



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

**Misc Civ Appli 102 of 2006**

**REPUBLIC ..... APPLICANT**

**V E R S U S**

**THE JUDICIAL COMMISSION OF INQUIRY INTO THE GOLDENBERG AFFAIR,  
HON. MR. JUSTICE OF APPEAL S.O. BOSIRE,**

**PETER LE PELLEY S.C. .... RESPONDENTS**

**EX PARTE: HON. PROFESSOR GEORGE SAITOTI**

**J U D G M E N T**

The Applicant herein, Hon. Professor George Saitoti, is an Hon. Member of Parliament. At the time material to these proceedings he was the Vice-President and Minister of Finance in the Government of Kenya.

By Gazette Notice Number 1237 dated 24<sup>th</sup> February, 2003, HE Mwai Kibaki, President and Commander-in-Chief of the Armed Forces of the Republic of Kenya, appointed a Judicial Commission of Inquiry comprising Justice Samuel Elkana Onderi Bosire, a Judge of Appeal as Chairman, Justice David K. Aganyanya, a Judge of the High Court as Vice-Chairman (later replaced by Hon. Mr. Justice Nzamba Kitonga of the **COMESA** Court of Justice), Mr. Peter Le Pelley, Senior Counsel together with two Joint Secretaries, and two Counsel to assist the Commission.

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The Commission was established under the provisions of the Commissions of Inquiry Act, (Chapter 102 Laws of Kenya) and produced and presented its report on 3<sup>rd</sup> February, 2006 (*the Report*) to the President His Excellency Mwai Kibaki, Commander-in-Chief of the Armed Forces of Kenya.

At paragraph 846 of its Report, the Commission observes as follows:-

846. *Regarding those persons whose acts are in our view, contrary to the law, and are in criminal in nature we have agonized over whether or not to recommend prosecution. We have, however, decided against such recommendation as there are many imponderables on what the Attorney-General considers before deciding to prefer criminal charges against any person or group of people. In view of that we will list names of those who in our view were in one way or another, responsible for those acts and omissions for the attention of the Hon. the Attorney-General for any possible criminal or civil action.*

The Applicant is among the 14 persons listed for such possible criminal or civil action. The Applicant upon reading and reflecting upon the Report and its conclusions and findings formed the opinion that the Commission had in its remarks, findings and conclusions regarding the Applicant made errors of fact and law. The Applicant therefore sought and was granted leave of court to bring Judicial Review Proceedings.

So, by a Notice of Motion dated and filed on 3-03-2006 by M/s Ngatia & Associates (Advocates) the Applicant seeks three orders:-

**A. An order of *Certiorari* to remove into the High Court the Report of the Judicial Commission of Inquiry into the Goldenberg Affair and to quash the findings, remarks, decisions therein relating to the Applicant, the Hon. Professor George Saitoti;**

**B. An order of *Prohibition* directed to the Attorney-General and/or any other person prohibiting the filing and prosecution of criminal charges against the Hon. Professor George Saitoti in respect of the Goldenberg Affair pursuant to the Judicial Commission of Inquiry into the Goldenberg Affair or otherwise.**

**C. Costs of and incidental to this suit be awarded to the Applicant.**

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The Application was supported by Verifying Affidavit of Hon. Professor George Saitoti, comprising 95 (*ninety-five paragraphs*) and sixty-nine (69) pages, sworn on 23<sup>rd</sup> February, 2006, and the following grounds which we shall examine in turn in the course of this judgement.

**C ERRORS OF FACT**

3.0 The Commission has made adverse remarks, findings and decisions relating to the Applicant based upon material errors of fact. The errors of fact were the foundation of the Commission's adverse remarks, findings and decisions.

3.1 The Commission has made the said adverse remarks, findings and decisions in disregard, ignorance and/or misunderstanding of established and relevant facts. The errors of fact are not insubstantial or insignificant.

3.2 The Commission has also committed manifest errors in the assessment of the evidence before them. The errors did influence the making and content of the said adverse remarks, findings and decisions.

3.3. The Commission's adverse remarks, findings and decision based upon wrong facts are a cause of injustice remediable by this Honourable Court.

3.4 The Commission has taken into account irrelevant considerations and also failed to base its decision on evidence.

3.5 The Commission has acted in a manner that constitutes unfairness. In addition thereto, if the Commission had not made those fundamental errors the Commission would have absolved the Applicant of any blame. In arriving at such decision the Commission has acted in breach of the rules of natural justice.

3.6 The Commission was wrong and acted contrary to law in accepting matters which were factually wrong in arriving at its decision.

3.7 The Commission was wrong and acted contrary to law in rejecting unchallenged evidence which corroborated the submissions of the Applicant. By its various errors of law

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and fact, the Commission has failed to arrive at a just and fair determination of the matters before it as related to the Applicant.

3.8 The Commission has in its said remarks, findings and decisions arrived at unsustainable conclusions of fact. The same constitutes an error in law.

3.9 The Judicial Commission has relied upon errors of fact and false statements to arrive at its erroneous conclusions as against the Applicant. The said errors and false statements are set out in detail in the affidavit sworn by the Applicant.

**D. RIGHTS TO A FAIR TRIAL**

4.0 The Constitution of Kenya provides:-

***“77. (1) If a person is charged with a criminal offence, then, unless the charge is withdrawn, the case shall be afforded a fair hearing within a reasonable time by an independent and impartial court established by law.”***

4.1 By reason that the said errors of fact and errors of law have been made by a Judge of Appeal and 2 Senior Counsel there is reasonable apprehension on the part of the Applicant, and there would be reasonable apprehension on the part of a fair-minded and informed member of the public, that no trial of the Applicant would be unaffected by the Report and by said errors. Thus, the Applicant cannot expect or receive a fair trial.

4.2 By reason that the said errors of fact and errors of law have been widely and serially publicized nationally by newspapers and the electronic media over and over again, there is reasonable apprehension on the part of the Applicant, and there would be reasonable apprehension on the part of a fair-minded and informed members of the public, that no trial of the Applicant would be unaffected by the Report and by the said errors. No fair trial can reasonably be expected or be had by the Applicant.

4.3 A basic requirement of a fair trial that:

***“It is of fundamental importance that justice should not be done, but should manifestly and undoubtedly be seen to be done.”***

*R. Vs. Sussex Justices ex parte McCarthy (1924) 1 KB 256, 259...*

cannot now be met.

4.4 The hearing of any case against the Applicant will

not be within any reasonable time, the charges being related to matters alleged to have taken place about 15 years ago.

4.5 The documents and witnesses upon which such case can be, or is, based have been available to the Hon. the Attorney-General for those past 15 years and he has not taken any step to bring any or any such case during that period.

4.6 The private prosecution brought against the

Applicant by the Hon. Raila Odinga in 1995 was terminated in 1995 by the Attorney-General without having proceeded to any hearing or determination or being replaced by any other proceeding. Upon termination of that case, no other case was preferred against the Applicant by the Attorney-General or anybody else.

E. PRINCIPLE IN GITHUNGURI –VS- REPUBLIC [1986] KLR I

5.0 Commencement of any criminal charges against the Applicant would be in contravention of the principles laid down by the High Court in Githunguri –Vs- Republic (1986) KLR I:

*“We are of the opinion that to charge the Applicant four years after it was decided by the Attorney-General of the day not to prosecute and thereafter also by neither of the two successors in office, it not being claimed that any fresh evidence has become available thereafter, it can in no way be said that the hearing of the case by the Court will be within a reasonable time as required by Section 77 (1). The delay is inordinate as to make the non-action for four years in excusable in particular because this was not a case of no significance.”*

F. PRINCIPLE IN REPUBLIC –VS- PATTNI

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5.1 Commencement of any criminal charges against the Applicant would also be in contravention of the Principle laid down in High Court in Republic V Pattni H.C. Cr. C. No. 229/2003 as hereunder:

*“I am suggesting that once the Attorney General decides not to pursue a matter his right to change his mind may be lost where there has been inordinate delay. I am convinced that 9 years 8 months of inertia is inordinate and inexcusable delay.”*

### F. ULTRA VIRES

6.0 The Commission has stepped outside its

jurisdiction and acted in excess of its jurisdiction in making remarks, findings and decisions; *Anisminic -Vs- Foreign Compensation Commission [1969] 2 Ac. 147.*

6.1 The Commission has acted *ultra vires*.

6.2 The Commission’s report has raised a Constitutional conflict.

6.3 The Commission has unlawfully declined by not considering evidence before it.

6.4 The Commission has acted *ultra vires* its enabling Act and its terms of reference.

### G. FRUSTRATING LEGISLATIVE PURPOSE

7.0 On 19<sup>th</sup> April, 1995, Parliament after extensive debate resolved that *“the Government policy decision to grant export compensation for gold and diamond jewellery was done procedurally.”* EXH. 98 page 520 Col. 2 Parliamentary Hansard, 19 April, 1995. The Commission’s Report comes to the opposite conclusion, and recommends criminal investigation of the Applicant in respect of the decision.

7.1 To prefer criminal charges against the Applicant in relation to the decision made namely, to pay 15% ex gratia payment to Goldenberg International Ltd. would be in conflict with the **National Assembly (Powers & Privileges) Act** and the Constitution of Kenya. In making a decision that the Applicant should be subjected to criminal investigations which are intended to be a precursor to preferment of criminal charges, the Commission acted in utter disregard

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of the statutory prohibition. The decision is thus in excess of the power conferred by the Commissions of Inquiry Act.

### H. UNREASONABLENESS AND THE WEDNESBURY PRINCIPLES (Associated Provincial Picture Houses –Vs- Wednesbury Corpn (1948) I KB 273)

8.0 The said remarks, findings and decisions are in law unreasonable. In addition the absence of an evidential foundation for the said remarks, findings and decisions constitutes an error of law.

8.1 By all the foregoing, and the following, the Report of the Commission is such as has frustrated the statutory purpose of setting up the Commission, and it has thus acted illegally.

8.2 The said remarks, findings and conclusions in respect of the Applicant having been made in violation of well established law, amount to bad-faith in law.

8.3 The Commission has gone to unreasonable lengths to exonerate some persons, and to unreasonable lengths to incriminate others. In failing to accord equal treatment to all persons, the Commission has violated the principle of equality before the law.

8.4. The Commission thus erroneously and despite statements to the contrary has in fact cast upon the Applicants a wrongful burden of proving his innocence.

8.5. This approach was further erroneous in law in that the Commission therefore had in its mind an unspecified charge, which it did not disclose to the Applicant, but which it required the Applicant to actually dispel from the Commission's mind, a process unfair and wholly contrary to law and the rule of law.

8.6 The remarks, findings and decisions condemn the applicant in respect of unspecified and non-existent 'crimes' such as "*supporting the activities of GIL*" and *conduct whenever issues about the additional export compensation were raised by staff of the Ministry of Finance.*

8.7 These are unjudicial findings suggesting 'new' and non-existent criminal offences, a concept wholly contrary to law.

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8.8 Such remarks, findings and decisions amount to innuendo and not findings based on evidence as required in law.

8.9 Such an unjudicial approach, and unjudicial remarks, findings and decisions, constitute a violation of the Commission's status as a Judicial Commission, (as distinguished from just a Commission, a distinction the Commission itself drew often during the hearings, and also in the Report)

**I. PROPORTIONALITY**

9.0 The Commission is in breach of the principle of proportionality.

9.1 The Commission did not maintain a proper balance between the adverse effects its decision would have upon the rights, liberties and interests of the Applicant and the statutory purpose it was required to fulfill.

9.2 The Commission has not struck a fair balance between the general and public interest of the community and the protection of the fundamental rights of the applicant.

9.3 The Commission's errors of fact and errors of law have substantial, direct and irreversible adverse consequences upon the applicant which are wholly disproportionate.

**J. BAD FAITH**

10.0 The Commission's errors of fact and errors of law are so glaring as to constitute breaches of its duty to act in good faith in arriving at its decision.

10.1 The Commission did not fairly consider or resolve the evidence and submission touching on the Applicant and is in breach of its duty to do so.

10.2 The Commission's adverse remarks, findings and decisions disclose bias and/or apparent bias disclosed by the matters set out herein and in the Verifying Affidavit.

**K. LEGITIMATE EXPECTATION**

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The Report violates the legal principle of legitimate expectation. The Applicant, like every member of the public, had the following, among other, legitimate expectations:

- (i) The Judicial Commission would act as a judicial inquiry and adhere to fairness and principles of law and honour its assurances to that effect;*
  - (ii) The Judicial Commission would not act on errors of fact or false basis in arriving at its conclusions and recommendations;*
  - (iii) The Judicial Commission would treat all persons before it equally, and not act in any manner that was discriminatory or treat any person differently from other persons in similar situations;*
  - (iv) The Judicial Commission would not exercise the discretion vested in it in any unlawful manner;*
  - (v) The Judicial Commission would not act in a manner that would frustrate the policy of setting up the Commission and thereby act illegally. (R.V. Immigration Appeals Tribunal ex parte B. Singh [1986] 1 WLR 910);*
- i. The Judicial Commission would not ignore weighty and cogent evidence in its conclusions;*

The Applicant, the Hon. Professor George Saitoti pleads that the adverse remarks, findings and decisions are a consequence of the breach and violation of all the foregoing principles of law.

In addition to the said Statement of Facts, Affidavit Verifying the Facts, and the grounds as set out above, the Applicant's Advocates relied upon skeletal arguments, and decided cases which were referred to us extensively.

We will later in this judgement analyse each of these contentions by the Applicant's Counsel in light of the relevant portions of the Report along with the arguments of Keriako Tobiko, learned Director of Public Prosecutions ably assisted by Miss Emily Kamau, learned Senior State Counsel.

APPLICANT’S SUBMISSIONS

The Applicant’s case was urged into phases. Phase 1 was urged by Mr. Pheroze Nowrojee in support of the prayer for an order of Certiorari. Phase II was urged by Mr. Ngatia, in support of the prayer for an order of Prohibition.

**PHASE 1: THE CASE FOR AN ORDER OF CERTIORARI**

The first point urged by the Applicant’s Counsel in support of the prayer for an order of Certiorari is that the Report has based its findings, remarks and recommendations and decisions regarding the Applicant on errors of fact and law. Learned Counsel urged that the errors of fact include conclusions unsupported by evidence, fundamental factual errors and errors of precedent fact, and that such errors of fact are not only reviewable but also correctable, according to **JUDICIAL REVIEW HANDBOOK** by Michael Fordham, pages 728-740. Learned Counsel cited not less than twenty eight such alleged major errors of fact as set out in the Applicant’s Affidavit Verifying the Facts, paragraph 13, A1-A28.

For purposes of clarity we set out the errors complained of as listed at paragraph 13 of the applicant’s verifying affidavit and part of the response by the applicant.

A (1) The report at paragraph 762 states and relies on the following statement:

**“He (*Mr. Buluma*) also advised against the notion that the additional 15% export compensation could be paid on ‘ex gratia’ basis while awaiting the amendment of the Local Manufacturers (Export Compensation) Act.”**

(b) This is false.

**Mr. Buluma did not so advise. There is no letter, memo or oral evidence whatsoever to this effect, direct or indirect.**

(c) Mr. Buluma advised the opposite. Mr. Buluma was the first parliamentary draftsman and also the counsel attached to the Treasury for Budgetary matters. He specifically advised that the 15% could and should be paid by way of ex gratia on the conditions set out in the

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memo of 28<sup>th</sup> January 1991, which was drafted by him and Mr. Mbindyo, and then brought to me for confirmation. The evidence was Mr. Mbindyo's testimony.

A 2 (a) The report at para 114 states and relies for findings on the following statement:

**“Beside, notwithstanding the strong objection voiced by the two technocrats (Prof Ryan and Mr. Kirira), the payments and exclusive rights accorded GIL were not discontinued”.**

(b) This is false.

**I did not in fact discontinue the payments. I responded to that very memo from those very two technocrats called all the technocrats, (including Prof Ryan and Mr. Kirira), met with them, and discontinued the 15% payments**

A3. (a) The report also at para 114 states and relies for findings on the following statement.

**“clearly, the minister appeared resolute in continuing with the scheme”.**

(c) This is false.

**I was resolute in ending the scheme. I called all the technocrats, (including Prof Ryan and Mr. Kirira) met with them, and discontinued the 15% payments, turned down the appeal from Goldenberg, turned down the appeal from the commissioner of mines, reduced the 20% under the Act to 18% and introduced compulsory inspection of all gold exports.**

These were all clearly resolute steps discontinuing, not continuing the scheme.

A 4 (a) The report states at para 192:

**“The scheme as approved and implemented by the minister for Finance was illegal.”**

(b) This is false.

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**There is no illegality in what is paid by ex gratia. See below for the varied types of ex gratia payments. There was no legality in paying 15% additional incentive or subsidy by ex gratia unless some law expressly barred such additional incentive.**

There was no such law. There was no such bar in the Local Manufacturers (Export compensation) Act Cap 482. No payment of the additional 15% ex gratia was ever made under the Local Manufacturers. (*Export Compensation*) Act, Cap 482 nor any money paid from its authorized payment fund. (*Which is the money collected by customs*)

A 5 (a) The Report states at para **547**

**“He, the minister argues that the decision he arrived at was a government decision and that the material had been evaluated by the meeting of 12<sup>th</sup> May 1988. That cannot possibly be true, as GIL was not in existence in May 1988.”**

(b) This is false.

**I did not so argue. I argued that the decision arrived at was Government Policy (not a Government decision).**

A 6 (a) The Report states at para **93**:

**(1)“He granted 35% export compensation and exclusive rights to GIL**

**(2) “It should be recalled that Mr. Charles**

**Mbindyo carried out Hon. Saitoti’s instructions regarding the approval of GILs proposal to be allowed sole rights...” at para **590****

(b) Both these statements are false

Both these statements are contradicted by the commission itself on the same page at para **94...**

A 7 (a) The report states at para **192**

**“The scheme as approved and implemented by the minister for Finance was illegal”**

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(b) This is a further false statement. I do not implement anything. This has been made clear again and again by the law, by the **FINANCIAL REGULATIONS** and by the evidence of many witnesses before the commission. The commission has ignored all this.

A 8 (a) The report states at para **588**:

**“He (Hon. Prof Saitoti) left the Ministry of Finance in or about March 1993 and soon thereafter Goldenberg’s network started crumbling.”**

(b) This is false. Instead of it crumbling the tempo of Goldenberg’s activities and receipts from Government funds increased.

A 9 (a) The report states and repeats:

**“He (Hon Prof Saitoti) left the Ministry of Finance in or about March 1993.....” (at para 588)**

**“Hon Mudavadi became Minister of Finance on or about February or March 1993 and replaced Hon Saitoti (at para 589).**

Both statements are false.

The evidence before the commission was so clear in the parliamentary HANSARD refers 988 of 23<sup>rd</sup> June 1999, Ex. 94 where Hon. Mudavadi states:

**“..... 1(Hon Mudavadi) was appointed the Minister of Finance on 13<sup>th</sup> January 1993 by His Excellency the President and I held the portfolio until January 1998.**

A 10 (a) The report states at para 548:

**“Its (Goldenberg’s) hub of operations was the export compensation scheme”**

(b) This is false

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**The 13.5 billion contracts, the 5.8 billion claims, the shipment loan facility, the cheque-kiting, the forex certificates, and other steps had nothing to do with the 15% ex gratia or the export compensation provisions and did not need to rely on any such hubs.”**

A 11 (a) The report states at para **93** that

**“In the absence of those he said the company was irregularly licensed. We agree.”**

This is false.

I did not licence anything. I only approved an application. Its implementation was to be done in a lawful manner. If it could not be legally implemented the company would not be able to proceed.

A 12 (a) The report states at para **549** that

**“All those who assisted the company must have done so knowing that no exports were made.”**

(b) This is false.

**There is no evidence whatsoever before the Judicial Commission that I had any knowledge of whether there were or were not exports. There is no evidence that Customs ever informed me or even the Treasury that no exports were being made yet compensation or the ex gratia were being claimed.**

A 13 (a) The report includes me among those who either *“aided or abetted GIL’s activities”* (at para

**550**) it is stated that;

**“It can be reasonably inferred that Hon Saitoti and Mr. Kotut supported the activities of GIL” para 588.**

(b) This is false.

**The following evidence relating to payments shows that these findings cannot be sustained and it is important to recall that there has been no consideration by the commission of their effect on these findings. In the commission hearings the vouchers were EXHIBIT . 107 A pages 107 etc. This too has been omitted from consideration by the commission in arriving at its conclusions.**

A 14 (a) The report states at para **581** that

**“None of them registered his objection to the payments as their subordinate officers repeatedly did”**

(b) This is another half truth.

**Not a single official, from the three Permanent Secretaries; Mbindyo, Magari and Koinange; not the Finance Secretary Mr. Ali, nor any of the accounting officers ever objected as provided for in the FINANCIAL REGULATIONS. Appendix 5.1.1 Para 9 and 10. Ex 107 A page 87**

A15 (a) The report states and relies on the following statements;

**“GIL’s proposals were not given any technical evaluation before approval was given. When eventually Prof Ryan evaluated their proposal he rejected it outright. (at para 112)**

**“We earlier stated Mr. John Keen had made proposals in line with GIL’s proposal to the same minister. The minister quite properly sought and obtained a technical evaluation from Prof Ryan to the effect that if implemented the proposal would amount to a devaluation of the Kenya shilling. So at the date GIL’s application was placed before the minister, he was aware that it would not be prudent to approve GIL’s proposal. (at para 105).**

(b) Both statements are false.

**Prof. Ryan did not reject the proposal Prof Ryan stated the opposite in his testimony. Prof Ryan several times refuted the allegation that because he rejected the John Keen**

**application, the Goldenberg application should also have been rejected, since they were similar. There is no parallel. The situation in the country had changed dramatically since Prof Ryan had advised against Hon Keen’s proposal of 1989.**

A 16 (a) The report states at para 105 and relies on the following statements:

**“Besides he (the minister ) was made aware that a statutory amendment was necessary before a variation of the rate of compensatory payment, to a particular individual, or in respect of particular goods only, could be introduced.”**

(b) This is false.

**At the time that the Goldenberg application was placed before me in October 1990, the memo and letter from Mr. Mulili Deputy Commissioner of Customs to Mbindyo (PS Treasury) and to Buluma (A.C.) raising these issues, were not in existence, having been written in November-December 1990. Similarly the letter from Mr. Buluma to Mr. Mulili and copied to Mbindyo, saying this would be illegal was also not in existence having been written in January 1991.**

A 17 The report at para 102 states and relies on the following statement:

**“In his budget speech 1982/83, budget, the then minister for finance, Hon. Arthur Magugu suspended the export compensation scheme arguing that it had been used as a vehicle of fraud against the government by some exporters and that it had very limited impact on export promotion. But the suspension was for a limited period. By his speech of 7<sup>th</sup> June 1990, Saitoti emphasized that the expansion of the scheme supplemented with an import duty exemption scheme would act as stimulus to export promotion. We were however unable to find a reason for change in Government thinking.”**

(b) This is false.

**It was not me who “changed the Government thinking” in 1990. It was Mr. Magugu himself, in December 1982 itself, who restored export compensation. The FINANCE ACT 1982, which was available to the commission confirms as much.**

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A 18 (a) The report states at para **108** and relies on the following statements;

**“Mr. Mbindyo in his evidence stated that although the minister had on 19<sup>th</sup> October 1990 declined to grant GIL a monopoly, he later called him and instructed him that monopoly would be granted administratively. The file note in Exhibit 179 A page 247 brings this out.”**

(b) This is false.

The file note does not bring this out.

(c) The file note refers to the additional 15% and not to the monopoly. Secondly the file note refers to administrative action taken in January 1991, while the alleged monopoly was allegedly granted in October 1990.

A 19 (a) The report states at para **109**

**“The third document we look at is a memo from Prof Terry Ryan dated 2<sup>nd</sup> August 1991. Although the document was written long after the minister had approved GIL’s proposal, none the less it shows in a way that at the date he granted his approval he was aware he was acting outside his powers as minister for Finance.”**

(b) This is false.

**Nowhere does the commission then specify which part of the memo shows this. A Judicial Commission cannot make such an adverse finding about me on the basis that some writing shows in away some wrong doing. This is neither judicial reasoning nor judicial conduct.**

A 20 (a) The report states at para **110**;

**“There are remarks on it which need to be noted. The Permanent Secretary to whom it was addressed was Mr. Mbindyo. He marked the note to the “V P/MF” – VIZ – Vice President and Minister for Finance who was then Hon. Saitoti. All the minister did was to write “NOTED”. This was despite the concluding remarks in the next paragraphs which explicitly pointed out that the monopoly and the 35% export compensation**

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**granted to GIL were illegal, and that there was no financial vote from which the additional 15% compensatory payment would be met.”**

(b) This was false because the commission is not

candid and does not disclose in full what the Permanent Secretary marked to me stating only that he wrote “*VP/MF*”.

What the Permanent Secretary wrote to me in full is

“VP/MF please note Terry’s remarks Mdyo. 6/8”

(b) Why did the commission not reproduce these remarks in full?

**A 21** (a) The report states at para **105**

**“It was after this letter (of 11<sup>th</sup> January 1991 from Mr. Buluma) that Mr. Mbindyo’s memo to Hon. Saitoti was written. This memo was placed before the minister. All he did was to endorse on it that it was in order.”**

(b) This is false again because the commission is not candid and does not disclose that between the letter of 11<sup>th</sup> January 1991 and the memo of 28<sup>th</sup> January 1991 there was a meeting on 25<sup>th</sup> January 1991 between Mr. Buluma, Mr. Mbindyo and myself and that at this meeting all that was in the memo was discussed, advised, recommended and approved.

A 22 (a) The report states at page 301 setting out what they term the ‘*minimal loss*’

**“Total export compensation paid: Kshs.1,433,212,501/=**

(b) This is false because the commission is not candid and does not disclose that:

(i) The 15% ex gratia payments amounted to Kshs.255 million and

(ii) The 20% export compensation constituting Kshs.1.1 billion out of the above Kshs.1.4 billion granted, was never in question, and was never questioned by either the Public Accounts Committee or Parliament, or the Auditor General, and were not a loss even by the reckoning of the Auditor General or the Public Accounts Committee.

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A 23 (a) The report states at para **81**

**“In September 1990 Mr. Mbindyo testified that he received an application identical to this one (of Goldenberg dated 8<sup>th</sup> October 1990 Exh 22) but which was addressed to him as the Permanent Secretary Treasury. It was presented to him by Mr. Kamlesh Pattni, who was then accompanied by his Co-director Mr. Kanyotu. After informing his minister of the application he referred the same to the Financial Secretary, Mr. Ali. This fact was confirmed in the cross-examination of the witness by Mr. Nowrojee on behalf of the minister and supported by the unsworn statement of Mr. Kanyotu.”**

(b) This was false. Mr. Kanyotu’s statement does not

support that Mr. Mbindyo referred the first letter addressed to the Permanent Secretary Treasury to Mr. Ali, the Financial Secretary.

A 24 (a) The report states at para **82**:

**“The minister by acting on this second application without due regard to the earlier one in effect blocked what the Permanent Secretary had sought to do namely to have the application evaluated.”**

(b) This is false. I did not block any evaluation by Mr. Ali, because the evidence from Mr. Kanyotu is that there was nothing for Mr. Ali to receive (because the letter was handed back by Mr. Mbindyo to Mr. Pattni and not kept by Mr. Mbindyo) and therefore nothing for me to block. Again Mr. Kanyotu’s statement does not support that Mr. Mbindyo referred the first letter addressed to the Permanent Secretary Treasury, to Mr. Ali the Financial Secretary.

A 25 (a) The report states at paras 202 and 118

**“If we digress a bit, Mr. Mbindyo testified that before he wrote his two letters both dated 1<sup>st</sup> November 1990, he had held a meeting with his minister, Hon Saitoti, with the Governor of the Central Bank, Eric Kotut. In that meeting Mr. Kotut categorically stated that he would administer the export compensation scheme.**

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**Considering that the Treasury like CBK deliberately overlooked relevant aspects of the matter, it can be inferred that there was an understanding among the three persons to flout Regulations and the law for an agreed purpose.” at 202.**

**“He (Mr. Mbindyo) conceded that the second letter was a departure from what had been approved and argued that this came about because of discussions he had with the minister and the Governor in which the approval of GIL’s proposal was varied. Clearly Mr. Mbindyo did not tell us the whole story by reason of the manner in which the scheme was implemented.” At 118.**

**“The (second) letter was copied only to Mr. Eric Kotut, Governor, Central Bank (at 118).**

(b) This is false.

A 26 (a) The report states at para **184**

**“Mr. Njeru Kirira, who was a Senior Economist in the Ministry of Finance, in his memo to Prof Ryan dated 18<sup>th</sup> September 199”**

(b) This is an incomplete and unedited statement.

A 27 (a) The report states at para **191**

**“Thus Goldenberg continued getting payment purportedly under the export compensation scheme, but in actual fact, it was being paid a windfall. The additional 15% was described as Ex gratia by Mr. Mbindyo. Hon. Saitoti described it as “a bonus incentive” whichever description it is given the payment was nothing but a payment without any legal or economic basis. It was a mark-up without any justifiable basis. As the payment was out of public funds the project was fraudulent.”**

(b) This is false. Goldenberg did not continue getting paid purportedly under the Export compensation scheme. The 15% additional payments were never made under the Export Compensation Scheme which was under the Local Manufactures (Export Compensation) Act Cap 481. (482).

A 28 (a) The report states at para **590**

**“Mr. Mbindyo’s evidence and that of Prof Ryan was that Hon Saitoti declared to them that it was a government decision to license Goldenberg.”**

b) This is false

c) Prof Ryan did not give such evidence.

On the question of errors of precedent fact and the law counsel urged that on the doctrine of separation of powers, what Parliament decides is not to be questioned by any court. Counsel cited the provisions of Section 4 and 12 of the National Assembly (*Powers and Privileges*) Act (*Cap 6, Laws of Kenya*) which in express terms says, no civil or criminal proceedings should be instituted against any Member of Parliament for words spoken before or written in a report to the Assembly or a Committee or by reason of any matter or thing brought by him therein by Petition, Bill, resolution, motion or otherwise, (Section (4)), and that no proceedings or decision of the Assembly or the Committee or Privileges shall be questioned in any court. And that on this ground alone, an order of certiorari should issue.

## **PHASE II: THE CASE FOR AN ORDER OF PROHIBITION**

Mr. Ngatia took up submissions on prayer B of the Notice Motion seeking a prayer of Prohibition directed at the Attorney General or any other person prohibiting the filing and prosecution of criminal charges against the applicant in respect of the Goldenberg Affair pursuant to the Judicial Commission of Inquiry into the Goldenberg Affair or otherwise.

It was Mr. Ngatia’s submission that the Commission has admitted in its Report that records regarding Goldenberg were always available in the Government offices for all to see. The matter was discussed before the National Assembly where the 15% export compensation allegedly approved by the applicant was queried and discussed and Parliament approved it to have been made procedurally and the Parliament having made such a resolution, it is only Parliament who can alter it. It was a unanimous decision of Parliament supported by the Attorney General and this amounts to a representation or assurance that the applicant cannot be subjected to criminal proceedings in respect of Goldenberg. Despite the fact that the

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Attorney General says that the Commission's Report on Goldenberg does not bind them, the applicant cannot take chances.

The applicant is not unaware of the Attorney General's inherent powers to prosecute under Section 26 (3) of the Constitution but the same have to be exercised with Section 123 (8) of the Constitution, in mind. The court is empowered under S 123 (8) of the Constitution to oversee the Attorney General's exercise of such powers. He therefore questions the exercise of the Attorney General's powers and on this point he considered the principles laid down in the case of **GITHUNGURI VS. REPUBLIC 1986 KLR I**. It is a decision of 3 judges where the applicant had been charged with several counts alleging contravention of the Exchange Control Act and had challenged the decision to charge him, in a constitutional court because the Attorney General's Office had informed him and Parliament that he would not be prosecuted for those offences. The court held that the Attorney General's powers should be exercised quasi judicially and that it is an abuse of court process to charge the applicant after a decision had been made not to prosecute him. It is submitted that the contention that the applicant can defend himself before the magistrate's court cannot stand. Making further reference to the findings in the **GITHUNGURI CASE**, the counsel submitted that there has been inordinate delay in investigating this case, the approval by the applicant having been done in 1991, 15 years ago. Investigations into the Goldenberg Affair were commenced in 1993 and it is now over 11 years. It is the applicant's submission that such a delay points to mala fides on the part of the Attorney-General

Mr. Ngatia also submitted that there have been various prosecutions arising from the Goldenberg Affair i.e. about 9 cases and in none of those was the applicant charged. The Law Society of Kenya had filed Criminal Case 1 of 1994 and another case by Hon. Raila Odinga in Criminal Case 107 of 1995 but the Attorney General had the proceedings terminated, an indicator that the Attorney General had no evidence against the applicant and that creates an irresistible inference that the applicants decision was procedural and that the Attorney General can also terminate this case in the wider public interest.

Like the findings in the **GITHUNGURI CASE** that prosecution after 4 years was unreasonable, the applicants urges this court to find that a delay of 11 years in bringing this case would be unrealistic and that due to the delay, the applicant may no longer be in

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possession of evidence that he would require to defend himself which would result in an unfair trial that would be oppressive and vexatious and breach the applicant's rights under Section 77 of the Constitution.

It is a further submission by counsel that the Attorney General practised inertia which has taken away the Attorney General's would be power to prosecute. This principle was adopted in the case of **REPUBLIC VS. PATTNI CRIMINAL CASE NO. 229 OF 2003** from the **GITHUNGURI CASE** and that there is no new evidence to entitle the Attorney General to prefer a criminal prosecution against the applicant.

Applying the finding in the case of **NDARUA VS. REPUBLIC (2002) E.A. 2005** where the constitutional court found that the Attorney General was making one party pay for the sins of others, the Attorney General seems to be doing the same to the applicant in that he has been picked from among others who are mentioned in the Goldenberg Affair and this court should hold that it is done in bad faith.

In the case of **MOHAMED GULAM H. KARMALI VS. REPUBLIC MISC. APPLICATION 387 OF 2005** the court found that the function of the court is to ensure that its processes are used fairly by both state and citizen alike. To buttress the above was also the case of **KANGWANA VS. ATTORNEY GENERAL MISC. APPLICATION NO. 446 OF 2005** where the prosecution was found to have been instigated by improper purpose. The applicant wants this court to find that the Attorney General's intention to start investigations and probably charge him is prompted by ulterior motives and improper purposes and this court should treat both the applicant and state fairly.

Regarding the report prepared by Minister Simeon Nyachae and Justice Ringera, the then Solicitor General which exonerated the applicant from any criminal intent, the World was told of it, it means then that this case is based on incorrect factual grounds which is evidence of ulterior or improper motive. The Attorney General having exonerated the applicant from blame cannot now change his mind.

Mr. Ngatia also submitted that the findings of the commission have already prejudiced the applicant by finding that the hub of Goldenberg started to crumble once the applicant left

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office, yet some of the biggest payments for Kshs. 5.8 billion and Kshs.13 billion were made long after the applicant had left office. The trial would therefore not be fair.

Mr. Ngatia also relied on Section 12 of National Assembly (Powers and Privileges) Act that the policy decision taken by the applicant was supported by Parliament such decision cannot be challenged without revoking Parliamentary Privilege. Besides, the applicant made an executive decision and it was endorsed by Parliament and the court cannot interfere with that decision respecting the doctrine of separation of powers.

It is a further submission of the applicant that there has been unjustified breach of both substantive and procedural legitimate expectation of the applicant. It is submitted that by the Attorney General severally making statements and by his conduct has engendered in the applicant a substantive legitimate expectation of receiving a benefit that no criminal intent will be imputed to the applicant because the applicant's decision to approve 15% ex gratia/incentive payment was procedural. Counsel said that the benefit to the applicant is two fold in that the Attorney General cannot reverse his earlier indications otherwise it would be unjustified breach of the applicant's legitimate expectation. Secondly the benefit is that the Respondent would follow the proper procedure but there is now a threat to the promises made to the applicant. Despite the fact that investigations in the matter commenced in 1993, there have been orders by the Attorney General for intensive investigations to be carried out. Considering that there was the Report by the Minister Simeon Nyachae and Justice Ringera which exonerated the applicant, carrying out more investigations 11-15 years later is unfair and oppressive to the applicant. The Attorney General had no impediment in carrying out the investigations and coming out so late in the day to carry out more investigations is unfair. The Respondents have failed to justify by their affidavit why the unjustified breach of both the substantive and procedural expectation and the denials in the affidavit are bare. Counsel urged that the approval of the 15% ex gratia payment was regularly done because there was no fixed procedure for such approval and the applicant used the normal procedures which included consultations and recommendations of relevant officials as well as the Attorney General. Such advice was received from the then Permanent Secretary Mr. Mbindyo and Mr. Buluma the Parliamentary Counsel. The Public Accounts Committee Report of 1992/1993 also found as a fact that the Government (applicant) had followed normal procedure in

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approving the request of Goldenberg International Ltd and concluded that their hands were tied because the said amount had received Parliamentary approval.

In the Simeon Nyachae/Justice Ringera Report to IMF (GK2) it was found that the applicant made the approval on recommendations of Public Officers and Committees appointed by Government to look into the matter and the same was approved by the House and the Attorney General supported the motion. His ultimate submissions is that there is a substantive legitimate expectation as to the substance of the motion in Parliament. There were express determinations and representations by the prosecuting authority, the Attorney-General that have not been rebutted or controverted and the Attorney-General would be prohibited from investigating the applicant or preferring criminal charges against him. Counsel urged the court to quash the findings, remarks of the Commission relating to the applicant in their report and prohibit the Attorney-General from prosecuting the applicant pursuant to the Commission's report.

### THE RESPONDENT'S SUBMISSIONS

Mr. Tobiko the Director Public Prosecutor appeared on behalf of the Hon. the Attorney General and opposed the motion. He relied on the replying affidavit dated 26<sup>th</sup> June 2006 sworn by Grace Murungi, the Principal State Counsel, in the Department of Public Prosecutions Attorney General's Office, the annexures thereto and skeletons arguments dated 14<sup>th</sup> July 2004.

In response to prayer (a) seeking an order of certiorari, the Director Public Prosecutor submitted that Judicial Review jurisdiction is concerned not with the merits of the decision but the decision making process and that the applicant is actually attacking the merits of the decision of the Commission.

He relied on the case of **R V THE HON CJ OF KENYA ex parte NAMBUYE MISC 8829/03** where the ruling of the tribunal was challenged and the court held that it was being asked to adjudicate on the merits of the decision of the tribunal. It is the DPP submission that this court is being asked to review the merits of the decision of the tribunal and substitute the Commission's findings with those of the court. He said that what is challenged is factual errors and there is a thin line between a decision on merit and procedure and that the courts

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are usually cautious about challenges on factual errors. In this Judicial Review proceedings the court is not supposed to sit on appeal of the decision of the Commission. That was the holding in the case of **CHIEF CONSTABLE OF NORTH WALES POLICE V EVANS [1982] 3 ALL ER 141**.

He further stated that the prayer sought relies on errors of fact but certiorari lies to quash errors of law or where one acts ultra vires, but that the court can intervene if the public body ignores uncontroverted evidence or if the body makes findings which are unsupported by evidence. However, once there is some evidence like in this case, the court should not interfere. He further submitted that a decision can be quashed if it is irrational or unreasonable as per the Wednesbury principle which refers to a decision that is so outrageous that it defies logic or accepted moral standards. He submitted that the test of proving irrationality is high and difficult to satisfy and the decision of the commission cannot be said to be irrational or unreasonable. The DPP considered the alleged 1<sup>st</sup> error at para 762 of the Commission's Report which the Applicant says was an error because the Attorney General had given clearance for the payment of the extra 15% ex gratia payment, having been advised by the Permanent Secretary Treasury and the Chief Parliamentary Counsel and Attorney General recommended the payment and yet the Commission makes a totally opposite finding. To the contrary, the DPP urged that in para 104 of the report, there was evidence to support the finding in para 762.

His conclusion is that the finding at para 762 has some basis in that there was evidence in para 104 and 105 justifying it. The DPP also gave an example of para 190 of the Report which was said to have no legal basis and was unjustifiable but he countered that finding with that at para 109 where it was said the minister was aware that he was acting outside his powers and so the Commission had a basis for their finding in the Report. The DPP contends that the findings of the commission are not irrational or perverse and it matters not whether the decision was right or wrong because this court is not concerned with merit. The DPP did not make any submissions controverting any of the other alleged errors raised by the applicant.

In response to the submission that the Commission made a finding that the approval by the applicant of 15% incentive was reached without evaluation was a material error, DPP said that

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there was in fact evaluation by the Minister for Environment, the Permanent Secretary Mr. Mbindyo and Professor Ryan. He submitted that in fact there was some material evidence upon which the Commission made its finding. He further said that evaluation was done a year after approval of the payments and hence the submission that evaluation was done in error, had a basis.

In reply to the submission by applicants that the Commission preferred the evidence of Mbindyo to that of Nyachae/Ringera Report, the DPP submitted that both were considered because both Prof. Ryan and Mbindyo whose evidence the Commission relied upon, appeared and testified before the Commission and the Commission was not therefore bound by the Nyachae/Ringera Report.

As to the submission that the Commission did not look at PAC Reports, Simeon Nyachae/Ringera Report, the DPP submitted that the Commission was set up to unravel the mystery of the Goldenberg Affair and the Commission was entitled to reach a different conclusion.

The DPP conceded that the Kshs.5.8 and Kshs.13 billion were not paid out during the Applicant's tenure and the finding that most of Goldenberg operations were in his tenure is untrue. He also conceded to the fact that applicant was not concerned with actual payments. (Para 588 of report).

On allegation of abuse of office, the DPP said that the standard of proof in criminal cases is beyond reasonable doubt is not applicable to the Commission of Inquiry. The Commission only needed to weigh the evidence before it and that in any event they were not required to pronounce the guilt of any party. The Commission made recommendations as to who to be investigated further and who were left scot free.

It was his further submission that the approval of 15% incentive was illegal but the Commission did not go ahead to consider the illegality since Mr. Buluma admitted that there was an illegality, and the Commission's finding was therefore proper and was not unreasonable in the circumstances.

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The DPP recalled that the applicant was served to appear at the Commission but he chose not to, though he was represented by an Advocate. He never gave evidence to controvert the evidence adduced and an adverse inference must be made against him that his evidence might have been unfavourable and he should not be had to complain. Besides, the Commission has not told the Attorney General whether or not to prosecute. The Commission had a duty to make a preliminary finding.

It was further submitted that had the applicant appeared at the hearings of the Commission some of the inconsistencies might have been clarified.

In answer to what errors of precedent fact are, the DPP said that it is one that goes to jurisdiction and such errors are not just reviewable but correctable. He submitted that the factual errors complained of are not precedent facts and the factual errors go to the substance and are not reviewable. They cannot therefore be quashed by certiorari, as they have not been shown to be unreasonable or perverse. He also said that the errors complained of are not apparent on the face of the record as the applicants have had to look for other evidence.

The DPP submissions on the prayer for prohibition were that the prayer is broad and if granted would immunize the applicant from any prosecution even if other evidence were available.

He responded to submissions made on the **GITHUNGURI CASE** and said that it is distinguishable from the Applicant's case in that in the **GITHUNGURI CASE**, there had been a specific written confirmation that he would not be prosecuted. In this case the Attorney General has never told the applicant that he will not prosecute the applicant and secondly, unlike the **GITHUNGURI CASE**, there is new evidence that was unravelled by the commission during its hearings, and therefore the **GITHUNGURI** principle does not apply.

As regards the principle of inertia it was submitted that there is no time limit for prosecution of serious offences unless limited by statute.

He said that after the Commission Report was read by Attorney-General he instructed that the police start investigations on the suspects including the applicant and so far they have not received any report from police regarding the applicant.

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He distinguished this case from – **PATTNI'S CASE** because in that case a person was charged pending investigations. In **NDARUA CASE** there was no evidence to support the charge.

In the **GULAM KAMARLI CASE**, there was an arbitration clause and the court found that it amounted to abuse of court process to charge the applicant without going to arbitration.

On the decision made by Parliament, it is conceded that the Attorney General supported the amendment to enable him perform his duties under S. 26 of the Constitution and he never gave a direction not to prosecute anybody.

The DPP agreed that S. 12 of National Assembly (Powers and Privileges) Act cannot be challenged. Those who make statements in Parliament are protected from prosecution or suits. His submission is that Parliamentary privilege could be raised as a defence by the applicant and it cannot be raised here at this stage in Judicial Review proceedings.

On legitimate expectation, he submitted that the Attorney General never made any specific representations to the applicant that he would not be charged. Besides that can be used as a defence.

As regards withdrawal of cases relating to the Goldenberg Affair, DPP said that there is no bar to withdrawal of cases by the Attorney General for good reason and it does not create legitimate expectation and an order of prohibition cannot therefore be granted.

### **ISSUES RAISED**

After hearing arguments of both counsel for the applicant and the respondent, we have deliberated and generally agreed to consider the following to be the issues and questions that the court will consider and base its agreed and unanimous judgment upon.

They are as follows:

#### **1. Was the Commission a Judicial Commission of Inquiry?**

· Has the commission complied with S. 7 of the Commissions of Inquiry Act Cap 102 LOK?

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- What are the implications of the Commission's findings?

### **2. Are there errors of fact and law in the Commission's Report?**

What are the implications of Sections 4 and 12 of the National Assembly (*Powers and Privileges*) Act Cap 6 LOK on the Commission's Report?

- Does S. 12 of the National Assembly (Powers and Privileges) Act have Constitutional underpinning?
- Was the Commission in breach of the doctrine of separation of powers?
- Consider the role of the Hon. the Attorney General and the effects of his contribution to the motion in the Goldenberg debate.
- Did the Commission act within its jurisdiction?

### **3. What is Legitimate expectation?**

- What was the legitimate expectation of the applicant from the Commission and was the said legitimate expectation breached?
- What is the effect of the breach if any?

### **4. Was there a Violation of S. 77 of the Constitution by the Commission?**

- What rights were violated if any?
- What is the principle in the **GITHUNGURI CASE**?
- Is that principle applicable to this case?
- Can the applicant be accorded a fair trial?

### **5. Was there bias and unfair treatment on evidence favourable to the applicant by the commission?**

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- Does the Wednesbury Principle on unreasonableness apply?
- Has the applicant been treated differently?

### **6. What is the principle of proportionality?**

- Did the Commission strike a balance between the different interests?
- Did the Commission consider the public interest?

### **7. Did the commission act in bad faith?**

- Was there abuse of power?

### **8. Why should the court intervene?**

- Can the orders of certiorari and prohibition issue?

## **THE ANALYSIS AND CONCLUSIONS.**

Was the Commission a Judicial Commission of Inquiry?

We find it useful to commence our analysis of the task before the court by answering the above question because the need to answer the question will have serious implications to the task before the court.

The answers to this question are:

- 1.) The description of its mandate as appears in the Kenya gazette notices at pages 305 and 306 of the challenged report. The Commission was established by his Excellency the President Mwai Kibaki pursuant to the Commission of Inquiry Act (cap 102). In the Gazette Notices it is clearly described as “a Judicial Commission”
- 2.) Under s13 of the Commissions of Inquiry Act, the Commission is deemed to be judicial for the purpose of Chapters 11 and 18 of the Penal Code
- 3.) Paragraph 579 of the Goldenberg Report reads:

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**“Ours are judicial proceedings in that this Commission was designated a judicial commission of inquiry. We must therefore be guided by judicial principles. In view of that, accomplice evidence may only be acted upon if upon careful examination it cannot be but true or the evidence is amply corroborated”**

The implication of the Commission having been judicial is that it must act in accordance with its mandate and as regards the Goldenberg Commission its commission and also act in accordance with the law and the Constitution. This is the reason behind “**illegality**” being a ground for judicial review. In this regard, it is pertinent to endorse Lord Diplock’s description of illegality in the celebrated case of *COUNCIL OF CIVIL SERVICE UNIONS v THE MINISTER FOR CIVIL SERVICE 1985 AC374 HL*:

**“By illegality as a ground for judicial review, I mean that the decision maker must understand correctly the law that regulates his decision making power and must give effect to it.”**

In the case of *ATTORNEY GENERAL v FULHAM CORPORATION 1921 HC 1921* it was held that illegality might also consist of using powers in manner totally different from that envisaged. Section 7 of the Commissions of Inquiry Act Cap 102 of the Laws of Kenya reads:

**“It shall be the duty of a Commissioner, after making and subscribing the prescribed oath, to make a full, faithful and impartial inquiry into the matter into which he is commissioned to inquire to conduct the inquiry in accordance with the directions conferred in the commission and in due course, to report to the President, in writing, the result of the inquiry and the reasons for the conclusions arrived at, and also if so required by the President, to furnish to the President a full record of the proceedings, of the commission.”**

It is therefore clear to the court that a commission appointed under. Commissions of Inquiry Act such as the Goldenberg Commission has a statutory duty to submit a full, fair and impartial Report and failure to so act may render the commissions findings, determinations, decisions and recommendations ultra vires the Act and in particular section 7. Whether or not the Commission has jurisdiction concerning any matter or was acting in excess of jurisdiction

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depends on any finding whether or not it acted within its purview under the Section and the terms of its commission.

In the case of a Commission the duty of fairness is a statutory requirement and it is so expressed. The duty to render a full, faithful and an impartial report is statutory and therefore there is no need of this court to have it implied. This is in contrast to the many situations where courts have implied the duty to act fairly.

### **ERROR OF FACT AND LAW**

The applicant has pleaded that there are (28) twenty eight errors of fact and has set them out in extenso in the affidavit verifying the statement. The Respondent did try to explain at least one of them but the explanation only related to a particular period. However evidence in the Report reveals that 20% was payable as a matter of law under the Local Manufacturers Act whereas 15% ex gratia became payable as an incentive or subsidy and the payment was made pursuant to a Government policy which was in turn based on recommendations from the Ministry of Natural Resources and Mines and an evaluation from some public officials and an Inter-ministerial Committee. Parliamentary report/Hansard availed to the Commission reveals that the Government (of which the Ministry of Finance was part of) had approved both the policy and the implementation. The Hansard clearly reflects and states that the steps taken were procedurally correct:

- (i) In 1994 the Public Accounts Committee of Parliament sat to inquire into the Goldenberg affair.
- (ii) In 1995 the Public Accounts Committee (PAC2) sat to inquire into the Goldenberg affair. Page 21 of the Report states:

**“After evaluating all the evidence available to the committee, it was noted that the Government followed normal procedures of approval in granting the request by Goldenberg International Ltd”**

The Attorney General addressed Parliament using a prepared statement at length but the substance of the address was as follows:

**“Mr Deputy Speaker, Sir, I stand to support the amendment moved by the Minister for Finance ... With those few remarks I beg to support – see page 334 to 338 of Hansard of 11.4.95”**

The Resolution unanimously passed by Parliament reads:

**“That this House adopts the Report of the PAC on the Government of Kenya Accounts for the year 1992/93 which was laid on the Table of the House on 30<sup>th</sup> March 1995 to the exclusion of paras 38, 39, 40 and 112 and recommendations appearing therein, taking into account the fact that the policy decision to grant export compensation to gold and diamond jewellery was done procedurally.”**

According to the Hansard perused by us, the Applicant had before the passing the above resolution, made a strong presentation under a barrage of points of order all aimed at challenging the explanation he gave concerning the origin of the Government policy and the implementation of the policy including the role he played in giving the approval. His presentation in Parliament was in our view in keeping with the need for executive authority or policy being subjected to Parliamentary scrutiny so as to achieve transparency and accountability. Parliament is a watchdog of the Executive. It provides the checks and balances necessary in a constitutional democracy.

It is clear to us that as the 20% was paid under the provisions of the Local Manufacturers Act and the Act itself did not provide for the payment of the additional or any ex gratia incentive. The applicant approved in principle the payment of the additional incentive as a matter of Government policy and on the recommendations of public officials. A perusal of the Report confirms the above.

To us, the Motion and the resolution must be seen in terms of the function of Parliament to act as a check on the Executive on matters of policy. By debating the Motion and passing the resolution in the terms set out above Parliament in its wisdom did so pursuant to the doctrine of the separation of powers which is aimed at ensuring that the three arms of Government namely the Executive, Legislature and the Judiciary maintain the necessary checks and balances. This doctrine is recognized in the framework of the Constitution in that the Executive Powers are vested in the President as Head of the Executive Arm of the

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government and the legislative power is vested in Parliament. Similarly, though not so expressed in the Constitution, the Judicial power vests in the Judiciary as held by Constitutional courts in the past. In addition it is important to state that our Constitution is founded on the Rule of Law. In order to maintain the intended constitutional balance the three arms of government do have separate and distinct roles with only a few known overlaps depending on the degree of separation. Historically the three arms have in Kenya maintained a respectable aloofness by keeping to their respective constitutional roles and by jealously guarding their constitutional territories.

Taking Parliament as an example it has passed the National Assembly (Powers and Privileges Act Cap 6 which has defined the conduct of its affairs in s (4) and s 12 as follows:

### **Section 4**

**“No civil or criminal proceedings shall be instituted against any member for words spoken before, or written in a report to, the Assembly or a Committee, or by reason of any matter or thing brought by him therein by petition, bill, resolution motion or otherwise.”**

### **Section 12**

**“No proceedings or decision of the Assembly or the committee of Privileges acting in accordance with this Act shall be questioned in any court.”**

At page 219 of the Goldenberg Report (GR) the Commission made the following finding, decision, determination, or conclusion in paragraph 587:

**“Besides Parliamentary approval of the expenditure as a customs refund does not cure the *illegality* of the payment of the 15% exgratia. The argument that because the payment was designated exgratia, then there was no breach to the Local Manufacturers (Export Compensation) Act is a red herring. The designation of the payments as exgratia was a ploy to circumvent the above Act. The approval given to GIL’s proposal was not that it would be paid exgratia but additional export compensation. Whether it was subsequently called exgratia or customs refund, those were moves to conceal the illegality and in our view Parliament does not have the power under the law to *pardon***

***illegality it still stands. The only way Parliament could possibly have gone round this was to amend the relevant law retrospectively to cover all past illegal payments.”***

With all due respect to the Commissioners, we consider the above finding to be horrendous in law and a serious misdirection in applying the relevant law for the following reasons:

(1) If the Local Manufacturers (Export Compensation) Act was silent on the payment of the additional 15% exgratia and the Government had formulated a policy in respect of the extra 15% on the basis of a recommendation by the experts and the policy, after a lengthy debate approved by a resolution of Parliament is the Commission of Inquiry in a position to undo in 2006 what Parliament had approved in 1994/1995. This is Parliament’s approval of an Executive originated policy. Surely, the answer must be a resounding “NO”. From the above cited provision a decision of Parliament cannot be the basis of a civil or criminal proceedings against the applicant who is a member of Parliament or be the basis of a cause of action. If the courts are barred by law from the probing into policy issues of the Executive and Parliament how can a Commission of Inquiry unravel what Parliament has resolved as a matter of policy.

(2) It is not every policy decision of Parliament that ends up as an Act of Parliament and Parliament must under the doctrine of separation of powers have the latitude to act as a watchdog body to the Executive without necessarily legislating as such.

(3) We have noted that the Commission is silent on whether or not it considered the legal implications of s 4 and s 12 of the National Assembly (Powers and Privileges) Act Cap 6 of the law in its findings.

(4) If a court of law cannot question the decisions covered by 4 and 12 of the National Assembly (Powers and Privileges) Act can an inferior body such as a Commission of Inquiry assume any such powers? Since it did not have such powers we find that it acted in excess of jurisdiction.

### **Constitutional underpinnings of the National Assembly (Powers and Privileges) Act**

In addition to the above observations, the Commission’s findings of illegality of a Parliamentary decision must also be considered from another angle, namely, that the National

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Assembly (Power and Privileges) Act stems directly from section 57 of the Constitution which provides:

**“Without prejudice to the powers conferred by section 56, Parliament may, for the purpose of the orderly and effective discharge of the business of National Assembly, provide for the power, privileges and immunities of the Assembly and its committees and members.”**

We find that the fact that s 4 and s 12 of the National Assembly (Powers & Privileges Act) were made pursuant to s 57 of the Constitution is significant in that, it gives the two sections constitutional underpinnings in that the two sections reinforce the principle of separation of powers and therefore any finding which purports to encroach on a decision of Parliament which is made within its constitutional territory or mandate would also be unconstitutional and the courts and other judicial bodies should be, in the forefront of avoiding any possible constitutional conflicts in all their undertakings. Both the Executive and Parliament do have a monopoly on issues of Policy and a respectable interplay is encouraged in view of Parliament’s role in terms of acting as a check on any excess of the Executive and also in its watchdog role. Our view is that executive decisions and policies except where they are reviewable under the Judicial Review jurisdiction of the Court are in the province of the Executive and Parliament and not the province of the courts, not to mention the Commissions and tribunals. We therefore find that Parliament did not violate any law in passing the Motion and the Resolution and the reference to illegality is in our view a serious misdirection in law on the part of the Commissioners.

In considering the Commissions finding or determination on this point we consider it important to touch on the role of the Honourable the Attorney General. Thus, the role of the Attorney General both in Parliament and outside Parliament is a crucial one in that he is the principal legal adviser to the government. It follows that the advice he gives concerning the affairs of the government does have legal implications. This role is set out in s 26(2) as under:

**“The Attorney General shall be the principal legal adviser to the Government of Kenya”**

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He therefore sits in Parliament in that role. The Attorney General's contribution in Parliament must therefore be seen from the standpoint as an adviser of Government. In this regard the court has examined Exhibit 98 of the *HANSARD NATIONAL ASSEMBLY* 5<sup>th</sup>-19<sup>th</sup> April 1995 which was annexed to the Original Applicants affidavit GSR I. Also relevant to this is the *NYACHAE RINGERA* Report to the IMF dated 27<sup>th</sup> July 1998 exhibited in the same affidavit marked GSR 2. In addition to the finding of illegality by the Commission is Exhibit 188 of the Commission, *POLICE INQUIRY STATEMENT OF CHARLES MBINDYO* dated 22<sup>nd</sup> May 1995 marked GSR – 3.

Finally there is Exh 46 – *PUBLIC ACCOUNTS COMMITTEE REPORT 'PAC'* 1992-93 marked GSR 4. It is important to observe that all the four documents were before the Commission.

At page 270 of the Hansard the late Kijana Wamalwa who was then the PAC Chairman addressed the issue of legality as follows:

**“Mr Speaker sir, there has been a lot of acrimony about the legality of the extra 15 per cent Export Compensation. I think this a nettle that must be grasped I do not think we can avoid it. The House will remember that last year, it was explained how the ex gratia payment was allowed by this House under customs refund. The law required that anything beyond 20 per cent to come to this House for approval. That item was brought to this House under customs and approved as such. I remember last year, the Hon Anyona argued very convincingly that the House did approve of that amount of money although under a different heading. This is a matter which only the House can resolve. If the Sixth Parliament did not mean to approve the extra money for Export Compensation or did not understand what they were doing then only this House can change that situation now” ...**

We shall later on in this judgment refer to the *HANSARD* on the Hon Attorney General's contribution in Parliament. Hon Nyachae and Justice Ringera Report/Letter to the IMF states:

**“As Minister for Finance, he approved Goldenberg Scheme of Export Compensation. The investigations reveal that he did this on the recommendations of public officials and**

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**committees appointed by the government to look into the matter. No criminal intent could be imputed to him in those circumstances.”**

The letter was written to the IMF in answer to outstanding economic governance which the Kenya government had committed itself to acting. Hon Justice Ringera as Solicitor General gave the above representation to the IMF on behalf of the Attorney General pursuant to s 26(2) of the constitution.

Mr Mbindyo in his statement to the police dated 22<sup>nd</sup> May 1995 said at page 3:

*“Thereafter Kamlesh Pattni submitted an application to the PS Treasury. Among other things it requested for additional export compensation of 20% over and above the 20% already granted in 1985. I made my inquiries to the Commissioner of Mines and the PS Ministry of Mines and Geology whom I found out had already submitted a letter to Treasury carrying the decision of an Inter Ministerial Committee which had recommended payment of 20% over and above the 20%.*

*Based on the recommendations of the Inter-ministerial Committee I advised the Minister accordingly. Namely that the Committee was recommending 20% payment and a limited number of one or two exporters because of the similarity of the commodity.”*

The Report of the Public Accounts committee (PAC) 1992/93 made the following conclusions at page 21:

**“After evaluating all the evidence which was made available to the Committee, it was noted that the Government followed normal procedures of approval in granting the requirement by Goldenberg International Limited. While the Committee deplores the payment of extra 15% Export Compensation which was brought to Parliament and approved under the Customs Refund item, although it had been meant for Export Compensation, the committee finds that their hands are tied in that the account so paid had received Parliamentary approval. In view of the foregoing the Committee recommends that all parties concerned should adhere to their contractual obligations and accordingly, all the outstanding export compensation claims lodged by the company before the abolition of export compensation should be settled, as soon as possible.”**

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It is therefore crystal clear that the Commission's findings on the legality or illegality flies in the face of the above four important documents and a resolution of Parliament. It is also clear that the commission "finding" had no basis in law yet it was the duty of the Commissioners as a Judicial Commission to understand correctly the law that regulates its decision making power and to give effect to it – refer to the *COUNCIL OF CIVIL SERVICE UNIONS v THE MINISTER FOR CIVIL SERVICE* [1985] AC 374 HL. The laws which the Commissioners needed to correctly address as per the above analysis are the Constitution, National Assembly (Powers and Privileges) Act S 4 and 12, the doctrine of separation of powers and legitimate expectation. From its Report it is clear to us this was not addressed. If a body fails to correctly address the law governing its powers, certiorari must issue on this ground.

In our view criminal proceedings cannot stem from a resolution of Parliament. Thus in *PREBBLE v TELEVISION NEW ZEALAND* (1994) 3 ALLE 407 at page 415, *CHURCH OF SCIENITH* [1972] 1 ALL ER 378 and *PEPPER v HART* 1993 1 ALL ER 42 cited by the Applicant's Counsel, it was held in the three cases:

**“The important public interest protected by the privilege was to ensure that a member or witness when he spoke was not inhibited from stating fully and freely what he had to say. That principle complied with the wider principle that the courts and Parliament were both asked to recognize their respective constitutional roles and that the courts would not allow any challenge to be made to what was said or done within the walls of Parliament in performance of its legislative functions and protection of its established privileges, undoubtedly prohibited any suggestion being made in court proceedings (whether by way of direct evidence cross examination or submission) that statements made in the House were lies or were motivated by a desire to mislead and also prohibited any suggestion that proceedings in the House were initiated or carried through into legislation in pursuance of an alleged conspiracy. ... the collective privilege of the House to be the sole judge of such matters, since they lay entirely within the jurisdiction of the House. If a suggestion in cross examination or submission that a member or witness was lying to the House were to be allowed that could lead to exactly the conflict between the courts and Parliament which the principle of non-intervention by the court was designed to avoid.”**

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Perhaps we should in concluding this point touch on the issue of public interest which has been mentioned in the **PREBBLE** case. The Commission was appointed by the President under s 3 of the Commissions of Inquiry Act Cap 102 – and the appointment of such Commission must relate to an inquiry which would in the opinion of the President be in *public interest*. The avoidance of conflict which would ensue if the applicant who defended himself in Parliament were to be dragged into court on the same matter, which Parliament duly approved is an issue of public interest which the Commission in its finding of illegality ought to have addressed or bear in mind when reaching their recommendations as a judicial body. This would attract an order of certiorari against the Report now that the Commissioners are no longer in office.

For the same reason where the Attorney General acts or threatens to act contrary to the Constitution by overlooking its provisions and in particular the fundamental rights and freedoms (and in this case s 77 of the Constitution), the doctrine of separation of powers and the supporting common law, an order of prohibition must reach out to him and stop him pursuant to s 84 of the Constitution and the inherent powers of this Court. The reason for this is that he would be acting contrary to the public interest. In addition, International relations with other states and International institutions such as IMF are conducted on the principle of *Pacta Sunt Servanda* and what was represented in the Nyachae/Ringera Report is binding on Kenya because good faith is presumed. Every respectable Nation must have a foundation of public morality and therefore it would be immoral for any Public Officer including the Attorney General to purport to back out of the Nyachae/Ringera Report. The principle of *Pacta Sunt Servanda* means that agreements must be carried out in good faith. Backing out would be a serious breach of faith and the court frowns upon this.

In the case of *R v THE CHIEF MAGISTRATE'S COURT AND ANOTHER EX-PARTE MOHAMED GULAM HUSSEIN FAZAL KARMALI & ANOTHER H.C. Misc Civil Application No 367 of 2005* the Presiding Judge, Nyamu J had this to say before issuing a prohibition against proceedings instituted contrary to the public interest – at page 27:

**“I hold that acting outside the law violates public policy and the state has no business stooping to such levels ...**

... The office had a clear duty to give proper advice including the efficacy of the method adopted in securing the public interest. In this regard I wish to endorse fully the observations of Lord Pearce on what is prejudicial to the interests of the State, in the case of *CHANDLER v DIRECTOR OF PROSECUTIONS* 1964 AC 763 (HL)

‘Questions of defence policy are vast, complicated, confidential and wholly unsuitable for ventilation before a jury. In such a context the interest of the State must be in my judgment mean the interests of the state according to the policies laid down for it by its recognized organs of Government and authority, the policies of the state as they are; not as they ought, in the opinion of the jury to be. Anything which prejudices those policies is within the meaning of the Act prejudicial to the interests of the state. Although the concept of public interest has somewhat been changing with the times and evade a precise definition, in the context of Kenya public interest is reflected for example in securing and enforcing the fundamental rights and freedoms.’

#### LEGITIMATE EXPECTATION

We now turn to the applicant claims based on legitimate expectation. The learned DPP Keriako Tobiko has in the course of the hearing relied on the publication entitled the **Applicant’s Guide to Judicial Review** – the Public Projects authored by Lee Bridges among others and published by London Sweet and Maxwell 1995. At page 18 of the publication, Legitimate expectation has been defined as under:

**“It seems established that in certain cases where an applicant has been promised that there will be for instance, consultation before a decision is made, then a legitimate expectation will arise that that consultation will take place and if it does not, then there will be a breach of the duty to act fairly”**

The quotation is taken from Lord Diplock’s judgment in the seminal case of *COUNCIL OF CIVIL SERVICE v MINISTER FOR THE CIVIL SERVICE* [1985] AC 374 at page 408:

The publication adds: **“if the decision maker unreasonably departs from the publicly stated policy or customary practice or reneges on an earlier decision or undertaking thus confounding the applicant’s legitimate expectations from the decision maker, then**

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it can also be argued that there has been a breach of the duty to act fairly. A person or a group may have a legitimate expectation that they will be consulted by the decision maker or if the decision maker has made promises or given undertakings which the decision in question will alter see – *ATTORNEY GENERAL OF HONG KONG v NQ YUEN SHIU* 1983 AC 629 and *R v LIVERPOOL CORPORATION exp LIVERPOOL TAXI FLEET OPERATORS ASSOCIATION* [1972] 2 QB 299. However, this procedural approach does not prevent the public body changing its policy, so long as it does so in a proper manner taking account of legitimate expectations for consultation, an oral hearing or whatever else is necessary to comply with the duty to act fairly.”

In other cases legitimate expectation has been used to denote a substantive right; an entitlement that the claimants asserts cannot be denied him or her. In *R v DEVON COUNTY COUNCIL exp BAKER* (1999) [1995] I ALLR 73, 88-89 the Court of Appeal, Simon Brown L.J. summed up this approach:

“These authorities show that the claimant’s right will only be found to be established when there is a clear and unambiguous representation upon which it was reasonable for him to rely. Then the administrator or other public body will be held bound in fairness by the representation made unless only its promise or undertaking as to how the power would be exercised is inconsistent with the statutory duties imposed on it. The doctrine employed in this sense is akin to an estoppel.”

Legitimate expectation is based on the need not to have bargains thwarted – see *R v REGISTRAR OF SOCIETIES exp SMITH KHISIA WASWA & OTHERS Misc Civil Application No. 769 of 2004*. where Nyamu J addressed this aspect of legitimate expectation. We find that the Commission had clearly indicated that it was a Judicial Commission of Inquiry to be guided by judicial principles. It must be held to its representation on this. The applicant did submit to its jurisdiction through his Counsel on this understanding.

Lord Fraser in the *CCSU v MINISTER FOR CIVIL SERVICE* [1985] A.C. 374 supra HL has explained the two ways legitimate (sometimes referred to as reasonable) expectation arise namely:

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**“from an express promise given on behalf of a public authority or from the existence of a regular practice which the claimant can reasonably expect to continue.”**

What then is the Court’s role in this area of law?

1. The court is to reconcile the targeted bodies continuing need to initiate or respond to change with legitimate interests or expectations of citizens or strangers who have relied and have been justified in relying on a current policy or on an extant promise;

2. The Court must make sure that the power to make and alter policy has not been abused by unfairly frustrating legitimate individual expectations. - see the case of *EX-PARTE UNILEVER (PLC)* 1996 STC 681 where this approach was adopted;

3. The other approach is for the Court to consider whether through unfairness or arbitrariness, the change of mind amounts to abuse of power such as in the case of *EX-PARTE PRESTON* [1985] AC 835 which concerned an allegation that the Inland Revenue Commissioners had gone back impermissibly on their promise not to reinvestigate certain aspects of an individual’s taxpayers affairs. In this case Lord Scarman delivered himself as follows:

**“I must make it clear in my view that the principle of fairness has an important place in the law of judicial review: and that in an appropriate case it is a ground upon which the court can intervene to quash a decision made by a public officer or authority in purported exercise of power conferred by law.”**

Lord Scarman citing the decision of the House of Lords in *REG v INLAND REVENUE COMMISSIONERS, ex-parte NATIONAL FEDERATION OF SELF EMPLOYED AND SMALL BUSINESS LTD (1988) AC 617* has held that a claim for judicial review may arise where the Commissioners have failed to discharge their statutory duty to an individual or have abused their powers or acted outside them and that unfairness in the purported exercise of a power can be such that it is an abuse or excess of power. Lord Templeman at pg 862 has adopted the same approach in these words:

**“Judicial review is available where a decision making authority exceeds its powers commits an error of law, commits a breach of natural justice, reaches a decision which no reasonable tribunal could have reached or abuses its powers.”**

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Abuse of power has on the ground taken several forms firstly as in the *Wednesbury sense* that is, use of power for a collateral purpose reneging without adequate justification by an otherwise lawful decision and finally that the courts have the power to redress unfairness and that power that has been abused is power which has not been lawfully exercised.

From the above analysis of the law on this point the Report does breach the principle of legitimate expectation of the applicant in the following ways:

(i) The Judicial Commission (JC) would act as a judicial inquiry and adhere to the principle of law. As reviewed above the Commission failed to take into account the relevant provision of the Constitution and possible constitutional conflict, the National Assembly Power and Privileges) Act. The Permanent Secretary to The Treasury Incorporation Act, Cap 101 and the Exchequer and Audit Act, the Financial Regulations including misdirecting themselves on the principle of illegality of the 15% extra payment and failed to appreciate the legal implications of documents such as the letter to IMF, Nyachae/Ringera, PAC 1991-1992, Hansard Report on the Motion and Resolution of Parliament on the 15 per cent, extra gratia

(ii) The (J.C.) would not disregard principles of law in arriving at its conclusions and recommendations. The particulars in (1) above would also apply here;

(iii) The (J.C.) would honour its assurances that it would act judicially – Same particulars as in (1) above apply to this item;

(iv) The (J.C.) would act towards all persons including the applicant with fairness in its decision-making

- Persistent refusal to admit in evidence Exhibit 88, the Police Inquiry Statement of Mr Mbindyo the PS at the time the approval of the 15 per cent was given. Exhibit only admitted after three separate applications.

- Ignoring the findings of Nyachae/Ringera letter Ex 179B.

- Failure to give reasons as to why the letter was not referred to by the commissioners or reasons for failure to depart from its findings

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· Failing to ascertain when the applicant left office i.e. 13<sup>th</sup> January 1993 and making a finding that the applicant left in or about March 1993 or in or about February/March and reaching the erroneous conclusions that the Goldenberg empire or hub had started to crumble after the applicant's departure whereas during the applicant's tenure only 255 million was paid out which payment was legally due under the Local Manufacturers Act whereas immediately after his departure on 13<sup>th</sup> January 1993, between March and April huge amounts of Kshs 5.8 billion were paid out and between April and July another big tranche of 13.58 Billion was paid out although these payments were not paid as exgratia payments;

· Imputations and allegations of abuse of office by the Applicant in the face of Parliament's verdict that the exgratia payments were procedurally correct and in the face of the documents such as Nyachae/Ringera letter to IMF, PAC Reports I & II, Mbindyo Police Inquiry Statement and in the face of the 15 steps taken by the Applicant namely:

(1) Calling in Prof Ryan, upon the presentation of the proposal for additional 15% prior to approval;

(2) Following the advice of the Permanent Secretary Treasury to grant additional Compensation - Mbindyo Police Statement 1995 Ex 188 and Nyachae/Ringera report of 27<sup>th</sup> July 1998 Ex 179 page 183;

(3) Following the advice of the P.S. Ministry of Environment and Natural Resources to grant additional compensation Ex 35 – Letter of 14<sup>th</sup> August 1996;

(4) Refusing the monopoly in writing;

(5) Following the Advice of the Attorney General to pay 15% exgratia – Mbindyo evidence verbatim page 17564 2<sup>nd</sup> November, 2004);

(6) Following advice of PS Mbindyo to pay 15% exgratia – testimony of 2<sup>nd</sup> November, 2004;

(7) Setting reasonable safeguards for the exgratia payments as on 28<sup>th</sup> November, 1991

· There had to be actual expectation

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- The foreign exchange had to be earned through that export
- There had to be full remittance of that foreign exchange
- Evidence of each of the above three conditions had to be produced each time payment was claimed by GIL

(8) Terminated the 15% exgratia on 9<sup>th</sup> January 1992;

(9) Rejecting the Appeal of GIL against the termination on 17<sup>th</sup> January 1992;

(10) Rejecting the Appeal of the Mines Commissioner on 10<sup>th</sup> January 1992

(11) Reducing the 20% Export compensation to 18% L.N. No.6 of 1992 Ex 91D

(12) Issuing Legal Notice 142/1992 for physical inspection of gold exports on 4<sup>th</sup> June, 1992

(13) Applicant had nothing to do with 5.8 Billion paid on 19<sup>th</sup> April 1993 –

28<sup>th</sup> June 1993 ,6<sup>th</sup> July 1993 .

(14) Applicant had nothing to do with payment of 13.58 Billion which was paid in 1993 after the applicant had left and one year after the abolition of the 15% additional payment. 13.58 billion was in respect of spot contract transactions.

(15) Applicant had nothing to do with the payments for Preshipment Loans which facility was between the World Bank and Government of Kenya.

(v) The JC would not exercise the discretion vested in it in any unlawful manner that was discriminating against the applicant or anyone – particulars as above.

(vi) The JC would not act in a manner that would frustrate the policy of setting up the Commission and thereby act illegally (see *R v IMMIGRATION APPEALS TRIBUNAL ex-parte B SINGH (1986) I WLR 910* – failing to act in the public interest by failing to correctly apply the law and s 7 of the Commissions of Inquiry Act cap 102.

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(vii) The JC could not ignore weighty and cogent evidence in its conclusions – thereby failing to consider relevant considerations.

(viii) The JC would take into account all relevant evidence and not take into account matters which it should not Particulars as above including Hansard – AG’s contribution in Parliament PAC, Nyachae/Ringera, Kijana Wamalwa’s contribution on legality and Parliamentary Motion and Resolutions

(ix) The J.C. would not treat the applicant or anyone else differently from other persons in the applicant’s situation

(x) The JC would not discriminate in favour of or against individuals, the submissions made by the applicant and all others would be weighed and reasons, if any, for their rejection given and made public

(xi) It is expected by the public that the JC would not act on any false basis and would not act without due process in violation of the law.

(xii) A litany of 28 errors in the Report as regards the applicant was not contemplated by the applicant

Going by the analysis of the law each of the above constitutes legitimate expectations by the applicant which expectations were thwarted by the Commission and for the above reasons certiorari should reach out to the Report on behalf of the Applicant.

Moreover we find and hold that in the special circumstances analysed and in so far as they are in relation to the Applicant, the Report falls far short of the statutory duties imposed on the Commissions by s 7 of the Commissions of Inquiry Act Cap 102 of the Laws of Kenya. We hold that the Report cannot in the circumstances be said to be a full Report as regards the Applicant. We hold that it is not a faithful Report as regards the Applicant. We hold that it is not an impartial report as regards the Applicant. We hold that it is not a fair report as regards the applicant.

**VIOLATION OF S 77 OF THE CONSTITUTION**

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1. The applicant has contended that he cannot have a fair trial if the prosecution is violating s 12 of the National Assembly (Powers & Privileges) Act Cap 6. We are in agreement with the applicant's submissions on this point and we have elsewhere in this judgment addressed the constitutional underpinnings of s 12 including the need to avoid conflicts with Parliament pursuant to the doctrine of separation of powers. Of course we must caution, that in Kenya unlike some of the Commonwealth countries such as the United Kingdom, it is the Constitution that is supreme and not any of the three arms of Government and therefore the common law cases concerning the supremacy of Parliament in the United Kingdom must be read with this proviso in mind. The effect of this is that where any of the other arms encroach on a territory that is not theirs under the Constitution they can be challenged under the constitution;

2. The Constitution demands that a trial must be held by an independent and impartial Court, within a reasonable time. Our finding on this is that the principles laid down in *GITHUNGURI v R* (1986) KLR I apply due to the position the Attorney General has taken in the matter in the last 15 years for example:

(a) His contribution in Parliament did create an implied representation that after the deadline of 15<sup>th</sup> May 1995 a final position should have been reached.

(b) The Nyachae/Ringera representations to the IMF are very firm representations given on behalf of the Country by among others the Hon the Attorney General. The representations in the letter were acted on by the IMF and it would not be just to allow the Attorney General to change course now, under a new Administration.

(c) The applicant is a member of Parliament who in making his contribution in Parliament defended himself on the floor of the August House. Historically Parliaments were in certain jurisdictions called the High Court of Parliament in that as regards matters within their jurisdiction they were regarded as final and could not be reopened elsewhere. There is a semblance of double jeopardy.

In this connection the Hansard Report records that the applicant was subjected to questions and points of order. For this reason we find that subjecting him to a trial allegedly on the grounds of new evidence cannot result in a fair trial because it violates his pre trial rights as

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enunciated in the GITHUNGURI case and recently elaborated on, by the Presiding Judge of this Court in the case of *R v THE FIRST CLASS MAGISTATE AT CITY HALL NAIROBI* ex-parte SENNIK (supra). Thus, for example the comments made in Parliament and by other public officers have already prejudiced the principles of a fair trial, so that even if Kenya were to choose to fly in a Judge from Greenland for the trial, instead of a local Judge such Judge would most probably acquit because the principles of a fair trial have acquired an international dimension and there is a commonality of standards. On this refer to the SENNIK case supra;

3. We concur with the Applicant's Counsel on their argument that there cannot now be a trial of the Applicant unaffected by the Report and by the said errors and breaches of law by the commissioners, which errors and breaches have been widely and serially publicized nationally as truth and law in the past three years. No fair trial can result. In a way this has resulted in some shift of burden before the actual charging and has also seriously and adversely affected the presumption of innocence – again refer to the SENNIK case. This in our view violates s 77(1) of the Constitution

4. We agree with the Applicant's submission that instituting any criminal charges against him would be in contravention of the principle laid down in the GITHUNGURI case supra which principles have been extensively applied.

5. The learned and eloquent DPP has strongly argued that the applicant has himself to blame for not appearing at the commission but we find that the DPP's argument is substantively flawed in that the Applicant did not in any way lose his right to a fair trial which must include any of his pre trial rights. It is also not good law for the DPP to argue that the Applicant should be arrested and charged so that he can raise whatever defences he has in a trial court. The Court has a constitutional duty to ensure that a flawed threatened trial is stopped in its tracks if it is likely to violate any of the applicant's fundamental rights. The court is empowered under s 84 of the constitution to give such orders as are just to secure such rights. It is no consolation to the applicant to tell him after 11 to 15 years of investigations in a matter where the Attorney General had access to all the files that he will have a fair trial and receive justice. The office of the Attorney General is the foremost

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defender of the rule of law. It cannot be heard to say to a court of justice regarding an applicant for relief,

**“Do not worry I now have new evidence against you after 11 to 15 years”!**

The applicant’s pre trial rights include the constitutional assurance that he will have a fair trial and presumption of innocence. The commencement of that trial ought to have taken place if at all many years ago. The inaction and inertia, as revealed in his case violates both the letter and the spirit of s 77 of the Constitution both as regards pre trial rights and the trial rights if a criminal case were to be instituted and also it cannot in the circumstances be said to have taken place within a reasonable time.

We are alive to the following in making the above findings concerning pre trial and actual trial rights:

(i) The L.S.K’s. private prosecution of the applicant of 1994 where the Attorney General objected to it, on the ground that he would undertake his own prosecution;

(ii) Hon Raila Odinga’s “private prosecution against the Applicant which the Attorney General also terminated in 1995 by entering a *nolle prosequi*;

(iii) In 1994 the matter was debated in Parliament following that year’s Public Accounts Committee Report. The Attorney General is an ex officio member of Parliament. He had already filed about three other cases in court but never touched the applicant;

(iv) In 1995 the House debated the Public accounts Committee (PAC 2) where their conclusion appears to target the applicant’s approval of GIL’s proposals. Page 21 of the PAC Report reads:

**“After evaluating all the evidence which was made available to the committee, it was noted that the Government followed normal procedures of approval in granting the request by GIL”**

The Attorney General is recorded in the Hansard, at page 334, 11<sup>th</sup> April 1995 to have made his contribution in those words:

**“Mr Deputy Speaker Sir, I stand to support the amendment moved by the Minister for finance (Hon Mudavadi).**

**“With those few remarks I beg to support” page 338 Hansard in the April 1995.**

And the Motion was unanimously passed by the House as follows:

**“That this House adopts the Report of the Public Accounts Committee on the government of Kenya Accounts for the year 1992/1993 which was laid on the table of the House on 30<sup>th</sup> March 1995 to the exclusion of paragraphs 38,39,40 and 112 and recommendations appearing therein, taking into account the fact that the *Government Policy decision* to grant export compensation to gold and diamond jewellery was done procedurally” Page 520 Hansard 19<sup>th</sup> April 1995.”**

Also see the Attorney General’s further contribution in Parliament on 11<sup>th</sup> April 1995 where he says that on 12<sup>th</sup> October, 1993 he had pursuant to his powers under s 26(4), instructed the Commissioner of Police to carry out investigations and to report back on all GIL issues and further directed that progress reports be filed with him until the final report – see 334 Hansard 11<sup>th</sup> April 1995 and 338 Hansard 11<sup>th</sup> April 1995 when he gave a final deadline of 15<sup>th</sup> May 1995 as the latest date for the receipt of the final report. According to the record what resulted from the so called comprehensive, intensified investigations and final report, was the filing in 1997, 1998 and 1999 of criminal cases in connection with the Goldenberg affair. The applicant was never charged. During the 1994 and 1995 the Attorney General initiated criminal proceedings against other persons and in all to-date he has filed 9 cases touching on alleged omissions and commissions of the Goldenberg affair – all without the applicant. The cases have been ongoing for 9 years. The Nyachae/Ringera Report signed on behalf of the Attorney General concludes:

**“The evidence was gathered by the police and analysed by the Attorney general’s office:**

Surely this is an express assurance by the Attorney General on behalf of the people of Kenya including the applicant because it was signed by a Finance Minister and a senior Judge on behalf of the Attorney General. In addition he was *amicus curae* to the Commission. Conditionalities of funding by IMF are Cabinet matters and the applicant was in the Cabinet.

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Our finding is that the cumulative effect of the Attorney General's actions as indicated above including the specific assurance to IMF by his office do constitute implied representations in the nature of the **GITHUNGURI** situations where there were specific undertakings and assurances and the Attorney General should be confined or held to his bargains. We have also to take into account that we have in this judgment found serious flaws in the Report upon which the Attorney General is apparently reacting by ordering further investigations in conformity with the recommendations on the Applicant. It is also important for us to mention that when the applicant came to court on 3<sup>rd</sup> March this year the applicant did not ask for any conservatory order to stop any investigations and when the Notice of Motion was filed on 3<sup>rd</sup> March 2006 no indications have been given by the Attorney General that the further investigations have yielded any further evidence otherwise he would have said so by filing an affidavit. Even with further evidence we find and hold that in the circumstances there cannot be a fair trial and where there cannot be a fair trial prohibition must issue. Moreover the resolution of Parliament quoted above clearly approved the Government policy decision to grant export compensation in respect of gold and diamond jewellery and further approved the payments. The question is, can that policy decision validly form the subject matter of a criminal offence against the applicant on a matter of policy? To us the answer is a clear "NO". The Local Manufactures Act which came into force on 1<sup>st</sup> November, 1974 states:

**"An Act of Parliament to provide for compensatory payments to be made in respect of certain locally manufactured goods which are exported from Kenya and for matters connected therewith and incidental thereto." Compensatory payment" is defined in section 2 of the Act as a payment provided for under s 3 of the Act – this was the 20% which was payable to exporters as a matter of law. The so called 15% was additional payment outside the Act and which the Government experts wanted introduced as a matter of policy as an additional incentive and they had done an evaluation on it. The "Commissioner" under the Act is the person in charge of Customs and Excise Department."**

It is in the light of the above that the repeated findings by the Commission that the 15% was illegal without giving reasons is questionable because Parliament, PAC, Nyachae/Ringera Report all treated the additional 15 per cent as additional incentive introduced as a matter of Government policy hence the conclusion by PAC, Parliament, Nyachae – Ringera Report.

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Even on the assumption that the 15% was illegal can it form the subject matter of a criminal case against the applicant in the face of s 57 of the constitution and s 12 of the National Assembly (Powers and Privileges Act). Our answer is no for the reasons set out above.

In our view the contemplated proceedings by the Attorney General in relation to the applicant would constitute abuse of power, immoral and lacking in good faith in view of the Nyachae/Ringera Report and he cannot shelter himself behind his powers under s 26 of the Constitution and this Court is perfectly entitled to stop him where he is not using his powers in a judicial manner. The court is entitled pursuant to s 84, 123(8) of the Constitution and the inherent powers of this Court. It would be unjust for this court to overlook and forget the Attorney General's clear statements to Parliament, directions to the Commissioner of Police under s 26, his written findings and assurances to the IMF, his inertia for 11 years, his decision about who to charge. We find that the cumulative effect of all the above constitutes bad faith arbitrariness and abuse of power. Only an overriding interest would justify the Attorney to act otherwise. That overriding interest would have been asserted by way of prompt prosecution of any suspects and speedy recovery of the looted billions. The Attorney General's inertia of over 11 years has compromised that overriding interest. Legitimate expectation does not of course apply to the Attorney General but any change of mind in the circumstances described does invite action by this Court under s 84, 123(8) and s 3 of the Judicature Act including the inherent powers to prevent abuse of power, violation or likely violation of a fair trial within a reasonable time and likely breach of the fundamental rights of the applicant. Legitimate expectation as expounded on in this judgment does of course apply to the Commission.

**BIAS AND UNFAIR TREATMENT OF EVIDENCE FAVOURABLE TO THE APPLICANT**

The following have been relied on in supporting that the Commission was biased:-

A. The Applicant has contended with justification, in our view that three separate applications were made to admit Exhibit 188, the Police Inquiry Statement of former PS Mbindyo wherein he confirms that he had checked with other ministries – and that there was an inter ministerial Committee which had recommended additional incentive to the Minister. No good reasons were offered for the reluctance to admit the evidence, yet it touched on an

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important aspect of the inquiry and counsel for the applicant have contended that the statement was admitted in dying moments of the Commission.

B. Ignored the findings of Nyachae/Ringera Report and only made a casual reference to it notwithstanding its potential for creating a legitimate expectation This is indicative of failure to take into account a relevant consideration.

C. The Commission's imputations and allegations of abuse of office by the applicant which imputations could result in a criminal charge, made in the face of 15 steps taken by the Minister and reproduced elsewhere, overlooking vital documentary evidence that the Minister acted upon evaluation by public officials and advice by the PS as per the Police Inquiry Report of Mbindyo which the Commission was reluctant to admit. Our finding on this is that 15 steps taken by the Applicant are inconsistent with the imputation and allegations made against the Applicant and therefore the imputations and allegations are patently irrational. We find the conclusions here against the principle of proportionality and also against the weight of the evidence on the face of the record and a violation of the Commissioners' duties under s 7 of the Commissions of Inquiry Act.

D. Making findings on a fundamental error in para 588 of the Report in relation to the applicant by concluding that almost all GILS operations were during Hon Saitoti's tenure as Minister for Finance and coming up with an arbitrary change of guard date (not specified) between the two Ministers yet the date of appointment was 13<sup>th</sup> January 1993 and it is after this date that the substantial payments of 5.8 Billion and 13.58 Billion were paid out long after the Applicant had left the high office. Even in the face of this horrendous finding or conclusion concerning the relevant change of guard date the Commission concludes:

**“It can be reasonably inferred too that Hon Saitoti and Mr Kotut supported the activities of GIL. That is the more so considering Hon Saitoti's conduct whenever issues about the additional export compensation were raised by staff of the Ministry of Finance. Whether Hon Saitoti should *face appropriate criminal charges* arising from his own actions should be considered. The evidence on record is that the activities and the loss for which the Commission was appointed to inquire escalated.”**

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We found that this conclusion constitutes a fundamental error of fact and is indicative of bias, failure to act fairly, faithfully and impartially.

Our finding on this is that it is a clear case of bias on the part of the Commissioners. This conclusion and the muddle on dates cannot in our view be accidental, in view of the drastic recommendations made contrary to the evidence, apparent on the face of the record. We find that the fundamental error concerning the operative date does not only constitute a clear perception of bias but also causes a reasonable person to imply bias and the order of certiorari must issue to quash any reference to the applicant in the paragraph. It is our further finding that in this recommendation or imputation the Commissioners went outside their mandate and in view of our findings on bias, in relation to the applicant the report cannot be full, fair and impartial as required by s 7 of the Act under which the Commission was appointed;

E. Unfairly attributing blame to the Applicant concerning Customs Refunds which were passed by Parliament as such where the Applicant had no role as a Policy maker. Vouchers were dealt with or supposed to be handled in accordance with the Financial Regulations by those implementing the policy including the P.S. Explanation of the change of description was given to the Public Accounts Committee (PAC) which it accepted but ignored by the Commission see Ex 99;

F. We have been unable to find fault with para 72 of the Applicant's affidavit concerning different Treatment to him. This was never controverted by the Attorney General at all. The treatment was selective and targeted e.g. accepting accomplice evidence as regards the applicant and rejecting accomplice evidence against others in similar situations. We found this irrational.

G. In addition apart from a half hearted attempt by the Attorney General to explain the late Buluma's advice the Attorney General never made any attempt to explain away the 28 major errors of fact set out in the Verifying Affidavit of the Applicant paragraph 13, A1-A28. The errors of fact include conclusions unsupported by evidence, fundamental factual errors and errors of precedent fact. Many of these errors cannot pass the Wednesbury test of reasonableness.

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As set out in **JUDICIAL REVIEW HANDBOOK** by Michael Fordham 3<sup>rd</sup> Edition pages 728 and 740, errors of fact are not only reviewable but correctable.

In the illustrations we have described in this judgment, the Commissioners have failed to correctly address the law – this constitutes errors of precedent fact and go to jurisdiction which in turn, means that the Commissioners were unable to discharge the statutory duties in terms of s 7 of the Commissions of Inquiry Act Cap 102. As regards errors of other facts our finding is that all are caught under the headings: irrationality, Wednesbury unreasonableness, irrelevant considerations, or failure to take account of relevant considerations and bias. It is not possible to label each of the (28) errors but they are in our view sufficiently addressed in the applicant’s affidavit and this have not been controverted – see **GITHUNGURI CASE**.

The Court accepts the label given to each of the 28 lapses or errors by the applicant.

Our finding is that again the errors are far from being accidental in view of their nature and consistency in making them notwithstanding the great public interest in the Commission’s work. What is lamentable is that, it is not one error they made but a litany of 28 errors! Regardless of the number of errors our finding on this is that they constitute evidence of bias, partiality and the cumulative effect is the Commission’s inability to discharge its statutory duty to the Applicant under s 7 of the Act. They further constitute irrationality and Wednesbury unreasonableness in some cases, absence of impartial approach and discriminatory treatment, all of which are grounds for intervention by way of order of certiorari - see **JUDICIAL REVIEW HANDBOOK** 3<sup>rd</sup> Edition Michael Fordam at page 728, where the law is set out as under:-

**“A body must not make errors of precedent fact, conclusions unsupported by evidence or fundamental factual errors.”**

Paragraph 49.1 the learned author has observed:

**“If a public body considers the factual trigger to exist when in truth it does not exist, the body is proceeding to exercise a function which in truth is beyond its powers. This justifies the Court in investigating for itself the key question of fact on all available**

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**material. Accordingly, errors of precedent fact are not just reviewable, but correctable.”**

In the matters described above this Court is cautious about entertaining challenges based on alleged factual errors because questions of fact are primarily entrusted to the public decision maker. Generally a court cannot substitute its own decision in place of the public body on all questions: law, fact, judgment, policy and discretion. However the court may appropriately intervene to correct a fundamentally flawed conclusion of fact see FORDHAM pg 73 para (49.1.2). Court’s intervention is limited to:

- a mistake as to fact can vitiate a decision as where the fact is a condition precedent to an exercise of jurisdiction
- where the fact is the only evidential basis for a decision or
- where the fact was as to a matter which expressly or impliedly had to be taken into account
- where finding out of tune with the evidence
- where a finding is perverse or where the commissioners have misdirected themselves on law by a misunderstanding of the statutory language or otherwise that a determination cannot stand.

The above principle gives the court the power to intervene

e.g. where as in paragraph 588 the Commission has made a fundamental mistake concerning an important date of appointment of the two Ministers, where the Commission has instead of considering Financial Regulations has substituted its own findings that the Minister was responsible for implementation instead of policy. The determination or representation or innuendo that the applicant was responsible for the big loss of 5.8 billion and 13.58 Billion whereas the applicant had left office and that the hub of Goldenberg collapsed after the departure of the applicant is unsupported by evidence and as we had said earlier this is indicative of bias and does affect jurisdiction.

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Also, where a body reaches unsustainable conclusion of fact this constitutes Wednesbury unreasonableness:

**“This applies to a decision which is so outrageous in its defiance of logic or accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it.”**

The findings in para 588 cannot attract any other label except Wednesbury unreasonableness and irrationality on the face of the Report. There was no material upon which the findings in this paragraph could have been based. In the cases of *EDWARDS v BARSTOW* [1956] AC 14 and *R V INLAND REVENUE COMMISSIONERS exp. PRESTON* [1985] AC 835, 862F it was held that the court is entitled to substitute its own opinion for that of the person to whom the decision has been entrusted only if the decision is so aberrant that it cannot be classed as rational. The Court is also entitled to intervene for error of law including absence of any material on which the decision could reasonably be reached – see **JUDICIAL REVIEW HANDBOOK** 3<sup>rd</sup> Edition page 732 para 49.2.5. Material error of fact results in the decision being ultra vires and the court can intervene.

With the above principles in view, we hold that certiorari shall issue to quash the determination arrived at as a result of the errors in the decisions identified in this judgment.

Where we have concluded that there was bias as per the Report we applied the following definition of bias:

(1) In *R v SUSSEX JUSTICES exp McCARTHY (HC 1924)* the court enunciated the following definition of bias:

**“it is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done”**

(2) In *R v GOUGH (HL1994)* the test was formulated by posing the following question:

**“is there a real danger of bias by the decision maker? The Court must apply an objective test and not make a judgment on the likelihood of a particular tribunal being, in fact, biased.”**

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On this issue we prefer the test of bias in the Australian case of *WEBB v THE QUEEN* 1994 181 CLR 41 where Mason CJ and McHugh J commented:

**“In considering the merits of the test to be applied in a case where a juror is alleged to be biased it is important to keep in mind that the appearance as well as the fact of impartiality is necessary to retain confidence in the administration of justice. Both the parties to the case and the general public must be satisfied that justice has not only been done but that it has been seen to be done. Of the various tests used to determine an allegation of bias the reasonable apprehension test of bias is by far the most appropriate for protecting the appearance of impartiality.”**

In the case before us there is more than an appearance of bias taking into account for example para 588 of the Report due to, constant references to illegality and imputations of a criminal offence, abuse of power and litany of errors by the Commissioners.

In the *R v BOWSTREET METROPOLITAN STIPENDIARY MAGISTRATE ex-parte PINOCHET UGARTE (No 2)* appearance of bias was sufficient to attract the order of certiorari.

Our finding on this is that there is something close to actual bias in the light of the cumulative lapses, fundamental factual errors, omissions and commissions highlighted in the verifying affidavit and which have not been controverted

(3) The test of bias applies to all public law decisions and is not confined to judicial or quasi judicial bodies or proceedings

(4) Concerning irrelevant considerations we would like to adopt the test formulated by the House of Lords in the case of *PADFIELD v MINISTER OF AGRICULTURE AND FISHERIES 1968* (HL) that where a body takes account of irrelevant considerations any decisions arrived at become unlawful. In the *PADFIELD* case Lord Upjohn ruled that unlawful behaviour might be constituted by

(a) an outright refusal to consider the relevant matter

(b) a misdirection on a point of law

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- (c) taking into account some wholly irrelevant or extraneous consideration
- (d) wholly omitting to take into account a relevant consideration.

### THE PRINCIPLE OF PROPORTIONALITY

On this the applicant contends:

1. The commission is in breach of the principle of proportionality
2. the Commission did not maintain proper balance between the adverse effects its decision would have upon the rights, liberties and interests of the Applicant and the statutory purpose it was required to fulfill.
3. the Commission has not struck a fair balance between the general and public interest of the community and the protection of the fundamental rights of the Applicant
4. the Commission errors of fact and errors of law have substantial direct and irreversible adverse consequences upon the Applicant which are wholly disproportionate. Thus, the 20% paid during the Applicant's tenure of office was approximately 255 million yet the Commission's findings, determination and mandate relates to loss of billions. The Commission's attention has focused on the 15 per cent additional compensation and failed to give proportionate attention to the recognition of loss of billions which is the main mission of the Commission. The principle of proportionality is recognized in our Constitution. In 1980 the Committee of Ministers of the Council of Europe did define proportionality as under:-

**“An appropriate balance must be maintained between the adverse effects which an administrative authority decision may have on the right, liberties or interests of the person concerned and the purpose which the authority is seeking to pursue.”**

In view of our conclusions on irrationality, unreasonableness, illegality bias, and bad faith, we find that since the interests of the applicant were not in any way inconsistent with the Commissions, fair, faithful and impartial findings the ultimate decision, determination or findings concerning the applicant are out of proportion – the Commission struck the incorrect balance. It should not be forgotten that where there is a likelihood of breach of fundamental

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rights and freedoms the Courts should adopt a high intensity review in considering the conclusions reached based on this principle. When the high intensity test or a more searching scrutiny by the court is applied as it should be because there is an element of human rights, the major conclusions cannot in our view satisfy the test and certiorari would also issue on the ground of lack of proportionality. It should be noted that the principle of proportionality is well entrenched in our Constitution especially in the determination on limitations in Chapter 5 of the Constitution.

### BAD FAITH

The Commission's errors of fact and errors of law as analysed above constitute breaches of its duty to act in good faith. The evidence was not fairly considered in relation to the Applicant. The Commission's adverse remarks, findings and decisions disclose bias and/or apparent bias. Bad faith may be precipitated by any failure to give reasons because failure to give reasons for a decision is that it may suggest that there is no good reason and the resultant decision is irrational. There is therefore considerable overlap with the other subheadings of irrationality such as unreasonableness, irrelevant considerations, improper purpose, abuse of power.

It is impossible to analyse each and every omission. Suffice it to say that we do endorse fully the able arguments of the advocates for the applicant, namely leading Counsel Pheroze Nowrojee and Fred Ngatia as reflected in the skeleton arguments on the effect of the errors of law and fact in the Report. We further wish to observe that the learned DPP did not respond to the contentions on errors except in respect to the matter relating to the advice said to have been given by the late Mr Buluma. The Applicant's contentions are uncontroverted. The learned DPP did however submit that the lapses if any did not constitute Wednesbury unreasonableness. However as clearly demonstrated above the grounds of intervention in the circumstances of this case are much wider and they cover almost the entire spectrum of intervention in Judicial review because of the overlap.

We further accept the applicant's contention that the Commission in so far as the applicant is concerned has created a pyramid of noticeable bias, discriminatory treatment of evidence and submissions, factual errors both facts Precedent and other facts, including failing to take

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into account material evidence apparent on the record and as a direct consequence the pyramid has resulted in erroneous and biased conclusions.

A good example of this is the constant mention in its findings of illegal payments, illegal incentives even in the face of Parliamentary approval and the provisions of section 4 and s 12 of the National Assembly Powers & Privileges Act, the Constitution, and also failure to act judicially even after having warned itself as a Commission thereby compromising its findings, determinations and decisions as against the applicant. In view of the lapses described in these proceedings – both of omission and commission our finding is that in so far as the applicant is concerned the Commission did not discharge its duties in accordance with s 7 of the Commission of Inquiry Act as regards the Applicant. Thus, there cannot be full inquiry if it is based on fundamental errors, if the evidence relied on is evidence other than that taken before the Commission. It cannot be an impartial inquiry if it treats one person one way and the other the other way. It cannot be a faithful inquiry if the Commission has failed to take into account matters it ought to have taken into account or it has acted unreasonably or irrationally in arriving at its findings, determinations or decisions.

Finally, jurisdictional (such as not addressing the applicable law) and fundamental errors do attract certiorari. Perhaps it is also important to emphasise that the applicant had legitimate expectation that the Commission would conduct itself in a judicial manner. However in view of the jurisdictional and fundamental errors it (the Commission) cannot be said to have been fair to the applicant. By imputing, suggesting or implying the Commission of a Criminal Offence by the applicant before any charges are preferred, the applicant has been denied the right to equality of arms and therefore disadvantaged in any future trial. In the case of *R v THE SUBORDINATE COURT OF THE 1<sup>ST</sup> CLASS MAGISTRATE AT CITY HALL NAIROBI ex parte SENNIK H C Misc Civil Application No. 652 of 2005 supra, Nyamu J* quoted with approval the definition of equality of arms in the Jamaican case of *CAPBELL v JAMAICA* 24<sup>th</sup> March 1993 UN doc BAOR A/48/40 Vol II p 44 para 64:

**“The right to equality of arms is an essential feature of a fair trial and it is an expression of the balance that must exist between the prosecution and the defence.”**

In this regard, the Commission repeated use of words such as illegalities, criminal, cheating of Parliament just to give a few examples does demonstrate in our view a mindset aimed at a

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particular result to the apparent disadvantage of the applicant. This in our view has compromised the applicant's position and also violates s 77 quite apart from the fact that it unfairly compromises the applicant's right to equality of arms which is one of the ingredients of s 77 namely the right to a fair trial or as put in the GITHUNGURI case "a square deal."

It is also vital to mention that the Commission was appointed in the public interest. However any disregard of the relevant law defeats that public interest. Legitimate expectation is after all about fairness.

Finally as regards the Attorney General in view of the events described earlier namely Inertia of 11 years, his clear contribution in Parliament including supporting the policy decision on 15 per cent, his specific advice and assurances to IMF which were acted on clearly, stating that there was no criminal intent on the part of the applicant, PAC 1 and PAC 2, failure to unearth or state that he has any fresh evidence on the applicant, the possibility of any vital evidence having been lost by the applicant for his defence due to the inaction of over 11 years. He has by conduct denied himself the right to prosecute the Applicant in future in connection with the same issue. In addition, in view of the constitutional implications of the courts dealing with the same matter which was concluded by Parliament including the implications, of s 57, 77 of the Constitution and s 12 of the National Assembly (Powers and Privileges) Act and the doctrine of separation of powers and the illegality of instituting criminal proceedings against a member of Parliament on charges which stem from a policy decision approved by Parliament, and abuse of the court process this court must protect itself against abuse of its process. This Court cannot countenance the Attorney General acting against the public interest which he is supposed to uphold. Threatening criminal charges contrary to law is acting against the Public Interest.

### CONCLUSION

We are aware that the greater public interest was the ability of the Attorney General and other mandated agencies to prosecute the culprits of the Goldenberg Scandal and to recover the looted billions but we believe that no shortcuts should be taken because administering justice in the process and in every case that comes before the court is an even greater public interest. Despite the scandal the courageous people of this nation have risen from the ashes. This is why it is important to remember that as our national anthem exhorts justice must

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continue to be our shield and defender. The courts must never shy away from doing justice because if they did not do so justice has the capacity to proclaim itself from the mountain tops and to open up the Heavens for it to rain down on us. Courts are the temples of justice and the last frontier of the rule of law. We would like to repeat the words of the single Judge when he granted interim relief to stop the arrest of the Applicant:

**“Justice has its own momentum. Even when delayed it has a capacity to reassert itself in due season!”**

Public interest includes observance of the law by all including all Constitutional job holders. We hold that the Attorney General as the foremost defender of the public interest should never ever act in a manner that has the potential of violating the public interest. This Court has the Constitutional mandate under s 123(8) of the Constitution and s 84 of the Constitution and its inherent powers to stop any such threat.

### WHY THE COURT MUST INTERVENE

The learned DPP has powerfully argued that this court should only be concerned with the decision making process and not the decision. He is right, because this is the core business of judicial review but there are situations which would justify the court to target the decision especially where the court is presented with a completed task as has happened here.

We have no hesitation in observing that our intervention would be perfectly justified, under the powerful holding, by Lord Reid in the case of *ANISMINIC LTD v FOREIGN COMPENSATION COMMISSION* [1969] 2 A.C. 147 (HL) in these words:

**“It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity. But in such cases the word ‘jurisdiction’ has been used in a very wide sense, and I have come to the conclusion that it is better not to use the term except in the narrow and original sense of the tribunal being entitled to enter on the inquiry in question. But there are many cases where, although the tribunal had jurisdiction to enter on the inquiry, it has done or failed to do something in the course of inquiry which is of such nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the**

**course of the inquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which, under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decided a question remitted to it for decision without committing any of these errors it is as much entitled to decide that question wrongly as it is to decide it rightly. I understand that some confusion has been caused by my having said in *REG v GOVERNOR OF BRIXTON*, ex-parte ARMAH [1968] AC 192 234 that a tribunal has jurisdiction to go wrong. So it has, if one uses ‘jurisdiction’ in the narrow original sense. If it is entitled to enter on the inquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equally valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law ...”**

We approve Lord Reids words as good law but we are firmly of the view that due to the circumstances of this case, the omissions or commissions fall under the first part of the above quotation and we have the power to intervene. For example take our findings on the issue of bias or the failure to discharge the Commissioners statutory duties under s 7 of the Commissions of Inquiry Act. The courts conclusion that any of this factors exist must inevitably justify intervention. To take the matter to another level, the recommendations on the applicant do in a big way affect his liberty. This in turn meant that the Commissioners ought to have considered the implications of their findings, decisions and determinations on the applicant’s right for example to a fair trial under s 77 of the Constitution and perhaps restrain themselves from using a language that would compromise the applicant’s defence or put him at a disadvantage. We do not think any judicial or quasi judicial body can even for a minute be allowed to operate outside the Constitutional provisions. Although the application has been quite rightly been brought under the Law Reform Act Cap 26 because of the status of the Commission the Attorney General has also been served, and an order of prohibition has been sought against him because of the Constitutional implications of the Commission’s findings and his threat to arrest and prosecute the applicant. Under S 3 of the Judicature Act and s 84 of the Constitution this court is empowered to give such orders or issue such writs as

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would be necessary so as to secure the fundamental rights so that as hinted elsewhere if the applicant's right to equality of arms has been violated or threatened by the Attorney General this Court would be entitled to issue an order of prohibition against the Attorney General. This application is on the ground, a hybrid one, because of the involvement of the Attorney General.

For the avoidance of doubt the Commission having completed its task the reference to the Commission in this judgment refers to the Commission itself and the Commissioners as well.

It is with the above in view and with great respect to the Commissioners who did a lot of work to produce the Goldenberg Report, that we grant the two orders prayed for in the application. Firstly, as demonstrated above because the applicant, is in the circumstances described above entitled to the orders on merit and secondly because it would be grave injustice for our justice system to tolerate even for a minute longer the errors which are patently on the face of an important historical document, the Goldenberg Report. Like a mountain withstands winds and the elements, it should only remain so, after enduring the challenges of justice. Only then can our generation be able to bequeath it to the next generation.

Like so much straw into a burning fire let this order of certiorari consume all offending references. Like fire which converts, everything to itself let this order of certiorari remove and convert the dark spots. Like guided missiles hit only the target, let this order have the same effect by hitting only the targeted paragraphs which are in relation to the applicant only.

In the result, we forthwith order the removal into this Court of the Goldenberg Report and immediately quash the following paragraphs to the extent that they refer adversely to the Applicant only; - Paragraphs 81,82, 93,102,104,105,108,109,110,112,114,184,190,192,202,547,548,583,584,585 586,587,588,589,590,762:

As regards paragraphs 588 we forthwith quash the words appearing therein namely, "in or about March 1993" and by way of correction, insert in substitution thereof the words "13<sup>th</sup> January 1993".

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As regards paragraph 589 we forthwith quash the words appearing therein namely, “on or about February or March 1993” and by way of correction insert in substitution thereof the words “13<sup>th</sup> January 1993.

We further order the immediate issue of the order of prohibition against the Attorney General in terms of prayer B in the application dated 3<sup>rd</sup> March 2006.

This being a public law matter and of great public interest, we order that each party bear their own costs.

In conclusion, the Applicant’s Counsel Pheroze Nowrojee, when concluding his address to this court asked for mercy for his client. This Court as a temple of Justice gives the applicant his entitlement, that is justice. Unlike the **GITHUNGURI** case, we shall not ask the applicant to look at the hills – Instead we ask the applicant, at the end of these proceedings to join all of us as usual, and bow to this temple of Justice. In that vein, this court is obliged to, thank the learned DPP, his assistant Emily Kamau and in the same measure the Applicant’s lead Counsel Pheroze Nowrojee and F. Ngatia for their meticulous research and contribution to these proceedings.

It is so ordered.

DATED and delivered at Nairobi this 31<sup>st</sup> day of July 2006.

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J.G. NYAMU

JUDGE

.....

R. WENDOH

JUDGE

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ANYARA EMUKULE

JUDGE

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