

This application by way of Notice of Motion is brought under Section 36 Judicature Act, Rules 3, 6 and 8 of the Judicature (Judicial Review) Rules 2009 for the following orders namely,

- a) An order of prohibition restraining the Respondents from proceeding with the investigation of the petition for the removal of the Applicant from the office of Lord Mayor.
- b) A writ of certiorari quashing the decision of the Tribunal to adopt Rules of procedure that are not provided for by the law and which are unjust.
- c) A writ of certiorari quashing the decision of the Tribunal to appoint three none members designated as lead counsel, co-lead counsel and Secretary
- d) An injunction restraining the 2<sup>nd</sup> Respondent from proceeding in excess of its jurisdiction and abuse of the Rules of natural Justice.
- e) An order of prohibition and stopping the 2<sup>nd</sup> Respondent from continuing to investigate the petition without regulations provided for by law.
- f) An injunction restraining Mr. Daniel Rutiba, Mr. Titus Kamyia and Mr. Robert Kirunda from acting as members and/or officers of the Tribunal established to investigate the petition for the removal of the Appellant as Lord Mayor of Kampala Capital City.
- g) A declaration that the proceedings for the investigation of the petition against the Lord Mayor are a nullity.
- h) A declaration that the conduct of the Respondent in amending the petition containing allegations against the Lord Mayor is ultravires the terms of reference and therefore a nullity.
- i) A declaration that the investigation by the Tribunal of a petition not served onto the Applicant as required by law is a nullity.
- j) A declaration that the term given to the Applicant by the 2<sup>nd</sup> Respondent to file a defence is unreasonable, unfair and illegal.
- k) A declaration that the act of the Tribunal commencing work before taking oath is a nullity and unreasonable.

- l) A declaration that the recording of statements from Councilors before the pre-trial process and in the absence of the applicant is unfair, irregular and illegal.
- m) An order for the award of general and exemplary damages for the psychological torture, mental anguish and emotional stress suffered by the Applicant.

The grounds for this application are contained in the affirmation of the application but briefly are said to be as follows:

1. That the Minister received a petition by 16 Councilors of the Authority and acted on it without serving a copy to the Applicant.
2. That Minister acting in the course of his duty appointed a tribunal to investigate allegations against the Applicant without providing for regulations governing its conduct as required by law.
3. That the tribunal appointed three non members to wit, Mr. Dan Rutiba as Lead Counsel, Titus Kanya as Co-Counsel and Mr. Robert Kirunda as Secretary without powers to do so.
4. That the Tribunal went ahead to issue rules without the mandate to do so which act is improper in law and ultravires its powers.
5. That the Tribunal made Rules which deny the Applicant right to effective legal representation.
6. That the tribunal started working in a hurried manner before the members took oath.
7. That the 2<sup>nd</sup> Respondent has threatened to start hearing in unauthorized manner.

8. That the Applicant has been subjected to psychological torture, mental anguish and emotional stress for which the 1<sup>st</sup> Respondent is vicariously liable.
9. The orders sought are necessary for ends of justice to be met.

The application is supported by the affirmation of the Applicant, his supplementary affirmation and further supplementary affirmation. There is an affirmation in rejoinder by one Kiwanuka Abdallah who is one of his Advocates. The Applicant's said affirmation in support of the motion more or less reiterates the grounds of this application. They further spell out the background to the petition against him. They also emphasise the way the tribunal has so far gone about its business, the details of which I will refer to later in this ruling.

In reply the Respondents filed affidavits sworn by Frank Tumwebaze, the Minister in charge of the Presidency and Kampala Capital City.

There are two affidavits sworn by Robert Kirunda who described himself as the Secretary to the KCCA Tribunal and one by Elisha Bafilawala a senior state Attorney in the Attorney General's Chambers.

The gist of Hon. Frank Tumwebaze's affidavit is that on receipt a petition from one third or more of Authority Councilors, he made consultation with the Attorney General in evaluation of the petition. He also consulted the Hon. Chief Justice on constitution of the Tribunal and their subsequent swearing.

The affidavit in reply by the said Elisha Bafilawala did not add much to this application. It dwelt mainly on some legal arguments.

Mr. Robert Kirunda's affidavit in reply talks about the setting up of the Tribunal which in turn appointed the support staff.

It further narrates how the tribunal went about serving the Applicant and that he duly filed his defence to the petition on Tuesday 18<sup>th</sup> June 2013. He contends that the tribunal is acting within its powers.

The said Robert Kirunda swore another affidavit which is in reply to the Applicant's supplementary affirmation in support of the motion.

Besides some legal arguments he deponed on the proceedings in the tribunal on 17/06/2013 and in particular on how the applicant's Counsel conducted themselves.

At the hearing of the application Ms Robinah Rwakojo Commissioner Civil Litigation and Wanyama Kodoli Principal State Attorney appeared for the Respondents. The applicant was represented by Mr. Alaka Caleb as the Lead Counsel, Mr. Medard Lubega Segona, Katumba Chrysestom, Samuel Muyizi and Julius Galisanga.

The following issues were agreed upon for determination by Court.

1. Whether this application is properly before Court
2. Whether the Tribunal was properly established and constituted.
3. Whether the charges before the Tribunal are proper and sustainable.
4. Whether the proceedings in the tribunal are regular.
5. Remedies available to the parties.

Since the 1<sup>st</sup> issue was intended to cater for preliminary objections against the application, Counsel for the Respondents made their submissions on it first so that Counsel for the Applicants could make their reply as they proceed with their submissions on the rest of the issues.

The first point of objection according to Ms Robinah Rwakojo is that Judicial Review is not available to a party where there are alternative remedies.

It was her view that under Section 12 (20) of the Kampala Capital City Act the applicant has a right of appeal. That this application is pre-emptive and an abuse of the remedy of Judicial Review.

She cited Housing Finance Co. Ltd. V the Commissioner General Uganda Revenue Authority Misc. Appli. No. 722 of 2005 and Uganda Group Industries Ltd v URA CS No. 5/2009 to drive home her point.

The second objection was that the matter for resolution in this case is similar to the matters in the Constitutional Court between the same parties in the Constitutional Petition No. 28 of 2013 and Misc. Application No. 32/2013.

She cited **Attorney General V Retired Dr. Col. Kiiza Besigye H.C. Misc. App. No. 733 of 2005** to show that the proceedings before this court cannot be continued with in view of the same matters pending before the Constitutional Court.

The 3<sup>rd</sup> objection is that it was erroneous to sue the Tribunal. That the Applicant should only have sued the Attorney General under **Article 250 (1) & (2)** of the Constitution.

She cited **Peter Apell & 5 Others V the Permanent Secretary Ministry of Lands, Housing and Urban Development Misc. App. No. 78/2009.** She also referred to Frank Sebowe V Attorney General. Counsel prayed that the application be dismissed with costs.

In reply to the 1<sup>st</sup> objection Mr. Caleb Alaka contended that ***Section 12 (20)*** of the Act presupposes that the Lord Mayor is already removed and that is when he can appeal to the High Court which is not the case in this application.

He explained that the Applicant is aggrieved by the impropriety of the mechanism put in place to remove him. That the issues raised are in regard to illegalities and violation of rules of natural justice and that the only remedy available is by way of Judicial Review. **He cited Magellan Kazibwe V Law Council-Misc. Appl. No. 1 of 2012.**

On the 2<sup>nd</sup> objection Counsel contended that the matters before the Constitutional Court were withdrawn so that as of now there is no matter similar to this application before any other court.

On the last objection regarding the inclusion of the Tribunal as a co-Respondent Counsel contended that this is a contentions matter before the High Court-He cited **John Jet Tumwebaze V Makerere University Council and Others Civil Appl. No. 353 of 2005** where court held that non Corporate Bodies are amenable to Judicial Review.

I have considered submissions by both sides on these preliminary objections. On whether this case should have been brought in this court by way of appeal instead

of an application for Judicial Review, Section 12 (20) of Kampala Capital City Act which was relied on by Counsel for the Respondents is quite clear and it states:

**“(20) A person who is removed as Lord Mayor or Deputy Lord Mayor may appeal to the High Court within twenty one days after a decision is communicated to him or her and the High Court may confirm or revoke the decision to remove him or her and make any order that Court considers just in the matter.”**

It is clear to me that this provision of the Act does not apply to the instant case. The Applicant has not been removed as provided for under section 12 (8) of the Act.

In this application, the Applicant contests the propriety of the Constitution of the Tribunal and the regularity of its proceedings. There is no any other course of action he can take except by proceeding by way of Judicial Review. It appears to be the only remedy available to him.

The second leg of objection is whether there are similar matters before the Constitutional Court such that this application is barred by Section 6 of the Civil Procedure Act.

The evidence on record discloses that Constitutional Petition No. 28 of 2013 and the application made under it in which the matter in issue was substantially the name as the matter in issue in the instant case and between the same parties was withdrawn on 24/06/2013.



The provision for consent of all the parties to the petition under rule 16 (4) of the Constitutional Court (Petitions and References) Rules 2005 is for purposes of dealing with the issue of costs.

Thus if all the parties to the petition consent to the withdrawal, the petition is dismissed without costs. But if not all the parties consent to the withdrawal of the petition it will stand dismissed with costs to the non consenting parties under sub-rule 5 of rule 16. Failure or omission to obtain consent from the Respondent does not in any way hinder the withdrawal of the petition from being effected.

I am of the considered view that upon filing of the Notice of withdrawal, the petition in the constitutional Court was dismissed. The Respondents would only pursue the issue of costs.

So when this application came up for hearing on 27/06/2013 there was no more petition or proceedings in the constitutional Court to warrant calling into operation the provisions of Section 6 of the Civil Procedure Act.

On whether the 2<sup>nd</sup> Respondent was properly joined in this application, I do agree with Counsel for the Applicant that this issue is a matter of controversy in the High Court. There are conflicting decisions as pointed at by Counsel.

In my view I find that any order in Judicial Review is directed at the decision maker. It is the decision making process of the public body or official that is being contested.

I think it is good practice to join the decision maker with the Attorney General. This is what was done in the instant case.

I do not find any illegality here to warrant the dismissal of the application.

All in all I find no merit in the preliminary objections. They are rejected. I will go ahead to consider the application on its merits.

**Whether the Tribunal was properly established and constituted.**

It was contended for the Applicant that the Authority is not fully constituted in accordance with the provisions of Section 6 of Kampala Capital City Act (hereinafter referred to as the Act)

They pointed out that Councilors representing the professional bodies mentioned under paragraph (g) of subsection 1 of Section 6 of the Act have not been elected. They would be four in number.

That since the Authority is not fully constituted and it is not capable of acting under Section 12 of the Act to remove the Lord Mayor.

It was argued that the law requires that at least 1/3 of all the members of the Authority shall sign the petition to the Minister for the removal of the Lord Mayor and that the resolution to remove the Lord Mayor has to be supported by not less than two thirds majority of all the members of the Authority.

That in absence of a fully constituted Authority the above two steps for the removal of the applicant cannot be legally undertaken.

It was argued that the Minister could not act on a petition emanating from some members of the Authority which is not fully constituted. Hence the Tribunal was not properly established and constituted.

Reference was made to **Constitutional Petition No. 46 of 2011 and Constitutional reference No. 54 of 2011 Hon. Sam Kuteesa and 2 others V.**

**Attorney General** on the need for Public bodies being fully constituted as prescribed by law.

It is contended that before appointing a Tribunal the Minister has to first evaluate the petition and contesting himself that there are sufficient grounds to do so. That he cannot reach this decision unless he has heard from both sides.

That the Applicant should have been given a copy of the petition to enable him make his reply upon which the Minister would find whether he is satisfied with the grounds before appointing the Tribunal.

That since this was not done the Tribunal was not properly established and constituted.

Another forceful argument is that when the Attorney General was consulted by the Minister in evaluation of the petition, he found all the grounds in the petition had no merit. That in view of this the Minister should not have appointed the Tribunal contrary to the Attorney General's opinion which is binding.

It was further pointed out that it was illegal to the Tribunal to include another ground which was not originally in the petition simply because the Attorney General opined that it was the possible ground.

It is also contended that the Tribunal was not properly appointed in absence of a statutory instrument duly published in the Gazette which would be judicially noticed. That merely announcing the Tribunal has no force of law and consequently the Tribunal was not properly constituted.

It was further submitted that the Tribunal appointed other three persons namely the Lead Counsel, Co-Lead Counsel and Secretary without powers to do so.

That since these three persons have legal and executive powers, that makes them members of the tribunal when they were not appointed by the Minister. That for this reason also, the tribunal is not properly constituted.

Hon. Lubega Segona emphasised that the Minister erred in appointing a tribunal in absence of Annextures accompanying the petition as required under Section 12 (3) (b) of the Act.

Counsel attacked what the 2<sup>nd</sup> Respondent treats as terms of reference. He argued that there is nothing to show that it is an official document because it is not signed, dated nor does it show who authored it. That the terms of reference should have been gazetted.

He argued that the Tribunal had no power to make the rules, as there is no Act of Parliament which empowers the Tribunal to make them.

He referred court to the Provisions of article 79 (2) of the Constitution to fortify his point that it is only the Minister who could make these rules under Section 82 of the Kampala Capital City Act.

In reply Mr. Wanyama Kadoli for the Respondents submitted that the Tribunal is a creature of the law, under Section 12 (5) of the Act.

He contended that the absence of Councilors representing professional bodies envisaged under Section 6 (1) (g) cannot and does not amount to the authority not being fully constituted.

She relied on rule 2 of the 4<sup>th</sup> schedule to the Act which provides that the quorum for a meeting of the Authority shall be one half of all members of the Authority.

She also referred to Section 30 of the Interpretation Act, which I find irrelevant to this application.

On the argument that there is no instrument for the appointment of the Tribunal Counsel submitted that Section 12 (5) of the Act does not make it a condition that the Minister must have statutory Instrument appointing members of the Tribunal.

He went further to argue that Section 82 of the Act is not mandatory and that subsection 2 of Section 82 enumerates areas where a Statutory Instrument may be necessary but that the Tribunal in issue is not one of them.

It was his view that the Tribunal was deliberately left out because of the nature of the requirements under Section 12 (5) of the Act where upon the receipt of the petition the Minister has to evaluate it in consultation with the Attorney General and if satisfied that there are sufficient grounds appoint the Tribunal within 21 days after receipt of the petition.

That for this reason the section did not provide for gazetting and publication of members of the tribunal.

On the Attorney General's opinion Counsel contended that there is nowhere in his evaluation did the Attorney General tell the Minister to stop the process. He contended that evaluation of the Petition is the work of the Minister only that he has to do it in consultation with the Attorney General, which he did.

He further contended that under Section 12 (5) of the Act the Attorney General has no power to direct the Minister on whether or not to evaluate the petition but that he has power under article 119 of the Constitution to advise.

On whether the Applicant was entitled to a hearing before the Minister at the time of evaluating the petition, Mr. Wanyama Kodoli was of the view that since the Minister is not exercising Judicial or quasi-judicial functions the Applicant has no right of a hearing at that stage. **Counsel cited DOTT Services Ltd v Attorney General and Auditor General Misc. Appl. No. 125 of 2009 and Peter Apell & 5 Others V the Permanent Secretary Ministry of Lands, Housing and Urban Development Misc. Appl. No. 78 of 2009** to illustrate his argument that not all administrative decisions require the Applicants to be heard before a simple and straight forward decisions are made.

Counsel concluded by saying that in the instant case the Applicant did not prove the right which was violated in his capacity as a Lord Mayor.

On the issue of the appointments made by the Tribunal, Counsel contended that these are not members of the Tribunal but support staff to assist the Tribunal in execution of their duties.

On what oath the support staff took, Counsel contended that which ever oath they took that court cannot invalidate the holding of their respective offices. He referred court to Section 43 of the Interpretation Act regarding deviation from form.

In conclusion Counsel asserted that the Tribunal was lawfully established.

I have carefully considered submissions by Counsel. In order to resolve this issue I will consider each complaint/argument as presented by Counsel for the Applicant.

**Constitution of the Authority**

It was argued for the Applicant that the Authority is not fully constituted and for that reason it is not capable of initiating the petition for his removal and subsequently pass the necessary resolution.

The composition of the Authority is provided for under Section 6 of the Act. It consists of the Lord Mayor, Deputy Lord Mayor, and such number of Councilors as stated in paragraphs c, d, e, f, and g of subsection 1 of the said section.

Paragraph (g) in particular provides for the election of one Councilor representing each of the following professional bodies namely;

- (i) Uganda Institution of Professional Engineers
- (ii) Uganda Society of Architects
- (iii) Uganda Medical Association and
- (iv) Uganda Law Society.

It is not in dispute that these Councilors have not been elected as required under Section 13 (3) of the Act.

Section 12 (3) of the Act Provides, inter alia, that for purposes of removing the Lord Mayor or Deputy Lord Mayor a petition in writing signed by not less than one third of all the members of the Authority shall be submitted to the Minister stating that the members intend to pass a resolution of the Authority to remove the

Lord Mayor, Deputy Lord Mayor and setting out the particulars of the charge supported by the necessary documents where applicable.

Subsection 1 of Section 12 provides that any of the above said officials may be removed from office by the Authority by resolution supported by not less than two thirds majority of all the members of the Authority on any of the grounds which are set out under this subsection.

I am inclined to agree with Counsel for the Applicant that the Authority is fully constituted if it consists of all the members as provided for under section 6 of the Act.

In other words, it is only after all the Councilors have been elected composed of members provided for under Section 6 that one can talk of a fully constituted Authority capable of transacting business where the participation of all the members is required by the Act.

The one third or two thirds majority required under section 12 cannot be calculated against the number of Councilors so far elected. It must be as against all the members of the authority as prescribed under Section 6 of the Act. It is not disputed that presently the authority is composed of 30 Councilors. They would be 34 if the four Councilors representing the said professional bodies had been elected.

Failure to elect the four Councilors rendered the Authority not finally constituted and they are not capable of transacting business in which all the members of the authority are statutorily required.



But this court is alive to the fact that the Authority has been transacting business and taking decisions when it is not fully constituted as required by law.

Such acts done and decision so far taken cannot be declared a nullity in view of the decision in **Hon. Sam Kuteesa and 2 others (supra)**.

In that case the constitutional Court found that the Inspectorate of Government was not properly constituted in absence of the two Deputies. The Inspector General of Government alone could not commence prosecution against any one after the Inspectorate was not legally constituted.

But mindful of the fact that in the past criminal prosecution had been done and completed, and to ensure that there is no disruptive effect in the administration of justice system the court held that its decision would only be applied prospectively as from the date of delivery of their Judgment.

In the same spirit and following the above authority the decision of this court that the Authority is not capable of legally transacting any business where all the members of the authority are required will be applied prospectively from the date of delivery of this ruling to avoid any disruption in the activities of the Authority.

Further, judicial review is a discretionary remedy; which must be exercised judiciously. Court cannot issue an order nullifying all the acts and decisions the Authority has done for the last two years or so.

There must be on-going projects or activities which have been undertaken by the authority, just as there were on-going prosecutions by the IGG in the Kuteesa case. It would be an improper use of court's discretion of such projects, decisions or

activities were to be halted simply because the Authority was not fully constituted when they were undertaken.

Court cannot use its discretion where the result would be to unleash chaos, confusion, disruption of activities or inevitable legal consequences to the Authority.

What this means in respect of this case is that the petition which was originated by 1/3 of the members of the Authority cannot be faulted.

Similarly the appointment of the tribunal by the Minister cannot be challenged on the ground that the Authority was not fully constituted and its proceedings cannot be halted on that ground.

But if the Tribunal determines that there is a prima-facie case for the removal of the Applicant, the authority cannot proceed to pass the resolution for his removal because the Act requires such resolution to be supported by the votes of not less than two thirds of all members of the Authority.

This being a new stage in the process of removing the Applicant, the Authority must be fully constituted in accordance with the provisions of Section 6 of the Act to be legally capable of passing the required resolution.

Before I take leave of this point, I wish to state that once the Authority is fully constituted, its decision or other acts cannot be affected simply due to the absence of any member or due to the fall of any vacancy.

**Evaluation of the Petition without hearing the Applicant**

It was contended that the Tribunal was not properly established since the Minister in evaluating the petition did not hear the Applicant's side of the story.

Section 12 (5) provides to the effect that upon receipt of the petition for the removal of the Lord Mayor, as in this case, he shall evaluate the petition in consultation with the Attorney General and if satisfied that there are sufficient grounds, constitute a tribunal in consultation with the Chief Justice to investigate the allegations.

I am inclined to agree with counsel for the Respondent that the process of evaluating the petition and getting satisfied that there are sufficient grounds to warrant constituting the Tribunal is purely administrative and the Minister is not required to hold a hearing where the Applicant is required to state his side of the case.

The Act provides for the hearing of both sides during the investigations by the Tribunal.

The Minister would be acting ultra vires and in excess of his powers if he embarked on a hearing of both sides. His duty is to process the petition in consultation with the Attorney General before deciding whether or not to constitute the Tribunal.

### **The opinion of the Attorney General in evaluation of the Petition**

Section 12 (5) of the Act provides:

“(5) the Minister shall evaluate the petition in consultation with the Attorney General and if satisfied that there are sufficient grounds for doing so, shall, within twenty one days after receipt of the petition, constitute a tribunal consisting of a Judge of the High Court or a person qualified to be appointed a Judge of the High Court as Chairperson and two other persons all of whom shall be appointed by the Minister in consultation with the Chief Justice, to investigate the allegations.”

In evaluating the petition the Minister did indeed consult the Attorney General. By letter of 22/5/2013 the Attorney General wrote to the Minister (Hon. Frank Tumwebaze Minister for presidency in office of the President ) in which he stated the relevant law mainly the meaning of Section 12 of the Act.

The Attorney General went ahead to analyse each of the grounds in the petition pointing out evidential weaknesses in support of the petition. It was his view that the Petitioners had not assembled the required evidence to back the allegations.

In view of the above it was contended for the Applicant that the Minister should not have gone ahead to constitute and appoint the Tribunal. That the opinion of the Attorney General was binding on him. That for this reason the Tribunal was not properly constituted.

According to Section 12 (5) which I have set out above, when the Minister receives the Petition he has to do the following within 21 days.

- (i) He has to evaluate the Petition in consultation with the Attorney General. My understanding of this is that he has to study and analyse the petition and in so doing seek the assistance of the Attorney General.

- (ii) Then he has to satisfy himself that there are sufficient grounds to constitute a Tribunal to investigate the allegations.

Here it is clear to me that the decision to constitute a Tribunal lies with the Minister alone and not together with the Attorney General.

In fact in his letter to the Chief Justice (*annexture “A” to his affidavit in reply*) *the Minister correctly appreciated the legal position when stated in part*” pursuant to section 12 (5) of the Kampala Capital City Act, 2010, I have evaluated the said petition in consultation with the Attorney General and satisfied myself that there do exist grounds for constituting a Tribunal to investigate the allegations.”

The Attorney General was entitled to make a critique of the petition and make the comments that he did.

For instance he observed that the petitioners had not assembled enough evidence to back the allegations and stated that they would probably have done better with the technical assistance in assembling the evidence.

Whether technical assistance was sought or not is not part of their proceedings. What is clear is that having done what he was legally obliged to do the Minister was satisfied there are grounds for constituting a tribunal to investigate the allegations.

What is also clear is that the Attorney General did not advise against the establishment of the tribunal to investigate the allegations. He knew very well that having made his observation the power and/or discretion to constitute the Tribunal lay with the Minister.

Whether the Minister was correct to find that the ground did exist to warrant constituting the Tribunal is a matter outside the ambit of judicial review. This court cannot delve to the merits or demerits of the petition.

In exercising its supervisory powers under judicial review court is not concerned with the merits or demerits of the decision in issue but with the decision making process- see Kulwo Joseph Andrew and 2 Others v. Attorney General and 6 Others Misc. case No. 106 of 2010 where Justice Y. Bamwine as he then was followed the British Celebrated case of Chief Constable of North Wales Police V Evans 1982. UK HL 10, (1982) 3 ALL E.R 141.

The purpose of judicial review is to ensure that lower tribunals, public bodies and officers act in accordance with the law, justly and with fairness. That the machinery of government works properly.

It is not the duty of the court to substitute its decision with that of the decision making body. It is not sitting in its appellate jurisdiction. If did it would be accused of usurping the powers of these bodies or officers under the guise of judicial review.

In the instant case there is evidence that the Minister followed the proper procedure. After receiving the petition he evaluated it in consultation with the Attorney General. Having been satisfied that there are sufficient grounds to constitute the Tribunal, he appointed the same in consultation with the Chief Justice.

He did all this within the statutory period of 21 days. As I have already stated, whether in fact there are sufficient grounds for this petition or not is a matter this

court cannot go into. That issue will be determined by the Tribunal investigating the allegations in the petition.

Apart from a critique of the petition by the Attorney General I do not see any binding advice or opinion which the Minister disobeyed to warrant any interference with his decision to constitute and appoint the Tribunal.

**Absence of a statutory instrument establishing the Tribunal.**

I have already summarized arguments by both sides on this point in my ruling.

I am of the view that it is good practice to issue a statutory instrument when appointing a tribunal of this nature giving them not only terms of reference but also rules of procedure. There is no evidence in this case that any statutory instrument was made and duly gazetted.

The question that arises is whether the tribunal in issue is a nullity ab initio as urged for the applicant because no statutory instrument was made, gazetted and published to be judicially noticed?

My view is that this Tribunal cannot be equated to a Commission of Inquiry under the Commissions of Inquiry's Act (Cap 166) where under Section 15 the Commission has to be published in the gazette.

The tribunal in this case is appointed under Section 12 (5) whose sole objective is to investigate the allegations contained in the petition. That is the scope of its operation and terms of reference. While, as I have said, it would be good practice to issue a statutory instrument to that effect, failure to do so cannot affect the

validity of the Tribunal which was duly constituted and appointed by the Minister in consultation with the Chief Justice, with a clear mandate to execute.

The direction to make regulations under Section 82 (1) of the Act for the better carrying into effect of the provisions of the Act is discretionary and does not apply in every operationalisation of the provisions of the Act.

In the instant case I am inclined to agree with the learned Principal State Attorney that given the time limit set out under section 12 (5) of the Act it would not be practical for the Minister to go through the formalities of establishing the Tribunal by issuing and publishing a statutory instrument.

After receipt of the petition the Minister has only 21 days within which to evaluate the petition in consultation with the Attorney General and then inform himself whether there are sufficient grounds for the petition. He has then to constitute the tribunal and appoint them in consultation with the Chief Justice.

It is clear to me that the hurry in appointing the tribunal complained about by the Applicant is actually dictated by the statute. The Minister had no option but to act in a hurry to beat the deadline.

I find that failure to issue a statutory instrument is a mere technicality which does not affect the validity of the Tribunal appointed under Section 12 (5) of the Act where such requirement is not expressly provided.

Related to the above argument is the contention that the Tribunal has no rules of procedure and that it appointed some three other people without any legal power to do so.



To avoid unnecessary repetition I will consider the above matters when resolving the fourth issue as agreed upon by Counsel. I will for now move to the 3<sup>rd</sup> issue.

**Whether the charges before the Tribunal are proper and sustainable**

Hon. Lubega Segona Counsel for the Applicant contended that the petition was not competent because it lacked Annextures as required by Section 12 (3) (b) of the Act. He referred this court to a letter written by the Attorney General to the Minister from presidency-Hon. Frank Tumwebaze, in which he drew the Minister's attention to the fact that the petition refers to a number of Annextures which were not attached to the same. He requested the Minister to send the annextures to enable him evaluate the petition. The letter dated 21/05/2013 is annexure "K" to the application.

Counsel went on to argue that even by 17/6/2013 after the Tribunal had been appointed the Annextures were still missing. That the Minister established the Tribunal on 5/6/2013 in absence of annexure accompanying the petition.

The other complaint against the petition is that the Minister and the Tribunal amended the charges to include one which was not raised by the petitioners in their petition. This was the charge of failure to convene two consecutive meeting of the Authority without reasonable cause.

On the latter complaint I am in agreement with Counsel that neither the Minister nor the tribunal can amend the petition by introducing a new charge in the petition. That would not be a ground for removal of the Applicant signed by not less than one third of all the members of the Authority submitted to the Minister within the meaning of Section 12 (3) of the Act.

The alleged amendment by including a new ground appears to have been prompted by the Attorney General's observation when evaluating the petition.

I am not persuaded by the arguments by Counsel for the Respondent that the challenge against the charges would be made to the Tribunal.

I find that this court in exercise of its supervisory powers is entitled to consider such an issue.

Although the proceedings of the tribunal are not before this court, since the allegation of the inclusion of a new charge or ground is not challenged this court will take a decision on the matter.

This court directs that any ground or charge which was not part of the petition submitted to the Minister must be struck out leaving the tribunal to investigate only the allegations made in the petition.

Needless to say that the inclusion of the new ground does not invalidate the whole petition.

On the issue of Annexures to the petition I wish to state that such documents are some of the pieces of evidence in support of the petition.

It is noteworthy that it was on 21/05/2013 when the Attorney General requested for the Annexures to enable him evaluate the petition.

It appears they were immediately availed to him because by 22/05/2013 he was in a position to make a thorough evaluation of the petition and communicate to the Minister by letter of the same date.

I also observe that by his letter of 17/06/2013 referred to by Counsel for the Applicant, Mr. Robert Kirunda Secretary to the Tribunal communicated to the Applicant that the required annextures were contained in the documents served upon his team. He pointed out that the tribunal had not had access to the replay of the WBS Television Morning Flavour Programme.

In his affidavit in reply of 25/06/2013 paragraph 13 he averred that on 18/06/2013 the Applicant's Lawyers were served with the WBS recording. This shows that the Applicant is in possession of the required Annextures.

There is nothing in the Act to the effect that all the evidence must be available at the time of submitting the Petition to the Minister.

Instead the Tribunal is mandated to investigate the allegations in the petition. There is no doubt that in the process the tribunal will receive more evidence in support of the grounds in the petition. It may also get evidence exonerating the Lord Mayor. That is the purpose of an investigation. What is important is that the Applicant is afforded ample opportunity to controvert all the evidence brought against him,

A thorough and fair investigation cannot be limited only to the Annextures accompanying the petition. There are no legal or logical reasons to fetter the tribunal's hands in conducting an investigation into the allegations contained in the petition.

Apart from the inclusion of a new ground which must be struck out I find that the rest of the charges are properly before the tribunal and capable of being investigated by it.

**Fourth issue is whether the proceedings in the Tribunal are regular**

The Applicant's complaint under this issue revolve around lack of statutory instruments, terms of reference, rules of procedure and the appointment of Robert Kirunda and 2 others.

I have already held that though desirable, failure to make regulations by way of statutory instrument did not affect the validity of the constitution and appointment of the Tribunal.

Section 12 (5) of the Act is sufficient for the procedure to establish the tribunal. It also provide for the clear mandate of the Tribunal which is to investigate the allegations contained in the Petition. This is the basic term of reference. The appointment of the Secretary, the lead Counsel and the co-Lead Counsel and other support staff is an administrative arrangement to enable the tribunal execute its mandate.

In my view, what is of significance is whether their roles help the Tribunal in having a fair and just process rather than whether they took any oath and if so which oath they took.

Contrary to Counsel for the Applicant's submission, there is nothing to show any of the three officers is part of the Tribunal as members thereof.

Where no rules of procedure are prescribed as in this case, the investigating body must adopt such a procedure that will enable it observe the principles of natural justice which are so fundamental in any decision making process. This was the view of this court in **Hon. Justice Anup singh Choudry v Attorney General H. C. Misc. Appli. No. 4 of 2012** which was brought to my attention by Counsel for the Applicant.

The reason for this is that the right to a fair hearing is entrenched in our constitution.

Article 44 (c) provides that notwithstanding anything in the constitution, there shall be no derogation from the enjoyment of the right to fair hearing.

Article 42 further provides that any person appearing before any administrative official or body has a right to be treated justly and fairly.

In short the right to fair hearing and fair treatment is so fundamental that it must be observed at all times in decision making process even if no procedure is prescribed.

The KCCA Act envisages the observance of the principles of natural justice. This is clearly brought out under subsection 7 of section 12 of the Act thus;

“(7) The Lord Mayor or Deputy Lord Mayor is entitled to appear at the proceedings of the tribunal and to be represented by a Lawyer or other expert or person of his or her choice.”

This means that in investigating the allegation the Tribunal acts as a quasi judicial body and must afford the Lord Mayor the right of a fair hearing.

The appearance of the Lord Mayor or his Lawyer at the proceedings of the tribunal is not cosmetic. He is entitled not only to present his side of the case but to also cross-examine any witness giving evidence contrary to his interest.

But it must be noted, however, this Tribunal is an investigative body and not an ordinary court to be bogged down with formal rules of procedure. Technicalities of procedures can be avoided without sacrificing the right to be heard.

It is the tribunal which is in charge of the proceedings and not the parties. It is for that reason entitled to control the hearing including cross-examination to avoid unnecessary delays.

According to the supplementary affidavit by Robert Kirunda of 26/06/2013 paragraph 18, he avers that the rules provide for cross-examination of witnesses.

In paragraph 23 he states that the Applicant has been given opportunity to apply for leave to cross-examine witnesses including recalling of any witnesses who have already testified.

On the other hand affidavits and affirmation filed by the Applicant paint a chaotic picture of the proceedings of 20/06/2013 where his Advocates stormed out of the Tribunal and he was also not able to proceed owing to the manner he was brought to the tribunal by police.

It appears since then the Applicant has not appeared at the proceedings of the Tribunal either in person or through his lawyers.

That being the case the Applicant is entitled if he so requests, to be availed the evidence of all witnesses who have so far testified in his absence for his study and decision whether to have them recalled for cross-examination.

According to annexure “F” to Robert Kirunda’s said supplementary affidavit in reply, I note that the Applicant has been served with witness statement and Annexures being documents which were tendered at the tribunal proceedings on 20/06/2013.

Similar process can be undertaken for the rest of the tribunal proceedings since 20/06/2013 to enable the applicant prepare his defence and even cross-examine any witnesses he finds necessary to do so. The Applicant is entitled to have any witness who testified in his absence to be recalled for cross-examination.

But at all times the Tribunal must remain in control of the proceedings to avoid an abuse of the process calculated to delay or derail its work, bearing in mind always that the Applicant gets a fair hearing and fair treatment.

### **Remedies available**

The Applicant sought orders for prohibition, certiorari and injunction.

From what I have tried to discuss above I do not find any reason for an order prohibiting the Respondent from proceeding and or from continuing with investigations of the Petition for the removal of the Applicant from the Office of the Lord Mayor.

He sought an order of certiorari quashing the decision of the Tribunal to adopt rules of procedure that are not provided by the law and which are unjust.

I have already found in effect that in absence of any statutory instrument this tribunal has no prescribed rules of procedure. In that case it must simply observe the principles of nature furtive to ensure that the Applicant is afforded a fair hearing and is fairly treated; bearing in mind that this is not an ordinary court process.

Another major order sought is a declaration that the proceedings for the investigation of the petition against the Lord Mayor are a nullity.

From my Ruling it is clear that there is no foundation for such an order.

I will however declare that the additional ground which was not in the petition that was submitted to the Minister is not sustainable and is hereby struck out. An investigation on it is not tenable.

The other orders sought are hinged on the main ones and are equaled disallowed.

I must emphasize that if at the conclusion of its investigations the tribunal finds that there is a prima facie case for the removal of the Applicant, the Authority cannot proceed to pass a resolution for his removal unless it is fully constituted as provided for under Section 6 of the Act.

All in all the application is dismissed, but in the circumstances of this matter I will make no order as to costs.



**V.T Zehurikize**  
***JUDGE***

Ruling delivered this 12<sup>th</sup> day of July 2013.

.....  
***DEPUTY REGISTRAR***