IN THE COURT OF APPEAL

AT NAIROBI

(CORAM: BOSIRE, O'KUBASU & VISRAM, JJ.A)
CIVIL APPEAL NO. 310 OF 2009

BETWEEN

TOM MBALUTO ……...…….....….....….....… APPELLANT

AND

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

1. **HON. LADY JUSTICE JESSIE LESIIT**
2. **HON. LADY JUSTICE HANNAH OKWENGU**
3. **HON. MR. JUSTICE JACKTON OJWANG**
4. **HON. MR JUSTICE FESTUS AZANGALALA**
5. **HON. MR. JUSTICE LUKA KIMARU ..…….……..... RESPONDENTS**

(An appeal from the Ruling and Order of the High Court of Kenya at Nairobi (Wendoh, J) dated 18th September, 2009

in

H. C. Misc. Civil Appl. No. 666 of 2008)
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JUDGMENT OF THE COURT

This is an appeal from the ruling of Wendoh, J dated 18th September, 2009 in which the learned Judge of the High Court dismissed the appellant's application for leave to apply for orders of certiorari relating to the Tribunal of Inquiry to Investigate the conduct of Justice Tom Mbaluto ("the Tribunal"), and its report and decision made the 2nd May, 2008.

The appellant was appointed Judge of the High Court on 2nd April, 1986. On 15th October, 2003, His Excellency the President of the Republic of Kenya, Hon. Mwai Kibaki, acting in exercise of the powers conferred on him by the Constitution then in existence, appointed the Tribunal to investigate the conduct of the appellant (and several other Judges) in relation to certain allegations of impropriety made against the appellant, and to make a report and its recommendations, in accordance with the then Constitution.

The Tribunal, comprising Justices Lesiit, Okwengu, Ojwang, Azangalala and Kimaru conducted its proceedings and hearings from 19th February, 2007 to 31st August, 2007, and eventually rendered a report

dated 2nd May, 2008, recommending removal of the appellant from the office of Judge of the High Court for misbehaviour.

Aggrieved by that decision, the appellant filed an application for Judicial Review under ***Order 53 Rules 1 and 2*** of the Civil Procedure Rules, seeking leave of the court to apply for the following orders:

"1. THE APPLICANT, the Hon. Mr. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 Applicant, the Honourable Mr. Justice Mbaluto, be removed from the office of Puisne Judge for misbehaviour.

2. THE APPLICANT, the Hon. Mr. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 Constitution.

3. THE APPLICANT, the Hon. Mr. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 proof must be much higher than that of the "balance of probabilities", but lower than that of "beyond reasonable doubt".

4. THE APPLICANT, the Hon. Mr. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 No. 1 and 2 of 2007) 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"

5. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 Lessit to Investigate the Conduct of Puisne Judge Tom Mbaluto (Tribunal Matters it (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.

6. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 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.

7. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 there was clear and convincing evidence, which establish misbehavior which is of such gravity as to justify the removal of the Applicant from office.

8. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 (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) 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 High Court Civil Case No. 10 of 1990, Gichambati Mwita Mairo vs Sarara Matongo Sigore.

9. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 there was an element of dishonesty and culpability on the part of the Applicant in delivering the 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.

10. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 Applicant delivered the judgment in Kisii High Court Civil Case No. 10 of 1990, Gichambati Mwita Mario vs Sarara Matongo Sigore with the intention of inflicting injury upon Sarara Matongo Sigore, the defendant therein.

11. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 Applicant delivered the judgment in Kisii High Civil Case No. 10 of 1990, Gichambati Mwita Mairo vs 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.

12. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 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 Mario vs Sarara Matongo Sigore.

13. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 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.

14. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 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 Mwita Mairo vs Sarara Matongo Sigore.

15. THE APPLICANT, the Hon. Justice Tom Mbaluto be granted leave to apply for AN ORDER OF CERTIORARI 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 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.

16. THAT the costs of this application be provided for.

The appellant relied on 21 grounds in support of his application for leave, and also filed a supporting verifying affidavit comprising 184 paragraphs. Briefly, he complained that the Tribunal acted ultra vires its jurisdiction under ***section 62 (5)*** of the Constitution and Gazette Notice 9532 of 2006; it made several errors relating to the standard of proof applicable to an inquiry under ***section 62 (5)*** of the Constitution; by failing to give the Applicant the benefit of doubt as regards the uncertainty of the date he allegedly received a bribe; that the Tribunal made errors that excluded evidence of crucial witnesses; that the Tribunal acted in bad faith by ignoring evidence of several witnesses; by failing to consider and resolve the credibility of the Applicant by ignoring the evidence of witnesses on the Applicant's good character; that the Tribunal acted irrationally and unreasonably in finding the evidence of Sarah Matongo to be credible and that the Tribunal breached the Applicant's legitimate expectation that it would apply the principles laid down in the Report and Recommendations of Hon. P. N. Waki, J.A. that there is need to protect a Judge from incredible accusations without protecting judges who have been corrupt. It is the contention of the Applicant that the High Court had jurisdiction under ***section 60*** of the Constitution, to supervise the manner in which the Tribunal exercised the mandate conferred upon it under ***section 62 (5) (b)*** of the Constitution and Gazette Notice 9532 of 2006.

The learned Judge, when presented with the above material, decided not to deal with the same ex-parte, as ***Order 53*** of the Civil Procedure Rules then provided, but ordered that the application be served, and be heard inter-partes. Following an inter-partes hearing, the learned Judge, in a long 26 page ruling, declined to grant leave, relying mainly on technicalities. Here is how she delivered herself, in part:

"What I am saying is that though no person or authority can be immune from the jurisdiction of this court by way of Judicial Review, the Applicant has not approached this court in the proper manner. The Applicant is challenging the Constitutional powers of the Tribunal and should have come by way of an Originating Notice of Motion under the Constitutional Provisions. The court has not been properly moved under the appropriate law and this court's jurisdiction is not therefore properly invoked to grant the orders sought.

The second reason why the orders sought in the chamber summons can not be granted is because the chamber summons as framed is defective and incompetent. In Judicial Review, the Applicant first moves the court by way of a chamber summons seeking leave to commence Judicial Review proceedings in his own name. It is after leave has been granted that the Republic takes over the proceeding which are brought in the name of the Republic on behalf of the aggrieved party, the ex parte Applicant by way of notice of motion. In the instant case the chamber summons has been brought in the name of the Republic. The formatting of a Judicial Review application has to be strictly observed in compliance with Order 53 Civil Procedure Rules. An application for leave is made to a judge in chambers under Rule 1 (2). At this stage the Republic can not be brought in this application as an Applicant. In the Farmers Bus Service vs Transport Licensing Appeals Tribunal (1959) EA 779 the East African Court of Appeal held that a Judicial Review application has to be brought in the name of the Republic and must be properly intituled. Order 53 Rule 3 (1) provides that once leave is granted, then within 21 days or as directed by the court, the Applicant has to file a Notice of Motion. The Court did set out the format of a Judicial Review application from the time of seeking leave which is by way of a chamber summons and brought by the Applicant after leave is granted, the Notice of Motion is brought in the name of the Republic. In Jotham Mulati Welamondi vs the Chairman ECK & Others (2002) IKLR 486 J. Ringera agreed with the court in the Farmers Bus case (supra) and struck out an application that did not comply with the requirements that the Notice of Motion be brought in the name of the Republic, whereas the chambers summons is brought in the name of the ex parte Applicant. The Republic can not move the court for leave as has been done in this application as the Republic only comes in after leave of the court has been granted. The application is therefore incompetent and is for striking out. The court also went ahead to demonstrate how Judicial Review applications should be formatted both at leave stage and at Notice of Motion stage. For the above reason this application is incompetent and will be struck out in any event.

For reasons that this court has not been properly moved to grant the orders sought, the court will not bother to look at the merits of the application and the result is that the chamber summons is struck out with costs to be borne by the applicant."

The appellant states in his memorandum of appeal that the learned Judge erred in law in so finding. He has outlined 22 grounds of appeal, as follows:

"***1. The Learned Judge, in dismissing the Chamber Summons Application dated 30th October, 2008, failed to exercise her discretion properly; alternatively she exercised her discretion wrongly; alternatively in exercising her discretion she applied the wrong principles.***

2. The Learned Judge erred in law and fact by failing to direct her mind to the fact that the Chamber Summons Application before her was for leave to file Judicial Review Proceedings, it was brought under Order LIII of the Civil Procedure Rules required to be heard ex parte, and no decision on its merits was required in law.

3. The Learned Judge erred in law and fact by exceeding her jurisdiction under Order LIII Rule 1, 2 and 3 by pronouncing on the merits of the Chamber Summons Application before her at the leave stage.

4. The Learned Judge erred in law and fact by failing to direct her mind to the fact that the Chamber Summons Application before her was unopposed by the Respondents, and the facts and law as stated and submitted in the Application were conceded by the Respondents. There was therefore, no contest on the substance of the facts, the law or the form of the Application and the Learned Judge ought to have granted leave.

5. The Learned Judge erred in law and fact by failing to find that the Chamber Summons Application before her was not frivolous and raised substantial matters of law and fact that ought to be determined at the main hearing of the Notice of Motion Application for grant of judicial review orders.

6. The Learned Judge erred in law and fact and misdirected her mind by misinterpreting and misapplying the tenor, purport and meaning of Sections 123 (1) and 123 (8) of the Constitution.

6.1 The Learned Judge further erred in law by making findings in finality on Sections 123 (1) and 123 (8) of the Constitution of Kenya at the leave stage.

7. The Learned Judge erred in law and fact and misdirected her mind in finding that the High Court cannot exercise, by way of Judicial Review, its supervisory jurisdiction over a Tribunal created under section 65 (2) of the Constitution.

7.1 The Learned Judge erred in law by making findings in finality at the leave stage that the High Court cannot exercise supervisory jurisdiction over a tribunal constituted under Section 69 (2) of the Constitution by way of Judicial review.

8. The Learned Judge erred in law and fact and misdirected her mind in failing to find that the Tribunal was constituted under Section 65 (2) and was subordinate to the High Court which has original jurisdiction under Section 60 and supervisory jurisdiction under Section 123 (8) of the Constitution.

9. The Learned Judge misdirected herself by failing to find that notwithstanding being a creature of the Constitution, a Tribunal created under Section 65 (2) of the Constitution is amenable to Judicial Review under Section 123 (8) of the Constitution.

10. The Learned Judge erred in law and fact by failing to apply the findings in the case of Kipkalya Kones vs Republic & Another ex parte Kimani Wanyoike High Court Miscellaneous Civil Application No. 129 of 2003, that the High Court has supervisory jurisdiction over any Constitutional body, and that this supervisory jurisdiction can be exercised by way of Judicial review.

11. The Learned Judge erred in law and fact and misdirected her mind in finding that the Applicant was "challenging the abuse of Constitutional powers by the Tribunal" and should have come by way of an Originating Notice of Motion.

12. The Learned Judge erred in law and fact by finding that the constitutional exercise of powers by a constitutional body can only be challenged by way of a constitutional application.

13. The Learned Judge erred in law and fact in finding that the Courts had recognized Constitutional Judicial Review under Section 123 (8) of the Constitution.

14. The Learned Judge erred in law and fact and misdirected herself by referring to and considering Authorities which had not been placed before her particularly: Wehilye vs Republic 1 KLR 837; Alielo vs Republic (2004) 2. KLR: Marbury Vs Madison US 137 (1803); Simon Nganga Mbugua Vs The Returning Officer Kamukunji Constitutency in Nairobi and ECK H.C.M.I.S Application 13/2008; IIchamus Community Vs Registered Officials of ODM, PNU, ODMK, K.A.N.U. and Rangal Lemuguran and 30 others, High Court Miscellaneous Application No.

18 of 2008; Welamondi Vs the Chairman ECK and other (2002) 1 KLR 486; This was to the prejudice of the Applicant and occasioned a miscarriage of justice.

15. The Learned Judge erred in law and fact by finding that the Tribunal constituted under Section 65 (2) of the Constitution of Kenya was at par with the High Court and not subordinate to it.

16. The Learned Judge erred in law and fact by finding that the Chamber Summons Application before her was incompetent and was not properly intituled and further misunderstood, misinterpreted and misapplied the decision of the Court of Appeal in the case of Farmers Bus Service vs Transport Licensing Appeal Tribunal (1959) EA 779.

17. The Learned Judge misdirected herself by failing to appreciate and consider the amendments to the Civil Procedure Act and Rules made thereunder by way of The Statute Law (Miscellaneous Amendment) Act, 209.

18. The Learned Judge failed to exercise her discretion properly and judiciously and in considering the Appellant's application she failed to direct her mind to the Appellant's Application, and the grounds therein, the Appellant's submissions, and the law and authorities placed before her in support thereof.

19. The Learned Judge erred in law in finding in finality at the leave stage that the High Court was at par with a Tribunal constituted under Section 65 (2) of the Constitution.

20. The Learned Judge erred in law in finding that the Court had not been properly moved under the appropriate law.

21. The Learned Judge, in all circumstances of the matter, failed to achieve the overriding objective, function and purpose of the Court, which is to do justice as regards the Application that was before her and accordingly erred in law by making the Orders that she did.

22. The Learned Judge erred in law in finding that the Court's jurisdiction had not been properly invoked."

In his submissions before us, Mr. Pheroze Nowrojee, learned counsel for the appellant, argued that the learned Judge erred in ordering that the application for leave be heard inter-partes, instead of dealing with it on an ex-parte basis initially as the Rules so required; that the Learned Judge erred in relying on technicalities to reject leave; that she exceeded her jurisdiction by pronouncing on the merits of the application at the stage of leave; that she mis-applied the "test" governing the grant of leave; that the application had outlined serious and weighty grounds to proceed with Judicial Review, and that in declining leave to do so, the learned Judge denied the appellant his fundamental rights and natural justice.

Mr. C. N. Menge, learned Principal Litigation Counsel, for the respondent, in a fairly luke-warm support of the learned Judge's ruling, argued, simply, that the grant of leave was a discretionary matter, and that the Judge had exercised her discretion well. He admitted, however, that the application for leave before the High Court was not contested by his clients, the respondents.

The leave of the court is a prerequisite to making a substantive application for judicial review. The purpose of the leave is to filter out frivolous applications. The granting of leave or otherwise involves an exercise of judicial discretion. This Court can only interfere with the discretion of the learned Judge denying the appellants leave to apply for judicial review on the firmly established principles stated in ***Mbogo vs Shah [1968] E.A. 93***.

In rejecting the application for leave, did the learned Judge exercise her discretion judicially? The answer to that question depends on whether the Judge properly applied the test in considering whether to grant leave or not.

In judicial review applications, leave of the court is a necessary pre-condition to the making of an application for judicial review, and no application for judicial review may be made unless this leave has first been duly obtained (***Order 53 Rule 1***, Civil Procedure Rules).

As for the "test" to be applied in granting leave, which is usually ex parte before a Judge in Chambers, ***Halsbury's Laws of England***, ***4th Edition, Volume 1 (1) at pg 276***, states:

"Leave should be granted if on the material then available the court considers, without going into the matter in depth, that there is an arguable case for granting the relief sought by the applicant."

Approving the above test, the Court of Appeal in Re: ***Samuel Muchiri W'Njuguna and the Tea Act (C A No. 144 of 2000, Nairobi)***, states as follows:

"It cannot be denied that leave should be granted, if on the material available, the court considers, without going into the matter in depth, that there is an arguable case for granting leave. The appropriate procedure for challenging such leave subsequently is by an application by the respondent under the inherent jurisdiction of the court, to the Judge who granted leave, to set aside such leave."

Similarly, in ***Republic vs Communications Commission of Kenya (C. A. 175 of 2000, Nairobi)*** the Court of Appeal cited the above passage with approval.

All that the learned Judge was required to do at the stage of application for leave, was to determine, without going into any depth, whether there was an arguable case for granting the relief sought. The Judge erred in going into the merits of the case, and making final conclusions on a matter that had not been heard.

The material presented before the High Court raised serious and weighty issues relating to the Tribunal's jurisdiction, process and procedure, some of which the Judge herself summarized in her ruling. These issues, especially the one relating to jurisdiction, were certainly arguable points. We need not go into all the issues or even all the grounds of appeal as we would not wish to trespass on the jurisdiction of the court which may eventually hear the application for judicial review.

We are satisfied that the learned Judge ought to have granted leave to the appellant for lodging the application for certiorari. As she did not do so, it is within our jurisdiction to grant such leave. And we do so notwithstanding that the format of the chamber summons did not comply with the rules of civil procedure. We invoke the provisions of ***Article 159*** of the Constitution, and ***sections 3A and 3B*** of the Appellate Jurisdiction Act to overlook the defect in the form of the chamber summons. Accordingly, the order we make is that we set aside the order of the learned Judge dismissing the appellant's application for leave and substitute it with an order granting leave as prayed for in the chamber summons dated 30th October, 2008. The appellant shall have 21 days from the date hereof to file his motion for orders of judicial review. The appellant shall have the costs of this appeal.

Dated and delivered at Nairobi this 3rd day of February, 2012.

S. E. O. BOSIRE

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JUDGE OF APPEAL

E. O. O'KUBASU

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JUDGE OF APPEAL

ALNASHIR VISRAM

…….
JUDGE OF APPEAL

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

DEPUTY REGISTRAR