REPUBLIC OF KENYA

High Court at Nairobi (Milimani Law Courts)

Civil Miscellaneous Application 666 of 2008

-

REPUBLIC……..……APPLICANT
VERSUS

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

HON LADY JUSTICE JESSIE LESIIT

HON. LADY JUSTICE HANNAH OKWENGU

HON. MR. JUSTICE JACTON OJWANG

HON. MR. JUSTICE FESTUS AZANGALALA

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

EX-PARTE TOM MBALUTO
JUDGEMENT
INTRODUCTION

1.This application has had a chequered history. The applicant in this application, **Hon Tom Mbaluto**, was until 15th October 2003 a Judge of the High Court of Kenya. He had been appointed to that position on 2nd April 1986. On that fateful day His Excellency the President **Hon. Mwai Kibaki** appointed a Tribunal vide Gazette Notice No. 7282 of 2003 in the exercise of the powers conferred upon the President under section 62(5) and (6) of the then Constitution of Kenya (hereinafter referred to as the said Constitution) to investigate the conduct of applicant amongst other judges. Vide Gazette Notice No. 9532 of 2006 of 20th November 2006 the President appointed **Lady Justice Jessie Lesiit**, **Lady Justice Hannah Okwengu**, **Prof Justice Jackton Ojwang**, **Mr Justice Festus Azangalala** and **Mr Justice Luka Kimaru** (the 2nd to the 6th Respondents herein) to be members of the Tribunal to investigate the applicant's conduct.

2.After hearing the evidence from 27 witnesses and submissions of counsel, the Tribunal on 2nd May 2008 presented its report in which it recommended to the President that the applicant be removed from the office of a *Puisne* Judge for misbehaviour under section 62(4) of the said Constitution.

3.Being unhappy with the said recommendation, the ex parte applicant moved this court by way of Chamber Summons dated 30th October 2008 seeking leave of the Court to institute judicial review

application to substantially quash the said decision of the Tribunal.

4.After hearing the application for leave, **Hon. Lady Jutice Wendoh**, by her ruling dated and delivered on 18th September 2009 struck out the application for leave on the ground that the same was incompetent.

5.Undeterred the applicant appealed to the Court of Appeal being Civil Appeal No 310 of 2009 - **Tom Mbaluto vs. Jessie Lesiit and 4 Others [2012] eKLR** - which by its decision dated 3rd February 2012 reversed the decision of the High Court thus paving way for these proceedings.

6.This ruling is therefore the subject of the Notice of Motion dated 22nd February 2012 in which the Applicant herein seeks the following orders:

1 **An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesiit (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) that the said Tribunal recommends that the **Honourable Mr. Justice Mbaluto**, be removed from the office of *Puisne* Judge for misbehaviour.

2 **An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesiit (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) recommending that the **Honourable Mr. Justice Mbaluto**, be removed from the office of *Puisne* Judge for misbehaviour.

3 **An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesiit (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, Hon**. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) that the Standard of "beyond reasonable doubt" would not be appropriate for the purpose of an inquiry under Section 62(5) of the [then] Constitution.

4 **An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesiit (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) that the Standard proof must be much higher than that of the "balance of probabilities" but lower than that of "beyond reasonable doubt".

5 **An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesiit (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal matter No. 1 and 2 of 2007) that the applicable standard of proof was that known as "clear and convincing standard of proof, which is a standard lesser than proof beyond reasonable doubt, but higher than proof by preponderance of evidence".

6 **An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesitt (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) that though the direct evidence in support of the allegation of bribery had a narrow base taken together with the apparent partial manner in which the

proceedings were conducted, the Applicant was influenced by factors other than the evidence before him in Kisii High Court Civil Case No. 10 of 1990, **Gichambati Mwita Mairo vs Sarara Matongo Sigore**.

7 **An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesitt (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) that all the circumstances, taken together with the direct evidence of bribery, lead to the conclusion that the Applicant's partiality was the result of an inducement, and, therefore, accepts Sarara's evidence and finds that the Applicant did indeed receive a bribe from **Gichambati Mwita Mairo** in Kisii High Court Civil Case No. 10 of 1990, **Gichambati Mwita Mairo vs Sarara Matongo Sigore**.

8 **An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesitt (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) that there was clear and convincing evidence, which establish misbehaviour which is of such gravity as to justify the removal of the Applicant from office.

9 **An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesitt (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) that the Applicant had used his office as *Puisne* Judge improperly or to confer an undue benefit upon **Gichambati Mwita Mairo** the Plaintiff in Kisii High Court Civil Case No. 10 of 1990, **Gichambati Mwita Mairo vs Sarara Matongo Sigore**.

10**An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesitt (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) that there was an element of dishonesty and culpability on the part of the ex parte Applicant in delivering judgment in favour of **Gichambati Mwita Mairo**, the Plaintiff in Kisii High Court Civil Case No. 10 of 1990, **Gichambati Mwita Mairo vs Sarara Matongo Sigore**.

11**An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesitt (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) that the Applicant delivered the judgement in Kisii High Court Civil Case No. 10 of 1990, **Gichambati Mwita Mairo vs Sarara Matongo Sigore** with the intention of inflicting injury upon **Sarara Matongo Sigore**, the Defendant therein.

12**An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesitt (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) that the Applicant delivered the judgement in Kisii High Court Civil Case No. 10 of 1990, **Gichambati Mwita Mairo versus Sarara Matongo Sigore**, with the knowledge that he had no power to declare that **Sarara Matongo Sigore**, the Defendant, was holding a parcel of land in trust for the benefit of **Gichambati Mwita Mairo**, the Plaintiff therein.

13**An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesitt (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) that the Applicant while making the declaration that the Defendant, **Sarara Matongo Sigore** was holding a parcel of land in trust for the benefit of the Plaintiff, **Gichambati Mwita Mairo** had calculated to produce injury to the said **Sarara Matongo Sigore**, the Defendant in Kisii High Court Civil Case No. 10 of 1990, **Gichambati Mwita Mairo versus Sarara Matongo Sigore**.

14**An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesitt (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) that the Plaintiff's claim in Kisii High Court Civil Case No. 10 of 1990, **Gichambati Mwita Mairo vs Sarara Matongo Sigore** could not have succeeded as any order that would have been made touching the said parcel of land could not be enforced against the well known maxim of natural justice, that a party should not be condemned unheard.

15**An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesitt (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) that it was strange that a trust was declared in a matter where it had neither been pleaded nor evidence adduced in support thereof, and on land which is a first registration in the names of the Defendant and another in Kisii High Court Civil Case No. 10 of 1990, **Gichambati versus Mwita Mairo Sarara Matongo Sigore**.

16**An order of certiorari** do issue to remove into the High Court of Kenya and quash the decision and finding made on 2nd May 2008 by the Tribunal of Inquiry comprising of the **Hon. Lady Justice Jessie Lesitt (Chairperson)**, **Hon. Lady Justice H. Okwengu**, **Hon. Mr. Justice J.B. Ojwang**, **Hon. Mr. Justice F. Azangalala** and **Hon. Mr. Justice L. Kimaru** to investigate the Conduct of *Puisne* **Judge Tom Mbaluto** (Tribunal Matters No. 1 and 2 of 2007) that it was a grave shortcoming on the part of the Applicant not to appreciate that an international boundary was involved, and a claim touching the same would, of necessity, require the technical evidence of surveyors.

17**An order** that the Respondents do pay the costs of and occasioned by this application.

APPLICANT'S CASE

7.In support of the application the ex parte applicant herein filed a Statutory Statement together with a verifying affidavit sworn by himself on 30th October 2008.

8.According to the applicant, he was appointed a *Puisne* Judge on 2nd April 1986 in accordance with the provisions of section 62(1) of the Constitution and discharged the duties of a *Puisne* Judge from 2nd April 1986 to 15th October 2003 when **His Exellency Honourable Mwai Kibaki CGH, MP President and Commander in Chief of the Armed Forces of Kenya** ("the President") appointed a Tribunal vide Gazette Notice No. 7282 of 2003 in exercise of the powers conferred upon him under sections 62(5) and (6) of the Constitution to investigate his conduct and sixteen (16) other *Puisne* Judges in relation to allegations that the applicant had been involved in corruption, unethical practices and absence of integrity in the performance of the function of his office and to make a report and its recommendations thereon in accordance with the provisions of section 62 of the Constitution. On 20th November 2006, vide Gazette Notice No. 9532 of 2006 the President in exercise of the powers conferred upon him by section 62(5) and (6) of the Constitution, appointed the 2nd to 6th Respondents herein to be members of the Tribunal to

investigate his conduct of the Applicant which Tribunal conducted its proceedings and hearings from 19th February 2007 to 31st August 2007 during which it inquired into diverse allegations whether the had been involved in corruption, unethical practices and absence of integrity in the performance of his duties as a *Puisne* Judge in course of which the Tribunal received testimony on oath from twenty-seven (27) witnesses and written submissions and/or oral submissions from the Assisting Counsel to the Tribunal, **Mr. Mbuthi Gathenji** and the applicant's Counsel, **Mr. Mutula Kilonzo**. On 2nd May 2008, the Tribunal presented its Report and Recommendation ("the Report") arising therefrom to the President pursuant to the provisions of 62(5) and (6) of the Constitution in which the Tribunal arrived at the conclusion that the applicant had been involved in corruption, unethical practices and absence of integrity in the performance of the functions of his office and that the foregoing amounted to misbehaviour as provided for under section 62(3) of the Constitution and recommended to the President in accordance with the provisions of section 62(5) of the Constitution that the applicant should be removed from office of *Puisne* Judge for misbehaviour under section 62(4) thereof. It is deposed that in the Report, the Tribunal made remarks, findings, decisions and conclusions that are adverse to the applicant.

9.It is the applicant's case that he has accordingly filed the instant application seeking an order of certiorari to remove into the High court of Kenya and quash the said decision. In the applicant's view, the Tribunal acted ultra vires its jurisdiction under Gazette Notice No. 9532 of 2006 and section 62(5) of the Constitution. To him, the President through Gazette Notice No. 9532 of 2006 appointed **Lady Justice Jessie Lesiit** to be the Chairperson ("the Chairperson of the Tribunal") and directed that the Tribunal's mandate was (a) to investigate his conduct as *Puisne* including, but not limited to, the allegations that the said *Puisne* Judge has been involved in corruption, unethical practices and absence of integrity in the performance of the functions of his office; and (b) to make a report and its recommendations thereon to the President expeditiously. It is deposed that the President appointed the Tribunal pursuant to the provisions of section 62(5) of the Constitution upon receiving representations from the **Honourable Mr. Justice Johnson Evan Gicheru**, the Chief Justice of the Republic of Kenya ("the Chief Justice") in terms of a report presented to the Chief Justice on 30th September 2003 by the **Hon. Mr. Justice A G Ringera** in "Report of the Integrity and Anti-Corruption Committee of the Judiciary" ("***the Ringera Report***"). The said representation, according to the applicant, had been made by the Chief Justice to the President pursuant to section 62(5) of the Constitution regarding the applicant that he had been implicated in corruption, unethical conduct and judicial misbehaviour was in terms of the allegations contained in pages 7 and 8 of Annexure to Part A of the ***Ringera Report***. On 8th January 2007, the Assisting Counsel, drafted the allegations that the Applicant faced in Tribunal Matter No. 2 of 2007 ("the Allegations"). According to the information received by the applicant from his legal counsel the Allegations were drafted on 8th January 2007 after the High Court of Kenya at Nairobi (**Lesiit, Wendoh and Emukule JJ**) had held and determined on 3rd November 2006 in Nairobi HCMCA No. 1062 of 2004 ***Justice Amraphael Mbogholi Msagha v Chief Justice of the Republic of Kenya & 7 Others*** (unreported) that the only issue to be placed before the Tribunal is the representation by the Chief Justice to the President which gave rise to and formed the basis of the question of removal of a judge before setting up of the Tribunal and that it is therefore not open to the Tribunal or the Assisting Counsel to frame any other issues beyond that which formed the basis of the representation to the President for removal of a judge. Accordingly, on 20th February 2007, the applicant's advocate raised a preliminary objection with regard to Allegations Nos. 7 to 11 whereupon the Tribunal on 25th July 2007 held and determined that the said allegations did not form its mandate and struck the same out.

10. The applicant contends thatthe Tribunal in paragraph 5.2 at pages 130 -131 of the Report found and determined that its mandate under Gazette Notice No. 9532 of 2006 as read together with section 62(5)(b) of the Constitution was to inquire into the actual complaint or matters which were the subject of the representations made by the Chief Justice to the President at the time the President appointed the Tribunal in order to determine whether the applicant had misconducted himself and to make the appropriate recommendations to the President. However, as at 24th November 2006 when the President appointed the Tribunal, the actual complaint against the applicant that prompted the Chief Justice to represent to the President some time in the course of October 2003 that the question of the applicant's removal under section 62 of the Constitution ought to be investigated was as contained and stated in pages 7 and 8 of Annexure to Part A of the ***Ringera Report*** hence the Tribunal's jurisdiction under

section 62(5) (b) of the Constitution and or Gazette Notice No. 7282 of 2003 (as amended by Gazette Notice Number 9532 of 2006) was to conduct an inquiry into the existence of the question of the applicant's removal in so far as Kisii HCCC No. 10 of 1990 was concerned was limited to inquiry into and the reporting of the facts as to the three representations contained in the ***Ringera Report*** relating thereto. It is averred that as at 15th October 2003, the Chief Justice had not seen either the court file, the pleadings the proceedings or judgment delivered on 23rd October 1997 in Kisii HCCC No. 10 of 1990 wherefore the Chief Justice could not have represented and did not in fact represent to the President that among the matters giving rise to the question of his removal as a *Puisne* Judge under section 62 of the Constitution were: (a) an allegation that the applicant had misconducted himself by interrupting, preventing and refusing to hear the evidence of **Benson Morumbwa Onyancha** (TW19)in Kisii HCCC No. 10 of 1990; (b) an allegation that the applicant initiated, permitted and condoned communication between himself and **GichambatiMwita Mairo** (TW25) a plaintiff in Kisii HCCC No. 10 of 1990 in the absence of the defendant, **Sarara Matongo Sigore** (TW5); (c) an allegation that the applicant misconducted himself by entertaining and hosting the said **GichambatiMwita Mairo**, a litigant in Kisii HCCC No. 10 of 1990; (d) an allegation that the applicant abused his office as a High Court Judge to advance the private interests of the said **GichambatiMwita Mairo** by conferring undue benefit upon him to the detriment of the said **SararaMatongo Sigore.** According to the applicant **Charles Njai**, (TW1) the Registrar High Court of Kenya testified before the Tribunal that the Chief Justice had not received representations that either the Applicant had interrupted **Benson Morumbwa Onyancha** in Kisii HCCC No. 10 of 1990 or initiated, permitted and condoned communications with **Gichambati Mwita Mairo** or that the Applicant entertained and hosted **Gichambati Mwita Mairo.** In the applicant's view, the thrust of the testimony given by the said **Charles Njai** before the Tribunal, is that the Chief Justice could not have represented and did not in fact represent to the President that a question had arisen of the applicant's removal under section 62(5) of the Constitution on the basis of an allegation that: (a) the applicant had prevented **Benson Morumbwa Onyancha** (TW19)from giving evidence or destroyed the evidence he had given or ejected him from court and had threatened to lock him up; and or (b) the applicant had initiated, permitted and condoned communications with **Gichambati Mwita Mairo** (TW25); and/or (c) the applicant had entertained and hosted **Gichambati Mwaita Mairo** (TW25).

11. The applicant deposes that his Advocate on record has read to him and that he has understood the evidence and testimony of **Samuel Soita** (TW2), the Deputy Registrar High Court of Kenya at Kisii before the Tribunal, who testified before the Tribunal that the Chief Justice did not in fact have sight of the record and proceedings in Kisii HCCC No. 10 of 1990 before 15th October 2003 when the President appointed a Tribunal under section 62(5)(a) of the Constitution vide Gazette Notice No. 7281 of 2003 to investigate the applicant's conduct and that the Chief Justice had sight of the record and proceedings in Kisii HCCC No. 10 of 1990 on or after 28th November 2003 hence as at 15th October 2003 when the President appointed a tribunal vide Gazette Notice No. 7281 of 2003 to investigate his conduct as a *Puisne* Judge, the Chief Justice could not have represented and did not in fact represent to the President that a question had arisen of his removal under section 62(5) of the Constitution from an allegation either that: (a) the applicant had abused his office as a High Court Judge to advance the private interests of **GichambatiMwita Mairo** by conferring undue benefit upon him to the detriment of the **SararaMatongo Sigore** (TW5)**;** or (b) thejudgment delivered by the applicant on 23rd October 1997 in Kisii HCCC No. 10 of 1990 was passed irregularly, improperly or incorrectly. According to the applicant there was no representation made to the President by the Chief Justice relating to the question of the Judgment delivered by himself on 23rd October 1997 in Kisii HCCC No. 10 of 1990 or the decree that was consequently issued on 21st May 1998 and in the absence of such a representation made to the President by the Chief Justice, the Tribunal exceeded and acted ultra vires its mandate by entertaining considering deliberating and making remarks, findings and decisions with respect to Allegation No. 6. Further, the Tribunal took additional evidence after the applicant had delivered judgment in Kisii HCCC No. 10 of 1990 in the form of a letter dated 29th July 2004 from the Ag. Director of Survey to the Secretary to the Tribunal, a letter dated 28th June 1990 from the District Land Registrar, South Nyanza Ref. No. SN/NYABASI/BUSOGA/364/3, a copy of the Green Card in respect of Nyabasi/Busoga/363 that were produced in evidence and also accepted and considered the evidence and testimony of **Pauline Wanjiku Gitimu** (TW18) an Acting Senior Director of Survey in charge of mapping who did not and whose testimony was not before the applicant in Kisii HCCC No. 10 of 1990 and thereafter deliberated and

made remarks findings and decisions with respect to Allegation No 6 namely that the applicant had abused his office as a High Court Judge to advance the private interests of **Gichambati Mwita Mairo**, by conferring undue benefit upon him to the detriment of **Sarara Matongo Sigore**. According to legal advice given by the applicant's advocates in so doing the Tribunal reviewed the judgment and decree that he had delivered in Kisii HCCC No. 10 of 1990 on 23rd October 1997 and the decree issued thereafter on 21st May 1998 on the basis of fresh evidence that was made available to the Tribunal by the said **Pauline Wanjiku Gitimu** (TW18) which evidence was not available before the applicant in Kisii HCCC No. 10 of 1990 and or re-appraised the evidence that had been tendered in Kisii HCCC No. 10 of 1990 and or drew inferences of fact therefrom and in doing so purported to perform the functions of the Court of Appeal established under section 64(1) of the Constitution and vested with jurisdiction and powers thereunder in relation to appeals from the High Court as may be conferred by it by the ***Appellate Jurisdiction Act*** (Cap. 9 Laws of Kenya) and thereby acted *ultra vires* its jurisdiction under section 62(5) (b) of the Constitution. Further it is the applicant's view that the Tribunal in entertaining considering deliberating and making remarks findings and decisions on Allegation No. 6, purported to perform a duty which is the sole prerogative of the Court of Appeal under Rule 29(1) (a) of the Court of Appeal Rules to wit, to re-appraise evidence and draw inferences of fact on an appeal from a decision of the High Court hence the Tribunal frustrated Parliament's legislative purpose in enacting the ***Appellate Jurisdiction Act*** (Cap. 9 Laws of Kenya) which Act confers upon the Court of Appeal the sole and exclusive jurisdiction to re-appraise evidence and draw inferences of fact on an appeal against a judgment and decree of the Superior Court.

12. It is the applicant's case that the Tribunal committed an error of law in paragraph 5.6 at pages 137-138 of the Report relating to the standard of proof at pages 137-138 of the Report wherein the Tribunal found and determined at that whereas the standard of **"beyond reasonable doubt"** would not be appropriate for the purpose of an inquiry under section 62(5) of the Constitution, the standard of proof must be much higher than that of the **"balance of probabilities"**, but lower than that of **"beyond reasonable doubt"** hencethe applicable standard of proof was that known as "clear and convincing standard of proof, which is a standard lesser than proof beyond reasonable doubt, but higher than proof by preponderance of evidence". To the applicant, the Tribunal misdirected itself in law by holding that the applicable standard of proof is the one known as "clear and convincing standard of proof, which is a standard lesser than proof beyond reasonable doubt, but higher than proof by preponderance of evidence", and further failed in its duty to correctly understand, apply and give effect to the principles in **Bhandari v. Advocates Committee (1956) 3 All E R 742 per Tucker LJ at pages 744 and R v Police Complaints Board (1983) 2 All ER 353** per **McNeill J** at page 371.It is the applicant's case that the contents of paragraph 6.1.1 at page 142, paragraph 7 at pages 155-156 and 158 of the Report demonstrate the manner in which the Tribunal arrived at its decision and findings on the basis of probabilities, conjecture, speculations and suspicions and not on the basis of the standard of proof beyond reasonable doubt and further the Tribunal made the following remarks findings and decisions in *that: "(t)he Tribunal finds that all these circumstances, taken together with the direct evidence of bribery, lead to the conclusion that the subject judge's partiality was the result of an inducement, and, therefore, the Tribunal accepts Sarara's evidence and finds that the subject Judge did indeed, receive a bribe from Gichambati Mwita Mairo"* which remarks, accord to him shows that the Report failed to correctly understand, apply and give effect to the criminal standard of proof of "proof beyond reasonable doubt" that is applicable to the inquiry such as the one that the Applicant faced before the Tribunal under section 62(5) of the Constitution. The applicant contends that the Tribunal had a duty to correctly understand apply and give effect to general principles of law that have been codified under the provisions of section 41 of the ***Evidence Act*** that whenever the Tribunal had to form an opinion as to the law of any country, the Tribunal had to rely solely on statements of such laws contained in book(s) purporting to be printed and published under the authority of the government of such country and to contain any such law and the report of a ruling of the courts of such country contained in book(s) purporting to be a report of such rulings. However, in making a decision, determination and finding that the standard of proof must be much higher that that of the "balance of probabilities" but lower than that of "beyond reasonable doubt", the applicant's case is that the Tribunal formed its opinion as to the standard of proof applicable in the United States of America known as the "clear and convincing standard of proof which is a standard lesser than proof beyond reasonable doubt, but higher than proof by preponderance of evidence" and relied for on an "***article entitled "Standard of Proof", in http: en. wikipedia.org/wiki/burden of proof***" for the

proposition in question which article was not brought to the Tribunal's attention by either the Assisting Counsel to the Tribunal, **Mbuthi Gathenji** or my Counsel, **Mutula Kilonzo** in the course of their respective closing submissions nor was the "***article entitled "Standard of Proof", in http: en. wikipedia.org/wiki/burden of proof***" brought to the attention of the Assisting Counsel to the Tribunal or the Applicant's Counsel for purpose of canvassing. In making the abovementioned decision finding and conclusion, the Tribunal did not rely on a statement of law of the United States of America contained in any book(s) purporting to be printed and published under the authority of the Federal Government of the United States of America and to contain any such law nor did the Tribunal rely on reports of rulings and judgments of the Supreme Court and or Federal Courts of the United States of America contained in book(s) purporting to be reports of such ruling(s) and judgment(s) hence failed to correctly understand, apply or give effect to general principles of law codified under the provisions of section 41 of the ***Evidence Act*** that whenever the Tribunal had to form an opinion as to the law of any country, the Tribunal had to rely solely on statements of such laws contained in book(s) purporting to be printed and published under the authority of the government of such country and to contain any such law and the report of a ruling of the courts of such country contained in book(s) purporting to be a report of such rulings. In the applicant's view, the source of law adopted by the Tribunal for the proposition that the standard of proof in the United States of America known as the "clear and convincing standard of proof which is a standard lesser than proof beyond reasonable doubt, but higher than proof by preponderance of evidence" to wit an "***article entitled "Standard of Proof", in http: en. wikipedia.org/wiki/burden of proof***" is not a source of law in Kenya contemplated under section 3(1) of the ***Judicature Act Cap 8 Laws of Kenya***.

13. It is therefore the applicant's case that the Tribunal having committed an error of law as to the standard of proof applicable in an inquiry under section 62(5) of the Constitution by making the remarks, findings and decisions in paragraph 7.0 at page 156 of the Report, committed a further consequential error of law at paragraph 6.1.1 at page 141 of the Report by failing to give to him the benefit of the doubt as to the date of the alleged bribery. The aforesaid error of law committed by the Tribunal, according to the applicant, relates to its failure to give to the Applicant the benefit of the doubt arising out of the ambiguity, uncertainty and lack of particularity of the testimony of **Sarara Matongo Sigore** (TW5) as to the date when the applicant allegedly corruptly solicited and received the sum of Kshs. 60, 000/= from **Gichambati Mwita Mairo** (TW25) at paragraph 6.1.1 at page 141 of the Report. To the contrary, the Tribunal while making the remarks findings decisions and conclusions contained in paragraph 6.1.1 at page 141 of the Report found and determined that in fact the evidence led by the Assisting Counsel disclosed a doubt at to the date when the alleged bribery incident occurred but nonetheless neglected and failed to give to the applicant the benefit of the doubt thereby making an error of law as to the standard of proof in relation to Allegation No. 1 that the applicant corruptly received Kshs. 60, 000/= from **Gichambati Mwita Mairo** (TW25). Whereas the said **Sarara Matongo Sigore** in his witness statement dated 6th April 2004 stated that the alleged incident of bribery took place on a date after 26th July 1995, on 27th July 2007 upon cross-examination he testified under oath that the alleged bribery incident took place on a date after the 26th July 1995. Further **Professor Chacha Nyaigoti Chacha** who the said **Sarara Matongo Sigore** claimed had taken him to Kisii Sports Club on the date he allegedly witnessed Gichambati **Mwita Mairo** corruptly giving the applicant the sum of Kshs. 60, 000/= denied being in Kisii after July 1995 since he took up a new appointmentasthe Executive Secretary of the High Education Loans Board on 2nd of August 1995. Therefore, it is the applicant's contention that if **Sarara Matongo Sigore's** complaint and testimony that the bribery incident occurred after 26th July 1995, and further that the alleged bribery occurred on a day when the matter came up for hearing before the applicant, then the incident could have only taken place either on 4th September 1995, 2nd October 1995, 6th June 1996 or 16th September 1997 when the matter came up diversely before the applicant in the presence of the said **Sarara Matongo Sigore** and if the bribery incident occurred on a date after 26th July 1995 when **Sarara Matongo Sigore** attended court in Kisii (as the Tribunal found and determined), **Professor Chacha Nyaigoti Chacha** was not in fact in Kisii on the said 4th September 1995, 2nd October 1995, 6th June 1996 or 16th September 1997 since he had taken up a new appointmentasthe Executive Secretary of the High Education Loans Board on 2nd of August 1995 wherefore **Professor Chacha Nyaigoti Chacha** could not have taken **Sarara Matongo Sigore** to Kisii Sports Club on a date after 26th July 1995 when

the said **Sarara Matongo Sigore** allegedly witnessed **Gichambati Mwita Mairo** corruptly give the applicant a sum of Kshs. 60, 000/= .

14. According to the applicant's legal counsel, the Tribunal committed and made an error of law in making remarks, findings and decisions in regard to Allegation No. 6 at paragraph 6.1.6 at page 151 of the Report that abuse of office by a *Puisne* Judge would occur where such judge demonstrates partiality or lack of fairness and in so doing failed in its duty to correctly understand, apply and give effect to legal criteria of determining whether a charge of abuse of office has been established particularly the principle in **Three Rivers District and Others v. Bank of England (No.3)(2000) All ER 1** at pages 80-81. In the applicant's view, his testimony before the Tribunal showed that he could not and did not in fact abuse the powers conferred upon a *Puisne* Judge when he delivered the judgment in Kisii HCCC No. 10 of 1990 on 23rd October 1997.

15. According to the applicant's legal advisers, the Tribunal's remarks findings and decisions at paragraph 6.1.6 at page 151 of the Report regarding Allegation No. 6 quite apart from being perverse were made against the weight of the evidence available before the Tribunal and or were not supported by any or any sufficient evidence that tended to or showed that either firstly, that the applicant had used his office as a *Puisne* Judge improperly or to confer an undue benefit upon **Gichambati Mwita Mairo**, the plaintiff in **Kisii HCCC No. 10 of 1990**; and or secondly, that there was an element of dishonesty and culpability on the applicant's part in delivering the judgment in **Kisii HCCC No. 10 of 1990** on 23rd October 1997; and or thirdly, that the applicant delivered the judgment in **Kisii HCCC No. 10 of 1990** with the intention of inflicting injury upon **Sarara Matongo Sigore**, the defendant therein; and or fourthly, that the applicant delivered the judgment in **Kisii HCCC No. 10 of 1990** with the knowledge that he had no power to declare that **Sarara Matongo Sigore**, the defendant was holding a parcel of land in trust for the benefit of the plaintiff; and or fifthly, that while making the declaration that **Sarara Matongo Sigore** was holding a parcel of land in trust for the benefit of **Gichambati Mwita MAiro**, the applicant had calculated to produce injury to the said **Sarara Matongo Sigore**. Further legal advise received is to the effect that the Tribunal in making the remarks findings and decisions at paragraph 6.1.6 at page 151 of the Report regarding allegation No. 6 failed in its duty to correctly understand, apply and give effect to the principle in **Attorney General's Reference (No.3 of 2003) (2204) EWCA Criminal 868 (2005) 4 All ER 303** defining the legal criteria for determining whether a public officer has abused his office and that the Tribunal's remarks findings and decisions at paragraph 6.1.6 at page 151 of the Report regarding Allegation No. 6 were made in the absence of any evidence to support such finding wherefore the Tribunal's decision and determination with respect to Allegation No. 6 is unreasonable and or perverse. To the contrary, the evidence available to the Tribunal relating to Allegation No. 6 disclosed that while the applicant was delivering the judgment in **Kisii HCCC No. 10 of 1990** in favour of **Gichambati Mwita Mairo** and thereby declaring that **Sarara Matongo Sigore** held a parcel of land in trust for the benefit of **Gichambati Mwita Mairo** was honestly performing the functions of the High Court of Kenya vested with unlimited original jurisdiction in civil matters under section 60(1) of the Constitution and the inherent powers of the High Court under section 3A of the ***Civil Procedure Act*** (Cap 21 Laws of Kenya). To the applicant, Tribunal made remarks findings and decisions regarding Allegation No. 6 thereby acting in bad faith for the reason that it ignored the evidence of **Richard Sarara Marigo** that was favourable to him that (a) at no time did **Gichambati Mwita Mairo** ever claim ownership over **Sarara Matongo Sigore's** parcel of land nor did **Gichambati Mwita Mairo** ever commit an act of trespass over **Sarara Matongo Sigore's** parcel of land; (b) the boundary between Kenya and Tanzania was altered by the Joint Boundary Commission of Kenya and Tanzania thereby causing a shift and movement of neither people nor their land; (c) owing to the alteration of the boundary between Kenya and Tanzania by the Joint Boundary Commission of Kenya and Tanzania, the parcel of land that belonged to **Gichambati Mwita Mairo** became part of the territory of Kenya; (d) at all material times **Gichambati Mwita Mairo** had been claiming from **Sarara Matongo Sigore** a parcel of land that belonged to **Gichambati Mwita Mairo** from the period prior to alteration of the boundary between Kenya and Tanzania; (e) that **Richard Marigo Sigore** offered testimony in Kisii HCCC No. 10 of 1990 that was favourable to **Gichambati Mwita Mairo's** claim to the disputed parcel of land; (f) that **Sarara Matongo Sigore** at all material times wanted **Gichambati Mwita Mairo** to vacate and leave the parcel of land that belonged to **Gichambati Mwita Mairo**; (g) that it was not proper for **Sarara Matongo Sigore** to require **Gichambati Mwita Mairo** to vacate the parcel of land that belonged to **Gichambati Mwita**

Mairo and return to Tanzania; (h) that for as long as **Richard Marigo Sigore** could remember, **Gichambati Mwita Mairo** and his family occupied the land that was the subject of the dispute in Kisii HCCC No. 10 of 1990; (i) that the parcel of land that was the subject of the dispute in Kisii HCCC No. 10 of 1990 at all material times belonged to **Gichambati Mwita Mairo** and not **Sarara Matongo Sigore**; (j) that **Richard Marigo Sigore** informed the Applicant when the court visited the *locus in quo* on 10th February 1995 as well as when he gave oral testimony before the Applicant in Kisii HCCC No. 10 of 1990 that after the alteration of the boundary by the Joint Boundary Commission of Kenya and Tanzania, the boundary line moved and brought **Gichambati Mwita Mairo's** land into Kenyan territory.

16. According to the applicant's Advocates on record the contents paragraph 6.1.5 at page 151 of the Report wherein the Tribunal in making the remarks findings and decisions reflected therein regarding Allegation No. 6 acted in bad faith for the reason that it ignored a judicial finding and determination of **J. S Kaburu**, Resident Magistrate made on 5th October 1989 in Migori RMCC No. 382 of 1988 **Republic v Gichambati Mwita Mairo** regarding the third charge that **Gichambati Mwita Mairo** faced in the said prosecution. Therefore it is deposed that by reason of the foregoing, the proceedings and judgment of the Honourable **J.S Kaburu** delivered on 5th October 1989 in Migori RMCC No. 382 of 1988 **Republic v. Gichambati Mwita Mairo**, were pertinent in the determination of Allegation No. 6 that the applicant was charged with in Tribunal Matter No. 2 of 2007 to wit that he abused his office as a High Court Judge, to advance the private interests of **Gichambati Mwita Mairo**, by conferring undue benefit upon the said **Gichambati Mwita Mairo** to the detriment of **Sarara Matongo Sigore** since the judicial finding and determination of the **Honourable J.S Kaburu** of 5th October 1989 regarding the third charge that **Gichambati Mwita Mairo** faced in Migori RMCC No. 382 of 1988 **Republic v. Gichambati Mwita Mairo**, was favourable to the applicant in so far as the applicant was charged with Allegation No. 6 in Tribunal Matter No. 2 of 2007. Therefore, in its consideration of Allegation No. 6 at paragraph 6.1.6 at pages 148- 151 of the Report, the Tribunal failed to consider and or ignored altogether the purport, import and effect of the proceedings and judgment in the aforesaid case notwithstanding the proceedings and judgement in question were germane to the Tribunal's determination of Allegation No. 6 in Tribunal Matter No. 2 of 2007.

17. According to the applicant's advocates, the Tribunal had a duty to correctly understand, apply and give effect to the principles of law applicable in the declaration of trusts in respect of a first registration of land under the provisions of the ***Registered Lands Act*** (Cap. 300 Laws of Kenya) as well as the principle enunciated by the Court of Appeal in **Mumo v. Makau (2004) 1 KLR 13** regarding declaration of trusts in respect of a first registration of land under the provisions of the Registered ***Lands Act*** Cap. 300 Laws of Kenya and that the Tribunal found and determined therein regarding Allegation No. 6 in Tribunal Matter No. 2 of 2007 that "(t)he Tribunal found it strange that a trust would be declared in a matter where it had neither been pleaded nor evidence adduced in support thereof, and on land which is a first registration in the names of the defendant and another" by which finding the Tribunal failed in its duty to correctly understand, apply and give effect to the principles regarding the declaration of trusts in respect of a first registration of land under the provisions of the ***Registered Lands Act*** (Cap. 300 Laws of Kenya) thereby committing a fundamental error of law. In his view, the Tribunal had a duty to correctly understand, apply and give effect to the principle enunciated in the aforesaid Court of Appeal decision regarding vilification of a trial judge who has adopted a course of action that is not only equitable but does bring about and expeditious disposal of a long simmering dispute.

18. According to the applicant's legal advisers, the contents of paragraph 6.1.6 at pages 148 – 151 of the Report wherein there are contained remarks, decisions, conclusions and findings vilifying the applicant for his determination of the dispute between **Gichambati Mwita Mairo** and **Sarara Matongo Sigore** in Kisii HCCC No. 10 of 1990 in favour of **Gichambati Mwita Mairo** notwithstanding the fact that the Tribunal had taken cognizance of the applicant's defence and justification for determining Kisii HCCC No. 10 of 1990 in favour of **Gichambati Mwita Mairo**, to wit that (a) the applicant was not dealing with a registered parcel of land but with an unregistered one which had been translocated into Kenya after the re-alignment of the Kenya-Tanzania boundary. (b) that the applicant did not consider it is duty as a judge to assist the disputants before him, **Gichambati Mwita Mairo** and **Sarara Matongo Sigore** on how to frame their respective pleadings in Kisii HCCC No. 10 of 1990. (c) that the applicant determined Kisii HCCC No. 10 of 1990 of the basis of the original unlimited jurisdiction of the

High Court pursuant to the provisions of section 60 of the Constitution wherefore he declared that **Sarara Matongo Sigore** was holding a parcel of land in trust for the benefit of **Gichambati Mwita Mairo**. (d) that the applicant declared that **Sarara Matongo Sigore** was holding a parcel of land in favour of **Gichambati Mwita Mairo** in furtherance of his duties of a judge who is enjoined to do justice and correct any errors that may arise whenever a person wrongfully holds a parcel of land. (e) that the applicant decided Kisii HCCC No. 10 of 1990 in favour of **Gichambati Mwita Mairo** on the basis of the information that the applicant had and the evidence before him notwithstanding the fact that he did not have the benefit of the evidence of a land registrar and or surveyor. (f) that although the applicant could have made an error in the determining Kisii HCCC No. 10 0f 1990 in favour of **Gichambati Mwita Mairo** by granting him an undefined portion of land, he considered that there had been a re-alignment of the international boundary, further that **Sarara Matongo Sigore** did not call witnesses to support his contention and moreover that the applicant could not have been influenced to determine Kisii HCCC No. 10 of 1990 in the manner that he did.

19. Further information emanating from the applicant's legal advisers is to the effect that in the premises, the Tribunal did not correctly understand, apply and give effect to the principle stated by the Court of Appeal in the aforementioned case regarding vilification of a trial judge who has adopted a course of action that is not only equitable but does bring about and expeditious disposal of a long simmering dispute in the course of making the remarks, decisions, conclusions and findings at paragraph 6.1.6 at pages 148 – 151 of the Report thereby committing an error of law.

20. Furthermore, it is contended that the Tribunal committed an error of law at paragraph 6.1.5 at page 150 of the Report by making a decision finding or conclusion that was Inconsistent with the Proviso to section 173(1) of the ***Evidence Act*** (Cap 80 Laws of Kenya) in that in making the remarks findings and decisions in regard to Allegation No. 6 at paragraph 6.1.5 at page 150 of the Report that technical evidence of surveyors was needed was influenced by and relied on the testimony of **Pauline Wanjiku Gatimu** an Acting Senior Director of Survey, **Geoffrey Gachathi** a Senior Land Registrar of Titles who at the material time was the District Land Registrar Homa Bay District and **Silas Chienjo** a Surveyor in the Government of Kenya. However, notwithstanding the fact that the evidence and or testimonies of the said witnesses was not available to the applicant during the trial of Kisii HCCC No. 10 of 1990, the Tribunal made the remarks findings and decisions in regard to Allegation No. 6 at paragraph 6.1.5 at page 150 of the Report that: "(i)t was also a grave shortcoming on the part of the judge not to appreciate that an international boundary was involved, and a claim touching the same would, of necessity, require the technical evidence of surveyors" and in so doing the Tribunal failed in its duty to correctly understand, apply and give effect to the legal principles codified in the proviso to section 173(1) of the ***Evidence Act*** (Cap. 80 Laws of Kenya). In the view of the applicant's advocates, the Tribunal had a duty to correctly understand, apply and give effect to the principle stated in **Okale v. Republic (1965) EA 555 at page 557** when it made the remarks findings and decisions in regard to Allegation No. 6 at paragraph 6.1.5 at page 150 of the Report that: "(i)it was also a grave shortcoming on the part of the judge not to appreciate that an international boundary was involved, and a claim touching the same would, of necessity, require the technical evidence of surveyors".

21. Further errors according to the applicant are to the effect that the content of paragraph 6.1.3 at page 145-147 of the Report containing the Tribunal's perverse, irrational and unreasonable decisions remarks and findings which in any event were not supported by any or any Sufficient Evidence that he excluded the evidence of **Benson Morumbwa Onyancha**. To the applicant, the Tribunal at paragraph 6.1.3 at page 144 of the Report found and determined that **Sarara Matongo Sigore's** evidence was that he destroyed the report of **Benson Morumbwa Onyancha**, which finding and determination of the Tribunal at paragraph 6.1.3 at pages 145-147 of the Report quite apart from not being supported by the said **Benson Morumbwa Onyancha's** own evidence, contradicted the finding and determination it had made at page 144 hence in the applicant's view, the Tribunal's decisions, remarks, conclusions and findings at paragraph 6.1.3 at page 145-147 of the Report are perverse, illogical, unreasonable and contradictory whereupon this Honourable Court has jurisdiction to set them aside. The same finding that the applicant excluded professionally assembled data from the disputed land by refusing to admit in evidence the report and/or destruction of the report of the Land Registrar, **Benson Morumbwa Onyancha** contradicts the evidence of the said TW19 and/or is not supported by the said TW19's testimony before the Tribunal and

further contradicts the evidence of **Isaac Otara Momanyi**, who was the applicant's Court Clerk at the material time and or is not consistent with or supported by the said **Isaac Otara Momanyi's** testimony before the Tribunal. It is therefore the applicant's case that the Tribunal committed an error of precedental fact by making the remarks comments decisions and conclusions at paragraph 6.1.3 at page 147 of the Report that the applicant excluded the evidence of the Land Registrar, **Benson Morumbwa Onyancha** and or prevented him from giving testimony in Kisii HCCC No. 10 of 1990 for the reasons that (a) firstly, the said **Benson Morumbwa Onyancha** did not testify before the Tribunal that he produced his report in evidence in the course of the trial of Kisii HCCC No. 10 of 1990; (b) secondly, **Isaac Otara Momanyi** testified before the Tribunal that on 22nd October 1995, the applicant delivered a ruling upon an informal application by **Gichambati Mwita Mairo** as to whether or not the report of **Benson Morumbwa Onyancha** could be admitted in evidence. It is further deposed by the applicant that the Land Registrar, **Benson Morumbwa Onyancha's** and **Isaac Otara Momanyi's** testified before the Tribunal that on 22nd October 1995, an objection was raised by **Gichambati Mwita Mairo**, the plaintiff in Kisii HCCC No. 10 of 1990 whereupon on the even date the applicant upheld the said objection, consequently the said **Benson Morumbwa Onyancha** left court on 22nd October 1995 with his report intact.

22. The applicant's case is that in the absence of evidence, the Tribunal did not in fact have any jurisdiction to make any adverse decision, remark conclusion or finding against him in paragraph 6.1.3 of the Report particularly the remarks, decisions and conclusions that the Tribunal made at page 155 thereof that (…) the Tribunal finds that the exclusion of the evidence of **Benson Morumbwa Onyancha**, and that of the Surveyor, was by design and was intended to distort the outcome of the case, and this amounts to misconduct and abuse of office." And that the Tribunal while making the adverse decisions, remarks, conclusions or finding against the Applicant in paragraph 6.1.3 at pages 145-147 of the Report failed in its duty to correctly understand, apply and give effect to the provisions of section 35 of the ***Evidence Act*** (Cap 80 Laws of Kenya) as applicable to the production of the documentary evidence of **Benson Morumbwa Onyancha**

23. The applicant contends that the Tribunal acted in bad faith by ignoring the evidence of **Gichambati Mwita Mairo**, **Range Marwa Rebui**, **Merama Masero** and **Professor Chacha Nyaigoti Chacha** whose evidence was favourable to him and or the Tribunal misdirected itself in law in the evaluation of the evidence of the said **Gichambati Mwita Mairo**, **Range Marwa Rebui**, and **Merama Masero** respectively and proceeded to misdirect itself both in law and fact by making a finding, decision and determination at paragraph 7.0 at page 180 of the Report that the applicant did in fact corruptly solicit and receive the sum of Kshs. 60, 000/= from the said **Gichambati Mwita Mairo**. To the applicant the Tribunal sought to ignore the evidence of **Gichambati Mwita Mairo** that was favourable to him by making a decision determination finding and conclusion that "*Gichambati on the occasion when the subject judge visited the disputed land, had unilaterally convened a Kuria oath taking ceremony. By so doing, Gichambati managed to sway important witness to support him, and declare him the owner of the land, which decision was to be convened to the subject judge at the very beginning. These included the area Chief Richard Sarara Marigo (TW14), and the tribal elders, such as Marwa Kabaka Gitwekere (TW13). From the evidence the Tribunal believes that Gichambati had more confidence in Kuria traditional methods of dispute settlement, than in the judicial method which the subject Judge was required to implement."* That determination, he deposes, was made against the weight of the evidence that was available before it to wit the testimony of **Range Marwa Rebui**, **Marema Masero** and **Marwa Kabaka Gitwekere**. Since neither **Range Marwa Rebui** nor **Marema Masero** nor **Marwa Kabaka Gitwekere** testified before the Tribunal that **Gichambati Mwita Mairo** swayed them to support him and declare him the owner of the disputed land which decision was to be conveyed to me as was found and determined by the Tribunal at paragraph 6.2.2 at page 153 of the Report, the applicant's case is that the Tribunal finding and determination at paragraph 6.2.2 at page 153 of the Report that **Gichambati Mwita Mairo** swayed them to support him and declare him the owner of the disputed land which decision was to be conveyed to me was not supported by any evidence. It is therefore averred that the Tribunal (in the absence of any evidence from either **Range Marwa Rebui**, **Marema Masero** and or **Marwa Kabaka Gitwekere** respectively) lacked the jurisdiction to make the finding and determination at paragraph 6.2.2 at page 153 of the Report that **Gichambati Mwita Mairo** swayed them to support him and declare him the owner of the disputed land which decision was to be conveyed to me. It is the applicant's understanding that Tribunal had a duty to correctly understand apply and give effect to the principle in

Sheikh Mushtaq v Nathan Mwangi Kamau Transportes and 5 Others (1982-88) 1 KAR 946 per **Nyarangi JA** at page 954 et seq. with respect to its assessment and understanding of the *Kuria* custom of dispute resolution process through administration of the *Ekihore* oath thereby misdirecting itself in regard to the credibility of **Gichambati Mwita Mairo** whose testimony was favourable to the applicant that and the Tribunal made a decision conclusion finding and determination that **Gichambati Mwita Mairo** (whose testimony was favourable to the applicant) "*had more confidence in Kuria traditional methods of dispute resolution, than in the judicial method which the subject Judge was required to implement*", yet the Tribunal did not fully understand the substance and application of the *Kuria* custom of dispute resolution process through administration of the *Ekihore* oath. Further, the Tribunal at paragraph 6.2.2 at page 153 of the Report made critical comments with respect to **Gichambati Mwita Mairo's** belief in the *Kuria* custom of dispute resolution process through administration of the *Ekihore* oath. According to the applicant's legal counsel, the Tribunal's opinion of **Gichambati Mwita Mairo's** belief in Kuria custom dispute resolution process through administration of the *Ekihore* oath affected the Tribunal's assessment of the credibility of **Gichambati Mwita Mairo** whose testimony was favourable to the Applicant.

24. It is further contended by the applicant that the Tribunal committed an error of law at paragraph 6.1.1 at page 139 of the Report in making remarks, decisions and conclusions that **Professor Chacha Nyaigoti Chacha** and **Charles Mwita Sigore** could and or did not in fact corroborate the testimony of **Sarara Matongo Sigore** that the applicant corruptly received Kshs. 60, 000/= from **Gichambati Mwaita Mairon and** that the Tribunal while making the foregoing remarks, decisions and conclusions failed in its duty to correctly understand, apply and give effect to the principle in **R v. Whitehead (1929) 1 K.B. 99 at p. 102 per Lord Hewart CJ, Mutonyi v. Republic (1982) KLR 203 at pages 207 - 208** per **Potter JA** that there is a rule of practice requiring the corroboration of a complainant's evidence in a corruption case. In his view, if the Tribunal correctly understood its duty to correctly understand the principle that it is the practice to require corroboration of a complainant's evidence in a corruption case, the Tribunal failed in its duty to apply and give effect to the practice that required that the evidence of **Sarara Matongo Sigore** that the applicant had corruptly solicited and received a sum of Kshs. 60, 000/= from **Gichambati Mwita Mairo** should have been corroborated.Further the Tribunal while making the foregoing remarks decisions and conclusions failed in its duty to correctly understand, apply and give effect to the principle in **Mutonyi v. Republic (1982) KLR 203 at page 208** per **Potter JA** that for evidence to be capable of amounting to corroboration it should affect the accused person by connecting him or tending to connect him with the offence confirming in some material particular not only the evidence that the offence has been committed but also that that the accused committed it. Apart from the foregoing, the Tribunal while making the foregoing remarks, decisions and conclusions failed in its duty to show which piece of evidence and particularly the manner in which the testimony of **Professor Chacha Nyaigoti Chacha** and or **Charles Mwita Sigore** either affected the applicant by connecting him or by tending to connect him with the charge of corruptly receiving a sum Kshs. 60, 000/= from **Gichambati Mwita Mairo** and/or confirmed in some material particular not only the evidence that the sum of Kshs. 60, 000/= was corruptly solicited and received but that in fact the applicant was the one who corruptly solicited and received the sum of Kshs. 60, 000/= from **Gichambati Mwaita Mairo**. Further, the Tribunal found and determined at paragraph 6.1.1 at page 139 of the Report that **Charles Mwita Sigore** corroborated the testimony of **Sarara Matongo Sigore** that the applicant corruptly received a bribe of Kshs. 60, 000/= from **Gichambati Mwaita Mairo**, thereby failing to correctly understand, apply and give effect to the principle in **Lubogo v. Uganda (1967) EA 440 at page 442** per **Duffus JA** that hearsay evidence of a witness cannot amount to corroboration

25. To the applicant, the Tribunal committed an error of law in finding and determining at paragraph 6.1.1 at page 139 of the Report that **Charles Mwita Sigore**, whose testimony was that **Sarara Matongo Sigore**, told him that he had witnessed **Gichambati Mwaita Mairo** corruptly give to the Applicant Kshs. 60, 000/= could and did in fact corroborate the testimony of the said TW5 that he saw the applicant corruptly solicit and receive the sum of Kshs. 60, 000/= from TW25 for the reason that the testimony of the said TW9 was hearsay and/or inadmissible and/or otherwise unreliable statement wherefore it could not in law amount to corroboration of Allegation No. 1. In fact, it is deposed that **Charles Mwita Sigore** testified before the Tribunal that he did not directly witness the applicant corruptly solicit and receive the sum of Kshs. 60, 000/= from **Gichambati Mwita Mairo**. The applicants states that **Charles Mwita Sigore** testified before the Tribunal that **Sarara Matongo** told him that the said **Sarara Matongo Sigore**

was the person who had witnessed the applicant corruptly solicit and receive the sum of Kshs. 60, 000/= from **Gichambati Mwaita Mairo** wherefore the testimony of the said **Charles Mwita Sigore** was a hearsay and/or inadmissible and could not in law amount to corroboration of the allegation that I corruptly solicited and received from **Gichambati Mwita Mairo** Kshs. 60, 000/=. In the applicant's view, **Charles Mwita Sigore's** testimony before the Tribunal was inconsistent, unreliable and contained material discrepancies hence was in law incapable of corroborating Allegation No.1 to wit that the applicant corruptly solicited and received a sum of Kshs. 60, 000/= from **Gichambati Mwita Mairo** for the reasons that (i) firstly, whereas **Charles Mwita Sigore** testified before the Tribunal that the incident that **Sarara Matongo Sigore** had narrated to him in which the said **Sarara Matongo Sigore** informed him that he saw the applicant corruptly solicit and receive the sum of Kshs. 60, 000/= from **Gichambati Mwita Mairo** was quite apart from being an extraordinary incident, a significant event of his life, the said **Charles Mwita Sigore** on cross-examination could not remember the date when such an extraordinary and significant event occurred. (ii) secondly, whereas **Charles Mwita Sigore** testified before the Tribunal that while at Kisii Sports Club other than **Sarara Matongo Sigore** and **Gichambati Mwaita Mairo**, he did not speak to any other person, during cross-examination the said **Charles Mwita Sigore's** testimony contradicted his witness statement dated 5th August 2004 whereat the said **Charles Mwita Sigore** had in fact stated that while he was at the Kisii Sports Club he sought to find out the whereabouts of **Sarara Matongo Sigore** from a person (the said TW9 failed to particularize in his said statement) at the reception area. (iii) thirdly, whereas **Charles Mwita Sigore** testified before the Tribunal that while he was at Kisii Sports Club, **Gichambati Mwaita Mairo** left him outside at the gate of the Kisii Sports Club and further that he never entered the Club house, during cross-examination, the said **Charles Mwita Sigore's** testimony contradicted his witness statement dated 5th August 2004 whereat the said **Charles Mwita Sigore** stated that while he was at the Kisii Sports Club he sought to find out the whereabouts of **Sarara Matongo Sigore** from a person (he did not specify in his statement) at the reception area. (iv) fourthly, whereas **Charles Mwita Sigore** testified before the Tribunal that while he was at Kisii Sports Club, **Gichambati Mwaita Mairo** left him outside the Kisii Sports Club at the gate and further that the said **Charles Mwita Sigore** never entered the Club house, wherefore the said **Charles Mwita Sigore** had to wait for somebody to come so that he could send for **Sarara Matongo Sigore** to be called, during cross-examination, the said TW9's testimony was at variance with and contradicted his witness statement dated 5th August 2004 whereat the said TW9 stated that while he was at the Kisii Sports Club he sought the whereabouts of **Sarara Matongo Sigore** from a person at the reception area. (v) fifthly, whereas **Charles Mwita Sigore** stated in his witness statement dated 5th August 2004 that upon arrival at the Kisii Sports Club, he inquired at the reception whether a short old man had been seen at the club, during cross-examination, the said **Charles Mwita Sigore** testimony before the Tribunal was at variance with and contradicted his witness statement since the said **Charles Mwita Sigore** testified that he inquired about the whereabouts of **Sarara Matongo Sigore** at the gate of Kisii Sports Club and not at the reception. (vi) sixthly, whereas **Charles Mwita Sigore** in his witness statement dated 5th August 2004 stated that while he was at the Kisii Sports Club, he noticed that a khaki envelope was protruding from **Gichambati Mwita Mairo's** right coat pocket, during cross-examination and the **Honorable Mr. Justice Luka Kimaru** and the **Honorable Lady Justice Hannah Okwengu** the said **Charles Mwita Sigore** testified before the Tribunal that what he saw was in fact a khaki paper bag.

26. It is therefore the applicant's case that the Tribunal's decision and determination at paragraph 6.1.1 at page 139 of the Report was made against the evidence of **Professor Chacha Nyaigoti Chacha** who during cross-examination, testified under oath that he could not recollect an incident in which **Sarara Matongo Sigore** while in his company witnessed the applicant corruptly solicit and receive the sum of Kshs. 60, 000/= from **Gichambati Mwita Mairo** wherefore the said **Professor Chacha Nyaigoti Chacha** could not and did not in fact corroborate the testimony of **Sarara Matongo Sigore** that the applicant corruptly solicited and received the sum of Kshs. 60, 000/= from **Gichambati Mwita Mairo**.

27. It is therefore the applicant's case that in the absence of evidence, the Tribunal lacked jurisdiction to make the finding and determination at paragraph 6.1.1 at page 139 of the Report that **Professor Chacha Nyaigoti Chacha** corroborated the testimony of **Sarara Matongo Sigore** that the applicant corruptly received a bribe of Kshs. 60, 000/= from **Gichambati Mwaita Mairo** and based on his advocate's advice the Tribunal's finding and determination at paragraph 6.1.1 at page 139 of the Report that **Professor Chacha Nyaigoti Chacha** corroborated the testimony of **Sarara Matongo Sigore** that the

applicant corruptly received a sum of Kshs. 60, 000/= from **Gichambati Mwaita Mairo** is therefore unreasonable, illogical, perverse and irrational. To him therefore the Tribunal committed an error of law at paragraph 7.0 at page 156 of the Report by accepting and Relying on the evidence and testimony of **Sarara Matongo Sigore** as proof that the applicant corruptly solicited and received Kshs. 60, 000/= from **Gichambati Mwita Mairo** and further failed to correctly understand the principle in **Ndungu Kimani v. The Republic (1979) KLR 282** that a witness upon whose evidence a court proposes to rely should not create the impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness or do (or say) something which indicates that is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence thereby committing an error of law at paragraph 7.0 at page 156 of the Report by accepting and relying on the evidence of **Sarara Matongo Sigore** as proof of the allegation that I corruptly solicited and received Kshs. 60, 000/= from **Gichambati Mwita Mairo**. In support of this averment the applicant set out several instances which according to him go to show that the testimony of the said **Sarara Matongo Sigore** was unreliable.

28. According to the applicant, the Tribunal made a perverse irrational and unreasonable decision conclusion and finding that **Sarara Matongo Sigore** was a consistent and credible witness and that the Tribunal acted unreasonably by taking into consideration aspects of the testimony of **Professor Chacha Nyaigoti Chacha** and **David Kombo** that were either irrelevant to the determination of the allegation that the applicant corruptly solicited and received the sum of Kshs. 60, 000/= from **Gichambati Mwita Mairo** and or based its decision upon consideration of aspects of the testimony of **Professor Chacha Nyaigoti Chacha** and **David Kombo** which were accorded manifestly inappropriate weight. It is deposed that the remarks decisions and conclusions at paragraph 6.1.1 at page 139 of the Report, the Tribunal relied upon the evidence of **David Kombo** yet neither **David Kombo** nor **Professor Chacha Nyaigoti Chacha** testified before the Tribunal that **Gichambati Mwita Mairo** did in fact gain entry into Kisii Sports Club either through the gate at the golf course or the main gate and or either as alleged by **Sarara Matongo Sigore** or at all and in the course of determining Allegation No. 1, the Tribunal acted unreasonably at paragraph 6.1.1 at page 142 of the Report by placing manifestly excessive and inappropriate weight on the testimonies of **David Kombo** and **Professor Chacha Nyaigoti Chacha** relating to the possibility of non-members gaining entry into Kisii Sports Club whereas the germane issue that required resolution was whether or not **Gichambati Mwita Mairo** did in fact enter Kisii Sports Club hence the Tribunal's decision at paragraph 7.0 at page 156 of the Report, regarding Allegation No. 1 was therefore based upon consideration of aspects of the testimonies of **David Kombo** and **Professor Chacha Nyaigoti Chacha** which were either irrelevant to the determination of whether or not **Gichambati Mwita Mairo** did in fact gain entry into Kisii Sports Club through the main gate and or were otherwise accorded manifestly excessive and or inappropriate weight by the Tribunal.

29. It is the applicant's case that the Tribunal committed an error of fact and law at paragraph 6.2.2 at page 153 of the Report by holding and determining that **Gichambati Mwita Mairo's** testimony was not corroborated in any material respect except by **Richard Sarara Marigo** when the Tribunal had a duty to correctly understand apply and give effect to the general principle of law as stated in **DPP v. Kilbourne (1973) 1 All ER 440** per **Lord Hailsham** at page 448 that the word 'corroboration' by itself means no more than evidence tending to confirm other evidence. In my opinion, evidence which is (a) admissible and (b) relevant to the evidence requiring corroboration, and if believed, confirming it in the required particulars, is capable of being corroboration of that evidence and, when believed, is in fact such corroboration. To the contrary the applicant avers that his testimony before the Tribunal confirmed and therefore corroborated in material particular the testimony of **Gichambati Mwita Mairo** before the Tribunal that the Applicant did not corruptly solicit and receive the sum of Kshs. 60, 000/= from **Gichambati Mwita Mairo** from the Kisii Sports Club hence in the course of making foregoing finding and determination at paragraph 6.2.2 at page 152 of the Report that **Gichambati Mwita Mairo's** testimony was not corroborated in any material respect except by **Richard Sarara Marigo**, the Tribunal failed in its duty to correctly understand, apply and give effect to the general principle of law as stated in **DPP v. Kilbourne (1973) 1 All ER 440** per **Lord Hailsham** at page 448 that 'corroboration' by itself means no more than evidence tending to confirm other evidence. In my opinion, evidence which is (a) admissible and (b) relevant to the evidence requiring corroboration, and if believed, confirming it in the required particulars, is capable of being corroboration of that evidence and, when believed, is in fact such corroboration thereby committing an error of law.

30. According to the applicant, the Tribunal acted in bad faith by failing to consider and or resolve the applicant's credibility yet at paragraph 6.2 at pages 151 to 155 of the Report the Tribunal considered the demeanor of the witnesses who testified before it and recorded its impression of the witnesses who in the tribunal's opinion were the key ones. Therefore whereas the applicant was the subject of Tribunal Matter No. 2 of 2007, filed an Affidavit on 20th August 2007 in answer to the charges that he faced in Tribunal Matter No. 2 of 2007 and gave testimony on oath before the Tribunal on 28th August 2007, the Tribunal did not consider and or resolve his own demeanour and credibility when the Tribunal considered the demeanour of the witnesses who testified before it and recorded the its impression of who in the tribunal's opinion were the key witnesses at paragraph 6.2 at pages 151 to 155 of the Report. By selectively failing to find that the applicant was a key witness and or consider his own demeanour and credibility the Tribunal, it is the applicant's position that it was partisan and biased against him and that the Tribunal acted in bad faith by ignoring the testimony of **Professor Chacha Nyaigoti Chacha** regarding the applicant's good character and credibility yet the Tribunal at paragraph 6.2.4 on page 154 of the Report found and determined that **Professor Chacha Nyaigoti Chacha** was as a truthful and honest witness, the Tribunal ignored the testimony of the said **Professor Chacha Nyaigoti Chacha** before it of the applicant's good character and credibility.

31. The applicant also contends thatthe Tribunal breached his legitimate expectation that it would apply and give effect to the principle laid down in the Report and Recommendation of the Tribunal to Investigate the Conduct of the **Honourable Mr. Justice P. N Waki JA** that there is need to protect Judges from incredible accusations without protecting Judges who have been corrupt. And therefore the applicant legitimately expected the Tribunal to apply and give effect to the principles set out at page 29-30 of the Report and Recommendation of the Tribunal to Investigate the Conduct of the **Honourable Mr. Justice P. N Waki JA** that Judges should be protected from incredible accusations without protecting those who have been corrupt as against the complainant in Tribunal Matter No. 2 of 2007, **Sarara Matongo Sigore** (TW5) as well as the said TW5's testimony before the Tribunal. The applicant therefore legitimately expected the Tribunal to understand apply and give effect to the principles set out in the **Waki Report** at pages 20 to 31 thereof enjoining a tribunal appointed pursuant to the provisions of section 62(5) of the Constitution to conduct an inquiry in a judicious and balanced manner considering and resolving all evidence before it whether favourable or unfavourable to the subject judge.

32. To the applicant,the Tribunal generally acted in bad faith and the Tribunal's errors of fact and errors of law are egregious, patent and glaring so as to constitute breaches of its duty to act in good faith towards myself in the manner that it made its decisions determinations findings and or conclusions. Further the Tribunal did not act fairly or consider or resolve all the evidence and submissions before it particularly the evidence of various witnesses that was favourable to the applicant and is in breach of its duty so to act. Its remarks conclusions and decisions disclose bias and or apparent bias disclosed by the matters set out hereinabove.

33. Apart from this affidavit, there was a further affidavit sworn by the applicant on 1st October 2012. In that affidavit the applicant reiterated the contents of the aforesaid affidavit and added that the Tribunal recommended to the President in accordance with the provisions of section 62(5) of the Constitution that he should be removed from office of Puisne Judge for misbehaviour under section 62(4) thereof and that on 17th July 2008, the President, in exercise of the powers conferred by section 62(4) of the Constitution and pursuant to the recommendation of the Tribunal, removed him from office of Puisne Judge of the High Court of Kenya vide Gazette Notice No. 6236 of 2008.

APPLICANT'S SUBMISSIONS

34. On behalf of the applicant, it is submitted based on Nairobi High Court Miscellaneous Civil Application No. 1062 of 2004 between **Justice Amraphael Mbogholi Msagha vs. Chief Justice of the Republic of Kenya & 7 Others** (the ***Mbogholi Case***) that it is not open to the Tribunal or the Assisting Counsel to frame any other issues beyond that which formed the basis of the representation to the President for removal of a judge. Following this decision it is submitted that the Tribunal herein on 20th February 2007 struck out allegations Nos. 7 to 11 and that its mandate was to inquire into the actual

complaint or matters which were the subject of representations made by the Chief Justice to the President at the time the President appointed the Tribunal in order to determine whether the Applicant had misconducted himself and to make appropriate recommendations to the President. According to the applicant the Tribunal's jurisdiction was therefore limited to inquiry into and reporting of the facts as to the complaints that the applicant had asked the Defendant for Kshs 50,000.00 and one bag of millet so that he could rule in his favour which the defendant refused; that the applicant had solicited for money from the plaintiff; and that the applicant is said to have received Kshs 60,000.00 from the plaintiff at Kisii Club where he was seen by the defendant who was in the company of one **Professor Chacha Nyaigoti Chacha**.

35. It is submitted however, that as at 15th October 2003, the Chief Justice had not seen either the Court file, the pleadings and the proceedings or judgement delivered on 23rd October 1997 in Kisii HCCC No. 10 of 1990 and therefore could not and did not in fact represent to the President the issues of interruption and refusal to hear the evidence, communication between the applicant and TW25, hosting of TW25, conferment of undue benefit on TW25. Therefore, it is submitted that by considering the said issues, the Tribunal exceeded and acted ultra vires its mandate. It is further submitted that by accepting and considering the evidence and testimony of **Pauline Wanjiku Gitimu** (TW180 who did not and whose testimony was not before the Applicant in Kisii HCCC No. 10 of 1990 and basing it finding on allegation that the applicant had abused his office thereon, the Tribunal reviewed the judgement and decree that had been delivered on the basis of the fresh evidence, re-appraised the evidence tendered and drew adverse inference thereon and took additional evidence after judgement had been delivered hence it performed the functions of the Court of Appeal thus frustrated the legislative purpose in enacting the Appellate Jurisdiction Act Cap 9 Laws of Kenya as well as section 80 of the Civil Procedure Act.

36. While citing **Bhandari vs. Advocates Committee [1956] 3 All ER 742** and **R vs. Police Complaints Board [1983] 2 All ER 353**, it is submitted that the Tribunal arrived at its decision and findings on the basis of probabilities, conjecture, speculation and suspicions and not on the basis of the standard of proof beyond reasonable doubt that is applicable to the inquiry such as the one that the Applicant faced before the Tribunal under section 62(5) of the Constitution. In arriving at the said decision it is submitted that the Tribunal relied on an "***article entitled 'Standard of Proof", in http: en. Wikipedia.org/wiki/burden of proof***" which article was not brought to the Tribunal's attention by either the Assisting Counsel or the Applicant's Counsel. In relying thereon, it is submitted that the Tribunal did not rely on a statement of law of the United States of America contained in any book(s) purporting to be printed and published under the Authority of the Federal Government of the United States of America and to contain any such law nor did the Tribunal rely on reports of rulings and judgments of the Supreme Court and or Federal Courts of the United States of America contained in the book(s) purporting to be reports of such ruling(s) and judgement(s) contrary to section 41 of the ***Evidence Act*** as read with section 3(1) of the ***Judicature Act*** Cap 8 Laws of Kenya.

37. It is submitted that by failing to give the applicant the benefit of doubt with respect to the allegations of bribery in light of ambiguity, uncertainty and lack of particularity of the testimony of TW5, the Tribunal committed an error.

38. On the authority of **Three Rivers District and Others v. Bank of England (No.3)(2000) All ER 1** at pages 80-81 and **Attorney General's Reference (No.3 of 2003) (2204) EWCA Criminal 868 (2005) 4 All ER 303**, it is submitted that the Tribunal failed in its duty to correctly understand, apply and give effect to legal criteria of determining whether a charge of abuse of office has been established.

39. It is further submitted that the Tribunal's finding were made against the weight of evidence available before it and or were not supported by any or any sufficient evidence.

40. It is submitted that the Tribunal, in ignoring the evidence favourable to the applicant acted in bad faith and that the Tribunal had the duty to correctly understand, apply and give effect to the principles of law applicable in the declaration of trusts in respect of a first registration of land under the provisions of the ***Registered Lands Act*** (Cap 300 Laws of Kenya) as well as the decision of the Court of Appeal's decision in **Mumo vs. Makau [2004] 1 KLR 13**.

41. It is submitted that the Tribunal was under a duty to correctly understand and apply and give effect to the provisions of the proviso to section 173(1) of the ***Evidence Act*** to the fact that the evidence and or testimonies of TW18, TW12 and TW`7 were not available to the applicant at the hearing hence the applicant was mandatorily enjoined while delivering the judgement in Kisii HCCC No. 10 of 1990 on 23rd October 1997 to base his decision only upon facts which had been admitted in evidence and duly proved as was held in **Okale vs. Republic [1965] EA 555**.

42. By relying on the evidence of **Sarara Matongo Sigore** which was unreliable, it is submitted that the Tribunal failed to correctly understand the principle in **Ndungu Kimani vs. Republic [1979] KLR 282** that a witness upon whose evidence a court proposes to rely should not create the impression in the mind of the court that he is not a straight forward person, or raise a suspicion about his trustworthiness or do or say something which indicates that he is a person of doubtful integrity and therefore an unreliable witness which makes it unsafe to accept his evidence.

43. It is submitted that the finding that the applicant declined to admit some evidence of destruction of the same was not supported by evidence. In any case the Tribunal failed to appreciate that the admissibility of such evidence was subject to section 35 of the ***Evidence Act***.

44. It also submitted that the allegation of corruption and bribery was not proved to the required standards as was held in **Mutonyi vs. Republic [1982] KLR 203** and that in line with the holding in **Lubogo vs. Uganda [1967] EA 440**, hearsay evidence of a witness cannot amount to corroboration.

45. It is further reiterated as deposed in the affidavits herein above that the Tribunal's decision was made in bad faith, was unreasonable, perverse and irrational hence the orders sought ought to be allowed.

RESPONDENT'S SUBMISSIONS

46. On behalf of the Respondent, it was submitted that under section 3(1) of the Commission of Inquiry Act, the President has the power to appoint commissioners to inquire on the conduct of any public officer hence the Tribunal was mandated to generally carry out investigations into the Conduct of the Judge, make a report and its recommendations thereon to the President expeditiously. It is also submitted that under section 62(5)(b) of the repealed Constitution, the Tribunal investigating the conduct of a Judge was widely mandated to inquire into the matter and report on the facts thereof to the President and recommend to the President whether that judge ought to be removed under that section. It is therefore submitted that the Tribunal did not derogate from its mandate and hence the ex parte applicant have failed to show any act by the Tribunal that was *ultra vires* since the Tribunal acted within its mandate and all they did was to make a recommendation on the conduct of the ex parte applicant.

47. On the standard of proof the Respondent relied on **Bhandari vs. Advocates' Committee [1956] 1 WLR 1442** to the effect that the standard of proof where a professional person is being tried by his or her professional body in disciplinary proceedings whose effect may be to deprive that person of his or her right to practice is a standard less than the reasonable doubt test of criminal law but higher than the balance of probabilities of civil cases.

48. With respect to errors of fact, it is submitted that under Order 53 of the ***Civil Procedure Rules***, 2010 and ***Law Reform Act*** section 8 and 9, judicial review is a procedural process and therefore it is concerned with the procedure rather than merits of the decision and to the extent that the substantial part of the pleadings and submissions are devoted to arguments on the merits of the allegations, it does not fall within the ambit of judicial review application.

49. On the authority of **Gerald Wanjohi and Margaret Gathaga vs. District Forest Officer**, it is submitted there was no evidence of bad faith since it was not shown that the Tribunal acted vindictively or abused the powers conferred on it by statute contrary to public good.

50. On irrationality, it is submitted based on **Associated Provincial Picture Houses Ltd, v. Wednesbury Corporation [1948] 1 K.B. 223**that the question which needs to be determined is whether

the Tribunal's finding was so unreasonable that no reasonable person could have made it and that the evidence adduced before the Tribunal was sufficient enough to back their finding.

51. With respect to the issue of legitimate expectation, it is the Respondent's position, based on **R (Bibi) vs. Newham London Borough Council [2001] EWCA Cin 607, [2002] WLR 237** and **Keroche Breweries vs. KRA Civil Application No. 743 of 2006**, that the Tribunal had not promised a different treatment to the ex parte applicant and therefore contravened on this promise hence the Tribunal was well within its legal mandate and did not contravene any legitimate expectation.

52. It is therefore the Respondent's submission that the applicant is not entitled to the reliefs sought.

53. It is further submitted that by dint of Order 53 rule 7 of the Civil Procedure Rules, the decision complained of should be annexed whenever a party seeks to quash that decision. However, in this case the Gazette Notice that eventually legally signified the removal of the ex parte applicant from service has not been sought to be quashed nor has it been annexed to the application hence the quashing of the report without the Gazette Notice would be an exercise in futility incapable of implementation. To the Respondent, it is trite law that the court should issue practical orders capable of being implemented and supervised. In this case however, the efficacy of any order of judicial review given will also be affected by the considerable lapse of time the matter has taken and the fact of the changed circumstances in the judiciary including the limit on the number of judges at the High Court complicated by the fact of there being no vacancy to fill within that limit.

54. It is the Respondent's prayer that the application ought to be dismissed with costs.

DETERMINATIONS

55. Having considered the application herein, the affidavits in support and the submissions made by counsel both written and oral, this is my view of the matter.

56. A perusal of the verifying affidavit clearly discloses that the matters contained therein are contrary to the rules relating to affidavit are not purely factual matters. Some of the averments are in fact legal arguments couched as factual depositions. Others are opinions which although indicated as sourced from legal advice are better of being propounded in submissions rather than in the body of affidavit. As held by the Court of Appeal in **Pattni vs. Ali and Others [2005] 1 EA 339; [2005] 1 KLR 269**:

"an affidavit is a sworn testimony on facts and as such the provisions of the Evidence Act have been applied to affidavits and therefore rules of admissibility and relevancy apply. Hearsay evidence and legal opinions are for exclusion…The proviso to Order 18 rule 3(1) which relates to interlocutory applications does not detract from the provision; in other words it is not permitted anywhere that a statement may be deposed to as being a fact when the source of that knowledge is information… What is permitted is that if the matter is deposed to on belief and the ground of that belief is information from a third party, that information is admitted, provided its source is specified…Up to 1963 the strictures required that affidavits made on information should not be acted upon by any Court unless, firstly, the sources of the information are specified, and secondly, if it is not stated in the affidavit what is deposed to from the deponent's own observation and from what information and both these requirements the deponent has to state expressly or the entire affidavit is for rejection. After 1963, equitable principles were entertained in considering such affidavits and Courts were looking at the substantive, rather than the formal contents of the affidavit and the Courts henceforth said there was no obligation on the deponent to distinguish what he swears to on knowledge and what is on information and belief as the Court would itself examine the affidavit and determine from a clear reading of it, which averments emanate from what source and only the offending portions would be rejected..Where the portions complained of are fraught with argumentative propositions and expressions of opinion, it would be oppressive to allow such matters to masquerade as factual depositions and since Order 17 rule 6 donate the power to strike out

scandalous, irrelevant or oppressive matter and as the three categories are to be read disjunctively the said portions are struck out".

57. However, as no issue was taken with respect to the competency of the affidavit, I will say no more on the matter in light of the provisions of Article 159(2)(d) of the Constitution.

58. The scope of judicial review was dealt with by the Court of Appeal in **Municipal Council of Mombasa vs. Republic & Umoja Consultants Ltd Civil Appeal No. 185 of 2001** in which the Court held:

"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."

59. In **Republic vs. Kenya Revenue Authority *Ex parte* Yaya Towers Limited [2008] eKLR** 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.***

60. In **Pastoli vs. Kabale District Local Government Council and Others [2008] 2 EA 300** the Court citing **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** 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."

40. The Court is however aware of the decision in **Re Bivac International SA (Bureau Veritas) [2005] 2 EA 43** that like the Biblical mustard seed which a man took and sowed in his field and which is the smallest of all seeds but when it grew up it became the biggest shrub of all and became a tree so that the birds of the air came and sheltered in its branches, 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. It has been said that the growth of judicial review can only be compared to the never-ending categories of negligence after the celebrated case of ***Donoghue vs. Stephenson*** in the last century.

41. Whereas it is true that the frontiers of judicial review have expanded and will continue to expand in order to meet and address emerging situations the present position is that the decision whether or not to grant judicial review orders is dependent on whether or not the impugned decision is tainted by the three "Is" and these are illegality, irrationality and procedural impropriety. These broadly encompasses whether the body or authority concerned has acted without jurisdiction or *ultra vires*, or contrary to the provisions of a law or its principles; whether 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 in that the decision taken is in defiance of logic and acceptable moral standards; and whether there is a failure to act fairly on the part of the decision-making authority in the process of taking a decision the unfairness being in non-observance of the Rules of Natural Justice or to act with procedural fairness towards one to be affected by the decision as well as 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.

42.In reaching its determination, it must however, be recognised that a Tribunal or statutory body or authority has jurisdiction to err and the mere fact that in the course of its inquiry it errs on the merits is not a ground for quashing the decision by way of judicial review as opposed to an appeal. It is only an appellate Tribunal which is empowered and in fact enjoined in cases of the first appeal to re-evaluate the evidence presented at the first instance and arrive at its own decision on facts of course taking into account that it had no advantage of seeing the witnesses and hearing them testify. Whereas a decision may properly be overturned on an appeal it does not necessarily qualify as a candidate for judicial review. In **East African Railways Corp. vs. Anthony Sefu Dar-Es-Salaam HCCA No. 19 of 1971 [1973] EA 327,** it was held:

"It has been recognised for a long time past, that courts are empowered to look into the question whether the tribunal in question has not stepped outside the field of operation entrusted to it. The court may declare a tribunal's decision a nullity if (i) the tribunal did not follow the procedure laid down by a statute on arriving at a decision; (ii) breach of the principles of natural justice; (iii) if the actions were not done in good faith. Otherwise if none of these errors have been committed, the court cannot substitute its judgement for that of an authority, which has exercised a discretionary power, as the tribunal is entitled to decide a question wrongly as to decide it rightly..... And so have the courts repeatedly held that they have an inherent jurisdiction to supervise the working of inferior Courts or tribunals so that they may not act in excess of jurisdiction or without jurisdiction or contrary to law. But this admitted power of the Superior Court's to supervise inferior Courts or tribunals is necessarily delimited and its jurisdiction is to see that the inferior court has not exceeded its own, and for that very reason it is bound not to interfere in what has been done within that jurisdiction, for in so doing it would, itself, in turn transgress the limits within which its own jurisdiction of supervision, not of review, is confined. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise..... Even if it were alleged that the Commission or authorised officer misconstrued the provision of the law or regulation, that would still not have entitled the court to question the decision reached. If a magistrate or other tribunal has jurisdiction to enter on the enquiry and to decide a particular issue, and there is irregularity in the procedure, he does not destroy his jurisdiction to go wrong. If he has jurisdiction to go right he has jurisdiction to go wrong. Neither an error in fact nor an error in law will destroy his jurisdiction.....Where the proceedings are regular upon their face and the inferior tribunal had jurisdiction, the superior Courts will not grant the order of *certiorari* on the ground that the inferior tribunal misconceived a point of law. When the inferior tribunal has jurisdiction to decide a matter, it cannot (merely because it incidentally misconstrues a statute, or admits illegal evidence, or rejects legal evidence, or convicts without evidence) be deemed to exceed or abuse its jurisdiction."

43. In **Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others, Civil Application No.**

307/2003, Omolo J.A. stated as follows;

"The courts expressly recognize that they are manned by human beings who are by nature fallible, and that a decision of a court may well be shown to be wrong either on the basis of existing law or on the basis of some newly discovered fact which, had it been available at the time the decision was made, might well have made the decision go the other way."

44.It follows that a Court in judicial review proceedings would not be entitled to quash a decision made by a Tribunal merely on such grounds as the decision being against the weight of evidence; that the Tribunal in arriving at its decision misconstrued the law; that the Tribunal believed one set of evidence as against another and that the Tribunal has ignored the evidence favourable to the applicant while believing the evidence not favourable to him. Therefore in cases where the credibility of the witnesses is in issue, even an appellate court will not lightly interfere with a decision of the lower court since in that case the weight of evidence is best judged by the court before whom that evidence is given and not by a tribunal which merely reads a transcript of the evidence. The well known legal principle is that in the realm of "pure" fact, the advantage which the judge derives from seeing and hearing the witness must always be respected by an appellate court and that the importance played by those advantages in assisting the judge to any particular conclusion of fact varies through a wide spectrum from, where credibility is crucial and the appellate court can hardly ever interfere. See **Aga Khan Hospital vs. Busan Munyambu KAR 378; [1976-1985] EA 3; [1985] KLR 127.**

45.However, where a decision is arrived at based on complete lack of evidence and out of the blue as it were, unless the same is based on the application of the evidential doctrine of judicial notice, if such a finding is so outrageous, it may amount to gross unreasonableness as to justify the grant of judicial review orders. However mere allegation of sufficiency of evidence will not suffice. Similarly, the mere fact that the evidence favourable to a party was not considered will not be aground for quashing a decision if there was material on record which would have warranted a finding to the contrary.

46.I have considered the material on record and I with respect agree with the Respondent that the bulk of the material relied upon go to the merit of the decision rather than to the process. In my view, there are only two grounds disclosed upon which the Tribunal's decision may be quashed and these are whether or not the Tribunal acted without jurisdiction or exceeded the same and secondly, whether the Tribunal's decision was not supported by evidence in order to justify the invocation of irrationality principle.

47.The law on the jurisdiction of a Tribunal set up to inquire into the conduct of a Superior Court Judge is now well settled in this country. In **Nairobi High Court Miscellaneous Civil Application No. 1298 of 2004-Republic vs. Chief Justice of Kenya & 6 Others Ex Parte Moija Mataiya Ole Keiwua [2010] EKLR (Ole Keiwua's Case),** it was held:

"In the absence of a representation that was handed over to the President, the President had no powers to empower the tribunal to engage in an investigation and inquiry. The role of the tribunal was to establish whether the issues and complaints that were contained in the representation made to the President, was enough or not enough to sustain the removal of the applicant under section 62 (4), (5) and (6) of the Constitution. We think that the tribunal misdirected itself by assuming that it had powers to carry out an investigation process and frame its own charges against the applicant. The powers of the tribunal was limited or conditional upon the charges that were the subject of the representation that was made to the President. The representation arises from the Ringera committee's recommendations. And anything that was outside the Ringera report and outside the representation made to the President by the Honourable the Chief Justice, could not be a basis for inquiry or investigation by the tribunal. The tribunal misconstrued the words in the gazette notice but not limited to by purporting to gather evidence and engaging investigators to the field to sustain what they were calling charges against the applicant. That power was *ulra vires* their mandate and therefore illegitimate and an illegality. We also made a finding that the President had no powers to empower a tribunal to conduct an inquiry or investigation other than or outside the representation he received from the Honourable the Chief Justice. In essence the powers of the President was conditional and restricted to the representation he received from the

Chief Justice in exercise of his powers under section 62 (4) and 62(5)(a) is concerned. The President had no powers to direct the tribunal to investigate the conduct of the applicant by using the words *'including but not limited to'*. We find the inclusion of the said words in the gazette notice No.8828 of 2003 was in contravention of constitutional powers of the President as enshrined under section 62 of our Constitution. That was a manifest and patent contravention of our Constitution. By extension the engagement of the tribunal in a mandate outside the provisions of the Constitution was also an illegality and unconstitutional. In our humble view the issues to be investigated by the tribunal should only comprise those complaints and/or questions that were contained in the representation made to the President and not the general conduct of the applicant as a whole. The tribunal was not given an open ended mandate but their powers and jurisdiction were only within the boundaries of the representation that were made to the President and as in the gazette notice. The tribunal cannot arrogate itself powers to frame issues which were not before the Ringera committee and which were not subject of the representation and subsequent gazette notice No.8828 of 2003. The assisting counsel had no powers to frame charges or engage in an investigation process and place the results before the tribunal because that would be open to abuse and witch-hunting. Besides, the applicant would find it difficult to know and prepare the case he would be facing before the tribunal".

48.A similar finding was made in **Justice Amraphael Mbogholi Msagha vs. The Chief Justice & 7 Others** (supra).

49.While expounding on the same principle, it was held in **Nancy Makokha Baraza vs. Judicial Service Commission & 9 Others [2012] eKLR:**

"In the second stage where the President appoints a Tribunal, he does not enjoy absolute, unrestricted and/or unchecked powers in appointing a Tribunal to investigate and conduct an inquiry into the conduct of a judge. The powers of the President are subject to the petition presented to him.....It is therefore not within the powers and province of the President to formulate issues other than what is contained in the petition. The President cannot therefore purport to go outside the petition presented to him by the Commission. It is also not within the powers of the president to enlarge the powers, responsibilities and duties of the Tribunal. In essence the powers of the President and the Tribunal are restricted by the Constitution. The powers of the President and the Tribunal cannot be exercised independently outside the petition.....To argue otherwise would render the elaborate constitutional procedures and mechanisms for the removal of a judge a mirage. ....We further hold that in determining the issue whether or not to remove a judge, the Tribunal can only consider the grounds which were submitted to the President by the Commission in the petition presented pursuant to the provisions of Article 168(4) of the Constitution. To quote, Emukule, J in *Republic vs. Institute of Certified Public Accountants of Kenya ex Parte Vipichandra Bhatt T/A J V Bhatt & Company Nairobi HCMA No. 285 of 2006***,**

" in the absence of a rational explanation, one must conclude that the decision to refer the inquiry to a party who was not a member of the Disciplinary Committee and thus expand the inquiry outside the provisions of Statute can only be termed irrational within the meaning of the Wednesbury unreasonableness, was in bad faith and constitutes a serious abuse of statutory power. It is axiomatic that that statutory power can only be exercised validly if they are exercised reasonably. No statute can ever allow anyone on whom it confers a power to exercise such power arbitrarily and capriciously or in bad faith"

We hold that the expansion of the mandate of the Tribunal, by permitting it to investigate the conduct of the Petitioner, on matters other than those in the Petition by the Commission to the President, can only be termed irrational, unreasonable, arbitrary, capricious and exercised in bad faith. This constitutes a serious abuse of both statutory and Constitutional power. It is unacceptable and amounts to an infringement of the Petitioner's legitimate expectation that the Tribunal can only deal with the matters referred to the President by way of a petition. The action of enlarging the powers of the Tribunal by including the words "*including but not*" amounts to an infringement of the Petitioner's rights, which in our view, is unreasonable and unjustifiable in an open and

democratic society based on human dignity, equality and freedom. To that extent therefore, the Kenya Gazette authorizing the Tribunal to investigate the conduct of the Petitioner on matters *including but not limited* to the petition by the Commission, that Gazette Notice are unreasonably and arbitrarily worded and consequently amenable to the remedies provided under the Constitution."

50.It follows that the submissions made on behalf of the Respondent that once tribunal is set up by the President it is empowered to investigate any conduct of a Judge under the sun is incorrect.

51.The next issue is whether or not the Tribunal in this case went outside its mandate. For starters, for a Tribunal to go on a frolic of its own and embark on an uncalled for venture of calling new witnesses and placing reliance on their evidence to prop up the case against a Judge as it were would be perilously close to making a decision based on new matters unless the evidence is simply meant for clarification or on purely formal matters. Accordingly I agree that it was wrong for the Tribunal to have summoned a fresh witness whose evidence was not available at the time when the decision which gave rise to the complaints against the applicant was made.

52.In this case it is alleged that when the President appointed a Tribunal vide Gazette Notice No. 7282 of 2003 to investigate the applicant's conduct the Chief Justice could not have represented and did not in fact represent to the President that a question had arisen of removing the applicant under section 62(5) of the Constitution on the basis of the three allegations. Reliance for this submission is placed on the evidence of **Mr Charles Njai** (TW1) at pages 26-27 of Vol. 3 of the Hansard Verbatim Record of Evidence and that of **Mr. Samuel Soita** (TW2). In my view if the President had acted without a presentation from the Chief Justice that a question had arisen of the removal of the Applicant under the said provision of the Constitution, the President's action would have been without jurisdiction. However, I have looked at the pages referred to and from my own reading it comes out that what was not submitted to the Chief Justice was the evidence and documents accompanying the report. Therefore if the Report was actually presented to the Chief Justice and based on the said Report the Chief Justice made representations to the President, it is not the same thing as saying that the Chief Justice did not make such presentations. Whether or not the Chief Justice was justified in making the same before receiving the evidence was another matter and that was an issue that was well within the jurisdiction of the Tribunal to deal with and cannot in my respectful view be a ground for sustaining judicial review application. In **Joseph Vitalis Odero Juma vs. Chief Justice of Kenya & 6 Others [2010] eKLR**, it was held:

"A comparison between the report of the Ringera Committee and the allegations drawn up by the Assisting Counsel to the tribunal, indicates that the issues pertaining to the Petitioner, in both respects, were those that arose from two cases namely: Succession Cause No. 6 of 1999 and Succession Cause No. 60 of 1997. In effect, although the details of substance might not have been precisely the same, there was very little divergence between the two sets of allegations. In the light of the foregoing, the fact that the Assisting Counsel drew up allegations after the Tribunal was set up would not, by itself, render the suspension of the Petitioner unconstitutional. To our minds, once the Chief Justice was reasonably satisfied that there existed complaints against a Judge to warrant the setting up of a Tribunal to investigate the said Judge, the Chief Justice was entitled to recommend to the President that a Tribunal be set up. And when the question of removing a Judge from office has been referred to a Tribunal under Section 62 of the Constitution the President may suspend the Judge from exercising the functions of his office. Provided that the Chief Justice had received complaints against the Petitioner to warrant the setting up of a tribunal, the establishment of the tribunal would not be construed as unconstitutional. As to whether or not, (a) the tribunal acted in a judicious manner; or (b) was or was not independent and impartial; or (c) acted *ultra vires* the Public Officer Ethics Act 2003, would, to our minds, be issues which can only have been properly given consideration through an appellate exercise. Therefore, in so far as we are NOT sitting as an Appellate Court we decline the invitation of the Petitioner to make the findings he seeks in that respect.....we also hold the considered belief that the process of re-evaluating the evidence which was tendered before the Tribunal, with a view to determining whether or not the decision it arrived at was correct, would be deemed as exercising an appellate role over the said Tribunal.

This court is not sitting in the capacity of an appellate court. It therefore lacks, in this case, the jurisdiction to exercise the function of an appellate court."

53.On the standard of proof whereas I agree that the application of the wrong standard of proof may be aground for interfering with the finding of a Tribunal, that is not the same thing as saying that the correct standard was in actual fact not met. Whether or not the standard is met is to be decided based on the application of the correct standard of proof to a particular set of circumstances and the mere fact that the Tribunal arrived at a decision after applying the standard to the said facts and not another is not a ground for quashing the decision since whereas the standard to be applied is an objective test, the conclusion after the application of the requisite standard is a subjective one hence may not be amenable to judicial review. In **Bhandari vs. Advocates Committee [1956] 3 All ER 742**, whereas the Privy Council held that the standard of proof in allegation of professional misconduct involving an element of deceit or moral turpitude ought not to be on a mere balance of probabilities but that a higher standard of proof ought to be applied, the Court did not state that that higher standard is beyond reasonable doubt. Whereas in **R v Police Complaints Board (1983) 2 All ER 353**, **McNeill J** at page 371 was of the view that the criminal standard of proof does apply to disciplinary charges, in **Report and Recommendation into the Conduct of the Hon. Lady Justice Nancy Makokha Baraza [2012] eKLR**, the Tribunal accepted the position that the correct standard of proof is between proof beyond reasonable doubt and the balance of probabilities. On my part I concur with the position that the standard of proof ought to be higher than on balance of probabilities but not beyond reasonable doubt. As long as that standard is applied, it does not matter by whatever name it is called. In my view, nothing therefore turns on the issue of the application of the standard downloaded from the website.

54.On the issue of perverse, irrational, unreasonable and unsupported evidence, it is contended that the finding that the applicant destroyed the report of the Land Registrar and that the Applicant refused to admit in evidence the report of the said Land Registrar was not supported by evidence. I have read the conclusion of the Tribunal and it is clear that the Tribunal arrived at its decision after considering "all these circumstances, taken together with the direct evidence of bribery". In the light of this finding this Court cannot conclude that if the finding that the evidence of the Tribunal that the applicant destroyed the report of the Land Registrar and that the Applicant refused to admit in evidence the report of the said Land Registrar was not supported by evidence was to be upheld, the Tribunal would have arrived at a different decision. To make that determination would necessarily require the Court to re-evaluate the evidence which is not the mandate of the judicial review Court as opposed to an appellate court.

55.In the foregoing circumstances whereas I find that it was improper for the Tribunal to call for and entertain fresh evidence I am not satisfied that the Applicant herein has made out a case which would merit the orders sought in the instant application since the Tribunal arrived at its decision after considering all the evidence which was presented before it.

56.However, even if I were to find that the application was merited there is one other matter. It is the law that the decision whether or not to grant the remedy of judicial review is discretionary. In **Republic vs. Judicial Service Commission *ex parte* Pareno [2004] 1 KLR 203-209** it was held that judicial review orders are discretionary and are not guaranteed and hence a court may refuse to grant them even where the requisite grounds exist since the Court has to weigh one thing against another and see whether or not the remedy is the most efficacious in the circumstances obtaining and since the discretion of the court is a judicial one, it must be exercised on the evidence of sound legal principles. The court does not issue orders in vain even where it has jurisdiction to issue the prayed orders and hence the Court will refuse to grant judicial review remedy when it is nolonger necessary; or has been overtaken by events; or where issues have become academic exercise; or serves no useful or practical significance. Since the court exercises a discretionary jurisdiction in granting prerogative orders, it can withhold the gravity of the order where among other reasons there has been delay and where a public body has done all that it can be expected to do to fulfil its duty or where the remedy is not necessary or where its path is strewn with blockage or where it would cause administrative chaos and public inconvenience or where the object for which application is made has already been realised. See **Anthony John Dickson & Others vs. Municipal Council of Mombasa Mombasa HCMA No. 96 of 2000.**

57. As was held in **Sanghani Investment Limited vs. Officer in Charge Nairobi Remand and Allocation Prison [2007] 1 EA 354**:

"Section 8 of the Law Reform Act specifically sets out the orders that the High Court can issue in judicial review proceedings and the orders are, mandamus, *certiorari* and prohibition. A declaration does not fall under the purview of judicial review for the simple reason that the court would require *viva voce evidence* to be adduced for the determination of the case on the merits before declaring who that owner of the land is. Judicial review on the other hand is only concerned with the reviewing of the decision making process and the evidence is found in the affidavits filed in support of the application…....…Whereas it is true that the underlying dispute herein is ownership of the land, Judicial Review proceedings is not a forum where such a dispute can be adjudicated and determined as there would be a need for *viva voce* evidence to be adduced on how the land was acquired and came to be registered in the names of the applicant; whether the title is genuine or not. In cases where the subject matter or the question to be determined involves ownership of land, and the rights to occupy land namely occupation, and disposition, there would be need to allow *viva voce evidence* and cross-examination of the witnesses which is not available in judicial review proceedings. Even if the respondents had filed documents, they would be copies that would not be sufficient to establish authenticity of the title. The original documents would need to be produced at a full hearing where oral evidence would be adduced…….It may indeed be true that the notice that is impugned is irregular or unlawful and an order of *certiorari* would be deserved, but it is not in every case that the court will grant an order of judicial review even though it is deserved. Judicial review being discretionary remedy will only issue if it will serve some purpose. *Certiorari* is a discretionary remedy, which a court may refuse to grant even when the requisite grounds for it exist. The court has to weigh one thing against another to see whether or not the remedy is the most efficacious in the circumstances obtaining. The discretion of the Court being a judicial one must be exercised on the basis of evidence and sound legal principles…..So that in this case, even though this application were properly before this Court and the application had merit, the court may not have granted an order of *certiorari* because it would not be the most efficacious remedy in the circumstances. Even if the notice under challenge is quashed, the issue over the ownership of the land still stands and it will require determination by way of filing pleadings and *viva voce evidence* at another forum preferably the Civil Courts."

58.In this case, it is clear that vide a Gazette Notice No. 6236 dated 15th July 2008 which was published on 17th July 2008, **His Excellency the President** removed the applicant from the office of Puisne Judge of the High Court of Kenya. That Gazette Notice is not the subject of the present application. Therefore even if this Court were to find that the recommendations of the Tribunal ought to be quashed that would not necessarily quash the decision contained in the said Gazette Notice which decision would still be effective. In other words as rightly submitted on behalf of the Respondent to grant the orders sought herein would be an exercise in futility as it would amount to locking the stable door after the horse has bolted.

59.To grant the orders of certiorari sought would have the effect of quashing the orders of the Tribunal dated 2nd May 2008 quashing the decision of the Tribunal while in actual fact the applicant is aggrieved by his removal from his position as a Puisne Judge. The effect of that would be that the orders which the applicant is aggrieved with would be left intact and would remain in force. Accordingly no use will be served by granting the order of certiorari sought herein.

60.I however do not agree with the submissions made by the Respondent that the court should consider that the efficacy of any order of judicial review given will be affected by the considerable lapse of time the matter has taken and the changed circumstances in the judiciary. Whereas in ordinary master and servant relationship that would be factor to be considered in deciding whether or not to grant judicial review orders, the same must be applied with caution so that it is not deemed to be the legal position. In my view, that consideration only applies where there are available options which are similarly effectual. To deny a party a well deserved remedy when there are no options available to vindicate his grievance would in my view be a miscarriage of justice perpetrated by the Court and a Court of law, it has been held, has no jurisdiction to knowingly perpetrate injustice. In my view public appointments ought not to

be strictly equated to a relationship between master and servant since appointments in public service are not personal appointments and in most cases personal attachment is not as important as in purely private undertaking or venture. Whereas the consideration whether or not it is desirable to force an employee on an employer is a consideration when determining the type of remedy to grant it ought not to be the sole or even the dominant factor. Therefore the fact that the applicant has been out of office is not a ground to be relied upon to refuse the grant of otherwise well deserved orders. It must always be remembered that the position of a Psuine judge is statutorily underpinned unlike ordinary employment. See **Eric V J Makokha & 4 Others vs. Lawrence Sagini & 2 Others Civil Application No. Nai. 20 of 1994.**

ORDER

61. In the result I find no merits in the Notice of Motion dated 22nd February 2012. I further find that in the circumstances of this case the orders sought will not be efficacious. Accordingly, the said Motion is dismissed but with no order as to costs as the Tribunal is nolonger in existence.

Dated at Nairobi this day 3rd day of June of 2013

G V ODUNGA
JUDGE

*Delivered in the presence of **Mr Mbaluto** for **Mr Nowrojee** for the ex parte applicant, **Mr Kaumba** for the 1st respondent and **Ms Mutua** for the 2nd respondent.*