from 15th October, 2003.

Secondly we observe that all allowances payable to a constitutional office holder, and all facilities accorded to him are granted and maintained for the purposes of according the holder of such office, adequate and unhindered opportunity and time to discharge the onerous functions of that office. Where the functions of that office have been halted albeit temporarily the maintenance of such allowances and facilities may no longer be justifiable. Besides under Section 2 (2) of the Constitutional Offices (***Remuneration***) Act (***supra)*** "***the payment of such allowances is to be determined from time to time by the President."***

Where therefore a judge is suspended from the exercise of the functions of such office, the payment of any such allowances besides his salary (and the non-practising allowance) are entirely at the discretion of the President. As the executive authority of the Government of Kenya is by Section 23 (1) of the Constitution vested in the President and may be exercised by him either directly or through officers

subordinate to him, it was within his discretion to withdraw such allowances payable to a judge and to communicate that decision through the Registrar of the High Court, an officer subordinate to him.

We therefore find and hold that it was not unconstitutional or contrary to section 104 of the Constitution for the Registrar to communicate the President's decision of withdrawal of the allowances to the suspended Applicant.

XI. **SUMMARY**

In summary therefore we find and hold as follows-

(1) a judge may be removed from office for inability to perform the functions of the office of judge;

(2) pending the inquiry into the question of the removal of a judge, the President may suspend him, but subject to payment of his salary and/or allowances under Section 104 of the Constitution, and the provisions of the Constitutional Offices (***Remuneratio***n) Act;

(3) suspension under Section 62 (6) of the Constitution is a holding operation pending inquiries by the Tribunal into the conduct of the Applicant and not final in nature;

(4) in the exercise of his "***ministerial"*** powers the Chief Justice may receive complaints from any person, and may appoint any judge or judicial officer to receive and collate information relating to the complaint in particular or to judiciary in general;

(5) appointment of a Committee or other person to receive and collate information is not a delegation of the powers of the Chief Justice;

(6) it would be contrary to the doctrine of judicial independence for the Chief Justice as the first among equals (***primus inter pares"***) to hold an inquiry to satisfy himself of a prima facie case of a judge's misconduct;

(7) The Applicant's right to be heard by an independent and impartial tribunal is provided for under the Constitution and the Tribunal has been duly established and forum for the Applicant's legitimate expectation to be heard and a fair trial has been met;

(8) a tribunal established by the President under Section 62 (5) of the Constitution is not a subordinate court in terms of Section 67 (1) of the Constitution;

(9) the protected tenure of the office of judge is not a property in terms of either Section 70 (c) or 75 (1) of the Constitution;

(10) The suspension of a Judge from office shall cease to have effect upon recommendation of the Tribunal to the President that a Judge ought not to be removed from office;

(11) the subject matter of inquiry by the tribunal is that which the Chief Justice has represented to the President as the question for investigation and not inquiry at large into the life and conduct of a judge,

(12) a tribunal appointed under Section 62 (5) of the Constitution may make its own rules not inconsistent with the Constitution or the enabling statute,

(13) It is desirable to entrench either in the Constitution itself, or a new ***Judges Inquiries Act,*** a procedure for removal of a judge in place of Rules of procedure made by an adhoc Tribunal.

(14) There be entrenched into the Constitution provisions for judicial review.

(15) The communication of the President's decision of withdrawal of allowances and benefits besides

salary, to the suspended Applicant made by the Registrar of the High Court pursuant to Section 104 of the

XII. CONCLUSION AND COSTS

Save as otherwise specifically found in relation to declaration No. 9 and 12, which we granted and declaration No. 14, which is moot, we are of the firm and unanimous view that all the other prayers for the various declarations as enumerated in the Originating Summons dated 10th August, 2004 fail and are therefore dismissed with a direction that each party bears its own costs because the issues raised by the Applicant are of great legal significance to the growth of law and Constitutional development in Kenya.

In conclusion, we extend our thanks and sincere appreciation to Counsel on both sides for the research industry and presentation of their respective clients cases.

Dated and delivered at Nairobi this 3rd day of November, 2006.

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Jessie Lessiit

Judge

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Roseline P.V. Wendoh

Judge

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M.J. Anyara Emukule

Judge.