



IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: MAKHANDIA, KIAGE & M'INOTI, J.J.A.)

CIVIL APPEAL NO. 352 OF 2013

BETWEEN

REPUBLIC.....APPELLANT

AND

THE TRIBUNAL OF INQUIRY TO INVESTIGATE THE CONDUCT OF

PUISNE JUDGE TOM MBALUTO]

(HON. LADY JUSTICE JESSIE LESSIT]

HON. LADY JUSTICE HANNAH OKWENGU].....1ST RESPONDENT

HON. MR. JUSTICE JACKTON OJWANG]

HON. MR. JUSTICE FESTUS AZANGALALA]

HON. MR. JUSTICE LUKA KIMARU)]

JUDICIAL SERVICE COMMISSION].....2ND RESPONDENT

EX PARTE TOM MBALUTO

(Appeal from the judgment and decree of the High Court of Kenya at Nairobi (Odunga, J.) dated 3rd June 2013 in HC. MISC. C. A. No. 66 of 2008)

JUDGMENT OF THE COURT

Until 2nd May 2008 when a tribunal appointed by the President under **section 62** of the former Constitution recommended his removal from office, **Tom Mbaluto, the ex parte applicant** in the High Court, was a judge of the High Court. He was appointed to that office on 2nd April 1986 and under the terms of the former Constitution under which he was appointed, would have retired upon attainment of 74 years of age, which has already come to pass by the time of hearing this appeal. For convenience we shall refer to him as “**the appellant**” in this judgment. **The 1st respondent (“the Tribunal”)**, is the body made up of five serving judges of the High Court at the material time, namely **Hon. Justice Jessie Lessit, Hon. Justice Hannah Okwengu, Hon. Prof. Justice Jackton Ogwang, Hon. Justice Festus Azangalala** and **Hon. Justice Luka Kimaru**, which inquired into the appellant’s conduct and recommended his removal to the President. **The 2nd respondent (“the Commission”)** is the **Judicial Service Commission**, which under both the former and the current Constitutions is responsible for appointing or recommending for appointment judges of the various courts. The Commission litigated in the High Court as an interested party but did not take any part in this appeal.

The background to this appeal is the attempts made in Kenya in the late 1980s and early 1990s to address the perennial allegations of misconduct, lack of integrity, and outright corruption in the Judiciary, which ultimately culminated in the enactment of **section 23** of the **Sixth Schedule** to the **Constitution of Kenya, 2010**. That provision provided for the establishment of a mechanism for vetting of all judges and magistrates who were in office on 27th August 2010 to determine their suitability to continue serving under the current Constitution. The background to the vetting of judges, and the context of this appeal, is succinctly discussed in the judgment of the Supreme Court in **Judges &**

Magistrates Vetting Board & 2 Others v. Centre for Human Rights & Democracy & 11 Others [2014] eKLR, in which the vetting initiative was challenged.

One of the pre-vetting initiatives undertaken to address the malaise in the Judiciary was what came to be popularly known as the “*radical surgery*”, which, depending on who you ask, was either a noble initiative designed to exorcise the judiciary of the cancer of corruption, or a Machiavellian scheme, deviously contrived to rid the judiciary of unpopular or unwanted judges. Be that as it may, on 19th March 2003, the then Chief Justice of the Republic of Kenya, *Hon. Mr. Justice Johnson Evan Gicheru* appointed a three member committee of the Judiciary known as “*The Integrity and Anti-Corruption Committee of the Judiciary,*” (*the committee*) which was chaired by *Hon. Mr. Justice Aaron Ringera (rtd.)*, then a judge of the High Court. The mandate of the committee was to:

- (i) investigate and report on the magnitude of corruption in the judiciary;*
- (ii) identify the nature, forms and causes of corruption;*
- (iii) find out the level of bribery in monetary terms;*
- (iv) report on the impact of corruption on the performance of the judiciary;*
- (v) identify corrupt members of the judiciary and recommend disciplinary or other measures against them;*
- (vi) recommend strategies for the detection and prevention of corruption in the Judiciary; and*
- (vii) address any other related matters.*

The committee got down to work after which it presented its report to the Chief Justice on 30th September 2003. Among the judges against whom the committee received adverse allegations, which it found to be credible and disclosing corruption, want of integrity, and misbehaviour, was the appellant.

The procedure for the removal of a judge from office was at that time provided for in **section 62** of the former Constitution, the pertinent parts of which provided as follows:

“62. (1)...

(1)...

(2)...

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

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

(5) If the Chief Justice represents to the President that the question of removing a puisne judge under this section ought to be investigated, then –

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

(i) who hold or have held the office of judge of the High Court or judge of appeal; or

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

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

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

(6) Where the question of removing a judge from office has been referred to a tribunal under this section, the President, acting in accordance with the advice of the Chief Justice, may suspend the judge from exercising the functions of his office and any

such suspension may at any time be revoked by the President, acting in accordance with the advice of Chief Justice, and shall in any case cease to have effect if the tribunal recommend to the President that the judge ought not to be removed from office.

After receiving the report of the committee, the Chief Justice made representation to the President pursuant to **section 62(5)** of the former Constitution, as regards the appellant. On 15th October 2003, the President in turn appointed the Tribunal vide **Gazette Notice No. 7282**, which was ultimately superseded by **Gazette Notice No. 9532** of 24th November 2006, to investigate the conduct of several implicated judges, among them the appellant. The mandate of the Tribunal as spelt out in Gazette Notice No. 9532 was to:

“(a) investigate the conduct of Puisne Judge Tom Mbaluto 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.

(b) Make a report and its recommendations thereon to me expeditiously. In the meantime, the said Puisne Judge remains suspended from exercising the functions of his office.”

The appellant was served with the allegations against him and was duly represented by a team of counsel in the proceedings before the Tribunal, which at his request, were conducted in public. The allegations were primarily that he had entertained in a social place the plaintiff in **Kisii High Court Civil Case No. 10 of 1990, Gichambati Mwita Mairo v. Sarara Matongo Sigore, (HCCC No. 10 of 1990)** which was on-going before him; had corruptly received Kshs 60,000.00 from the said plaintiff; had improper communication with the same plaintiff in the absence of the defendant; had prevented a witness from testifying so as to give undue advantage to the plaintiff; and had rendered a decision calculated to confer undue benefit to the plaintiff and in which partiality, unfairness, and abuse of office were palpable. The appellant responded to the allegations by tendering affidavit evidence, upon which he was cross-examined.

Ultimately the Tribunal heard a total of 27 witnesses on the allegations against the appellant, prepared its report, and submitted the same to the President on 2nd May 2008. The final finding and recommendation of the Tribunal was as follows:

“Following the Tribunal’s findings that allegations No. 1, 3, 4, 5 and 6 have been fully substantiated, the Tribunal has come to the conclusion that the subject Judge has been involved in corruption, unethical practices, and absence of integrity in the performance of the functions of his office, and that this amounts to misbehaviour of such gravity as to justify removal of the Subject Judge from office, under section 62(3) of the Constitution of Kenya. It follows that the recommendation of this Tribunal to his Excellency the President, under section 62(5)(b) of the Constitution of Kenya, is that the subject Judge, the Hon Mr. Justice Tom Mbaluto, ought to be removed from office of Puisne Judge. Accordingly, the Tribunal hereby recommends that the subject Judge, the Hon Mr. Justice Tom Mbaluto, be removed from the office of Puisne Judge for misbehaviour, as provided under section 62(4) of the Constitution of Kenya.”

Pursuant to the Tribunal’s recommendation, on 15th July 2008, the President invoked the powers conferred on him by **section 62(4)** of the former Constitution and removed the appellant from the office of Judge of the High Court of Kenya vide **Gazette Notice No. 6236** of even date. Aggrieved by his removal, on 31st October 2008, the appellant took out judicial review proceedings seeking some 15 distinct orders of *certiorari* against different findings and holdings of the 1st respondent. Shorn of all the verbosity and superfluity, the appellant was essentially seeking an order of *certiorari* to quash the decision or recommendation of the Tribunal that he should be removed from office. He contended that the Tribunal’s decision was *ultra vires* its jurisdiction; based on the wrong standard of proof; in bad faith, in violation of his legitimate expectation, and tainted by errors of fact and law, irrationality, and unreasonableness.

The Attorney General who represented the Tribunal opposed the application contending that it had acted within its jurisdiction; had applied the correct standard of proof and that its decision was not tainted by bad faith, illegality, irrationality or breach of legitimate expectation as the appellant had alleged. The Tribunal maintained that in the circumstances of the application where the appellant was challenging the merit of the decision, judicial review orders could not issue. Lastly it was contended that the court could not issue orders in vain because the appellant had only challenged the report of the Tribunal and not the decision to remove him from office; a long period had elapsed since the appellant was removed from office; and lastly due to the changed circumstances of the Judiciary after the promulgation of the Constitution of Kenya 2010. **Odunga, J.** heard the application, and by the judgment dated 3rd June 2013, which is challenged in this appeal, dismissed the same. The learned judge took the traditional and pre-Constitution of Kenya 2010 view, espoused in decisions like ***Municipal Council of Mombasa v. Republic & Another [2002] eKLR***, that judicial review was concerned only with the decision making process and not the merits of the decision. While appreciating, as stated in ***Re Bivac International SA (Bureau Verita) [2005] 2 EA 42***, that the frontiers of judicial review would continue to expand to meet new situations, the learned judge nevertheless was of the view that it would not be proper for the court to substitute its decision for that of the Tribunal merely because it took a different view of the matter, since the Tribunal, in deciding which witness to believe, had the advantage of seeing and hearing the witnesses, which the court did not have. Nevertheless if the Tribunal were to arrive at a decision based on complete lack of evidence, the learned judge reasoned, or where illegality, irrationality and procedural impropriety on the part of the Tribunal were established, then the court would have basis for interfering. He ultimately found that the Tribunal had acted within its jurisdiction; that its decision had basis and support in the evidence that was adduced; and that in any event an order of *certiorari* would not be efficacious in the circumstances of this case, because the appellant had only applied to quash the decision of the Tribunal,

leaving intact the decision of the President to remove him from office. Accordingly he dismissed the application but made no order on costs.

The appellant was aggrieved and lodged the appeal now before us. Presenting the appeal in a succinct and focused fashion, **Mr. Nowrojee, learned SC**, compressed the appellant’s surfeit of grounds of appeal (29 in all) into three main grounds in which he faulted the learned judge for failure to hold that the Tribunal had no jurisdiction to investigate the conduct of the appellant, failure to hold that the Tribunal’s decision was a nullity, and holding that an order of *certiorari* would serve no practical purposes in the circumstances.

On the first ground, learned counsel submitted that although the learned judge had identified one of the issues for determination to be whether the 1st respondent acted without jurisdiction or in excess of jurisdiction, he failed to determine that issue. Relying on the judgment

of the High Court in **Republic v. Chief Justice of Kenya & 6 Others ex parte Muijo Mataiya ole Keiwua [2010] eKLR** counsel submitted that the Tribunal had no jurisdiction to consider complaints against the appellant other than those on the basis of which representation had been made to the President leading to the appointment of the Tribunal to investigate the appellant's conduct. In that regard it was submitted that the Tribunal was supposed to consider only the complaints received by the committee against the appellant but instead it veered off and considered other matters. In the appellant's view the Tribunal could not investigate anything else outside the report of the committee and the representations by the Chief Justice to the President.

As regards HCCC No. 10 of 1990, the appellant contends that the complaints received by the committee which led to the appointment of the Tribunal were that he had solicited for bribes from the plaintiff and the defendant in that case so as to rule in their favour and that he had met the plaintiff at Kisii Club where he had received Kshs 60,000.00. The appellant contended that the Tribunal's jurisdiction was limited to considering those complaints only and that it could not validly inquire into whether he had in the same HCCC No. 10 of 1990 improper communication with the plaintiff in the absence of the defendant; had prevented a witness from testifying so as to give undue advantage to the plaintiff; and had rendered a decision calculated to confer undue benefit to the plaintiff. It is the appellant's view as regards the latter issues, that the Tribunal had no jurisdiction and should have downed its tools as famously posited by **Nyarangi, JA in Owners of the Motor Vessel "Lillian S" v. Caltex Oil (Kenya) Ltd [1989] KLR 1.**

The appellant further submitted that the learned judge had not offered any reason why he did not follow the **ole Keiwua case** and lamented that he was denied the benefit of that decision and thereby denied equal protection and equal benefit of the law.

Relying on the same **ole Keiwua case**, the appellant argued that he was also denied the right to natural justice because he was not afforded an opportunity to be heard on the allegations against him by the committee before the President appointed the Tribunal to inquire into his conduct. The appellant therefore urged us to find that denial of natural justice vitiated the Tribunal's decision, rendering it null and void. In support of that proposition he relied on, among others, the decisions in **De Souza v. Tanga Council [1961] EA 377**; **Mary Wambui Munene v. Peter Gichuki King'ara & 2 Others [2014] eKLR**; **Joseph Mbalu Mutava v. Attorney General & Another [2014] eKLR** and **Judicial Service Commission v. Speaker, National Assembly & 8 Others [2014] eKLR**.

Lastly the appellant submitted that the learned judge erred by holding that in the circumstances of the case, the remedies sought by him would serve no practical purpose. The learned judge reasoned that the appellant had applied to quash only the recommendations of the Tribunal, leaving intact the decision by the President to remove the appellant from office of judge of the High Court. Even if the application were merited, quashing the decision of the Tribunal alone would serve no practical purpose. In the appellant's view, that aspect of the judgment was mere speculation, which the learned judge was not entitled to do and amounted to descending into the arena of the conflict whose dust blinded the learned judge. Citing the decision of this Court in **Butt v. Rent Restriction Tribunal [1982] KLR 417**, the appellant urged that the learned judge should not have acted like an advisor to the parties instead of an adjudicator.

The appellant contended that the remedies he had applied for were not futile because they concerned the vindication of his reputation and were an important step in clearing his name. He also argued that if the learned judge had granted an order of certiorari quashing the report of the 1st respondent, he would have taken other legal steps, including a declaratory suit, as regards the decision of the President to remove him from office. He concluded that in any event the decision of the President to remove him from office was a nullity because it was based on report of the Tribunal, which was itself a nullity.

The Attorney General, on behalf of the Tribunal, opposed the appeal, submitting that the learned judge properly refused to grant the orders of certiorari because what the appellant had challenged was only the recommendations of the Tribunal and not the decision of the President pursuant to which he was removed from office. Relying on the former **Order 53 rule 7(1)** of the **Civil Procedure Rules**, which was applicable at the time, he submitted that the appellant was barred from questioning, in an application for certiorari, the validity of any order or decision unless he had lodged a copy thereof before the hearing of the application. Having not complied with that requirement as regards the decision of the President to remove him from office, it was submitted, the appellant could not question or challenge that decision.

The Attorney General added that even the appellant himself had admitted that his application was academic and by a Notice of Motion dated 10th December 2012 had applied to amend the same to challenge the decision to remove him from office. He, however, withdrew that application on 17th December 2012, after the Attorney General objected to the same.

Regarding the jurisdiction of the tribunal, the Attorney General submitted that the Tribunal had acted strictly within its jurisdiction and that it was not intended to act in a mechanical or conveyor-belt fashion. In his view the allegations against the appellant were not new charges but all arose in connection with or were incidental to his handling of HCC No. 10 of 1990, which was the complaint before the committee. He also contended that although the appellant had the opportunity to challenge the charges he was now complaining about before the Tribunal, he opted not to and addressed all the charges. In the Attorney General's view, the appellant had waived his right to challenge the charges and the complaint was a mere afterthought.

The Attorney General further submitted that the learned judge properly eschewed issues touching on the merits of the decision of the Tribunal because there was evidence that supported the Tribunal's decision and that the learned judge was not supposed, in a judicial review application, to substitute his views and opinion for those of the Tribunal.

Next, it was submitted on behalf of the Tribunal that the question of whether the appellant was afforded an opportunity to be heard before the Chief Justice recommended to the President appointment of the Tribunal to investigate his conduct was not raised before the High Court, was not one of the agreed issues for determination, was not addressed by either the parties or the learned judge, and was being raised for the first time before this Court, without leave. Contending that a party is bound by its pleadings, the Attorney General asked us not to entertain the issue.

Probably out of abundant caution, the Attorney General submitted that the appellant was entitled to be heard by the Tribunal and not by the Chief Justice and that he was indeed afforded a full hearing by the Tribunal and cross-examined all the witnesses.

As we stated earlier, the Judicial Service Commission did not participate in the appeal, although it was duly served with the record of appeal and the hearing Notice.

Turning to the first ground of appeal relating to the jurisdiction of the Tribunal, it is common ground that the Chief Justice's recommendation to the President to appoint a Tribunal to inquire into the conduct of the appellant was based on the complaints that the committee had received regarding the appellant's conduct and handling of two cases, namely **Kisii HCCC No. 75 of 1994** and HCCC No. 10 of 1990. When the allegations against the appellant as regards the first case were presented, they related to **Kisii High Court Civil Case No. 702 of 1994, Melcazadek Ongiro Odera v. George Owili Mea**, which counsel assisting the Tribunal explained was the correct case to which the complaint related and not HCCC No. 75 of 1994. The appellant's counsel raised an objection, which the Tribunal sustained, holding that its mandate was to inquire into HCCC No 75 of 1994, which was referred to in the committee report, and not HCCC No 702 of 1994. That marked the end of the inquiry as relates to the first case.

As regards the second case, the committee report stated as follows:

“In Kisii the Judge was cited for corruption, that he solicited and received bribes in Civil Case No. 10/90. He is said to have asked the defendant for Kshs 50,000.00 and one bag of millet so that he could rule in his favour. The defendant refused to give anything. He solicited money from the plaintiff. He 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. The Committee found the allegations credible. They disclose corruption and want of integrity and they also amount to gross misbehavior.”

The appellant contends that the jurisdiction of the Tribunal extended only to investigating those specific allegations as regards HCCC No. 10 of 1990. He argues that the allegations that were laid against him before the Tribunal went beyond those received by the committee, which the Tribunal was appointed to inquire into, and were therefore *ultra vires* its jurisdiction, null and void.

The allegations that were presented against the appellant before the Tribunal were as follows:

- 1. Corruptly receiving a sum of Kshs 60,000/= from Gichambati Mwita Mairo, the plaintiff in a civil case in which your Lordship was the presiding judge, namely Kisii High Court Civil Case No. 10 of 1990, Gichambati Mwita Mairo v Sarara Matongo Sigore, so as to deliver a judgment favourable to Gichambati Mwita Mairo, the plaintiff;***
- 2. Corruptly soliciting a sum of Kshs 50,000/= and a sack of “wimbi” from Sarara Matongo Sigore, the defendant in Kisii High Court Civil Case No. 10 of 1990, Gichambati Mwita Mairo v. Sarara Matongo Sigore, as an inducement to deliver a judgment favourable to him;***
- 3. Misconducting yourself by interrupting Benson Morumbwa Onyancha, a witness in Kisii High Court Civil Case No. 10 of 1990, Gichambati Mwita Mairo v. Sarara Matongo Sigore, during proceedings by:***
 - (a) preventing him from giving further evidence***
 - (b) destroying the evidence he had given***
 - (c) Ejecting him from the court and threatening to lock him up in custody***
- 4. Misconducting yourself by initiating, permitting and condoning communication between yourself and Gichambati Mwita Mairo, the plaintiff in Kisii High Court Civil Case No. 10 of 1990, Gichambati Mwita Mairo v Sarara Matongo Sigore, without the knowledge of the defendant and thereby exhibiting a likelihood of bias on your part, in adjudicating on the matter in question, to the detriment of the defendant;***
- 5. Misconducting yourself by entertaining and hosting one Gichambati Mwita Mairo, the plaintiff in Kisii High Court Civil Case No. 10 of 1990, Gichambati Mwita Mairo v Sarara Matongo Sigore, at Kisii Sports Club, knowing that your Lordship was presiding over a matter involving Gichambati Mwita Mairo;***
- 6. Abusing your office as a judge of the High Court of Kenya to advance the private interests of Gichambati Mwita Mairo, the plaintiff in Kisii High Court Civil Case No. 10 of 1990, Gichambati Mwita Mairo v Sarara Matongo Sigore by conferring undue benefit upon him.”***

We have carefully considered the allegations received by the committee and the allegations presented to the appellant for purposes of the Tribunal's inquiry. The mandate of the Tribunal was to investigate the conduct of the appellant and in particular the allegations that he was involved in corruption, unethical practices and absence of integrity in the performance of the functions of his office. Following the ***ole Keiwua*** case, the appellant contends that because of the use of the words ***“including, but not limited to”*** in the gazette notice appointing the Tribunal, its jurisdiction was unlawfully extended.

In our view, to determine whether the Tribunal acted beyond its jurisdiction cannot be based on isolated consideration of a few words or a phrase, but on a full evaluation of whether the allegations presented to the appellant were founded on the allegations received by the committee or whether they were entirely new matters in respect of which there was no complaint before the committee. In that respect it is plainly obvious to us that the allegations made to the committee against the appellant related to his conduct and handling of HCCC No 10 of 1990. All the six allegations that were presented to him for the purposes of the Tribunal's proceedings related to his conduct and handling of the same HCCC No. 10 of 1990. None of those allegations relate to any other case or any matter extraneous to HCCC No. 10 of 1990. The six allegations arise directly from the allegations that were made to the committee, which led to the appointment of the Tribunal.

We may use the following examples to demonstrate that there is really no merit in the appellant's complaint. The complaint to the committee was that the appellant had received Kshs 60,000 at Kisii Sports Club from the plaintiff in HCCC No 10 of 1990. That is the subject of the 1st allegation before the Tribunal. That same complaint is the basis of the 4th allegation that the appellant had misconducted himself by communicating with the plaintiff without the knowledge of the defendant. It is also the basis of the 5th allegation that the appellant misconducted himself by entertaining and hosting the plaintiff at Kisii Sports Club while he was presiding over the plaintiff's case as well as the last allegation of abuse of office by advancing the private interests of the plaintiff by conferring upon him an undue benefit. The allegations regarding denial of a witness an opportunity to testify and destroying evidence equally arise from the appellant's alleged bias in handling of HCCC No. 10 of 1990.

It appears to us that even the appellant himself did not believe, as regards HCCC No. 10 of 1990, that the Tribunal was acting beyond its jurisdiction by considering new and independent matters that were not the subject of the complaint to the committee. We say so because while the appellant vigorously raised objections as regards HCCC No 75 of 1994 on the basis of the same argument that the Tribunal was only competent to inquire into allegations based on the complaint that were received by the committee, he did not raise any such objection as regards HCCC No. 10 of 1990.

With respect, we do not see how in the circumstances of this case it can be said that the Tribunal went beyond its jurisdiction and considered new matters that were not the subject of the complaint to the Committee. To entertain the appellant's complaint in this regard would be to succumb to a narrow and rather artificial distinction. We accordingly find no merit in the first ground of appeal.

As regards the second ground of appeal, the appellant's contention is that the decision of the Tribunal is a nullity because he was denied an opportunity to be heard before the President appointed the Tribunal to inquire into his conduct. Because of the alleged violation of the *audi alteram partem* limb of the rules of natural justice, the appellant contends that the recommendations of the Tribunal were null and void. In support of the proposition that he was entitled to be heard before the Chief Justice made representations to the President to appoint a tribunal to inquire into his conduct, the appellant relies on the High Court decision in the *ole Keiwua case*.

We agree with the Attorney General that this complaint was raised for the very first time and rather belatedly, in the appellant's written submissions. We have carefully perused the record of appeal and find that the alleged denial of the right to natural justice was not one of the grounds upon which the appellant challenged the recommendations of the Tribunal before the High Court. Paragraph 9 of the Chamber Summons pursuant to which he was granted leave to impugn the decision of the Tribunal sets out 21 grounds, which did not include the alleged denial of the right to be heard, at whatever stage. That issue was not canvassed by any of the parties before the learned judge and naturally he never expressed himself on it. Even the rather lengthy memorandum with 29 grounds of appeal upon which this appeal is founded, does not raise any questions, even obliquely, about the alleged denial of the appellant's right to be heard.

Rule 104 of the *Court of Appeal Rules*, among others, prohibits an appellant from arguing, without leave of the Court, grounds of appeal other than those set out in the memorandum of appeal. The appellant did not seek leave of the Court to raise the new ground of appeal but rather belatedly, and literally from the blue, raised it in the written submissions. It needs no emphasis that submissions must be founded on the issues before the court and the evidence on record regarding the issue. A party is not at liberty to change the nature of his case surreptitiously at the submissions stage.

It is in the discretion of the Court to allow a party to raise a new point on appeal, depending on the circumstances of the case. (See also *George Owen Nandy v. Ruth Watiri Kibe, CA No. 39 of 2015* and *Openda v. Ahn [1983] KLR 165*). In this case we have stated that the appellant never raised the issue in his judicial review application, neither party addressed the issue in the High Court, the learned judge, quite properly did not address the issue and, to make the matters worse, the appellant did not raise the issue in his memorandum of appeal in this Court. The Attorney General is entitled to complain, as he does, that he has been taken by surprise and denied a fair opportunity to respond to the new issue. As has been stated time and again, there is a philosophy and logical reason behind our appellate system, which except in exceptional cases and upon proper adherence to the prescribed procedure, restricts the appellate court to consideration of the issues that were canvassed before and decided by the trial court. If that were not the case, the appellate court would become a trial court in disguise and make decisions without the benefit of the input of the court of first instance. (See *North Staffordshire Railway Co. v. Edge [1920] AC 254*).

Ultimately we cannot see any justification why we should allow the appellant, in the circumstances of this case, to raise a new issue some 15 years from the date of the appointment of the Tribunal, without any form of explanation as to why the issue was never raised earlier before the Tribunal or the High Court or why he did not bother to seek the leave of this Court so as to give the Attorney General a fair opportunity to object or prepare for the new point. We shall not say more on this issue, which we find not to be properly before us.

The last issue is whether the learned judge erred by holding that an order of *certiorari* would not be efficacious in the circumstances of this case. The judgment of the High Court is expressly clear that this was not the reason for denial of the remedies that the appellant had sought. This is how the learned judge expressed himself in **paragraphs 55 and 56** of the impugned judgment:

“I am not satisfied that the applicant (appellant) 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. However, even if I were to find that the application was merited, there is one other matter...”

To understand where the learned judge was coming from, we need to refer to proceedings on record, which show that on 2nd October 2012, the appellant filed a Notice of Motion seeking to amend the main application for *certiorari* and the statutory statement upon which it was based so as to add prayers for an order of *certiorari* to quash the Gazette Notice pursuant to which he was removed from office. This is what the appellant informed the learned judge:

“The application has become necessary to prevent the proceedings from becoming merely academic. If the prayer of certiorari is granted, a notice of motion is correctly drafted, the decision of the tribunal removing the judge from office will be set aside but the consequential gazette notice will be left standing. It might create future problems. The proposed amendment will enable the court to determine all the issues with finality without any loose ends left.”

The Attorney General opposed the application, contending that by his own admission the appellant had confirmed that the application, as drawn, was moot. He further contended that the appellant could not be allowed to amend the main application, having already obtained leave to apply for an order of *certiorari* on the basis of different averments. He also maintained that the gazette notice could not be the subject of an application for an order of *certiorari* because the rules allow an application for *certiorari* to be brought strictly within six months of the order complained of, while in this case the gazette notice was then more than four years old. In the face of the objection, on 17th December 2012, the appellant applied to withdraw the Notice of Motion for amendment, which the court dully allowed.

Back to the last ground of appeal, it is trite that whether or not to grant orders of judicial review is at the discretion of the court. The learned authors of Halsbury's Laws of England (4th Ed. Vol. II, P. 805 para. 1505 state as follows as regards an order of *certiorari*:

“certiorari is a discretionary remedy which a court may refuse to grant even when the requisite grounds for its grant 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.”

(Emphasis added).

(See also Aberdare Freight Services Ltd v. Kenya Revenue Authority [2006] eKLR and Sanghani Investment Ltd v. The Officer in Charge, Nairobi Remand & Allocation Prison [2007] eKLR).

For an appellate court to interfere with exercise of discretion by the court below, it must be satisfied that the decision was clearly wrong because the judge misdirected himself or because he acted on matters which he should not have acted on or because he failed to take into consideration matters which he should have taken into consideration and in doing so, arrived at a wrong decision. (See Mbogo & Another v. Shah [1968] EA 93 and Matiba v. Moi & 2 Others [2008] 1 KLR 670).

In this case the learned judge reiterated that the orders that the appellant had sought were discretionary remedies and that he had to satisfy himself that they would be efficacious. He noted that where the orders prayed for would not be efficacious, the court could decline to grant the same even though they were otherwise deserved, because it could amount to the court acting in vain. Having himself suggested to the court that the orders he had sought were likely to be moot, the applicant cannot turn round and criticise the learned judge for so finding. We are not persuaded that in taking into account whether the order sought would be efficacious, the learned judge exercised his discretion erroneously. Additionally, as we have noted, that was not even the reason why the learned judge dismissed the application before him; the dismissal was primarily based on the finding that the application had no merit.

Having carefully considered this appeal, we are not persuaded that the learned judge committed any error to warrant our interference with his judgment. Accordingly, this appeal is hereby dismissed. Granted the nature of the appeal, we make no orders on costs. It is so ordered.

Dated and delivered at Nairobi this 18th day of May, 2018

ASIKE-MAKHANDIA

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JUDGE OF APPEAL

P. O. KIAGE

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JUDGE OF APPEAL

K. M'INOTI

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

DEPUTY REGISTRAR