THE REPUBLIC OF UGANDA

IN THE COURT OF APPEAL OF UGANDA AT KAMPALA

CIVIL APPEAL NO. 0091 OF 2012

(ARISING FROM HIGH COURT MISCELLANEOUS CAUSE NO. 74 OF 2012)

HONOURABLE JUSTICE ANUP SINGH CHOUDRY...APPELLANT

VERSUS

ATTORNEY GENERAL.....RESPONDENT

CORAM:

HONOURABLE MR. JUSTICE REMMY KASULE, JA HONOURABLE MR. JUSTICE RICHARD BUTEERA, JA HONOURABLE LADY JUSTICE SOLOMY BALUNGI BOSSA JA JUDGMENT OF THE COURT

Introduction

This is an appeal from the judgment and decision of the High Court (Zehurikize J.) dated July 5, 2012. That decision stems from an application for Judicial Review filed by the appellant before the High Court of Uganda vide ***Honourable Justice An up Singh Choudry v. Attorney General HC-OO-CV-MC-No.0074 of 2012.*** The application was filed under ***S. 24(2)(b) of the Judicial Service Act, Ss. 33, 36, 38, 41 and 42 of the Judicature Act (cap 13),*** and ***Order 52 Rules 1*** and ***3 of the Civil Procedure Rules.*** It sought orders that a declaration be made that the Judicial Service Commission (JSC) report to His Excellency the President of the Republic of Uganda made on July 2, 2009 regarding the applicant is null and void; that an order of certiorari issues to quash the said JSC

report; that an order of Prohibition issues to stop the JSC from enforcing and taking any further action premised on the JSC report and that provisions be made for the costs of the application.

The JSC Report that was sought to be quashed had recommended that a Tribunal be appointed under ***Article 144 of the Constitution*** to investigate the question of the removal of the Appellant from office as a Judge of the High Court of Uganda. The High Court delivered judgment on July 5, 2012 and declined to grant the orders sought by the Appellant, hence this appeal.

While this appeal was still pending, the Appellant filed in this Court ***Miscellaneous Application No. 0271 of 2013*** in which he sought an injunction order prohibiting the JSC from implementing, following up or pursuing the advice to H E the President of Uganda to appoint a tribunal to consider the removal of the appellant from office as a Judge of the High Court of Uganda, until several pending matters had all been respectively and finally determined by the Constitutional Court. The pending matters included this appeal, ***Constitutional Petition No. 11 of 2012, Honorable Justice An up Singh v. Uganda Law Society and Attorney General, Miscellaneous Application No. 14 of 2012 (arising from Constitutional Petition No. 11 of 2012},*** and ***Pastor Bosco Odiro v. Attorney General, Constitutional Petition No. 34 of*** 2012.

Miscellaneous Application No. 0271 of 2013 came up for hearing on February 10, 2014 before us. The Applicant in the said application, who is also the Appellant in this appeal, claimed that he stood to suffer substantial loss and irreparable damage, which cannot be atoned for in damages, if an injunction order is not issued stopping the JSC from implementing, following up or pursuing the advice to H E the President of Uganda, to appoint a tribunal to consider removal of the Applicant/Appellant from office as a Judge of the High Court of Uganda, pursuant to the judgment

delivered by the High Court (Civil Division) on July 5, 2012, which did not stop the challenged acts and omissions of the JSC.

He further claimed that all the pending matters have a substantial legal bearing on the propriety of the advice rendered by the JSC to H E the President of Uganda to appoint a tribunal to consider the removal of the Applicant/Appellant from the office as a Judge of the High Court of Uganda, which had yet to be decided by the Constitutional Court. If not stopped all decisions in those cases would be rendered nugatory. He further averred that this ***Civil Appeal*** raises questions of fact and law which are of public importance and stands great chance of success. The balance of convenience was in favor of granting the application and it was just and equitable to grant the orders sought. Both ***Miscellaneous Application No. 0271 of 2013 and*** this appeal were placed before us on February 10 and 12, 2014.

As regards the Application, we ordered for preservation of the status quo until conclusion of this appeal. This decision therefore disposes of ***Miscellaneous Application No. 0271 of 2013 as*** well as the appeal.

Legal representation:

The Appellant was represented by learned Counsel Jimmy Muyanja and the Respondent by learned State Attorney Henry Oluka.

Grounds of appeal

The grounds of appeal were framed as follows:

1. *That the learned Trial Judge erred in law and fact to hold that the letter from the Chairman Judicial Service Commission constituted a complaint from the Uganda Law Society against the appellant.*
2. *That the learned Trial Judge erred in fact to hold that the letter of December 17, 2008 was the first complaint by the Uganda Law Society, against the appellant.*

. 3. That the learned Trial Judge erred in law to hold that s. 11 of the Judicial Service Act (cap 24), did not apply to disciplinary proceedings against a Judge of the High Court such as the appellant.

4. *That the learned Trial Judge erred in law to hold that there is no prescribed procedure to be followed by the Judicial Service Commission whilst handling disciplinary proceedings against a Judge of the High Court*
5. *That the learned Trial Judge erred in law and fact to hold that the applicant was afforded an opportunity by the Judicial Service Commission to state his side of the case.*
6. *That the learned Trial Judge erred in law and fact to hold that the applicant was afforded a fair hearing.*
7. *That the learned Trial Judge erred in law and fact to hold that the letter by Professor Frederick Ssempebwa did not raise suspicion of bias or impartiality*
8. *That the learned Trial Judge erred in law and fact to hold that the Attorney General was not caught in a conflict of interest as an ex-officio member of the Judicial Service Commission and the Uganda Law Society, in acting as principal legal adviser of the Government and His Excellency the President of the Republic of Uganda.*
9. *That the learned Trial Judge erred in law and fact to hold that failure to inform the appellant of the decision made sometime in July 2009 was not fundamental as to invalidate the decision of the Judicial Service Commission.*

The appellant prayed that;

The appeal be allowed

(a) A declaration be made that the Judicial Service Commission's report made on July 2, 2009 regarding the Applicant/Appellant is null and void
(b) A certiorari order be issued quashing the said Judicial Service Commission report
(c) An order of prohibition issues to stop the Judicial Service Commission from enforcing and taking any further action on the said report
(d) The appellant be granted costs in the Court of Appeal and in the High Court below

Background

The brief facts of the appeal as they appear in the Appellant's conferencing notes his submissions and in his affidavit accompanying the application for judicial review in the High Court are as follows: The Appellant is a Judge of the High Court of Uganda. He was appointed to this position on May 2, 2008. On December 5, 2008, the then Honourable Chairperson of the JSC, Mr Justice Manyindo wrote to the appellant notifying him that the JSC

received from the Uganda Law Society (ULS), documents relating to his trial by the Solicitors' Disciplinary Tribunal of England and Judgment of the Supreme Court of Judicature Court of Appeal (Civil Division), UK. He enclosed the documents and asked the appellant to comment on the decisions of the Court and Tribunal. These documents concerned previous conduct regarding the Appellant's solicitor's practice in the United Kingdom.

On December 17, 2008, the then President of the ULS, Mr. Oscar John Kihika wrote to the Secretary JSC asking the JSC to formally request the appointing authority to reverse or rescind the appellant's appointment on the basis that he was not a fit and proper person to hold the office of a High Court Judge in Uganda. The reasons for which he was said to be unfit were that as a solicitor in England and Wales, he had made bogus claims for costs and he was subsequently struck off the roll of solicitors, and he never successfully appealed against the decision vide ***Times Newspaper Limited v. Anup Singh Choudry Case No. 98/0829/1.***

The appellant sought further and better particulars, from the JSC, regarding the complaint against him, in a letter dated January 5, 2009. The JSC did not respond to this letter. The appellant made a response dated June 19, 2009 which was filed with the JSC between July 24 and 29, 2009. The response was prepared for him by Counsel Peter Carter QC, a member of the Bar of England and Wales. Counsel Peter Carter invited the JSC to reject the complaint against the Appellant, on the ground, amongst others, that his being recommended by the JSC and his being subsequently appointed a High Court Judge in Uganda by H E the President were done when the appointing authorities were fully aware of his having been struck off the Roll of Solicitors in the UK.

The appellant also filed a complaint with the JSC between July 2 and 9,
2008 concerning the composition of the membership of the JSC which was destined to hear the complaint against him. His complaint- raised the following objections to the jurisdiction of the JSC and we quote:

"*1. That even though Professor Frederick Ssempebwa was still a Commissioner in the Respondent body, he nevertheless had been (sic) actively pursued and filed documentation with the JSC to support the complaint lodged against me*

2. *That the then Chairman of the JSC the Hon. Retired Deputy Chief Justice Seth Manyindo (emeritus) is an uncle to one William Byaruhanga an advocate and a partner in Kasirye, Byaruhanga and Company Advocates against whom I delivered a decision in the Commercial Court Division, in the matter of Mugerwa Pius Mugalasi v. Ntwatwa Lule and **4** others, **HCT-00-CC-MA-0444-2008** having found the said law firm guilty of selling the same plot to two different persons, which I believe occasioned conflict of interest on the part of the Chairman.*
3. *That the members of the Law firm Kasirye, Byaruhanga and Company Advocates have been actively in (sic) moving the Uganda Law Society to file a complaint against me as evidenced by the emails attached.*"

After filing his response and complaint, the appellant waited for summons by the JSC to attend a ***de facto*** hearing wherein he could cross-examine the complainants and also present his case to the JSC but in vain.

In the meantime, the Honourable Principal Judge, Judge Yorokamu Bamwine notified him through a memorandum dated April 5, 2012 that the ULS had filed a constitutional petition against the Attorney General vide ***Constitutional Petition No. 11 of 2012 The Uganda Law Society v. The Attorney General*** seeking orders directing His Excellency the President of the Republic of Uganda to appoint a Tribunal pursuant to the JSC recommendation to commence proceeding for revocation of his tenure as a High Court Judge of the Republic of Uganda. It was only after reading the petition of the ULS that the appellant realized two things; first that the JSC in its communication dated November 18, 2009 to the President of the ULS, Mr. Bruce Kyerere, the JSC had indicated that it had already arrived at a conclusion on the question of his removal from office as a judge of the High Court of Uganda on an unascertained date, in violation of ***section 11 of the Judicial Service Act (cap 14)*** without having; summoned him to attend the hearing; availed to him the opportunity to cross-examine the complainants; or availed him the opportunity to defend himself. He conceded that he might have seen the ULS communication dated October

5, 2009 but was unaware of any decision because the JSC neither notified him of the fact of the decision having been made nor availed him a copy of the same.

On their part, the complainants, the ULS Council and members had been making follow-up communication to various authorities, without availing the appellant copies of such communications.

As example, he cited firstly the letter of the ULS President, Mr. Bruce Kyerere to the Law Society of England and Wales dated April 23, 2009, notifying it that the petition to remove the appellant primarily relied on the ruling of the Solicitors Disciplinary Tribunal, whose proceedings had been obtained through the internet. In that letter, Mr. Kyerere requested that the Law Society of England and Wales provide the ULS with certified copies of the ruling, which the JSC required before it could proceed with the matter.

Secondly he referred to the ULS communication to the Secretary JSC on July 16, 2009 in which the Secretary of the ULS noted that the JSC had committed itself to resolving the matter of the appellant and scheduled a session for June 30, 2009 in that regard. In the same letter, the Secretary of the ULS had further noted that the JSC session had indeed been convened and had considered the matter on June 30, 2009, but was yet to communicate the outcome to the ULS. The Secretary ULS therefore requested for a formal communication from the JSC on the matter.

In yet another communication, the ULS wrote to the Chairman JSC on November 16, 2009, reminding him that the JSC had promised to handle the matter relating to the appellant expeditiously.

Lastly, the ULS had communicated to H E the President of the Republic of Uganda, on January 31, 2012, in which it observed that the JSC had found a ***~~prima facie case~~*** against the appellant that warranted the appointment of a tribunal.

Regarding the JSC, the appellant stated that it had been making follow-up communications to various authorities in the Republic of Uganda, without availing him copies of the same. The first communication was made by the JSC to the ULS on July 20, 2009. In that communication, the JSC informed the ULS that its complaint was still being processed by the JSC and as soon as the process was completed, it would promptly give the ULS an update.

The second communication was made by the Chairman of the JSC, Honorable Mr. Justice Manyindo to the President of the ULS on November 18, 2009, in which he informed the President of the ULS that the JSC had considered its complaint against the appellant and on July 2, 2009, it had written to H E the President advising him to investigate the matter fully so as to determine whether or not the judge should be removed from the bench. The Honorable Chairman also pointed out to the President that once the matter is referred to the Tribunal, then the Judge must be interdicted by the President under ***Article 144(5) of the Constitution.***

The appellant also complained about the Attorney General, who is an ex officio Commission member of the JSC. He asserted that the Attorney General had purported to render advice on the ULS complaint, without availing the appellant copies of the same. This placed the office of the Attorney General in a conflict of interest position.

He argued that the act of the JSC in arriving at a conclusion and failing to notify him of the decision was contrary to ***S. 11(d) of the Judicial Service Act*** and consequently, making a recommendation to H E the President of the Republic of Uganda either on July 2, 2009 or on an unascertained date without giving him a fair hearing occasioned him substantial miscarriage of justice.

He also argued that the act of the Attorney General, who is an ex officio member of the Respondent, purporting to advise H E the President of the Republic of Uganda had occasioned him a miscarriage of justice.

He further argued that the acts and omissions of the JSC would result in substantial miscarriage of justice to him.

The Appellant maintained that he never received a response to the issues he raised regarding the danger of bias existing within the membership of the JSC; he was never summoned to attend any hearing before the JSC to either cross-examine the complainants or to present his case; and he had never been notified of any decision taken by the JSC.

Issues raised by the grounds of appeal

We observe that the grounds of appeal fall into three broad categories which touch on;

1. Whether the learned trial judge erred in finding that there was a complaint.
2. Whether the appellant was given a fair hearing
3. Whether there was bias

For convenience, the grounds of appeal that bear on any of these broad categories have been grouped and treated together. We note that the learned trial Judge treated the case along similar lines.

The duty of a first appellate Court

We recall that this is a first appellate court and as such, the law enjoins it to review and re-evaluate the evidence as a whole, closely scrutinize it, draw its own inferences, and come to its conclusion on the matter. This duty is recognized in ***Rule 30(i) (a)*** of the ***Rules of this Court.*** The cases of ***Pandya v R [1957] EA 336*** and ***Kifamunte Henry v Uganda SCCA No. 10 of 1997*** have also succinctly re-stated this principle. We have borne these principles in mind in resolving this appeal.

As a preliminary matter, we observe and agree with both Counsel that appointment of judicial officers is as matter of great public importance, and therefore that JSC and the public at large, including the ULS, should ensure

that the right people are appointed to the Bench at all levels and that close scrutiny is paid to their background before and even after appointment.

Resolution of the issues

Whether the learned trial judge erred to find that there was a complaint

This issue is canvassed in grounds 1 and 2 of the memorandum of appeal. Learned Counsel for the appellant argued firstly that the appellant was not informed of the complaint of the ULS of November 14, 2008. He also asserted that the Chairman of the JSC paraphrased the complaint, which is not allowed; that he merely attached documents sent to the JSC by the ULS without attaching a complaint. He contended that a complaint should be forwarded to the affected person and that the documents sent by the Chairman JSC were different from the complaint of the ULS contained in its letter of December 17, 2008. Learned Counsel further submitted that the ULS was not competent to raise a complaint as it did not comply with its governing law, the ***Uganda Law Society Act,*** which required it to make decisions by resolution signed by two thirds of its membership, which was not the case in the matter.

Counsel Oluka for the Respondent argued that when Commissioner Ssempebwa as a representative of the ULS filed a complaint with the JSC, he did so as a representative of the ULS on the JSC. Both by the November 5, 2008 letter of Commissioner Ssempebwa to the JSC and by the December 17, 2008 letter of the ULS to the JSC, the ULS furnished a complaint with the JSC about the conduct of the appellant.

The facts as made out from the affidavits of the appellant and respondent are that On November 14, 2008, Professor Frederick E Sempebwa, a Commissioner with the JSC, wrote a letter to the Secretary JSC. This letter is crucial in understanding and resolving several aspects in this appeal. We have therefore reproduced it verbatim.

It reads:

"*14 November 2008*

TheSecretary
Judicial Service Commission

Kampala

Dear Sir,

Re: Justice Anup Singh Choudry

Please find herewith the information obtained by the Uganda Law Society on the conduct of His Lordship as a Solicitor in the United Kingdom.

Kindly place on the agenda of the next meeting of the Commission an item on: ***The status of Justice Anup Singh Choudry on the Bench.***

Sincerely yours,

FREDERICK E SSEMPEBWA

COMMISSIONER **"**

After recalling the facts as they have already been set out above, the learned trial Judge considered this matter and quoted verbatim the letter of the Chairman JSC, as he then was, to the appellant dated December 5, 2008 He then had this to say;

"In my view the above letter disclosed a dear complaint against the applicant. It was that the Uganda Law Society had submitted documents disclosing a ruling against him by the Solicitors Disciplinary Tribunal of England and judgment of the Supreme Court of Judicature Court of Appeal. Copies of the decisions against him were enclosed. It is'' immaterial that by letter of December 17, 2008, the President ULS wrote to the Secretary JSC raising the same issues. It is dear to me that the Commission had earlier on received the complaint. This explains why by letter of November 14, 2008, Fredrick

Ssempebwa in his capacity as a Commissioner directed the Secretary JSC to place on the agenda the complaint regarding the applicant. He was dear in his letter when he said please find herewith the information obtained by the Uganda Law Society on the conduct of His Lordship as Solicitor in the United Kingdom.'

From the above correspondence it is obvious that the complaint against the applicant was not raised for the first time by the President of the ULS in the letter of December 17, 2008 which was some 12 days later after the complaint had been brought to the attention of the applicant by letter of December 5, 2008...,"

A close scrutiny of the tenor of the letter of Commissioner Ssempebwa dated November 14, 2008 when considered together with the accompanying documents from the ULS reveals that the ULS was not enamoured with the conduct of the learned Judge as a solicitor in the United Kingdom. The ULS decided in the first instance to communicate its disenchantment to the JSC through Commissioner Ssempebwa, its representative to the JSC. While submitting the ULS documents, Commissioner Ssempebwa directed the Secretary of the JSC to put the matter of ***"the status of Justice Anup Singh Choudry on the Bench"*** on the agenda of the next JSC meeting. All this indicates that Commissioner Ssempebwa considered this to be a complaint about the tenure of the appellant on the Bench that needed urgent attention. In fact, it is to this complaint that the Chairman, the Honorable Justice Manyindo reacted in his letter to the appellant dated December 5, 2008. This letter indicates that the JSC considered that Commissioner Ssempebwa's letter and the accompanying documents raised serious concerns on the appellant's conduct and asked the appellant to comment on it. In fact, the appellant admitted in the letter he wrote to the Chairman, JSC Honourable Justice Manyindo dated July 2, 2009, reproduced below on page 33, that Commissioner Ssempebwa lodged the initial complaint. We therefore find it strange that in this appeal and in the lower court, the Appellant purported to deny the existence of the complaint.

We agree with the learned trial Judge that it was of no consequence that the President of the ULS subsequently wrote a letter on December 17, 2008, to the Secretary JSC asking the JSC to formally request the

appointing authority to reverse or rescind the appellant's appointment on the basis that he was not a fit and proper person to hold the office of a High Court Judge in Uganda.

The law provides that the complaint to the JSC may be in writing or even

oral. If it is oral, the Secretary of the JSC is obliged to reduce it into writing: see ***Regulations 5, 8(a) and (b), and 9(1) Judicial Service Complaints and Disciplinary Proceedings) Regulations 2005 (SI 88 of2005.***

We consider that there is no particular format for a complaint specified by law. As long as it is written, as it was in this case, and is clearly comprehensible, it is our understanding and judgment that it is admissible.

It is therefore our considered decision that from the chronology of events as outlined above; there existed a complaint with the JSC lodged by Commissioner Ssempebwa by his letter of November, 14, 2008 on behalf of the ULS. We are fortified in this view by the manner in which the JSC treated the letter and the information in the accompanying documents. The appellant also treated it as a complaint.

We should add that we also see no merit in the submission of Counsel for the appellant that the ULS had no locus to lodge a complaint. Any person may submit a complaint to the Commission against, among others, a Judge, the Chief Registrar or Registrar of a Court, or a magistrate. See: ***Regulation 4 of the Judicial Service Commission Regulations of 2005, (SI No. 87 of2005).*** According to the ***Uganda Law Society Act (cap 276),*** the Uganda Law Society is a body corporate with perpetual succession with power to sue and to be sued in its corporate name. See: ***section 2 of the Uganda Law Society Act.***

Among the objects for which the society is established are; to protect and assist the public in Uganda in all matters touching, ancillary or incidental to the law ***(Section 3(d));*** and to assist the Government and the Courts in all matters affecting legislation and administration and practice of law in Uganda. (Section 3 (e)). Its council may exercise all the powers of the society (section (10))

The president of ULS heads the governing council of the ULS and may legally act on its behalf and that of the membership ***(Section 9).*** Based on the above, we conclude that the ULS president acted legally on behalf of the governing council and membership of the ULS . It is our judgment therefore that the ULS was competent to file a complaint with the JSC.

We also note that this is a new ground that was not raised when the matter came up for review in the High Court. We therefore conclude that there is no merit in grounds 1 and 2 of the appeal which we dismiss accordingly.

Whether the appellant was accorded the right to a fair hearing

We now turn to grounds 3, 4, 5, 6 and 9 of the memorandum of appeal, which canvass the right to a fair hearing. The appellant submitted that the JSC never informed him of the complaint of the ULS dated November 14, 2008 and did not give him a hearing thereon. He further submitted that the letter he received from the Chairman, JSC, did not suffice.

Learned Counsel for the appellant also cited various acts and omissions of the JSC, and correspondences that were exchanged between the JSC and ULS that he was not informed about. He further submitted that the appellant was not given the right to appear before the JSC and defend himself, at the time the complaint was considered; that he was not allowed to cross-examine witnesses; and lastly that the decision of the JSC, to advise H E the President of Uganda to set up a tribunal to inquire into the conduct of the Appellant was never communicated to the Appellant.

Learned Counsel for the respondent argued that there was a lacuna on how the JSC was to manage the procedure for removal or discipline of a judicial officer set out in ***Article 147(3) of the Constitution.*** He argued that under that ***Article,*** the JSC receives and processes complaints, and interprets them as it sees fit. In such interpretation, it investigates and determines whether the complaint is worthy of further consideration, but in relation to judicial officers mentioned under the same ***Article,*** it is not required for a complainant to make his case or the subject of a complaint to make an oral reply to the complaint, or carry out further investigations before a decision is made. He made analogies to the powers of the Director of Public Prosecutions under ***Article 144(2)-(4).*** He argued that in this case, the JSC chose to make a representation to the President to appoint a Tribunal. Hearing could only proceed when the Tribunal was set up and it was premature at this stage to raise the issue of fair hearing.

As a preliminary matter, we observe that the procedure for removal of a judge is a two stage process; the preliminary determination that must be made by the JSC regarding whether it should make a recommendation to the President that he sets up a tribunal to consider whether a judge should be removed; and the Tribunal stage that involves the hearing of the allegations against the judge and actual determination by the Tribunal of whether he/she should be removed from office.

We have already addressed the matter of the existence of the complaint above and we need not repeat what we have said. On the acts and omissions of the JSC and the ULS thereon, the appellant's evidence is that; on receiving the letter of the Chairman of the JSC, Honorable Justice Manyindo, dated December 5, 2008, informing him about the documents filed by the ULS with the JSC, the appellant sought further and better particulars, from the JSC, regarding the complaint against him, in a letter dated January 5, 2009. The JSC did not respond to this letter; that he filed a response to the JSC dated June 19, 2009 that was prepared for him by Counsel Peter Carter QC. Counsel Peter Carter informed the appellant that he has never been summoned to attend any hearing before the JSC.

Then there were various correspondences which have already been referred to originating from both the JSC and the ULS and in respect of which no copies were sent to the Appellant. They included the letter of April 23, 2008 that the ULS president Mr. Oscar John Kihika wrote to the

president of the Law Society of England and Wales requesting him to assist in securing certified copies of the ruling of the Solicitors Disciplinary tribunal against the appellant; the letter by the President of the ULS Mr. Bruce Kyerere dated July 16, 2009, written to the Secretary JSC requesting it to formerly communicate the outcome of the JSC's session, which was scheduled to sit on June 30, 2009 to consider the matter of the appellant; the letter of July 20, 2009 that the Secretary to the JSC Mr. Kagole Kivumbi wrote to the President ULS, informing him that the ULS complaint was still being processed; and the letter of reminder of November 16, 2009 that the ULS President Mr. Bruce Kyerere wrote the JSC to finalize its investigation and take a decision on the appellant's matter.

There was also the letter of November 18, 2009, that the Chairman of the JSC, Honorable Justice Manyindo wrote to the President of the ULS and informed him that the JSC had considered the ULS complaint and on July 2, 2009, it had written to the President advising him to appoint a Tribunal under ***~~Article 144(4) (c) of the Constitution~~*** to investigate the matter fully and advise him whether or not the Judge should be removed from the Bench. The appellant was also not given a copy of the decision of the JSC on the ULS complaint that was referred to in the Chairman's letter of July 2, 2009 to HE the President.

There was another letter of March 6, 2012 that the President of the ULS, Mr. James Mukasa Sebugenyi wrote to the Honorable the Attorney General and notified him that the ULS had petitioned the Constitutional Court over the matter of Justice Choudry, as H E the President had failed to act on the recommendation of the JSC. This letter too was not copied to the appellant. Lastly, on March 15, 2012, Mr. C. Gashirabake responded to the ULS letter of March 6, 2012, on behalf of the Attorney General and stated that the Honorable the Attorney General had rendered to HE the President. The requisite legal advice on the way forward, and requested the ULS to stay any action they were contemplating. The appellant did not receive a copy of both these letters as well.

The JSC's response to the omissions is contained in the affidavit of the secretary of the JSC, Mr. Kagole Kivumbi in answer to the affidavit filed by the appellant in the application for judicial review in the High Court. The affidavit is dated June 6, 2012. He stated as follows and we quote:

3. That I know that on 17th December, 2008 the Uganda Law Society lodged a complaint with the Judicial Service Commission in which the Society requested the appointing authority to reverse or rescind the appointment of the Applicant as set out in Annexture 'A ' hereto.

4. That on the 16th of February 2009 the Uganda Law Society sought to have the Applicant interdicted by the Judicial Service Commission under SI No. 87 of 2005 as shown in Annexture 'B' hereto.

5. That in response to the two communications above, the Judicial Service Commission wrote to the Uganda Law Society notifying it of the fact that it had received the Society's complaint and was investigating it, this correspondence was copied to the Applicant a copy of this letter is attached hereto and marked Annexture 'C'.

6. That further on 13th March 2009, the Commission notified the Law Society of the investigations it was undertaking, a copy of this notification was sent to the Applicant herein, this correspondence is marked as Annexture V'.

7. That following the inception of the complaint by the Law Society, the Judicial Service Commission had earlier on 5th December 2008 asked the Applicant to comment on the Findings/Decisions of the Court in England on matters raised by the Uganda Law Society as evidenced in Annexture 'E' attached hereto.

8. That the applicant replied to the correspondence from the Commission by seeking for details of the complaints, the Judgment, press reports and questioning how documentation against him was procured, all this is evidenced in the Applicants undated correspondence enclosed herewith and marked Annexture XF'.

9. That I know that the Applicant was fully conversant and in consistent and constant communication with the Judicial Service Commission on matters touching on the complaint against him as evidenced by his communication of 9th July 09, where he intimated that he was aware that the Commission would make a decision, reference is made to Annexture 'G' enclosed herewith.

10. That I further know that the Applicant in vouching for his character and professionalism sought to place before the Commission secondment of his ,
Person of Jonathan Crystal and Vrahimis Anonion Orphanon as shows in Annexture 'H'"

11. "that in undertaking all correspondence from paragraph 3-10 herein the in the applicant was involved from the inception of the complaint against him, the investigation, receipt of Rulings/judgments from England, forwarding of his response to the complaint, knowledge of the recommendation of the Judicial service Commission and finally did lodge complaints with the Principal Judge owing that he was abreast, fully briefed and knowledgeable of all the processing proceedings (sic) by the Commission, touching the complaints filed against him.

12. That I know with the above background, with my institutional knowledge of conduct of this matter that the Applicant has been more than fairly accorded impartial treatment in conduct

of the complaint against him.

13. *That I am further aware that the conduct of this complaint has been undertaken well within the powers conferred by the Constitution in Articles 144, 146, 147, Cap 14 and the Rules created there under...".*

The JSC Secretary's evidence in a nutshell is that the appellant was at all times in touch with the JSC and aware of what was going on. Although some of the correspondences between the JSC and the ULS were not copied to the appellant, we do not consider this omission to be fatal to the proceedings that went on in the JSC. The correspondences cited were not central to the decision by the JSC to write to the President advising him to appoint a Tribunal under ***Article 144(4) (c) of the Constitution*** to investigate the matter of the appellant.

The remaining aspects concern the alleged failure to accord the appellant a right to appear before the JSC when it was considering the matter of the appellant; and the alleged failure to accord him an opportunity to cross examine the complainant and witnesses. The two will be considered in turn. But both aspects of the right to a fair hearing cannot be properly addressed without a clear understanding of the functions and duties of the JSC on receiving a complaint.

We observe that the functions of the JSC are set out in ***Articles 147 and 148 of the Constitution.*** The function most relevant to the matter at hand is found in ***Article 147 (d),*** which is; ***to receive and process***:

people's recommendations and complaints concerning the Judiciary and the administration of justice and, generally, to act as

3. A link between the people and the judiciary Article 148 provides or the powers of the JSC with respect to appointments and disciplinary control. The JSC may appoint persons to hold or act in any judicial office other than the officers specified in ***Article 147(3) of the Constitution*** who include the Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a judge of the High Court, and the Chief Registrar or registrar. Its role here is limited to identifying, interviewing and recommending to the President successful candidates to appoint.

Article 144(2) provides for the removal of judicial officers who include the Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a Judge of the High Court. Under the same ***sub-Article,*** the JSC cannot exercise disciplinary control over the Chief Justice, the Deputy Chief Justice, the Principal Judge, a justice of the Supreme Court, a justice of Appeal and a Judge of the High Court, and the Chief Registrar or registrar.

Under ***Article 144(3)*** it is only the President that can remove such judicial officer after the question of his or her removal has been referred to a tribunal appointed ***on the recommendation of the JSC or the Cabinet on any ground described in Article 144(21***.

From the above analysis we note that the JSC is clearly empowered by the ***Constitution*** to recommend to the President whether a tribunal should be set up to remove a judge on the grounds of inability to perform the functions of his or her office arising from infirmity of body or mind; misbehavior or misconduct; or incompetence. Before the JSC undertakes this exercise, it has to make a preliminary determination on whether to make the recommendation or not. In other words, it should find out whether a prima facie case exists. In this regard, we consider that its

proceedings in this regard should be properly recorded and documented. How then should the JSC proceed to fulfill its duty under this article?

It has been argued by learned Counsel for the respondent that the ***Judicial Service Commission Act*** does not apply to judicial officers mentioned under ***Article 147(3) of the Constitution*** such as the appellant and that there is a lacuna as to how the JSC should proceed in respect of such officers. The learned trial Judge held that ***section 11*** of the ***Judicial Service Act*** did not apply to disciplinary proceedings against a judge of the High Court like the appellant, in view of the provisions of ***Article 147(1) and (3)*** and ***Article 148 of the Constitution.***

We do appreciate that this is the first case to be handled by the JSC concerning a Judge after the current ***(1995) Constitution***, and that there was no precedent to guide it on the proceedings. However, with respect, we do not agree that ***section 11*** of the ***Judicial Service Act*** does not apply to disciplinary proceedings against a judge of the High Court like the appellant.

We consider that there is guidance on how the JSC should proceed to determine such a matter in the Judicial Service Act in its preamble and sections 9 to 11. The preamble clearly stipulates that the purpose for the enactment of the Judicial Service Act is to "regulate and facilitate the discharge by the President and the Judicial Service Commission of their functions under Chapter Eight of the Constitution pursuant to article 150f2) of the Constitution and for other matters related to the Judiciary" Chapter 8 of the Constitution concerns the Judiciary.

The Constitutional Court has held that the "preamble is a vital aid in the interpretation of a statute. It determines its objective. The preamble is normally a preliminary statement of the reasons which have made the Act desirable. It may also be used to introduce a particular section or group of sections." See Uganda v. Atugonza Francis, Constitutional Reference No. 31 of 2010 P.6

The provisions of ***sections 9 to 11 of the Judicial Service Act*** offer further guidance. They provide;

> ***9. Meetings and decisions of the commission***
>
> ***(1) The chairperson of the commission shall preside at all meetings of the commission, and in his or her absence the deputy chairperson shall preside; and in the absence of both of them, the judge of the Supreme Court referred to in article 146(2) (d) of the Constitution shall preside.***
> ***(2) The Quorum at meetings of the commission shall be six.***
> ***(3) Every decision of the commission shall, so far as possible, be by consensus.***
> ***(4) Where there is no consensus, decisions shall be by a majority of all the***

members

(5) In any vote under subsection (4), each member of the commission shall have one vote, and none shall have a second or casting vote.

(6) In any matter of discipline or ~~a proposal to remove a judge~~ or other judicial officer, the decision shall be carried by at least six members of the commission at a meeting at which the Attorney General is present.

(7) Subject to the provisions of the Constitution, the commission may act, notwithstanding the absence of any member or any vacancy in the office of a member.

(8) ~~The commission may regulate its own procedure~~.

"10. Decision by circulation of papers

(1) Except for matters of appointment, discipline, reviewing and making recommendations on the terms and conditions of service of judges and other judicial officers, or a proposal to remove a judge or any other judicial officer, decisions may be made by the commission without a meeting by circulation of the relevant papers among the members and the expression of their views in writing.

"11. Rules of natural justice

In dealing with matters of discipline, and removal of judicial officers, the commission shall observe the rules of natural justice; and, in particular, the commission shall ensure that an officer against whom disciplinary or removal proceedings are being taken is-

(a) Informed about the particulars of the case against him or her

(b) Given the right to defend himself or herself and present his or her case at the meeting of the commission or at any inquiry set up by the commission for the purpose;

(c) Where practicable, given the right to engage an advocate of his or her own choice; and told the reasons for the decision of the commission

"12. Bias

(1) Any judicial officer whose conduct is under consideration by the commission in a disciplinary matter is entitled to object to the participation of a member of the commission in the proceedings and decisions of the commission on the ground of bias

(2) ~~Where an objection is raised under sub-section (1). the commission~~ Shall inquire in~~to and rule on the objection before proceeding~~ further with the ~~consideration of the case of the judicial officer who~~ ~~raised the objection~~.

(3) ..."

In the absence of any clear provision to the contrary, it follows therefore that the principles that guide the Judicial Service Commission as enunciated in the ***Judicial Service Act*** apply to all judicial officers. In fact, ***section 9(6) of the Act*** makes this clear when it refers to;

"***a proposal to remove a judge or other judicial officer.***"

Thus when the JSC sits to consider a proposal to remove a judge, it is enjoined by the ***Act*** in that regard to hold a meeting ***(s. 10)*** as opposed to circulating of the relevant papers among the members and the expression of their views in writing under ***section 10 (1) of the Judicial Service Act.*** The meeting must be attended by at least six members of the Commission ***(s. 9(2)),*** including the Attorney General ***(s. 9(6)).*** The JSC must observe the rules of natural justice ***(s. 11)***.

We also note that the ***Judicial Service Act*** in ***section 1(e)*** assigns the same meaning to judicial officer as does the ***Constitution Article 151*** which provides:

> ***151. Interpretation***
>
> ***In this Chapter, unless the context otherwise requires, "judicial officer" means_***
>
> ***(a) A judge or any person who presides over a court or tribunal howsoever described"***

All the above provisions are clear and unambiguous and do not need any amplification. It is not stated anywhere that the provisions of ***section 11*** apply only to judicial officers who the JSC is empowered to remove. If that was the intention, the Act would have specifically stated so.

We have not had opportunity to benefit from decided cases in Uganda, this being a novel case. However, several authorities have been cited by both parties from other commonwealth jurisdictions to assist the court in this regard. We proceed to examine whether authorities from other jurisdictions are applicable in light of the above statutory provisions. The first one is the case of ***Barnwell v Attorney General [1994] 3 LRC*** from Guyana. We consider it important to reproduce its facts as they are necessary to determine whether there are parallels that can be drawn from it with this case with regard to the right of a judge to appear and defend him/her self before the JSC.

The appellant was a High Court judge. On two occasions he was invited to appear before the Judicial Service Commission in relation to allegations which had been made about his conduct. In an appropriate case, the commission was empowered under

article 197(5) of the Guyana Constitution to make representation to the President that the question of removing a judge from office ought to be investigated by a tribunal appointed by the President. However, on each occasion after the appellant had appeared and explained his conduct to the commission the issue was treated as closed and the took no further action. In September 1989 the appellant was summoned to the chambers of the Chancellor, who was an ex oficio the chairman of the commission. The Chancellor informed the appellant that a magistrate had made allegations against him in a letter which she had sent to the chancellor. The Chancellor read from the letter but did not show it directly to the appellant, nor provide him with a copy until much later. The Chancellor reported to the commission the substance of his discussions with the Judge and showed it the letter from the magistrate. A few days after the meeting between the judge and the chancellor, the commission, without having afforded the appellant an opportunity to appear before it or to comment in any way, purporting to act accordance with article 197(5) made a representation to the president that the question of removing the judge from office ought to be investigated. A few days later the appellant was suspended from office under article 197(7). The appellant challenged his removal by applying for Judical Review in the Guyana High Court. The application was dismissed. The appellant appealed to the Guyana Court of Appeal.

Article 197(5) of the Constitution of Guyana provides:

"if the Prime Minister, in the case of the Chancellor or the Chief Justice, or the Judicial nice Commission, m the case of any other judge, represents to the President that the question of removing a judge from office under this article ought to be investigated,

(a) The President shall appoint a tribunal, which shall consist of a chairman and not less than two other members, selected by the President, acting in his discretion m the case of the Chancellor or the Chief Justice or in accordance with the advice of the Prime Minister after consultation with the Judicial

Service Commission in the case of any other judge, from among persons who hold or have held office as a judge of a court having unlimited jurisdiction in civil and criminal matters in some part of the Commonwealth or a court having jurisdiction in appeals from any such court or who are qualified to be appointed as any such judge; and

(b) The tribunal shall Inquire into the matter and advise the President whether or not the judge ought to be removed from office '

Article 197(7) states;

> *If the question of removing a judge from office has been referred to a tribunal under paragraph (5), the President may suspend such judge from performing the functions of his office, and any such suspension may at any time be revoked by the President, and shall in any case cease to have effect if the tribunal advises the President that the judge ought not to be removed from office. In effecting any such suspension or any revocation of any such suspension, the President shall act in accordance with his own deliberate judgment in the case of the Chancellor or the Chief Justice and in accordance with the advice of the Chancellor in the case of any other judge.*"

On appeal from judicial review, the Guyana Court of Appeal held that the decision of the commission to make a representation to the President with regard to investigating the possible removal of the judge from office under article 197(5) was ***ultra vires*** and void because among other reasons, the Chancellor as chairman of the commission had no authority under article 199 or any other provision of the Constitution to act on its behalf and even if his meeting with the appellant could properly be described as a 'hearing' the commission could not adopt its chairman's actions as its own as those actions were themselves ***ultra vires.*** Accordingly the commission had not given the appellant an opportunity to be heard by it before it reached its decision. It was further held that in the absence of any express provision to the contrary, the commission was master of its own procedure but it was required to apply rules of procedural fairness and natural justice to its deliberations. It had acted in breach of its duty to act fairly and in breach of the rules of natural justice ***(audi alteram partem*** and right to a fair hearing) when it made its representation to the President; and a contravention of the rules of natural justice rendered the decision void even if it could be shown that without such contravention there would have been an adverse result.

This decision renders support to the principle that Constitutional provisions do not displace the requirement to apply principles of natural justice. In that regard as well, there are parallels with this case. Bishop a made a pertinent observation in that case at page 48 of the judgment and we quote;

"I would say that a critical function of the JSC, upon receipt of an allegation o misbehavior, is to evaluate it, in order to ascertain whether it should be advanced to the next stage, the article 197(5) removal exercise. Looked at objectively, the JSC (by a careful and thorough examination of all the facts) is required to extract what issues have been raised and material facts found in relation to the complaint and considered germane to a proper and balanced exercise of the JSC's discretion to make or not make an adverse representation to the

President that the question of removing the judge from office ought to be investigated. Such examination would include seeing and hearing the complainant and the accused judgee separately. It would serve to inform and enhance evaluation."

We consider the above to be pertinent and wise counsel. Pertinent in that the procedure in Uganda is also two pronged, requiring the JSC to make a preliminary determination as to whether or not to advise the President to constitute a tribunal to determine whether or not a judge should be removed. The second stage is the full hearing before the Tribunal. But need the JSC give the appellant a right to appear at the stage of deciding whether or not to advise the President to constitute a tribunal? In the case of Guyana cited above, the appellant appeared before the JSC on the two previous occasions and explained himself but on this last occasion, he was not given a chance to appear.

We note that the Constitution of Guyana is couched in almost similar language like the Ugandan one. It appears that at the time of the decision, Guyana had no specific legislation on whether or not to accord a judge the right to appear before the JSC and present his/her case at the time of its consideration of whether or not to render advice to the President. The procedure advised by Bishop G is largely what is laid down in the ***Judicial Service Act*** for the JSC to follow in the case of Uganda.

The learned Trial Judge in the court below relied on the Privy Council case of ***Evans Rees and Others v. Richard Alfred Crane Privy Council Appeal No 13 of1993,*** decided on February 14th, 1994, more particularly the reasoning of the Privy Council that the affected judge;

"***...ought to have been told of the allegations made to the Commission and given a chance to deal with them not necessarily by oral hearing, but in whatever way was necessary to make his reply***".

While we uphold the principle that natural justice requires that the Judge be given a chance to deal with the allegations, it is our view that in the case of Uganda, the form in which he/she should deal with such allegations and how the JSC should handle them is dearly spelt out in ***section 11 of the Judicial Service Act as*** indicated above.

We conclude that the provisions of ***section 11 (b) of the Judicial Service Act*** oblige the JSC to give such judicial officer, like the Appellant ***the right to defend himself or herself and present his or her case at the meeting of the commission or at any inquiry set up by the commission for the purpose*** as part of its compliance or observation of the rules of natural justice. This was not done in the case of the Appellant. We therefore answer the issue of whether the appellant's right to a fair hearing was infringed in the affirmative.

On the right to cross-examine witnesses at the stage the JSC is considering the complaint, we have found the Kenyan case of ***Nancy Makokha Baraza v Judicial Service Commission and 9 Others; Constitutional Petition No. 23 of 2012 [2012] eKLR*** instructive. This Kenyan case laid down the principle that at that stage, cross-examination of witnesses is not necessary and that the proper forum for it is during the proceedings of the Tribunal.

The facts of that case were that the Petitioner was appointed Deputy Chief Justice of Kenya after a rigorous interview. The Judicial Service Commission was a statutory body established under Article 171 of the Kenyan Constitution. Its functions included recommending the appointment of persons to be appointed as Judges to the President of the Republic of Kenya. It was alleged that on December 31, 2011, at the Village Market, an upmarket shopping mall on the outskirts of Nairobi, the Petitioner assaulted, intimidated and threatened a security guard, one Rebecca

Kerubo aka Kemunto. The incident attracted a lot of publicity in the print and electronic media. The Honorable Chief Justice of Kenya, Dr. Willy Mutunga, therefore decided to institute the judiciary's own internal investigation. A full meeting of the JSC followed and a decision was made to set up a sub-committee of eight members to look into the incident and report back to the JSC. The sub-committee received oral and documentary evidence and heard a total of 15 witnesses including the Petitioner and the complainant.

The subcommittee in due course prepared its report and handed it over to the JSC. The JSC considered the report and resolved under Article 168(4) to send a petition to the President to suspend Judge Nancy Baraza as a judge of the Supreme Court and Deputy Chief Justice of Kenya and to appoint a tribunal to investigate her conduct. The Petition was sent to the President in accordance with article 168(l)(e) of the Constitution. One of the grounds of her Petition in that case was that during the sub-committee inquiry, the Petitioner was never afforded an opportunity to test the veracity or otherwise of the evidence adduced by the witnesses who testified at the delegated sub-committee sittings either through cross examination or other modes known to law and as such the JSC (1st Respondent) denied her a reasonable opportunity to influence the decision making process, thus being in breach of the succinct rules and principles of natural justice. She further submitted that her rights to a fair hearing under Article 50 of the Constitution of Kenya were grossly violated and/or trampled upon by the JSC.

Her petition was dismissed on the ground that she had been given an opportunity to give her version of the events by the sub-committee (where she appeared in person) and that the right to cross-examine witnesses was prematurely pursued, as the petitioner would have an opportunity to cross-examine such witnesses during the Tribunal proceedings.

We note again, that the judge complained against, was given an opportunity to appear before the subcommittee of the Kenyan JSC which

heard her version of events as well as that of the complainant before the JSC sat to make a recommendation to set up a tribunal. This was not done in the case before us now.

We also hasten to add that in Uganda, unlike in Kenya, there is in place specific statutory provisions the JSC has to follow in its consideration as to whether to advise the President to appoint a Tribunal under ***Article 144(4) (c) of the Constitution*** to investigate the matter of the removal of a judge. These provisions are in the ***Judicial Service Act*** dealing with the issue of the application of the principle of natural justice also known as audi alteram partem rule to such proceedings. We have already pointed them out.

In light of these provisions and taking into account the above quoted jurisprudence, it is our considered view that it was not enough that the Chairman, JSC wrote to the appellant, notifying him of the complaint and requesting his comments thereon. It was also not enough for the JSC to state that the appellant was aware that a decision would be made regarding the complaint, or that he was aware and abreast of the developments and communication between the JSC and the ULS. It was a duty imposed on the JSC by the ***Judicial Service Commission Act Section 11 (b)*** to give the appellant ***"the right to defend himself or herself and present his or her case at the meeting of the commission or at any inquiry set up by the commission for the purpose".***

The nature of the complaint that the JSC was considering was very grave. It concerned the fitness or otherwise of the appellant to hold judicial office, based on allegations of fraudulent conduct as a solicitor in England and Wales. The decision rendered to set up a Tribunal was a very serious one indeed. It would affect him negatively, whether or not the Tribunal decided to impeach him. The fact that the appellant was "in consistent and constant communication and was aware that the JSC would make a decision" as stated by the Secretary of the JSC in his communication of

July 9, 2009 is not sufficient ground for the JSC to exclude him from appearing and presenting his side of the story at the JSC meeting. What is apparent from the record is that the JSC sat and considered the matter without hearing the appellant, at the meeting of the JSC or some other inquiry set up by the JSC for that purpose, contrary to the rules of natural justice stipulated in the above section.

The appellant was not even informed about the decision that had been taken against him. It was only after receiving communication from the learned Principal Judge dated April 5, 2012, that the ULS had filed a Constitutional Petition against the Attorney General seeking orders directing His Excellency the President to appoint a Tribunal pursuant to the JSC recommendations that he learnt of the JSC's decision. The non derogable right of fair hearing with the concomitant application of the rules of natural justice should have been observed by the JSC.

On this particular aspect, the learned Trial Judge, after quoting ***section 11 of the Judicial Service Act*** had this to say at page 19 of his judgment;

"I have carefully considered Counsel's submissions on this point In view of the relevant provisions of the Constitution I find that s 11 of the Judicial Service Act does not apply to disciplinary proceedings against a Judge of the High Court like the applicant. The Judicial Service Commission has as one of its functions to advise the President on appointment, confirmation and removal of Judge. It has no power to do any of those acts apart from advising the President..."

With respect, we consider that the learned trial Judge erred in reaching such a conclusion. As already demonstrated, the function of advising the President is a process that must follow the law as laid down in the ***Judicial Services Act.*** We consider that there was no substantial compliance by the JSC with ***Articles 28(1) and 42 of the Constitution as well as sections 9, 10 and 11 of the Judicial Service Act***.

We further observe that the right to a fair hearing in a non-derogable right ***under the Constitution Article 28(1) and Article 44 (c). Article 28(1)*** provides as follows:

28. Right to a fair hearing.

t[1]) ***the determinati~~on of civil rights and obligations~~ or any criminal charge, a person shall be entitled to a fair, speedy and public hearing before an independent and impartial court or tribunal established by law.***

(2) **..."**

44. Prohibition of derogation from particular human rights and freedoms.

Notwithstanding anything in this constitution, there shall be no derogation from the enjoyment of the following rights and freedoms-

(a) ***Freedom from torture and cruel, inhuman or degrading treatment or punishment;***
(b) ***freedom from s/a very or servitude;***
(c) ***~~the right to fair hearing:~~***
(d) ***the right to an order of habeas corpus.***"
(emphasis by the court)

We also consider ***~~Article 42 of the Constitution~~*** relevant. It provides:

"42. Right to just and fair treatment in administrative decisions.

Any person appearing before any administrative official or body has a right to be treated ~~justly and fairly~~ and shall have a right to apply to a court of law in respect of any administrative decision taken against him or her.*

It is our decision therefore that the JSC erred when it considered the complaint against the appellant without observing his right to appear and present his case at the meeting of the Commission. This omission vitiated the proceedings against the appellant. The JSC also erred when it failed to communicate the decision it reached to the appellant, contrary to the rules of natural justice.

We conclude that the proceedings against the appellant were proceedings for removal of a judge within the meaning of ***~~sections 9(6) and 11 of~~*** The ***~~Judicial Service Act~~*** and that the appellant should have been given an opportunity to be present his case when his matter was being considered at the meeting of the Commission. The fact that he was not was a clear violation of his right to a fair hearing and the principles of natural justice. The decision of the JSC was therefore ***~~ultra vires,~~*** null and void. This disposes of grounds 3, 4, 5, 6 and 9 of the appeal, which we uphold accordingly.

Whether there was bias on the part of JSC on account of Commissioner Ssempebwa and the learned Attorney General sitting on the meeting that made the decision against the appellant

This broad ground is canvassed in grounds 6, 7, and 8 of the memorandum of appeal. Learned Counsel for the appellant submitted that Commissioner Ssempebwa was an advocate, thus a member of the ULS as well as a member of the JSC. He was indeed a representative of the ULS to the JSC pursuant to ***Article 146 (2) (c) of the Constitution.*** He submitted documents of the ULS relating to the appellant to the JSC and sent a directive for a meeting of the JSC to be called and sat in Judgment of the appellant. Therefore, he was biased. He also submitted that the Attorney General, who sat in on the Committee that made the decision, conveyed that decision to the President and rendered advice to the President in respect thereof. He also submitted that he had written to the JSC on July 2009, complaining about the role of Commissioner Ssempebwa on the JSC panel but he had not received a response from the JSC.

In response, Learned Counsel for the Respondent submitted that the presence of the representative of the ULS and the Attorney General is a constitutional imperative under ***Articles 146(2) (c) and Article 146(3) of the Constitution*** respectively. He also submitted that when the Attorney General makes a representation to the President under ***Article 144(4) of the Constitution*** on the appointment of a tribunal, then that

procedure would be acceptable under the principles of Constitutional interpretation.

We have already reproduced ***~~section 12 of the Judicial Service Act~~*** relating to bias. We observe that no record of the proceedings of the JSC was availed to the trial Court to determine when and where the decision was taken by the JSC to advise H E the President to set up a tribunal to investigate the appellant as judge of the High Court, or who attended it. We however consider that the assertion of the appellant that both Commissioner Ssempebwa and the Attorney General sat and deliberated in the meeting that made the decision was not controverted by the Respondent. Mr. Kagole Kivumbi's affidavit, which he swore as Secretary to the JSC is silent on the matter so we consider this to be a tacit admission of the Appellant's assertion. We shall address the issue of participation of Commissioner Ssempebwa and the Attorney General separately.

Regarding Commissioner Ssempebwa, we consider it important to address the content of the letter that was written by the appellant to the Chairman, JSC Honorable Justice Manyindo dated July 2, 2009. It reads:

"My lord

Re: Frederick Ssempebwa Commissioner

My response has now been filed and I trust that the JSC will consider the same and take the appropriate action.

However I would like to express my reservation about the above named commissioner because he initially lodged the complaint and has been active in petitioning against me.

He also attended the Law Society's AGM on May 2, and addressed the meeting and voted against me. I enclose extract from the emails page 2 of Exhibit ASC5 and may even produce the video of the meeting.

This commissioner had clearly expressed his opinion and I am sure you will agree that the JSC cannot be impartial in considering my response if such a member who ought to have been disqualified remains on board.

His conduct amounts to infringement of Article 128.

The principle of natural justice will demand that this commissioner recuses himself from sitting as a commissioner on my matter..."

The Appellant referred in paragraph 6(a) of his affidavit supporting the application for review in the High Court sworn on May 24, 2012 to Commissioner Sempebwa's letter to the JSC of November 14, 2008 and to his active participation in the deliberations of the ULS leading to the lodging of the complaint. As already noted, the affidavit in reply of the Secretary to the JSC Mr. Kagole Kivumbi did not respond let alone controvert the appellant's assertion that Commissioner Ssempebwa sat in the meeting that made the decision against him. Thus the Appellant's assertions as regards this point, having not been controverted, are deemed to have been admitted by the Respondent. We therefore consider this to be established by the evidence.

The appellant wrote another letter to the Chairman of the JSC, Honourable Justice Manyindo on July 9, 2009 in which he referred to his earlier letter of July 2, 2009. He stated in that letter that he was aware that the JSC would be writing a report following his response. He requested the Chairman to exhibit his letter of July 2, 2009, and the enclosures in the JSC report and indicate that the appellant had complained about the JSC not being impartial in considering his response in view of the presence of Commissioner Ssempebwa. This letter too was not responded to by the JSC.

The fact that the complaint was first filed by Commissioner Ssempebwa on behalf of the ULS who was its member and representative to the JSC is itself not an indication of bias. Nevertheless, this should have alerted the JSC to the need to pay particular attention to fairness. We consider that it was incumbent upon the JSC to address the concerns raised by the appellant against Commissioner Ssempebwa, to take a decision on them, and inform the appellant about the decisions made thereby, before sitting with him to consider the case against the Appellant. Apparently, none of these steps were taken.

On the face of it, Commissioner Ssempebwa's participation appeared that he was both an accuser i.e. through the ULS and judge i.e. through the JSC. In this regard, we consider that it is an inescapable conclusion that there was apparent bias based on the fact that Commissioner Ssempebwa actively participated in deliberations of the ULS leading to the filing of the complaint of the ULS against the appellant, there was a complaint against his participation pending before the JSC, and that he then proceeded to sit on the panel that heard and determined the matter. This was compounded by the fact that the JSC chose to ignore the concerns of the Appellant in this regard.

We have found parallels to this case in the case of ***Queen v. Gaisford [1892] 1 QB 381*** persuasive in that regard. The facts in that case were the defendant had deposited and left a heap of earth and manure by the side of the highway. A vestry meeting was summoned by the District Surveyor to consider (inter alia) the obstruction of a highway by the defendant. A justice of the peace moved a resolution calling upon the defendant to remove the heap. The defendant failed to remove the heap, whereupon a summons was taken out against him by the District Surveyor for depositing the heap to the obstruction and annoyance of the highway, and for failing to remove it after notice. The justice who moved the resolution, and who was a ratepayer of the parish, sat and adjudicated with another justice upon the summons, and made an order directing that the heap be removed and sold and the proceeds of sale be applied to the repair of the highway. The defendant brought an application of certiorari to bring up and quash the order made by the justices. It was held that the justice was disqualified from adjudicating upon the summons, for the part taken by him in moving the resolution afforded ground for reasonable suspicion of bias on his part, though there might not have been bias in fact, and upon further ground that as a rate payer the justice had a pecuniary interest in the result of the summons:

It is therefore our considered decision that the learned trial Judge erred when he found that no bias had been established. The existence of apparent bias, even if it may not have been there in fact, was an additional factor that vitiated the decision made by the JSC.

On the involvement of the learned Attorney General in the JSC meeting, we do not consider that it is necessary to go into the principles of constitutional interpretation before we can decide whether the act of the Attorney General in conveying the decision of the JSC to the President constituted bias. Counsel for the respondent submitted that the mere presence of a member of the ULS and that of the Attorney General on the Committee that made the decision did not constitute bias.

It is necessary to examine the composition of the JSC as established by law before we determine the question whether the mere fact of the Attorney General sitting in the JSC meeting that took the decision against the Appellant attracted bias. ***Article 146 of the Constitution*** provide as follows:

"146. Judicial Service Commission

(1) there shall be a Judicial Service Commission

(2) the Judicial Service Commission shall subject to clause (3) of this article, consist of the following persons who shall be appointed by the President with the approval of Parliament-

(a) a chairperson and deputy chairperson who shall be persons qualified to be appointed as justices of the Supreme Court, other than the Chief Justice, the Deputy Chief Justice and the Principal Judge;

(b) one person nominated by the Public Service Commission;

(c) two advocates of not less than fifteen years' standing nominated by the Uganda Law Society;

(d) one judge of the Supreme Court nominated by the President in consultation with the Judges of the Supreme Court, the justices of Appeal and judges of the High Court; and

(e) two members of the public who shall not be lawyers nominated by the President

(3) The Attorney General shall be an ex officio member of the commission.

(4) The Chief Justice, the Deputy Chief Justice and the Principal Judge shall not be appointed to be chairperson, deputy chairperson or a member of the Judicial Service Commission.

The Attorney General is thus an ex official member of the Commission. We do not consider the fact that the Attorney General conveyed the decision of the JSC to the President to imply bias on his part. He was merely performing his role conferred on him by ***the Constitution.*** Moreover, the act took place after the decision was made. As for his sitting on the quorum, the appellant did not sufficiently substantiate why he should have been excluded. We note that he is an ex- officio member who has not been shown to have any role in the drafting or even conveying the complaint to the JSC. While he was copied in on some of the communication between the JSC and the ULS, he did not make any response before the decision was made. We therefore consider that he rightly sat on the meeting that made the decision and no bias flawed his actions. Certainly, none has been established. We therefore dismiss ground 8 of the grounds of appeal.

Conclusion

The appellant made the prayers already set out on page 4 of this judgment for orders that:

(a) The appeal be allowed.
(b) A declaration be made that the Judicial Service Commission's report made on 2nd July 2009 regarding the Applicant/Appellant is null and void.
(c) A certiorari order be issued quashing the said Judicial Service Commission report.
(d) An order of prohibition issues to stop the Judicial Service Commission from enforcing and taking any further action of the said Report.
(e) The Appellant be granted costs in the Court of Appeal and in the High Court.

In conclusion, this appeal partly succeeds and we make the following orders and declarations. All the grounds of appeal except for grounds 1, 2 and 8 are allowed. Ground 8 of appeal is dismissed. The report of the JSC to HE the President is hereby declared null and void by reason of the proceedings of the JSC being ***ultra vires*** for failure to give the appellant a

President is hereby declared null and void by reason of the proceedings of the JSC being ***ultra vires for*** failure to give the appellant a fair hearing and for bias. The report is accordingly quashed. In light of this declaration, we see no need to make the order of prohibition requested for by the appellant in paragraph (d) of the prayers. The appeal is allowed to the **extent shown above with costs to the appellant here and in the court below.**

Before we take leave of this matter, we consider that we should comment on ***The Judicial Service Commission Regulations SI 87 of2005*** and ***The Judicial Service (Complaints and Disciplinary Proceedings) Regulations SI 88 of 2005.*** Both are made under ***Section 27 of the Judicial Service Act.*** That section provides for regulations to be made in respect of the manner in which matters shall be referred to the JSC, among other matters. We shall begin with the former.

The Judicial Service Commission Regulations provide for how the meetings of the JSC are to be conducted. Under ***Regulation 3,*** the Chairperson has to preside over every meeting of the Commission unless he is absent, in which case the Deputy Chairperson or in his/her absence a member of the Commission from the Judiciary should preside. The JSC is obliged to keep a record of the members present and the business transacted at every meeting of the Commission. The JSC is further obliged, in the exercise of its powers in connection with the dismissal or termination of any judicial officer, to act in accordance with the provisions of the Constitution, the Act and these regulations.

We are citing these provisions out of concern because apart from the affidavit tendered by Mr. Kagole Kivumbi, no record of any proceedings was tendered by the JSC in the High Court for its scrutiny. Needless to mention, a record speaks for itself and makes it easy to follow what happened.

With regard to The Judicial Service (Complaints and Disciplinary Proceedings) Regulations SI 88 of2005, it is clear that they apply to

Judges to a limited extent. First of all, they define a judicial officer as a judge or any person who presides over a court or a tribunal, however described ***(Regulation 1).*** They distinguish between complaints and disciplinary matters. With regard to complaints, a complaint may be filed by any person or organization aggrieved by improper conduct of a judicial officer ***(Regulation 3).*** The complaint may be against a judge, the Chief Registrar or a Registrar of a court, a magistrate among others ***(Regulation 4).*** The complaint may be oral or

in writing ~~***(Regulation 5).***~~ The procedure for handling complaints is elaborate and laid down in ~~***Regulation 10.***~~ Service of the complaint must be effected on the subject of the complaint within 14 days. The JSC must then proceed to determine whether a prima facie case is made out. If it is, it must then proceed to hear the case. (If the officer concerned is not a Judge)

It is our considered view that after the stage of finding a prima facie case, the JSC ceases to have authority to proceed with the matter by way of trial, if the person concerned is a judge. At that stage, it must consider whether or not to make a recommendation to the President to constitute a Tribunal to consider removal of a judge. Before it makes any determination however, the JSC is obliged to investigate the complaint, by itself or by anyone else authorized by it. The investigations include interviewing witnesses, the complainant, and the respondent, collecting documentary evidence, or a written report where it has authorized someone else to investigate ~~***(Regulation 13).***~~ Otherwise it would have no basis on which to submit or not to submit its recommendation.

Dated at Kampala this 18th day of June 2014

Signed by Hon. Justice Remmy Kasule

Justice of appeal

HONORABLE JUSTICE RICHARD BUTEERA

JUSTICE OF APPEAL

HONORABLE JUSTICE SOLOMY BALUNGI BOSSA

JUSTICE OF APPEAL