REPUBLIC OF KENYA

IN THE SUPREME COURT OF KENYA

(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko SCJJ)

PETITION NO. 4 of 2020

BETWEEN

HON. MR. JUSTICE MARTIN MATI MUYA .....PETITIONER

AND

THE TRIBUNAL APPOINTED TO INVESTIGATE THE CONDUCT OF JUSTICE MARTIN MATI MUYA, JUDGE OF THE HIGH COURT OF KENYA.....RESPONDENT

(Being an Appeal against the decision and recommendation of the Tribunal appointed under Article 168(5)(b) of the Constitution, to investigate the conduct of the Hon. Justice Martin Mati Muya, delivered at Nairobi on 17th March 2020)

JUDGMENT OF THE COURT

A. INTRODUCTION

[1] When many years ago Lord Bowen L.J., in ***Leeson v. General Council of Medical Education and Registration*** (1889), L. R. 43 C. D. 385 famously compared Judges to Ceaser's wife, that they should be beyond suspicion, he was merely emphasizing that the standard of conduct expected of a judge is much higher than that of an ordinary citizen; that the credibility of the judicial system is dependent upon the judges who man it; and that, public confidence in the Judiciary requires every judge to discharge his or her judicial functions with

integrity, impartiality and intellectual honesty without the slightest whiff of improper conduct or behaviour.

[2] The public rightly expects the highest standard of behaviour from a judge, hence the protection extended to judges and the Judiciary by the Constitution, which provides for judicial independence. For the purpose of this appeal, it demands that a judge shall not be removed for misconduct or misbehaviour, unless the judge has fallen far too short of that standard of conduct or behaviour as to demonstrate that he or she is no longer fit to remain in office.

[3] The Basic Principles on the Independence of the Judiciary adopted by the United Nations General Assembly in 1985 was formulated as minimum aspirations to assist Member States in securing and promoting the independence of the judiciary within the framework of their national legislation. In its pertinent parts, it provides that;

> ***"11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.***
>
> ***12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.***
>
> ***...***
>
> ***18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties".***

[4] Those very principles are repeated word for word in *Principle IV: Independence of the Judiciary* of the **Latimer House Guidance on Parliamentary Supremacy and Judicial Independence (1998).**

[5] Upon appointment, judges make a solemn declaration that they will adjudicate cases before them impartially and do Justice without fear, favour, bias or other influence. Their decisions are made in accordance with the Constitution and the law and they are not liable in an action or suit in respect of a decision made in good faith and in the lawful performance of judicial function. See Article 165(5) of the Constitution.

[6] Likewise, a judge is guaranteed tenure of service until attaining the retirement age unless he or she is shown to be unable to perform the functions of office due to mental or physical incapacity; is in breach of a code of conduct; is bankrupt; is proved to be incompetent in the performance of judicial duties; or has committed acts amounting to gross misconduct or misbehaviour.

See Article 168. (1) of the Constitution.

[7] To warrant removal of a judge on any of these grounds, the Judicial Service Commission (the Commission), upon being satisfied that the complaint against the judge constitutes any of grounds for the removal of a judge will send the petition to the President, who, for his part, will suspend the judge from office and appoint a tribunal to inquire into the complaint. By Article 168(8) of the Constitution, a judge, who is aggrieved by a decision of the Tribunal, may challenge it to the Supreme Court.

[8] That is how this Petition has reached this Court. We next trace its genesis.

B. BACKGROUND AND LITIGATION HISTORY

(i) The Complaints against the Petitioner

[9] At the time of the incident giving rise to the matters under consideration in this petition, the Hon. Mr. Justice Martin Mati Muya, (the Petitioner), who joined the judicial service in 1982 as a Magistrate, was the Presiding Judge of the High Court at Bomet, having been transferred there on 2nd June, 2016 from Mombasa High Court. In August 2017, almost one year after reporting to the new station, two complaints were lodged with the Commission against him. The first complaint was raised by the firm of Onyinkwa & Company Advocates on behalf of their client NIC Bank Limited (the Bank) in respect of the manner the Petitioner is alleged to have handled ***Bomet HCCC NO. 4 of 2016, Alfred Kipkorir Mutai & Kipsigis Stores Limited v. NIC Bank Limited*** (***HCCC NO. 4 of 2016).***

[10] The second complaint was filed by the firm of Mukite Musangi & Company Advocate on behalf of their client, Kenya Commercial Bank Limited and arose from ***Bomet HCCC No. 2 of 2016 Alfred Kipkorir Mutai & Kipsigis Stores v. KCB Bank Limited (HCCC No. 2 of 2016)***. In both complaints, the Petitioner was accused of taking "more than" five (5) months to give reasons for the Ruling delivered on 30th May, 2017. It was also alleged that by directing in that Ruling that *status quo* be maintained, the Petitioner occasioned great financial loss to the Bank in the sum of **Kshs. 76,159,411**. While it is conceded that, in respect of ***HCCC No. 2 of 2016***, the Petitioner gave the reserved reasons on 17th October, 2017, in ***HCCC NO. 4 of 2016***, the reasons were rendered on 3rd November 2017. It is this last complaint and the orders of *status quo* that is the subject of the instant appeal.

(ii) HCCC NO. 4 of 2016

[11] The source of the dispute culminating with the impugned orders were hire purchase agreements between the Plaintiffs in the suit (the borrowers) and the Bank. In the agreements, the Bank advanced loan facilities to the former to purchase several motor vehicles. The facilities were secured by joint registration of those motor vehicles in the names of the borrowers and the Bank. It was a term of

the agreements that the original logbooks would be deposited with the Bank until the facility was fully repaid. When there was default in the repayment, the Bank threatened to repossess all the subject motor vehicles, prompting the borrowers to institute ***HCCC NO. 4 of 2016*** on **14th September, 2016** to stop the Bank by an order of permanent injunction from repossessing the motor vehicles and also to declare that they were not indebted to the Bank, claiming that they have fully settled the loan.

[12] Filed simultaneously with the Plaint under Certificate of Urgency was a Notice of Motion Application in which the Plaintiffs sought temporary orders of injunction to restrain the Bank from seizing, repossessing, advertising for sale, and or selling some 26 commercial vehicles, the subject of the hire purchase agreement.

[13] The application was granted *ex parte* on the same day of filing and directions given for *inter partes* hearing on 27th September, 2016, on which day, the Bank applied for fourteen (14) days to file and serve a response to the application. The borrowers too asked for fifteen (15) days after service by the Bank to file and serve a Supplementary Affidavit. Both applications were granted by the Petitioner. The interim *ex parte* orders were extended by consent with the matter being fixed for mention on **15th November, 2016,** we believe to confirm compliance by both sides with the directions.

[14] Because the sequence of events that followed this date bears considerable degree of relevance to our determination of this appeal, we set out those dates and step taken in the prosecution of the application *in extenso* below.

[15] It would appear that on **15th November, 2016**, when the application was due for mention, the borrowers had not complied with the directions to file Supplementary Affidavit, because on that day they again requested for a further fifteen (15) days to do so. By consensus, parties agreed that the hearing of the application be by way of written submissions. They were granted a mention date

for **24th January 2017**, to once again confirm compliance and to highlight written submissions. Interim orders were consequently extended, once more.

[16] When the application came up as scheduled on **24th January, 2017**, the Deputy Registrar gave a further mention date of **20th February, 2017** before the Petitioner. Before the Petitioner on the scheduled date, only Counsel for the Bank was present. None of the parties had filed their submissions. For the reason that neither the borrowers nor their counsel were in attendance, and on application by Counsel for the Bank, the interim orders were vacated and the Ruling on the application for injunction set for **28th February, 2017.**

[17] Having learnt of the vacation of the interim orders, the borrowers immediately filed an application for the setting aside of the proceedings of 20th February 2017, the maintenance of *status quo* and the reinstatement of the interim orders. The file was placed before the Deputy Registrar on **24th February, 2017**, who, in turn, directed that it be placed before the Petitioner on **28th February, 2017**, that being the date for the reserved ruling.

[18] The Ruling was not delivered on **28th February 2017**, as scheduled. It would appear that Counsel for the borrowers had not up to this point filed and served written submissions because on that date, he urged the Court to adopt their written submissions filed in **HCCC No. 2 of 2016**, a similar matter as **HCCC 4 of 2016** involving the same borrowers and another bank, Kenya Commercial Bank Limited. Counsel for the Bank did not oppose the request. Although there was an earlier order to the effect that the Ruling would be rendered on the basis of written submissions, the Petitioner in granting the request by the borrowers directed for a further mention on **3rd March, 2017**, and **'stayed the collection/repossession orders made by the Defendant Bank'**.

[19] During the mention of **3rd March, 2017,** Counsel for the borrowers requested for a date to highlight their written submissions, while Counsel for the

Bank indicated that they would rely on the Replying Affidavit. That being the case, the Petitioner finally fixed the application for highlighting of submissions on **5th April, 2017**, on which date parties highlighted their submissions and a Ruling reserved for **27th April, 2017**.

[20] That did not happen because before the Ruling could be delivered, the Bank brought an application on **10th April, 2017**, to discharge the injunctive orders, alleging that the borrowers were in the process of selling the motor vehicles in question. Having certified the application urgent, the Petitioner fixed it for *inter parties* hearing for **27th April, 2017,** the date for the Ruling. The borrowers, for their part, responded by taking out a Notice of Preliminary Objection challenging the competency of this latest application.

[21] The Ruling slated for 27th April, 2017, was not delivered. Instead, parties presented their arguments in respect of the original application for temporary injunction and the preliminary objection to the Bank's application to discharge interim orders. The Ruling for both were reserved for **17th May, 2017** but were again deferred to **30th May, 2017.**

[22] On 30th May, 2017, the Petitioner finally delivered that Ruling on the application for injunction and the preliminary objection in which he stated;

> ***"That the Plaintiffs' application dated 9/9/2016 is merited and orders therein are granted and that reasons to be given on 10/7/2017"***
>
> *-And-*
>
> ***"That the Preliminary Objection dated 19/4/2017 has merits; but in the interest of justice the status quo maintained. Reasons to be given on 10/7/2017."***

[23] Accordingly, the Petitioner confirmed the *ex parte* interim orders of injunction and in respect of the preliminary objection he ordered for the maintenance of *status quo*, with reasons for both decisions reserved for 10th July, 2017. Not satisfied by this decision, the Bank timeously lodged a notice to challenge it in the Court of Appeal. But by a strange twist, it was alleged that shortly after the lodgment and sealing of the Notice of Appeal, the Deputy Registrar, Hon. Maureen Cherono, on the instructions of the Petitioner, recalled and crossed it with the words **"Cancelled on 5/6/17. File pending reasons for the decision"**.

[24] In the meantime, reserved reasons slated for 10th July, 2017 were again not ready and the Petitioner indicated to counsel for the parties that they would be delivered on **14th July, 2017**. On two subsequent occasions, that is, on 14th July and 31st July, 2017 the reasons were not rendered, with the notice for the next date being given as 18th September, 2017.

[25] It was common factor that between **18th September, 2017** and 30th October, 2017 the reserved reasons were not ready and were adjourned several times, on 4th October 2017, 13th October 2017, 17th October 2017, 18th October 2017 and 30th October 2017. However, as we intend to show later, they were ultimately rendered on **3rd November 2017**.

[26] Having failed to have the interim orders vacated and having waited for months on end for the reasons for the decision of 30th May, 2017, the firm of Onyinkwa & Company Advocates decided to approach the Chief Justice while involving the Commission at the same time, by writing to the Chief Justice on 17th August, 2017 and copying the Commission in the letter. In the letter, they sought the intervention of the Chief Justice by urging him to call ***"for this file, review the same and take the requisite administrative action to remedy the situation herein."***

[27] The firm of Mukite Musangi & Company Advocates raised similar complaints. On the basis of the two letters, the Chief Justice asked for the Petitioner's "comprehensive response on each complaint".

[28] While not denying that he delayed in giving reasons for his decision of 30th May, 2017, the Petitioner, in a lengthy -46 paragraph-response, denied allegations that he was biased against the Bank and attributed the delay to the parties who kept filing one application after the another. He too ascribed the delay to the **"exigencies of work, other attendant official duties and unscheduled holidays"**. He explained that, by granting an order for the maintenance of *status quo,* his intention was to preserve the subject matters of the suit; that at no time did he direct the Deputy Registrar to cancel the Notice of Appeal; that the question of the indebtedness to the Bank in the sum of **Kshs. 76,159,411** was the subject of the main suit which was yet to be decided on merit; and that, though the delay to render reasons were regrettable, he eventually rendered them and gave plausible explanation for the delay.

[29] The period between 14th September, 2016 when the application for injunction was filed and 27th April, 2017, when it was canvassed, is eight (8) months, a rather long time to wait for the hearing of an application which was certified urgent. The clear theme in Order 40 is that applications for injunction must be heard without delay, and whenever a temporary restraining order is granted *ex parte*, the application must be set down for hearing at the earliest time available. The court, after *inter-partes* hearing, must deliver its ruling, either at once or within thirty days of the conclusion of the hearing, unless, of course, the judge records the reason for not doing so.

[30] Order 40 Rule 4(4) requires all applications for injunction to be **"heard expeditiously and in any event within sixty days from the date of filing unless the court for good reason extends the time"**. In reality, there are few instances of compliance with these rules and there are many reasons for that. That

will not be the subject here, suffice, however to state, as this case demonstrates, that delays are caused largely by adjournments, either by parties or in some instances, by the courts.

Because of the nature of injunction applications and the history of delays, Rule 6 was introduced to Order 40 to ensure that an interlocutory injunction must be determined within a period of twelve months, failing which, the injunction shall lapse unless, for any sufficient reason the court orders otherwise.

[31] It is widely known that delay occurs at all stages of litigation; between filing and trial, between trial and judgment, between judgment and appeal, and, starting all over again at the appellate level, between filing, hearing and judgment. Purely, as a reminder of how depressingly familiar is the syndrome of judicial delay, consider the many decisions by the courts in this country, some of which we shall be making reference to in this judgment, where instances of excessive delay have been strongly deprecated.

[32] In this appeal and liberal computation of time, the period of delay between 30th May, 2017, the date the Ruling was delivered and 3rd November, 2017 when written reasons were given, translates to five (5) months.

(iii) Proceedings before the Commission

[33] Upon receipt of the Petitioner's response to the two letters to which we have made reference, the Chief Justice, pursuant to Article 168 (2) of the Constitution, forwarded both letters and the reply he had received from the Petitioner to the Commission. The Commission, in turn, constituted a four-member Committee to consider the complaints.

[34] Whereas the Committee received presentations and recorded evidence on both complaints, it is of interest to note that in its final Report to the Commission, it only presented findings in respect of **HCCC NO. 4 of 2016**, without any

mention on the status of the complaint in **HCCC NO. 2 of 2016,** save to clarify that the reserved reasons in **Bomet H.C.C.C. No. 2 of 2016,** were indeed given on 17th October, 2017. We cannot tell from that finding whether the Committee was satisfied that the delay was not inordinate, and therefore did not deserve consideration by the Commission and beyond.

[35] According to the Committee, the Petitioner was culpable of inordinately delaying the delivery of the reasons for the ruling in **HCCC NO. 4 of 2016**, contrary to the provisions of **"Order 21 Rule 1"** of the Civil Procedure Rules; and that, as a result, a *prima facie* case of gross misconduct, misbehavior, incompetence, lack of integrity and professionalism, breach of the Constitution and bias had been made out against him.

It was on those grounds that it recommended to the Commission to petition the President to appoint a Tribunal to further investigate the conduct of the Petitioner.

(iv) Appointment of the Tribunal

[36] The Commission adopted the report of the Committee. It was however satisfied that the only grounds disclosed by *prima facie* evidence against the Petitioner were gross misconduct and misbehavior. Consequently, the Commission petitioned the President to suspend the Petitioner and also recommended the appointment of a Tribunal to investigate his conduct pursuant to Article 168(4) of the Constitution.

[37] The President, in terms of Article 168(5)(b) of the Constitution and by Gazette Notice No. 4851 of 31st May, 2019 suspended the Petitioner and appointed members of the Tribunal comprising Justice (Rtd) Alnashir Visram as Chairperson, Lucy Kambuni (SC) as Vice Chairperson and Justice (Rtd) Festus Azangalala, Ambrose Weda, Andrew Bahati Mwamuye, Sylvia Wanjiku Muchiri and Amina Abdalla as members. By a separate Gazette Notice No. 4852, the President also appointed Assisting Counsel and Joint Secretaries.

[38] Aggrieved by the entire process culminating with the decision to appoint a Tribunal to investigate his conduct, the Petitioner moved to the Employment and Labour Relations Court where he filed Petition No. 154 of 2019.

(v) Proceedings in The Employment and Labour Relations Court

[39] In the Employment and Labour Relations Court, the Petitioner challenged the appointment of the Tribunal insisting that it was irregular, invalid, unconstitutional, null and void *ab initio*. For that reason, he asked the court to **declare** that the entire proceedings of the Commission, the Report, findings and recommendations were flawed, biased, malicious and a violation of the Petitioner's right to fair hearing and fair administrative action; that the Report, findings by Commission did not meet the threshold of Article 168(1) of the Constitution and the Judicial Service Code of Conduct and Ethics; that the petition to the President to form a tribunal to investigate his conduct for alleged gross misconduct, misbehaviour was premature and unlawful.

[40] The Petitioner also asked the court to declare that the Tribunal appointed by the President was irregular, invalid and unconstitutional; that the decision by the President to suspend him from discharging his duties as a Judge of the High Court of Kenya was likewise irregular; and that any adjustment of his remuneration and benefits pursuant to his suspension by the President be reversed, and his full remuneration and benefits reinstated and any deductions already effected be refunded to him.

[41] Without going into the details of that dispute, for the purpose of this appeal, it is enough to say that, after considering the arguments by both sides, the court (*M. Onyango, J.*) dismissed the petition, holding that the Commission acted within its mandate; and that the Petitioner's right to a fair hearing and a fair administrative action were not violated.

(vi) Proceedings before the Tribunal

[42] With the foregoing challenge before the Environment and Land Court out of the way, the Tribunal commenced the inquiry by laying out, as reproduced below, the allegations against the Petitioner, together with a summary of the evidence in support of the allegations as required by Clause 8 (2) of the Second Schedule to the Judicial Service Act;

> ***"WHEREIN, between the 14th September, 2016 and 3rd November, 2017, you, being a Judge of a superior court within the Republic of Kenya, acted Contrary to Article 168(1)(e) of the Constitution by inordinately delaying the delivery of reasons for your rulings and ordering that the status quo be maintained thereby occasioning grave financial loss to the Defendants in Bomet High Court Civil Suit No. 4 of 2016 between Alfred Kipkorir Mutai & Kipsigis Ltd Vs NIC Bank Limited.***
>
> ***The following allegations have been made in respect of this ground-***
>
> ***a) Contrary to Order 21 Rule 1*** *(sic)* ***of the Civil Procedure Code*** *(sic)* ***Cap 21 of the laws of Kenya, on delivery of rulings and judgments, which requires that "once parties have been heard, filed and highlighted their submissions, a judgment or ruling should be delivered immediately or within sixty days from the close of trial by notice to all parties or their advocates. Where there is delay beyond the sixty days, then the judicial officer is required to record reasons for such delay and forward a copy to the Hon. Chief Justice." You failed to deliver the reasons for your ruling within the***

said prescribed time period, thereby occasioning inordinate delay in the delivery of your decision.

b) ***Your actions of delaying the delivery of the reasons for the rulings against the backdrop of your denying the request by the Defendants to order that the ongoing sale of the financed motor vehicles, the subject matter of the suit be stopped and the said motor vehicles be kept in a safe place pending the determination of the applicant's application was oppressive, punitive, unjust and unfair to the petitioner causing financial loss to the tune of Ksh. 76,159,411.***

c) ***In the circumstances, your conduct occasioned grave suffering and inconvenience to the Defendants/Respondent and as such you failed to perform your duties in an efficient and competent manner as required by the Judicial Service Code of Conduct and Ethics.***

d) ***You failed in your constitutional duty to ensure that justice is delivered without undue delay as provided for in Article 159(2) of the Constitution".*** [our emphasis].

[43] We reiterate by emphasizing that the Petition was premised on inordinate delay of the reserved reasons and on order for the maintenance of *status quo*, which was alleged to have led to financial loss to the Bank in the sum of **Ksh. 76,159,411.** The citing of Order 21 Rule 1 of the Civil Procedure Rules in the specific allegations, which we have reproduced in inverted commas above was erroneous as we demonstrate shortly.

[44] To prove the allegations in the Petition, the Tribunal received testimonies from nine (9) witnesses and also heard the defence of the Petitioner in lengthy proceedings. In summary, the Lead Assisting Counsel presented witnesses whose testimonies were largely in support of the Petition, insisting that, as a result of the delay by the Petitioner in giving reasons for his Ruling of 30th May, 2017, the borrowers had a field day, disposing of the motor vehicles while vandalizing others to the detriment of the Bank.

[45] The Petitioner admitted the delay but contended it was not deliberate; that parties had a fair share of blame in manner they brought applications, sought for adjournments and extension of time. He also contributed the working conditions in Bomet High Court and being in charge of two court stations, as some of the reasons for the delay.

[46] In a detailed report dated 17th March, 2020 presented to the President, the Tribunal unanimously found that the allegations against the Petitioner had been proved to the required standard; and that the Petitioner's conduct amounted to gross misconduct contrary to Article 168(1)(e) of the Constitution.

[47] Specifically, it rejected the Petitioner's argument that there was no Petition before the Commission as envisaged in the Constitution and found that the letter from Onyinkwa and Advocates constituted a valid petition; that the Petitioner's right to a fair administrative action was not violated by the mere absence of the court file since he had it at the time he prepared his written response to the Chief Justice; that the proceedings, and the consequent Report, findings and recommendation by the Commission met the required procedural threshold and safeguards applicable to that forum. It went on to state that;

> ***"581.***
>
> **.....**

8. The reasons given by the Hon. Judge for the delay in delivery of the reasons of the ruling dated 30th May, 2017 are neither sufficient nor credible or justifiable.

9. There was unjustifiable and inordinate delay by the Hon. Judge in delivering the ruling delivered (sic) ***on 30th May, 2017; taking into account the context and peculiar circumstances of Bomet H.C.C.C. No. 4 of 2016.***

10. The Tribunal is in no way setting out an inexorable rule on what constitutes unjustifiable and inordinate delay as this must be determine within the context of facts of each particular case.

11. The Hon. Judge's conduct not only occasioned prejudice to the Defendant/Respondent Bank in Bomet H.C.C.C. No. 4 of 2016 but also offended the Overriding Objectives of the Court as stipulated under Sections 1A & 1B of the Civil Procedure Act and Section 3 of the High Court (Organisation and Administration) (General) Rules.

12. That the inordinate and unjustifiable delay in delivery of the reasons for the ruling delivered on 30th May, 2017 has been proved to the required standard; and the same constituted gross misconduct on the part of the Hon. Judge.

13. In conclusion, the Judge's conduct amounted to gross misconduct". [our emphasis].

[48] Like the Commission, the Tribunal was persuaded that the delay was not only inordinate but also unjustifiable, in the context of the peculiar facts of this case; that the reasons given for the delay were insufficient and incredible; and that the Petitioner's conduct occasioned prejudice to the Bank as it offended the Overriding Objectives.

[49] We note that, unlike the Commission, the Tribunal did not find that the delay led to financial loss to the Bank in the sum of Ksh.76,159,411. It also clarified that the interim injunctive orders issued on 14th September, 2016 were extended by consent of the parties and not the Petitioner on his own motion.

[50] The Tribunal gave the Petitioner the benefit of doubt regarding the question whether the discharged interim orders were subsequently reinstated *ex-parte* or after *inter-partes* hearing.

[51] It was apparent to the Tribunal that the Deputy Registrar, in purporting to cancel the Notice of Appeal, did not act under the instructions of the Petitioner but on her mistaken belief that she had the jurisdiction to do so.

[52] Though doubtful about the date, the Tribunal, took the Petitioner's word that he read the reasons for his ruling of 30th May, 2017 on 3rd November, 2017; and that even with that date, there was nonetheless a delay of over five (5) months which in its estimation was inordinate.

[53] Upon the foregoing opinion, the Tribunal recommended to the President that the Petitioner ought to be removed from office.

(vii) Proceedings before the Supreme Court

[54] Under Article 168 of the Constitution, the President is required to act in accordance with the recommendations made to him by the Tribunal, giving allowance to the expiry of the time allowed for an appeal to this Court by an

aggrieved Judge or upon the Judge exhausting the right of appeal and the final decision affirms the Tribunal's recommendations.

[55] In the exercise of that right, the Petitioner approached this Court, by way of an appeal, to challenge the decision reproduced in paragraphs [46], [47] and [48] on 21 grounds contained in the main Petition of Appeal and additional grounds in the Supplementary Record of Appeal which were condensed and the Petitioner prays that there be;

> ***a) declaration that there was no valid Petition lodged with the JSC by the firm of Onyinkwa & Company Advocates against the Appellant and that the proceedings before the JSC as well as those before the Tribunal are therefore null and void ab initio.***
> ***b) a declaration that the Respondent lacked the requisite jurisdiction to inquire into complaints against the Appellant.***
> ***c) a declaration that the JSC as well as the Respondent acted in violation of the requirements of Articles 47 and 50 of the Constitution and that the Appellant's right to a fair administrative action was therefore violated.***
> ***d) a declaration that the delay by the Appellant in giving reason for his decision delivered on 30th May 217 was not inordinate and that the same has been sufficiently and justifiably been explained.***
> ***e) a declaration that the Appellant's actions did not amount to gross misconduct and/or misbehavior warranting his removal from office.***

f) a declaration that the findings and recommendations of the Respondent to his Excellency Hon. Uhuru Kenyatta, the President and Commander-in-Chief of the Defence Forces of the Republic of Kenya, that the Appellant be removed from office and be and are hereby quashed and in the result, the Appellant is ordered to resume his duties as a Judge of the High Court with back pay and benefits.

g) the costs and incidental to this Petition to be borne by the Respondent".

[56] In opposing the Petition, the Tribunal filed Grounds of Objection to argue that the Tribunal properly found the letter of complaint addressed to the Chief Justice and copied to the Commission by the firm of Onyikwa & Co. Advocates to have met the requirements of a valid Petition for the removal of a judge from Office under Article 168(3); that no proof was tendered for the claim that the Petitioner's rights to fair administrative action and fair hearing were violated; that the Tribunal arrived at the correct determination that the Petitioner inordinately and without justification delayed giving reasons for his Ruling of 30th May 2017; that the Commission applied the correct standard of proof; and that it did not go into the merits of the Ruling but only discussed the implications of the delay as it was bound to do, in order to arrive at a proper determination. As such, the Tribunal urged us to find no merit in the appeal and to dismiss it.

C. PARTIES' SUBMISSIONS

(a) The Petitioner's written submissions

Mr. Philip Nyachoti and Mr. Oscar Eredi, learned counsel for the Petitioner and for the Tribunal respectively highlighted their written submissions as outlined briefly below.

[57] In his submissions, the Petitioner consolidated into six all the 21 grounds of appeal and argued them in the following clusters;

i. ***Inordinate delay and gross misconduct***

ii. ***Missing court file and fair hearing***

iii. ***Matters considered without jurisdiction***

iv. ***Loss and prejudice to NIC Bank Limited***

v. ***Burden of proof***

vi. ***Validity of the Petition before the Judicial Service Commission***

(i) Whether the delay was Inordinate and whether it amounted to gross misconduct

[58] Starting with the question whether five (5) months delay in rendering the reasons for his Ruling of 30th May, 2017 was inordinate, the Petitioner argued that whether or not a delay in performing an act is inordinate will depend on the circumstances of each case as there is no precise measure.

[59] While conceding the delay, the Petitioner argues that it was, first, not inordinate, but secondly, that he proffered plausible reasons. He clarified that he decided to deliver the Ruling without reasons so as to ensure that the parties were aware of the outcome given the urgency of the matter and as he was proceeding on leave; that he ordered for the maintenance of *status quo* which was to ensure that the possession and ownership of the subject motor vehicles were preserved until further orders; and that properly construed, the orders did not and were not intended to allow the borrowers to dispose of the motor vehicles.

[60] He explained further that he proceeded on leave on 5th June, 2017, resumed on 1st July, 2017 and immediately embarked on the many matters that had accumulated in his absence; that between 17th July and 21st July 2017 he had circuit sessions at Kericho High Court; and that the summer recess then commenced on 1st August, 2017 and ran upto 15th September, 2017.

[61] Then the election petitions cycle set in, engaging all levels of the court system. The petitions were to take precedence over other matters, due to their strict constitutional and statutory timelines.

[62] On top of all these challenges, the Petitioner pointed out that he did not have a court house in Bomet; and that he was accommodated in an incomplete building which had no electricity or water. The Petitioner had to share a common toilet in the trading centre with members of the public and staff. The court did not have a secretary or typist.

[65] In his view, had the Tribunal seriously considered these explanations, it would have found him innocent of any delay; that had it scrutinized the annexed cause lists for both Kericho and Bomet High Courts for the period under review, it would have been obvious to it that the pressure of work on one Judge was overwhelming. This state of affairs is the norm in most courts across the country and the Tribunal ought to have taken judicial notice that most courts are always overstretched with heavy caseload and backlog; and that the Tribunal ought to but failed to ascertain the working conditions at the Bomet and Kericho High Courts before blaming the Petitioner for the delay.

[66] The Petitioner faults the Respondent for placing reliance on Order 21 Rule 1 of the Civil Procedure Rules, which had no application in the situation under inquiry; that the Order 21 Rule 1 only applies to judgments as opposed to rulings on applications for injunction, as was the case before the Tribunal; and that the instructive provision is Order 40 Rule 5 of the Civil Procedure Rules, which caps

the period of delivery of rulings at thirty days after the close of arguments, but allows a Judge to record reasons when unable to deliver a ruling within that period.

[67] That distinction, in his view, is deliberate as the former provision requires that where there is delay, the reasons for the delay must be forwarded to the Chief Justice, whereas there is no such requirement in the latter; just a record of the reasons for the delay. Because the recommendation for his removal was based on this misinterpretation the Petitioner contends that the recommendation to the President to set up a tribunal to investigate him, the subsequent investigations into his conduct and the recommendation for his removal were all misconceived.

[68] While the Tribunal relied on the **Law of Guyana** under the **Time Limit for Judicial Decisions Act No. 9 of 2009** to the effect that the removal of judge from office will be justified ***"for persistently not writing decisions or for continuously failing to give decisions and reasons therefore within such time as may be specified by Parliament"***, the Petitioner argued that there was no evidence or record that he was a habitual defaulter; that there was no corresponding law like the Guyana **Time Limit for Judicial Decisions Act No. 9 of 2009** in Kenyan; and that for a conduct to be **"gross"**, it must be so atrocious and or so outrageous as to justify the removal of a judge from office. In his case, taking into account the evidence against him and his explanation on the delay, the Petitioner urged the Court to find that what he was accused of was not too extreme to amount to "gross" misconduct.

(ii) Whether the unavailability of the court file was prejudicial and amounted to a violation of the right to fair hearing

[69] While it is common factor that the court file in respect of ***HCCC No. 4 of 2016*** was forwarded upon demand to the Chief Justice and was not available to the Committee, the Commission or the Tribunal, the main question around it was whether its unavailability jeopardized the Petitioner in his defence and therefore

amounted to a violation of his right to a fair hearing. The Petitioner submits that he repeatedly requested for the file in order to allow him prepare his defence in vain; that after a formal request by the Lead Assisting Counsel, the Chief Registrar of the Judiciary, who is also the Secretary to the Commission, confirmed that the original file could not be traced.

[70] It was the Petitioner's contention before the Committee and the Tribunal that he finally rendered the reasons for his 30th May, 2017 decision on 3rd November, 2017 and gave reasons for the delay as required by Order 40 Rule 5 of the Civil Procedure Rules. This claim could only be ascertained from the record of the misplaced file.

[71] The Petitioner submits, in this regard, that the Chairperson of the Tribunal, having expressly assured him that any prejudice occasioned to him by the fact of the missing file would not be visited on him and having himself agreed to participate in the proceedings in the absence of the court file on the strength of that assurance, it was erroneous for the Tribunal to find that the unavailability of the file did not render the proceedings a nullity or infringe on his right to fair administrative action and fair hearing as guaranteed under Articles 47 and 50 of the Constitution.

[72] To hold, as the Tribunal did, that the Petitioner was in possession of the court file while preparing his written response dated 13th November, 2017 to the Chief Justice would be to ignore the fact that at that time, he was merely responding to an administrative complaint and not making out a defence to a comprehensive list of allegations before the Tribunal which required a more substantive response.

(iii) Whether the Tribunal considered matters without jurisdiction

[73] The Petitioner has submitted that the Tribunal delved into the merits of his decision in which he confirmed the prayer for interim orders of injunction and granted an order for the maintenance of *status quo*, thereby improperly exercising

appellate powers; that the Tribunal had no jurisdiction to decide on matters of evidence pending determination before the court in respect of the question of alleged loss by the Bank, the state of the motor vehicles, or their whereabouts. The Tribunal delved into these aspects of the dispute despite itself having acknowledged that they were live issues before the High Court; that the Tribunal, in determining those issues invited evidence in support of the Bank's position without disclosing that evidence to the Petitioner. For instance, the evidence relating to the 1st Plaintiff (***Kipsigis Stores Limited)*** being wound up in Insolvency Case No. 14 of 2016 before the High Court in Nairobi was not brought to the Petitioner's attention when he made the impugned Ruling.

[74] The Petitioner, in addition, pointed out that the Tribunal considered extraneous matters when it drew comparison between his decision in **HCCC No. 4 of 2016** and another in **HCCC no. 3B of 2017**, to show that whereas both cases were similar, the Petitioner was biased in the former case against the Bank and in favour of the other bank in the latter, ***Kenya Commercial B*ank** by rejecting the Borrowers' objection and directing them to deliver certain motor vehicles to ***Kenya Commercial B*ank**, or in the alternative to deposit a sum of Ksh.69,444,104.56 in court. According to the Petitioner, it was for the Tribunal to insist that the two decisions ought to have been the same, as they were not based on the same facts and circumstances.

(iv) Whether the Bank suffered loss and prejudice by the decision of the Petitioner

[75] The Petitioner submits that there was no evidence to link the delayed reasons with any loss to the Bank, or how the delay was oppressive, punitive or unjust to the Bank. In his opinion, the Bank had the option of returning to him for review of the orders with which it was aggrieved or move to the Court of Appeal for appropriate remedies, including an application under Rule 5(2)(b) of the Court of Appeal Rules; that if there was any doubt regarding the interpretation of the order

of *status quo,* nothing stopped any of the parties to request for clarification; that without the determination on merit of **HCCC No. 4 of 2016**, it was speculative for the Tribunal to conclude that the Bank was owed Ksh.76,159,411.47, just as it was conjectural to find that the subject motor vehicles had been sold or vandalized; and that by filing a counterclaim, the Bank was manifestly interested only in the liquidated sum and not the subject motor vehicles.

(v) Whether the burden of proof was unfairly shifted to the Petitioner

[76] According to the Petitioner, the Tribunal unfairly shifted the burden of proof to him by requiring him to show when he delivered the reasons for the Ruling and to prove that he recorded the reasons for the delay; that since it was the Bank that was asserting that he did not deliver the reserved reasons and record the reasons for the delay, the burden of proof lay on the Lead Assisting Counsel to bring proof of their assertion. The Petitioner insists that having established that the subject court file could not be traced, for no fault of his own, it was unfair to ask him to avail evidence not in his possession.

(vi) Whether there was a valid petition before the JSC

[77] Finally, the Petitioner has complained that the Commission acted without jurisdiction in considering a complaint that was not properly presented to it as required by the Constitution; that the letter dated 17th August, 2017 by the firm of Onyinkwa & Company Advocates, which was the basis of setting up the Tribunal, was addressed to *"the Chief Justice at the Supreme Court Building"* and not to "*the JSC at Re-Insurance Plaza, 1st floor, Nairobi"*, the physical address of the Commission. He contends that the letter was not a formal complaint or a Petition to the Commission as envisioned in Article 168(2) and (3) but a mere request for an administrative intervention by the Chief Justice in his capacity as the Chief Justice of Kenya and head of the Judiciary. He relies on the testimony of Ibrahim

Onyinkwa Advocate, to the effect that he did not intend to initiate the Petitioner's removal, but rather, he wanted to hasten the delivery of reasons for the Ruling of 30th May, 2017.

[78] In the absence of a Petition, it was submitted, the entire proceedings before Commission, its findings and recommendations to the President to appoint the Tribunal; the proceedings before the Tribunal, findings and recommendations for the Petitioner's removal from office, were all unconstitutional, illegal, null and void *ab initio*.

[79] In the end, the Petitioner has pleaded with us to find, on the basis of these submissions, that all the allegations against him were not proven at all, as the evidence presented did not meet the threshold established by the previous Tribunals set up to investigate the conduct of Justices ***Daniel Aganyanya*** and ***Nancy Baraza.***

(b) The Tribunal's written submissions

[80] The Tribunal filed both written submissions and grounds of objection in opposition to the appeal. Though the grounds of appeal were condensed and argued by the Petitioner as six clusters, the Tribunal has responded in these submissions to only four of the six grounds listed above, namely, whether there was a valid Petition before the Commission, whether the Petitioner's right to a fair hearing was violated, whether the Tribunal applied the correct standard and burden of proof and whether the Petitioner's conduct amounted to gross misconduct or misbehaviour.

[81] What is presented by the Tribunal as the 5th ground, which can be subsumed in the ground challenging the finding of inordinate delay and gross misconduct is one asking whether the delay in giving reasons was justifiable. The two grounds omitted in the submissions are, whether the Tribunal considered matters without jurisdiction and whether the Bank suffered loss and prejudice by the decision of

the Petitioner. We shall nonetheless consider all the six condensed grounds on their merit.

(i) Whether there was a valid Petition before the Commission

[82] Starting with the last ground, whether the letter dated 17th August, 2017 constituted a valid formal petition to the Commission, the Tribunal submits that Article 168 of the Constitution in setting out the grounds and procedure for removal of a judge, provides for only two requirements on the form of petition to be presented to Commission; that the petition must be in writing and should set out the facts constituting the grounds for the judge's removal.

[83] For that reason, it was submitted that the Article allows the complaint to be in any form so long as the two elements are present; and that the letter having clearly set out various instances of the Petitioner's conduct, which in the author's view, amounted to incompetence, gross misconduct, lack of integrity and professionalism, inordinate delay and bias, it met the two elements.

[84] The letter was, therefore a valid petition; that the Petitioner failed to disclose that in ***High Court Petition No. 154 of 2019 Martin Mati Muya v. Judicial Service Commission & Another*** [2019] eKLR, that he had instructed, the court firmly found that the letter met the threshold of Article 168(2). The court also held that the Chief Justice did not act on the letter as the Chairman of the Commission, but as the Chief Justice; and that he forwarded it together with the Petitioner's response to the Commission that in turn independently acted on it as permitted by the Constitution.

[85] Citing the decision of this Court in ***Joseph Mbalu Mutava v. The Tribunal appointed to investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya*** [2019] eKLR, the Tribunal reminded us that even in that case, the complaint was instituted by letters to the Commission.

(ii) Whether the unavailability of the court file was prejudicial and amounted to a violation of the right to fair hearing

[86] The Tribunal submits that what constitutes fair procedure will depend upon the circumstances of each particular case and in support of this statement it cited two English court decisions in ***Selvarajan v. Race Relations Board*** (1976) 1 All ER 12 and ***Russel v. Duke of Norfolk*** (1949) 1 All ER 109; that upon receipt of the letter of complaint, the Petitioner responded in writing; that once again he was invited and indeed appeared with counsel before the Commission and was heard; and this process was replicated at the Tribunal in accordance with the gazetted rules of procedure.

[87] Regarding the misplaced court file, the Tribunal submits that, since the Petitioner was in possession of the court file while preparing his written response to the Chief Justice's letter, it should follow that the Petitioner used the occasion to respond fully to the complaint and therefore he suffered no prejudice on account of the misplaced file.

[88] The Tribunal also points out that, out of choice, the Petitioner elected to proceed with the inquiry without the file; that in accordance with the current criminal jurisprudence, loss of a court file does not lead to an automatic acquittal in a criminal trial; and that at no time was any witness called without the Petitioner getting prior notice, witness statements and an opportunity to cross-examine the witnesses were availed.

[89] Finally on this ground, it was submitted that the question of whether indeed and when the reasons for the Ruling of 30th May 2017 and the reasons justifying the delay were given was a matter within the Petitioner's knowledge, and he ought to have availed them either to the Tribunal or to the Commission, if they in fact existed.

(iii) Whether the delay was inordinate and whether it amounted to gross misconduct

[90] The Respondent was categorical that the effect of the injunction and the order for *status quo* was to prevent the Bank from recovering the loan by the repossession and sale of the motor vehicles. The reasons for the Ruling were adjourned several times. In addition, the reasons proffered for the delay were properly found to be unsatisfactory. For example, the samples of the cause list presented for the period from 2nd to 5th May 2017 had only between one to five matters listed for hearing before the Petitioner on each day. The Judge's annual colloquium was for a period of one week, the entire Court recess from 1st August, 2017 to 15th September, 2017 was long enough for the Petitioner to render the reserved reasons.

[91] In terms of Article 159(2)(d) of the Constitution of Kenya as augmented by Sections 1A and 1B of the Civil Procedure Act and Section 3 of the High Court (Organization and Administration) (General) Rules, the Tribunal submitted that justice was not ***"administered in a just and expeditious manner"***; that the Petitioner did not ***"facilitate the just, expeditious, proportionate and affordable resolution"*** of this dispute. The Tribunal cites the decision of *Hancox, JA*, (as he then was) in ***Samuel Mbugua Githere v. Kimungu*** (1984) KLR, to make the point that where the delay is inordinate and unexplained, the courts are not prepared to exercise discretion in favour of the defaulting party.

For the foregoing reasons, the Tribunal urged us to find that the delay was inordinate and therefore amounted to gross misconduct.

(iv). Whether the burden of proof was unfairly shifted to the Petitioner

[92] The Tribunal has submitted on this ground that an inquiry into the conduct of a Judge, is a quasi-judicial process. The Tribunal is, however, not strictly bound

by the rules of evidence but guided by the rules of natural justice and relevancy as codified in Section 13 of the Second schedule of Judicial Service Act. Like the Court stressed in ***Tribunal Appointed to Investigate the Conduct of Justice Joseph Mbalu Mutava*** (supra), the evidentiary burden to avail all the evidence necessary to establish the allegations against the judge is borne by the Lead Assisting Counsel.

[93] This burden is discharged if the evidence presented is below "beyond reasonable doubt" but above "a balance of probability". Guided by the decision of the Privy Council in ***Re Hon. Chief Justice of Gibraltar*** [2009] UKPC 43 as well as the decision of Supreme Court of Canada in ***Hanes v. Wawanesa Mutual Insurance Company*** 1963 S.C.R. 154, the Tribunal submits that it applied the correct standard of proof in arriving at its recommendation to the President; and that at no point did it shift its own burden to the Petitioner.

[94] In any case, the Tribunal has submitted, the allegation of inordinately delaying the delivery of reasons for the Ruling and for directing the maintenance of *status quo* were never denied by the Petitioner. That being the case and bearing in mind that the Petitioner took over five months to deliver reasons for the Ruling, the Tribunal was justified to conclude that the Petitioner was guilty of gross misconduct, to warrant his removal from office.

[95] We have pointed out in Paragraph [81] above that the 5th ground argued by the Tribunal in the submissions regards the question whether the delay in giving written reasons were justifiable. The submissions on this question are recorded in Paragraph [90] above. We only wish to add that the Tribunal has stressed that in the absence of a credible explanation, any delay will be construed to be inordinate; and that the delay in this matter was obviously inordinate as there were no excusable justification.

D. ISSUES FOR CONSIDERATION AND DETERMINATION

[96] Flowing from the foregoing background and submissions, our consideration and determination of this appeal will be restricted to the following six issues, which were the only grounds canvassed before us.

i. ***Whether the delay in giving reasons was inordinate and amounted to gross misconduct***
ii. ***Whether the unavailability of the court file was prejudicial and amounted to a violation of the right to fair hearing***
iii. ***Whether the Tribunal considered matters without jurisdiction***
iv. ***Whether the Bank suffered loss and prejudice by the decision of the Petitioner***
v. ***Whether the burden of proof was unfairly shifted to the Petitioner***
vi. ***Whether there was a valid Petition before the Commission***

E. ANALYSIS AND DETERMINATION

[97] We reiterate the principle reflected in Chapter 10 of the Constitution that although judges, like all other citizens, are subject to the law, there is need to protect their decisional independence in the interests of the whole community to enable them to apply and interpret the Constitutions and legislation without fear of any form of improper interference and influence. In their judicial conduct, judges are not subject to direct discipline, except in the extreme cases of proved misconduct or misbehaviour, among other grounds. It is only those circumstances plainly spelled out in Article 168(a) to (e), and in those circumstances only, may a judge be removed from office.

[98] Complaints and removal proceedings against judges are generally very sensitive issues. It must follow from this view that such proceedings ought to be dealt with strictly in accordance with a clear constitutional and legislative framework, which must also follow an established clear and objective standard.

[99] Though independent in the way they arrive at their decisions, judges are subject to a number of forms of accountability which are not incompatible with their individual and institutional independence. To begin with, they are accountable through the public nature of their work but more particularly through the appellate system of the courts. In this regard, there is a duty on the judges to give reasons for their decisions. It is only by giving reasons for their decisions that those aggrieved may appeal those decisions. Transparency that builds public confidence in the judicial process will be achieved through reasoned decisions.

[100] In its first ever determination under Article 168 (8) in the case of ***Joseph Mbalu Mutava v. Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya*** [2019] eKLR, the Supreme Court laid down the following broad principles, in so far as they are relevant here, regarding removal of a judge on the ground of gross misconduct.

i. *Unlike its jurisdiction under Article 163(4), the Supreme Court, as the first and only appellate Court in such matters, has a more expansive jurisdiction since, it is required to re-evaluate and re-assess the evidence on record in order to establish whether the Tribunal misdirected itself leading to a wrong conclusion.*
ii. *Judges are presumed to be independent and to act without the control of anyone in deciding cases before them.*
iii. *Judges should always ensure that their conduct is beyond reproach in the eyes of a reasonable observer. They must always uphold the principle that justice must not only be done but be seen to be done.*
iv. *Once the President has received a petition from the Commission, he is constitutionally bound to appoint a Tribunal.*
v. *The standard of proof, whether in direct or circumstantial evidence, is one which is neither beyond reasonable doubt nor on a balance of probabilities.*

[101] An appeal under Article 168(8) to the Supreme Court is essentially in the nature of first appeal, in the exercise of which jurisdiction the Court has a more expansive power to review and re-evaluate the evidence on record in order to establish the correctness of conclusions of facts as well as of law recorded by the Tribunal, but granting deference to Tribunal's observation of credibility or unreliability of witnesses.

[102] It is a settled principle that whilst a first appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the court below failed to appreciate the weight of the evidence or that he was plainly wrong in his conclusions, the appellate court will not hesitate to overturn the decision. In other words, a first appellate court is not bound necessarily to follow the trial court's findings of fact because such an appeal is by way of retrial. See ***Joseph Mbalu Mutava v. Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya*** [supra] and the time-tested ***Peters v. Sunday Post Ltd*** [1958] EA 424.

[103] We now turn to consider the six grounds set out above, and we do so, not in the sequence in which they were argued before us, but in the order we have set out below.

(i) Whether there was a valid Petition before the Commission

[104] The argument around this question is that the letter to the Chief Justice dated 17th August, 2017 did not constitute a valid formal petition to the Commission as contemplated by Article 168 (2) of the Constitution.

Article 168(2) and (3) aforesaid provides that:

> ***"(2) The removal of a judge may be <u>initiated only by the Judicial Service Commission</u> acting on its own motion, or on the petition of any person to the Judicial Service Commission.***
>
> ***(3) A petition by a person to the Judicial Service Commission under clause (2) <u>shall be in writing, setting out the alleged facts constituting the grounds for the judge's removal</u>".*** [our emphasis].

[105] The two-pronged arguments by the Petitioner are that the removal of a judge from the office can only be initiated by a petition and not a letter, as was the case here, and two, that the petition must be directed to the Commission and not the Chief Justice or any other person. The last argument, according to the Petitioner, is supported by the testimony of Ibrahim Onyikwa, a senior partner at Onyikwa & Co. Advocates who stated before the Tribunal that the complaint was not intended to initiate the process of the Petitioner's removal from office, but was merely to seek the Chief Justice's administrative intervention to get the Petitioner to render the reasons for his Ruling.

[106] Though the text of Article 168(2) does not specify what form a petition should take, read together with Sub-Article (3), it is sufficient if it is in writing and sets out the alleged facts constituting the grounds for wishing to remove a judge. That being our construction of Article 168(2), a petition for its purpose can be in any form, email or other electronic means, so long as it satisfies this requirement, and specifies the person complaining. In contrast and in its colloquial sense, the word petition simply means, to make a request to someone to do something, as opposed to a petition as a formal court pleading or application requesting for some specific judicial relief.

[107] We do not, with respect, accept the suggestion by the Petitioner that the author of the letter did not intend it to be a petition in the sense of Article 168(2). This is because reading the full, and not selective testimonies of both partners in the firm of Onyinkwa & Company Advocates, Ibrahim Onyikwa and Dennis Onyikwa, will leave no doubt that in their intention, with the Bank's instructions, was to seek administrative action from the Petitioner's "employer", including those that **"normally would include removal, would include discipline"**.

[108] It is our considered view, once more that the letter in question sets out the alleged facts which the Bank believed constituted the grounds for the Petitioner's removal from office, and therefore met the enumerated features of a petition.

[109] On the second limb, whether the letter was directed to the correct body, the Commission, it must be understood that by the provisions of Article 168(2), even on its own motion, the Commission can initiate the removal of a judge. The Chief Justice, in the instant case, in his administrative capacity, merely forwarded the complaint together with the Petitioner's response to the Commission and the Commission, being satisfied that there were issues for investigation, seized the complaint.

[110] While we find no merit in this ground and reject it, it is particularly apposite to stress that a complaint intended for the removal of a judge on any of the grounds stipulated under Article 168(1) (a) to (e) is, no doubt, a very serious matter. It brings to bear the preservation of the professional integrity and ability of the Judge who is the subject of the complaint and also concerns the independence of the Judiciary as a whole. Therefore, for the process of removal of a judge to promote public confidence in the Judiciary, and to give certainty on the process, the complaint to the Commission must not be initiated in a casual and ambiguous manner.

[111] Due to the controversy generated by the manner the complaint in this matter was initiated, raising the question whether the letter merely sought the Chief Justice's administrative intervention or whether it was petition, and in order to prevent abuse of its process by litigants who are likely to file frivolous or vexatious complaints, it is perhaps time the Commission considered a structured and formal complaints initiating mechanism.

[112] In what form, for example, will the Commission, acting on its own motion, or on the petition of any person initiate and conduct the inquiry into the questions of inability to perform the functions of office arising from mental or physical incapacity, breach of a code of conduct, bankruptcy and incompetence of a Judge?

[113] A structured and formal complaints initiating mechanism similar to the procedure governing the conduct of a Committee or Panel constituted under the Third Schedule made pursuant to Section 32 of the Judicial Service Act for discipline and removal of judicial officers may be considered, with necessary adaptations to fill the void in conducting preliminary inquiries on the complaints before a recommendation for removal can be made.

[114] It can also be in the nature and form that have been adopted by equivalent bodies elsewhere. For example, in New Zealand, the office of Judicial Conduct Commissioner may require a complaint against a judge to be in the form of a written statutory declaration, containing details of the specific facts on which the claim of misconduct or disability is based. See Section 13(2) of the Judicial Conduct Commissioner and Judicial Conduct Panel Act of 2004.

[115] The Judicial Service Commission Act, 1994 of South Africa (The Amendment Act, 2008), brought in a requirement that for the Judicial Conduct Committee to recommend to the Judicial Service Commission to investigate any serious complaint against a Judge, the originating complaint must be lodged by means of

an affidavit or affirmed statement, specifying the nature of the complaint; and the facts on which the complaint is based. See Section 14(3)(b) of the aforesaid Act.

[116] In Australia, for example, Section 34(2)(c) the South Australian Judicial Conduct Commissioner Act, 2015 makes it an offence to make a complaint knowing that there are no grounds for making it or to make a statement to the Commissioner that is false or misleading in a material particular.

[117] We adopt the foregoing as international best practices, especially the requirements that the complaint should contain as much relevant detail as possible, bear the particulars of the complainant and a verification of the truthfulness of the complaint under penalty of perjury.

In the end we find no substance in this ground and reject it.

(ii) Whether the delay was inordinate and whether it amounted to gross misconduct

(a) The Delay

[118] At the heart of this appeal as indeed it was before the Tribunal and the Commission, is the question of delay by the Petitioner after delivering the Ruling on 30th May, 2017, to give the reasons for the Ruling. He had undertaken to do so on 10th July, 2017 but failed and instead the reasons were deferred eight (8) times for five (5) months.

[119] The delay coupled with the orders for the maintenance of *status quo,* according to the Bank, were prejudicial to it, particularly after their application to set aside the interim injunctive orders was not granted by the Petitioner. It was the Bank's case that as a result, the borrowers took the liberty and embarked on selling the motor vehicles leading the Bank to suffer loss in the sum of Kshs. 76,159,411.

[120] The first preliminary point for our resolution is whether it was lawful for the Petitioner to defer the reasons for his rulings of 30th May, 2017 to 10th July, 2017 or any other future date. The Tribunal noted that, unlike the Supreme Court **(**Rule 20(2) of the Supreme Court of Kenya Rules, 2012) and the Court of Appeal (Rule 32 (1) and (5) of the Court of Appeal Rules), there is no provision in the Civil Procedure Rules or in any law granting the High Court power to defer reasons for its ruling or judgment. It justified this position thus;

> ***"The Tribunal further notes that the High Court does not have and never had express provisions allowing it to defer reasons for a ruling/judgment, unlike the Courts above it. Neither the Civil Procedure Act and the Rules thereunder nor any Statute that sets out the powers and authority of the High Court feature any such provision granting that authority to defer reasons to the High Court".***

[121] This pronouncement was a clear misdirection made *per incuriam*, contrary to an express provision in Rule 32(1) and (2) of the High Court (Organization and Administration) (General) Rules, 2016 which prescribe that;

> ***"32. (1) Subject to the Civil Procedure Rules and Criminal Procedure Code, the Court may, at the close of any hearing, give its decision but reserve its reasons.***
>
> ***(2) Where the Court reserves its reasons in a decision under sub-rule (1), the Court may deliver the reasons, within seven days".***

[122] It was not only the Tribunal that missed this provision but none of the counsel in these and the proceedings in the Commission and the Tribunal made reference to it. It must follow, from Rule 32(1) and (2), first, that it was within the

Petitioner's discretion to reserve reasons for the Ruling, and secondly, that the Petitioner had seven days from 30th May, 2017 to give those reasons.

[123] The second point we take is Petitioner's argument that the Commission erred when it relied on Order 21 Rule 1 of the Civil Procedure Rules to the effect that he was expected to deliver the ruling immediately after hearing, or to do so within sixty days from the close of trial, failing which he was required to record and forward the reasons to the Chief Justice.

[124] Since the Tribunal noted the error and correctly clarified that the correct provision is Order 40 Rule 5 of the Civil Procedure Rules, nothing really turns on that objection. Though as we progress its importance will be clear. We stress that, since the application before the Petitioner was one for injunction, by Order 40 Rule 5, the Petitioner was to deliver the Ruling either at once or within thirty days of the conclusion of the *inter- partes* hearing;

> ***"Provided, where the ruling is not delivered within thirty days, the judge shall record the reason therefor and immediately fix a date for ruling".***

In contrast with Order 21 Rule 1, there is no requirement in Order 40 Rule 5 to forward the recorded reasons to the Chief Justice.

[125] It was accepted as a fact that after the file was sent to the Chief Justice upon his request, it was misplaced, never to be traced, despite strenuous steps throughout the period of the inquiry. In Paragraph 529 of the report, the Tribunal acknowledged the challenges faced by both itself and the Commission when called upon to ascertain some crucial information that could only be obtained from the misplaced file. The report states that;

> ***"529. Were the reserved reasons in issue actually delivered? In this respect we are alive to the fact that we***

did not have the court file to verify this position. Nevertheless, the Hon. Judge in his evidence before the Tribunal stated that he delivered the reasons on 3rd November, 2017".

[126] The question whether the Petitioner recorded the justification for the delay was likewise dependent on the availability of the file. While the Petitioner maintained that he recorded the reasons why he did not give written reasons in the Ruling within the time stipulated, counsel for the Bank insisted that they did not see a copy of those reasons.

[127] According to the Petitioner, he had enumerated several reasons to justify the failure to render reasons for the ruling within thirty days as required by the Rules. He reiterated those reasons before the Tribunal and asked it to consider them. He explained that, besides presiding in Bomet High Court, he had been assigned additional duties at Kericho High Court, where he was, like in Bomet, the only High Court Judge; that he had a heavy cause list from the two court stations; that immediately after delivering the Ruling on 30th May, 2017, he proceeded on his annual leave for the entire month of June, 2017; that the August Court Recess as well the Judges' Annual Colloquium fell during the period under consideration; and finally, that the working conditions at Bomet High Court were unfavourable, as he had no secretary, the court building was incomplete and there were no toilets or running water.

[128] Though the Tribunal agreed with the Petitioner that the reserved reasons were in fact finally given on 3rd November, 2017, it rejected the Petitioner's explanation for the delay and held that, without plausible excuse, the delay was inordinate and amounted to gross misconduct.

[129] Applying Order 40 Rule 5 and Rule 32(2) aforesaid, it is our view that the relevant dates for consideration are 5th April, 2017, being the date parties were

heard, 30th May, 2017, when the ruling was delivered with reasons being reserved and 3rd November, 2017, the date when those reasons were given.

[130] From 5th April, 2017, the Petitioner had 30 days to rule on the application and the objection. A ruling was rendered on 30th May, 2017, out of time, even taking into account the additional seven days permitted by Rule 32(2).

[131] From this, there can be no debate that the reasons were rendered after some delay. With respect, we come to the same conclusion on this point as the Tribunal, that those reasons were given five months after the period allowed by the rules. It is true also that during this period, the delivery of those reasons weas adjourned eight times.

[132] This Court has, in interpreting Article 159(2)(b) of the Constitution, in the case of ***Teachers Service Commission v. Simon P. Kamau & 19 others*** [2015] eKLR warned that;

> ***"The standpoint of the Constitution is that, delayed justice amounts to injustice: and the Courts, which are the dedicated mechanism for the delivery of justice, have an obligation to see to a steady pace of litigation, terminating within a reasonable time-frame".***

[133] While we fully endorse this statement, and the fundamental principles enacted in Sections 1A and 1B of the Civil Procedure Act and Section 3 of the High Court (Organization and Administration) (General) Rules, to underscore expeditious administration of justice, we would like, for our part, to stress that long drawn delays after the conclusion of a hearing, are contrary to the rule of law as they prolong uncertainty; and that litigants are entitled to know the reasons for the courts' decisions. That is the reason why Section 25 of the Civil Procedure Act demands of courts that, after the case has been heard, they must pronounce

judgment, and only then a decree can be drawn. Judgments, as indeed all judicial decisions must contain, by dint of Order 21 Rule 4;

> ***"...a concise statement of the case, the points for determination, the decision thereon, and the reasons for such decision".*** [our emphasis].

[134] We may also add that complaints about the delay in case resolution have echoed through the centuries around the world. It is those problems that, no doubt inspired the famous phrase, attributed to William Gladstone, British Prime Minister (1868-1894), ***'justice delayed is justice denied.'***

[135] Many years before this pronouncement, **Magna Carta** (1215), one of the greatest constitutional documents of all time, expressed the need for swift justice in Latin, *Nulli vendemus, nulli negabimus aut differemus rectum aut justiciam* - **"To none will we sell, to none will we deny, or delay, the right of justice."**

[136] Similarly, in its preamble, the Bangalore Principles enjoin the courts to guarantee all persons who appear before them that the determination of any criminal charge against those facing trial or the rights and obligations of litigants in a civil suit, are rendered without undue delay, through a fair and public hearing.

[137] After nearly 800 years, the question of delay in the dispensation of justice is today as alive in many countries as it was at the time **Magna Carta** was promulgated. Although in Kenya, as noted by this Court in ***Teachers Service Commission v Simon P. Kamau*** case (supra), the proverbial *"Justice delayed is justice denied"* is now a constitutional imperative enshrined in Article 159(2)(b) of the Constitution, the malaise of delays and backlog of cases has been one of the main indictments against the Judiciary as demonstrated by the enduring characteristic of proceedings in many courts in this country.

[138] According to the State of the Judiciary and the Administration of Justice Annual Report (SOJAR) (2019 – 2020) and the Performance Management and Measurement Understandings Evaluation Report for that period, there were 617,582 pending cases in all the court levels.

[139] It is therefore not surprising that the question of delay and its twin, backlog has been the subject of discussion innumerable times in the past as confirmed by successive reports on judicial reforms, the reports of ***Judges and Magistrate Vetting Board (JMVB)*** [2012] eKLR, and the Judiciary policy documents. One of the **JMVB** reports, for example, bleakly found that:

> ***"An entrenched history of corruption, a lack of impartiality, and excessive delays had fostered the disintegration of any hope that justice might be obtained through recourse to the courts in Kenya……The overriding theme linking the majority of the complaints is the delay occasioned by the judge. This is of great concern. From the perspective of the Board, delay in delivering judgments and rulings became the central issue in determining the judge's suitability to continue serving on the bench. The duration and scale of the delays undoubtedly caused major distress to many litigants and contributed to a major depletion of confidence in the judiciary."***

[140] The report identified, the length of the delay; the volume of delayed decisions; the urgency of the matters to be decided; the particular systemic pressures faced by the judge sitting at a particular station; personal factors such as ill-health or bereavement; and the steps taken by the judge to audit, manage and eliminate the backlog, the difficulties under which judges labour, including the

systemic and institutional problems, and the work environment, as some of the factors to be taken into account while dealing with accusations of delay.

[141] In defining what length of delay qualifies to be inordinate, it is recognized that 'time' is a relative and subjective concept and that in the context of judicial processes, as we shall demonstrate shortly, the principal issue may not be the extent of delay, but its reasonableness and justification for it.

[142] Secondly, as the Tribunal, correctly acknowledged, there is no single universally accepted definition of the word "*inordinate*". It, however noted that;

> ***"540…there can be no definition cast in stone as to what amounts to inordinate delay but the same can only be determined on a case by case basis within the context of the facts therein. It is not only the length of time but a consideration whether the reasons advanced for the delay are rational and justifiable and whether on account of the delay prejudice has been occasioned on any of the parties".***

[143] Salmon LJ, while explaining the meaning of inordinate delay in widely cited ***Allen v Sir Alfred McAlpine and Sons Ltd*** [1968] 1 All ER 543 said;

> ***"It would be highly undesirable and indeed impossible to attempt to lay down a tariff – so many years or more on one side of the line and a lesser period on the other. What is or is not inordinate delay must depend upon the facts of each particular case. These vary infinitely from case to case, but inordinate delay should not be too difficult to recognise when it occurs."***

[144] In ***Manchester Outfitters Suiting Division Ltd & another v. Standard Chartered Financial Services Ltd & another*** [2002] eKLR, the Court of Appeal found a delay of five years inordinate, even when due allowance was made for the judge's other duties, because it was inexcusable. See also ***Elizabeth Barangaza v. Tyson Habenga,*** Civil Appeal No 285 of 1997.

[145] Broken down, the authorities stress the points that, whether a delay is inordinate is a question to be determined on a case by case basis and on the peculiar facts and circumstances; that inordinate delay should not be difficult to discern where it occurs- it should be apparent, self-evident and obvious. The focus should not be on the length of the delay *per se*, but also on the justification and reasons, which in turn must be rational and plausible; that where the delay is prolonged, it is in the discretion of the court to consider, whether justice can still be done despite the delay. In addition, the prejudice likely to be occasioned to any party is equally an important consideration.

[146] The reports of JMVB, to which we have alluded to, document instances of default in rendering decisions ranging from three to eight years, without any plausible explanation. In a specific case, there were as many as 200 judgments and rulings pending.

[147] In this appeal, having accepted that the reserved reasons were delivered on 3rd November, 2017, we understand the questions before us on this ground to be, first, whether the delay of five months was inordinate and unjustified, and depending on the answer, the next question will be whether the delay, if any constituted an act of gross misconduct, serious enough to justify the Petitioner's removal from the office.

[148] As we consider the twin questions, we shall bear in mind that the burden of proving that the delay was so inordinate and therefore amounted to gross misconduct lay on the shoulders of the Lead Assisting Counsel, which burden was

dischargeable by him demonstrating the existence of the matters alleged against the Petitioner on standard of proof that is below "beyond reasonable doubt" but above "a balance of probability". See ***Joseph Mbalu Mutava v. Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya*** [supra].

[149] Taking into consideration the complaint against the Petitioner, his explanation, all the circumstances and the threshold of proof, we ask; is five months' delay inordinate?

(b) Justification for the Delay

[150] A lapse of five months, it follows from the authorities relied on by both sides, is not *per se* inordinate. It will only amount to inordinate delay if it is inexcusable for lack of justification.

[151] In his rebuttal of the allegations for the delay, the Petitioner explained that he single-handedly served both Kericho and Bomet High Court stations; that apart from judicial work, he discharged administrative functions of the two court stations as the Presiding Judge; that the two stations had heavy caseload; and that from 22nd to 25th of May, 2017, he was on circuit at Kericho.

[152] He further clarified that the following month of June, he proceeded on his annual leave; that upon resuming duty on 17th July, 2017 he proceeded for one week on circuit duties to Kericho where he found a lot of pending work, at the end of which the August court recess set in on 1st August, 2017 and ran up to 15th of September, 2017. It was during the recess period that he also attended the Annual Judges' Colloquium.

[153] After the August recess, the Petitioner worked in Bomet for the month of September, 2017. It was in the month of September, 2017 that he was gazetted to hear election petitions. He did another round of circuit to Kericho in October, 2017,

and also participated in the training of Bomet Law Court's staff on the Registry Culture Change at Naivasha. The following month, in November, he returned to Bomet and rendered the reserved written reasons for his Ruling of 30th May, 2017.

[154] In addition to these factors, the Petitioner lamented about the working environment; that in Bomet, he worked from a room in an incomplete building, with no electricity, water or toilets; and that he did not have secretarial or copy typist services. He concluded that even with these challenges, he was able to perform his duties as a judge fairly, save for this one instance.

[155] From the record, it is clear to us that before the complaint was escalated to the Commission, the Petitioner, in his response dated 13th November, 2017 to the Chief Justice, had catalogued these reasons and some of the challenges he was facing in running the two court stations. The reasons, in our opinion, were not, as it were, invented for purposes of the Tribunal proceedings.

[156] He confirmed to the Tribunal that he had brought these challenges to the attention of the Chief Justice and Chief Registrar of the Judiciary.

[157] For the delay, he expressed regrets and pleaded with the Tribunal to find that the delay was not deliberate.

[158] Taking into consideration the length of the delay, being five months; bearing in mind that this was just one isolated instance of delay in the Petitioner's many years of service; appreciating the justification he proffered which highlighting systemic institutional pressures, personal factors such as his annual leave, the lamentable conditions of work, we think plainly that the finding of inordinate delay failed to take into consideration these reasons.

[159] Comparing the delay here with those running into several years enumerated in the JMVB reports, the five years in, for example, ***Manchester Outfitters Suiting Division Ltd & another v. Standard Chartered Financial***

Services Ltd & another [supra], or sixteen months in ***Elizabeth Barangaza v. Tyson Habenga*** [supra], we hold the view that five months delay, coupled with plausible reasons presented to the Chief Justice, the Commission and the Tribunal, was clearly not inordinate in the sense we have explained the word previously in the judgment. It was not extreme, or unconscionable. It was not out of proportion and did not exceed the limits of reason.

[160] It is important to note that, even though the Tribunal found the five months inordinate and unjustifiable, it qualified that conclusion by stating that;

> ***"565. For the avoidance of doubt, we emphasize that it is not every delay of over five months which is unjustifiable and/or inordinate. We are not setting out an inexorable rule on what constitutes unjustifiable and inordinate delay. It goes without saying that the period of over five months found unjustified and inordinate is informed by the peculiar circumstances of the case before us".***

Then in its final findings, the Tribunal accepted that;

> ***"10. The Tribunal is in no way setting out an inexorable rule on what constitutes unjustifiable and inordinate delay as this must be determined within the context and facts of each particular case".***

[161] With respect, the Tribunal did not give sufficient consideration to the reasons advanced by Petitioner for the delay. In the Tribunal's opinion the Petitioner ought to have utilized the Court Recess and annual leave to finalize his pending judgments and rulings. This position clearly ignored the Petitioner's explanation that his personal circumstances were such that he could not finalize all pending decisions during that period.

[162] Both **the Report of the Committee on the Administration of Justice** (The Kwach Report), 1998 and **the Final Report of the Task Force on Judicial Reforms**, 2019 (the Ouko Report) justify the recess system on the ground that it during the recess period that Judges take leave, deal with judgment and ruling backlog and attend to other professional and family matters.

[163] While Judges are encouraged to deal with judgment and ruling backlog, and while in reality judges, by and large use recess to do so, it is not possible in all instances to finalize all pending rulings and judgments during each recess, as the Tribunal appeared to suggest.

[164] Indeed, judges are overburdened on a daily basis and work extremely long hours. The time judges spend in court is just a fraction of their working time. They spend evenings, nights, and weekends reading files, reading other judgments and drafting opinions. Further, subordinate courts and majority of the superior courts work five days a week. In the absence of sufficient breaks, leave or recess, therefore, judges can suffer a burnout, and are likely to fail to meet work-related commitments.

[165] The Petitioner's explanation that he served in two court stations, or that he had heavy caseloads, or that he worked under difficult conditions, were not rebutted. The Petitioner presented lengthy cause lists for both Bomet and Kericho High Courts, which were marked and produced as MM, MM10 and MM11, to demonstrate the caseload. The Petitioner's examination before the Tribunal on this issue was limited to Bomet High Court yet he was categorical that Kericho High Court too had a heavy caseload. We confirm this assertion on own assessment of the cause list for the station.

[166] For Bomet High Court, on average on a single day, the Petitioner would have six cases listed for hearing. These included murder trials, which the Petitioner said

would take a whole week and succession causes that would involve many witnesses and could take a whole day or even two days.

[167] The burden on the Petitioner in terms of Order 40 Rule 5 of the Civil Procedure Rules, was limited to him offering an explanation, some reason, why the reasons were not rendered within thirty days of the hearing.

[168] The Petitioner, having discharged the initial burden of proof under Order 40 Rule 5, the evidential burden shifted to the Tribunal to rebut the Petitioner's claims, by, for instance visiting Bomet and Kericho High Courts to verify for itself some of the challenges presented to them on the working conditions. Similarly, there is nothing to show that the Tribunal conducted further inquiry over the general and overall status of delayed decisions in the High Court and the contributing factors of delay.

[169] In conclusion, insofar as this ground is concerned, only long, incessant, repetitive and even habitual delays may amount to an indefensible dereliction of duty, which in turn may render the judge concerned unsuitable to hold office.

[170] Making due allowance for the Petitioner's judicial and administrative duties, the explanation proffered by him and the single and isolated incident, five months' delay was simply a delay, not inordinate delay. We believe too, that, justice could still be served despite the delay.

For all the reasons stated, this ground succeeds.

(c) Gross misconduct

[171] The question that must of necessity follow from our determination above, is whether, in the light of that outcome, there can be any other basis for upholding the Tribunal's recommendation to the President for the removal of the Petitioner from office. As we answer that question, it is vital too to bear in mind that security

of tenure for judges is intended to protect them against interference by any person or authority and against arbitrary removal from office.

[172] The Constitution of Kenya today guarantees the individual independence of judges, by, among other measures, establishing an objective criteria and transparent procedure for their removal unequivocally specified under Article 168, that;

> ***"168. (1) A judge of a superior court may be removed from office only on the grounds of–***
>
> ***(a) Inability to perform the functions of office arising from mental or physical incapacity;***
>
> ***(b) A breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;***
>
> ***(c) Bankruptcy;***
>
> ***(d) Incompetence; or***
>
> ***(e) Gross misconduct or misbehaviour*** [our emphasis].

[173] Of the six core values of the Judiciary under the **Bangalore Principles of Judicial Conduct**, competence and diligence are prerequisites to the due performance of judicial office. Value 6 (6.5) specifically demands of a judge to perform **"all judicial duties, including the delivery of reserved decisions, efficiently, fairly and with reasonable promptness".**

[174] It further emphasizes that a judge may be removed from the office only for reasons of incapacity or misbehaviour that clearly render them unfit to discharge their duties.

[175] The United Nations Basic Principles on the Independence of the Judiciary (1985), on the other hand requires, just like our Constitution, that for judges to enjoy absolute freedom from liability in respect of their judicial functions, their security, remuneration, conditions of service, pensions and the age of retirement be adequately secured by law. Judges are, to that extent guaranteed tenure of office until attainment of voluntary or mandatory retirement age; and that, barring this, they can be removed only for reasons of incapacity or behaviour and other grounds that render them unfit to discharge their duties.

[176] In a nutshell, the allegation against the Petitioner was that, by inordinately delaying the delivery of reasons and for ordering that the *status quo* be maintained, he committed an act of gross misconduct, warranting the invocation of Article 168(1) (e). "Gross misconduct" and "misbehaviour" are used in the Article with the word **'or'** between them as a sentential connective to indicate an alternative. In that sense, we are of the persuasion that the ground for our consideration is "gross misconduct".

[177] The Tribunal correctly noted that the phrase 'gross misconduct' is not defined in the Constitution, Judicial Code of Conduct nor in any other legislation within the Kenyan jurisdiction; and that there is no conventionally accepted legal definition of 'gross misconduct'.

It went on to say;

> ***"438. The Tribunal adopts a definition of gross misconduct or misbehaviour that infers <u>more seriousness</u> in the case of the former and less serious infractions amounting to the latter. The framing of gross misconduct or misbehaviour under the Kenyan Constitution and the Judicial Code of Conduct (2003) requires the possibility of sanctioning a variety of contravening behaviour.***

....

> ***444. The Tribunal underscores that <u>not every allegation of misconduct merits the removal of a judge from office</u>..... where a Tribunal is of the view that the allegation does not meet the constitutional standard the Tribunal cannot recommend the removal of the judge that is the subject of the inquiry".*** [our emphasis].

[178] Whether the conduct of a judge can be typified as **"gross misconduct or misbehaviour**" cannot be assessed in abstract. It is a question of fact which will depend on the nature of the complaint. As the Tribunal correctly noted, it is not every misconduct that will expose a judge to a removal process.

> ***"that not every allegation of misconduct merits the removal of a judge from office.....and where a Tribunal is of the view that the allegation does not meet the constitutional standard the Tribunal cannot recommend the removal of the judge"***.

[179] This Court did not define the phrase "gross misconduct" in ***Joseph Mbalu Mutava v. Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya*** [supra] case. And it is true, from the use of the word "gross" that there are different degrees of misconduct. Some may undermine public confidence in the administration of justice generally, without having to reach the conclusion that an individual judge is incapable of performing the duties of his or her office. Others may be so grave with the potential of undermining public confidence in the ability of the judge to perform the duties of office or in the administration of justice generally, warranting the discharge from performing judicial functions.

[180] Though dealing with the removal of a County Governor under Article 181 of the Constitution for **"gross violation of this Constitution or any other law",** in ***Martin Nyaga Wambora & 3 others v. Speaker of the Senate & 6 others*** [2014] eKLR, the both the High Court and the Court of Appeal were in agreement that the word gross can only mean any of the following; atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious, and shocking.

[181] The Tribunal itself observed that;

> ***"426....the Privy Council in Re Hon. Chief Justice of Gibraltar stated that removal of a judge can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability properly to perform the judicial function".*** [our emphasis]

It went on to explain the term "gross misconduct" as follows;

> ***"427. In his book Kenya's Constitution: An Instrument for Change, Professor Yash Pal Ghai defined the term "gross misconduct" to mean 'generally atrocious, colossal, deplorable, disgusting, dreadful, enormous, gigantic, grave, heinous, outrageous, odious and shocking'. These words express some extreme negative conduct whether a conduct is gross or not will depend on the matter as exposed by the facts".***

[182] The Tribunal further borrowed the provisions of the Guyana **Time Limit for Judicial Decisions Act No 9 of 2009** to the effect that a judge could be removed from office only **"for misbehaviour or for persistently not writing decisions or for continuously failing to give decisions and reasons**

therefor within such time as may be specified by Parliament." [our emphasis].

[183] Clearly, all the words used to describe "gross" express some extreme negative conduct; a degrees of misconduct of such a serious, outrageous and flagrant nature that would warrant removal of a judge from office, those that would render an individual judge unfit or incapable of performing the duties of his or her office. That is how serious it ought to be.

[184] To use all the adjectives that have been employed; was it gross, so severe or extreme; so indifferent and blatant of the Petitioner to give written reasons five months after they were reserved?

[185] Was the delay of five months of such a magnitude and gravity as to bring the office of judge itself and the Petitioner himself into disrepute?

[186] Did the delay have the potential of undermining the standing of the courts, or destroying public confidence in the Petitioner's ability to continue to perform his judicial functions?

[187] We repeat, the necessity of proof always lies with the person who lays charges. In this case, it was the Assisting Lead Counsel who bore the evidentiary burden to prove the allegations contained in the Petition.

[188] From our earlier conclusion regarding the accusation of inordinate delay, which has a direct bearing on this aspect of the appeal, the proven facts only established 'delay' and not 'inordinate delay' in the delivery of the reserved written reasons. If the delay was not inordinate, it must follow that the Petitioner's conduct did not amount to 'gross misconduct' within the intended meaning in the Constitution.

[189] The Tribunal compared the Petitioner's conduct with that in ***the Report of The Tribunal Set up Under Article 134(2) of the Constitution of the***

Republic of Seychelles to Inquire into the Inability of Judge Durai Karunakaran to Perform the Functions of the Office of Judge on Grounds of Misbehaviour August, 2017. We do not think the conduct of the Petitioner is anything near that of Judge Karunakaran who was found to lack diligence, to have delayed the hearing of many cases and also to have delayed the delivery of many Judgments. He was found to have encouraged the culture of incessant adjournments that was simply "unacceptable and deplorable"; and that the **"delays were so pervasive that this amounted to gross misbehaviour on the part of Judge Karunakaran compelling a recommendation for removal from office".**

[190] Equally, we do not think that the conduct of the Petitioner was persistent, or that, considered alone, it was capable of destroying the confidence in the judge's ability to properly perform his judicial function. There was no discernible pattern of dereliction, but a single act of transgression; a five months' delay. He readily admitted the delay, gave an explanation and expressed remorse.

[191] By the standards we have seen in other jurisdictions and even locally, we come to the conclusion, on this ground that gross misconduct was not proved to the required threshold and the recommendation by the Tribunal to the President to remove the Petitioner from office on that ground was therefore in error. No doubt the delay may, to the extent we shall explain, been prejudicial to the Bank, the punishment imposed on the Petitioner was, in our respectful view excessive and disproportionate his indiscretion.

[192] Removal of a judge from office for whatever reason is not a light matter. That is why there are only very limited specific circumstances for the removal. Removal from office is the only and most severe sanction available for discipline of a judge. Unlike Kenya, some jurisdictions have made provision for lesser measures, such as reprimand. Guideline VI.1(a)(ii)-(iii) of the **Latimer House Guidelines** makes recommendation for the Chief Justices to exercise some powers to impose

any disciplinary measures short of removal, save that no judge should be reprimanded in public.

[193] England and Wales, and in some instances in the United States, have adopted a range of graduated options from the admonition to reprimand.

[194] In the former, the Lord Chief Justice under the Constitutional Reform Act may give a judicial office holder formal advice, or a formal warning or reprimand, for disciplinary purposes (but this does not restrict what he may do informally).

[195] Making reference to the **Ouko Report** (supra), the Tribunal, in its report, suggested alternative disciplinary measures that will take into consideration the gravity of the allegations and provide for a range of disciplinary measures that may be taken against a judge in such circumstances. The Ouko Report had recommended that there be a provision in the Constitution for sanctions against Judges of less serious misconduct, misdemeanor or unprofessional conduct not warranting removal of a judge from office. It noted that at the time (and indeed today), the only disciplinary control the Chief Justice, as the head of the Judiciary exercises over Judges in such situations is limited to things like **"transfers, withdrawal of official work, refusal to grant permission to attend conferences or workshops or refusal to grant leave."**

[196] There are, however, arguments against the use of graduated sanctions against sitting judges on the ground that it may compromise the public's and litigants' respect for judicial decisions. It is also argued that it is demeaning to the office. While there is no evidence to substantiate these claims, and remembering that in other jurisdictions this graduated sanctions are now commonplace, however in the wisdom of Kenyans, under the current legal framework, the Constitution provides only for the procedures for removal of Judges, and there are no equivalent procedures for disciplinary action against a Judge for misconduct not warranting removal.

(d) Order for Maintenance of Status Quo

[197] The other aspect of gross misconduct, according to the Statement of Allegation and Summary of the Evidence in Support of the Allegation, was that, by ordering that the *status quo* be maintained pending the delivery of the reasons, the Petitioner committed an act of gross misconduct under Article 168(1)(e). According to the Bank, the order for *status quo* meant that the injunctive orders that were in force were to remain in place, and since the *status quo* of the motor vehicles at this stage was that they were being sold, that the order also meant that the sale could go on. As a result of those orders, it was argued that the Bank suffered loss of KSh. 76,159,411.

[198] To begin with, the Tribunal made no findings regarding the question of the order of *status quo* and the alleged loss of KSh. 76,159,411, quite properly, in our view, because it would have been inappropriate for it to do so as those were matter whose determination was yet to be reached by the trial court. Secondly, it could not question the exercise of judicial discretion by the Petitioner.

[199] For the reasons above, we find merit in this argument; that the ground of gross misconduct was not proved to the required standard.

(iii) Whether the burden of proof was unfairly shifted to the Petitioner

[200] The burden that was alleged to have been shifted to the Petitioner was in relation to proof of the date when the Petitioner delivered the reserved reasons. The Petitioner was of the view that having established that the subject court file could not be traced, a fact confirmed by the Secretary of the Commission, it was unfair to shift to him the burden of proving that in fact, he delivered those reasons.

[201] The Tribunal submitted, on the other hand, that an inquiry before the Tribunal was a quasi-judicial process, and therefore it was not strictly bound by

the rules of evidence but guided by the rules of natural justice and relevancy as codified in Section 13 of the Second schedule of Judicial Service Act. Accordingly, allegations against the Petitioner were proved to the set standard; and that at no point was the burden of proof shifted to the Petitioner.

[202] It is not in doubt that it was conceded that the reserved reasons were delivered. Indeed, the Tribunal expressly accepted this and found that the reasons were delivered on 3rd November, 2017. That left only the question, whether the delay of five months, between 30th May, 2017 and 3rd November, 2017 was inordinate, a question we have determined already.

[203] Though the Tribunal required the Petitioner to provide proof that he actually delivered the reasons and the date of doing so, that question was moot in view of the Tribunal's own finding, as expressed above.

This ground, for the reasons we have given, is likewise hypothetical.

(iv) Whether the unavailability of the court file was prejudicial and amounted to a violation of the right to fair hearing

[204] A Tribunal constituted under Article 158 is a quasi-judicial body which must comply with the rules of natural justice. It is required to conduct a fully-fledged trial, where the affected judge is entitled to the right to legal representation; the right to be present while the witnesses testify; the right to adduce and challenge evidence; and the right to present arguments, and related rights in order to ensure that the hearing complies with the dictates of procedural and substantive fairness.

[205] It is on record that the Petitioner repeatedly requested, without success, for the relevant court file to prepare his defence. The file had been forwarded to the Chief Justice following letters of complaint against the Petitioner. The Secretary to the Commission confirmed that;

> ***"... the file Bomet High Court Case No. 4 of 2016 between Alfred Kipkorir Mutai & Kipsigis Stores Limited vs. NIC Bank Limited is misplaced. We have made efforts to trace it, but so far without success.***
>
> ***We are not therefore in a position to avail it at the moment. Should it be traced, we shall forward the same to you at the earliest opportunity."***

[206] With that confirmation, all hopes of tracing the file during the period of investigations dissipated.

[207] Though the Tribunal reiterated the *dicta* in criminal cases that loss of a file *per se* will not lead to an automatic acquittal, it did not, at all, suggest that the Petitioner was responsible in any way for the misplacement of the file.

[208] The file was critical for the Petitioner's rebuttal of allegations that, when he rendered the reserved reasons on 30th May, 2017, he failed to record reasons for the delay of five months, contrary the proviso to Order 40 Rule 5 of the Civil Procedure Rules. The Petitioner swore that he recorded the reasons. That fact could only be ascertained from the missing files. Learned Counsel for the Petitioner pleaded with the Tribunal saying that;

> ***"My Lord. It is not that it is not necessary. It is very necessary, it is very key but if it cannot be found really there is nothing we can do, we have to proceed with the matter as it is.....We really wanted to look at it particularly for the second witness who is coming, who understands the matter better. But now that it is not available, our hands are tied, we have to deal with the issue as it is."***

[209] The Chairman of the Tribunal, appreciating the Petitioner's predicament to defend himself without the file, assured him that;

> ***"And his testimony and your submissions will be considered in the light of the fact that we did not have that file. So due allowance, we say in our parlance, due allowance will be given to the fact that the file was not produced and the benefit, if any you may wish submit, must go to the Judge because it is not his fault that the file is not there".***

[210] The Chairman appears to have kept his word to the following extent. The Tribunal came to the ultimate conclusion that, in the absence of the file, it was not possible to determine whether the discharged interim orders were subsequently reinstated *ex-parte* or after *inter-partes* hearing. It was also of the view that the interim injunctive orders were extended by consent of the parties and that the reserved reasons were delivered. The Petitioner was thus exonerated with regard to those claims. These determinations were made in view of the fact that the file was not available for perusal.

[211] Even though the Tribunal was alive to the fact that the proof of some allegations was dependent on the record of proceedings, as shown above, strangely it rejected the Petitioner's explanation that the reasons were recorded.

[212] Therefore, it was prejudicial for the Tribunal to insist on proof of a fact that could not be availed in the absence of the file, with the result that the Petitioner was jeopardized in his defence. It is of no effect that the Petitioner willingly agreed to proceed with the hearing without the file. He could not have e acquiesced in light of the statement of hopelessness by his counsel, reproduced above. The Petitioner merely accepted his fate in light of the situation he and indeed the Tribunal found themselves, without the court file.

[213] We also do not accept the Tribunal's claim that the Petitioner having had possession of the court file while preparing his written reply to the Chief Justice, was not prejudiced as he had the opportunity to responded to all the concerns raised. We bear in mind that responding to the letters submitted to him by the Chief Justice, and preparing to defend himself before the Commission and the Tribunal are two different stages, with different standards of proof. The latter required a more comprehensive response, being a matter of discipline with the likelihood of removal from office. For this, the Petitioner certainly required to refer to the record of proceedings.

[214] It was, for these reasons, erroneous for the Tribunal to find that the unavailability of the file did not infringe the Petitioner's right to fair administrative action and fair hearing as guaranteed by Articles 47 and 50 of the Constitution.

This ground succeeds.

(v) Whether the Tribunal considered matters without jurisdiction

[215] Both in his original grounds and those contained in the supplementary record of appeal, the Petitioner complains that the Tribunal, in error, veered off to consider certain matters without jurisdiction. Those matters were identified as reference made to **HCCC No. 2 of 2016** and **HCCC No. 3B of 2017;** that it ought not to have considered whether a court can reserve the reasons for its decision, or attempt to determining "the judge's state of mind".

[216] Further, it has been contended that the Tribunal delved into the merits of the Petitioner's decision in the application for injunction and the Notice of Preliminary Objection, thereby improperly exercising an appellate power.

[217] The Tribunal appointed under Article 168 of the Constitution is responsible for the regulation of its proceedings. In the course of its work, it must uphold the principle of substantial justice; it has to interpret the laws and regulations in a

manner that promotes the principle of substantial justice; that it will exercise all the powers necessary for the proper execution of its mandate; and the Tribunal is not bound by strict rules of evidence but shall be guided by the rules of natural justice and relevancy.

[218] The Tribunal, accordingly, exercises wide powers. We have already addressed some of the complaints raised in this ground. But some bear repeating for emphasis. Since the complaint was not about the competency of the Petitioner, and consistent with the principle of judicial independence, the Tribunal could not inquire into the manner in which the Petitioner exercised his discretion when deciding an interlocutory application. Without proof of bias, bad faith or corruption, there was no basis to fault the Petitioner's exercise of discretion. And if he did not exercise it properly, it could only be challenged by an application for review or setting aside, stay of execution and proceedings or on appeal.

[219] Contrary to the Bank's argument that it could not move to the Court of Appeal with a 5(2)(b) application because the Notice of Appeal had been cancelled, we have said that the cancellation was irregular and had no effect on the validity of the notice. Indeed, it was conceded that even after the purported cancellation, the notice was served on the borrowers' advocates.

[220] But significantly, in a similar situation where the Court of Appeal had dismissed the appeal but reserved the reasons for that decision, in the case of ***Richard Nyagaka Tong'i v. Chris Munga N. Bichage & 2 others*** [2015] eKLR, this Court explained that;

> "[*57] ....we are not in agreement that no notice of appeal could be lodged against the Order of the Court of Appeal of 11th December, 2013 on account of the appellant not being able to discern issues of constitutional interpretation or application. In our perception, the*

principle running through the Lawrence Nduttu and Munya 1 cases is no more than that, the detailed reasoning in the Appellate Court's Judgment is relevant only for drafting a competent petition of appeal under Article 163(4)(b), but not a notice of appeal. Thus, where a Court reserves reasons for Judgment to a later date, time for filing the notice of appeal runs as from the time of the decision, rather than that of the detailed reasons for the decision"

[221] Though that decision was based on the Supreme Court Rules, the principle would, no doubt, also apply to the circumstances of this matter. See ***Sheikha v. Halima*** (1959) E.A 500, cited by this Court in the above case and where the Court of Appeal similarly said;

"[46] When should the appellant have filed an appeal before this Court, given that the reasons in support of the Court's decision were deferred to 4th April, 2014? Under Rule 31(1), the appellant ought to have given a Notice of Appeal within 14 days, as from 11th December, 2014 and subsequently filed an appeal in accordance with Rule 33(1), within 30 days as from the date of filing the notice". *Per Forbes V-P.*

[222] It was equally erroneous for the Tribunal to have considered matters which the Petitioner was not even aware of when he made the impugned decision. The existence of an insolvency cause to wind up the 1st Plaintiff **(Kipsigis Stores Limited)** in **Nbi. H.C. Insolvency Case No. 14 of 2016** was not brought to the Petitioner's attention when he granted injunction against the Bank. Yet, the Tribunal, even after acknowledging that all these issues were alive before the High

Court, went ahead, nonetheless, to blame the Petitioner for the "negative consequences" that the Bank was exposed to by his decision.

[223] That will suffice for this ground. We intend, however, to demonstrate shortly, as we turn to the final ground, that the Tribunal, in considering the prejudice allegedly suffered by the Bank, went into details that only a trial court was competent to consider.

(vi) Whether the Bank suffered loss and prejudice by the decision of the Petitioner

[224] At the beginning of this judgment, we have set out the genesis of the complaint to the Commission that ultimately led to the setting up of the Tribunal to investigate the Petitioner. We do not wish to regurgitate that background. But to the extent relevant to this ground, it was claimed that the delay to deliver the reasons for the ruling and the rejection of the request by the Bank to stop the alleged ongoing sale of the financed motor vehicles was not only oppressive and punitive to the petitioner, but had also caused it financial loss in the sum of Ksh.76,159,411.

[225] In paragraph 569 of its report, the Tribunal confirmed the claims of prejudice as a result of those orders. The prejudice to the Bank was said to be its inability to realize its security for reasons, among others that, one of borrowers was being wound up, while the motor vehicles were being vandalized. Yet, at the same time the Tribunal declined to determine the question of financial exposure to the bank, maintaining that that issue was live before the High Court, and that it could not second guess its outcome.

[226] For our part, we cannot see the prejudice to the Bank. Where an order is vague, as suggested by the Bank in relation to that of the maintenance of *status quo*, the practice is to seek a clarification. We, with respect agree that loss, if any,

arising from the sale of the motor vehicles to the third parties or vandalism of the motor vehicles were all matters to be tested in a judicial process in a trial.

[227] We can do no better than reproduce, in pertinent portions of the record of the proceedings of the Tribunal that illustrate that no loss or even prejudice linked directly to the Petitioner's decision was occasioned or proved.

[228] The Vice Chairperson of the Tribunal sought to know the exact extent of loss suffered by the Bank and asked;

> ***"Lucy Kambuni (Vice Chairperson): I think I have a question. I am just trying to understand. So, what really is the loss of the bank here? Have you lost anything? There is an outstanding claim. This suit is still pending in Bomet; is it not?***
>
> ***Steven Atenya (Senior Legal Manager): Yes.***
>
> ***Lucy Kambuni (Vice Chairperson): You can still pursue your counterclaim and hopefully recover. So, what have you really lost as the bank.***
>
> ***Steven Atenya: Yes***
>
> ***Lucy Kambuni (Vice Chairperson): What about the guarantors? There are guarantors in this contract; isn't it?***
>
> ***Steven Atenya: Yes, the guarantors –***
>
> ***Lucy Kambuni (Vice Chairperson): - which you can still pursue.***

Steven Atenya: The guarantors are the two directors of these companies. We can and especially with the revelation of the new changes to the Law of Contract Act, we can only exhaust our recourse against our main borrower before we can go for the guarantors. When we go for the guarantors, we can only get orders as against their property and nobody sitting in here can actually guarantee that these guarantors have adequate resources to cover an outstanding debt of 103 million and therefore the bank is not guaranteed that it will recover a debt of 103 million continuing to accrue interest."

[229] The truth of the matter was that the Bank's counterclaim seeking from the borrowers Kshs. 76,159,411.47 as the sum owed to it had not been tried and decided in the High Court. By accepting that the Bank suffered prejudice, the Tribunal went beyond where it ought to have stopped. Further, it also emerged from examination of witnesses that, apart from the guarantors to the facility, there was insurance cover for the vehicles.

[230] We have demonstrated that there was no proven loss or prejudice suffered by the Bank as a direct consequence of the Petitioner's decision. Obviously, the Bank encountered inconvenience and even some irritation by that decision, but no loss or prejudice was shown.

This ground succeeds.

F. CONCLUSION

[231] So important is judicial independence that removal of a judge can only be justified where the shortcomings complained of are so serious as to destroy confidence in the judge's ability properly to perform the judicial function.

[232] As grounds of removal of a judge from office, gross misconduct or misbehaviour is used in contradistinction to simply misconduct or misbehaviour. Gross is an expression of something very serious. It is a test of whether the judge, whose conduct is being investigated, could continue to be trusted to carry out his or her role in the administration of justice.

[233] It is not every delay that would attract punishment. Only inordinate and inexcusable delays are discouraged.

G. THE CONCURRING OPINION OF NJOKI NDUNGU, SCJ

[234] I have read the decision of the majority and while I concur with the final decision and orders in this matter, I am of a different opinion from that of the majority, particularly regarding the issue of inordinate delay and as to whether the delay amounted to gross misconduct.

[235] Whereas I acknowledge and agree with the majority and the Tribunal that there is no precise definition of the term 'inordinate', I am persuaded by the definition given by the Court of Appeal of Alberta in ***Humphreys v. Trebilcock***, 2017 ABCA 116, where it stated:

> ***"In this context inordinate means that the differential between the norm and the actual progress of an action is so large as to be unreasonable or unjustifiable."***

[236] Similarly, the ***Merriam-Webster Dictionary*** defines the term 'inordinate' as exceeding reasonable limits. Therefore, did the delay exceed reasonable limits to be considered an inordinate delay?

[237] In ***Mwangi S. Kimenyi v. Attorney General & another,*** HC. Civil Suit No.720 of 2009; [2014] eKLR the High Court observed that:

> ***"There is no precise measure of what amounts to inordinate delay. Inordinate delay will differ from case to case depending on the circumstances of each case; the subject matter of the case; the nature of the case; the explanation given for the delay; and so on and so forth. Nevertheless, inordinate delay should not be difficult to ascertain once it occurs; the litmus test being that it should be an amount of delay which leads the court to an inescapable conclusion that it is inordinate and therefore, inexcusable. Caution is, however, advised for courts not to take the word "inordinate" in its dictionary meaning, but to apply it in the sense of excessive as compared to normality."***

[238] I take note that the courts in Kenya have made several conflicting decisions on what constitutes inordinate delay. For instance, in ***Agip (Kenya) Limited v. Highlands Tyres Limited*** [2001] KLR 630**, in finding that a delay of eight months was not inordinate, the court noted that delay is a matter of fact, decided on the circumstances of each case, and that the court** must consider whether the defendant has been prejudiced by the delay.

[239] On the other hand, in ***Nzoia Sugar Company Limited v. West Kenya Sugar Limited*** [2020] eKLR the High Court found an unexplained delay of two years in prosecuting a matter unreasonable. It also stated that the mere fact that the defendant had not demonstrated prejudice was not sufficient to sustain that suit.

[240] From the foregoing, it is clear that delay is a matter of fact to be determined on a case-to-case basis. Coming to the case at hand, Order 40 Rule 5 of the Civil Procedure Rules requires a ruling for interlocutory to be delivered within thirty days from the date of the hearing. Further, Order 32 (1) and (2) of the **High Court (Organization and Administration) (General) Rules 2016** stipulate that a

court may give a decision but reserve its reasons for a period of seven days. In the instant case, the ruling was delivered on 30th May 2017, with the reasons for the judgment being delivered on 3rd November 2017, five months after the delivery of the ruling.

[241] This Court in ***Charo v. Mwashetani & 3 Others*** **SC** Application No. 15 of 2014; [2014] eKLR**,** in considering an application for extension of time, emphasized that the concept of timelines and timeliness is a vital ingredient in the quest for efficient and effective governance under the Constitution. Further, that the Court is eternally mandated to respond appropriately to individual claims, as dictated by compelling considerations of justice.

[242] Coming to the issue at hand and considering the circumstances of the case, I note that the Bank filed a notice of appeal against the ruling of the Petitioner. This was a clear indication of the Bank's intention to appeal against the said ruling. The matter was also filed under a certificate of urgency, a fact that was acknowledged by the Petitioner who ably explained that it was due to the urgency that he gave the ruling without the reasons. Therefore, the Petitioner was fully aware that this was an urgent matter which needed complete disposal, and with which, without the reasons, the aggrieved party was likely to suffer prejudice. In view of the above, I find that the delay was inordinate as it exceeded reasonable limits, given the urgency of the matter and the likely prejudice occasioned to the Bank.

[243] Having found that the delay was unreasonable, was there justifiable explanation for it? What reasons did the Petitioner advance? The first justification proffered by the Petitioner for the delay was that the house he was occupying was unfinished with no water and electricity. In my considered view this justification is not excusable as the Petitioner did not demonstrate how "the unfinished house" affected him from giving reasons in the impugned ruling bearing in mind that he had an office with the requisite amenities to enable him to discharge his duties.

[244] The second explanation given by the Petitioner for the delayed reasons is that he had taken leave from June 2017 and resumed duty on 17th July 2017. Annual leave under Section 28 of the Employment Act is 21 working days which would ordinarily translate to one calendar month unless the employer provides for a longer period. Be that as it may, while scheduling to proceed for leave, the Petitioner, perhaps, should have prioritized issuance of the said reasons and any other urgent work before proceeding for leave. Even if he had to proceed for leave without clearing urgent work before him, the Petitioner failed to explain the other four of the five months' delay. Therefore, I find that the Petitioner's explanation inadequate.

[245] The Petitioner's third justification for the delay is that he served in two stations, that is, Kericho and Bomet High Courts. From the cause list annexed on record, I am not able to conclude that the Petitioner was fully engaged in the two stations for a period of five months and even if he was, I am of the opinion that he should have organized his work on a priority basis depending on the urgency of the matters before him. Like the two other explanations given above, this one too fails.

[246] Taking into account the urgency of the matter and the prejudice likely to be suffered by the aggrieved party as a result of the delay, I find that the said delay to be unreasonable. In saying so, I take note that the High Court, unlike the Supreme Court, is not a final appellate court. Therefore, it is contemplated that if a party is aggrieved by a decision of the High Court, they have the right of appeal to the Court of Appeal and will need the reasons from the High Court to formulate the grounds of appeal. The failure therefore, of not giving reasons, had the effect of violating the Bank's right to be heard and its access to justice.

[247] Did the inordinate delay in giving reasons for the ruling in ***Bomet*** HCCC No. 4 of 2016: ***Alfred Kipkorir Mutai & Kipsigis Stores Limited vs. NIC***

Bank Limited (Alfred Kipkorir Case) amount to gross misconduct? Article 168 (1) (e) of the Constitution provides that a **judge of a superior court may be removed from office only on the grounds of gross misconduct or misbehavior.**

[248] Further, Section 25(1) of the Judicial Service Act, provides that:

> ***"(1) Where the Chief Justice, after such inquiry as they may think fit to make, considers it necessary to institute disciplinary proceedings against an officer on the ground of misconduct which, if proved, would in the Chief Justice's opinion, justify dismissal, he shall frame a charge or charges against the officer and shall forward a statement of the said charge or charges to the officer together with a brief statement of the allegations, in so far as they are not clear from the charges themselves, on which each charge is based, and shall invite the officer to state, in writing should he so desire, before a day to be specified, any grounds on which he relies to exculpate themselves."***

[249] While I agree with the majority and the Tribunal's decision that the term gross misconduct is not defined in the Constitution, I am persuaded by the Oxford Dictionary's definition of the term 'gross misconduct' as *"unacceptable or* ***improper behavior of a very serious kind****, especially by an employee or professional person."* [Emphasis added]

[250] Oxford Dictionary also defines the term 'gross' as "*unacceptable because clearly wrong,"* while the Black's Law Dictionary 9th Edition definition of misconduct as *'***a dereliction of duty or improper behavior**." [Emphasis added]

[251] From the foregoing definitions, it is my considered opinion that what constitutes either gross misconduct or misconduct varies depending on the degree. As such, did the Petitioner's action constitute gross misconduct? It is my considered view that, in the instant case, the inordinate delay in giving reasons in the ruling constituted a *dereliction of duty* amounting to **misconduct.** A judge is mandated by the ***Bangalore Principles of Judicial Conduct*** to perform all his or her duties, including the delivery of reserved decisions, efficiently, fairly, and with *reasonable promptness*. To my mind, the delay to giving reasons for the ruling for a period of five months in a situation where there is an indication that an appeal from that decision will be made, and that such appeal cannot be made without those reasons can only bring me to the conclusion that the Petitioner performed his duty neither efficiently nor with promptness. Therefore, the action of the Petitioner, bearing in mind the consequences of such dereliction of duty to the aggrieved litigant, is objectionable. However, does such a dereliction of duty warrant removal from office?

[252] In ***Re Brown, 626 N.W.2d 403 (Mich. 2001)*** the Michigan Supreme Court articulated several factors that were among the criteria to be used in evaluating judicial discipline cases. The recommended factors are as follows:

> *(1) Misconduct that is part of a pattern or practice is more serious than an isolated instance of misconduct;*
>
> *(2) Misconduct on the bench is usually more serious than the same misconduct off the bench;*
>
> *(3) Misconduct that is prejudicial to the actual administration of justice is more serious than misconduct that is prejudicial only to the appearance propriety;*
>
> *(4) Misconduct that does not implicate the actual administration of justice, or its appearance of impropriety, is less serious than misconduct that does;*

(5) Misconduct that occurs spontaneously is less serious than misconduct that is premeditated or deliberated;

(6) Misconduct that undermines the ability of the justice system to discover the truth of what occurred in a legal controversy, or to reach the most just result in such a case, is more serious than misconduct that merely delays such discovery; and

(7) Misconduct that involves the unequal application of justice on the basis of such considerations as race, color, ethnic background, gender, or religion is more serious than breaches of justice that do not disparage the integrity of the system on the basis of a class of citizenship.

[253] In the ***Matter of Waddick***, 605 N.W.2d 861, the Supreme Court of Wisconsin in suspending Judge Waddick for 60 days for misconduct observed:

> ***"The misconduct consisted of Judge Waddick's recurring delay in deciding cases between 1991 and 1998, his filing of Certifications of Status of Pending Cases during that time that falsely represented that no cases were awaiting decision in his court beyond the prescribed period, and stating falsely to the Judicial Commission during an informal appearance in June 1996 that he had no cases awaiting decision beyond the prescribed period."*** [Emphasis added]

[254] Applying the above criteria, I note that there was no evidence led to the effect that the Petitioner had formed a part of *a pattern* delaying rulings, reasons thereof, or judgments. To my understanding, this was an isolated incident. I, therefore, find that even though the Petitioner's action amounted to misconduct it did not warrant removal from office.

[255] Even so, I must point out that whereas the Constitution and the Judicial Service Act make provisions for the removal of a judge for ***gross misconduct***, there is no equivalent constitutional and statutory provisions for a disciplinary

process of any kind for mere ***misconduct*** that does not amount to removal of a judge. As such, there is a quagmire whenever there may be a finding of an alleged conduct of a judge which is just misconduct and not gross misconduct. For this reason and despite my finding in the instant case on the Petitioner's misconduct, there is nothing more I can say, other than to state there is urgent need for constitutional and statutory amendments that will allow for provisions for disciplinary procedures to be applied, where a judge's impugned actions or omissions do not meet the constitutional threshold for removal from office. There is need to provide some form of sanction, where such circumstances exist, other than removal from office. Alas, until then the lacuna in law remains to the detriment of any aggrieved party.

[256] On a separate issue, I agree with the majority decision that a Tribunal established under Article 168 of the Constitution must comply with the rules of natural justice which required the Tribunal to conduct a fully-fledged trial, where the Petitioner was entitled to the right to legal representation, the right to be present while the witnesses testify, the right to adduce or challenge evidence, and the right to present arguments and related rights. Further to that, I wish to add that denying the Petitioner the opportunity to adduce or challenge the contents of the missing file which was crucial to the determination of the matter amounted to a violation of his right to fair administrative action under Article 47 which guarantees every person the right to **administrative action that is <u>expeditious, efficient, lawful, reasonable, and procedurally fair.</u>**

[257] In ***Cyrus Shakhalanga Khwa Jirongo v. Soy Developers Ltd & 9 others*** S.C Petition No. 38 of 2019; [2021] eKLR this court noted as follows:

> ***"[69] In the present case, all the evidence before us points to the fact that the documentation necessary to prove the alleged fraud may no longer be available and we agree with the learned Judge of the High Court that, where both***

parties have admitted that the same issues are also pending resolution in another Court, and that the issue of <u>lost documentation remains unresolved</u>, it would be most unfair to subject the Appellant to a criminal trial. [Emphasis added]

[258] The supplementary record, at page 60 between paragraphs 315 to 318, reveal that during the trial before the Tribunal, the Petitioner alleged that the proceedings by the JSC's Committee were marred by manifest breaches, violating his right to fair hearing and the right to fair administrative action as guaranteed under Articles 47 (1) and 50 (2) of the Constitution respectively. The Petitioner had alleged that on 18th March 2019 and 8th April 2019, when JSC conducted its proceedings the court file in the ***Alfred Kipkorir Case*** was not supplied to him despite the Petitioner's protests.

[259] In this context, the Tribunal in paragraph 487 of its report and findings observed that it was not in dispute that the court file in question was forwarded to the Chief Justice vide a letter dated 12th January 2018 following a complaint by the Bank and thereafter, the file could not be traced and was not availed during JSC's proceedings. It was the respondent's finding that even though the file was missing, the Petitioner was willing to proceed without the file.

[260] The question I ask then is, does the Petitioner's consent remedy the fact that his right to fair administration was infringed by JSC? I answer in the negative. The right to a fair hearing is a non-derogable right under Article 25 of the Constitution and should not be violated under any circumstances. Therefore, the Petitioner agreeing to proceed with the matter without the file does not remedy the fact that his right to a fair hearing was violated by JSC. In my understanding of the right to

a fair hearing, he was entitled to the missing file to enable him to prepare for his defence.

[261] The above notwithstanding, the problem of missing files in Kenyan courts is not a new phenomenon, but one that has persisted over the years and should be frowned upon. Missing files continue to deny innocent Kenyans the fundamental right to be governed by the rule of law and efficient access to justice. Therefore, improving operations at the registries where files were stored is not only important in reducing case delay but also important in tracking files within the system. I take cognizance that the Judiciary has taken substantial measures to curb the loss of files but unfortunately reports of lost, deliberately or inadvertently misplaced or disappearance of court files are still common. There is therefore a need to strengthen our system to ensure the eradication of the vice of missing files.

[262] As to whether the Bank suffered loss and prejudice as a result of the Petitioner's actions, I am at variance with the majority's finding. In that regard, I wish to restate the provisions of Rule 86 of the Court of Appeal Rules, 2010 which enumerates the contents of a memorandum of appeal as follows:

> ***"A memorandum of appeal shall set forth concisely and under distinct heads, without argument or narrative, the grounds of objection to the decision appeal against, specifying the points which are alleged to have been wrongly decided, and the nature of the order which it is proposed to ask the Court to make;***
> ***The ground of objection shall be numbered consecutively."***

[263] In my opinion, therefore, the Bank suffered prejudice as a result of the delay in giving reasons for the ruling. If the Bank was aggrieved by the ruling of 30th May 2017, taking into account the proviso of Rule 86 above, it would not have been able to file a memorandum of appeal within the stipulated period of time. It is common

knowledge that generally an aggrieved party would extract their grounds of appeal from the reasoning of a judgment or ruling they are dissatisfied with. The Petitioner, being a judge, is well versed with the provisions of Rule 86 and therefore delaying the reasons for 5 months barred the Bank from accessing justice in good time, consequently, suffering prejudice. Accordingly, I find that the delay in giving reasons for the ruling on 30th May 2017 caused prejudice to the Bank.

H. FINAL DISPOSITION OF THE COURT

[264] In the order the arguments were presented, we dispose of the six grounds by declaring as follows;

a) On the first ground, we reverse the Tribunal's decision that the delay in giving reasons was inordinate and amounted to gross misconduct.
b) We agree that the unavailability of the court file before the Commission and the Tribunal was prejudicial to the Petitioner and amounted to a violation of his right to fair administrative action and hearing.
c) Though the Tribunal has wide powers in the process of investigating any of the grounds for removal of a judge, it acted in excess of its mandate, in specific situations when it considered issues pending determination in the High Court or introducing matters that were not before the Petitioner when he made the decision in question.
d) There was no proof that the Bank suffered loss or prejudice as a result of the Petitioner's decision.
e) The Tribunal applied the correct standard and burden of proof, and there are no instances where the burden was unfairly shifted to the Petitioner.
f) The letter initiating the complaint was, by the terms of **Article 168(3)** of the Constitution, a valid Petition to the Commission

H. ORDERS

[265] Arising from the above, the consequential orders to be made are that:

(a) The Petition of Appeal dated 25th March, 2020 is allowed.

(b) Save for the correct finding that the letter of complaint was a petition, the Tribunal's finding in respect of all the other grounds, set out above, are quashed and set aside.

(c) We declare that the Petitioner's conduct did not amount to gross misconduct in terms of Article 168(1)(e) of the Constitution.

(c) The Tribunal's recommendation to the President to remove the Petitioner from office under Article 168(7)(b) of the Constitution is likewise set aside.

(d) We make no orders as to costs.

[266] Orders accordingly.

DATED and **DELIVERED** at **NAIROBI** this **19th** day of **May, 2022**.

.....	.....
M.K. IBRAHIM	**S.C. WANJALA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**
.....	.....
NJOKI NDUNGU	**I. LENAOLA**
JUSTICE OF THE SUPREME COURT	**JUSTICE OF THE SUPREME COURT**

.....
W. OUKO
JUSTICE OF THE SUPREME COURT

I certify that this is a true copy
of the original

REGISTRAR
SUPREME COURT OF KENYA