REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MISC. CIVIL APPLICATION NO. 952 OF 2003

IN THE MATTER OF AN APPLICATION BY PETER NYAKUNDI MORIGORI FOR A JUDICIAL REVIEW ORDER IN THE NATURE OF CERTIORARI AND IN THE MATTER OF THE JUDICIAL SERVICE COMMISSION REGULATIONS (SERVICE COMMISSION'S ACT CAP 185 LAWS OF KENYA

REPUBLIC……………….................................... APPLICANT

VERSUS

JUDICIAL SERVICE COMMISSION OF KENYA … RESPONDENT

EX PARTE: PETER NYAKUNDI MORIGORI

JUDGEMENT

Introduction

1. By a Notice of Motion dated 12th September, 2003 filed the same day, the *ex parte* applicant herein, **Peter Nyakundi Morigori**, seeks the following orders:

1. **That an Order of *Certiorari* to remove into the High Court and quash the decision of the Judicial Service Commission of Kenya delivered on and dated 31/7/2003 and contained in the letter dated 9/8/2003 ordering the dismissal of Peter Nyakundi Morigori, the Applicant herein.**
2. **That the costs of this application be provided for.**

Ex Parte Applicant's Case

2. The said Motion is supported by a Verifying Affidavit sworn on 26th August, 2003 by the applicant.
3. According to the applicant, until 14th August, 2003, he was a Resident Magistrate at Tawa Court where he was employed by the Respondent as a Magistrate on 1st September, 1990 and since then had worked in the following stations namely:-

   a. Garissa Law Court – between 1/9/1990 and April 1994

   b. Muranga Law Courts – between April 1990 and November 1997

   c. Kiambu Law Courts - between November 1997 and February 2001

   d. Migori Law Courts – between February 2001 and June 2002

e. Tawa Law Courts – between June 2002 up to 14/8/2003when the Respondent communicated its decision to dismiss me, on 31/7/2003 vide their letter of 9/8/2003.

4. On 26th June, 2003, he received a letter from the Respondent informing him that he had been cited by the Integrity and Anti-corruption Committee for various malpractices namely, inefficiency, lack of integrity and incompetence. Immediately after receiving that letter he sought clarification from the Respondent on the issue whether the letter was indeed meant for him because though it contained his name, the PJ Number was not his.
5. He continued that on 8th July, 2003 the Respondent replied to his letter stating that Judicial Officers are identified by their names and status but not PJ Numbers which statement according to the applicant was rather surprising because the Respondent had not disclosed in its letter of 24th June, 2003 the station in which the alleged malpractices were committed. Upon receipt of this letter he wrote back to the Respondent seeking to be supplied with details of the alleged malpractices to enable him reply to which he received a reply vide a letter dated 14th July, 2003 delivered to him on 28th July, 2003. Upon receipt thereof he immediately replied and gave his representations on the alleged malpractices vide letter dated 6th August, 2003. However, unknown to him the Respondent had already sat and decided his case on 31st July, 2003, a development he learnt through the Respondent's letter of 9th August, 2003 delivered on 14th August, 2003, a delay which the applicant could not understand. In any event he was neither forewarned that he was supposed to reply to the letter within a certain period nor was he advised that the Respondent was due to deliberate upon his case on 31st July, 2003.
6. The Applicant reiterated that though from the Respondent's letter of 24th June, 2003, he was cited for malpractices by the Integrity and Anti-corruption Committee, a perusal of the Terms of Reference and Conditions under which the Integrity and Anti-corruption Committee was to operate were very specific namely to identify the corrupt members of the Judiciary and recommend disciplinary or other measures against them and that the said committee did not cite him for corruption. To the contrary, it cited him for delivering Rulings and Judgments that were not dated. However the particular Rulings and Judgments he was accused of were written by him while he was on transfer at Tawa Court and sent to Migori for delivery. These files were forwarded to him to write the Rulings and Judgments by his in charge at Migori. According to the Applicant, it is a matter of law that Rulings and Judgments are dated at the time of pronouncements and not before hence there was no mistake committed by him for which he would be cited.
7. With respect to the other instances where he was cited for malpractices namely acquitting accused persons without reasons in ruling and delivering unreasoned Rulings and Judgments in Criminal and Civil Cases, he contended that the legal remedy lay in Appeal, if any party is aggrieved by Rulings and/or Judgments of that nature. He was however not advised on whether or not there was any Appeal against the alleged Ruling and Judgments and no complaint was made by any party or parties that the alleged Rulings and Judgments occasioned miscarriage of justice in anyway. In any event there was no indication as to what parameters the Integrity and Anti-corruption Committee used to arrive at the conclusion that the alleged Ruling and Judgments were not reasoned.
8. According to the applicant, in citing him for the aforesaid alleged malpractices, the Integrity and Anti-corruption Committee acted in excess and/or *ultra vires* its Terms of Reference and did not hear him before citing him for the alleged malpractices hence he was condemned by both the Respondent and the Integrity and Anti-corruption Committee unheard notwithstanding that he had rendered service to the Nation for about 14 years continuously and nobody had ever complained against him or complained about the manner in which he had been discharging his duties.
9. The Applicant disclosed that he had never been warned or reprimanded regarding the manner in which he had been conducting his judicial duties and to just dismiss him for the aforesaid citation was indeed harsh, oppressive, unjust and unfair and that he deserved a better treatment than this as he was not corrupt.
10. According to the applicant, his response to the allegations leveled against him were never considered as he had already been dismissed by the time the letter was delivered to the Registrar as Secretary of the Respondent hence the Respondent did not hear the applicant before taking the

action to dismiss him nor did it comply with the provisions of the ***Judicial Service Regulations*** (hereinafter referred to as "the Regulations") especially Regulation 26 thereof under the ***Judicial Service Act, Cap 185*** (hereinafter referred to as "the Act") which required that a sub commission be appointed to investigate the allegations of misconduct leveled against the applicant and table its report before the Commission for consideration.

<u>Respondent's Case</u>

11. In opposition to the application, the Respondent filed a replying affidavit sworn by **William Ouko**, the then Registrar of the High Court of Kenya and the Secretary to the Respondent Commission on 20th January, 2004.
12. According to him, the Applicant was given sufficient opportunity to defend himself through the show cause letters that he should not be dismissed for gross misconduct.
13. He added that the Respondent as the employer of the Applicant was entitled to take into consideration the Interim Report submitted by Integrity Committee in accordance with the law and that considering the said Report together with the explanation given by the Applicant the Judicial Service Commission made a decision to dismiss the Applicant. In his view, the Applicant failed to show any reasonable cause or explanation to merit his continued employment with the Judiciary.
14. It was deposed that if aggrieved by the decision of the Judicial Service Commission, the Applicant should have exhausted the procedure set out in the Act hence the application for Judicial Review was premature and this court ought not to entertain the same.
15. It was averred that the decision of the Judicial Service Commission was made pursuant to the provisions of the Act after due process of the law.
16. The Respondent filed submissions on 11th June, 2015 which submissions were however directed to the application dated 18th November, 2014 which sought for the setting aside of the order dismissing the applicant's application. However on 16th December, 2014, this Court set aside the order dismissing the said application. Accordingly there were no submissions filed in response to the Notice of Motion the subject of this decision.

<u>Determinations</u>

17. The parameters of judicial review were set out by the Court of Appeal in **<u>Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001</u>** in which it was held that:

"Judicial review is concerned with the decision making process, not with the merits of the decision itself: the Court would concern itself with such issues as to whether the decision makers had the jurisdiction, whether the persons affected by the decision were heard before it was made and whether in making the decision the decision maker took into account relevant matters or did take into account irrelevant matters…The court should not act as a Court of Appeal over the decider which would involve going into the merits of the decision itself-such as whether there was or there was not sufficient evidence to support the decision."

18. In **<u>Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR</u>** it was held that the remedy of judicial review is concerned with reviewing not the merits of the decision of which the application for judicial review is made, but the decision making process itself. It is important to remember in every case that the purpose of the remedy of Judicial Review is to ensure that the individual is given fair treatment by the authority to which he has been subjected and that it is no part of that purpose to substitute the opinion of the judiciary or of the individual judges for that of the authority constituted by law to decide the matter in question. Unless that restriction on the power of the court is observed, the court will, under the guise of preventing abuse of power, be itself, guilty of usurpation of power. See ***Halsbury's Laws of England 4th Edition Vol (1)(1) Para 60.***
19. It must be remembered that judicial review is concerned not with private rights or the merits of the

decision being challenged but with the decision making process. Its purpose is to ensure that the individual is given fair treatment by the authority to which he has been subjected. See R vs. Secretary of State for Education and Science ex parte Avon County Council (1991) 1 All ER 282, at P. 285.

20. The broad grounds on which the Court exercises its judicial review jurisdiction were restated in the Uganda case of **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300.** In that case the Court cited with approval **Council of Civil Unions vs. Minister for the Civil Service [1985] AC 2** and **An Application by Bukoba Gymkhana Club [1963] EA 478** at **479** and held:

"In order to succeed in an application for judicial review, the applicant has to show that the decision or act complained of is tainted with illegality, irrationality and procedural impropriety ...Illegality is when the decision-making authority commits an error of law in the process of taking or making the act, the subject of the complaint. Acting without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles are instances of illegality. It is, for example, illegality, where a Chief Administrative Officer of a District interdicts a public servant on the direction of the District Executive Committee, when the powers to do so are vested by law in the District Service Commission...Irrationality is when there is such gross unreasonableness in the decision taken or act done, that no reasonable authority, addressing itself to the facts and the law before it, would have made such a decision. Such a decision is usually in defiance of logic and acceptable moral standards...Procedural Impropriety is when there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision. The unfairness may be in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision. It may also involve failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision."

21. The reason for saying this is due to the recognition that the grounds upon which the Court exercises its judicial review jurisdiction are incapable of exhaustive listing. As was stated by **Nyamu, J** (as he then was) in **Republic vs. The Commissioner of Lands *Ex parte* Lake Flowers Limited Nairobi HCMISC. Application No. 1235 of 1998*:***

"Availability of other remedies is no bar to the granting of the judicial review relief but can however be an important factor in exercising the discretion whether or not to grant the relief...The High Court has the same power as the High Court in England up to 1977 and much more because it has the exceptional heritage of a written Constitution and the doctrines of the common law and equity in so far as they are applicable and the Courts must resist the temptation to try and contain judicial review in a straight jacket...Although judicial review has been bequeathed to us with defined interventions namely illegality, irrationality and impropriety of procedure the intervention has been extended using the principle of proportionality...The court will be called upon to intervene in situations where authorities and persons act in bad faith, abuse power, fail to take into account relevant considerations in the decision making or take into account irrelevant considerations or act contrary to legitimate expectations...Even on the important principle of establishing standing for the purposes of judicial review the Courts must resist being rigidly chained to the past defined situations of standing and look at the nature of the matter before them...Judicial review is a tool of justice, which can be made to serve the needs of a growing society on a case-to-case basis...The court envisions a future growth of judicial review in the human rights arena where it is becoming crystal clear that human rights will evolve and grow with the society."

22. This is in tandem with the holding in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that judicial review stems from the doctrine of *ultra vires* and the rules of natural justice and has grown to become a legal tree with branches in illegality, irrationality, impropriety of procedure (the three "I's") and has become the most powerful enforcer of constitutionalism, one of

the greatest promoters of the rule of law and perhaps one of the most powerful tools against abuse of power and arbitrariness.

23. That the 1st Respondent has powers and jurisdiction to discipline judicial officers is not in dispute. Its powers to terminate the *ex parte* applicant's employment cannot therefore be contested. The question to be determined is whether in arriving at its decision the due process of the law was adhered to. Article 47(1) and (2) of the Constitution provide:

(1) Every person has the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair.

(2) If a right or fundamental freedom of a person has been or is likely to be adversely affected by administrative action, the person has the right to be given written reasons for the action.

24. In **Keroche Industries Limited vs. Kenya Revenue Authority & 5 Others Nairobi HCMA No. 743 of 2006 [2007] KLR 240** it was held that:

> **"Statutory power must be exercised fairly. Perhaps it is important to recall the observations made in the English case of** *Reg vs. Secretary of State for the Home Department ex-parte Doody [1994] 1 AC 531* **as follows: "The rule of law in its wider sense has procedural and substantive effect…Unless there is the clearest provision to the contrary, Parliament must be presumed not to legislate contrary to the rule of law. And the rule of law enforces minimum standards of fairness, both substantive and procedural."…On the issue of discretion Prof Sir William Wade in his Book** ***Administrative Law*** **has summarized the position as follows: The powers of public authorities are…essentially different from those of private persons. A man making his will, may subject to any right of his dependants dispose of his property just as he may wish. He may act out of malice or a spirit of revenge, but in law, this does not affect his exercise of his power. In the same way a private person has an absolute power to allow whom he likes to use his land…regardless of his motives. This is unfettered discretion. But a public authority may do none of these things unless it acts reasonably and in good faith and upon lawful and relevant grounds of public interest. The whole conception of unfettered discretion, is inappropriate to a public authority which possesses powers solely in order that it may use them for the public good. But for public bodies the rule is opposite and so of another character altogether. It is that any action to be taken must be justified by positive law. A public body has no heritage of legal rights which it enjoys for its own sake, at every turn, all of its dealings constitute the fulfillment of duties which it owes to others; indeed, it exists for no other purpose…But in every such instance and no doubt many others where a public body asserts claims or defences in court, it does so, if it acts in good faith, only to vindicate the better performances of the duties for whose the merit it exists. It is in this sense that it has no rights of its own, no axe to grind beyond its public responsibility; a responsibility which define its purpose and justifies its existence, under our law, that is true of every public body. The rule is necessary in order to protect the people from arbitrary interference by those set in power over them…when litigants come to the courts it is the core business of the courts and the courts role is to define the limits of their power. It is not for the Executive to tell them when to come to court! It is the constitutional separation and balance of power that separates democracies from dictatorships. The courts should never, ever, abandon their role in maintaining the balance…From the above analysis this is a case which has given rise to nearly all the known grounds for intervention in judicial review, that is almost the entire spectrum of existing grounds in judicial review. It seems apt to state that public authorities must constantly be reminded that ours is a limited government – that is a government limited by law – this in turn is the meaning of constitutionalism...Parliament did not confer and cannot reasonably be said to have conferred power in any of the taxing Acts so that the same powers are abused by the decision making bodies. In such situations even in the face of express provision of an empowering statute appropriate judicial orders must issue to stop the abuse of power. A court of law should never sanction abuse of power, whether arising from statute or**

discretion…Nothing is to be done in the name of justice which stems from abuse of power. It must be settled law by now, that a decision affecting the rights of an individual which stems from abuse of power cannot be lawful because it is outside the jurisdiction of the decision making authority guilty of abusing power. Abuse of power taints the entire impugned decision. A decision tainted with abuse of power is not severable. The other reason why the impugned decision cannot be severed from any other lawful actions in the same decision is because of the great overlap which has occurred in this case stretching from illegality, irrationality impropriety of procedure to abuse of power. Once tainted always tainted in the eyes of the law."

25. In **Peter Okech Kadamas vs. Municipal Council of Kisumu Civil Appeal No. 109 of 1984 [1985] KLR 954; [1986-1989] EA 194** **Platt, JA** held that:

"Wherever any person or body of persons has authority conferred by legislation to make decisions affecting the rights of the subjects, it is amenable to the remedy of an order to quash its decisions either for an error of law in reaching it, or for failure to act fairly towards the person who will be adversely affected if the decision of failing to observe either one or other to the two fundamental rights accorded him of the rules of natural justice or fairness, viz: to have afforded to him a reasonable opportunity of learning what is alleged against him and of putting forward his own case in answer to it, and to the absence of personal bias against him on the part of the person by whom the decision falls to be made."

26. The Applicant contended that he was never heard since by the time he respondent to the allegations made against him, the decision had already been made. It is however not the law that a party must be heard before an adverse decision is made against him but that he ought to be afforded an opportunity of being heard before the decision is made. This was the position in **Union Insurance Co. of Kenya Ltd. vs. Ramzan Abdul Dhanji Civil Application No. Nai. 179 of 1998** in which the Court of Appeal held:

"Whereas the right to be heard is a basic natural-justice concept and ought not to be taken away lightly, looking at the record before the court, the court is not impressed by the point that the applicant was denied the right to defend itself. The applicants were notified on every step the respondents proposed to take in the litigation but on none of these occasions did their counsel attend. Clearly the applicant was given a chance to be heard and the court is not convinced that the issue of failure by the High Court to hear the applicant will be such an arguable point in the appeal. The law is not that a party must be heard in every litigation. The law is that parties must be given a reasonable opportunity of being heard and once that opportunity is given and is not utilised, then the only point on which the party not utilising the opportunity can be heard is why he did not utilise it."

27. Further as is stated by Michael Fordham in ***Judicial Review Handbook***; 4th Edn. at page 1007:

"Procedural fairness is a flexi-principle. Natural justice has always been an entirely contextual principle. There are no rigid or universal rules as to what is needed in order to be procedurally fair. The content of the duty depends on the particular function and circumstances of the individual case".

28. In **Kenya Revenue Authority vs. Menginya Salim Murgani Civil Appeal No. 108 of 2009,** the Court of appeal delivered itself as follows:

"There is ample authority that decision making bodies other than courts and bodies whose procedures are laid down by statute are masters of their own procedures. Provided that they achieve the degree of fairness appropriate to their task it is for them to decide how they will proceed."

29. In **R vs. Aga Khan Education Services *ex parte* Ali Sele & 20 Others High Court Misc.**

Application No. 12 of 2002, it was held *inter alia* as follows:

"On the allegation that there was breach of the rules of natural justice, it is not in every situation that the other side must be heard. There are situations where a hearing would be unnecessary and even in some cases obstructive. Each case must be put on the scales by the court and there cannot be general requirement for hearing in all situations. There will be for example situations when the need for expedition in decision making far outweighs the need to hear the other side and in such situations, the court has to strike a balance."

30. In **Russel vs. Duke of Norfork [1949] 1 All ER at 118**, the Court expressed itself as hereunder:

"There are in my view no words which are of unusual application to every kind of inquiry and every kind of domestic tribunal. The requirements of natural justice must depend on circumstances of the case, the nature of the inquiry, rules under which the tribunal is acting, the subject matter that is being dealt with and so forth. Accordingly I do not derive much assistance from the definition of natural justice which have been from time to time being used, but whatever standard is adopted one essential is that the person concerned would have had a reasonable opportunity of presenting his case."

31. As was held in **Simon Gakuo vs. Kenyatta University and 2 Others Misc. Civil Application No. 34 of 2009:**

"The *audi alteram partem* rule should not be interpreted to mean a full adversarial hearing or anything close to it as per the courtroom situations and as per section 77 of the Constitution. Interpreting the demands of natural justice as requiring an adversarial hearing or anything similar is a serious misdirection in law. There are no rigid or universal rules as to what is needed in order to be procedurally fair. What is needed is what the court considers sufficient in the context of each situation with its own unique facts with the needs of good administration in view. I urge practitioners of law not to rigidly import the hearing requirements in court room situation etc."

32. In this decision the Court will therefore determine whether the Applicant was afforded an opportunity of being heard. By a letter dated 24th June, 2003, The Secretary to the Judicial Service Commission informed the Applicant that an interim report had been submitted to the Chief Justice by a Sub-committee on Integrity of and Corruption in Kenya Judiciary in which the applicant was cited for certain malpractices involving inefficiency, lack of integrity and incompetence. The particulars of the said allegations were disclosed and the Applicant was informed to reply thereto within fourteen (14) days of the date of the said letter. The said letter was received the same day. On 14th July, 2003, detailed particulars of the allegations were furnished to the applicant. However, instead of the Applicant responding thereto immediately at any rate within 14 days of the details being furnished to him, it was not until 8th August, 2003 that he responded. By that time a decision had already been made on 31st July, 2003 which date fell outside the 14 days. The Applicant however contends that in the letter dated 14th July, 2003 he was not informed the period within which he was required to respond. As the applicant had been made aware that he had 14 days to respond, one would have reasonably expected the Applicant to respond thereto within 14 days of having been furnished with the details of the complaints. I am therefore not satisfied that the applicant's contention that he was not heard is merited.

33. It was further contended that the procedure adopted was not the correct procedure provided in law. In support of this contention the Applicant has relied on Regulation 26 of the ***Judicial Service Regulations*** which provided as hereunder:

"(1) Where the Chief Justice after such inquiry as he may think fit to make considers it necessary to institute disciplinary proceedings against an officer on the grounds of misconduct which , if proved would in his opinion justify dismissal, he shall frame the charge or charges against the officer and shall forward a statement of the said charge or charges to the officer

together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based, and shall invite the officer to state in writing should he so desire, before a day to be specified any grounds on which he relies to exculpate himself.

2. *If the officer does not furnish a reply to the charge or charges within the period specified, or if in the opinion of the Chief Justice he fails to exculpate himself, the Chief Justice shall cause copies of the statement of the charge, or charges and the reply, if any of the officer to be laid before the commission and the commission shall decide whether the disciplinary proceedings should continue or not.*

3. *(a) If it is decided that the disciplinary proceedings should continue, the commission shall appoint a sub-commission to investigate the matter consisting of two or more persons who shall be persons to whom the commission may by virtue of section 69(2) of the constitution delegate its powers.*

(b) The Chief Justice shall not be a member of the sub-commission, but if puisne Judges of the High Court have been designated as members of the commission under Section 68(1) of the Constitution they may be members of the sub-commission.

(4) The sub-commission shall inform the officer that on a specified day the charges made against him will be investigated and that he shall be allowed or, if the sub-commission so determines, shall be required to appear before it to defend himself.

(5) If witnesses are examined by the sub-commission, the officer shall be given an opportunity of being present and of putting questions on his own behalf to the witness, and no documentary evidence shall be used against him unless he has previously been supplied with a copy thereof or given access thereto.

(6) The Attorney- General shall if requested by the commission direct a legally qualified officer from the office of the Attorney General to present to the sub -commission the case against the officer concerned.

(7) The sub commission shall permit the accused officer to be represented by an advocate.

(8) If during the course of the investigations grounds for the framing of additional charges are disclosed, the Chief Justice shall follow the same procedure as was adopted in framing the original charges.

(9) The sub commission having investigated the matter shall forward its report thereon to the commission together with the record of the charges framed, the evidence led, the defence and other proceedings relevant to the investigation, and the report of the sub-commission shall include:-

a) *A statement whether in the sub-commissions judgment the charge or charges against the officer have been proved and the reasons therefor.*

b) Details of any matters which in the sub-commissions' opinion aggravate or alleviate the gravity of the case; and

c) a summing up and such general comments as will indicate clearly the opinions of the subcommission on the matter being investigated but the sub-commission shall not make any recommendation regarding the form of punishment to be inflicted on the officer.

(10) The commission, after consideration of the report of the sub commission, shall if it is of the opinion that the report should be amplified in any way or that further investigation is

desirable, refer the matter back to the sub-commission for further investigation and report.

(11) The commission shall consider the report and shall decide on the punishment if any which should be inflicted on the officer or whether he should be required to retire in the public interest.

34. This provision was considered by the Court of Appeal in **Stephen S. Pareno vs. Judicial Service Commission of Kenya [2014] eKLR** where the Court expressed itself as follows:

"Applying the above conditionalities to the rival arguments herein, it is clear that the central actor in the mandate donated to the respondent in so far as disciplinary proceedings initiated under the subject regulation is concerned was the Hon the Chief Justice. It was the Chief Justice who was required to receive the complaint, peruse it and then determine whether the complaint required to be investigated. Being so convinced the Chief Justice would frame the charge or charges forming the alleged misconduct on the part of the particular officer. Accompanying the charge or charges would a statement of facts relied upon as a basis for the charge or charges. The Chief Justice would then on the basis of the statement of facts and the charge and or charges framed (the Chief Justice) invite the officer to state in writing if he so wished and by a specified date the grounds on which he intends to exculpate or exonerate himself from the charge (s) leveled against him/her. It is only after the compliance or non compliance with this requirement that the matter would be forwarded to the Judicial Service Commission for consideration. The primary duty of the Judicial Service Commission was first of all to determine whether the disciplinary proceedings were to continue or not. It was only upon the Judicial Service

Commission deciding that disciplinary proceedings should continue that the Judicial Service Commission would appoint a sub commission to investigate the matter. Once seized of the matter, the sub-commission would then inform the officer concerned that on a specified date the charge (s) against the officer would be investigated. There was liberty on the part of the officer concerned to appear before it to defend himself. All documentation to be relied upon by the sub-commission in the conduct of its investigations required to be made known to the officer concerned. If deemed fit, the proceedings could be accusatorial whereby the Attorney General could designate an officer to present the case against the officer. The officer could elect to appear in person or be represented by an advocate. In the event of any new matter arising concerning the same officer which would likely form part of the ongoing disciplinary process, the process was required to be restarted a fresh by the Chief Justice with regard to the newly disclosed matter(s). Upon conclusion of the investigations the sub-commission was required to submit the entire record of proceedings to the full Judicial Service Commission for necessary action. The sub-commission had no mandate to make any recommendation as to the nature of the form of punishment that may be meted out against the particular officer. Upon a receipt of the report from the sub-commission the commission would then refer the matter back to the sub-commission for consideration or proceed to take appropriate action within the regulations."

35. The Court proceeded to find that the above outlined procedure was not followed in the appellant's case and the learned trial Judge rightly concluded that the Attorney General was right in conceding that Regulation 26 (supra) had been flouted.
36. On the issue of delay which was similarly alluded to in this case the Court expressed itself as follows:

"...the only limitation binding on the appellant was the six months period provided by Order LIII Rule 2. Neither the Constitutional provisions which created the respondent, nor the Public Service Commission Act which donated the power to promulgate the governing regulations provide any limitation on time within which to seek relief… Leave to apply for judicial review was sought by the appellant, and which was granted on 15th September, 2003. The substantive motion was presented on 16th September, 2003. From 31st July, 2003

when the decision to dismiss the appellant from the respondent's service was made, to 15th September, 2003 when the judicial review application was presented, is a period of 46 days. Whereas from 15th August when the appellant received the respondent's dismissal letter, to the 15th day of September, 2003 when the appellant moved to seek judicial review, was a period of thirty (30) days. Both of these periods fall within the stipulated time frame in order LIII rule 2. We therefore find the learned trial Judge fell into an error when he ignored the period stipulated in order LIII rule 2 as binding on the appellant, only to impose his own time frame that was not stipulated by any provision of law. In the absence of proof that indeed the appellant knew that disciplinary proceedings had been initiated against him by the respondent beyond the Registrar High Court's administrative action through the issuance of a Notice to Show Cause, there was no way the appellant could have been accused of having slept on his rights. The appellant therefore moved at the right moment and with speed to seek the most appropriate relief in the circumstances, namely, an order of certiorari by way of judicial review. It was directed at a public body (the Judicial

Service Commission) on account of alleged breaches of its public duty to award the appellant, a public officer, by unprocedurally relieving him of his employment with it."

37. In the instant case, from the Respondent's own affidavit, there is no indication that the strict procedure under Regulation 26 aforesaid was adhered to. According to the respondent "the Respondent as the employer of the Applicant was entitled to take into consideration the Interim Report submitted by Integrity Committee in accordance with the law and that considering the said Report together with the explanation given by the Applicant the Judicial Service Commission made a decision to dismiss the Applicant." That may be so; however the disciplinary procedure under the said Regulation had to be strictly adhered to. As was appreciated in ***Pastoli's Case*** (supra) failure to adhere and observe procedural rules expressly laid down in a statute or legislative Instrument by which such authority exercises jurisdiction to make a decision amounts to a procedural impropriety hence one of the grounds for granting judicial review remedies.
38. It was for this reason that the Court in ***Pareno's Case*** (supra) expressed itself as follows:

"We however agree with the finding of the learned trial Judge that the relief of judicial review by way of certiorari is available where breach of rules of natural justice is proven. Having said so, we find it strange that the learned judge withheld this relief from the appellant despite agreeing with the appellant's contentions that regulation 26 of the Judicial Service Commission Regulations had been flouted. We have already set out above elements of Regulation 26. Key in all these elements is the need for the accused officer's full participation in the disciplinary process right from the time they are initiated by the *Hon. the Chief Justice* upto the time the decision is finally rendered by the respondent, a process which was not accorded to the appellant. There was therefore a clear breach of the Rules of Natural justice. This formed a sound basis for the appellant laying a claim to an order of judicial review by way of certiorari…The appellant's grievance in the judicial review proceedings was not that reasons had not been given by the respondent for his dismissal, but that a wrong process had been employed to relieve him from his employment service with the respondent. In other words, he alleged excess jurisdiction by a public body which is a criteria for one to seek the relief of judicial review by way of certiorari. What the appellant moved to attack was the process leading to the decision reached and not the merits of the decision reached. He should have therefore been accorded the relief sought."

39. Similarly in this application I find that the procedure for dismissal of the Applicant under Regulation 26 was not followed.

<u>Order</u>

40. In the premises I find merit in the Notice of Motion dated 12th September, 2003 and I grant an order of an Order of *Certiorari* to remove into the High Court for the purposes of being quashed the decision of the Judicial Service Commission of Kenya delivered on and dated 31st July, 2003

and contained in the letter dated 9th August, 2003 ordering the dismissal of **Peter Nyakundi Morigori**, the Applicant herein which decision is hereby quashed. The Costs of this application are awarded to the Applicant.

Dated at Nairobi this day 13th of July, 2015

G V ODUNGA

JUDGE