

Approved for tabling <sup>BAT</sup> <sup>SNA</sup>  
18/10/16

PARLIAMENT OF KENYA



THE NATIONAL ASSEMBLY

ELEVENTH PARLIAMENT

FOURTH SESSION

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THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS

REPORT

ON THE APPROVAL FOR APPOINTMENT OF HON. JUSTICE DAVID KENANI  
MARAGA TO THE OFFICE OF CHIEF JUSTICE OF THE REPUBLIC OF KENYA

CLERK'S CHAMBERS,  
PARLIAMENT BUILDINGS,  
NAIROBI

OCTOBER, 2016

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## ABBREVIATIONS AND ACRONYMS

CID	Criminal Investigations Department
HELB	Higher Education Loans Board
EACC	Ethics and Anti-Corruption Commission
Hon	Honourable
H.E	His Excellency
KRA	Kenya Revenue Authority
MP	Member of Parliament
LSK	Law Society of Kenya
JEC	Judiciary Elections Committee
HC	High Court
CA	Court of Appeal
CMC	Chief Magistrates Court
CJ	Chief Justice
JWCEP	Judiciary Working Committee on Elections
JMVB	Judges and Magistrates Vetting Board
CLE	Continuous Legal Education
JSC	Judicial Service Commission

## **1.0 CHAIR'S FOREWORD**

On 4<sup>th</sup> October, 2016 pursuant to Standing Order 42 (1), the Speaker communicated to the House a message from His Excellency the President Hon. Uhuru Kenyatta regarding the appointment of Justice David Kenani Maraga as Chief Justice of the Republic of Kenya.

The Message dated 29<sup>th</sup> September, 2016 was addressed to the Speaker of the National Assembly as per Article 166 (1) (a) of the Constitution of Kenya 2010. The Message also included a copy of a letter to H.E the President conveying the decision by the Judicial Service Commission to pick Hon. Justice David Kenani Maraga for consideration for appointment as Chief Justice.

The above Constitutional provisions require that in making appointments to the Office of Chief Justice, the President shall seek the approval of the National Assembly. The Speaker of the National Assembly referred the Message together with the nominee's curriculum vitae to the Departmental Committee on Justice and Legal Affairs for consideration pursuant to provisions of Standing Order 42 (3) (c)

The Committee's Report contains observations, findings and recommendation by the majority of the Committee's members that the nominee is suitable and qualified for appointment as Chief Justice of the Republic of Kenya.

The Committee conducted the vetting process for approval of the nominee with reference to the Constitution of Kenya 2010, the Public Appointments (Parliamentary Approvals) Act, 2011 and the Judicial Service Act, 2011, the Leadership and Integrity Act, 2012 and other relevant provisions of the law.

On behalf of the committee, I wish to thank the Offices of the Speaker and the Clerk of the National Assembly for the support extended to it in the execution of its mandate. Furthermore, the committee appreciates the input by members of the public made through submissions.

Finally, pursuant to Standing Order 216(5) (f), it is my pleasure and duty to present to the House, the Report on the approval for appointment of Hon. Justice David Kenani Maraga as Chief Justice of the Republic of Kenya.

**Hon. Samuel Chepkong'a, M.P**

## 2.0 MANDATE OF THE COMMITTEE

The Departmental Committee on Justice and Legal Affairs derives its mandate from provisions of Standing order 216(5) which defines functions of the Committee as being:

- a) To investigate, inquire into, and report on all matters relating to the mandate, management, activities, administration, operations and estimates of the assigned ministries and departments;
- b) To study the programme and policy objectives of ministries and departments and the effectiveness of their implementation;
- c) To study and review all legislation referred to it;
- d) To study, assess and analyze the relative success of the ministries and departments measured by the results obtained as compared with their stated objectives;
- e) To investigate and inquire into all matters relating to the assigned ministries and departments as may be deemed necessary, and as may be referred to it by the House or a minister;
- f) To vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those understanding order 204 (Committee on appointments); and
- g) To make reports and recommendations to the House as often as possible, including recommendations of proposed legislation.

In accordance with Second Schedule of the Standing Orders, the Committee is mandated to consider:-

- a) Constitutional Affairs
- b) The administration of law and justice
- c) The Judiciary
- d) Public prosecutions
- e) Elections
- f) Ethics ,Integrity and anti-corruption and
- g) Human rights.

The Committee oversees the following Ministries/Departments:

- a) State Law Office
- b) The Judiciary
- c) Ethics and Anti-Corruption Commission
- d) Independent Electoral and Boundaries Commission
- e) Commission on Administrative Justice

The Committee also has oversight mandate over all matters relating to political parties.

### **3.0 MEMBERS OF THE COMMITTEE**

<b>Chairperson</b>	Hon. Samuel Chepkong'a, M.P.
<b>Vice Chairperson</b>	Hon. Priscilla Nyokabi, M.P.
<b>Members</b>	Hon. Njoroge Baiya, M.P.
	Hon. Muriithi Waiganjo, M.P.
	Hon. Ndirangu Waihenya, M.P.
	Hon. Florence Kajuju, M.P.
	Hon. Kang'ata Irungu, M.P.
	Hon. Benson Mutura, M.P.
	Hon. John Njoroge Chege, M.P.
	Hon. William Cheptumo, M.P.
	Hon. Mohamed Abdi Haji, M.P.
	Hon. Bitok Kirwa, M.P.
	Hon. Sammy Koech, M.P.
	Hon. Moses Cheboi, M.P.
	Hon. Paul Bii, M.P.
	Hon. Charles Gimose, M.P.
	Hon. Johana Ng'eno, M.P.
	Hon. Boniface Otsiula, M.P.
	Hon. David Ouma Ochieng, M.P.
	Hon. Neto Agostinho, M.P.
	Hon. Kaluma Peter, M.P.
	Hon. Fatuma Ibrahim Ali, M.P.
	Hon. Ben Momanyi Orori, M.P.
	Hon. T. J. Kajwang', M.P.
	Hon. (Bishop)Mutua Mutemi, M.P.
	Hon. Olago Aluoch, M.P.
	Hon. Christine Oduor Ombaka, M.P.
	Hon. Benjamin Andayi, M.P.
	Hon. Mwamkale William Kamoti, M.P.

#### 4.0 COMMITTEE SECRETARIAT

First Clerk Assistant  
Principal Legal Counsel  
Second Clerk Assistant  
Legal Counsel  
Research Officer

Mr. Abenayo Wasike  
Mr. Dennis Abisai  
Mr. Ahmed Salim  
Ms. Mugure Gituto  
Ms. Clare Jerotich

## 5.0 BACKGROUND

### 5.1 Establishment of the Departmental Committee on Justice and Legal Affairs

The Departmental Committee on Justice and Legal Affairs is one of the Departmental Committees established under National Assembly Standing Order No.216 (1).The Committee has mandate to vet and report on all appointments where the Constitution or any law requires the National Assembly to approve, except those under Standing Order 204 (Committee on Appointments)

The committee is mandated to consider for approval by the National Assembly, appointments of the Chief Justice and Deputy Chief Justice under Article 166(1) (a) of the Constitution. The said Article requires H.E the President to nominate and with the approval of the National Assembly, appoint the Chief Justice and the Deputy Chief Justice in accordance with the recommendations of the Judicial Service Commission.

The vetting process is guided by the Public Appointments (Parliamentary Approval) Act; 2011.Section 7 of the Act provides that-

***The issues for consideration by the relevant by the relevant House of Parliament in relation to any nomination shall be;***

- a. the procedure used to arrive at the nominee;***
- b. any constitutional or statutory requirements relating to the office in question; and***
- c. the suitability of the nominee for the appointment proposed having regard to whether the nominee's abilities, experience and qualities meet the needs of the body to which nomination is being made.***

The vetting process is guided by the Public Appointments (Parliamentary Approval) Act, 2011.

Section 10 of the Act further provides that;

***“Where the nomination of a candidate is rejected by Parliament, the appointing authority may submit to the relevant House the name of another candidate, and the procedure for approval specified in this Act shall apply accordingly”.***

The office of Chief Justice is established under Article 161 (2) (a) of the Constitution of Kenya, 2010.The Article provides that;

*“There is established the office of Chief Justice, who shall be the Head of the Judiciary and....”*

The Supreme Court is established pursuant to Article 163 (1) of the Constitution and the Chief Justice shall be the president of the court under Article 163 (1) (a).

## **5.2 Appointment process of the Chief justice nominee**

- a. The Position of Chief Justice fell vacant after the then serving Chief Justice/President of the Supreme Court Hon. Justice Dr. Willy M. Mutunga, D.Jur, E.G.H, S.E.GH retired on 16<sup>th</sup> June, 2016.
- b. The position of Chief Justice of the Republic of Kenya was declared vacant by the Judicial Service Commission (JSC) pursuant to section 3 (1), part 11, First Schedule of the Judicial Service Act, No.1 of 2011.
- c. Thereafter, on 17<sup>th</sup> June, 2016 the Judicial Service Commission advertised the vacant position of Chief Justice of the Republic of Kenya in accordance with the provisions of Section 3, Part 11, First Schedule of the Judicial Service Act, and No.1 of 2011.
- d. The deadline set out in the advertisement for submission of applications was 7<sup>th</sup> July, 2016 at 5.00 p.m. However, pursuant to Gazette Notice No.4954 of 1<sup>st</sup> July, 2016 a Public Holiday (Idd – Ul – Fitr) was declared on 7<sup>th</sup> July 2016 and accordingly the deadline was extended by one day to 8<sup>th</sup> July, 2016.
- e. The Judicial Service Commission received a total of thirteen (13) applications for the advertised position of Chief Justice.
- f. Pursuant to Part 111, First Schedule of the Judicial Service Act, 2011 the Judicial Service Commission in its meeting of 12<sup>th</sup> July, 2016 reviewed all the applications for completeness and compliance with Constitutional and statutory requirements and shortlisted six (6) candidates.
- g. The Judicial Service Commission held a meeting on 14<sup>th</sup> July, 2016 and scheduled the six (6) candidates for interview on Monday 29<sup>th</sup> August, 2016 at 9.00 a.m to Saturday 3<sup>rd</sup> September, 2016 at 9.00 a.m.
- h. The names of the applicants and shortlisted candidates for the position of Chief Justice were published in the print media and the Kenya Gazette pursuant to the provisions of Section 9, Part 111, First Schedule of the Judicial Service Act, No.1 of 2011. The shortlisted candidates were accordingly notified of the dates of interviews.

- i. The criteria used to evaluate qualifications of individual applicants are provided under Part V, First Schedule of the Judicial Service Act, No.1 of 2011.
- j. On the 29<sup>th</sup> August, 2016 the High Court in Constitutional Petition No.314 of 2016, ordered that the Judicial Service Commission re-consider all applicants who had not been shortlisted for the position of Chief Justice.
- k. Following the above Court order as served on the Commission on 29<sup>th</sup> August, 2016, the Commission at its meeting held on the same day reviewed the applications of applicants who had not been shortlisted and resolved that they all be invited for interview.
- l. The interview schedule was revised to include all the applicants as ordered by the Court.
- m. The Candidates were accordingly notified and the revised interview schedule published in the print media and the Kenya Gazette.
- n. Mr. David Mwaure Waihiga wrote to the Commission withdrawing his candidature.
- o. The number of candidates who appeared for the interview was twelve (12).
- p. The interviews were conducted between 29<sup>th</sup> August and 15<sup>th</sup> September, 2016 at the Supreme Court Library.
- q. The Commission exercised due diligence and contacted the following vetting bodies for confidential reports on the candidates; Kenya Revenue Authority, Higher Education Loans Board, Law Society of Kenya, Directorate of Criminal Investigation, Advocates Complaints Commission, Ethics and Anti-Corruption Commission and the National Intelligence Service. Members of the Public were also invited to submit any information of interest on any of the candidates. Several complaints /information were received from the members of the public. They were admitted, processed and forwarded to respective candidates for response. The particular candidates responded and the responses were considered in evaluating and nominating the best candidate for the position.
- r. At the conclusion of the exercise and pursuant to Article 166 (1)(a) and Article 172 (1) (a) of the Constitution of Kenya as read with Section 14, Part V, First Schedule of the Judicial Service Act, and No.1 of 2011, the Judicial Service Commission recommended Hon. Mr. Justice David Kenani Maraga for appointment as Chief Justice of the Republic of Kenya.
- s. A letter from the Chief of Staff and Head of Public Service dated 29<sup>th</sup> September, 2016 to the Speaker of the National Assembly indicated that the Judicial Service Commission had recommended to His Excellency the President the nomination of Hon. **Justice David Kenani Maraga** for appointment as the Chief Justice of the Republic of Kenya.

- t. On October 5, 2016, the Hon. Speaker in a communication to the House referred the name of the nominee to the Departmental Committee on Justice and Legal Affairs for approval hearing and prepare a report for tabling in the House within the stipulated time.

### 5.3 Notification to the Public

Section 6(9) of the Public Appointments (Parliamentary Approval) Act (No.33 of 2011) provides that “*any person may, prior to the approval hearing and by a written statement on oath, provide the Clerk with evidence contesting the suitability of a candidate to hold the office to which the candidate has been nominated*”.

The Clerk of the National Assembly placed an advertisement in the print media inviting the public to submit memoranda by way of written statements on oath (**sworn affidavits**) on the suitability or otherwise of the nominee in conformity with section 6(9) of the Public Appointments (Parliamentary Approval) Act 2011. The submissions were to be received latest by Wednesday 12<sup>th</sup> October, 2016.

Pursuant to provisions of Article 118 of the Constitution, section 6(4) of the Public Appointments (Parliamentary Approval) Act (No.33 of 2011) and Standing Order 45(3), the general public was also notified in the print media by the Clerk of the National Assembly of the intention of the Departmental Committee on Justice and Legal Affairs to conduct the vetting and approval hearing of the nominee on Thursday 13<sup>th</sup> October, 2016.

### 5.4 Submission of Memoranda

Section 7 of the Public Appointments (Parliamentary Approval) Act, 2011 provides that the issues for consideration by the relevant House in relation to any nomination shall be:-

- (a) the procedure used to arrive at the nominee;
- (b) any constitutional or statutory requirements relating to the office in question; and
- (c) the suitability of the nominee for appointment proposed having regard to whether the nominee’s abilities, experience and qualities meet the needs of the body to which nomination is being made.

Pursuant to Section 6(9) of the Public Appointments (Parliamentary Approval) Act, 2011, the Committee, through the Clerk of the National Assembly, invited submissions from the public on the suitability or otherwise of the nominee for appointment to the positions of Cabinet Secretary.

Further, section 6(10) of the Public Appointments (Parliamentary Approval) Act, 2011 provides that a candidate may at any time, by notice in writing addressed to the Clerk withdraw from the approval process and his nomination shall thereupon lapse.

The Departmental Committee on Justice and Legal Affairs held a sitting for vetting and approval hearing of the nominee on Thursday 13<sup>th</sup> October 2016 and was informed that-

- 1) by the deadline date of 12<sup>th</sup> October 2016, the Clerk of the National Assembly had only received objections from;
  - a. Mr. Benard Kibet Sang Advocate and Mr. Tom Cheruiyot Biegon resident of Ainamoi Constituency.
  - b. Edward Kings Onyancha Maina
  - c. Samson Ndenderu Kigamba Maina
- 2) the nominee had not notified the Clerk of the National Assembly of withdrawal from the approval process as outlined under Section 6(10) of the Public Appointments (Parliamentary Approvals) Act .

In view of the foregoing and in accordance with the provisions of the Constitution, the Public Appointments (Parliamentary Approvals) Act and the Standing Orders of the National Assembly, the Departmental Committee on Justice and Legal Affairs resolved to proceed to undertake the approval hearing as required and scheduled.

### **5.5 Petitions**

#### **A. Petition by Mr. Samson Ndenderu Kigamba Esq .**

The petitioner was the plaintiff in a matter in Nakuru CMCC 1/1986 while the Chief Justice nominee was the defendant's Counsel. The petitioner averred that Hon. Justice Maraga;

- a. Was at all material time the master mind of the delay of the suit.
- b. deceitfully and fraudulently informed the trial court that the plaintiff was never entitled to fruits contained in a sale agreement between the petitioner and the Defendant
- c. Advised the defendant not to obey and execute a court order being that the defendant deposits in court a Lister Engine Perkins Number 321554 Type P6. An appeal (Civil Appeal No. 49 of 1995) in respect of this case filed in the High Court of Kenya at Nakuru directed the parties to seek directions before the Resident Magistrate's on the order to deposit the Lister Perkins Engine.
- d. Conspired to have the three court files in this matter disappear.
- e. Colluded with the Law Society of Kenya and the Advocates Complaints Commission derail or defuse complaints leveled against him.

#### **B. Petition by the residents of Ainamoi Constituency, Kericho County**

The residents of Ainamoi Constituency registered reservations about the handling of *Criminal Case No. 11 of 2008 R vs Andrew Mueche Omwenga* being a case involving the murder of David Kimutai Too and Eunice Chepkwony. In this case Hon. Justice Maraga, the presiding Judge reduced the charges against the accused from murder to manslaughter and sentenced the accused person to a perceived lenient sentence of ten years.

The petitioner prays that the National Assembly should not approve the nomination of Hon. Justice David Maraga to be the next Chief Justice of the Republic of Kenya; that the nominated Chief Justice apologizes to the family of the deceased persons and that if the nomination is

approved the nominated Chief Justice fast tracks the appeal filed against his judgment in *Criminal Case No. 11 of 2008* and all pending cases in the interest of justice.

### **C. The Petition by Mr. Edward Kings Onyancha Maina**

The petitioner's objection is based on a ruling delivered by the Chief Justice nominee in Kisumu on 29<sup>th</sup> July, 2016, a ruling which the petitioner asserts has created backlog. The petitioner also points out that during the interview of Hon. Justice Maraga he assertively declared that he shall not work on Saturday's because of his faith. He opposes the appointment of Justice Mr. David Kenani Maraga.

### **D. The Petition by Bernard Kibet Sand Advocate and Tom Cheruiyot Biegon**

Bernard Sang is the Advocate retained by the family of Hon. David Too while Tom Biegon is a resident of Ainamoi constituency. They averred that the Chief Justice Nominee Hon. David Maraga lacks the requisite legal judgment to hold the high position of Chief Justice of the Republic of Kenya as a result of the decision he made in *R vs Andrew Mueche Omwenga (2009) eKLR*. They averred *inter alia* that-

- a. The Learned Judge failed to exercise legal judgment by erroneously reducing the charge of murder to manslaughter.
- b. The Learned Judge believed the testimony of the accused that PC Eunice and the accused had a love relationship in Kiganjo College despite the fact that there was no evidence.
- c. The Learned Judge disregarded the testimony of two witnesses who went to the scene but chose to rely on hearsay to conclude that guns were recovered at the scene.

In the circumstances the petitioners averred that the Learned Judge did not dispense justice and that the approval of his nomination is an affront on justice to the families of the deceased persons.

### **5.6 Clearance Requirements**

On 5<sup>th</sup> October, 2016 the Clerk of the National Assembly wrote to the Ethics and Anti-Corruption Commission, Kenya Revenue Authority (KRA) and the Higher Education Loans Board (HELB) requesting for reports with respect to the nominee on-

- matters touching on integrity;
- tax compliance; and
- loan repayments.

In response, HELB confirmed vide a letter Ref. HELB/RD/56593/POV/17 dated 10<sup>th</sup> October, 2016 that the nominee having been a beneficiary of the HELB Loans Scheme was cleared by the board in July 2011. Kenya Revenue Authority confirmed vide a letter RE. CDTD/HO/81 dated

10<sup>th</sup> October, 2016 that the nominee was tax compliant. The Ethics and Anti-Corruption Commission vide a letter Ref. EACC.7/10/5 VOL.III (37) dated 7<sup>th</sup> October, 2016 confirmed having no outstanding issues or ongoing investigations against the nominee. The Criminal Investigations Department (CID) confirmed vide a letter referenced CD/CRO/SEC/6/7/2/A/VOL.III/117 dated 10<sup>th</sup> October, 2016 that the nominee was cleared vide Police Clearance Certificate Serial No.538481/16.

## 6.0 APPROVAL HEARING OF HON.JUSTICE DAVID KENANI MARAGA – CHIEF JUSTICE NOMINEE OF THE REPUBLIC OF KENYA

In conducting the approval process, the Departmental Committee on Justice and Legal Affairs examined the nominee against the following criteria, amongst others, in accordance with the Public Appointments (Parliament Approval) Act No.33 of 2011.

- (i) Academic qualifications
- (ii) Employment record
- (iii) Professional affiliations
- (iv) Potential conflict of interest
- (v) Knowledge of the relevant subject
- (vi) Overall suitability for the position
- (vii) Tax compliance
- (viii) Integrity and morality
- (ix) Jurisprudence
- (x) Vision, leadership and judicial reforms
- (xi) Access to justice
- (xii) Expectations and key priorities

Hon. Justice David Kenani Maraga appeared before the Committee on Thursday 13<sup>th</sup> October, 2016 and was informed by the Chairperson that, pursuant to Section 6(9) of the Public Appointments (Parliamentary Approvals) Act, 2011, the Committee had invited submissions from the public on his suitability or otherwise for appointment to the position of Chief Justice of the Republic of Kenya and by the deadline date of 12<sup>th</sup> October 2016, the Clerk of the National Assembly had received objections from;

Mr. Benard Kibet Sang Advocate and Mr. Tom Cheruiyot Biegon resident of Ainamoi Constituency, Edward Kings Onyancha Maina and Samson Ndenderu Kigamba Maina. The Committee also received information from Mr. Felix Odhiambo of EISA in support of the nominee and Professional reference from Prof. Patricia Kameri-Mbote, Dean of the School of Law, the University of Nairobi.

The Chairperson informed the nominee that in view of the foregoing and in accordance with the provisions of the Constitution, the Public Appointments (Parliamentary Approvals) Act and the Standing Orders of the National Assembly, the Committee had resolved to proceed to undertake the approval hearing as required.

### **On self-Introduction, the nominee stated that–**

He was born on 12<sup>th</sup> January, 1951 in Nyamira County, Went to Maranda High School, Started practice as an advocate in 1978, practiced in Nakuru for 25 years until his appointment as a

Judge of the High Court in 2003. He holds a masters degree in Law (LL.M) from the University of Nairobi

The nominee also stated that he was appointed Judge of the Court of Appeal in 2011, served in 2012 in the Judiciary Working Committee on election preparations- as vice chairman under Hon. Justice Mohammed Ibrahim. The Committee was set to oversee election petitions within the stipulated timelines of six months. They proposed amendments to devolve petitions to Magistrates Courts to ensure that they are heard on time. He further stated that he has served in the Judiciary for 13 years.

The nominee responded to questions from members of the Committee as follows:-

**Vision and leadership of the Judiciary for the 21st century;**

**He stated that;**

- a. His vision arises from his 25 years' experience as an Advocate of the High Court in private practice and sitting as a judge for 13 years.
- b. His main vision is to eliminate backlog of cases in the Courts which drag on for years and affect the investments, businesses and the economy of the Country.
- c. He has a vision to get judicial officers and entire judiciary staff to work together as a team to serve litigants before them and understand that they are there to serve citizens as - no leader can succeed if he doesn't carry staff along with him.
- d. He will strive to digitize records and automate the proceedings of the court.

**Corruption in the judiciary**

- a. Corruption is both real and perceived and has permeated into all the sectors in Kenya and the judiciary is not an exception.
- b. Corruption in the judiciary is both real and perceived because those who lose cases have a perception that Judges must have been paid to decide adversely against them.
- c. The JSC relies on the office of the Judiciary ombudsman to receive complaints from the public. It is currently headed by a chief magistrates-. The nominee proposes that the office of Judiciary Ombudsman should be upgraded and be led by a retired or serving judge with its own secretariat

**Periodic vetting of judges and magistrates**

He doesn't agree with the proposal since it would create fear among judicial officers and that we do not need to have vetting on a regular basis when the JSC can do the same task.

### **Judiciary injuncting the actions /proceedings of Parliament**

- a. There have been conflicts between the arms of government for example the judiciary restrains Parliament or where judicial orders injuncts the executive on matters of public interest.
- b. All organs of the government are accountable to the people and conflicts cannot arise if all arms of government have respect for each other and have dialogue to address conflicts.
- c. Having consultations on a regular basis in closed door meetings to discuss areas of conflict should be explored by all parties involved.
- d. There are two distinct matters, the court have no jurisdiction to stop Parliament to exercise its Legislative role , but when dealing with disciplinary issues, Parliament sits as a quasi-judicial body and process requires a fair hearing. The cases before the judiciary are often where the petitioner feels that he was not given sufficient hearing by the respondent.

### **Rights of persons accused of committing serious crimes such as terrorism**

- a. In criminal cases there are several factors that the court must take into consideration before releasing suspects on bail with regard to criminal procedure.
- b. The courts are not involved with people who are in police custody and reserved his comments on extra-judicial killings.
- c. People must adhere to the law and Courts will always ensure that the due process of law is enforced as constitutionally mandated.

### **Extreme religious views and the rights of women**

- a. He is a Christian living in Kenya and working in the judiciary and respects other people's rights as guaranteed in the constitution under the bill of rights.
- b. His duty is to ensure that all people from all religions have their rights protected under the constitution but as long as they do not interfere with the rights of other people

### **Lack of landmark decisions by the Supreme Court on controversial public issues such as gay relationships and abortion**

The courts are where the tyre meets the road. The Acts passed by parliament cannot deal with every possible situation. When the court is faced with situations where there are no express

provisions, within the framework of that provision, the courts can come up with principles which can be applied. Where the courts have gone too far, this has been overruled by Parliament.

### **Elimination of death penalty**

The nominee Judiciary cannot legislate nor abolish death penalty. It is a fundamental issue that should be dealt with by Parliament.

**On American jurisprudence** with regard to the realism school of thought where the law is not clear until it is pronounced by the Supreme Court; he said that he subscribes to the sociological school of thought that the law should be interpreted and applied within the social context and he does not agree with the American school of thought

### **Physical access to justice**

The immediate former Chief Justice did a commendable job of creating the required infrastructure. Currently Judiciary has 34 High courts in 34 Counties and will work towards achieving the remaining 13 High Court stations in the 13 remaining Counties. This is in line with the principles of devolution in so far as access to justice is concerned.

### **Decisions of the Supreme Court on election cases**

The Supreme Court is not bound by its decisions and can depart from it but the Court of Appeal and High Court are bound by its decisions.

### **Digitization of the judiciary**

This will be a flagship project and he will request Parliament to allocate funds to realize transformation in the judiciary.

### **Expeditious disposal of land cases to address backlog**

Land matters are critical issues in all courts across the country and the Judicial Service Commission has conducted interviews and approved the appointment of 20 Land and Environment Court Judges.

The Judiciary had devolved jurisdiction of land cases to Magistrates courts but there is a decision challenging the same.

### **Alternative Dispute Resolution in criminal cases and the role of Elders in judicial matters,**

The judiciary always allows reconciliation in misdemeanors but not felonies and that elders are also used to help parties reconcile as demonstrated by a flag ship project in Kericho.

## **Relationship of the judiciary with other arms of government,**

He will encourage consultations with other arms of government and minimize conflicts that may arise for want of consultations. The Courts have no jurisdiction to restrain Parliament from legislating.

## **Objection of his nomination by Mr. Edward Kings Onyancha Maina,**

Mr. Kings filed an appeal out of time and the other party filed an application to strike it out. He Mr. Kings did not explain why he delayed to comply with the timelines stipulated in law and wanted the court to exclude weekends in the determination of time for filing the appeal. The law does not allow his argument and his appeal was struck out.

## **Objections by the residents of Ainamoi Constituency**

He appeared before the Judges and Magistrates Vetting Board chaired by Mr. Sharad Rao to respond to the same complain. He was asked to explain his decision in **R vs Andrew Mueche Omwenga** case and averments that he was not respectful to the family of the deceased persons, not sensitive to the members of the family, reduced the accusation against the accused from a capital offence of murder to manslaughter.

The family of the deceased Hon. David Too, in their view they believed that there was sufficient evidence to sustain a charge and sentence of murder. The Board sought his opinion in the manner in which he handled the matter and if he should have excused himself from the case.

The nominee stated that the matter is *Sub-Judice* since the state filed a notice of appeal which has not yet been decided.

The nominee was accused before the vetting board of tribalism because the accused was a Kisii, an allegation that was dismissed by the Board.

The nominee stated that is a professional requirement that if a family or friend comes to court, the judge should disqualify himself from the case. He did not personally know the accused person and cannot even identify him now and the only thing he has in common with accused is origin from the Kisii their ethnic group.

The nominee informed the Committee that he considered the evidence adduced at the trial and reached the view that the accused proved the defence of provocation and reduced the charges to manslaughter. Had he admitted the alternative defence of 'self defence' he would have acquitted the accused. His decision was based on evidence before the court and the law.

The nominee stated that he dismissed the defence of "*self defence*", stating that if indeed the accused person wanted to disarm the persons he shot, he should have then shot them elsewhere to immobilize the persons.

The nominee noted that he does not subscribe to extra-judicial killings and was dealing with a question of using reasonable force and that all the three people were armed with guns.

### **Kiambaa Church case,**

Hon. Justice Maraga was shocked from what he saw at the burnt church when he visited the scene during the trial. If one reads his judgment he will see how he agonized in that case regarding the persons who were burnt to death in the church. He stated that as a judge, he could not decide cases on emotions but on the evidence adduced. In this case there was no evidence for the court to find a conviction of the accused persons. He lamented the poor investigations by the police in this matter.

The nominee stated that the Judiciary is not the only player in the justice system and as chairman of the National Council on Administration of Justice; he will propose that members of Parliament be represented in the Council.

### **Composition of the Judicial Service Commission where advocates representing the LSK are actively involved in litigation,**

This is an issue which has been discussed at the JSC but the Chief Justice has no powers to make the decisions. There is need to discuss and find a way forward and if it requires amendments to the law then he will not hesitate to propose the relevant amendments.

### **Disciplinary matters by the JSC against Judges and Magistrates,**

There is need to be fair to everyone and the JSC cannot send a Judge home. A Judge can only be removed by a petition to the President to set up a tribunal.

The CJ takes serious all complaints to the Judicial Service Commission but not all matters to the JSC are referred to the President. Matters that are administrative in nature are handled by the Chief Justice.

He will strengthen the office of the Judiciary Ombudsman by proposing inclusion of investigators.

He informed members that the Judiciary needs support from Parliament when it seeks funds to implement its programmes. The Judiciary Training Institute will have a broadened curriculum to address emerging issues including parliamentary affairs by inviting speakers from Parliament.

## 7.0 COMMITTEE'S OBSERVATIONS AND FINDINGS

### 7.1 Observations

The Committee having considered the curriculum vitae of Hon. Justice David Kenani Maraga and having heard his submissions during the vetting made the following observations on his nomination;

- That Hon. Justice David Kenani Magara was born on 12<sup>th</sup> January, 1951
- He holds a Master of Laws Degree (LLM) from the University of Nairobi; a Bachelor of Laws Degree (LLB) from the same University, and a Diploma in Legal Practice from the Kenya School of Law, he was admitted to the Roll of Advocates on the 16<sup>th</sup> of October 1978.
- He is a member of the Chartered Institute of Arbitrators, London and the Law Society of Kenya.
- The nominee has presented papers in numerous seminars, conducted trainings in law, and offered lectures at the University of Nairobi as a visiting lecturer. He also served as a member of the Constitutional Review Task Force of the Seventh Day Adventist Church, East Africa Union.
- He is a senior legal professional with extensive experience in the Bar and on the Bench, and with a nascent but growing interest in academia. He was admitted to the Roll of Advocates 38 years ago, and has served as judge of Kenya's two Superior Courts for about 13 years.
- He is currently, the Presiding Judge of the Court of Appeal at Kisumu and the Chairman of the Judiciary Committee on Elections.
- He has previously served the Judiciary as the Chairman of a Tribunal appointed by His Excellency the President of the Republic of Kenya to investigate the conduct of a Judge of the High Court of Kenya; the Presiding Judge of the Family Division of the High Court at Nairobi; and the Resident Judge, High Court of Kenya at Nakuru.
- Before being appointed a Judge of the High Court, he was a legal practitioner in private practice for twenty-five (25) years, engaged in civil and criminal litigation as well as conveyancing matters. During that period, he was also a judge at the Nakuru Agricultural Show Trade Stands from 1985 to 1990.
- His contribution led to boosting of the Agricultural Society's Show activities and as a reward, the Kenya Farmers Union sponsored him and others to attend the Royal Agricultural Show in the UK in 1989. He also served as the Chairman of the Rift Valley Law Society.

- The nominee has a strong track record both in the Judiciary and private practice, where he successfully served both as a professional and a leader. He is exposed to many different facets of law, varied working environments, people, and communities making him a well-rounded individual.
- Both in legal practice and on the Bench, the nominee has made a significant contribution to local and international jurisprudence as demonstrated in the Anguka, Julie Ward, Choge and Mohammed Harshi Cases, among others detailed herein below. About twenty five (25) of his judgments have been reported by the National Council for Law Reporting and many more are pending publication.
- He has demonstrated superior legal capability while defending landmark criminal cases such as the Choge Murder Case, which ran for two years up to the Court of Appeal; the Anguka Case (in relation to the Ouko Murder); and the Julie Ward Murder.
- The Committee observed that the nominee has a proven strategic judicial and organizational value-driven leadership and focus.
- As the Presiding Judge of the Court of Appeal, Kisumu. He serves 14 Counties with a total of 26 Judges of High Court, Environment and Land Court as well as Employment and Labour Relations Court. Between October 2014 and June 2016, which is the period under which served in that station, the Court disposed a total of 1,200 appeals and applications.
- The nominee is the Chair of the Bar-Bench Committee of the Kisumu Court of Appeal, as well as the Chair of the Court Users' Committee. Under his leadership, the relationship between the Bar and the Bench was tremendously enhanced with more advocates now taking pauper briefs.
- As the Resident Judge of the High Court at Nakuru, He was the Chairman of Court Users' Committee, which regularly met and resolved bottlenecks in regard to the expeditious disposal of cases.
- He was extensively involved in the welfare of prisoners as demonstrated by several visits to Nakuru Main Prison and Naivasha Maximum Prison to check on the welfare of prisoners and remandees. In 2010 he resolved a potentially explosive hunger strike that had been staged by prisoners and remandees in protest against the manner in which they were being handled by certain Magistrates and a Judge. Had the strike succeeded, it would have caused substantial damage to public confidence in the Judiciary. On a subsequent visit to that prison by the Court of Appeal Judges, the prisoners and remandees commended him and his actions to those visiting Justices.
- In the administration of justice, he realized the need for the training of Chiefs, Assistant Chiefs, and Village Elders as the first ports of call by victims of sexual offences and on the handling of evidence on sexual offences. He obtained World Bank funding, and got

over 100 Chiefs, Assistant Chiefs and Village Elders trained. The Judges and Magistrates Vetting Board commended him for that action and for taking steps to decongest prisons in his region.

- As Chairman of the Judiciary Committee on Elections (JCE), the predecessor of Judiciary Working Committee on Election Preparations and after disposal of the election petitions and appeals arising from the 2013 General Elections, pursuant to **Article 10** of the Constitution, the committee observed that he brought together all the Judges and Magistrates who had heard those petitions and appeals; all the government institutional stakeholders; representatives from the Law Society of Kenya; representatives from political parties in Kenya; as well as representatives from Civil Society Organizations and obtained their views on electoral law reform and issues which should be addressed for a seamless electoral dispute resolution after the 2017 General Elections.
- The Committee observed that in May 2012 to August 2015, he served as Vice-Chairman of the Judiciary Working Committee on Election Preparations (JWCEP). The JWCEP was set up by the Hon. Chief Justice and tasked to liaise with other stakeholders in the conduct of elections and to advise the Judiciary on how to efficiently and expeditiously deal with the numerous election-related disputes then anticipated to arise from the 2013 General Elections. He chaired over 50 Committee and Stakeholder Meetings; facilitated 5 training sessions that equipped the Judges and Magistrates with skills and knowledge for the expeditious and competent determination of election petitions and appeals. Under his leadership, the Judiciary successfully determined 192 election petitions (including the Presidential Petitions) and 84 appeals (a total of 276 matters) within the timeframes set out in the Constitution.
- The nominee is an accomplished trainer and facilitator, who has facilitated several capacity-building sessions at the Judiciary Training Institute; the Law Society of Kenya's Continuous Legal Education (CLE) workshops; as well as seminars and conferences at other institutions. He is also a visiting lecturer at the University of Nairobi.
- In Community service and pro bono, activities, he has been supporting Moi Children's Home since the 1980s and St. Barnados Children's Home, Nairobi since 1996. He has and continues to educate orphans and disadvantaged children, some of whom he has supported up to University level. He has helped build Churches at Mwereni in Kinango area of Kwale County; Yumbuni in Mutito Andei; Mutituni in Machakos County; Simerero in Siaya County and others in Nakuru, Nyamira and Kisii Counties. In private practice; I gladly handled several pro-bono briefs.

## 7.2 Findings


After conducting the approval hearings, the Committee made the following findings;

1. Hon. Justice David Kenani Maraga has the requisite qualifications and vast experience in the Judiciary which qualifies him for appointment to the position of Chief Justice of the Republic of Kenya.
2. Hon. Justice David Kenani Magara, according to the records and information availed to the Committee, has never been implicated in any issues that may lead to a conclusion of lack of integrity on his part.
3. The candidate exhibited impressive knowledge of topical issues including demonstrated understanding of administration and management principles required to address the challenges facing the Judiciary. The nominee exhibited a proper understanding of the doctrine of separation of powers which requires the three branches of government to exercise their powers in a manner that respects their respective constitutional territories while upholding the rule of law and the principle of checks and balances.
4. The Petition and objection to the appointment by Mr. Samson Ndenderu Kigamba lacked merit because the nominee obtained the stay orders on behalf of his client (the Defendant) and further that the nominee owed no duty of care to the petitioner who was the plaintiff in the matter.
5. The Petition and objection to the appointment by the residents of Ainamoi Constituency lacked merit because the nominee properly exercised his lawful judicial discretion to reduce the charge against the accused from murder to manslaughter.
6. The petition and objection to the appointment by Mr. Edward Kings Onyancha Maina lacks merit because Mr. Maina's appeal was properly dismissed for being filed out of time.

**8.0 RECOMMENDATION OF THE COMMITTEE**

THAT Pursuant to Article 166 (1) (a) of the Constitution of Kenya, the Public Appointments (Parliamentary Approval) Act, 2011 and Standing Order 216 (5) (f) of the National Assembly, the Committee recommends that;

**The House approves the nomination of Hon. Justice David Kenani Maraga for appointment by H.E the President as Chief Justice of the Republic of Kenya.**

Signed  .....

**Hon. Samuel Chepkong'a, M.P**

**(Chairperson)**

**DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS**

Dated this 17<sup>th</sup> Day of October, 2016

# MINUTES

**MINUTES OF THE SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE  
AND LEGAL AFFAIRS HELD ON THURSDAY, 13<sup>TH</sup> OCTOBER, 2016 AT 4.00 P.M.  
IN COMMITTEE ROOM 7, PARLIAMENT BUILDING**

**PRESENT**

Hon. Samuel Chepkonga, M.P. - Chairperson  
Hon. Priscilla Nyokabi, M.P. - Vice Chairperson  
Hon. Benson Mutura, M.P.  
Hon. Neto Agostinho, M.P.  
Hon. Ben Momanyi, M.P.  
Hon. Bitok Kirwa, M.P.  
Hon. Charles Gimose, M.P.  
Hon. Dr. Christine Ombaka, M.P.  
Hon. Fatuma Ibrahim, M.P.  
Hon. Florence Kajuju, M.P.  
Hon. John M. Waiganjo, M.P.  
Hon. Johana Ngeno, M.P.  
Hon. Mohamed Abdi Haji, M.P.  
Hon. Moses Cheboi, M.P.  
Hon. Ndirangu Waihenya, M.P.  
Hon. Paul K. Bii, M.P.  
Hon. Peter Kaluma, M.P.

**APOLOGY**

Hon. Olago Aluoch, M.P.  
Hon. Njoroge Baiya, M.P.  
Hon. Boniface Otsiula, M.P.

**ABSENT**

Hon. David Ochieng, M.P.  
Hon. Kang'ata Irungu, M.P.  
Hon. John Njoroge Chege, M.P.  
Hon. Kamoti Mwamkale William, M.P.  
Hon. (Bishop) Robert Mutemi, M.P.  
Hon. Sammy Koech, M.P.  
Hon. Tom J. Kajwang', M.P.  
Hon. William Cheptumo, M.P.

## **SECRETARIAT**

Mr. Abenayo Wasike	-	Clerk Assistant I
Mr. Ahmed Salim	-	Clerk Assistant III
Mr. Denis Abisai	-	Legal Counsel
Ms. Mugure Gituto	-	Legal Counsel II
Ms. Clare Jerotich	-	Researcher
Mr. Stephen Nyakuti	-	Audio Officer
Mr. John Mungai	-	Audio Officer
Mr. Moses Kariuki	-	Sergeant-at-arm

## **MIN No.JLA.CJ.APP.10 2016:-**      **PRELIMINARIES**

The Chairperson called the meeting to order at 4.10 p.m. with a word of prayer from Hon. Ben Momanyi, M.P. The Chairperson introduced the agenda of the meeting; confirmation of the minutes of the previous meeting and the consideration of the report on the vetting of the nominee to the position of the Chief Justice of Kenya, Justice David Kenani Maraga.

## **MIN No.JLA.CJ.APP.11/2016:-**      **CONFIRMATION OF THE MINUTES OF THE PREVIOUS MEETING**

The minutes were confirmed as follows;

Meting held on 13<sup>th</sup> October 2016 at 10.00 a.m. was proposed by Hon. Fatuma Ibrahim and seconded by Hon. Florence Kajuju, M.P

Meting held on 11<sup>th</sup> October 2016 at 10.00 a.m. was proposed by Hon. Moses Cheboi and seconded by Hon. Ben Momanyi, M.P

## **MIN No.JLA.CJ.APP.12/2016:-**      **ADOPTION OF THE REPORT ON THE VETTING OF JUSTICE DAVID KENANI MARAGA FOR APPOINTMENT TO THE POSITION OF THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA**

The Committee considered the report, word by word, and it was confirmed that the report represents the Committee's deliberations, views and findings. The report was unanimously adopted, with a recommendation that the House approves the nomination

of Hon. Justice David Kenani Maraga for appointment by H.E. the President as Chief Justice of the Republic of Kenya.

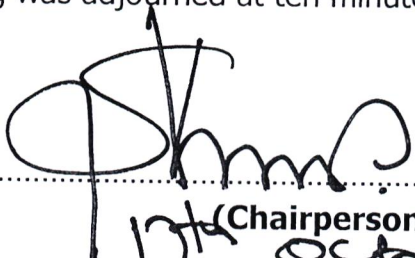
The adoption of the report was proposed by Hon. Ben Momanyi, M.P and seconded by Hon. Bitok Kirwa, M.P

**MIN No.JLA.CJ.APP.13 /2016:-**

**ADJOURNMENT**

The meeting was adjourned at ten minutes past five o'clock.

Signed.....



(Chairperson)

Date.....

17<sup>th</sup> October, 2016

**MINUTES OF THE SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON THURSDAY, 13<sup>TH</sup> OCTOBER, 2016 AT 10.00 A.M. IN MINI CHAMBER, COUNTY HALL, PARLIAMENT BUILDINGS**

**PRESENT**

- Hon. Samuel Chepkonga, M.P. - Chairperson
- Hon. Priscilla Nyokabi, M.P. - Vice Chairperson
- Hon. Benson Mutura, M.P.
- Hon. Neto Agostinho, M.P.
- Hon. Ben Momanyi, M.P.
- Hon. Bitok Kirwa, M.P.
- Hon. Charles Gimose, M.P.
- Hon. David Ochieng, M.P.
- Hon. Dr. Christine Ombaka, M.P.
- Hon. Fatuma Ibrahim, M.P.
- Hon. Florence Kajuju, M.P.
- Hon. Kang'ata Irungu, M.P.
- Hon. John M. Waiganjo, M.P.
- Hon. John Njoroge Chege, M.P.
- Hon. Johana Ngeno, M.P.
- Hon. Kamoti Mwamkale William, M.P.
- Hon. Mohamed Abdi Haji, M.P.
- Hon. Moses Cheboi, M.P.
- Hon. Ndirangu Waihenya, M.P.
- Hon. Paul K. Bii, M.P.
- Hon. Peter Kaluma, M.P.
- Hon. (Bishop) Robert Mutemi, M.P.
- Hon. Sammy Koech, M.P.
- Hon. Tom J. Kajwang', M.P.
- Hon. William Cheptumo, M.P.

**APOLOGY**

- Hon. Olago Aluoch, M.P.
- Hon. Njoroge Baiya, M.P.
- Hon. Boniface Otsiula, M.P.

**SECRETARIAT**

- Mr. Abenayo Wasike - Clerk Assistant I
- Mr. Ahmed Salim - Clerk Assistant III
- Mr. Denis Abisai - Legal Counsel

Ms. Mugure Gituto	-	Legal Counsel II
Ms. Clare Jerotich	-	Researcher
Mr. Stephen Nyakuti	-	Audio Officer
Mr. John Mungai	-	Audio Officer
Mr. Andrew Jumanne	-	Sergeant-at-arm
Mr. Moses Kariuki	-	Sergeant-at-arm
Mr. Stanley Lagat	-	Sergeant-at-arm

**MIN No.JLA/CJ.APP.07/2016**

**PRELIMINARIES**

The Chairperson called the meeting to order at 10.00 a.m. with a word of prayer from Hon. (Bishop) Mutua Mutemi, M.P. The Chairperson introduced the agenda of the meeting; the vetting of the nominee to the position of the Chief Justice of Kenya, Justice David Kenani Maraga. The Chairperson reminded Members that in line with the Committee's resolution during the previous meeting, the vetting will take around two hours, and that Members will confine themselves to questions relevant to the suitability or unsuitability of the nominee as per the vetting structure and questions filed for reference.

**MIN No.JLA./CJ.APP.08/2016:- APPROVAL HEARING OF JUSTICE DAVID KENANI MARAGA FOR THE POSITION OF THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA**

The Committee interacted with the nominee on a number of issues. Some of the issues raised and responded to include the following:

**On the vision of the nominee for the 21st century Judiciary:**

1. He stated that his vision arises from the experience in practice and as sitting as a judge. He informed the Committee that in practice he noted a lot of shortcomings. For example cases which drag on for years. He stated that a backlog of cases has an effect on the investment, business and the economy as a whole. Therefore his vision is to eliminate backlog.
2. He also stated that he is looking forward to ensure that judicial officers and the entire judiciary staff to work together as a team to serve litigants before them and understand that they are there to serve citizens-no leader can succeed if he doesn't carry staff with him.
3. Digitization of records and automation of the proceedings of the court is also one of the things he is looking forward to implement.

**On Corruption in the judiciary, he stated that**

1. It has permeated into all the sectors in Kenya and the judiciary is not an exception. He explained that corruption in the judiciary is both real and perceived because those who lose cases sometimes develop a negative notion against the integrity of the judges.
2. The JSC relies on the office of the ombudsman to receive complaints from the public and which is currently headed by a chief magistrate. He proposed that it should be led by a judge, retired or serving with its own secretariat and investigating officers.

**On the periodic vetting of judges and magistrates, he stated that;**

He does not agree with that idea as, in his opinion, it would create fear among judicial officers. He believes that we don't need to have vetting on a regular basis and that the JSC can do the job through strong internal mechanisms.

**On the Judiciary issuing injunction against Parliament and the Executive, he stated that;**

1. All organs of the government are accountable to the people.
2. All arms of government should respect each other and have dialogue to avoid conflicts.
3. The courts have no jurisdiction to stop Parliament from legislating
4. On disciplinary issues under article 165, Parliament sits in a quasi-judicial process which requires a fair hearing.

He stated that the cases before the judiciary are often where the petitioner feels that he has not being given a fair hearing.

**On the rights of accused persons for serious crimes such as terrorism and in light with protection of families, fair hearing and despite the fact that those found guilty should be accountable for their crimes, he stated that;**

In criminal cases there are several factors that the court must take into consideration with regard to criminal procedure. The courts are not involved with people who are brought before them by the police. However, on extra-judicial killings, if we don't adhere to the law there will be problems.

**On the extreme religious beliefs and the rights of women, he stated that;**

1. He asserted that he was a Christian living in Kenya and working in the judiciary.
2. He was not a fanatic and that he respects other peoples' rights.
3. Kenyans have a constitution with an elaborate bill of rights and his duty is to ensure that all people from all religions have their rights protected as provided for under the constitution but as long as they do not interfere with the rights of other people.

4. He is a liberal thinker.

**On death penalty he** stated that the court cannot legislate and the abolition of death penalty is not something that the judiciary can do, it is a fundamental issue that should be dealt with by Parliament.

**On the lack of landmark decisions on issues of public interest that should be done by the Supreme Court on issues such as homosexuality, abortion among other relationships, he stated that;**

1. The court is where the tire meets the road and Acts passed by Parliament cannot deal with every situation and that when the court is faced with a situation where there are no express provisions, within the framework of that provision in question, the courts can come up with principles which can be applied.
2. Where the courts have gone too far, this has been overruled by parliament through legislation.

**On American jurisprudence, with regard to the American system** where with the realism school of thought the law is not clear until it is pronounced by the court.

He declared that he subscribes to the sociological school of thought that is within the social context and does not agree with the American school of thinking on the same.

**On ADR in criminal cases; he stated;**

1. ADR may be allowed only in minor cases.
2. May recommend reconciliation in misdemeanors.
3. Felonies cannot be subjected to ADR or reconciliation.

**On his ruling in the Kiambaa Church case; he stated that;**

1. Even in the judgment he agonized on what had been done in that case, anyone with human feeling could feel the impact of what happened to the burnt church.
2. As a judge, he stated that he cannot decide cases on emotions and evidence placed before him could not find a conviction due to poor investigations.
3. The judiciary is not the only player in the justice system. As the chairperson of the National Council of Access to Justice, he will propose that MPs have a representative to the Council.

**On the issue of lawyers who are commissioners of JSC being allowed to practice before judges and magistrates appointed by them, he said that;**

This is an issue which has been discussed at the JSC but the Chief Justice has no powers to make the decisions. There is need to discuss and find a way forward and if it requires amendments to the law then he will not hesitate to propose the relevant amendments.

## **OBJECTIONS AGAINST THE NOMINEE**

### **On a petition by Samson Ndenderu Kigamba Esquire:**

- Where the petition alleges that as a result of the stay order by Mr. Maraga when Mr. Maraga was acting for the defendant, the complainant who was then the plaintiff lost his engine, the nominee reported that he was acting in under for and in the best interests of his client, and not the petitioner. Not only that, he stated that he has never been summoned by the disciplinary commission or the Law Society of Kenya on this issue as alleged by the petitioner.

### **On a petition by Edward Kings Onyancha Maina:**

- Where the petition alleges, among others, that Mr. Maraga caused backlog of cases, he stated that the complainant filed a notice of appeal application out of time. The other side applied to strike it out. The application was dismissed. The nominee therefore does not understand how that can cause a backlog.

### **On a petition by Residents of Ainamoi Constituency in Kericho County:**

The petitioner alleges that the judge was not respectful to the family of the deceased persons, and that he reduced the accusation against the accused from a capital nature to manslaughter. In their view, there was sufficient evidence to sustain a sentence of murder.

1. The nominee stated that the state filed a notice of appeal, and the appeal has not been decided. The matter is sub-Judice.
2. It is an unfortunate case and that before the Judges and Magistrates Vetting Board he was accused of tribalism because the accused was a Kisii like the judge himself. This was however dismissed by the vetting board.
3. The nominee further stated that the accused person was not known to him personally.
4. He was dealing with two defences; self-defence and provocation. Self-defense is an absolute defence. In dismissing the defence of self-defense, the judge reported that if the accused wanted to disarm the person, he should have shot them elsewhere to immobilize the person. That statement was not because the judge was insensitive, but he was in the consideration of the facts.

5. He reported that he does not at all subscribe to extra-judicial killings and that he deal with cases on the evidence and the law. That was the case when he admitted the second defence of provocation which led to the charge of manslaughter.

**MIN No.JLA. CJ.APP.09/2016:- COMMITTEE'S OBSERVATIONS AND FINDINGS**

The Committee having conducted the approval hearing, made the following observations and Findings;

1. That Hon. Justice David Kenani Maraga had the requisite qualifications and vast experience in the Judiciary.
2. That, according to the records availed to the Public Service Commission and the Committee, Justice David Maraga is not involved in any issues that may lead to his lacking integrity.
3. That the candidate exhibited impressive knowledge of topical issues including those touching on administration, management and challenges that he will need to address to implement the Judiciary transformation framework.
4. That the nominee, according to the best of the knowledge of the Committee, has not been convicted of any offence with regard to contravention of Article 75 of the Constitution.
5. Hon. Justice David Kenani Maraga has the requisite qualifications and vast experience in the Judiciary which qualifies him for appointment to the position of Chief Justice of the Republic of Kenya.
6. The Petition and objection to the appointment by Mr. Samson Ndenderu Kigamba lacked merit because the nominee obtained the stay orders on behalf of his client (the Defendant) and further that the nominee owed no duty of care to the petitioner who was the plaintiff in the matter.
7. The Petition and objection to the appointment by the residents of Ainamoi Constituency lacked merit because the nominee properly exercised his lawful judicial discretion to reduce the charge against the accused from murder to manslaughter.
8. The petition and objection to the appointment by Mr. Edward Kings Onyancha Maina lacks merit because Mr.Maina's appeal was properly dismissed for being filed out of time.

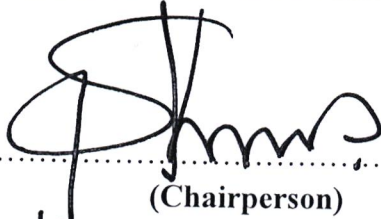
The Committee also considered the attached curriculum vitae of the nominee and by majority approved the nomination of Justice David Kenani Maraga for appointment by H.E. the President as the Chief Justice of the Republic of Kenya.

**MIN No.JLA. /2016:-**

**ADJOURNMENT**

The meeting was adjourned at forty five minutes past twelve o'clock. The next sitting scheduled for 4pm, 13<sup>th</sup> October 2016 at Committee Room 7, Parliament Building.

Signed.....



(Chairperson)

Date.....

17<sup>th</sup> October, 2016

**MINUTES OF THE SITTING OF THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS HELD ON TUESDAY, 11<sup>TH</sup> OCTOBER, 2016 AT 10.00 A.M. IN COMMITTEE ROOM, 4<sup>TH</sup> FLOOR, CONTINENTAL HOUSE, PARLIAMENT BUILDING**

**PRESENT**

- Hon. Samuel Chepkonga, M.P. - Chairperson
- Hon. Priscilla Nyokabi, M.P. - Vice Chairperson
- Hon. Benson Mutura, M.P.
- Hon. Neto Agostinho, M.P.
- Hon. Ben Momanyi, M.P.
- Hon. David Ochieng, M.P.
- Hon. Fatuma Ibrahim, M.P.
- Hon. Florence Kajuju, M.P.
- Hon. Kang'ata Irungu, M.P.
- Hon. John M. Waiganjo, M.P.
- Hon. Kamoti Mwamkale William, M.P.
- Hon. Mohamed Abdi Haji, M.P.
- Hon. Moses Cheboi, M.P.
- Hon. Peter Kaluma, M.P.
- Hon. (Bishop) Robert Mutemi, M.P.
- Hon. Tom J. Kajwang', M.P.
- Hon. William Cheptumo, M.P.

**APOLOGY**

- Hon. Olago Aluoch, M.P.
- Hon. Njoroge Baiya, M.P.
- Hon. Boniface Otsiula, M.P.
- Hon. John Njoroge Chege, M.P.

**ABSENT**

- Hon. Charles Gimose, M.P.
- Hon. Dr. Christine Ombaka, M.P.
- Hon. Bitok Kirwa, M.P.
- Hon. Ndirangu Waihenya, M.P.
- Hon. Paul K. Bii, M.P.
- Hon. Sammy Koech, M.P.
- Hon. Johana Ngeno, M.P.

## **SECRETARIAT**

Mr. Abenayo Wasike	-	Clerk Assistant I
Mr. Ahmed Salim	-	Clerk Assistant III
Mr. Denis Abisai	-	Principal Legal Counsel
Ms. Mugure Gituto	-	Legal Counsel II
Ms. Clare Jerotich	-	Researcher
Ms. Rehab Chepkilim	-	Audio Officer
Mr. Moses Kariuki	-	Sergeant-at-arm
Mr. Stanley Lagat	-	Sergeant-at-arm

## **IN ATTENDANCE**

Mr. Ezra Chiloba	-	CEO, IEBC
Ms. Betty Sungura	-	Dep. CEO, IEBC
Mr. Marjan Hussein	-	Dep. CEO, IEBC
Mr. Osman Ibrahim	-	Director Finance, IEBC
Ms. Jane Gitonga	-	M/P, IEBC
Ms. Moses Kipkogei	-	Legal Officer, IEBC

## **MIN No.JLA.CJ.APP.01/2016:-**

## **PRELIMINARIES**

The Chairperson called the meeting to order at 10.50 a.m. with a word of prayer from Hon. Robert Mutemi, M.P. The Chairperson introduced the agenda of the meeting; as consideration of the Institute of Directors of Kenya Bill, 2016, consideration of the vetting structure and questions for the nominee to the position of the Chief Justice of Kenya, and meeting with Independent Electoral and Boundaries Commission Secretariat.

## **MIN No.JLA.CJ.APP.02 /2016:-**

## **CONSIDERATION OF THE INSTITUTE OF DIRECTORS OF KENYA BILL, 2016**

The Committee considered the Institute of Directors of Kenya Bill, 2016. The Committee did not propose any amendments.

**MIN No.JLA.CJ.APP.03 /2016:-      CONSIDERATION OF THE VETTING STRUCTURE AND QUESTIONS FOR THE NOMINEE TO THE POSITION OF THE CHIEF JUSTICE OF KENYA**

The Committee, having received communication that Justice David Kenani Maraga's name was forwarded to the National Assembly for approval as the next Chief Justice of Kenya, considered the vetting structure in line with the Public Appointments (Parliamentary Approval) Act and in line with known best practices and resolved that during the vetting of the nominee which was scheduled for the 13<sup>th</sup> of October 2016, Members will ensure that questions asked by any Member will not be repeated by others and as much as possible, the vetting should take around two hours' time. Members also went through the memoranda submitted by the public in response to a request by the Clerk of the National Assembly through the print media.

**MIN No.JLA.CJ.APP.04 /2016:-      MEETING WITH INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION SECRETARIAT**

The Committee met with the Secretariat of the Independent Electoral and Boundaries Commission (IEBC). It was noted that the meeting was arranged in response to a letter by the IEBC secretariat requesting for audience. The Chief Executive Officer of the IEBC gave a brief presentation to the Committee on the Implications of the Election Laws Amendment Act on Preparations for 2017 General Elections. The Committee, however, asked the IEBC secretariat to meet the Committee on Tuesday, 18<sup>th</sup> October 2016 when the secretariat will be more prepared.

**MIN No.JLA.CJ.APP.05/2016:-      ADJOURNMENT**

The meeting was adjourned at forty five minutes past twelve o'clock.

**MIN.No.JLA.CJ.APP.06 /2016      DATE OF NEXT MEETING**

The next meeting will be held on Thursday 13<sup>th</sup> October, 2016 at 10.00 a.m.

Signed.....  
(Chairperson)

Date.....17<sup>th</sup> October, 2016.....

# MESSAGE FROM H.E THE PRESIDENT

678

② Mr. Justice  
P.S.S. memo  
for Ann  
to be issued



THE PRESIDENCY 3/10/16

NATIONAL ASSEMBLY  
RECEIVED  
28 SEP 2016  
SPEAKER'S OFFICE  
P. O. Box 41842, NAIROBI.

EXECUTIVE OFFICE OF THE PRESIDENT  
CHIEF OF STAFF AND HEAD OF THE PUBLIC SERVICE

Telegraphic Address  
Telephone: +254-20-2227436

STATE HOUSE  
P.O. Box 40530-00100

When replying please quote  
**SH/3/13 VOL.IX (11)**  
Ref. No. ....  
and date

29<sup>th</sup> September, 2016  
....., 20.....

CONFIDENTIAL

Hon. Justin Muturi, EGH. MP  
Speaker of the National Assembly  
Parliament Buildings  
NAIROBI

① Noted. CNA  
Prepare the necessary  
communication  
BWA  
SNA  
3/10/16

Dear Hon Muturi,

**RE: APPROVAL OF APPOINTMENT - CHIEF JUSTICE OF KENYA**

Reference is made to the above subject matter.

Following interviews by the Judicial Service Commission to fill the Position of Chief Justice, and the consequent selection of David Kenani Maraga, I am now forwarding the **Name of Hon. Mr. Justice David Kenani Maraga** for consideration and approval by Parliament as per the requirement of Article 166(1)a of the Constitution of Kenya 2010. This will pave the way for his appointment by His Excellency the President to be the Chief Justice of Kenya.

I have enclosed a copy of the letter conveying the decision by the Judicial Service Commission to pick Hon. Mr. Justice David Kenani Maraga for consideration for appointment as Chief Justice.

Yours *Sincerely*  
*JK*

**JOSEPH K. KINYUA, EGH**  
**CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE**

Encl.

cc: Mr. Justin Bundi, CBS  
Clerk of the National Assembly of Kenya  
Parliament Buildings  
NAIROBI

WASIKI  
Pls facilitate  
FA  
04/10

URGENT



THE PRESIDENCY  
EXECUTIVE OFFICE OF THE PRESIDENT  
CHIEF OF STAFF AND HEAD OF THE PUBLIC SERVICE

Telegraphic Address  
Telephone: +254-20-2227436  
When replying please quote

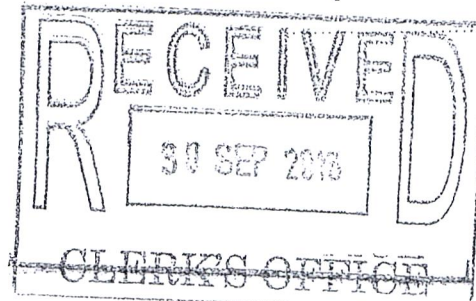
STATE HOUSE  
P.O. Box 40530-00100  
Nairobi, Kenya

Ref. No. **SH/3/13 VOL.IX (11)**  
and date

29<sup>th</sup> September, 2016

20

**Hon. Justin Muturi, EGH. MP**  
Speaker of the National Assembly  
Parliament Buildings  
**NAIROBI**



Dear

**RE: APPROVAL OF APPOINTMENT - CHIEF JUSTICE OF KENYA**

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Following interviews by the Judicial Service Commission to fill the Position of Chief Justice, and the consequent selection of David Kenani Maraga, I am now forwarding the **Name of Hon. Mr. Justice David Kenani Maraga** for consideration and approval by Parliament as per the requirement of Article 166(1)a of the Constitution of Kenya 2010. This will pave the way for his appointment by His Excellency the President to be the Chief Justice of Kenya.

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Yours

**JOSEPH K. KINYUA, EGH**  
**CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE**

Encl.

CC: **Mr. Justin Bundi, CBS**  
Clerk of the National Assembly of Kenya  
Parliament Buildings  
**NAIROBI**

Telephone: Nairobi 2221221

Email: [jscsecretariat@judiciary.go.ke](mailto:jscsecretariat@judiciary.go.ke)

JUDICIAL SERVICE COMMISSION

P. O. BOX40048-00100

NAIROBI

When replying please quote:

JSC. 1/4

22<sup>nd</sup> September, 2016Letter of Transmittal

His Excellency Hon. Uhuru Kenyatta, C.G.H.,  
 The President of the Republic of Kenya and Commander-in-Chief  
 of the Kenya Defense Forces,  
 Office of the President,  
 Harambee House,  
NAIROBI.

Your Excellency,



RE: RECOMMEDATION FOR APPOINTMENT TO THE OFFICE OF  
 CHIEF JUSTICE OF THE REPUBLIC OF KENYA OF HON. MR. JUSTICE  
 DAVID KENANI MARAGA

On behalf of the Judicial Service Commission, I have the honour to forward to Your Excellency, the attachment containing the recommendation for the appointment to the above stated office of Hon. Mr. Justice David Kenani Maraga National Identity Card No. 0330884 to be made by Your Excellency subject to the approval by the National Assembly in accordance with the Provisions of Article 166 (1) (a) of the Constitution of Kenya.

The Commission has undertaken the process with utmost transparency and as per the mandate conferred upon it by the Constitution and Judicial Service Act, 2011 and with tangible participation of the sovereign people of Kenya.

Thank you.

Yours faithfully

Hon. Prof. Margaret Kobia, PhD, CBS,  
 ACTING CHAIRPERSON,  
JUDICIAL SERVICE COMMISSION.



REPUBLIC OF KENYA

THE JUDICIAL SERVICE COMMISSION

SELECTION REPORT – CHIEF JUSTICE OF THE REPUBLIC OF KENYA

RECOMMENDATION

One (1) post was declared vacant and subsequently advertised by the Judicial Service Commission under Advertisement No. V/No. 6/2016. Thirteen (13) applications were received and all the applicants were shortlisted and called for interviews. Twelve (12) candidates appeared for interviews and were interviewed accordingly.

The Commission recommended that:

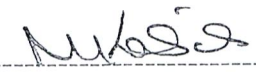
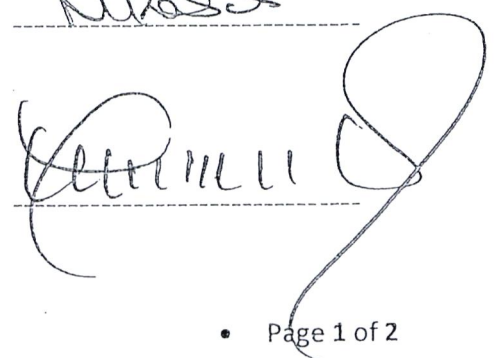
Hon. Mr. Justice David Kenani Maraga National Identity Card No. 0330884 be appointed to the post of Chief Justice of the Republic of Kenya.

The detailed report of the recruitment and selection process is annexed.

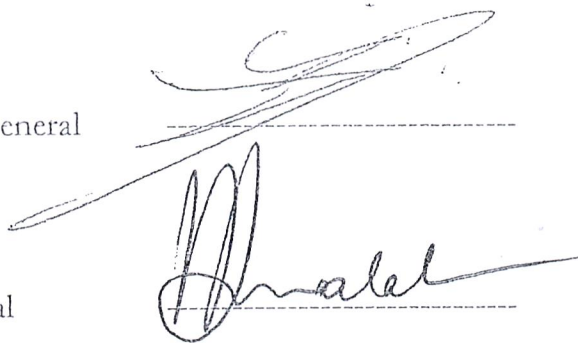
COMMISSIONERS

1. Hon. Prof. Margaret Kobia, PhD, CBS,  
Acting Chairperson.
2. Hon. Emily Ominde,  
Commissioner.

SIGNATURE

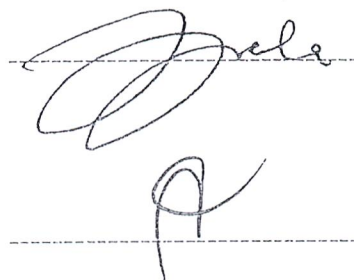
  
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3. Hon. Prof. Githu Muigai, EGH, SC, Attorney General  
Commissioner.



4. Hon. Mr. Justice M.A. Warsame, Judge of Appeal  
Commissioner.

5. Hon. Prof. Tom O. Ojienda, SC  
Commissioner.



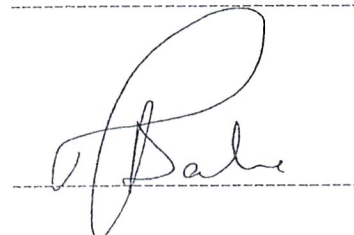
6. Hon. Mr. Justice A.O. Muchelule, Judge of the High Court  
Commissioner.



7. Hon. Ms. Winnie W. Guchu  
Commissioner.




8. Hon. Mr. Kipngetich Arap Korir Bett  
Commissioner.



9. Hon. Mercy Mwarah Deche  
Commissioner.

SECRETARY / CHIEF REGISTRAR OF THE JUDICIARY

Hon. Mrs. Anne A. Amadi,



Dated: 22<sup>nd</sup> September 2016



REPUBLIC OF KENYA

THE JUDICIAL SERVICE COMMISSION

ANNEXTURE

THE REPORT OF THE JUDICIAL SERVICE COMMISSION OF KENYA ON THE  
RECRUITMENT AND SELECTION PROCESS FOR THE CHIEF JUSTICE OF THE  
REPUBLIC OF KENYA

SUBMITTED TO HIS EXCELLENCY THE PRESIDENT OF THE REPUBLIC OF KENYA

ON 22<sup>ND</sup> SEPTEMBER, 2016

DATED 22<sup>ND</sup> SEPTEMBER, 2016

## INTRODUCTION

1. The Chief Justice / President of the Supreme Court Hon. Justice Dr. Willy M. Mutunga, D. jur, E.G.H., S.E.G.H., retired on 16<sup>th</sup> June, 2016.

## NOTICE OF VACANCY

2. Subsequently, the Judiciary declared the vacancy in the Office of the Chief Justice of the Republic of Kenya pursuant to **Section 3(1), Part II, First Schedule of the Judicial Service Act, No. 1 of 2011.**

## ADVERTISEMENT

3. Thereafter, on 17<sup>th</sup> June, 2016 the Judicial Service Commission advertised the vacant position of Chief Justice of the Republic of Kenya in accordance with the provisions of **Section 3, Part II, First Schedule of the Judicial Service Act, No. 1 of 2011.**
4. The deadline set out in the advertisement for submission of applications was **7<sup>th</sup> July, 2016 at 5.00 p.m.** However, subject to Gazette Notice No. 4954 of 1<sup>st</sup> July, 2016 declaring **7<sup>th</sup> July, 2016 a Public Holiday (Idd – UI –Fitr)** the deadline was extended to **8<sup>th</sup> July, 2016.**
5. A total of **thirteen (13)** applicants responded to the advertisement as follows:-

List of applicants for the position of Chief Justice:

S/No.	Name of Applicant	I.D. / Passport No.
1.	Hon. Mr. Justice Alnashir R.M. Visram	10177186
2.	Hon. Mr. Justice David Kenani Maraga	0330884
3.	Hon. Justice Dr. Smokin Charles Wanjala	2093616
4.	Hon. Lady Justice Roselyn Naliaka Nambuye	0213374
5.	Hon. Mr. Justice Amraphael Mbogholi Msagha	5468691
6.	Prof. Makau Mutua	A1695101
7.	David Mwaure Waihiga	1889015
8.	Hon. Mr. Justice (Rtd) Aaron Gitonga Ringera.	4826426
9.	Philip Nzamba Kitonga	4839950
10.	Lucy Wanja Julius	10252584
11.	Hon. Justice Prof. Jackton Boma Ojwang	7112666
12.	Paul Andrew Kongani Udoto Kongani	20459152
13.	Amb. Daniel Waisiko Wambura	10793375

## REVIEW OF APPLICATIONS

6. Pursuant to **Part III, First Schedule of the Judicial Service Act, 2011** the Judicial Service Commission at its meeting of 12<sup>th</sup> July, 2016 reviewed all the applications for completeness and compliance with Constitutional and statutory requirements and shortlisted six (6) candidates as follows:-

### Shortlisted Candidates

S/No.	Name of Applicant
1.	Hon. Mr. Justice Alnashir R.M. Visram
2.	Hon. Mr. Justice Amraphael Msagha Mbogholi
3.	Hon. Mr. Justice David Kenani Maraga
4.	Philip Nzamba Kitonga
5.	Hon. Lady Justice Roselyn Naliaka Nambuye
6.	Hon. Justice Dr. Smokin Charles Wanjala

7. The Commission's meeting held on 14<sup>th</sup> July, 2016 scheduled the six (6) candidates for interview as indicated below:-

### Schedule of interview for shortlisted candidates

S/No.	Name of Applicant	Day/Date of Interview	Time for the Interview
1.	Hon. Mr. Justice Alnashir R.M. Visram	Monday 29/8/2016	9.00 a.m.
2.	Hon. Mr. Justice Amraphael Msagha Mbogholi	Tuesday 30/8/2016	9.00 a.m.
3.	Hon. Mr. Justice David Kenani Maraga	Wednesday 31/8/2016	9.00 a.m.
4.	Philip Nzamba Kitonga	Thursday 1/9/2016	9.00 a.m.
5.	Hon. Lady Justice Roselyn Naliaka Nambuye	Friday 2/9/2016	9.00 a.m.
6.	Hon. Justice Dr. Smokin Charles Wanjala	Saturday 3/9/2016	9.00 a.m.

8. Pursuant to **Section 9, Part III, First Schedule of the Judicial Service act, No. 1 of 2011**, the Commission published the names of the applicants and shortlisted candidates in the print media and the Kenya Gazette. The shortlisted candidates were accordingly notified of the dates of interviews.

## INTERVIEWS

9. The interviews commenced on 29<sup>th</sup> August, 2016.
10. The criteria used to evaluate qualifications of individual applicants is provided under **Part V, First Schedule of the Judicial Service Act, No. 1 of 2011.**
11. On the 29<sup>th</sup> August, 2016 the High Court Constitutional Petition No. 314 of 2016 ordered that the Judicial Service Commission re-consider all applicants who had not been shortlisted for the position of Chief Justice.
12. Following the above order which was served upon the Commission on 29<sup>th</sup> August, 2016, the Commission at its meeting held on the same day, reviewed the applications of applicants who had not been shortlisted and resolved that they all be invited for interview.
13. The interview schedule was accordingly revised to include all applicants as follows:-

### **Revised interview Schedule for the position of Chief Justice:**

S/No.	Name of Applicant	I.D. / Passport No.	Day/Date of Interview	Time for the Interview
1.	Hon. Mr. Justice Alnashir R.M. Visram	10177186	Monday 29/8/2016	9.00 a.m.
2.	Hon. Mr. Justice Amraphael Msagha Mbogholi	5468691	Tuesday 30/8/2016	9.00 a.m.
3.	Hon. Mr. Justice David Kenani Maraga	0330884	Wednesday 31/8/2016	9.00 a.m.
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6.	Hon. Justice Dr. Smokin Charles Wanjala	2093616	Saturday 3/9/2016	9.00 a.m.
7.	Paul Andrew Kongani Udoto Kongani	20459152	Monday 5/9/2016	9.00 a.m.
8.	Hon. Mr. Justice (Rtd) Aaron Gitonga Ringera.	4826426	Tuesday 6/9/2016	9.00 a.m.
9.	Amb. Daniel Waisiko Wambura	10793375	Wednesday 7/9/2016	9.00 a.m.
10.	David Mwaure Waihiga	1889015	Thursday 8/9/2016	9.00 a.m.

11.	Hon. Justice Prof. Jackton Boma Ojwang	7112666	Monday 12/9/2016	9.00 a.m.
12.	Lucy Wanja Julius	10252584	Tuesday 13/9/2016	9.00 a.m.
13.	Prof. Makau Mutua	A1695101	Wednesday 14/9/2016	9.00 a.m.

14. The candidates were accordingly notified and the revised interview schedule published in the print media and Kenya Gazette.
15. Candidate No. 10 on the revised interview schedule David Mwaure Waihiga wrote to the Commission withdrawing his candidature.
16. Candidate No. 11 (Hon. Justice Prof. Jackton Boma Ojwang) was rescheduled to Thursday 15<sup>th</sup> September, 2016 subject to Gazette Notice No. 7315 dated 9<sup>th</sup> September, 2016 which declared 12<sup>th</sup> September, 2016 a public holiday (Idd-Ul-Adha).
17. The total number of candidates who appeared for interview was twelve (12).

### INTERVIEWS

18. The interviews were conducted between 29<sup>th</sup> August and 15<sup>th</sup> September, 2016 at the Supreme Court Library.
19. The Commission exercised due diligence and contacted the following vetting bodies for confidential reports on the candidates; Kenya Revenue Authority, High Education Loans Board, Law Society of Kenya, Directorate of Criminal Investigation, Advocates Complaints Commission, Ethics and Anti Corruption Commission and National Intelligence Service. Members of the public were also invited to submit any information of interest on any of the candidates. Several complaints / information were received from the members of the public. They were admitted, processed and forwarded to the respective candidates for response. The particular candidates responded and the responses same were considered in evaluating and nominating the best candidate for the position.

NOMINATION

20. At the conclusion of the exercise and pursuant to Article 166(1)(a) and Article 172(1) (a) of the Constitution of Kenya as read with Section 14, Part V, First Schedule of the Judicial Service Act, No. 1 of 2011 the Judicial Service Commission recommends Hon. Mr. Justice David Kenani Maraga Judge, Court of Appeal National Identity Card No. 0330884 for appointment as Chief Justice of the Republic of Kenya.

COMMISSIONERS

SIGNATURE

1. Hon. Prof. Margaret Kobia, PhD, CBS,  
Acting Chairperson.
2. Hon. Emily Ominde,  
Commissioner.
3. Hon. Prof. Githu Muigai, EGH, SC, Attorney General  
Commissioner.
4. Hon. Mr. Justice M.A. Warsame, Judge of Appeal  
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6. Hon. Mr. Justice A.O. Muchelule, Judge of the High Court  
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7. Hon. Ms. Winnie W. Guchu  
Commissioner.
8. Hon. Mr. Kipngetich Arap Korir Bett  
Commissioner.
9. Hon. Mercy Mwarah Deche  
Commissioner.

The image shows nine handwritten signatures, each written on a horizontal dashed line. The signatures are: 1. Margaret Kobia, 2. Emily Ominde, 3. Githu Muigai, 4. M.A. Warsame, 5. Tom O. Ojienda, 6. A.O. Muchelule, 7. Winnie W. Guchu, 8. Kipngetich Arap Korir Bett, and 9. Mercy Mwarah Deche. The signatures are written in black ink and vary in style, from cursive to more blocky.

SECRETARY / CHIEF REGISTRAR OF THE JUDICIARY

Hon. Mrs. Anne A. Amadi,

Mureno

Dated: 22<sup>nd</sup> September 2016

*2 Mr Justice  
P.S. prep  
for Amul  
We used  
Hon. Justice*



THE PRESIDENCY 3/10/16

NATIONAL ASSEMBLY  
RECEIVED  
28 SEP 2016  
SPEAKER'S OFFICE  
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SH/3/13 VOL.IX (11)

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Ref. No. ....  
and date

**CONFIDENTIAL**

Hon. Justin Muturi, EGH. MP  
Speaker of the National Assembly  
Parliament Buildings  
NAIROBI

*1 Noted. CNA  
Prepare the necessary  
communication up  
SNA  
3/10/16*

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**RE: APPROVAL OF APPOINTMENT - CHIEF JUSTICE OF KENYA**

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Yours *Sincerely*  
*J.K.*

**JOSEPH K. KINYUA, EGH**  
**CHIEF OF STAFF AND HEAD OF PUBLIC SERVICE**

Encl.

cc: **Mr. Justin Bundi, CBS**  
Clerk of the National Assembly of Kenya  
Parliament Buildings  
**NAIROBI**

# VETTING STRUCTURE AND QUESTIONS

**No. 33 of 2011 [Rev. 2012]**  
*Public Appointments (Parliamentary Approval) Act, 2011*  
[Issue 1] 8

SCHEDULE  
[Section 6(8).]

**CRITERIA FOR VETTING/APPROVAL OF NOMINEES FOR  
APPOINTMENT TO PUBLIC OFFICE BY PARLIAMENT  
QUESTIONNAIRE**

**Notes:**

- a) This questionnaire applies to appointments to public office arising by or under the Constitution or any other law where parliamentary approval is required.
- b) The questionnaire shall be used by the relevant parliamentary committee to vet a nominee appearing before the committee in the process of parliamentary approval.
- c) The questionnaire shall be filled and submitted by the nominee to the relevant parliamentary committee through the Clerk of the relevant House of Parliament on or before a date set by the committee.
- d) The submission of false information in the questionnaire is an offence and may result in prosecution.
- e) Any form of canvassing by a nominee shall lead to disqualification.
- f) The nominee must answer all the questions.

1. Name: **DAVID KENANI MARAGA**.....  
.....  
.....

2. Position: **CHIEF JUSTICE OF THE REPUBLIC OF KENYA**.....  
.....  
.....

3. Sex: **MALE**.....

- .....  
.....
4. Date of Birth: **12/01/1951 IN BOSOSE VILLAGE OF NYAMIRA COUNTY**  
.....  
.....
5. Marital Status: **MARRIED WITH THREE CHILDREN**.....  
.....  
.....
6. Daytime phone number: **0721 844 844**.....  
.....  
.....
7. Mobile phone number: **0721 844 844**.....  
.....  
.....
8. Email Address: **dkmaraga@gmail.com**.....  
.....  
.....
9. ID Number: **0330883**.....  
.....  
.....
10. PIN Number: **A000224303V**.....  
.....  
.....
11. Nationality: **KENAYAN**.....  
.....  
.....
12. Postal Address: **P.O. BOX 700—00517**.....

.....  
.....

13. Town/City: **NAIROBI**.....

.....  
.....

14. Knowledge of Languages: **EKEGUSII, KISWAHILI and ENGLISH**

.....  
.....

15. **Education:** (List, in reverse chronological order, each university, college, or any other institution of higher education attended and indicate, in respect of each, the dates of attendance, academic award obtained, whether a degree was awarded, and the dates on which each such degree was awarded).

1. **MASTER OF LAWS (LLM)—2010—2012—UNIVERSITY OF NAIROBI;**

2. **DIPLOMA IN LEGAL PRACTICE—1977-1978—KENYA SCHOOL OF LAW;**

3. **BACHELOR OF LAWS (LLB) 1974—1977—UNIVERSITY OF NAIROBI;**

4. **EAST AFRICAN ADVANCED CERTIFICATE OF EDUCATION—1972-1973—KISII HIGH SCHOOL;**

5. **EAST AFRICAN SCHOOL CERTIFICATE—1968-1971;**

6. **CERTIFICATE OF PRIMARY EDUCATION (CPE) —1961-1967—SIRONGA D.E.B PRIMARY SCHOOL.**

.....  
.....

**Employment Record:** (List in reverse chronological order all government agencies, business or professional corporations, companies, firms or other enterprises with which you have been affiliated as an officer, director, partner, proprietor, employee or consultant)

.....  
.....

1. **2011 TO DATE—JUDGE OF COURT OF APPEAL;**
2. **2003 TO 2011—JUDGE OF HIGH COURT;**
3. **1999 TO 2003—PRIVATE LEGAL PRACTICE—MARAGA & CO. ADVOCATES;**
4. **1988 TO 1999—PRIVATE LEGAL PRACTICE—BOWRY, MARAGA & CO. ADVOCATES;**
5. **1979 TO 1988—PRIVATE LEGAL—MARAGA & CO. ADVOCATES;**
6. **1978 TO 1979—LEGAL ASSISTANT—JONES & JONES ADVOCATES.**

.....  
.....

16. **Honours and Awards:** (List any scholarships, fellowships, honorary degrees, academic or professional honours, honorary society memberships, military awards and any other special recognition for outstanding service or achievement and in respect of each, state the date of award and the institution or organization that made the award).

.....  
.....

17. **Professional Association** (where applicable): (List all professional associations of which you are or have a member

and give any positions held and the respective dates when each such position was held).

**A) KENYA MAGISTRATES & JUDGES ASSOCIATION—2003 TO DATE;**

**B) LAW SOCIETY OF KENYA—1987-1989-CHAIRMAN—RIFT VALLEY LAW SOCIETY—MEMBERSHIP FROM 1978 TO DATE;**

**C) MEMBER—CHARTERED INSTITUTE OF ARBITRATORS—LONDON—2013 TO DATE;**

.....  
.....

18. **Memberships:** (List all professional, business, fraternal, scholarly, civic, charitable or other organizations, (other than those listed in response to Question 16) to which you belong or have belonged).

**a) RIFT VALLEY SPORTS CLUB;**

**b) ELDER NAIROBI CENTRAL SEVENTH-DAY ADVENTIST CHURCH;**

**c) ADVENTIST MEN ASSOCIATION—NAIROBI CENTRAL SEVENTH-DAY ADVENTIST CHURCH;**

.....  
.....

19. **Published Writings:** (a) List the titles, publishers and dates of books, articles, reports, letters to the editor, editorial pieces or other published materials you have authored or edited.

- a) **NUMEROUS JUDGMENTS IN THE COURT OF APPEAL—2011 TO DATE;**
- b) **CHAPTER ON “Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective,” IN THE BOOK: ‘Balancing the Scales of Electoral Justice: Resolving Disputes from the 2013 Elections in Kenya and the Emerging Jurisprudence.’ EDITED BY DR. COLLINS ODOTE AND DR. LINDA MUSUMBA; FEBRUARY 2016;**
- c) **NUMEROUS JUDGMENTS IN HIGH COURT—2003 TO 2011;**
- d) **PAPER ENTITLED—“Electoral Dispute Resolution: The Kenyan Experience” PRESENTED TO THE ZANZIBARI JUDGES AND MAGISTRATES WORKSHOP ON ELECTORAL DISPUTE RESOLUTION PROCESS HELD AT MELIA BEACH HOTEL ON THE 14<sup>TH</sup> AND 15<sup>TH</sup> APRIL 2015;**
- e) **PRESENTATION MADE TO THE JOINT SUPREME COURT AND COURT OF APPEAL JUDGES CONFERENCE IN NANYUKI ON “The Internationally Accepted Special and Limited Jurisdiction in Election Disputes”-- DECEMBER 2014;**
- f) **PRESENTATION ENTITLED “Maritime Security: Trial of Piracy Cases in Kenya” MADE TO THE INTERNATIONAL INSTITUTE FOR COUNTER-TERRORISM CONFERENCE ON “LAW & SECURITY: A PERSPECTIVE FROM THE FIELD AND BEYOND” HELD AT THE INTERDISCIPLINARY CENTRE IN HERZLIYA, ISRAEL FROM 30<sup>TH</sup> JUNE TO 2<sup>ND</sup> JULY 2013. THIS FOLLOWED MY LEADING JUDGMENT IN ATTORNEY GENERAL V. MOHAMUD**

**MOHAMMED HARSHI & OTHERS, CRA NO. 113 OF 2011—July 2013;**

- g) **MASTER OF LAW—(LLM) THESIS—“The Implication of Article 2(6) of the Kenya Constitution, 2010—UNIVERSITY OF NAIROBI—DECEMBER, 2012;**
- h) **PRESENTATION ENTITLED: “Using Judicial Performance Evaluations to Secure Judicial Independence and Accountability” MADE TO THE INTERNATIONAL COMMISSION OF JURISTS LAWYERS’ SYMPOSIUM HELD IN MASERU, LESOTHO 4TH TO 5TH MARCH 2010;**
- i) **PRESENTATION ON “Professional Integrity” MADE AT COUNCIL OF LEGAL EDUCATION “PUPIL –MASTER SENSITIZATION WORKSHOP” HELD IN NAKURU, IN AUGUST 2009.**

.....  
.....

(b) Supply four (4) copies of any reports, memoranda or policy statements you prepared or contributed in the preparation of any bar association, committee, conference or organization of which you were a member.

**SEE ATTACHED MUTAVA TRIBUNAL REPORT.**

.....  
.....

**20. Public Office, Political Activities and Affiliations:**

(a) List chronologically any public offices you have held or are currently holding, including the terms of service and whether such positions were elected or appointed.

**i) JUDGE OF HIGH COURT—2003-2011; and**

**ii) JUDGE OF COURT OF APPEAL—2011 TO DATE.**

.....  
.....

(b) List all memberships and offices held in and services rendered, whether compensated or not, to any political party or election committee. If you have ever held a position or played a role in a political campaign, identify the particulars of the campaign, including the candidate, dates of the campaign, your title and responsibilities. Also include any linkage you have to a political party at present.

**i) JUDICIARY WORKING COMMITTEE ON ELECTION PREPARATIONS—VICE CHAIRPERSON—MAY 2012 TO AUGUST 2015.**

**ii) JUDICIARY COMMITTEE ON ELECTIONS—CHAIRPERSON—AUGUST 2015 TO DATE.**

.....  
.....

(c) Have you ever been dismissed or otherwise removed from office for a contravention of the provisions of Article 75 of the Constitution?

**NO**

.....  
.....

(d) Have you ever been adversely associated with practices that depict bias, favouritism or nepotism in the discharge of public duties?

**NO**

.....  
.....

21. **Deferred Income/Future Benefits:** (List the sources, amounts and dates of all anticipated receipts from deferred income arrangements, stock, options, uncompleted contracts and other future benefits which you expect to derive from previous business relationships, professional services, firm memberships, etc).

**NONE**

.....  
.....

22. **Outside commitment during service in office:** (Do you have any plans, commitments or agreements to pursue outside employment with or without compensation during your service in office? If so explain).

**NO**

.....  
.....

23. **Sources of Income:** (List sources and mounts of all income received during the calendar year preceding your nomination and in the current calendar year).

**a) NET SALARY PLUS ALLOWANCES PAID DURING 2015—KES.8,843,583.55; and**

**b) NET SALARY PLUS ALLOWANCES PAID FROM JANUARY TO OCTOBER 2016—KES.7,369,653.00.**

.....  
.....

**24. Tax Status:** (State whether you have fully complied with your tax obligations to the State up to the end of the financial year immediately preceding the nomination for appointment).

**I HAVE**

.....  
.....

**25. Statement of Net Worth:** (State you financial net worth).

**APPROXIMATELY—KES.150,000,000/=**

.....  
.....

**26. Potential Conflicts of Interest:**

(a) Identity the family members or other persons, parties, categories obligation or financial arrangements that are likely to present potential conflicts-of-interest when you first assume the position to which you have been nominated. Explain how you would address any such conflict if it were to rise.

**NONE**

.....  
.....

(b) Explain how you will resolve any potential conflict of interest, including the procedure you will follow in determining these areas of concern

**N/A**

.....  
.....

**27. Pro-Bono/Charity Work/Donations to charity:**

(Describe what you have done by way of pro bono or charity

work, listing specific instances, the amount contributed and the amount of time devoted to each).

**a) PRO-BONO LEGAL REPRESENTATION OF SEVERAL INDIGENT ACCUSED PERSONS IN CRIMINAL CASES—1978 TO 2003;**

**b) HARAMBEE CONTRIBUTIONS TO SCHOOLS, CHURH CONSTRUCTION PROJECTS AS WELL AS PAYMENT OF SCHOOL FEES FOR ORPHANS AND CHILDREN FROM INDIGENT FAMILIES and PERSONAL DONATIONS TO NEEDY FAMILIES OVER THE YEARS—NOT EXCEEDING KES.300,000/= AT ANY ONE TIME.**

.....  
.....

28. Have you ever been charged in a court or law in the last three years? If so, specify the nature of the charge, where the matter is ongoing, the present status of the matter, or where the matter is concluded, the judgment of the court, or otherwise, how the case was concluded.

**I HAVE NEVER**

.....  
.....

29. Have you ever been adversely mentioned in an investigatory report of Parliament or any other Commission of inquiry in the last three years?

**NO**

.....  
.....

30. Have you any objection to the making of enquiries with your present employer/referees in the course of consideration of your nomination?

**NO**

.....  
.....

31. **References:** (List three persons who are not your relatives who are familiar with your character, qualification and work).

**a) Professor Patricia Kameri Mbote,**

Dean Faculty of Law,  
University of Nairobi,  
P.O. Box 30197 – 00100,  
NAIROBI  
Tel: +254 (0) 722 346 885,  
Email: profkmbote@gmail.com

**b) Mr. Omesh Kapila,**

Omesh Kapila & Company Advocates,  
P.O. Box 40636—00100,  
NAIROBI  
Tel: +254 (0) 20 3749371/2  
Email: dvk.co@dvdvkapila.com

**c) Dr. Jared Bosire,**

Conservation Manager,  
Wild Wide Fund Kenya Country Office,  
P. O. Box 62440-00200,  
NAIROBI  
Tel: +254 729812589  
Email: jbosire@wwfkenya.org

.....  
.....

**No. 33 of 2011 [Rev. 2012]**

*Public Appointments (Parliamentary Approval)*

[Issue 1] 10

# **CURRICULUM VITAE**

**HON. MR. JUSTICE DAVID KENANI MARAGA**

CURRICULUM VITAE,  
CERTIFICATES AND TESTIMONIALS AND  
REFERENCE LETTERS

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## CURRICULLUM VITAE

### JUSTICE DAVID KENANI MARAGA



**Permanent Address:** P. O. Box 700-00517 Nairobi, Kenya  
Tel. Mobile: +254 721 844 844  
Email: [dkmaraga@gmail.com](mailto:dkmaraga@gmail.com)

#### **Bio Data:**

Date of Birth: 12<sup>th</sup> January, 1951  
Gender: Male  
Marital Status: Married with three children  
Nationality: Kenyan

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#### **CAREER OBJECTIVE:**

In obedience to God's Command and Will, and guided by the Constitution, to serve humanity, and Kenyans in particular, with dedication, honesty and integrity, striving at all times to uphold the rule of law and do justice to all.

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**A. PERSONAL PROFILE**

I am a God fearing person who believes in, and endeavours to do, justice to all irrespective of their status in society. I have a great passion for upholding the rule of law, which is an essential ingredient for social justice, political stability and economic development. I value people as a core resource and have had great pleasure and success in building teams towards effective justice delivery.

I am results-oriented and have worked with a diverse range of partners, committee's, panels and other bodies to deliver the desired change and results consistently throughout my career to date. I am particularly keen on building a solid leadership pipeline and enabling people to achieve their fullest potential. In this regard, I have taken up inspirational leadership as a hobby and mentoring young people and professionals as second nature.

I am self-driven with strong organizational and administrative skills and the ability to work independently as well as collaboratively. I particularly pride myself in my ability to positively interact with the various consumers of justice, regardless of their level, to address pertinent issues concerning the justice system. This has resulted in enhanced

credibility of the Judiciary in the courts and stations where I have worked.

As a Judge, though I am occasionally provoked to anger by counsel, litigants or witnesses who try to frustrate the court process, I am, however, able to understand their situations, control myself and firmly, yet courteously and fairly, deal with the situation thereby maintaining court decorum. Further, utilizing my fluency in Kiswahili, when I realize that interpretation in court is not effective, I put counsel's questions to the witnesses in Kiswahili ensuring that the hearings proceed fairly and smoothly. I am also given to kindness; using that gift, I talk to parties especially those who are unrepresented, in order to make sure they are at ease. I explain to them the nature of the cases and ensure they understand what is required of them before we start the proceedings.

As a responsible citizen of Kenya, I am an Elder and one of the Bible-Study leaders of the Seventh Day Adventist Church. I have also served as Member of the Board of Governors of Sironga High School in Nyamira, Njoro Girls High School and Lanet Secondary School.

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**B. Professional Profile**

I am a senior legal professional with extensive experience in the Bar and on the Bench, and with a nascent but growing interest in academia. I was admitted to the Roll of Advocates 38 years ago, and I have served as judge of Kenya's two Superior Courts for about 13 years.

I have a strong track record both in the Judiciary and private practice, where I have successfully served both as a professional and a leader. I have also been exposed to many different facets of law, varied working environments, people, and communities making me a well-rounded individual.

Currently, I am the Presiding Judge of the Court of Appeal at Kisumu; the Chairman of the Judiciary Committee on Elections; and the Chairman of a Tribunal appointed by His Excellency the President of the Republic of Kenya to investigate the conduct of a Judge of the High Court of Kenya. Previously, I served as the Presiding Judge of the Family Division of the High Court at Nairobi; and the Resident Judge, High Court of Kenya at Nakuru.

Before being appointed a Judge of the High Court, I was a legal practitioner in private practice for twenty-five (25) years, engaged in civil and criminal litigation as well as conveyancing matters. During that period, I was also a judge at the Nakuru

Agricultural Show Trade Stands from 1985 to 1990. My contribution led to boosting of the Agricultural Show's activities and as a reward, the Kenya Farmers Union sponsored myself and others to attend the Royal Agricultural Show in the UK in 1989. I also served as the Chairman of the Rift Valley Law Society.

I hold a Master of Laws Degree (LLM) from the University of Nairobi; a Bachelor of Laws Degree (LLB) from the same University, and a Diploma in Legal Practice from the Kenya School of Law, leading to my admission onto the Roll of Advocates on the 16<sup>th</sup> of October 1978. I am also a member of the Chartered Institute of Arbitrators, London and the Law Society of Kenya.

I have presented papers in numerous seminars, conducted trainings in law, and offered lectures at the University of Nairobi as a visiting lecturer. I also served a member of the Constitutional Review Task Force of the Seventh-day Adventist Church, East Africa Union.

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### **C. PROFESSIONAL COMPETENCIES**

In its determination dated 21st September 2012 (Par. 133), in which it unanimously dismissed all the complaints made against me, the Judges and Magistrates Vetting Board stated:

“At his interview with the Board, the Judge made a confident, forceful and dignified impression. The Board received positive reports from the legal profession in the Rift Valley, who complimented the Judge on his punctuality, seriousness with which he approached cases, and his control of the courtroom.” (Par.132].

### *I. Development of Jurisprudence*

Both in legal practice and on the Bench, I have made a significant contribution to local and international jurisprudence as demonstrated in the Anguka, Julie Ward, Choge and Mohammed Harshi Cases, among others detailed herein below. As at 2012, about twenty five (25) of my judgments had been reported by the National Council for Law Reporting and many more are pending publication.

#### **October 2014 to Date - Court Of Appeal, Kisumu**

***Executive of Kisumu & Others v. Ann Atieno Adul & Others, CA Nos. 17 & 18 of 2015 (Consolidated)*** - Precedent setting constitutional authority on impeachment of County Assembly Speaker. This decision helped to minimize impeachment motions in County Assemblies.

**January 2012 to September 2014 – Court Of Appeal,  
Nairobi**

In the Court of Appeal, Nairobi, I presided over several landmark appeals on Commercial and Labour Law as well as in Election Petitions including:

**A. Kenya Airways Limited v. Aviation & Allied Workers Union Kenya & Others, CA No. 46 of 2013**—Precedent setting on termination of employment on redundancy;

**B. Attorney General v. Mohamud Mohammed Harshi & Others, CRA No. 113 of 2011**—Internationally cited authority on International Criminal Law (Piracy) on the Principle of Universal Jurisdiction. This decision led to minimizing piracy in the Indian Ocean.

**C. Wetangula v. Kombo & Others, Kisumu CA (Election Petition) No. 43 of 2013**—Precedent setting on nullification of election on grounds of bribery.

**D. Royal Media Services Ltd & Others v. Attorney General & Others, CA No. 4 of 2014**—This decision helped to settle a major Constitutional Freedom of the Media Regional Terrestrial Broadcasting Digital Migration and Broadcasting Signal Distribution Licensing

**2008-2010 High Court, Nakuru**

**A. *Reliable Concrete Works Ltd v. Municipal Council of Nakuru & Other, Nakuru High Court Constitutional Reference No. 3 of 2009*** - In this case I declared

Section 12 of the Valuation for Rating Act unconstitutional for authorizing Local Authorities, which are parties to valuation for rating disputes, to appoint members of the Valuation Courts.

**B. *Catherine Waithaka Mwangi v. Gervas P. Mwangi, Nakuru HCCC No. 19 of 2004*** – In this case I refused to

follow Court of Appeal decisions in *Bwana v. Said & 2 Others, [1991] KLR 454* and *Kenganga v. Ombwori, [2001] KLR 103* which held that adverse possession claims not commenced by Originating Summons are incompetent, but instead followed *Mariba v. Mariba & Another, [2007] 1 EA 175*.

**C. *Anne Mwaura & Others Vs David Wagathua Gitau & Others, Nakuru HCCA No. 171 of 2008*** – In this case I

set the record straight with regard to the Court of Appeal obiter dicta in *Tiwi Beach Hotel Ltd v. Julian Stamn [1990] 2 KAR 189* which had hitherto been followed without question in regard to the issue that the Business Premises Tribunal had no jurisdiction to issue injunctions.

**D. *Simon P. Kamau & Others v. Teachers Service Commission, Nakuru HCCC NO. 65 of 2006*** – In this case I held that the pension of the retired teachers entitled to salary increment the Government granted them in 1997 should be based on that increment. The decision, which provided relief to about 52,000 retired teachers, was upheld by both the Court of Appeal and the Supreme Court.

**E. *Republic v. Stephen Kiprotich Leting & Others, Nakuru HCCRC No. 34 of 2008*** — This case is now an authority and seminal material for teaching in university law schools on the offence of murder.

#### **2003 - 2007 High Court, Mombasa**

**A. *HC Election Petition No. 1 of 2005—Hassan Joho v. Hotham Nyange & Others*** —Precedent setting on, inter alia, the standard of proof in Election Petitions.

**B. *Charles Philip Mason v. Vennesa Kahaki Mason, Mombasa HCCC No. 11 of 2006 (OS)*** - Precedent setting on distribution of Matrimonial Property.

## **PUBLICATIONS**

1. Chapter on “Scrutiny in Electoral Disputes: A Kenyan Judicial Perspective,” in the Book: ‘Balancing the Scales of Electoral Justice: Resolving Dispute from the 2013 Elections in Kenya and the Emerging Jurisprudence.’ Edited by Dr. Collins Odote and Dr. Linda Musumba; February 2016;
2. LLM Thesis—“The Legal Implications of Article 2(6) of the Constitution of Kenya, 2010”; and
3. Numerous Judgments.

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### ***II. Legal Practice***

I have demonstrated superior legal capability while defending landmark criminal cases such as the Choge Murder Case, which ran for two years up to the Court of Appeal; the Anguka Case (in relation to the Ouko Murder); and the Julie Ward Murder. I have also prosecuted and defended civil cases majoring on commercial law and land cases while in private practice.

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### ***III. Transformational Leadership and Policy Influence***

I am a transformative leader with proven strategic judicial and organizational value-driven leadership and focus. Leadership is one of my core competencies and has easily emerged in most of my work and social settings. Many times I have been invited or asked to lead teams and/or tasks. This has been further augmented by my reliability, communication skills, responsibility and amiable nature, which are assets, I bring to every new opportunity. Below are some illustrations of this competence:

**October 2014 to Date - Presiding Judge, Court Of Appeal, Kisumu**

I currently serve as the Presiding Judge of the Court of Appeal, Kisumu. This Court serves 14 Counties with a total of 26 Judges of High Court, Environment and Land Court as well as Employment and Labour Relations Court. Between October 2014 and June 2016, which is the period under which I have so far served in that station, the Court has disposed a total of 1,200 appeals and applications.

I also serve as Chair of the Bar-Bench Committee of the Kisumu Court of Appeal, as well as the Chair of the Court Users' Committee. Under my leadership, the relationship between the Bar and the Bench has tremendously been enhanced with more advocates now taking pauper briefs.

During my term in Kisumu, I have paid visits (some impromptu) to Kisumu and Eldoret Prisons and attended to prisoners' concerns thus enhancing the relationship between the Judiciary and consumers of justice.

**April 2010 to December 2011 - Presiding Judge of the Family Division of the High Court in Nairobi**

As the Presiding Judge of the Family Division of the High Court in Nairobi, I presided over and determined several succession causes and applications in landmark succession disputes including the Mbiyu Koinange; Gerrishom Kirima and Kanyotu Succession Causes. I determined an average of 10 applications for grant of letters of administration per day. In that Division, I was also the Chair of the Bar-Bench Committee of the Family Division which brought together Advocates practicing in the Family Division and, inter alia, developed a system of expeditiously disposing of causes in the Division, especially child adoption by foreign applicants.

**May 2009 to August 2010 - Resident Judge, High Court of Kenya, Nakuru**

As the Resident Judge of the High Court at Nakuru, I was also the Chairman of Court Users' Committee, which regularly met and resolved bottlenecks in regard to the expeditious disposal of cases. I made several visits to Nakuru Main Prison and Naivasha Maximum Prison to check on the welfare of

prisoners and remandees. In 2010 I resolved a potentially explosive hunger strike that had been staged by prisoners and remandees in protest against the manner in which they were being handled by certain Magistrates and a Judge. Had the strike succeeded, it would have caused substantial damage to public confidence in the Judiciary. On a subsequent visit to that prison by the Court of Appeal Judges, the prisoners and remandees commended me and my actions to those visiting Justices.

In the administration of justice, I realized the need for the training of Chiefs, Assistant Chiefs, and Village Elders as the first ports of call by victims of sexual offences and on the handling of evidence on sexual offences. I obtained World Bank funding, and got over 100 Chiefs, Assistant Chiefs and Village Elders trained. In its said determination dated 21st September 2012 (Par. 133), the Judges and Magistrates Vetting Board commended me for that action and for taking steps to decongest prisons in his region.

**August 2015 to Date - Chairman of the Judiciary Committee on Elections (JCE).**

This Committee is the predecessor of Judiciary Working Committee on Election Preparations. After disposal of the election petitions and appeals arising from the 2013 General Elections, pursuant to **Article 10** of the Constitution, I

brought together all the Judges and Magistrates who had heard those petitions and appeals; all the government institutional stakeholders; representatives from the Law Society of Kenya; representatives from political parties in Kenya; as well as representatives from Civil Society Organizations and obtained their views on electoral law reform and issues which should be addressed for a seamless electoral dispute resolution after the 2017 General Elections.

Having completed the launch of its Strategic Plan by the Hon. Chief Justice on 26<sup>th</sup> February 2016, an event attended by seven Ambassadors, the JCE is now engaged in preparations (including electoral law reform) for the seamless disposal of as many as 500 election petitions expected to arise from the 2017 General Elections.

From our history, I know that Presidential Elections are emotive and high-pressure processes. If mismanaged at any stage (including determination of petitions arising therefrom), Presidential Elections can lead to instability in our country. In this regard, I presented a paper to the Parliamentary Justice and Legal Affairs Committee (JLAC) at Nairobi and Mombasa in 2015 and urged them to amend **Article 140(2)** of the Constitution and extend the period for the determination of Presidential Election Petitions from **14** to **30** days in order to give the Supreme Court sufficient time to properly determine

Presidential Election Petitions. JLAC has approved that proposal and a Bill to that effect is pending before Parliament.

**May 2012 to August 2015 – Vice-Chairman of the Judiciary Working Committee on Election Preparations (JWCEP)**

The JWCEP was set up by the Hon. Chief Justice and tasked to liaise with other stakeholders in the conduct of elections and to advise the Judiciary on how to efficiently and expeditiously deal with the numerous election-related disputes then anticipated to arise from the 2013 General Elections. I chaired over 50 Committee and Stakeholder Meetings; facilitated 5 training sessions that equipped the Judges and Magistrates with skills and knowledge for the expeditious and competent determination of election petitions and appeals. Under my leadership, the Judiciary successfully determined **192** election petitions (including the Presidential Petitions) and **84** appeals (a total of **276** matters) within the timeframes set out in the Constitution.

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**IV. Training & Capacity Building**

I am an accomplished trainer and facilitator, who has facilitated several capacity-building sessions at the Judiciary Training Institute; the Law Society of Kenya's Continuous Legal Education (CLE) workshops; as well as seminars and

conferences at other institutions. I am also a visiting lecturer at the University of Nairobi.

## **CONFERENCES, TALKS AND SPECIAL ENGAGEMENTS**

### **March 2016**

I appeared for one and half hour talk show dubbed “*Cheche*” on Citizen TV and informed the country on how the Judiciary had expeditiously disposed of election petitions arising from the 2013 General Elections and the preparations the Judiciary is currently undertaking to handle the election disputes expected to arise from the 2017 General Elections.

### **April 2015**

The Zanzibari Judges and Magistrates Workshop on Electoral Dispute Resolution Process held at Melia Beach Hotel on the 14<sup>th</sup> and 15<sup>th</sup> April 2015 where I presented a paper entitled “*Electoral Dispute Resolution: The Kenyan Experience.*”

### **December 2014**

I made a presentation to the Joint Supreme Court and Court of Appeal Judges Conference in Nanyuki on “*The Internationally Accepted Special and Limited Jurisdiction in Election Disputes*”. This led to the proposals pending before Parliament to extend the period for the determination of

Presidential Petitions from **14** to **30** days and to limit the jurisdiction of the Supreme Court to Presidential Petitions only.

### **July 2013**

The International Institute for Counter-Terrorism Conference on "*Law & Security: A Perspective from the Field and Beyond*" held at the Interdisciplinary Centre in Herzliya, Israel from 30<sup>th</sup> June to 2<sup>nd</sup> July 2013 where I presented a paper entitled "*Maritime Security: Trial of Piracy Cases in Kenya.*" This followed my leading judgment in ***Attorney General v. Mohamud Mohammed Harshi & Others, CRA No. 113 of 2011***

### **September 2012**

The Commonwealth Eastern and Southern Africa Regional Judges Forum on Economic and Financial Crimes in Collaboration with the Eastern and Southern Africa Anti-Money Laundering Group (ESAAMLG) Pretoria, South Africa organized by the Commonwealth Secretariat.

### **March 2010**

International Commission of Jurists Lawyers' Symposium held in Maseru, Lesotho 4<sup>th</sup> to 5<sup>th</sup> March 2010 where I presented a paper entitled: "*Using Judicial Performance Evaluations to Secure Judicial Independence and Accountability.*"

**August 2009**

Council of Legal Education “*Pupil –Master Sensitization Workshop*”, in Nakuru, where I presented a paper on Integrity.

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**COMMUNITY SERVICE AND PRO BONO ACTIVITIES**

I have been supporting Moi Children’s Home since the 1980s and St. Barnados Children’s Home, Nairobi since 1996. I have and continue to educate orphans and disadvantaged children, some of whom I have supported up to University level. I have helped build Churches at Mwereni in Kinango area of Kwale County; Yumbuni in Mutito Andei; Mutituni in Machakos County; Simerero in Siaya County and others in Nakuru, Nyamira and Kisii Counties. While in private practice, I gladly handled several pro-bono briefs.

I am a motivational speaker who has addressed young people and offered counsel and comfort to, amongst others, distraught widows. For instance, on 18<sup>th</sup> October 2014, I addressed a group of students at Alliance Boys High School; on 3<sup>rd</sup> October 2015, I addressed over 800 students of Segero High School in Uasin Gishu County; on 26<sup>th</sup> October 2015, I addressed students at Baraton University in Nandi County; on 2<sup>nd</sup> April 2015 I addressed over 500 women from both Bomet and Kericho counties on their constitutional rights to property and their right to stand against domestic violence; and on 13<sup>th</sup>

February 2016 I addressed over 1,200 students of Nyambaria High School in Nyamira County.

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**Financial Discipline** — I maintain strict financial discipline and live within my means.

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**Involvement in as a Party in Litigation** – None

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**Involvement in Political Party Activities or Finances** – None

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**Criminal Record** – None

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## **EDUCATION**

- **2010 to 2012** — Master of Laws Degree (LLM), Law, Governance and Democracy, University of Nairobi.  
Thesis: *“The Implications of Article 2(6) of the Constitution in the Domestication of International Treaties”*;
- **1974 to 1977**—Bachelor of Laws Degree (LLB Hons.), University of Nairobi, Kenya;
- **1977 to 1978**—Diploma in Legal Practice, Kenya School of Law, Nairobi Kenya;
- **1972 to 1973**—Kisii High School—East African Advanced Certificate of Education (A Level);

- **1968 to 1971**—Maranda High School—East African School Certificate (O Level);
  - **1961 to 1967**—Sironga DEB Primary School—Certificate of Primary Education (CPE)
- 

### **EMPLOYMENT HISTORY**

**September 2014 to date**—Presiding Judge, Court of Appeal, Kisumu;

**January 2013 to August 2014**—Judge, Court of Appeal, Nairobi;

**April 2011 to December 2012**—Presiding Judge, The Family Division of the High Court;

**September 2010 to March 2011**—Judge, Civil Division High Court, Nairobi;

**May 2008 to August 2010**—Resident Judge, High Court of Kenya, Nakuru;

**January 2008 to April 2008**—Judge, High Court of Kenya, Nakuru; and

**2003 – 2007**—High Court of Mombasa.

**1978 – 2003** – Private Legal Practice

#### **Major Clients**

- The Standard Chartered Bank Kenya Limited
- Barclays Bank of Kenya Limited
- Post Office Savings Bank Limited

- The Delphis Bank Limited
- The Deposit Protection Fund (Central Bank of Kenya)
- Royal Insurance Company of East Africa Limited
- Lion of Kenya Insurance Company Ltd
- Cannon Assurance Limited
- United Insurance Company Limited
- Pan Africa Insurance Company Limited
- Kenya Power and Lighting Company Limited

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### **APPOINTMENTS AND ASSOCIATIONS**

**August 2015 to date**—Chairman of the Judiciary Committee on Elections;

**May 2012 to August 2015 Vice**—Chairman of the Judiciary Working Committee on Election Preparations (JWCEP);

**2014 to date**—Chairman of the Tribunal Appointed by His Excellency the President of the Republic of Kenya, to investigate the conduct of a High Court Judge.

### **OTHER APPOINTMENTS**

- Chairman Rift Valley Law Society (1987-1989);
- Member of the Constitutional Review Task Force of the Seventh-day Adventist Church East Africa Union;

- Leader of the Public Affairs and Religious Liberty Department Nairobi Central Seventh-day Adventist Church;
  - Member of the Board of Governors of Sironga High School in Nyamira; Njoro Girls High School, Nakuru and Lanet Secondary School, Nakuru; and
  - Judge: Nakuru Agricultural Show Trade Stands (1985-1990).
- 

#### **MEMBERSHIP OF PROFESSIONAL ASSOCIATIONS**

- Member, Chartered Institute of Arbitrators, London; and
  - Member, Law Society of Kenya.
- 

#### **OTHER INFORMATION**

##### **Hobbies**

Dairy and Poultry farming as well as watching soccer on TV.

##### **Technical Skills and Languages**

###### **IT Skills**

Proficiency in all MS Office applications—Microsoft Word, PowerPoint, Excel, and email—and all common MS Windows platforms, MS Internet Explorer, Legal databases and other browser products.

**Languages**

English, Kiswahili and Ekegusii.

**OTHER SKILLS**

- Strong leadership, interpersonal, oral written and inter-cultural Communication Skills;
- Good Public Speaking;
- Teaching, both Lecturing and Facilitation of workshops, Liaison, and Chairmanship;
- Professional Writing and Social Science Skills.

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**REFERENCES****Professional Referees:****Professor Patricia Kameri Mbote,**

Dean Faculty of Law,  
University of Nairobi,  
P.O. Box 30197 – 00100,  
NAIROBI  
Tel: +254 (0) 722 346 885,  
Email: [profkmbote@gmail.com](mailto:profkmbote@gmail.com)

**Hon. Justice William Ouko,**

Judge of Appeal,  
Court of Appeal,  
P.O. Box 2  
MALINDI  
Tel: +254 (0) 722 731 124  
Email: [oukow@jambo.co.ke](mailto:oukow@jambo.co.ke)

**Mr. Omesh Kapila,**

Omesh Kapila & Company Advocates,  
P.O. Box 40636—00100,  
NAIROBI  
Tel: +254 (0) 20 3749371/2  
Email: [dvk.co@dvdkapila.com](mailto:dvk.co@dvdkapila.com)

**Character Referees:****Dr. Jared Bosire,**

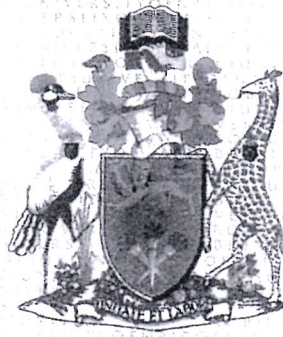
Conservation Manager,  
Wild Wide Fund Kenya Country Office,  
P. O. Box 62440-00200,  
NAIROBI  
Tel: +254 729812589  
Email: [jbosire@wwfkenya.org](mailto:jbosire@wwfkenya.org)

**Prof. Mary N. Getui,**

Professor, Religious Studies Department,  
The Catholic University of Eastern Africa,  
P.O. Box 62157 – 00200,  
NAIROBI  
Tel: +254 (0) 733 759 845  
Email: [mnetui@yahoo.com](mailto:mnetui@yahoo.com)



# UNIVERSITY OF NAIROBI



This is to certify that

**David Kenani Maraga**

having satisfied the requirements  
for the award of the degree of the


## MASTER OF LAWS

was admitted to the degree  
at a Congregation held at  
this University on the

**Seventh Day of December in the Year  
2012**

Certified True copy of the Original

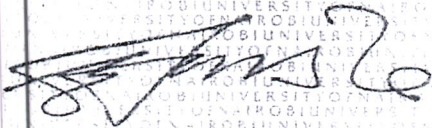
Dated this 4<sup>th</sup> day of July, 2016

  
**KENNEDY N. OGETO**

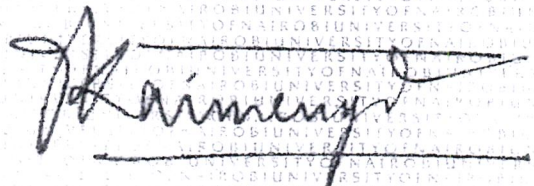
**ADVOCATE**

**CPS (K) R/762**

**P. O. BOX 79438 - NAIROBI**



**VICE-CHANCELLOR**



**DEPUTY VICE-CHANCELLOR (ACADEMIC AFFAIRS)**

# UNIVERSITY OF NAIROBI



This is to certify that

**David Kenani Maraga**

having satisfied the requirements  
for the award of the degree of the  
**BACHELOR OF LAWS**

**Second Class Honours (Lower Division)**

was admitted to the degree  
at a Congregation held at  
this University on the

**TWENTY SEVENTH DAY OF OCTOBER IN THE YEAR**

**1977**

Certified True copy of the Original

Dated this 4<sup>th</sup> day of July 2016.

KENNEDY N. OGETO  
ADVOCATE

CPS (K) R/762  
P. O. BOX 79438 - NAIROBI

REGISTRAR

VICE CHANCELLOR

in collaboration with the  
EAST AFRICAN EXAMINATIONS COUNCIL

This is to certify that the candidate named below sat for the Examination for the East African Advanced Certificate of Education and qualified for the award of an

EAST AFRICAN  
ADVANCED CERTIFICATE OF EDUCATION

The candidate passed at the level shown (Principal or Subsidiary) in the subject(s) named and attained the standard of the G.C.E. Advanced or Ordinary Level pass as indicated.

DAVID MARAGAH

K703 541

KISII SECONDARY SCHOOL KISII

	<u>E.A.A.C.E. Standard</u>	<u>G.C.E. Standard</u>	
HISTORY	PRINCIPAL	ADVANCED	GRADE B
GEOGRAPHY	PRINCIPAL	ADVANCED	GRADE A
ECONOMICS	PRINCIPAL	ADVANCED	GRADE A

SUBJECTS RECORDED THREE

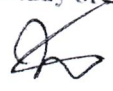
EXAMINATION OF NOVEMBER/DECEMBER 1973

Certified True copy of the Original

Dated this 4<sup>th</sup> day of July, 2016

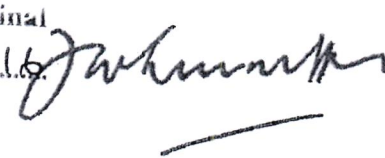


Chairman  
East African Examinations Council



KENNEDY N. OGETO  
ADVOCATE

GPS (K) R/ 762  
(See overleaf)  
P. O. BOX 79438 - NAIROBI



Vice-Chancellor  
University of Cambridge

in collaboration with the  
EAST AFRICAN EXAMINATIONS COUNCIL

This is to certify that the candidate named below sat for the Joint Examination for the East African Certificate of Education and School Certificate and qualified for the award of an

## EAST AFRICAN SCHOOL CERTIFICATE

IN DIVISION TWO

INCORPORATING A GENERAL CERTIFICATE OF EDUCATION

THE CANDIDATE REACHED THE GRADE SHOWN IN THE SUBJECTS NAMED AND ATTAINED THE STANDARD OF THE G.C.E. ORDINARY LEVEL PASS WHERE THIS IS INDICATED.

DAVID BRENN MASAKI MARAGAH

K702 30

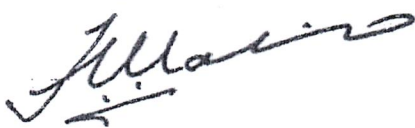
MARANDA SECONDARY SCHOOL BONDO

	GRADE	G.C.E. STANDARD
ENGLISH LANGUAGE	6	ORDINARY
LITERATURE IN ENGLISH	4	ORDINARY
BIBLE KNOWLEDGE	5	ORDINARY
HISTORY	3	ORDINARY
MATHEMATICS	8	
GENERAL SCIENCE	4	ORDINARY
BIOLOGY	4	ORDINARY
HEALTH SCIENCE	4	ORDINARY

SUBJECTS NAMED EIGHT SUBJECTS PASSED EIGHT G.C.E. PASSES SEVEN

THE CANDIDATE ALSO REACHED THE PASS STANDARD IN THE ORAL ENGLISH TEST.

EXAMINATION OF NOVEMBER/DECEMBER 1971



Chairman

Certified True copy of the Original

Dated this 4<sup>th</sup> day of July 20 1972



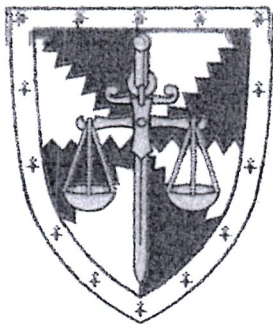
Vice-Chancellor

East African Examinations Council

KENNEDY N. OGETO  
(see overleaf) ADVOCATE

University of Cambridge

CPS (K) R/762  
P. O. BOX 79438 - NAIROBI



Chartered  
Institute of  
Arbitrators

**CIArb**

30

*David Kenani Maraga*

*Was successfully awarded the  
Introductory Certificate in*

*Arbitration*

*on*

*7 November 2013*

Certified True copy of the Original  
Dated this 4<sup>th</sup> day of July 2013

KENNEDY N. OGETO  
ADVOCATE

CPS (K) R/762  
P. O. BOX 79438 - NAIROBI

Anthony Abrahams, Director General  
Signed on behalf of the Chartered Institute of Arbitrators

Registered Charity 803725



# PETITIONS

*D/Committee*

**PETITION TO THE NATIONAL ASSEMBLY**

**UNDER ARTICLE 119**

**AGAINST**

**JUSTICE MR. DAVID KENANI MARAGA'S APPOINTMENT**

**AS THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA**

**OF**

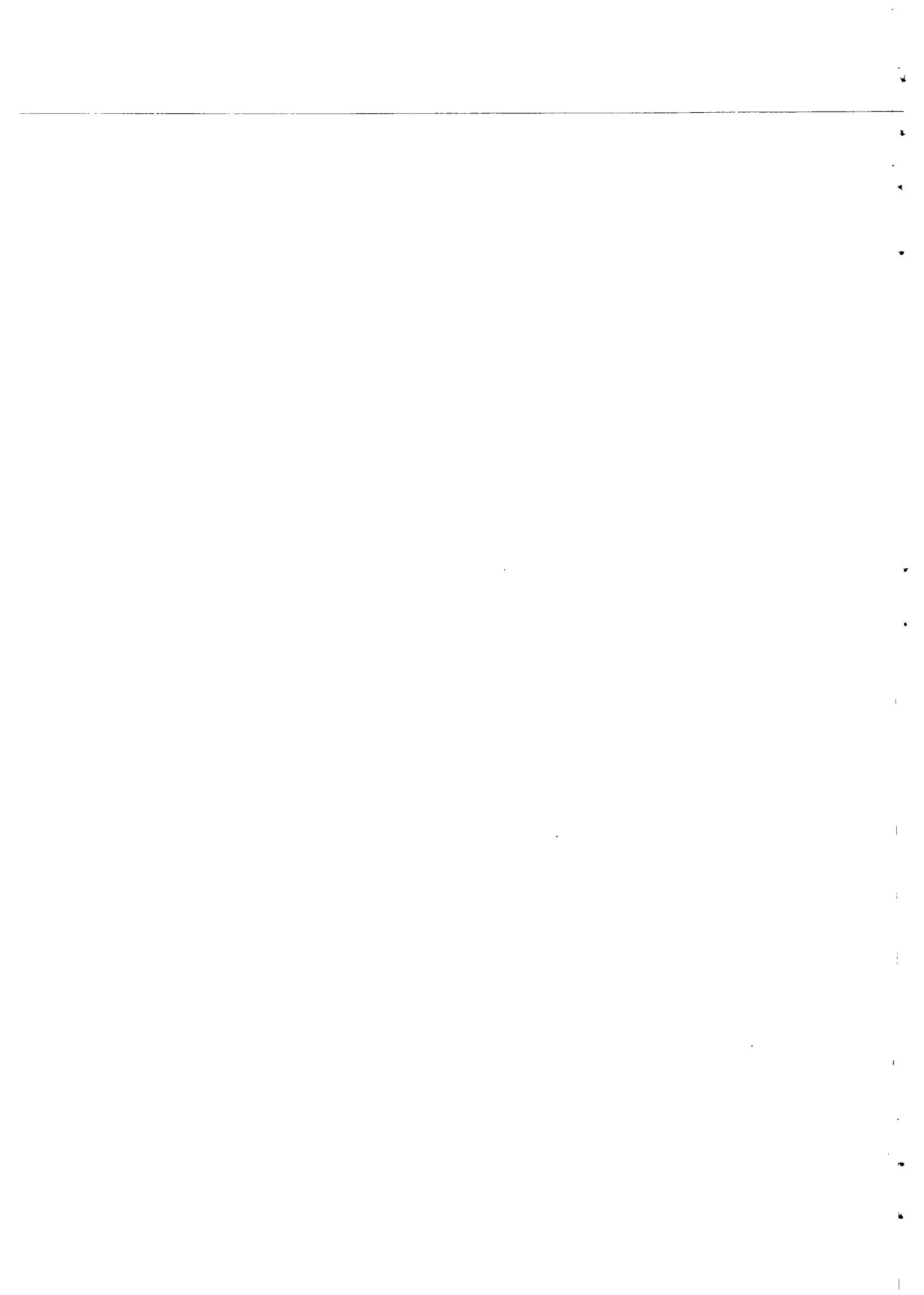


**THE CONSTITUTION OF THE REPUBLIC OF KENYA 2010**

**BY**

**EDWARD KINGS ONYANCHA MAINA FCILT**

Biashara Center Ground Floor Door J12  
Mburu Gichua Road  
P.O.Box 246-20100  
NAKURU  
Tel(+254) 721 796376  
E-mail:- [matrakings1976@gmail.com](mailto:matrakings1976@gmail.com)



# **EDWARD KINGS ONYANCHA MAINA FCILT**

**Biashara Center Ground Floor Door J12**

**Mburu Gichua Road**

**P.O.Box 246-20100**

**NAKURU**

**Tel(+254)721 7963276 E-Mail : matrakings1976@gmail.com.**

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**Our Ref.;**- Eldoret Court of Appeal Civil Application 50 & 51 of 2015

**Your Ref.;**-Appointment of The Chief Justice of The Republic of Kenya( Justice DK Maraga JA)

**DATE.:- Monday 10<sup>th</sup> October 2016**

**The Speaker;  
The National Assembly;  
Parliament Way/Harambee Avenue Junction;  
P.O. Box 41842-00100;  
NAIROBI .**

**Dear Sir**

**Re.:- Petition under Article 119 of The Constitution**

This presents the petition of Edward Kings Maina FCILT under article 119 of The Constitution of The Republic of Kenya opposing the appointment of Justice Mr. David Kenani Maraga JA as the new Chief Justice of Kenya.

Attached please copy of the Ruling delivered at Kisumu on 29.07.2016 in Court of Appeal Civil Application 50 &51 of The 2015( Maraga Gatembu & Murgor JJA).

During and upon Nomination Justice Mr. David Kenani Maraga JA assertively declared he will not and shall not work during Saturdays because he is a Seventh Day Adventist Church member.

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Petition under Article 119 of The Constitution on The Appointment of THE Chief Justice of Kenya 2016

He also declared to make the clearance of Back log of cases ravaging the Delivery of service by The Judiciary.

### **REASONS SUPPORTING THE PETITION**

- 1 Justice Mr. Maraga JA created backlog by the ruling delivered on 29.07.2016 in Eldoret Court of Appeal in Civil Application numbers 50&51 of 2015.
- 2 His declaration exhibits him as a person suffering from memory lapse.
- 3 The ruling reprobates and approbates against his own declaration on the backlog issues within the Judiciary.
- 4 By his ruling delivered at Kisumu on 29.7.2016 Justice Mr. DK Maraga JA usurped the legislative mandate reserved upon both The Houses of Parliament and proceeded to make Saturday the 4<sup>th</sup>, 11<sup>th</sup> and 18<sup>th</sup> plus the Sundays on 5<sup>th</sup>, 12<sup>th</sup> and 19<sup>th</sup> of July 2015 into working days to anchor the said same subject ruling striking out my Notice of Appeal lodged on 21.07.2015 as having been lodged outside the mandatory 14-days period and thus violated rule 75 of The Court of Appeal Rules.
- 5 The said same ruling was to benefit the Foreign Companies in the matter and protect the legal counsel who filed the application dated 17.09.2015.
- 6 The said same ruling was to protect and sustain the affidavit sworn by Faith Macharia-Okaalo which said same affidavit violates Order 9 rule 2c and Section

120 of The Evidence act chapter 80 laws of Kenya>No proof was canvassed in support of the allegation by the said same Faith Macharia-Okaalo allegation to wit **"I am duly authorized to swear "**.Thus creating an unjust evidence without any tinge of proof. Those who allege must proof.

- 7 The said same Subject Faith Macharia –Okaalo lacked any tinge of authority under a Corporate Resolution made under Corporate Seal donated from each of the alleged Applicants namely Africa Oil Turkana Limited the 1<sup>st</sup> Applicant, Africa Oil Kenya BV the 2<sup>nd</sup> Applicant and Africa Oil Corporation the 3<sup>rd</sup> Applicant.
- 8 The said same subject ruling dolled to the individual foreign companies the mandate to wing up Interstate Petroleum Company Limited and thus maintain fraudulent expropriating my rights in the Turkana Crude oil wells pursuant to The Chemical Analysis Report published on 13.12.2005 by The Kenya Petroleum Refineries Limited on the Samples that were surrendered for such chemical analysis through The Ministry of Energy.
9. It is ridiculous that Justice Mr. David Kenani Maraga JA has the audacity to amend the Constitution at article 9, 10 and 259 to make Saturdays and Sundays working days. Copy of the Calendar for the month of July 2015.
10. The said ruling delivered at Kisumu on 29.07.2016 in Court of Appeal Civil Application 50&51 of 2015 has robbed and denied me justice.


11. Attached is the supporting affidavit annexing the said ruling delivered at Kisumu on 29.07.2016 in Court of Appeal Civil Application 50 & 51 of 2015.

12. Annexed please also find copy of Page 10 of The Weekly Citizen Monday 10<sup>th</sup> to Saturday 115<sup>th</sup> October 2016.

**AND**

- i. **TAKE NOTICE** that I Edward Kings Onyancha Maina FCILT have neither no tinge of any shed of malice nor no tinge of any shed of vendetta against the subject Justice Mr. David Kenani Maraga
- ii. **TAKE NOTICE FURTHER** that I Edward Kings Onyancha Maina FCILT have no reservations to attend any interview deemed necessary to further this petition to its logical and legal end.

Justice be our shield and defender.

  
Edward Kings Onyancha Maina FCILT.

Tel(+254)721 796376

Enclosure.:-

Affidavit sworn at Nakuru annexing Ruling on 29.7.2016 in Court of Appeal Civil Application 50&51 of 2015.

CC.

Justice Mr. Davids Kenai Maraga(**Through The Speaker**)

**THE OATHS AND STATUTORY DECLARATIONS ACT**  
**CHAPTER 15 OF THE LAWS OF KENYA**  
**AFFIDAVIT OF EDWARD KINGS ONYANCHA**  
**I/D 0472450**

I Edward Kings Onyancha Maina care of Biashara Center Ground Floor J12 Mburu Gichua Road Post Office Box 246-20100 Nakuru do solemnly swear oath and states inter alia:-

- 01.THAT** I am the petitioner in this matter.
- 02.THAT** there is the ruling dated 21.04 2016 in Eldoret Court of Appeal Civil Application 50 & 51 of 2015 see exhibit copy marked **EKOM01**.
- 03.THAT** there is the copy of the calendar for the month of July 2015 see exhibit copy marked **EKOM02**.
- 04.THAT** there is the Judgment given on 02.07.2015 in Eldoret High Court Winding Up Cause number 1 of 2014 see exhibit copy marked **EKOM03**.
- 05.THAT** I Assertively declare the ruling on 21.4.2016 in the Court of Appeal Civil Application numbers 50 & 51 of 2015 benefits the applicants who are foreign firms.
- 06.THAT** I swear instant affidavit in support of the annexed petition brought under Article 119 of The Constitution of The Republic of Kenya against the approval for appointment of Justice Mr. David Kenani Maraga JA as next The Chief Justice of TR he Republic of Kenya 2016 .

**07.THAT** what is deponed to herein above is true and correct.

**SWORN at ..... this .....day of .....2016**  
**BY EDWARD KINGS ONYANCHA MAINA**  
**BEFORE ME**

**MARK M. MWENJE**  
**COMMISSIONER FOR OATHS**  
**SICHANGI PARTNERS**  
**ADVOCATES**  
**COMMISSIONER FOR OATHS**

.....  
Deponent

**DRAWN AND FILED BY**

**EDWARD KINGS ONYANCHA MAINA**

Biashara Center Ground Floor J12

P.O. Box 246-20100

**NAKURU.**

**SERVE UPON**

**THE SPEAKER**

**The National Assembly**

**Parliament Way**

**P.O. Box 40812-00100.**

**NAIROBI**

JAMHURI YA KENYA

200245280

FULL NAMES

EDWARD KINGS ONYANCHA MAMA



DATE OF BIRTH

15.02.1944

SEX

MALE

DISTRICT OF BIRTH

KISII

PLACE OF ISSUE

MUNICIPALITY

DATE OF ISSUE

23.01.1999

HOLDER'S SIGN

IEBC Acknowledgement Slip

JAMHURI YA KENYA  
REPUBLIC OF KENYA

Elector's No:

00182612122405-8

Elector's Full Names:

EDWARD KINGS ONYANCHA MAMA

ID / Passport No:

0472450

Registration Centre:

MAMA NGINA PAI

Polling Station:

SHABAB

Assembly Ward:

NARURU TOWN WEST

County:

NARURU

GPK

No. 000 9679878

37.44

IN THE COURT OF APPEAL  
AT ELDORET

(CORAM: MARAGA, GATEMBU, & MURGOR, JJA.)

CIVIL APPLICATION NO. 50 OF 2015

BETWEEN

AFRICA OIL TURKANA LIMITED.....1<sup>ST</sup> APPLICANT

AFRICA OIL KENYA BV.....2<sup>ND</sup> APPLICANT

AFRICA OIL CORPORATION.....3<sup>RD</sup> APPLICANT

AND

EDWARD KINGS ONYANCHA MAINA..... 1<sup>ST</sup> RESPONDENT

MAOSA KENGARA MONENA.....2<sup>ND</sup> RESPONDENT

CENTRIC ENERGY CORPORATION.....3<sup>RD</sup> RESPONDENT

INTERSTATE PETROLEUM  
COMPANY LIMITED.....4<sup>TH</sup> RESPONDENT

*(An Application to strike out the Notice of Appeal lodged by the 1<sup>st</sup> respondent on  
21<sup>st</sup> July 2015, in the intended appeal against the Judgment and order of  
Kimondo, J, dated 2<sup>nd</sup> July 2015 and delivered in the High Court of Kenya at  
Eldoret,*

in

*Winding Up Cause No. 1 of 2014  
(formally Winding Up Cause No 1 of 2012 Kitale)*

\*\*\*\*\*

RULING OF THE COURT

The applicants' Notice of Motion dated 17<sup>th</sup> September 2015 seeks to strike out the 1<sup>st</sup> respondent's Notice of Appeal dated 21<sup>st</sup> July 2015 and

filed in court on the same day. The application is supported by an affidavit sworn by Faith Macharia- Okaalo, learned counsel for the applicants.

In the affidavit, *Ms. Okaalo* avers that the judgment of the High Court was delivered on 2<sup>nd</sup> July 2015 wherein the High Court ordered the Winding Up of Interstate Petroleum Company Limited, the 4<sup>th</sup> respondent. That on 21<sup>st</sup> July 2015 the 1<sup>st</sup> respondent filed a Notice of Appeal well after the 14 days period specified by the *rule 75* of this Court's rules. She further avers that a copy of the Notice of Appeal was served on the applicants on 31<sup>st</sup> August 2015 well after the mandatory 7 days period specified by the rules, and that no application had been filed by the 1<sup>st</sup> respondent to extend the period for filing and service of the Notice of Appeal on the applicants.

Furthermore it is averred that the 1<sup>st</sup> respondent had also neglected to serve the Notice of Appeal on other affected parties namely, *Eric Patrick Adero Obat, Moses Ombonyo Onyango and Lucy Muthoni Gatimu (the affected parties)*, and that he had also failed to file an application to obtain an order dispensing with service on the named affected parties.

In a replying affidavit dated 7<sup>th</sup> December 2015, the 1<sup>st</sup> respondent described the delay in filing and serving the Notice of Appeal on the applicants as a regretful slip on his part which was in any event curable under *Article 159 (2) (d)* of the *Constitution*; that the delay would not

occasion any prejudice to the applicants or the affected parties in any event did not appear in the High Court during the hearings.

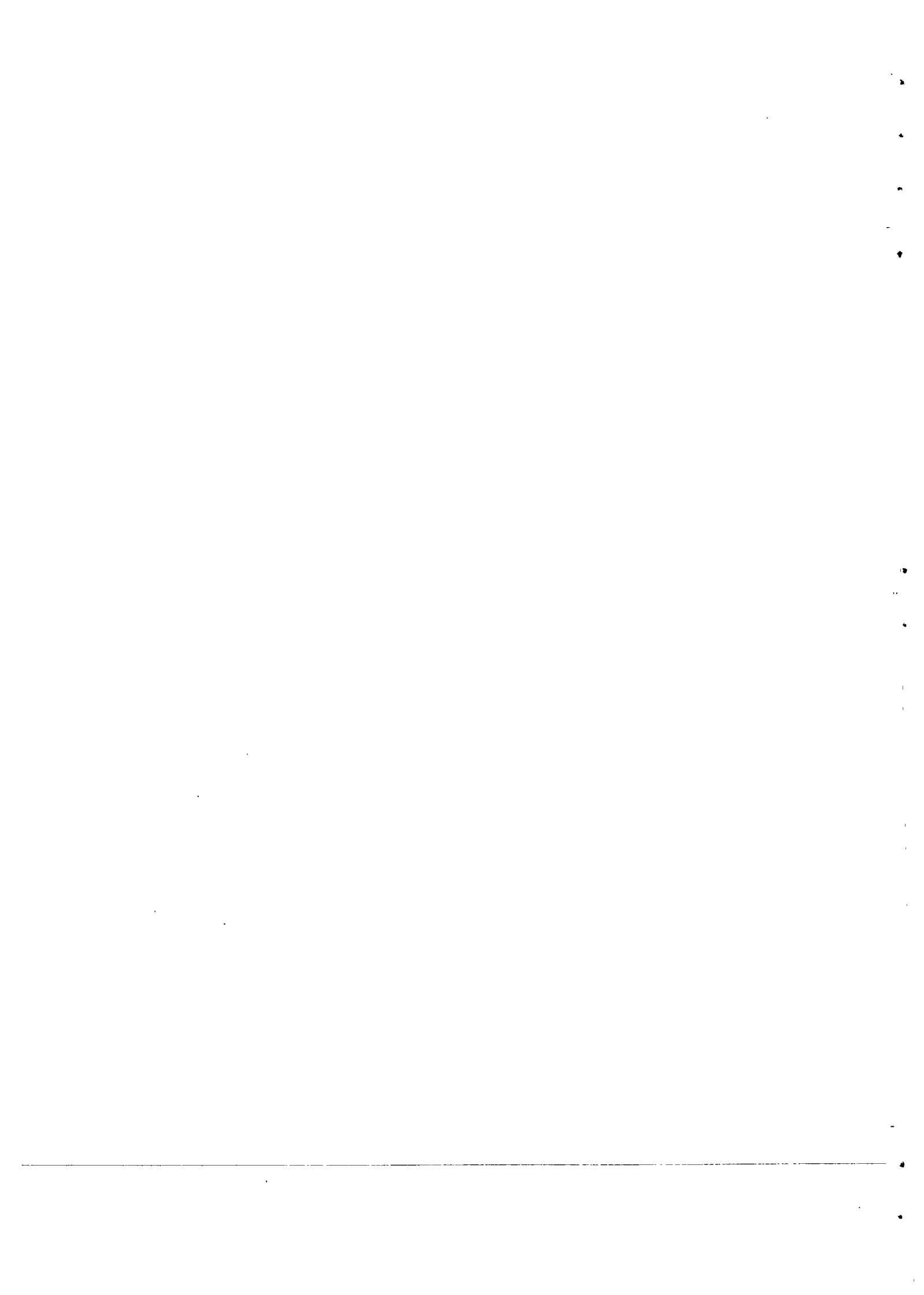
The 1<sup>st</sup> respondent also filed grounds of opposition which state that the applicants Notice of Motion violated *section 3A and 3B* of the *Appellate Jurisdictions Act*, *section 5* of the *Oaths and Declarations Act*, *sections 9, 11, 12, 24, 34 and 55* of the *Advocates Act*, *sections 1A and 1B* of the *Civil Procedure Act* and *sections 17 to 19, 43-47 and 107-109* of the *Evidence Act*. This was for reasons that Anjarwalla & Khanna Advocates allegedly lacked ostensible legal authority and the locus standii to draw and sign the Notice of Motion. As a result it was incurably and irredeemably defective and incompetent, bad in law, an abuse of the court process, frivolous, oppressive, and scandalous *ab initio*; further, that the Notice of Motion approbates and reprobates on the question of whether the service of the Notice of Appeal was upon all parties affected by the intended appeal, yet some parties were not served with a hearing notice in the High Court at Eldoret.

The 1<sup>st</sup> respondent also complains that no proof had been tendered on whether legal and ostensible authority had been donated to Faith Macharia-Okaalo to swear the affidavit of 17<sup>th</sup> September 2015 on behalf of the firm of advocates, or whether Alice Jonathan Gulenywa complied with the requirements of *sections 9, 11, 12, 24, 34 and 55* of the *Advocates Act* to make and commission the affidavit.

It was further contended that the Constitution of Kenya excludes Saturdays and Sundays as working days, and that *Article 159 (2)(d)* of the Constitution enjoins courts to dispense substantive justice. The 1<sup>st</sup> respondent took the view that the 7 days period set out in the rules was short oppressive and untenable, but that in any event the delay in effecting service on the applicants was not inordinately long.

In her submissions, *Ms. Okaalo* reiterated the averments in her submissions and to support her position she relied on *Ransa Company Limited & 2 others vs Manca Francesco [2015] eKLR; Turkana Drilling Consortium (K) Limited vs Interstate Petroleum Company Limited Civil Application No. 21 of 2011* and *Afri Co-operative Society vs Uganda Railway Corporation [2002] EA*. Counsel concluded by urging the Court to find that the 1<sup>st</sup> respondent's Notice of Appeal was incompetent and to strike it out.

*Edward Kings Onyancha Maina*, the 1<sup>st</sup> respondent who was in person, opposed the application and submitted that this Court had no jurisdiction to entertain the application that did not disclose the name of the law firm, and that the person that filed it was unqualified. Mr. Maina further submitted that the affidavit sworn by the applicants' counsel offends *section 107 to 109* of the *Evidence Act* since nothing was filed to prove that Ms. Okaala was authorised to swear the affidavit on their behalf. Another complaint was that, the applicants had misinterpreted the provisions on computation of



time to include Saturdays and Sundays, which days ought to have been excluded, with the result that the filing and service of the Notice of Appeal would be deemed to have been within the timeframes stipulated. Finally, that nothing had been produced by any of the affected parties to show that they had not been served.

On his part *Mr. Z Moku* adopted the submission of the 1<sup>st</sup> respondent but further added that *sections 3A and 3B* of the *Appellate Jurisdiction Act* donated wide discretion to the Court to grant a party an opportunity to be heard, and if granted, the party would be placed in a position to regularize a misstep or an omission. Counsel posited that appeals such as this should be decided on merit and not on technicalities, particularly as the matter is of national importance. The Court should recognize that striking out the Notice of Appeal would be counter productive as the 1<sup>st</sup> respondent will simply resort to filing an application to reinstate the appeal, which would be a waste of the Court's time.

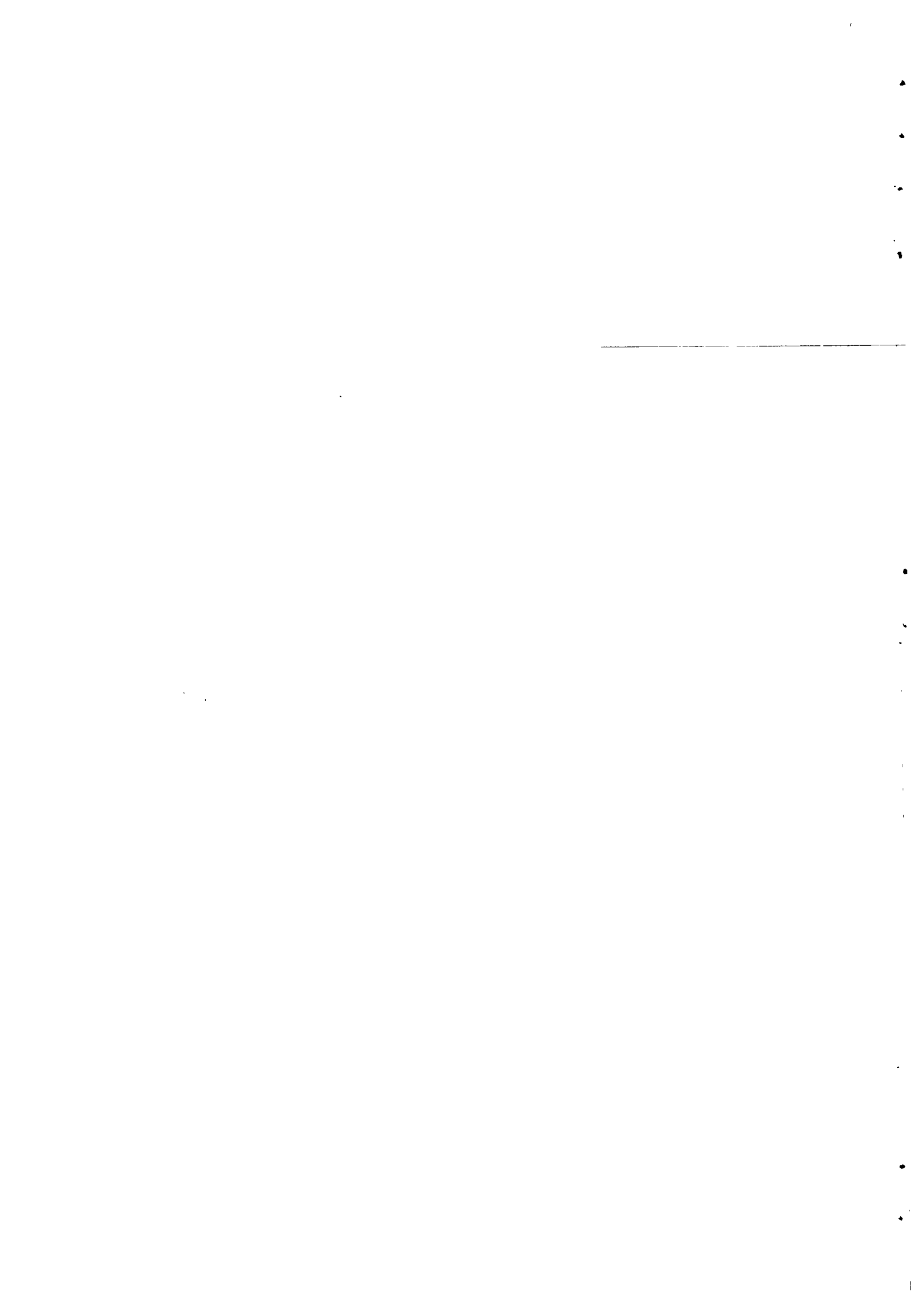
We have considered the application and the parties' submissions and will begin by addressing Mr. Maina's concerns contention that the application was incompetent on account of its having been filed by unqualified persons as required by *sections 9, 11, 12, 24, 34, and 55* of the *Advocates Act* and *sections 107 to 109* of the *Evidence Act*.

*Sections 34 and 35 of the Advocates Act* are the relevant provisions, and are concerned with the drawing up of proceedings by unqualified persons, and also provide that the documents relating to the proceedings should bear the names of the drawer, while *sections 107 to 109 of the Evidence Act* places the burden of proof on the person alleging the existence of facts.

The Notice of Motion is clearly signed by Anjawalla & Khanna Advocates who state that they are the advocates for the applicants. Having alleged that the firm of Anjawalla & Khanna Advocates were unqualified, it was incumbent upon Mr. Maina to place before this Court evidence to prove that allegation but he did not. Mr. Maina has also not proved that Ms. Okaalo, an advocate of the High Court of Kenya practicing with Anjarwalla & Khanna Advocates, who swore the affidavit in support of the application was not qualified to do so. In the circumstances, that ground of opposition falls.

On the question that the applicants miscalculated the computation of the period for filing of the Notice of Appeal by including Saturdays and Sundays, *rule 3* of this Court's rules only excludes Sundays and public holidays, and only when they fall on the last day of the stipulated period. It reads;

*“(a) a period of days from the happening of an event or the doing of any act or thing shall be deemed to be exclusive of the day in which the event happens or that act or thing is done;*



*(b) if the last day of the period is a Sunday or a public holiday (which days are in this rule referred to as excluded days) the period shall include the next following day, not being an excluded day;*

*(c)...”.*

In the circumstances, we find that the 1<sup>st</sup> respondent incorrectly construed *rule 3* of this Court's rules.

Finally, on the issue that no evidence was produced by any of the affected parties to show that they had not been served, since the onus was upon the 1<sup>st</sup> respondent to show that the affected parties had indeed been served, which he has not done, then, we must accede to the applicants' averments regarding the failure to serve the affected parties.

Returning to the merits of this application, it is the applicants' contention that the 1<sup>st</sup> respondent flouted *rules 42, 75, and 77* of the *Court of Appeal rules*. *Rule 75* of this Court's rules provides that the Notice of Appeal shall be filed within 14 days of the decision that is appealed against.

*Rule 77 (1) “An intended appellant” ... to “serve copies”... of the notice of appeal ... “on all persons directly affected by the appeal.”*

*Rule 84* further stipulates:

*“A person affected by an appeal may at any time, either before or after the institution of the appeal, apply to the Court to strike out the notice or the appeal, as the case may be, on the ground that no appeal lies or that some essential step in the proceedings has not been taken or has not been taken within the prescribed time.*

*Provided that an application to strike out a notice of appeal or an appeal shall not be brought after the expiry of thirty days from the date of service of the notice of appeal or record of appeal as the case may be”.*

The Notice of Appeal in this case was lodged on 21<sup>st</sup> July 2015 which was 18 days after the judgment was delivered. That contravened *Rule 75*. A copy of the Notice of Appeal ought to have been served on the applicants within 7 days after it was lodged in court, but was not served on them until 31<sup>st</sup> August 2015, which was a delay of 34 days. That also contravened *Rule 77 (1) of the said Rules*.

The Notice of Appeal was also not served upon on all the affected parties and yet no leave was obtained to dispense with service upon any party. These are fatal omissions which both Mr. Maina and Mr. Mokuia would like to wish away under *Article 159(2)(d)* of the *Constitution* and *sections 3A and 3B* of the *Appellate Jurisdiction Act* as mere technicalities. *Article 159(2)(d)* cannot be invoked to oust mandatory rules of procedure. And as this Court stated in *Hunter Trading Company Ltd vs. Elf Oil Kenya Limited, Civil Application No. Nai. 6 of 2010*, “*If improperly invoked, the “0<sub>2</sub> principle” [sections 3A and 3B of the Appellate Jurisdiction Act] could easily become an unruly horse.*”

For these reasons, we find that the 1<sup>st</sup> respondent omitted essential and mandatory steps in his attempt to appeal in this matter Accordingly we allow the Notice of Motion dated 17<sup>th</sup> September 2015 with the result that the Notice of Appeal lodged on 21<sup>st</sup> July 2015 is hereby struck out with costs to the applicants.

It is so ordered.

*DATED and delivered at Kisumu this 21<sup>st</sup> day of April, 2016.*

**D. K. MARAGA**

.....  
**JUDGE OF APPEAL**

**S. GATEMBU KAIRU, FCIarb**

.....  
**JUDGE OF APPEAL**

**A. K. MURGOR**

.....  
**JUDGE OF APPEAL**



I certify that this is a true  
copy of the original

**DEPUTY REGISTRAR**

A handwritten signature in black ink, consisting of several overlapping loops and curves, is written over the printed name of the Deputy Registrar.

Jaof1973@yahoo.com

IN THE COURT OF APPEAL  
AT ELDORET

(CORAM: MARAGA, GATEMBU, & MURGOR, JJA.)

CIVIL APPLICATION NO. 51 OF 2015

BETWEEN

AFRICA OIL TURKANA LIMITED.....1<sup>ST</sup> APPLICANT  
AFRICA OIL KENYA BV.....2<sup>ND</sup> APPLICANT  
AFRICA OIL CORPORATION.....3<sup>RD</sup> APPLICANT

AND

MAOSA KENGARA MONENA .....1<sup>ST</sup> RESPONDENT  
EDWARD KINGS ONYANCHA MAINA.....2<sup>ND</sup> RESPONDENT  
CENTRIC ENERGY CORPORATION.....3<sup>RD</sup> RESPONDENT  
INTERSTATE PETROLEUM  
COMPANY LIMITED.....4<sup>TH</sup> RESPONDENT

*(An Application to strike out Notice of Appeal lodged by the 1<sup>st</sup> respondent on 21<sup>st</sup> July 2015, in the intended appeal against the Judgment and order of Kimondo, J, dated 2<sup>nd</sup> July 2015 and delivered in the High Court of Kenya at Eldoret,*

in  
*Winding Up Cause No. 1 of 2014*  
*(formally Winding Up Cause No 1 of 2012 Kitale)*

\*\*\*\*\*

RULING OF THE COURT

This application arises from the same judgment as *Civil Application No. 50 of 2015*. The parties are the same, the averments by the parties who appeared were the same, as were their submissions, save that the 1<sup>st</sup> respondent in this instance is, Maosa Kengara Monena who despite having been served did not appear in Court.

Given these circumstances, the parties consented to adopt the submissions made in *Civil Application No. 50 of 2015* for the purposes of this application, and for this reason we did not consider it necessary to write two different rulings.

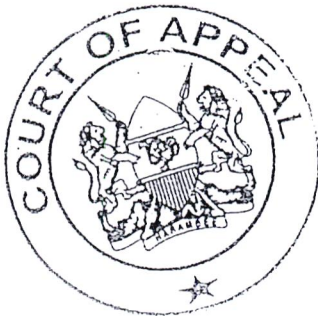
Accordingly, the ruling we have just delivered in *Civil Application No. 50 of 2015* applies *mutatis mutandis* to this application with the end result that the applicants' Notice of Motion herein dated 17<sup>th</sup> September 2015 is similarly allowed, and the Notice of Appeal lodged on 21<sup>st</sup> July 2015 is struck out with costs to the applicants.

It is so ordered.

*DATED and delivered at Kisumu this 21<sup>st</sup> day of April, 2016.*

**D. K. MARAGA**

.....  
**JUDGE OF APPEAL**



**S. GATEMBU KAIRU, FCI Arb**

.....  
**JUDGE OF APPEAL**

**A. K. MURGOR**

.....  
**JUDGE OF APPEAL**


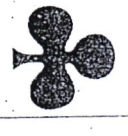
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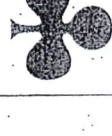
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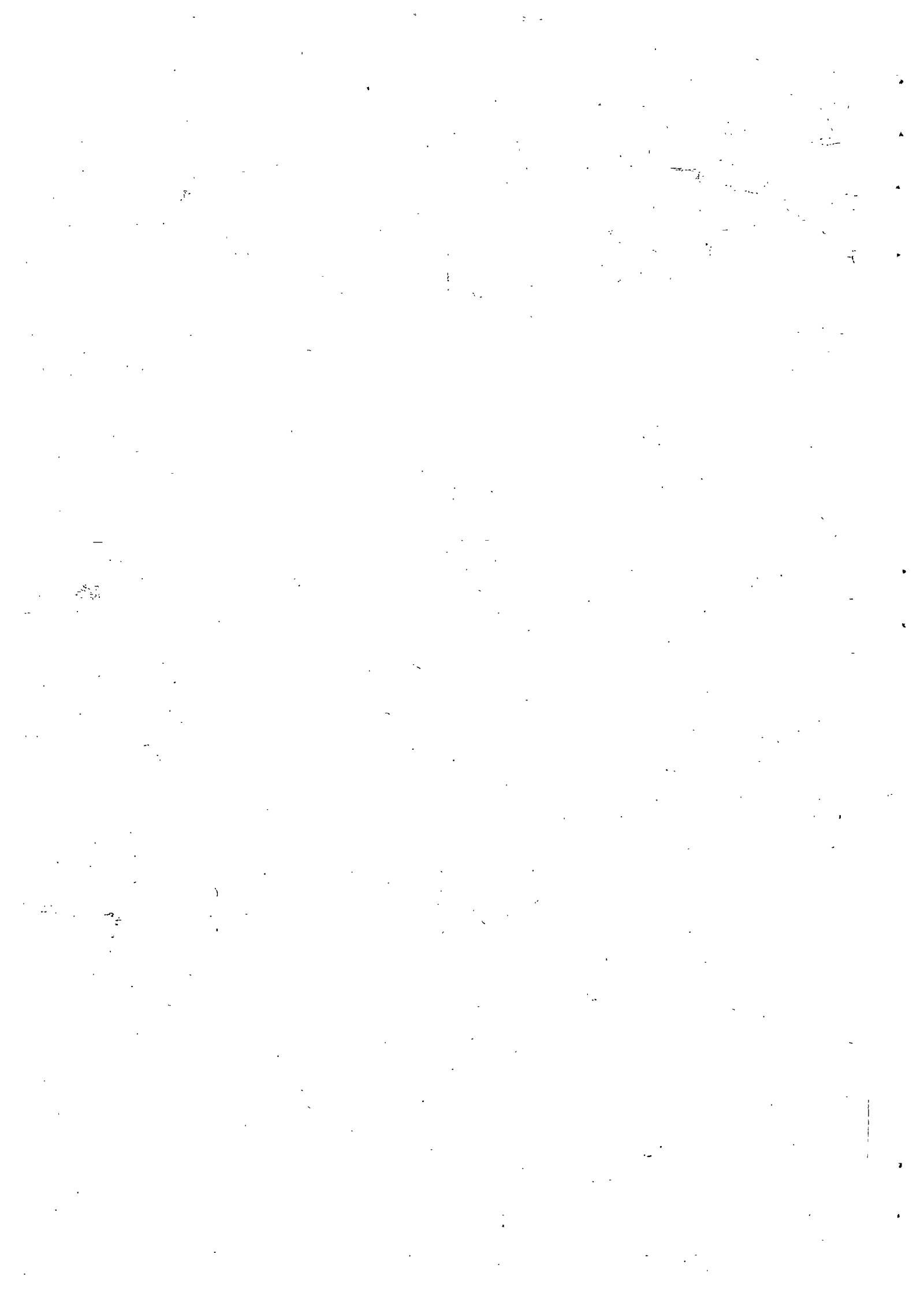
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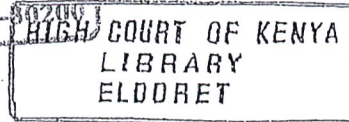
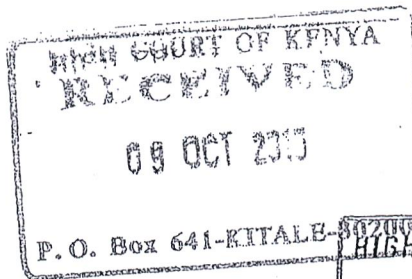
# 2015

# AUGUST

SUN	MON	TUE	WED	THU	FRI	SAT
			1	2	3	<del>4</del>
<del>5</del>	6	7	8	9	10	<del>11</del>
<del>12</del>	13	14	15	<del>16</del>	17	<del>18</del>
<del>19</del>	20	<del>21</del>	22	<u>23</u>	24	25
26	27	28	29	30	31	

SUN	MON	TUE	WED	THU	FRI	SAT
30	31					1
2	3	4	5	6	7	8
9	10	11	12	13	14	15
16	17	18	19	20	21	22
23	24	25	26	27	28	29





REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT ELDORET

WINDING UP CAUSE NO. 1 OF 2014

*RE* INTERSTATE PETROLEUM COMPANY LIMITED

**JUDGMENT**

1. A petition to wind up Interstate Petroleum Company Limited (hereafter *the company*) has been presented by Africa Oil Corporation (hereafter *the 1<sup>st</sup> petitioner*), Africa Oil Turkana Limited (formerly known as Turkana Drilling Consortium Kenya Limited, hereafter *the 2<sup>nd</sup> petitioner*) and Africa Oil Kenya B.V. (formerly known as Lundin Kenya B.V., hereafter *the 3<sup>d</sup> petitioner*). The petition is dated 2<sup>nd</sup> April 2012. It is predicated upon sections 218, 219 (e) and 220 of the Companies Act.
2. The gravamen of the petition is that the company is insolvent and unable to meet its debts; and, that it is just and equitable that it be wound up. The petitioners claim that the company is indebted to them in the sum of Kshs 4,915,221. The debt arises from costs awarded by the High Court at Kitale. A certificate of costs dated 7<sup>th</sup> June 2011 is exhibited. A formal notice was delivered at the registered offices of the company on 22<sup>nd</sup> June 2011.
3. It is pleaded that a period of more than three weeks has elapsed; and,

that no payment is forthcoming. Those matters are set out at length in the petition and confirmed in the verifying affidavits of Keith Hill and James Phillips, directors of the 1<sup>st</sup> to 3<sup>rd</sup> petitioners respectively sworn on 9<sup>th</sup> May 2012.

4. The petition is contested by the company. Learned counsel for the company Mr. Mokuia conceded that the company has not filed any formal response to the petition. The primary opposition to the petition has been from the contributories, and in particular, the 5<sup>th</sup> Contributory, Edward Kings Maina. The latter has filed grounds of opposition dated 27<sup>th</sup> July 2014 and a detailed affidavit sworn on 4<sup>th</sup> August 2014. There is another affidavit by the same deponent sworn on 21<sup>st</sup> October 2014. In a nutshell, he avers that the petitioners lack standing to present the petition, that the debt is disputed, that there are separate proceedings to impeach the decree giving rise to the debt, and, that the entire petition is actuated by bad faith and is incompetent.

5. A supporting creditor, number 0903658 B.C. Limited (formerly known as Centric Energy Corporation) supported the winding up proceedings. It has filed a deposition sworn by Donald Mahaga on 18<sup>th</sup> May 2015 and a list and bundle of documents dated 4<sup>th</sup> December 2014. The supporting

creditor avers that the company owes it costs of Kshs 4,339,423 arising out of a decree in Kitale High Court JR 30 of 2010. A copy of the certificate of costs and the demand against the company are annexed.

6. The petitioners filed three bundles of documents or lists of authorities dated 14<sup>th</sup> January 2014, 18<sup>th</sup> November 2014 and 25<sup>th</sup> May 2015. The 5<sup>th</sup> contributory filed two sets of authorities dated 21<sup>st</sup> October 2014 and 1<sup>st</sup> December 2014. On 26<sup>th</sup> May 2015, I heard oral submissions from the learned counsel for the petitioners and the supporting creditor. I also granted leave to the 5<sup>th</sup> contributory to address the court. For the record, the 5<sup>th</sup> contributory had filed a notice to act in person dated 31<sup>st</sup> July 2014. I have considered the application, depositions, and the rival submissions.
7. The legal parameters in a matter of this nature are well settled. Section 218 confers jurisdiction upon the High Court to wind up any company registered in Kenya. Under section 219 (e) and (f), a company may be wound up if it is unable to pay its debts; or the court forms the opinion that it is just and equitable that it be wound up.
8. Section 220 defines when a company is deemed to be unable to pay its debts. The debt must exceed *Kshs 1,000*; Demand has to be served at

the registered office of the company for a period of *three weeks*; and, the company fails to *secure, compound or pay the debt* or to offer a satisfactory explanation to the creditor. When those conditions are met, the company is *deemed* to be *unable* to meet its debts. See Re Azetiland Consultants Limited, Nairobi, Winding Up Cause 14 of 2007 [2009] eKLR.

9. The petitioners must thus show there is a debt that has remained unpaid for three weeks of the notice. If as urged by the company or contributory that the debt is disputed, the company has to demonstrate that the dispute is *substantial* and *bona fide*. See *Halsbury's laws of England*, Vol. 7 (3), 4<sup>th</sup> Edition, 2004 (Reissue) paragraph 452. A winding up order shall not be granted where the company disputes it in good faith. The court must be satisfied that the dispute is based on substantial grounds. See also Re Tanganyika Produce Agency [1957] E.A. 241, Re Ghelani Impex Limited [1975] E.A. 197. The latter decision is also good authority for the following proposition: it is not improper or oppressive for a judgement debtor to pursue winding up of the company while pursuing other alternative remedies. Re Ghelani Impex Limited, *supra*, at 199. The only caveat would seem to be the requirement of

three weeks' notice; and, the equitable jurisdiction conferred by section 219 (e). So much so that if it would be unjust to the company or creditors, the court may decline winding up the company. See Re Wildlife Shop Limited, Nairobi, winding Up Cause 23 of 1981 [1981] eKLR, Re Garnets Mining Co Ltd [1978] KLR 224.

10. Applying the above principles to the present case, I find as follows. I have read the ruling of Koome J (as she then was) in Kitale, High Court JR 30 of 2010. The ruling is annexed to the deposition of Kings Maina sworn on 4<sup>th</sup> August 2014. The company was the *ex parte* applicant. It sued the Permanent Secretary Ministry of Energy and five interested parties. They were, Turkana Drilling Company Limited; Lundin Kenya Limited; Africa Oil Corporation; Platform Resources Inc; and, Centric Imaging Inc. On 16<sup>th</sup> December 2010, the application was dismissed with costs to the respondent and the five interested parties.

11. I am satisfied that the three petitioners were some of the interested parties. They are Africa Oil Corporation (*the 1<sup>st</sup> petitioner*), Africa Oil Turkana Limited (formerly known as Turkana Drilling Consortium Kenya Limited, *the 2<sup>nd</sup> petitioner*) and Africa Oil Kenya B.V. (formerly known as Lundin Kenya B.V., *the 3<sup>d</sup> petitioner*). The 5<sup>th</sup> contributory submitted that

the current petitioners are *not* the ones who were awarded costs in the judicial review application. I think that is a red herring. I have studied the earlier affidavit of Donald Mahaga sworn on 8<sup>th</sup> March 2013. Turkana Drilling Consortium (K) Limited was incorporated on 13<sup>th</sup> April 2007. I have then seen the certificate of its change of name to Africa Oil Turkana Limited dated 21<sup>st</sup> October 2009. Lundin Kenya B.V. on the other hand was incorporated on 26<sup>th</sup> November 2007. It changed its name to Africa oil Kenya B.V as per the confirmation by the registrar of Companies dated 8<sup>th</sup> July 2009.

**12.** I thus find that the petitioners have standing to present the petition. The petition is verified by the two affidavits of Keith Hill and James Phillips as required by Rule 25 of the Companies (winding Up) Rules. From the affidavit of service of Peter Orwaru sworn on 25<sup>th</sup> June 2012, the petition was served on the company. The petition was advertised in the Kenya Gazette and one national newspaper. The relevant fees were paid to the Official Receiver. I am unable to hold that the petition as drawn and filed offends the Companies Act or Rules or that it is incompetent.

**13.** The petitioners had filed a single bill of costs. In a ruling delivered on

10<sup>th</sup> January 2011, the costs were taxed at Kshs 4, 915, 221. I have seen the certificate of costs dated 7<sup>th</sup> June 2011. Mr. Kings Maina submitted that the certificate of costs is not a decree; and that the petitioners should have moved the court under section 51 of the Advocates Act for entry of judgment on the taxed costs. I disagree. The costs awarded here were *party and party costs*, not advocate-client costs. Section 51 of the Advocates Act is thus inapplicable. The certificate for the party and party costs was for all intents and purposes a decree.

14. Like I stated earlier, the company has not filed any reply to the petition. There has been *no* appeal or application to set aside the certificate of costs in favour of the *three petitioners*. To be fair to the 5<sup>th</sup> contributory, ~~there would seem to be proceedings to set aside the~~ certificate of costs awarded to the *supporting creditor*. So much so that at the moment, there is *no* order staying the costs to the petitioner.

15. Although a tome of materials have been placed before the court, this petition turns on a very simple matter. The debt in this case exceeds Kshs 1,000. It is a debt of Kshs 4, 915, 221 due from the company to the petitioners. A formal demand of payment was made on the company

on 22<sup>nd</sup> June 2011 as more particularly pleaded at paragraph 6 of the petition. More than three weeks have expired since the delivery of the notice. The company has not met the debt, secured it or compounded it; or, made a reasonable explanation to the creditors. I have reached the inescapable conclusion that the company is unable to pay its debts as defined by section 220 of the Companies Act.

16. The only other key question is whether the debt is disputed on *bona fide* and *substantial* grounds. For starters, the company never filed a reply. The company has not shown any effort or capacity to meet the debt in good faith. The reply by the 5<sup>th</sup> contributory and by Mr. Mokuu, learned counsel for the company, is six-pronged: first, that the company has rights to exploration of crude oil reserves of 9.36 billion barrels in the disputed blocks 10BA, 10BB, 12A and 13T; secondly, that the petitioners have not sought to execute the decree in any other manner; thirdly, that the costs are being challenged separately before the Deputy Registrar and in Eldoret Civil Appeal 14 of 2015; fourthly, that the affidavit in support of the petition on behalf of Africa Oil Corporation is defective; fifthly, that the petition is *res judicata*; and , lastly, that the petition is not brought in good faith but meant to achieve a collateral

purpose.

17. There are three petitioners here. I have dealt at length with their identities, change of name and capacity to bring these proceedings. Rule 25 of the Companies (winding Up) Rules requires that every petition be verified by an affidavit of the petitioner, and if there be *more* than one petitioner, by an affidavit by *one* of the petitioners. In this case, I have found the petition is properly before the court. As I have stated, all the petitioners filed a single bill of costs for the *party and party costs*. The debt in question is owed to the three petitioners. The company or the 5<sup>th</sup> contributory have not shown that they have assets to meet the debt or that they have made efforts to repay the debt. The oil reserves or exploration rights referred to may well exceed the value of the debt now due. But it is not lost on me that the exploration rights over those oil blocks were the subject of the judicial review proceedings. The company lost in those proceedings at the High Court in Kitale. The appeal to the Court of Appeal ran into headwinds. The notice of appeal was struck out. A motion for stay of execution of the High Court decision was dismissed by the Court of Appeal on 20<sup>th</sup> September 2013. That is clear from the annexure marked *EKOM6* in Mr. Maina's affidavit of 21<sup>st</sup>

October 2014. It is true that the petitioners had lodged another petition for winding up on 14<sup>th</sup> October 2011. The petition was struck out on 15<sup>th</sup> February 2012. The main reason was that it had not been properly executed. That did not preclude the filing of the present petition or make this petition incompetent. I am unable to say the matter is *res judicata*.

18. The definition of *inability* to pay a debt under section 220 of the Companies Act is narrow and pointed. The point is that the company has not shown *substantial* or *bona fide* grounds disputing the debt. The onus to prove those matters fell squarely on the shoulders of the company. I stated that there has been *no* appeal or application to set aside the certificate of costs in favour of the *three petitioners*. The petitioners' counsel was categorical that the petitioners have not been served with any appeal. The proceedings before the Deputy Registrar referred to by the company and the 5<sup>th</sup> contributory are to set aside the certificate of costs awarded to the *supporting creditor* who was the 5<sup>th</sup> interested party in the proceedings at Kitale High Court. That was the subject of a *separate* bill of costs and certificate of costs.

19. True, the petitioners have other remedies in execution of the decree.

But they have a right to pursue the present action. It is not improper or oppressive for the creditor to pursue winding up of the company while pursuing other alternative remedies. *Re Ghelani Impex Limited*, [1975] E.A 197 at 199. The only caveat is the requirement of three weeks' notice; and, the equitable jurisdiction conferred by section 219 (f). The notice was delivered. I have no cogent evidence that the petitioners are acting in bad faith or intend to achieve a collateral purpose. I am then not satisfied that it would be unjust to the company or creditors to wind up the company in this case. See *Re Wildlife Shop Limited*, Nairobi, winding Up Cause 23 of 1981 [1981] eKLR, *Re Garnets Mining Co Ltd* [1978] KLR 224.

20. The upshot is that the petition is allowed. The company is wound up ~~for inability to pay its debts under section 219 (e) of the Companies Act.~~

I appoint the Official Receiver as the provisional liquidator. The costs of the petition shall be paid from the assets of the company.

It is so ordered.

**DATED, SIGNED and DELIVERED** at **ELDORET** this 2<sup>nd</sup> day of July 2015

**GEORGE KANYI KIMONDO**  
**JUDGE**

*Judgment read in open court in the presence of:*

Ms. F. Macharia for the petitioners instructed by Anjarwalla & Khanna Advocates.

Mr. Z. Mokuu (Absent) for the company.

Mr. Edward Kings Maina (in person) for the 5<sup>th</sup> contributory.

Ms. Ruto for Mr. Leshan for the supporting creditor instructed by Daly & Figgis Advocates.

Mr. J. Kemboi, Court clerk.

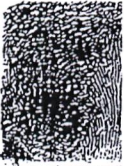


FULL NAMES

EDWARD KINGS ONYANCHA MAINA



DATE OF BIRTH: 15-08-1944  
SEX: MALE  
DISTRICT OF BIRTH: KISII  
PLACE OF ISSUE: MUNICIPALITY  
DATE OF ISSUE: 23-01-1996  
HOLDER'S SIGN: [Signature]



IEBC Acknowledgement Slip

JAMHURI YA KENYA  
REPUBLIC OF KENYA

Elector's No: 001826121221108-8

Elector's Full Names: MAINA  
EDWARD KINGS ONYANCHA

ID / Passport No: 0472450

Registration Centre: MAINA NGINA PR

Polling Station: \_\_\_\_\_

Assembly Ward: SHABAB

Constituency: NAKURU TOWN WEST

County: NAKURU

GPK No: 000 9679878

national

Fresh feuds hit Luo Council of Elders

Leo Omolo Odera

Fresh wrangles have erupted once again in the Luo Council of Elders. This time round, the council chairperson, Mzee Willis Otondi, is said not to be the officially registered council chairman.

The revelation was made in Kisumu city by one of the council members, Mzee Walter Adel who displayed the registrar's office list from in Nairobi, which states inter alia that the de facto chairperson is Mzee Calvins Odoyo from Subaland and not Otondi.

Adel immediately unleashed scathing attacks on Otondi whom he accused of mixing up the activities of the council with the ODM politics. He said the two organisations are different entities with two different sets of constitutions, and cannot therefore be mixed up.

Mzee Adel disclosed that he is contemplating instituting legal action against Otondi for reporting to be the leader of the Council of Elders and yet, he knew it pretty well that his team's registration was cancelled and replaced in June 2015.

Adel claimed that concern has been raised following the recent series of high profile ceremonies in which Otondi has been conducting the installation and anointment of a section of council leaders in various locations.

One such ceremony was held in Nyakach where Mzee Omolo Manyala, now deceased, was anointed and installed by Otondi as the leader of Nyakach Council of Elders. The second such ceremony took place in Seme constituency where Mzee Omoso Wasonga was installed as council leader. All these installations are illegal because the council constitution explains explicitly that there will always be one Ker chairman for the whole organisation.

In both ceremonies, Cord leader Raila Odinga was in attendance and even addressed the guests, and so were some of the Luo MPs and party operatives. He said there were qualms with Raila attending a public function and addressing it, adding that this should be in a different forum but one Luo Council of Elders. The Luo Council of Elders is a welfare society which is non-political and the two cannot be mixed together as one entity unless some people are out to confuse the Luo people to the last point," Mzee Adel.

His activities are likely to cause the council serious problems with the law reinforcement officers and the government.

He said Otiendo's team was registered in January 2010 following the politically motivated removal of the former chairman, the late Mzee Meshack Ogalo following his disagreement with Raila and ODM leaders. The late Ogalo quickly moved to the High Court which quashed his removal and termed it as illegal and unconstitutional and issued an order that the status quo remain.

It was at this time when the new team headed by Calvins Arikio was registered at the registrar of the registrar of societies on June 9 2015.

Justice Maraga not out of the woods yet

James Mwembi

A Nakuru businessman is contemplating challenging Justice David Maraga's selection for the Chief Justice position.

Edward Maina has vowed to table his argument against Justice Maraga before the parliament's justice and legal committee during its deliberations.

According to Maina, Justice Maraga made a ruling on a case in Kisumu that seemed to have favoured a foreign entity against his oil firm company.

He says Justice Maraga on April 21 this year at Kisumu struck out the notice of appeal lodged at Eldoret Court of Appeal on the basis that it was not lodged within the 14 days period allowed.

In the dispute between Maina's Interstate Petroleum Company Limited and three other foreign companies, Maina claims that Justice Maraga in his ruling over the notice of appeal favoured his

opponents.

The Nakuru businessman says that the 14 days period from July 3 2015 lapsed on July 22 2015 while the three companies say the 14 days period ended on July 17 the same year as sustained by the three-judge bench led by Maraga in Kisumu.

In his ruling, Justice Maraga had indicated that Saturdays and Sundays were included in calculating the 14 days period and therefore being the reason according to Justice Maraga of striking out Maina's notice of appeal under technicality.

Maina on his side maintains that all state offices in the country are closed on both Saturdays and Sundays hence the judge should not have ignored his argument before the court.

He says even during Justice Maraga's interview for the chief justice post, he said he would not be working on Saturdays adding that Article 9 and 10 of the constitution, Saturday and Sunday are not



Maina



Maraga

working days in the country.

Maina further argues that by so doing, Justice Maraga is already known to have abused the same constitution by not working on Saturdays.

"Justice Maraga gave away my economic right by striking out my notice of appeal in violation of article 40 of the constitution," argues Maina.

He adds that the presumed incoming Chief Justice violated the very constitution he will be sworn under to managing the judiciary.

In the particular case, Maina was defending a suit that the three companies had filed in Eldoret High Court seeking to dissolve Interstate Petroleum Company.

They wanted to dissolve Interstate Petroleum Company allegedly for being unable to pay them over Sh14.7 million. Maina's notice of appeal that was struck out by Justice Maraga

led by bench of three judges on April 21 this year was an intended appeal from the judgment and order of Justice GK Kimondo delivered on July 2 2015 against Interstate Petroleum Company in which Kings Maina is a shareholder.

Now Maina says Justice Maraga's integrity is questionable and should not be accorded the lucrative chief justice post.

Maina's grievances comes barely days after also the Ainamo legislator vowed to resist Maraga's elevation to Chief Justice over his late brother's case ruling by the same Justice Maraga.

The MP on his part claims that Justice Maraga had erred when he reduced to manslaughter the murder charges that was leveled against Samuel Moache who allegedly had killed his brother.

Kifwa suspends annual subscription fees for members

Clearing and forwarding industry rocked by stiff competition from multinationals

Our Reporter

Kenya International Freight and Warehousing Association leadership has waved annual renewal subscriptions for its members citing harsh economic conditions that

the industry is facing.

In a notice to members dated September 27 2016, Kifwa Mombasa branch chairman, Jacob Misiko, said all renewal subscriptions for next year have been waived.

"You are therefore requested to submit your files for renewal of customs agents licence direct to chief manager licensing department for processing," said Misiko.

He also told members to disregard an earlier communication in which

Kifwa members were to pay a subscription increment fee of Sh17,000.

Kifwa has also notified the commissioner of customs on the move to wave subscription fees for its members for this financial year.

Other Mombasa Kifwa officials are Judy Kivunzi and Josephat Mwachanya, branch secretary and treasurer respectively, as per a letter dated July 22 2016 signed by an assistant registrar of societies Jacob Ikiara.

Omar and Awiti on collision course for Wiper ticket

Correspondent

The scramble for the Wiper party ticket by two Mombasa leaders eyeing the Mombasa gubernatorial seat in the 2017 elections dominated party leader Kalonzo Musyoka's two-day tour of the coast.

Nyali MP Hezron Awiti and Mombasa senator Hassan Omar who wants to oust incumbent Hassan Joho used the tour to measure each other's political strength.

On the second day of the tour Omar found the going tough during a rally at the Tononoka grounds when the Mombasa senator was invited to run the show by Awiti.

Omar was heckled and booed by rowdy youths who shouted Joho's slogans forcing him to cut short his speech.

At one stage, Omar lost his temper and lashed out at Joho's style of leadership which did not go down well with the crowd.

It took the intervention of Wiper party national chairman David Musila to save the situation and calm down the rowdy crowd.

Omar was seen pleading with Awiti to urge the rowdy youths to stop heckling him.

After the dust settled, Omar was again on the spot when he lashed out at a section of ODM leaders who had demanded Kalonzo to tone down his presidential quest in the next polls.

Minor raped and murdered in Vihiga

James Anzigare

The body of a 14-year-old girl was found in her grandmother's house at Kihillila with her throat having been slit.

The girl whose body had deep cuts and was found lying on the floor of the house by neighbours, is said to be a student at Kidinye Secondary School and lived with her grandmother, Ruth Imari. Joyce Monyani, a neighbour, said the grandmother left the girl alone in the house to attend a funeral.

"Her grandmother left her alone in the house and we suspect the incident happened after heavy downpour in the evening," she said.

The girl has been living with her grandmother since last year and she joined school this year.

"This girl whose parents reside in Kabras, Kakamega county, began living with her grandmother late last year after sitting for her KCPE exams," said Imary.

The area police boss, Alfred Angengo, said the girl's throat was slit with a sharp object and investigations are ongoing.

"At the scene, we found a used condom and the girl's body had deep cuts and we suspect the suspect used a sharp object and we are still investigating the incident to apprehend the culprit," Angengo said.

Area MCA Abdalla Chogo has urged police to conduct thorough investigations and arrest the culprits.

② WASIK Parliament ① D/Committee  
ple bring to the attention of the Committee  
FA 12/10

679

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

-AND-

IN THE MATTER OF THE PUBLIC APPOINTMENTS (PARLIAMENTARY APPROVAL) ACT,  
CAP 136 OF THE LAWS OF KENYA

-AND-

IN THE MATTER OF THE JUDICIAL SERVICE ACT, CAP 185B OF THE LAWS OF KENYA

-AND-

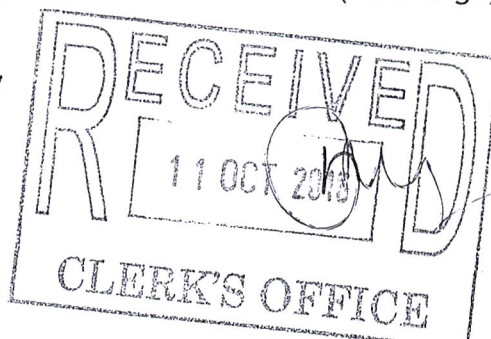
IN THE MATTER OF APPROVAL HEARING OF THE NOMINATION OF HON. MR. JUSTICE  
DAVID KENANI MARAGA, FOR THE POSITION OF THE CHIEF JUSTICE OF THE  
REPUBLIC OF KENYA

TO: THE CLERK OF THE NATIONAL ASSEMBLY  
MAIN PARLIAMENT BUILDINGS  
NAIROBI

STATEMENT BY: BERNARD KIBET SANG (ADVOCATE) AND TOM CHERUIYOT BIEGON

WE, BERNARD KIBET SANG (Advocate) of P.O Box 22944-00100 Nairobi and TOM CHERUIYOT BIEGON of P.O Box 1772-20200 Kericho, make this statement under oath, and state as follows:

1. THAT I, BERNARD KIBET SANG, an Advocate of the High Court of Kenya and a constituent of Ainamoi Constituency, have been retained by the family of the Hon. David Kimutai Too (Deceased) to present this statement on their behalf.
2. THAT I, TOM CHERUIYOT BIEGON, a resident of Ainamoi Constituency, present this statement on the capacity of a resident of Ainamoi Constituency.
3. THAT the nominee for the position of the Chief Justice (CJ), the Hon. Justice Kenani Maraga, is NOT fit to hold the position of the CJ, on the following grounds:
  - (i) The Learned Judge lacks the requisite competence and legal judgement to hold the highest court and office in the Judiciary, for the reasons to be deduced from his decision in the case of Republic -versus- Andrew Mueche Omwenga {2009} eKLR, where the Accused (Omwenga) was



charged with the heinous cold blood murder of the **Hon. David Kimutai Too** and **PC Eunice Chepkwony**. Before his demise, **Hon. David Too**, was the Member of Parliament for Ainamoi Constituency, in the, then, Rift Valley Province (now, Kericho County), while **PC Eunice Chepkwony**, was a Traffic Police Officer at the Eldoret Police Station, and also a resident of the said Ainamoi Constituency. Annexed and Marked 'BT1' is a true copy of the said Judgment.

- (ii) In his judgement, the Learned Judge failed to exercise legal judgement by erroneously reducing the charge of murder to that of manslaughter, stating the Accused was provoked and shot the two deceased in self-defence.
- (iii) The Learned Judge arrived at the conclusion of manslaughter despite agreeing with the evidence of the prosecution that the Accused in possession of a gun went hunting for the deceased in West Indies Eldoret, which clearly showed that the Accused had made up his mind to go after the two Accused with a gun, and which clearly manifested his state of mind (malice aforethought/*mens rea*) to commit the act (*actus reus*) of killing the deceased.
- (iv) In page 3, paragraph 2, of the judgement, the Learned Judge classifies malice aforethought in three, being, **express malice, implied malice and constructive malice**. That express malice is proved when it is shown that an Accused person intended to kill, while implied malice is established when it is shown that he intended to cause grievous bodily harm, and constructive malice is proved when an Accused killed in furtherance of a felony (for example rape or robbery) or when preventing a lawful arrest, even though there was no intention to kill or to cause grievous bodily harm.
- (v) We do agree with the Learned Judge on his finding that constructive malice was not proved. We expected that the Learned would proceed to analyse the remaining categories of malice. However, the Learned Judge seems to do a general analysis of the evidence without pinpointing the evidence to the issues of express or implied malice which were key in determining the state of mind of the Accused. With due respect, we therefore conclude that the judge did not demonstrate competence by not systematically analysing the evidence adduced with the issues of express and implied malice which issues he is the one that raised.

A handwritten signature in black ink, consisting of a large, stylized initial 'O' followed by several loops and a long horizontal stroke extending to the right.

- (vi) Further, the judgement is not well laid out to enable a reader clearly isolate the issues on determination. With due respect, a person aspiring for the highest judicial office ought to demonstrate meticulous organisation of his analysis of legal issues. The judgement is convoluted and leaves readers confused and unable to point out the direction of the judgement. We nonetheless struggled to pick out the issues from the judgement.
- (vii) The judge in reducing the charge from murder to manslaughter held that the Accused was provoked and also acted in self-defence by killing the two Accused. From evaluation of evidence, the Learned Judge also contradicted himself and erroneously agreed with the defence that the Accused was **provoked** and acted in **self-defence**. In reaching at the conclusion of provocation, the Learned Judge erroneously found that there was a love affair between the Accused and the deceased Eunice Chepkwony. In any event, the alleged love affair would not have the cause of the provocation. We say so because:
- (a) As to **provocation**, in page 5, paragraph 3 of the Judgement, the Learned Judge confirms that **most** of the police witnesses denied that the Accused had any love affair with the late PC Eunice.
- (b) The Learned Judge believed the allegation that the provocation arose from the alleged claims by the deceased that the Accused was spreading rumours that the late Eunice had HIV/Aids. How does an allegation of a rumour amount to provocation to the extent of killing, especially when it had been confirmed that the Accused and the late Eunice had taken an HIV Test at the instance of his wife? In our view, the Accused would not be **SO SERIOUSLY** provoked by allegations that he was **SPREADING** disproved rumours.
- (c) The Learned Judge believed the evidence of the Accused that he and the late PC Eunice were lovers in Kiganjo Police College, despite that no independent evidence was given to support the testimony by the Accused.
- (d) The Learned Judge believed the testimony of the Accused that he sold his Matatu KAQ 401 C for K.Shs 300,00 and gave sale proceeds to the late PC Eunice who added to it K.Shs 100,000 and bought the Toyota Carina. This is despite that no evidence was led to show that,

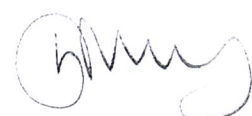
firstly, the Accused owned and sold the matatu KAQ 401C for K.Shs 300,000 and that and he and the late PC Eunice bought the Toyota Karina.

- (e) In respect of **self-defence**, the Learned Judge concludes that the Accused is the one that shot the two deceased and that neither of the deceased shot a single shot at the Accused (see page 8 paragraph 4 of the judgement). Further, the Learned Judge, selectively and with no valid reason chose not to believe the testimony of PW10 (PC Mutisya) and that of PW2 (Eric Igadwa Mbogani), that they saw a pistol on the waist of the late Eunice in clear demonstration that the late Eunice did not train a gun at the Accused to warrant self-defence. Instead, the Learned Judge, without demonstrating any reason for preference, chose to believe the testimony of PW 23, an Investigating Officer (who was not and would not normally be in the scene) that PW 10 and PW 2 recovered the gun at the scene. PW2 **who went crime scene**, in his testimony (see page 6, paragraph 6 of the judgement) clearly demonstrates that the late PC Eunice had a gun strapped on her waist and that there was no other gun on the scene. Why would the Learned Judge have chosen to disregard the testimony of **two** witnesses who went to the scene and found the gun on the waist of the late PC Eunice, but choose to rely on the testimony of one witness who relied on hearsay to conclude that guns were recovered at the scene?
- (f) In page 8, paragraph 1 of the judgement, the Learned Judge seems to believe uncorroborated evidence that the Accused went to the scene and that the two deceased were the first to point guns at the Accused. With due respect, what the Learned Judge is saying is that the Accused who had been pointed a gun at, acted in a 'movie like' swiftness, pulled out his gun and shot TWO people (including a trained gun user) who had already pointed guns at him!!!
- (g) The Learned Judge seems to unprocedurally rely on the 'testimony' of the Advocate for the Accused that Eunice had two guns (see page 8, paragraph 5 of the judgement). This amounts to relying on evidence of from the bar, which is highly irregular. Firstly, Advocates for parties do not normally provide evidence in proceedings and secondly, the said Advocate did not take the witness stand. Otherwise, where did the Learned Judge come up with the phrase, 'I



agree with the Accused's counsel that Eunice had two guns at the scene...'? Where did the Learned Judge come up with the conclusion that the police hid the extra gun that was allegedly in possession of the late Eunice? No testimony to that effect was given by any other witness other than the Advocate for the Accused.

- (h) The learned judge chose to believe what a witness says was told by another witness who also testified in court but did not give any testimony to the effect that the late Eunice had a gun (see page 7, paragraph 4 of the judgement). In other words, the learned judge chose to believe hearsay.
  - (i) The Learned Judge agrees that neither of the deceased fired a single shot (see page 8, paragraph 1). So the question that comes to mind is, whilst the Accused was shooting the late PC Eunice, why wouldn't the late Hon. Too shoot the Accused given that the Learned Judge believed that the two deceased had both whipped out guns? (see page 8, paragraph 3 of the judgement).
  - (j) In an apparent defeatism to his findings, the Learned Judge proceeds to state in the last paragraph of his judgement, "...considering the fact that accused is the one who followed the deceased to West Indies Estate and that neither of the deceased fired even a one shot, I find that Accused should have shot them on the arms or legs to disarm them and not on the head, chest and abdomen as he did. In the circumstance, I find that Accused used excessive force in shooting them on the said spots." This surely is not consistent with the findings that the Accused shot in self-defence, noting that as we had shown, no evidence was given to show that the late PC Eunice whipped out her gun, and further that no testimony was given to show that she had two guns which one may have been used by the late Hon. David Too. As a matter of fact, the late Hon. David Too was high school principal and since he had just been elected to Parliament, in all imaginations, he would **NOT** have had the courage to pick, let alone the skill to use a gun. Importantly, **NO** finger print evidence was adduced to demonstrate that the late Hon. David Too held a gun at the scene.
4. **THAT** usually, when judges deliver judgements, they are not put on the spot to defend their judgements in order to gauge their veracity. However, this Honourable House, through this honourable Committee, has an opportunity to



put the Learned Judge in his defence of the judgement. It is worth pointing out that the cold blood murder of the Hon. David Too happened in the same period with another killing of another legislator, Hon. Mugabe Were, and deaths of Hon. Kipkalya Kones and Hon. Lorna Laboso. In the issue of the killings, the judiciary ought to have risen to the occasion and sent an unequivocal message to the killers that representatives of the people hold a place *sui generis* in society and should be protected by all means.

5. **THAT** the death of the deceased caused a lot of emotionally pain to their families and the habitants of Ainamoi Constituency. Further, upon the murder, there was a lot of civil unrest that led to a number of deaths and property destruction. Thus, the said people had the legitimate expectation that justice would be served.
6. **THAT** out of the Learned Judge's decision, the families of the deceased as well as the constituents of Ainamoi Constituency, felt that justice was not served, and it is on this reason that they are opposed to the appointment of the nominee to the highest court and judicial office of justice. For avoidance of doubt, the late Hon. David Too was overwhelmingly elected by the people of Ainamoi Constituency. We say without any iota of doubt that he was loved by the people.
7. **THAT** the people of Ainamoi, as shown in media reports, do not have faith in Justice Maraga as a judge, let alone as the leader of the highest court and judicial office.
8. **THAT** and given that we have demonstrated that the Learned Judge did not dispense justice, to approve the nomination of the Learned Judge, would be an affront to justice to the families of the two deceased, the people of Ainamoi Constituency where the late Hon. David Too was a representative and the late PC Eunice a resident of Ainamoi, and this Honourable Parliament where the late Hon. David Too was a member.
9. **THAT** we make this statement under oath conscientiously believing the same to be true and in accordance with the oaths and Statutory Declarations Act (Cap 15) of the Laws of Kenya.

SWORN at NAIROBI by the said:  
BERNARD KIBET SANG (Advocate)  
-and-  
TOM CHERUIYOT BIEGON

This 11<sup>th</sup> day of October, 2016

BEFORE ME:-



COMMISSIONER FOR OATHS

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REPUBLIC.....PROSECUTOR

VERSUS

ANDREW MUECHE OMWENGA.....ACCUSED

J U D G M E N T

ANDREW MUECHE OMENGA (the Accused) in this case is charged with two counts of murder contrary to Section 203 as read with Section 204 of the Penal Code. It is alleged that on the 31<sup>st</sup> January, 2008 at West Indies Estate in Uasin Gishu District within Rift Valley Province, he murdered DAVID KIMUTAI TOO (David) and EUNICE CHEPKWONY (Eunice).

The prosecution case as can be gleaned from the evidence of 23 witnesses who testified against him is that at about 10.00 a.m. on 31<sup>st</sup> January, 2008 the Accused followed both the deceased to West Indies Estate in Eldoret Town where he shot them and fled on the GK motor bike he had to the DO's camp at Turbo where he surrendered himself and was arrested. Members of the public who heard gunshots ran to the scene and found David dead. Though Eunice was still alive, she was not talking. With the police who also rushed there on receiving information, they rushed Eunice to Moi Referral Hospital where she died while undergoing treatment. Accused was later handed over to police and escorted to Nakuru where he was charged with the murder of the two deceased persons.

What is murder" Before I deal with the definition of murder, it is important to bear in mind the fact that criminal law does not seek to punish people for their evil thoughts; an accused must be proved to be responsible for conduct or the existence of a state of affairs prohibited by criminal law before conviction can result. Whether a conviction results will depend further on the accused's state of mind at the time; usually intention or recklessness is required. The Latin maxim—*actus non facit reum, nisi mens sit rea*—"the act itself does not constitute guilt unless done with a guilty mind," encapsulates this principle.

With these two important elements of crime in mind, I can now define murder as the unlawful homicide committed with "malice aforethought." Homicide of course is the killing of a human being by another. Murder is therefore the killing of a human being by another with malice aforethought.

Section 203 of the Penal Code under which the Accused is charged defines murder as the causing, by a person or persons with malice aforethought, the death of another person by an unlawful act or omission. It reads:-

"Any person who of malice aforethought causes the death of another person by any unlawful act or omission is guilty of murder."

It is clear from this definition that for an accused person to be convicted of murder, it must be proved that he caused the death of the deceased with malice aforethought by an unlawful act or omission. There are therefore three ingredients of murder which the prosecution must prove beyond reasonable doubt in order to secure a conviction. They are: (a) the death of the deceased and the cause of that death; (b) that the accused committed the unlawful act which caused the death of the deceased and (c) that the Accused had the malice aforethought.

In the first element, there must be evidence proving that the death of a human being (the deceased) actually occurred. The evidence required to prove the death is usually the autopsy reports given by pathologists. But there are circumstances where the cause of death is too obvious to require medical evidence like where the deceased person was stabbed through the heart or where he is decapitated or his head is crashed. Stating this principle in *Ndungu Vs Republic* [1985] KLR 487 the Court of Appeal stated at p. 493 that:-

“...in some cases death can be established without medical evidence. Of course there are cases, for example where the deceased person was stabbed through the heart or where the head is crashed, where the cause of death would be so obvious that the absence of a post-mortem report would not be fatal. But even in such cases, medical evidence of the effect of such obvious and grave injuries should be adduced.”

The death of the two deceased persons in this case is not in dispute. It is also not in dispute that they died of gunshot wounds. The evidence of the pathologist, Dr. Njue PW20, makes that quite clear. That disposes of the first ingredient.

On the second ingredient, the Accused himself admitted that he shot David. I do not accept his contention that Eunice accidentally shot herself as he struggled to wrestle David's gun from her. The evidence of Ag. SSP Johnson Mwongela, PW19, that only Accused's Ceska pistol Serial No. A050468 Ex. 4 was fired at the scene and that the finger-ring he examined had a circular bullet hole as well as the evidence of Dr. Njue that Eunice was shot in a standing position while defending her self, leaves me in no doubt that the Accused shot her also.

In order to satisfy the second ingredient that the accused committed the unlawful act which caused the death of the deceased, we need to determine whether or not the Accused's act of shooting both of them was an unlawful act. I will deal with this aspect of the second ingredient along with the third ingredient which is whether or not the Accused killed the two deceased persons with malice aforethought.

What is “malice aforethought” Malice aforethought describes the *mens rea* or the mental element required for a conviction of murder. The term imports a notion of culpability or moral blameworthiness on the part of the offender. If ‘malice aforethought’ is lacking the unlawful homicide will be manslaughter.

Section 206 of the Penal Code gives the instances when malice aforethought is established. It states that:-

“Malice aforethought shall be deemed to be established by evidence proving any one or more of the following circumstances-

- (a) an intention to cause the death of or to do grievous harm to any person, whether that

person is the person actually killed or not;

(b) knowledge that the act or omission causing death will probably cause the death of or grievous harm to some person, whether that person is the person actually killed or not, although such knowledge is accompanied by indifference whether death or grievous bodily harm is caused or not, or by a wish that it may not be caused;

(c) an intent to commit a felony;

(d) an intention by the act or omission to facilitate the flight or escape from custody of any person who has committed or attempted to commit a felony.”

It is clear from this definition that there are three broad elements of ‘malice aforethought’. They are express, implied and constructive malice. Express malice is proved when it is shown that an accused person intended to kill while implied malice is established when it is shown that he intended to cause grievous bodily harm. When it is proved that an accused person killed in furtherance of a felony (for example, rape or robbery) or when resisting or preventing a lawful arrest, even though there was no intention to kill or to cause grievous bodily harm, he is said to have had constructive malice aforethought.

There is no evidence that the Accused shot the deceased persons in an attempt to arrest them. So the last instance of Section 206 of the Penal Code is not relevant to this case.

Even when any or all of the other instances are proved, it will not be murder if the accused person is shown to have been provoked and/or to have acted in self-defence. Mrs. Ndeda for the Accused has submitted that the Accused shot the two deceased persons out of provocation and in self defence. What is provocation" What is self defence and when do the two defences arise"

Black’s Law Dictionary, 7<sup>th</sup> Edition defines the term “provocation” as “Something (such as words or actions) that arouses anger or animosity in another, causing that person to respond in the heat of passion.” In as much as it is relevant to this case, Section 208 of the Penal Code explains what constitutes provocation:-

“S.208 (1) The term “provocation” means and includes, except as hereinafter stated, any wrongful act or insult of such a nature as to be likely, when done to an ordinary person or in the presence of an ordinary person to another person who is under his immediate care, or to whom he stands in a conjugal, parental, filial or fraternal relation, or in the relation of master or servant, to deprive him of the power of self-control and to induce him to commit an assault of the kind which the person charged committed upon the person by whom the act or insult is done or offered.”

Self defence on the other hand, as the term itself suggests, is defence of self. It is the use of force or threat to use force to defend oneself, one’s family or one’s property from a real or threatened attack. Self defence is therefore a justification in the application of force recognized by the common law.

The law generally abhors the use of force or violence. There are, however, instances where the use of reasonable force is justified. For instance, an accused charged with an offence may

seek to plead that he acted as he did to protect himself, or his property or others from attack or to prevent a crime or to effect a lawful arrest. Such pleas when successfully raised provide a justification for the accused's conduct thereby rendering his act lawful. Since the use of lawful force is not an offence, the accused will be acquitted of the offence as the element of *actus reus* (the unlawful act) will be missing.

A person is justified in using a reasonable amount of force in self defence if he or she believes that the danger of bodily harm is imminent and that force is necessary to repel it. This defence therefore turns on two requirements: one, that the force must be necessary and secondly that it must be reasonable.

It is not necessary, however, for there to be an actual attack in progress before the accused may use force in self defence. It is sufficient if he apprehends an attack and uses force to prevent it. In *Beckford Vs R* [1988] AC 130 Lord Griffiths stated (at p.144) that "a man about to be attacked does not have to wait for his assailant to strike the first blow or fire the first shot; circumstances may justify a pre-emptive strike." The danger the accused apprehends, however, must be sufficiently specific or imminent to justify the actions he takes and must be of a nature which could not reasonably be met by more pacific means.

In *Mokwa Vs Republic*, [1976-80] 1 KLR 1337 the Court of Appeal held that self defence is an absolute defence even on a charge of murder unless, in the circumstance of the case, the accused applies excessive force. In *Palmer Vs R.*, [1971] 55 Cr. App. R. 223 at p. 243 the English House of Lords held:-

"The defence of self defence either succeeds so as to result in an acquittal or it is disproved in which case as a defence it is rejected. In a homicide case the circumstances may be such that it will become an issue as to whether there was provocation so that the verdict may be one of manslaughter."

What is reasonable force is a matter of fact to be determined from evidence and the circumstances of each case. In the words of Lord Morris of Borth-y-Gest in the said English case of *Palmer Vs R.*, [1971] 55 Cr. App. R. 223 at p. 242 quoted with approval by the Court of Appeal in *John Njoroge Vs Republic*, Cr. App. No. 186 of 1987:-

"It is both good law and good sense that a man who is attacked may defend himself. It is both good law and good sense that he may do, but may only do, what is reasonably necessary. But everything will depend upon the particular facts and circumstances... It may in some cases be only sensible and clearly possible to take some simple avoiding action. Some attacks may be serious and dangerous. Others may not be. If there is some relatively minor attack, it would not be common sense to permit some action of retaliation which was wholly out of proportion to the necessities of the situation....If the moment is one of a crisis for someone in imminent danger, he may have to avert the danger by some instant reaction."

I should here point out that like in all other criminal cases, where accused raises the defences of self defence and provocation, the burden is still on the prosecution to prove him or her guilty beyond reasonable doubt. Where the accused raises defences of self defence or provocation, he does not thereby assume any burden of proving his innocence. It is for the prosecution to prove that the accused was not provoked or that he did not act in self defence. In other words the prosecution must disprove the defences of provocation and self defence

and it must discharge this burden beyond reasonable doubt—Joseph Kimanzi Munywoki Vs Republic, Cr. App. No. 31 of 2003 CA Nairobi), [2006] eKLR. In the said case of Beckford Vs R [1988] AC 130 Lord Griffiths (at p.144) rendered himself thus on self-defence:-

“It is because it is an essential element of all crimes of violence or the threat of violence should be unlawful that self defence, if raised as an issue in a criminal trial, must be disproved by the prosecution. If the prosecution fail to do so the accused is entitled to be acquitted because the prosecution will have failed to prove an essential element of the crime namely that the violence used by the accused was unlawful.”

As I have said, the Accused in this case has raised the defences of provocation and self defence. Did the circumstances of this case justify his act of shooting both the deceased persons" In other words was the Accused in imminent danger himself that he had to take the lives of the two deceased persons to save his" Put in another way, has the prosecution in this case disproved the defence of self defence" To determine this, I need to consider in detail the evidence of the alleged love affair between the Accused and Eunice and that of the shooting incident as related by the prosecution witnesses on the one part and the Accused on the other.

Although most of the police witnesses denied that Accused had any love affair with Eunice, under cross examination, PC Daniel Gaiko, PW6, admitted that this was a crime of passion. In examination in chief CI Virginia Kadenge, PW12, also denied knowledge of any love affair between Eunice and the Accused, but in cross-examination she admitted that from investigations they learnt that the cause of the shooting was a love triangle. This appears to have been common knowledge because even the Investigating Officer, Josphat Kisingu, PW23, admitted that even the OCPD gave the love triangle as the cause of the shooting.

In his defence, the Accused testified on oath that he met Eunice in 2000 at the Kenya Police College Kiganjo. They became lovers and agreed to marry. After passing out, however, they were posted to different stations and did not meet until 2006 when they found themselves at the Eldoret Traffic Office. Eunice informed him that she had been married and he told her he was also married. They got to know their respective couples and became family friends.

After Eunice's husband's death in June 2007 they renewed their love and in August 2007 they agreed to marry. When Accused's wife knew of his infidelity and having heard rumours that Eunice's husband had died of HIV and AIDS, she wanted to cause trouble but to assuage her fears Accused and Eunice took an HIV test in October, 2007. He produced the certificates as Ex. D1(a) and (b) which Accused's wife Edna Kerubo, DW3, also identified and corroborated Accused's evidence that at her request, Accused and Eunice took an HIV test. In October, 2007, as Justus Nyaberi Nyaboga, DW2, also testified, Accused took Eunice to his home in Nyamira and introduced her to his parents and his siblings as a woman he wanted to marry as his second wife. Accused's father had no objection to that. He said Accused was an adult who knew what he was doing. Later Accused gave Eunice Kshs. 300,000/= from the proceeds of the sale of his matatu KAQ 401C to which she added Kshs.100,000/- and bought a Toyota Karina Maroon in colour. They both used the vehicle as they were together most of the time and at times he could keep it. This is the vehicle the deceased had when they were shot.

It was also the evidence of Accused's former matatu driver Jared Atuya, DW1, that one day, prior to Accused selling his matatu, he took Accused to Eunice's house and left him there with the matatu. When he went for the matatu the following morning, Accused came out of Eunice's

house in a vest with a lessa around his waist.

Taking all this evidence into account, I am satisfied that the Accused and Eunice renewed their love affair after Eunice's husband's death and that they were in the process of marrying.

On the shooting incident, May Busienga Amasimbi, PW1, a resident of West Indies Estate in Eldoret Town, testified that on 31.1.2008 at about 10.22 am, as she was going to her friend's house, she saw a man in smart casual attire standing besides a maroon car in serious discussion with a woman. She did not pay much attention to them as she thought they were perhaps buying building sand. So she passed and went her way.

She did not find her friend. As she talked to someone to find out the whereabouts of her friend, she heard a woman screaming and she ran to where the screams were coming from. The woman turned out to be the one she had seen with a man. She was kneeling pleading in Kiswahili with a man in police uniform, "Mogaka usiniue" (Mogaka do not kill me) while the man she was with was seated in the car. The policeman then slapped her several times before firing a shot which missed her but the second and third shots caught her on the ribs and thigh. The policeman then went and shot the man in the car on the head through the window several times after which he took off on a motor bike.

With several other people from that estate who had been attracted by the gunshots, this witness moved close and found the woman still breathing. She identified her as the police officer by the name Eunice who was also her customer. She called another police officer, one Ngetich, whose number she had and soon thereafter police went to the scene and rushed the woman to hospital. The man Eunice was with had already died. In cross-examination, she denied seeing Eunice holding a pistol. She said she saw it on her waist when she had fallen down. She also denied that the man in the car talked with the policeman or in any way struggled with him.

Eric Igadwa Mbogani, PW2, also lives in West Indies Estate. He testified that while in his house in the estate on 31.1.2008, at about 10.10 a.m., he heard 5 to 6 gunshots from the rear of his house. He peeped through the window and saw a policeman on a GK motor bike take off in high speed and people including PW1 running to where the gunshots were heard. He also got out and rushed to the scene. There he saw a man in a grey suit collapsed on the steering wheel of a maroon car. He was profusely bleeding from the mouth. Outside the passenger side of the vehicle, about 3 metres away, he saw a woman lying down on the grass. When he got near, he could hardly feel the man's pulse. He pulled him out of the vehicle but for fear of tampering with evidence, he decided against rushing the woman who was still alive to hospital in the same vehicle. Because the woman's dress had fallen off, she was exposed and he decided to cover her nakedness. That is when he saw a pistol strapped to her waist and took possession of it. He then called Mwangi, a police friend of his who sent a police vehicle and two policemen to the scene. He handed the pistol to one of them and assisted them carry the woman into the vehicle and rushed her to Moi Referral hospital. In cross-examination, he denied seeing any other gun at the scene.

The other prosecution witnesses went to the scene after the shooting incident.

In his sworn testimony, Accused stated that on 31.1.2008, while on patrol, he saw Eunice standing at the rear of her car in an open space near West Indies Estate. He found that odd as

the nearest living quarters were about 20 metres away. Eunice beckoned him and he went there thinking she had a problem with the car. When he got near her he saw that she was in a foul mood. He nevertheless stretched his hand to greet her, but before she made any move, a man came out of the car and asked her "Huyu ndiyo yule mjinga amekwaribia jina" (Is this the fool who has disparaged your reputation"). Then Eunice immediately demanded to know why the Accused was scandalizing her that she had HIV and AIDS. When he turned to the man he found a gun trained at him and the man asked why the Accused was spoiling his wife's name. Accused jumped and held Eunice for cover. He then heard two gunshots and realizing he was in danger, he shot the man who fell as he held his head and then got up and sat on the driver's seat. Eunice dashed for that man's gun as the Accused also dashed for it. She got it and held it onto her stomach. In the course of the struggle he heard two gunshots and Eunice fell down. He assumed she had accidentally shot herself.

I have already discounted the Accused's contention that Eunice accidentally shot herself. The issue now is whether in the circumstances of this case the Accused acted in self defence and if so whether or not he used excessive force.

In view of the pathologist's evidence that Eunice was in an upright position and defending herself when she was shot and also the evidence of the ballistic expert, Ag. SSP Johnson Mwongela, PW19, that the finger-ring recovered from Eunice's body had a circular bullet hole with an upward trajectory, I reject PW1's evidence that Eunice was shot in a kneeling position. In the same vein I also reject her evidence that David did not come out of the vehicle and that he was shot through the window while he was seated in the car. If that was the case, with no bullet holes found on the car as IP Isaiah Ngetich, PW15, and IP Josphat Kisingu, PW23 said, David could only have been found with bullet wounds on the head and not with others on the shoulder, chest and especially on pelvis as CI Virginia Kadenge, PW12, said.

In any case it was not normal for David to have remained in the car when Eunice was pleading with the Accused to spare her live and continue sitting there and wait to be shot after Eunice had been shot. I agree with PC Peter Ngetich, PW17, that PW1 told him that the woman who was shot also had a gun. His concession that he did not concern himself with that gun is proof of the direction the police investigations took after the shooting incident in this case.

As the other witnesses went to the scene after the shooting incident, other than the evidence of PW1, we only have the Accused's account of that incident. That leaves me with no option but to make reasonable deductions from the available circumstantial evidence and as I do that, I have taken into consideration the fact that the Accused being an interested party may have lied to save himself.

As we know from Republic – Vs – Taylor Weaver and Donovan (1928) 21 Cr. App. R. 20 "Circumstantial evidence is very often the best evidence. It is evidence of surrounding circumstances which, by intensified examination is capable of proving a proposition with the accuracy of mathematics. It is no derogation of evidence to say it is circumstantial."

There is no evidence that Accused armed himself to kill or even do grievous harm to either of the deceased persons. He was issued with a firearm for use in the course of his normal duties in event of need. He had no problem with Eunice. There is also no evidence that he knew David or had even heard of him previously. As he said, he learnt much later that day that the man he had shot was David Too, the MP for Ainamoi Constituency. In the circumstances, I find

that Accused had no reason to kill either of them. I also find neither Eunice nor David had any intention of killing or even doing grievous harm to the Accused. They were simply annoyed by the rumours that they attributed to the Accused that Eunice had contracted HIV and AIDS from her late husband and wanted to scare him off from further spreading them. That is why neither of them fired even one shot.

But why did the Accused shoot the deceased persons"

As I have said, I do not agree with the Accused that Eunice accidentally shot herself while he was struggling to wrestle David's gun from her. The evidence of Ag SSP Johnson Mwongela that only Accused's gun was fired at the scene, demolishes that contention. From the evidence on record what I find happened is that Accused's fellow police rider who Accused said called him, informed him that he had seen Eunice in her car with a man. Accused who was already betrothed to her and had even bought that car jointly with her became jealous and followed them to West Indies as PW2 told PW6. They stopped and Eunice came out of the car. Accused then rode there but she refused to greet him. Instead she whipped out her gun that PW1 told PW 17 she saw her with and demanded to know why the Accused was scandalizing her that she had HIV and AIDs. Before he could even respond, David came out of the car with a gun and asked Eunice if the Accused was the fool who had been scandalizing her. Accused shot both of them both of them before either of them fired any shot.

As Accused said, David then entered the car and Accused, fearing that he may have gone for a weapon, shot him again in the car and he collapsed on the steering wheel, a position that PW2 found him in. That also explains the bullet marks and the cartridges that IP Isaiah Ngetich, PW15, the Scenes of Crime Officer who took photographs at the scene, found in the car and the drenching with blood that he saw on the driver's seat. The evidence of PC Philip Mutisya, PW10, that he saw a pistol on Eunice's waist when they were putting her into their vehicle to rush her to hospital and that he is the one who removed it from her waist at the hospital and handed it to PC Ndungu cannot be true. Equally untrue is PW2's account that he removed a gun from Eunice's waist and gave it to police officers at the scene. The true position is that, as the Investigating Officer, Josphat Kisingu, PW23 said, PW2 recovered a gun at the scene which he gave to the police and PW10 recovered Eunice's gun also at the scene.

As I have said, PW 17, PC Peter Ngetich's concession that he did not concern himself with the gun that PW1 told him Eunice had, tells us a lot about the investigations the police carried out with regard to the number of guns that were at the scene. I agree with Accused's counsel that Eunice had two guns at the scene, the pistol Ex. 4 and the G3 rifle she had been issued with on 29<sup>th</sup> January, 2008 which must have been in her car. As there is no evidence that David had a gun of his own, I find that the gun he came out of the car with when he heard Eunice shouting at the Accused is the is the same G3 rifle. It was recovered from the scene but the police realizing the blunder they had made of issuing Eunice with two guns, they hid it. Otherwise why would the police have wanted to tamper with the entry, in the Firearms Register, relating to the date when the G3 rifle was returned as PW23 conceded if that were not the case"

The sum total of all this evidence is that faced with two armed people, who he thought wanted to kill him, I find that Accused was justified in thinking that he was in imminent danger and was provoked to shoot both the deceased in self defence.

Adequate provocation, especially when coupled with self defence, can reduce a murder

charge to manslaughter- Mbugua Kariuki Vs Republic, [1976-80] 1KLR 1085 and Republic Vs Gachanja, [2001] KLR 428. This is also legislated in Section 207 of the Penal Code in the following words:-

“When a person who unlawfully kills another under circumstances which, but for the provisions of this section, would constitute murder, does the act which causes death in the heat of passion caused by sudden provocation as hereinafter defined, and before there is time for his passion to cool, is guilty of manslaughter only.”

In Mancini Vs Director of Public Prosecutions, [1941] All ER 272 the English House of Lords held that not every kind of provocation, however, will reduce murder to manslaughter. To have that effect the provocation must be such as to temporarily deprive the person provoked of the power of self control, as a result of which he commits the act which causes the death. The test to be applied therefore is that of the effect the provocation would have on a reasonable man, so that an unusually excitable or pugnacious person is not entitled to rely on provocation which would not have led an ordinary and reasonable person to act as he did. And before provocation becomes an operative factor in a murder trial, however, the prosecution must have proved beyond reasonable doubt, that murder, provocation apart, had been committed by the accused—Stingel Vs R. [1991] LRC Crim) 639.

In this case, as I have said, faced with two armed people I find that Accused was temporarily deprived of the power of self control as a result of which he shot them. However, considering the fact that accused is the one who followed the deceased to West Indies Estate and that neither of the deceased fired even one shot, I find that Accused should have shot them on the arms or legs to disarm them and not on the head, chest and abdomen as he did. In the circumstance I find that Accused used excessive force in shooting them on the said spots.

For these reasons and on the principles set out herein above, I reduce the charge of murder to manslaughter. I accordingly acquit the Accused of the charge of murder but convict him of the offence of manslaughter contrary to Section 202 as read with Section 205 of the Penal Code.

DATED and delivered this 29<sup>th</sup> day of October, 2009.

D. K. MARAGA

JUDGE.



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Mon. 1

③ WAZIKE  
pls fax to  
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③ D/Committee  
to ask the  
petitioners to

MAIN RECORDS UNIT  
03 OCT 2016  
RECEIVED (2)  
NAIROBI - KENYA

NATIONAL ASSEMBLY  
RECEIVED  
04 OCT 2016  
SPEAKER'S OFFICE  
P. O. Box 41842, NAIROBI.

PETITION TO THE NATIONAL ASSEMBLY OF KENYA  
PURSUANT TO STANDING ORDER 201

before  
JLAC  
Sida  
7/10/16

WE, the undersigned, are citizens of Kenya, residents of Ainamoi Constituency in Kericho County.

**DRAW the attention of the house to the following:**

That following the recommendation of the Judicial Service Commission, Hon Justice David Maraga now awaits the approval of the National Assembly and appointment by the President so as to assume the office of the Chief Justice of the Republic of Kenya.

The people of Ainamoi Constituency have reservations of the JSC nominee taking office as the Chief Justice.

Our reservations arise from the conduct of Justice Maraga in handling of the murder case of our former Member of Parliament the Late Hon. David Too in 2008 whereby he reduced the charges brought against the accused, one Andrew Maoche from Murder Charge to Manslaughter.

Whereas the Judge was exercising his judicial independence, his decision to reduce the charge and handing the accused a lenient sentence of ten years in prison was erroneous leading to miscarriage of justice.

During his appearance before the Judges and Magistrates vetting board, Justice Maraga was at pains to explain what informed his decision to reduce the capital offence charge in the face of glaring evidence enough to sustain the capital charge of murder. He made an outright admission that his decision was wrong and that he was human after all and was bound to error once in a while. He went further to point out that the state had lodged an appeal against his decision.

His remarks on the ruling that the accused should have shot the deceased on the limbs to disarm them were contemptuous and derogatory to the family of the deceased and his constituents at large who had overwhelmingly elected him.

In view of the foregoing, the credibility of Hon Justice David Maraga as to his moral character, integrity and impartiality stand questioned

**THEREFORE your humble petitioners PRAY that Parliament of Kenya:-**

- a. Should not approve his nomination to be the next Chief Justice of the Republic of Kenya.

AC



- b. Compels Hon Justice David Maraga to make an apology to the family of the deceased, the people of Ainamoi Constituency and the people of Kenya at large for his indiscretion and failure to uphold the Constitution.
- c. Compels Hon justice David Maraga to an undertaking that should parliament approve his nomination, he shall fastrack the pending appeal case and all other pending cases so that justice is served.

And your PETITIONERS will ever Pray.

Name of petitioner                      Address                      National ID                      Signature

1	Emmanuel Kiplangat Kimar	Ainamoi	23735748	[Signature]
2	Bernard Kibet	Ainamoi	30036671	[Signature]
3	Nick Kiplangat	Ainamoi	29699424	[Signature]
4	Abraham Chirchir	Ainamoi	27857537	[Signature]
5	Daisy Chepkemai	Ainamoi	33515748	[Signature]
6	Fred Keter	Ainamoi	21233451	[Signature]
7	Peter Chepkway	Ainamoi	26581326	[Signature]
8	Josephine Kimar	26 Ainamoi	20411903	[Signature]
9	Neddy Chebet	Ainamoi	23125581	[Signature]
10	Edna Chepkorir	Ainamoi	24571807	[Signature]
11	Winnie Chepkway	Ainamoi	28100867	[Signature]
12	Ester Chemiyot	Ainamoi	4753991	[Signature]
13	Lucy Luwei	Ainamoi	7633127	[Signature]
14	Sarah Chemiyot	Ainamoi	4752929	[Signature]
15	Bernard Tod	Ainamoi	25229100	[Signature]
16	Phid Kibet	Ainamoi	23166605	[Signature]
17	Peter Kiprono	Ainamoi	13108021	[Signature]
18	Joseph Tod	Ainamoi	1120498	[Signature]
19	Ruth Chepkway	Ainamoi	13107402	[Signature]
20	Stanley Kipngeno	Ainamoi	25375371	[Signature]

A

**PETITION BY A CITIZEN UNDER ARTICLE 119  
OF THE CONSTITUTION OF THE REPUBLIC OF  
KENYA  
AGAINST THE  
APPOINTMENT OF  
JUSTICE MR. DAVID KENANI JA  
AS THE NEXT THE CHIEF JUSTICE OF THE  
REPUBLIC OF KENYA 2016.**

**TO THE**

**THE SPEAKER**

**Through**

**THE CLERK**

**NATIONAL ASSEMBLY**

**PARLIAMENT WAY/HARAMBEE AVENUE JUNCTION**

**P.O. BOX 41842-00100**

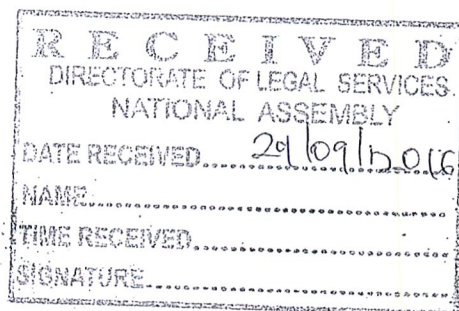
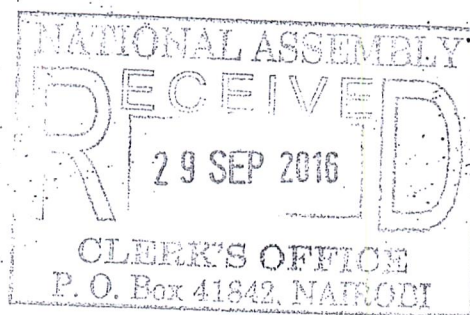
**NAIROBI.**

**BY**

**SAMSON NDENDERU KIGAMBA ESQUIRE**

**P.O. BOX 554 LIMURU-KENYA**

**TEL ( +254) 724 764 557**



Samson Ndenderu Kigamba Esquire  
P.O. Box 554 Limuru-KENYA  
Tel ( +254) 724 764 557

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**Our Ref.:-** Nakuru CMCC 1 of 1986 & Court of Appeal At Nakuru Civil Appeal 49/95

**Your Ref.:-** Appointment of New Chief Justice of Kenya (Justice Mr. David Kenani Maraga)

**DATE:-** Tuesday 27<sup>th</sup> September 2016.

**THE SPEAKER**

**Through**

**The Clerk**

**National Assembly**

**Parliament Way/Harambee Avenue Junction**

**P.O. Box 41842-00100**

**NAIROBI.**

Dear Sir

**Re.:- Petition of Citizen under Article 119 of The Constitution of The Republic of Kenya vs Appointment of Justice Mr. David Kenani as The next The Chief Justice of The Republic of Kenya 2016.**

**PETITION VS THE APPROVAL OF THE NEXT THE CHIEF JUSTICE**

I Samson Ndenderu Kigamba A Kenyan ZCitizen holding National Identity number 1373359( Copy attached) petition The National Assembly of The Republic of Kenya to disapprove and reject Justice Mr. David Kenani Maraga as the next The Chief Justice of the Judiciary of The Republic of Kenya.

**GROUND RELIEDS ON BY THE PETITIONER**

- 01.0.** I Samson Ndenderu Kigamba is the Plaintiff in Nakuru CMCC 1/1986 ( Samason Ndenderu Kigamba vs Daniel Mwangi Mithanga).
- 02.0.** David Kenani Maraga was at all material times the defense counsel acting for the said same Daniel Mwangi Mithanga in Nakuru CMCC 1/1986.

- 03.0. David Kenani Maraga at all material times masterminded the delay of the said same suit Nakuru CMCC 1/1986 ( Samason Ndenderu Kigamba vs Daniel Mwangi Mithanga).
- 04.0. At all material times the said same defense counsel for the defendant maintained the perjury and forgery that he was duly instructed under Power of attorney to repeal the Sale Agreement dated 12.04.19984 between the plaintiff on one part and the said same Daniel Mwangi Mithanga as t he defendant on another part.
- 05.0. At all material times the sale agreement executed between Samson Ndenderu Kigamba as the purchaser of the suit subject property measuring 110 x 110 ft to be excised out of plot number 22 situate at Shangani Township along Nakuru-Eldoret highway and at all material times the said same Daniel Mwangi Mithanga was the registered owner cum vendor the suit subject parcel of land measuring 110 x 110 the excised from plot number 22.
- 06.0. At all material times the said same subject purchaser instituted Nakuru CMCC 1/19986 to enforce the specific performance pursuant to the said same subject Sale Agreement that the said same subject vendor Daniel Mwangi Mithanga had malicious and arbitrarily breached.
- 07.0. At all material times it was epic terms the execution of the Sale Agreement effected on 12.4.1984 was to consummated by way of barter trade on transfer of an "Lister Engine Perkins Number 321554 Type P6" owned by the said Samson Ndenderu Kigamba in full payment in full payment and in remittance of the amount Kshs 40,000 value of the subject suit parcel of land measuring 110 x 110 which was to be apportioned and excised from plot number 22 owned by the said Daniel Mwangi Mithanga.
- 08.0. At all material times the said Daniel Mwangi Mithanga, upon executing the said sale agreement effected on 12.4.1984 with the said same Samson Ndenderu Kigamba , breached the terms of the said same Sale Agreement on 12.4.1984 by forcefully and maliciously hold in detinue both the said "Lister Engine Perkins Number 321554 Type P6" and refused the excision and conveyance of the said same subject suit land parcel measuring " 110 x 110" to the said same Samson Ndenderu Kigamba upon being excised and hived from plot number 22 owned by the said same subject Daniel Mwangi Mithanga.
- 09.0. At all material times David Kenani Maraga was the defense counsel in Nakuru CMCC 1.1986 wherein the said same Vendor Daniel Mwangi Mithamba was t he sole Defendant.
- 10.0. At all material times the said same defense counsel David Kenai Maraga deceitfully and fraudulently informed the trial court in Nakuru CMCC 1/1984 that the plaintiff was never entitled to the

fruits contained in the sale agreement and in particular that the subject "Lister Engine Perkins Number 321554 Type P6" was never the legal property of your humble petitioner herein capable of sustaining the sale agreement effected on 12.4.1984 with the said same Daniel Mwangi Mithamba.

- 11.0. At all material times the said same David Kenani Maraga as the defense counsel deliberately and with malice adviomed the saidsame Daniel Mwangi Mithanga never to obey and execute a court order given in Nakuru CMCC 1/1986 for stay of execution of the judgment on condition the said same subject "Lister Engine Perkins Number 321554 Type P6" was deposited into court pending an intended appeal to the High court in Civil Appeal CA49/95 vide t he court records in Nakuru High of Kenya at Nakuru in Miscellaneous Civil Application 61/1995.
- 12.0. At all material times the said same David Kenani Maraga conspired to have the court files Nakuru High Court Miscellaneous Civil Application 61/95, High Court Civil Appeal CA49/95 and Nakuru CMCC 1/1986 to disappear without trace so far.
- 13.0. At all material times thee said same subject David Kenani Maraga drew pleadings as though he was the defendant one Certain Daniel Mwangi Mithanga as the defendant in Nakuru CMCC 1/1984 and as appellant in High Court Civil Appeal Ca49/95 and in High Court Civil Application 61/95.
- 14.0. At all material times the said same Subject David Kenani Maraga collude with certain elements within the Nakuru Chief Magistrate's Court to make the court file Nakuru CMCC 1/84 disappear so far.
- 15.0. At all material times the said same Subject David Kenani Maraga collude with certain elements within the Law Society of Kenya and/or The Advocates complaint Commission to derail and defuse the complaints on misconduct and mischief leveled and filed against his conduct of Nakuru CMCC1/984.
- 16.0. At material times and during his epic interview for the appointment of t he Chief Justice of t he Judiciary of The Republic of Kenya the said same David Kenani Maraga JA assertively declared that he has never and will :-
- 17.0. Take and or give bribes  
Work of Saturdays Clear cases backlogs saturating service delivery by The Judiciary of The Republic of Kenya;  
in his presentation on his merit for consideration on appointment of The Chief Justice of the Judiciary.
- 18.0. At all material times it is the petition of your humble petitioner Samson Ndenderu Kigamba that David Kenani Maraga does not

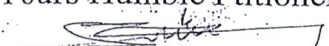
deserve to be considered for the appointment of The Post of The Chief Justice of the Judiciary of The Republic of Kenya at all.

- 19.0. AT all material times the said same David Kenani Maraga demonstrates a naked lack of honesty and mental trait capabilities endemic in an Puisne Judge.
- 20.0. At all material times it is clear that David Kenani Maraga lacks the traits on the creed of a puisne judge a basic foundation and fundamental quality of being considered and appointed unto the critical post of The Chief Justice of The Judiciary of The Republic of Kenya.
- 21.0. At all material David Kenani Maraga colluded with those responsible and answerable in redressing the complaints presented against him to both the Advocates Complaints Commission; To the Chief Justice including To the Attorney General in 1997 by your humble petitioner Samson Ndenderu Kigamba in the management of Nakuru CMCC 1/86.
- 22.0. At all material times the said same David Kenani Maraga perpetrated perjury on availability of one Mr. Watling from Pannel Bellhouse Mwangi who instructed JK Kurgat to sale by auction of The subject Perkins Engine "Lister Engine Perkins Number 321554 Type P6" suit property in Nakuru CMCC 1/86.
- 23.0. AT all material times on 27.4.1994 your humbler petitioner tried to reconstruct Nakuru CMCC1/86 but got sabotaged and undermined by the very said same David Kenani Maraga.
- 24.0. At all material times your humble petitioner asserts to be a law abiding citizen and a registered voter of the Republic of Kenya.
- 25.0. At all material times your humble petitioner has never held any tinge of malice and prejudice against the said David Kenani Maraga JA at all.
- 26.0. At all material times your humble petitioner has no objection attending any interview deemed necessary in furtherance to this humble petition.

DATED Thursday the 29<sup>th</sup> September 2016 at Ndeiya within Limuru Sub-county within The County of Kiambu.

Justice be our Shield and Defender.

Yours Humble Ptitioner

  
Samson Ndenderu Kigamba

Tel(+254) 724 764 557.

Enclosure

**Track Record in:-**

- a. Nakuru CMCC 1/84,
- b. Nakuru High Court Civil Application 61/95
- c. Nakuru High Court CA 49/95

**THE REPUBLIC OF KENYA**  
**THE OATHS AND STATUTORY DECLARATION ACT**  
**CHAPTER 15 Laws Of KENYA**

In The Matter of ; - Article 119 of The Constitution of The Republic of  
Kenya.

In The Matter Of:- David Kenai Maraga.

In the Matter of:- Appointment of David Kenai Maraga as The Chief  
Justice

of The Republic of Kenya.

The Affidavit of Samson Ndenderu Kigamba I/d 13732359.

I Samson Ndenderu Kigamba care of Post Office Box number 554  
Limuru in the Sub-County of Limuru within The County of Kiambu  
in The Republic of Kenya do solemnly swear oath and states as  
follows inter alia:- vide Article 119 of The Constitution of The  
Republic of Kenya:-

- 01.0 **THAT** I am the holder of The Kenyan National Identity number  
1373359 issued at Limuru on 30.07.1996 see exhibit marked  
**SNK01.**
- 02.0 **THAT** the letter from dated 30.07.1985 by PAnnel Bellhouse  
Mwangi to M/s J.K.Kurgat esquire t/a Goldstar Auctioneers  
P.O.808 Kericho see exhibit marked **SNK02.**
- 03.0 **THAT** there is the sale Agreement effected on 12.4.1984  
between Samson Ndenderu Kigamba as the purchaser on one part  
and Daniel Mwangi Mithanga as the vendor on another part see  
exhibit marked **SNK03.**
- 04.0 **THAT** there is the plaint dated on 01.01.1986 in Nakuru Chief  
Magistrate's Court civil case number CMCC1/1986 see exhibit  
marked **SNK04.**
- 05.0 **THAT** there is the defense dated 7.4.1986 drawn and filed by  
Maraga advocates for the defendant Daniel Mwangi Mithanga  
into Nakuru CMCC1/86 see exhibit marked **SNK05.**
- 06.0 **THAT** there is the letter dated on 26.7.1986 and on 20.9.1988  
by MF Patel Senior Deputy Registrar to Senior Resident  
Magistrate Nakuru re Nakuru SRMCC no. 1 of 1986 Samson N.  
Kigamba vs Daniel M.wangi Mithamba see exhibit marked  
**SKN06.**
- 07.0 **THAT** there is the letter dated on 26.7.1997 by Samson  
Ndenderu Kigamba to The Chief Justice P.O.Box 30041 Nairobi  
Attn. Mr. Justice M Cockar EGH and The Attorney General  
P.O.Box 40112 Nairobi and The Commissioner Advocates  
Complaints Commission P.O.Box 7797 Nairobi by Samson  
Ndenderu Kigamba re Professional Misconduct by Advocate  
DK Maraga re "INJUSTICE IN NAKURU CMCC nO.1/86 and

- Nakuru HC Civil Appeal No. 49/95” by Samson Ndenderu Kigamba your humble petitioner see exhibit marked SKN07.
- 08.0 THAT** there is the letter dated on 27.4.1994 by Samson Ndenderu Kigamba to The Deputy Registrar Law Courts of Kenya at Nakuru re Construction of Court File ie Nakuru Civil No. 1 of 1986 see exhibit marked **SKN08**.
- 09.0 THAT** there is the Surmons to Witness re Mr. JR Wattling c/o pannel Bellhouse Mwangi P.O.Box 44286 Nairobi in Nakuru CMCC 1/86 see exhibit marked **SKN09**.
- 10.0 THAT** there is the Notice of Motion dated 10.05.1995 and Affidavit sworn by David Kenani Marga on 10.5.1995 in Nakuru High Court Miscellaneous Civil Application number 61/95 see exhibit marked **SKN10**.
- 11.0 THAT** there is the ruling given on .....and on 6.6.1995 both by Ondeyo Judge in Nakuru High Court Miscellaneous Civil Application number 61/95 see exhibit marked **SKN11**.
- 12.0 THAT** there is the Statement of agreed issues by Samson Ndenderu Kigamba dated on 14.6.1996 in Nakuru High Court Civil Appeal number 49/95 see exhibit marked **SKN12**.
- 13.0 THAT** there is the written submissions dated on 20.07.1998 filed on 5.5.1999 into Nakuru High Court Civil Appeal number 49/95 see exhibit marked **SKN13**.
- 14.0 THAT** there is the Memorandum Appeal drawn and lodged by David Kenani Maraga into Nakuru49/1995 See exhibit marked **SKN14**.
- 15.0 THAT** there is the Memorandum of Cross Appeal drawn and lodged by Samson Ndenderu Kigamba dated on 12.6.1995 lodged into Nakuru49/1995 See exhibit marked **SKN14.15**
- 16.0. THAT** the disobedience and contempt of the court orders given as conditional stay and procured at the instance of David Kenani Maraga the defense counsel pending intended appeal Defendant Daniel Mwangi Mithanga to deposit the suit engine“**Lister Engine Perkins Number 321554 Type P6**” suit property in Nakuru CMCC 1/86 saw the very same Engine disappear to date.
- 17.0. THAT** David Kenai Marga is fully aware on how th e said same suit engine “**Lister Engine Perkins Number 321554 Type P6**” suit property in Nakuru CMCC 1/86 disappeared so far.
- 18.0. THAT** it is shocking and dumbfounding to hear and read that David Kenani Maraga assertively declare himself :-
- 18.1.** corruption free
- 18.2.** will clear case backlog in the judiciary

18.3. wants to supervise delivery and administration of The Judiciary;

18.4. transform the judiciary deliver delivery of Equity and Justice.

if appointed The Chief Justice of the Republic of Kenya.

19.0. THAT I swear this affidavit to parade the sequence of evidence portraying David Kenani Maraga as the root course of injustice meted upon your humble petitioner at the behest of dishonesty greed mischief and misconduct of David Kenani Maraga as the defense counsel for Daniel Mwangi Mithanga in Nakuru CMCC 1/86 and as an officer of the Court.

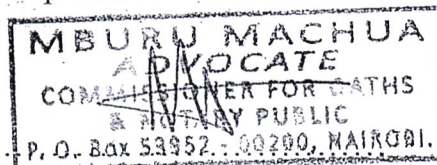
20.0. THAT I Swear instant affidavit to exhibit David Kenani Maraga as a person unfit and undeserving to be considered for the appointment of The Chief justice of Kenya 2016.

21.0. THAT at all material times Your humble petitioner holds no shed of vendetta and/nor malice against the said same David Kenani Maraga.

22.0. THAT what is deponed to herein above is true and correct.

SWORN at Nairobi this 29<sup>th</sup> day of September 2016

BY Samson Ndenderu Kigamba  
BEFORE ME



A COMMISSIONER FOR OATHS.

Drawn AND FILED by  
Samson Ndenderu Kigamba  
P.O.Box 554  
Limuru  
Kiambu-KENYA.  
Tel (+254) 724 764557

S/KK 01

JAMHURI YA KENYA

REPUBLIC OF KENYA

SERIAL NUMBER: 203149643

ID NUMBER: 1373359

FULL NAMES

SAMSON NDENDERU KIGAMBA

DATE OF BIRTH

1947

SEX

MALE

DISTRICT OF BIRTH

NAKURU

PLACE OF ISSUE

LIHURU

DATE OF ISSUE

30 07 1996

HOLDER'S SIGN



NATIONAL COUNCIL  
FOR PERSONS WITH  
DISABILITIES



NAME SAMSON NDENDERU KIGAMBA

REG NO: NCPWD/P/140057

Nature of Disability PHYSICAL;

Authorised Officer

Date of issue 27/03/2013

Serial No 0013856

XVI  
SNK05

IN THE SENIOR RESIDENT MAGISTRATE'S COURT

AT NAKURU

CIVI CASE NO. 1 OF 1986

SAMSON NDENDERU KICAMBA

PLAINTIFF

VERSUS

DANIEL MWANGI MITHANGA

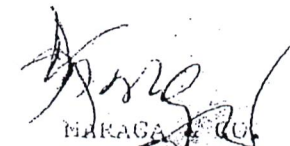
DEFENDANT

DEFENCE

1. The defendant admits the contents of paragraphs 1, 2, 7 and 8 of the plaint save and except that his address for service herein is care of M/s Maraga & Company, Advocates P.O. Box 671, Nakuru.
2. The defendant refers to paragraphs 3 and 4 and admits that he did enter into the alleged agreement but denies the allegation that the plaintiff performed his part of the contract.
3. Further and without prejudice to the foregoing denial the defendant states that the plaintiff sold to him the perking engine which he had no authority and or power to sell, and or as it had been attached, prior to the entering into the said agreement, in execution of a decree and or repossession order against the plaintiff and the engine was later reattached and taken from the defendant.
4. The defendant bought the said engine in execution of the said decree or order and is therefore not liable to transfer to the plaintiff the agreed piece of land and is not liable to the plaintiff for the value of the engine or at all.

WHEREFORE the defendant prays that this suit be dismissed with costs.

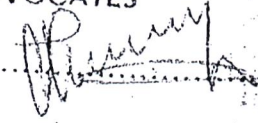
DATED at Nakuru this 7<sup>th</sup> day of April 1986.

  
 NAKURU  
 ADVOCATE FOR THE DEFENDANT

Drawn & Filed by:  
 M/s Maraga & Co.,  
 Advocates,  
 P.O. Box 671,  
 NAKURU.

RECEIVED THIS 9<sup>th</sup> DAY OF APRIL 1986  
 For OCHIENG - ODHIAMBO & CO.  
 ADVOCATES

To be served Upon:  
 M/s Ochieng Odhiambo & Co.,  
 Advocates,  
 NAKURU.

SIGNED 

(Service through M/s Maraga & Co.)

IN THE SENIOR RESIDENT MAGISTRATE'S COURT

AT NAKURU

CIVIL CASE NO. 1 JOF 1986

SAMSON NDENDERU KIGAMBA

PLAINTIFF

VERSUS

DANIEL MWANGI MITHANGA

DEFENDANT

PLAINT

1. The Plaintiff is a male adult residing at Elburgon whose address for service for the purposes of this suit is care of Ochieng-Odhiambo & Company, Advocates, Inder Singh Building, 3rd Floor, Kenyatta Avenue, P.O. Box 10285, NAKURU.
2. The Defendant resides in Molo and Summons hereof will be served upon him through the Plaintiff's Advocate's Offices.
3. By an agreement in writing dated 12th April, 1984 between the Plaintiff and the Defendant, the Defendant agreed to transfer to the Plaintiff a portion of his plot number 22 in Mukinyai Farmers Company Limited measuring 110 x 110 feet or thereabouts in consideration of the Plaintiff transferring to the Defendant a Perkins Engine Serial No. 3241554 Type "P6".
4. It was further agreed 'Inter alia' that:
  - a) both the portion of land and the Perkins Engine aforesaid were worth Shs. 40,000/=
  - b) the Plaintiff would take possession of the portion immediately after the execution of the agreement and the Defendant would take immediate possession of the Engine.
  - c) the parties would employ a qualified surveyor demarcate the portion aforesaid from plot No. 22 in Mukinyai Farmers Company Limited.
5. Although the Plaintiff has complied with the agreement aforesaid and surrendered possession of the said Perkins Engine to the Defendant, the Defendant has in

- breach thereof refused to give vacant possession of the portion aforesaid to the Plaintiff thereby occasioning him loss and damage.
6. The Plaintiff therefore claims from the Defendant a transfer of the said portion in terms of the agreement or alternatively a return of the said Perkins Engine together with mesne profits for the use thereof, or in the further alternative payment of Shs, 40,000/= being the value of the said machine with mesne profits.
  7. Demand has been made of the foregoing and notice given of intention to sue in default, but the Defendant has refused to comply with the agreement.
  8. The cause of action arose within the jurisdiction of this Honourable Court.

REASONS WHEREFORE the plaintiff prays for judgement against the Defendant for:

- / a) specific performance of the contract
- / b) alternatively, a return of the said Perkins Engine together with payment of mesne profits for the use thereof for the period 12th April, 1984 to the date of judgement.
- / c) alternatively, payment of Shs, 40,000/= being the value of the said engine together with mesne profits as hereinabove.
- d) costs of this Suit
- e) interest thereon at Court rates
- f) Such further or other relief as the Court may deem just to grant.

Dated at Nakuru this            day of January, 1986

OCHIENG-ODHIAMBO & COMPANY  
ADVOCATES FOR THE PLAINTIFF

DRAWN AND FILED BY  
OCHIENG-ODHIAMBO & COMPANY  
ADVOCATES,  
INDER ELUGH BUILDING,  
3RD FLOOR,  
KEMBATTA AVENUE,  
P.O. BOX 10285, NAKURU

TO BE SERVED UPON:  
DANIEL MEANGI MTHANGA  
MOLO - Service by the  
Plaintiff's Advocate

16  
VII  
Part 2  
SNK 03

AN AGREEMENT made this 12<sup>th</sup> day of April 1984.  
BETWEEN DANIEL MWANGI MTHANGA (I.D. No. 0729515/65) of Post Office Box Number 4, Elburgon in the Republic of Kenya (hereinafter called "the Vendor") of the one part AND SAMSON NDENDERU KIGAMBA (I.D. No. 1373359/64) of Post Office Box Number 139, Elburgon in the said Republic (hereinafter called "the Purchaser") of the other part.

WHEREAS the Vendor is the registered owner of Plot No. 22 in Mukinyai Farmers Company Limited in Molo measuring two (2) acres or thereabouts.

AND WHEREAS the Vendor is willing to sell a portion of the said piece of land measuring 110 x 110 feet and the Purchaser is willing to buy the said piece of land for a consideration of the sum of Sh. 40,000/=.

IT IS HEREBY AGREED AS FOLLOWS:-

1. THAT the Purchaser shall pay to the Vendor the said sum of Sh. 40,000/= by transferring/handing to the Vendor a Perkins Engine No. 3241554 Type "P6" P. series which said is worth Sh. 40,000/=.
2. THAT the Purchaser shall take possession of the demarcated piece of land immediately after the execution of this agreement and the Vendor shall take possession of the said Engine immediately after the execution of this agreement.
3. THAT the both the parties herein shall employ the services of a qualified surveyor to ascertain that the demarcated portion is numbered and separated from Plot No. 22 in Mukinyai Farmers Company Limited.
4. THAT both the parties shall assure quiet possession of the property herein without interference whatsoever.
5. THAT both parties have agreed that they shall avail themselves whenever required to sign any documents in respect of the said piece of land and the Perkins Engine,
6. THAT the Vendor shall measure the said 110 feet from the Road Reserve Point and the Purchaser shall ascertain and confirm that point is the said Road Reserve Point.

Cont...../2

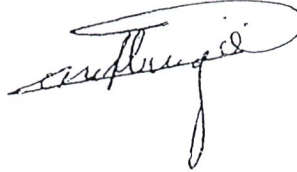
2<sup>th</sup> original Exb in Court Case 2

From 16

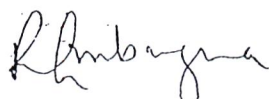
7. THAT the Advocates costs of this agreement shall be borne by both the parties in equal proportions.

IN WITNESS WHEREOF the parties herein have set their hands the day and year hereinabove written.

SIGNED by the said  
DANIEL MWANGI MTHANGA



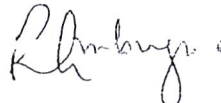
In the presence of:-

 R. L. M. MBUGUA,  
ADVOCATE,  
P.O. BOX 759,  
NAKURU.

SIGNED by the said  
SAMSON NDENDERU KIGAMBA



In the presence of:-

 R. L. M. MBUGUA,  
ADVOCATE,  
P.O. BOX 759,  
NAKURU.

PANNELL  
BELLHOUSE  
MWANGI

CERTIFIED PUBLIC ACCOUNTANTS (K)

Our Ref: W.071/6/MRN/WD/1403

30 July 1985

Alico House  
Mamlaka Road  
P.O. Box 44286  
Nairobi Kenya

SNK02

Telegrams: LENNAP NAIROBI  
Telex 25344 PBM  
Telephone: 721833/37/69

J.K. Kurgat Esq  
Goldenstar Auctioneers  
P.O. Box 808  
KERICHO

Dear Sir

WOODPECKER SAWMILLS LIMITED - IN RECEIVERSHIP

We write to advise that we have sold the one remaining asset of Woodpecker Sawmills Limited, the Sawmill engine, to Mr. Joshua Wanjema for the sum of KShs.8,000/=. By copy of this letter, we are confirming to him that property in the engine has now passed to him.

Yours faithfully  
for and on behalf of  
WOODPECKER SAWMILLS LIMITED



J.R. WATLING  
JOINT RECEIVER & MANAGER

cc: Joshua Wanjema Esq  
P.O. Box 789  
KERICHO

East Africa Offices Nakuru, Mombasa, Nanyuki, Nyeri, Eldoret, Arusha, Moshi

\*J.R. Watling F.C.A., CPA (K) \*D.G.M. Hutchison F.C.A., CPA (K) J.K. Muchekahu F.C.C.A., CPA (K)  
J.K. Mburu F.C.C.A., CPA (K) C.D.K. Arap-Kirui B. Comm., F.C.C.A., CPA (K) M.G. Waweru B. Comm., F.C.C.A., CPA (K) *Baish*

Member Firm of Pannell Kerr Forster Worldwide

- 3/19/1  
e.h. Ltd. and Wanjema in court

SINK 07  
SKN 07

SAMSON NDENDERU KIGAMBA,  
P.O. BOX 136  
ELBURGON

26TH JULY, 1997

THE CHIEF JUSTICE  
P O BOX 30041  
NAIROBI

ATTENTION: HON. MR. JUSTICE M. COCKAR EGH

AND

THE ATTORNEY GENERAL  
P O BOX 40112  
NAIROBI

ATTENTION: HON MR A S WAKO EGH

AND

~~THE~~FOOM

THE COMMISSIONER  
COMPULSORY COMMISSION  
P O BOX 7797  
NAIROBI

ATTENTION: MR R. MIBEI

Dear Sir,

RE: PROFESSIONAL MISCONDUCT BY ADVOCATE D.K. MARAGA RE: INJUSTICE IN  
NAKURU SRMCC NO.1/86 AND NAKURU HC CIVIL APPEAL NO. 49/1995

I write to complain against Miscarriage of Justice I am a victim of at the professional hands of one Nakuru Based Advocates Mr. D. K. Maraga in Nakuru CRMCC No. 1/86 now Nakuru H.C. Civil Appeal No. 49/95.

The Defendant in Nakuru SRMCC 1/86 died in 1989 before he could attend Court to give his evidences. The failure of the defendant the late Daniel Mwangi Mithanga to give evidence was the calculated strategem of the defence counsel to delay the determination of the suit. This also apply to the witness one Certain Mr. J. K. Kurgat who also died. He also never gave any evidence in Court, File.

~~The~~ Mr. Maraga merous correspondences highlighting disappearance of the Court file. Yet Mr. Maraga as an Advocate of High Court never resigned after he was linked to the incidents. The Defendant have been given many orders by the High Court and/or the Lower Courts. None of these Court Orders are obeyed. Yet Mr. Maraga hangs on to the suits.

There were the Orders granting stay of execution also disobeyed. Mr. Maraga conspired with the defendant, to defeat justice to justify his fee note. The Suit property, the Industrial Perkins Engineer was dismantled and vandalised all with the full knowledge and backing of Mr. Maraga the Legal Council. This Mr. Maraga confessed on 17th August 1995 to Court before the Honourable Mr. W. K. Yuiyot.

He filed his Memorandum of Appeal on 7th June, 1995. and now filed my Cross Appeal on 12th June, 1995. He now wants Orders of the Lower Court on what date the judgement was delivered. He confesses the Decree was given and court sealed on 20th February 1995.

This is a conspiracy to miscarry Justice with attempts to delay the Justice founded on abuse of professional ethics.

I strongly fear if this matter is allocated to any other Magistrate other than either Mr. W. K. Yuiyot the C.M. or Misc. H. Owino the SM I stand to further suffer miscarriage of justice. There is the problem of professional chauvinism prevalent in most courts and against lone litigant who are not presented by advocates. I have suffered this and the court records bear me witness plus my track of correspondences to the Chief Justice.

I strongly request your intercession to enhance the sense of trust and confidence the public bestow on the judiciary. This is now endangered by the greedy and unethical Advocates of the likes of Mr. Maraga as evidenced by the track records in Nakuru SRMCC 1/86 read with proceedings in Nakuru HC Misc. Application Number 129/94 and/or 61/95.

Yours faithfully,

  
SAMSON NDENDERU KIGAMBA

G.C. Mr. D. K. Maraga  
P. O. Box 671  
NAURU

- Encls. (1) Misc. Civil Applications 129/94 and 61/95 of High Court  
(2) Memorandum of Cross Memorandum of Appeal 49/95

SANKO  
SKNØE

700  
27

REPUBLIC OF KENYA  
IN THE SRM'S COURT AT NAKURU  
CIVIL SUIT NO. 1 OF 1986

SAMSON NDENDERU KIGAMBA ..... PLAINTIFF  
VERSUS  
DANIEL MWANGI NITHANGA ..... DEFENDANT

The Deputy Registrar  
Law Court of Kenya  
P.O. Box 61  
NAKURU

Dear Sir

REF: RECONSTITUTION OF COURT FILE ie NAKURU SRM CIVIL NO. 1 OF 1986

The Court File in Nakuru SRM Civil Suit No. 1 of 1986 i.e. Samson Ndenderu Kigamba (Plaintiff) Versus Daniel Mwangi Mithanga (since deceased) is reported lost. The matter had been STOOD OVER GENERALLY pending the Grant of Letters of Administratrix in Probate Cause No. 185/1990 to the widow of the late Daniel Mwangi Mithanga the defendant.

It is now duly confirmed that the widow have been granted the said letters of Administratrix in May 1991.

To facilitate the expeditious finalisation of this overly delayed matter I offer a certified copy of the Court Proceedings in photocopy towards reconstituting a skeleton copy of the lost Court File to enhance resumption of the proceedings soonest.

In the circumstances would you please confirm receipt of the said copy of the proceedings by signing its receipt and acceptance herein below.

ACKNOWLEDGEMENT RECEIPT

"This acknowledges receipt of the certified copy of Proceedings (in photocopy) in Nakuru SRM civil No. 1 of 1986 ie. Samson Ndenderu Kigamba Versus Daniel Mwangi Mithanga (deceased)

.....  
**EXECUTIVE OFFICER IN CHARGE**  
**LAW COURTS**

.....  
DATE 27/4/91

Would you please hasten with the reconstituted skeleton file to enable me take next hearing date.

.....  
SAMSON NDENDERU KIGAMBA  
PLAINTIFF

26/5/93

LAW COURTS  
RECEIVED  
NOV 19 1994  
NAKURU

Samson Ndenderu Kigamba,  
P.O. Box 139,  
Elburgon

18th January, 1995

LAW COURTS  
RECEIVED  
JAN 19 1995  
NAKURU

The Resident Magistrate,  
Law Courts of Kenya  
P.O. Box 61,  
Nakuru

Att. Mr. W.K. Tuiyot the S.P.M.

Dear Sir,

RE: REPEATED ADJOURNMENTS TO DELIVER JUDGEMENT IN NAKURU SRM CIVIL NO.1(ONE)  
OF 1986 SAMSON NDENDERY KIGAMBA VS DANIEL MWANGI MPTHANCA

I handed in my written submission to the Trial Magistrate the Hon. Mr. Kingori on 24th October 1994, then the trial magistrate undertook to deliver judgement on 18th November 1994. Mr. Maraga had already given in his submission on behalf of the defendants when I reported in court on 18th November 1994 the trial magistrate said he had not written the judgement and now fixed 2nd December 1994 when to deliver his judgement. Since 2nd December, 1994 the trial magistrate has adjourned giving his judgement on 14/12/94 to 23.12.94 to 11.1.95 to 18.1.95 today to 25.1.95.

I have on every adjournment requested the trial magistrate to please hasten preparing his judgement. This is a very old case now in its 10th (tenth) year.

I have a sick father in rural Limuru Kiambu who must everyday be taken to Kijabe Mission Hospital to be removed urine. I have no one to assist me on my father.

I have spent a lot of money on this adjournments which I feel are further punishment on me.

The court file in this case got lost. The Chief Justice intervened and I used copy of proceedings to make skeleton file. I blamed the defendants for the lost file on several times.

I have no quarrel with the trial magistrate. I do not know who and how my extra expenses on the adjourned days on delivering judgement will be met.

I will be very comfortable to wait 4 weeks adjournment only if then judgement will be given. This letter please is not an accusation nor a complaint against the trial magistrate. I only wish the trial magistrate to honour whatever adjournment he gives to allow me attend to my sick aging father.

Kindly intervene to help.

Yours faithfully,



SAMSON NDENDERY KIGAMBA

SKN 09 SKN 09

REPUBLIC OF KENYA

IN THE S. Rural COURT  
AT Meru  
CIVIL SUIT 1 OF 19 86

Samson Mwendu Nigambu

Plaintiff

against

David Mwangi Muthiga

Defendant

To: Mr G.R. Watting Alice House  
40 Belhouse Mwangi Ernest and Young House  
P.O. Box 44286 Nairobi  
WHEREAS your attendance is required to give evidence

..... on behalf of the Plaintiff ..... in the above suit,  
you are hereby required (personally) to appear before this Court on the 20th  
day of September, 1986, at 8:00 o'clock in the forenoon,  
and to bring with you (or to send to this Court) and so from day to day until your presence  
is dispensed with by the Court .....  
documents relating to the case

A sum of Shillings ..... being your travelling and other expenses and subsistence allowance for one day is herewith sent. If you fail to comply with this order without lawful excuse, you will be subject to the consequences of non-attendance laid down in rule 12 of Order XV of the Civil Procedure (Revised) Rules 1948.

Given under my hand and the Seal of the Court this 30th day  
of August, 1986  
[Signature]  
Registrar / Resident Magistrate

NOTE.—(1) If you are summoned only to produce a document and not to give evidence, you shall be deemed to have complied with the summons if you cause such document to be produced in this Court on the day and hour aforesaid.  
(2) If you are detained beyond the day aforesaid a sum of Shillings ..... will be tendered to you for each day's attendance beyond the day specified.

SKN 09 SKN 09

SNK10  
SNK10

IN THE HIGH COURT OF KENYA  
AT NAKURU  
MISC. CIVIL APPLICATION No. 61 OF 1995

TRUFENA WAIRIMU MWANGI, MARY NJERI MWANGI  
(as Legal Representatives of the late  
DANIEL MWANGI MITHANGA).....APPLICANTS

VERSUS

SAMSON NDENDERU KIGAMBA.....DEFENDANT

NOTICE OF MOTION  
(S.796 of the Civil Procedure Act and  
Order L Rule 1 of the Civil Procedure Rules)

LET ALL PARTIES concerned attend his honour in chambers  
at Nakuru on the 19<sup>th</sup> day of MAY 1995  
at 9.00 a.m. in the forenoon or soon thereafter as  
Counsel for the Applicants may be heard that upon the  
grounds set forth in the annexed affidavit of DAVID  
MARAGA, Advocate and on further grounds to be adduced at  
the hearing hereof. This Honourable Court may be  
pleased to order:-

- a) That the Applicants herein be given leave to appeal  
out of time.
- b) That the costs of this application be costs in the  
cause.

DATED at Nakuru this 10<sup>th</sup> day of May 1995.

  
BOWRY MARAGA AND COMPANY  
ADVOCATES FOR THE APPLICANTS

Drawn & Filed By:-  
Bowry Maraga & Co.,  
Advocates,  
Belpar House,  
Court Road,  
P.O. Box 671,  
NAKURU

To Be Served Upon:  
Mr. Samson Ndenderu Kigamba,  
P.O. Box 139,  
ELBURGON

"If any party served does  
not appear in court at  
the time and place afore-  
mentioned such order will  
be made and proceedings  
taken as the court may  
think just and expedient"

IN THE HIGH COURT OF KENYA

AT NAKURU

MISC. CIVIL APPLICATION No. 61 OF 1995

TRUFENA WAIRIMU MWANGI, MARY NJERI MWANGI  
(as Legal Representatives of the late  
DANIEL MWANGI MITHANGA).....APPLICANTS

VERSUS

SAMSON NDENDERU KIGAMBA.....DEFENDANT

AFFIDAVIT

I DAVID KENANI MARAGA of Post Office Box Number 671, and  
state as follows:-

1. That I am an Advocate of the High Court of Kenya practising as such in the firm of Bowry Maragá and company Advocates, at the above address.
2. That I have the conduct of this application on behalf of the Applicants.
3. That on or about the 13th March 1995 Judgment was delivered in Nakuru RMCC No. 1 of 1986 and the Applicants instructed me to appeal against that judgment.
4. That I sent a letter to the Resident Magistrate, Nakuru on the 13th March, 1995 asking for an uncertified copy of the proceedings and a certified copy of the judgment for appeal purposes. A photocopy of the said letter is attached hereto and marked "A".
5. The proceedings were not supplied to us until 28th April 1995 as stated on the annexed certificate of delay marked "B".
6. That the delay in filing an appeal is due to the delay in getting the proceedings and not due to circumstances within my control or the control of the Applicants.
7. That I swear this affidavit to support the Applicant's application for leave to appeal out of time.

.... / 2

8. That what is stated herein is true to the best of my knowledge, information and belief.

SWORN at Nakuru by the said )  
DAVID KENANI MARAGA on the )  
10<sup>th</sup> day of May 1995 )

*[Handwritten signature]*

BEFORE ME

*[Handwritten signature]*

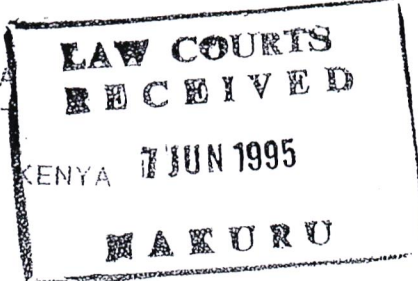
WETH OMWENYO )  
COMMISSIONER FOR OATHS )  
P. O. BOX 4031 )  
NAKURU )  
DATE 10.5.95 )  
COMMISSIONER FOR OATHS )

Drawn & Filed By:-

Bowry Maraga & Co.,  
Advocates,  
Belpar House,  
Court Road,  
P.O. Box 671,  
NAKURU

Exhibit "SNK3"

REPUBLIC OF KENYA



IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 49 OF 1995

(An appeal from the judgment of J.G. Kingori Esq. RM in Nakuru RMCC No. 1 of 1986)

TRUFENA WAIRIMU MWANGI
MARY NJERI MWANGI
(as Legal Representatives of the late Daniel Mwangi Mithanga).....APPELLANTS

VERSUS

SAMSON NDENDERU KIGAMBA.....RESPONDENT

MEMORANDUM OF APPEAL

The Appellants above named being aggrieved by the decision of J. G. Kingori Esq. Resident Magistrate delivered on or about the 20th February, 1995 or the 13th March, 1995 in Nakuru RMCC No. 1 of 1986 hereby appeal to this court against the said decision upon the following grounds namely:-

- 1. The learned trial magistrate erred in law in not realising that Joshua Kimama Wanjema Pw 2 having agreed to buy the milling machine on 30th August, 1983 from M/s. Golden Star Auctioneers but failed to pay for it until 16th July, 1985 when the machine had already been repossessed by the said Auctioneers and sold to the late Daniel Mwangi Mithanga the agreement between the said Wanjema and Golden Star Auctioneers was void for failure of consideration.
2. The learned trial magistrate erred in law in not realising that M/s. Pannel Bellhouse & Mwangi having not revoked their authority to M/s. Golden Star Auctioneers had no business accepting payment from a purported purchaser without first consulting the said Auctioneers to ascertain if the machine had been sold or not.
3. The learned trial magistrate erred in law in not appreciating that Mr. Kurgat the proprietor of Golden Star Auctioneers could not be called to testify as he had died.

...../2

- \*4. The learned trial magistrate erred in awarding the Plaintiff mesne profits at the rate of Shs. 3000/= per month without any basis at all.
5. The learned trial magistrate erred in law in awarding damages far beyond his pecuniary jurisdiction.
6. The learned trial magistrate erred in not holding that the Respondent did nothing to mitigate his loss and awarding damages for an unreasonably long period.
7. The decision was against the weight of evidence.

WHEREFORE the Appellants pray that the appeal be allowed with costs in this court and the court below and the decision of the Magistrate be set aside or altered.

DATED at Nakuru this 7<sup>th</sup> day of ~~14~~ June 1995.

  
BOWRY MARAGA AND COMPANY  
ADVOCATES FOR APPELLANTS

Drawn & Filed By:-

M/s. Bowry Maraga & Co.,  
Advocates,  
Belpar House,  
Court Road,  
P.O. Box 871,  
NAKURU

To Be Served Upon:-

Mr. Samson Ndenderu Kigamba,  
P.O. Box 139,  
ELBURGON

SINK11

IN THE HIGH COURT OF KENYA AT NAKURU  
MISC. CIVIL APPLICATION NO. 61 OF 1995

TRUFENA WAIRIHU MWANGI  
MARY NJIRI MWANGI (as legal Representative of the late  
DANIEL MWANGI MITHANGA ..... APPLICANTS

V E R S U S

SAMSON NLENDERU KIGAMBA ..... RESPONDENT

RULING

This ruling is in respect of an application filed on 15-5-95 for order that:-

- (a) The applicants be granted leave to appeal out of time.
- (b) Costs of the application be in the cause.

The basis of the application is the annexed affidavit of applicant's counsel in which he depones that judgment was delivered on or about 13-3-95 in Nakuru RMCC.1/86. He was then instructed to file an appeal against that judgment and he applied for a copy of the proceedings (uncertified), and a copy of the judgment (certified). This was by letter dated 13-3-95 (Annexure A).

It was not until 28-4-95 that the court forwarded a copy of the proceedings and judgment. A certificate of delay duly signed by the Deputy Registrar and issued on 8-5-95 clearly confirms the date when the proceedings were given to applicants counsel, as 28-4-95. The application was filed 17 days late.

The Respondent opposes the application and has filed a replying affidavit and a preliminary objection. He argues that he was supplied with proceedings on 3-3-95 and does not understand why the applicant say that proceedings were not ready until April, 1995.

Although this is not disclosed in the applicant's affidavit, his counsel argues that when the judgment was delivered his client as well as himself were not in court because they were not aware of the judgment date, since the judgment had been postponed many times.

I have looked at the original record of the lower court. On 18-10-94 the matter came for mention and an order was made to the effect that judgment would be on 18-10-94. There is no other order on record thereafter.

There is a judgment on record. It is not dated. It is not signed. It is not known if it was ever delivered to the parties. If it was ever delivered, then the record does not show when this was done.

In his objection, the Respondent has pointed out to the court that the applicant has failed to comply with the court order made on 31-3-95, and is therefore in contempt of court and should not be heard by this court.

I have read the lower court record for 31-3-95. The lower court on that day granted the applicant a stay of execution of the same in RMCC.1/86 on condition that the applicant deposits in court "the perkins engine", on or before 7-4-95 when the Respondent in his ground of objection (No.1), says that the applicant is in contempt of the court order made on 31-3-95, I understand him to be saying that the Applicant failed to deposit the said engine in court as ordered on 31-3-95. — 20

\* It is surprising that the applicant has said nothing concerning that order of 31-3-95 and the Respondent's allegation that he is in contempt of the same. The applicant's silence on this very serious allegation against him must be interpreted to imply that, the applicant is in agreement with the Respondent on that particular matter. The lower court record does not show that the said engine has been deposited in court. Much as the applicant may be said to be in contempt of that order made on 31-3-95, the effect of his failure to deposit the engine as security, as ordered by the court is that, the order of stay of execution made on 31-3-95 has lapsed. — 21

ORDER:

The record does not show what transpired on 15-4-95 when the engine was supposed to be brought to court. The court on that date only dealt with taxation. The engine is therefore not in court. 3

The parties shall go back before Mr. Ombongi Resident Magistrate who saw this engine on 5-4-95 so that he can decide on whether the same can be deposited in court or not. Should there be no space in court then he will make alternative order in respect of the security which the applicant's should deposit.

Mention case before Mr. Ombongi on 7-6-95.

S.C. ONDEYO  
JUDGE

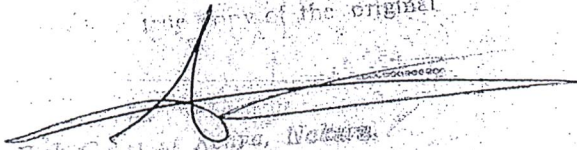
Respondent: I apply for proceedings and ruling.

Order:

Supply Respondent with certified copy of the proceedings and ruling upon payment.

S.C. ONDEYO  
JUDGE

True copy of the original  
High Court of Kenya, Nakuru

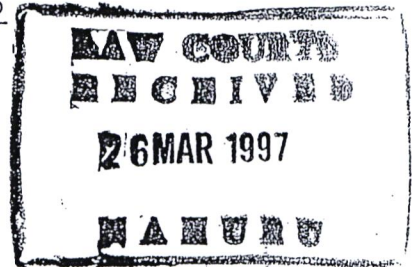


SNK12

THE PUBLIC OF KENYA  
IN THE HIGH COURT OF KENYA AT NAKURU  
CIVIL APPEAL NUMBER 49 OF 1995

B E T W E E N

- 1. TRUFENA WAIRIMU MWANGI
  - 2. MARY NJERI MWANGI  
(AS LEGAL REPRESENTATIVES OF THE LATE DANIEL MWANGI MITHANGA) .....
- APPELLANTS



V E R S U S

- SAMSON NDENDERU KIGAMBA .....
- RESPONDENT

STATEMENT OF AGREED ISSUES BY RESPONDENT

- 1. Whether Trufena Wairimu Mwangi and Mary Njeri Mwangi are legal Representatives of the late Daniel Mwangi Mithanga.
- 2. Whether there is evidence on record by the Trial Magistrate Joshua Wanjema was the successful bidder for the Saw Milling Machine and failed to pay for the machine promptly the said machine be repossessed by the Auctioneer M/S Golden Star Auctioneers.
- 3. Whether there was presented before the Trial Magistrate a Sale Agreement for the sale of the said Milling Machine between Joshua Kimama Wanjema on one part and Golden Star Auctioneers on another part.
- 4. Whether Pannel Bellhouse & Mwangi required to revoke their authority (if any at all) to Golden Star Auctioneers before accepting and receipting purchase price money for the Milling Machine from Joshua Kimama Wanjema without consulting Golden Star Auctioneers.
- 5. Whether it was the duty of the Trial Magistrate to ensure Mr. Kurgat the proprietor of Golden Star Auctioneers was called to testify before he (Mr. Kurgat) died.
- 6. Whether it was legal and with basis that the Trial Magistrate awarded the plaintiff mesne profit at the Rate of Ksh.3,000.00 per month.
- 7. Whether the damages awarded by the Trial Magistrate was far beyond his (Trial Magistrate) pecuniary jurisdiction and whether the lack of such pecuniary jurisdiction was known to any of the parties.
- 8. Whether if at all the plaintiff was responsible for the delay in the finalisation of the suit. Further whether the suit Engine is vandalised and by whom it should be replaced plus a what value.
- 9. Whether the decision arrived at by the Trial Magistrate was against the weight of the evidence.
- 10. Whether the suit Milling Machine was, if at all, repossessed on Execution Warrants obtaining in Nakuru RMCC No.72 of 1985.
- 11. Whether Nakuru RMCC No. 72 of 1985 was between Marioshoni Farmers Company Limited as plaintiff and Daniel Mwangi Mithanga as dependant.

12. Whether in what capacity Samson Ndenderu Kigamba the repondent herein was party if at all in the said Nakuru RMCC No. 72 of 1985.
13. Whether legal Title in suit Milling Machine alias Perkins Engine was properly passed by J.R. Watling PW4 to Joshua Kimama Wanjema.
14. Whether the Rate of Ksh.3,000.00 as mesue profits awarded to plaintiff was inordinately low if at all further whether the rate of Ksh.8,000.00 ought to have been awarded in the alternative.
15. Whether there was Nakuru HMISC Civil Suit Number 129 of 1994.
16. Whether paragraph Numbers 1, 2 and 3 of the instant memorandum of Appeal contradict paragraph Numbers 2, 3 and 4 of the statement of defence in the Trial Court. And whether File Numbers HC MISCCC NO. 129/94 and/or HC MISC Application 61/95 is relevant to this Appeal
17. Whether the evidence of the plaintiff and/or plus those PW1, PW2 PW3 and PW4 abated and/or challenged or refuted at all.
18. Whether the applicant is guilty of contempt of any Orders. If any Court estopped from hearing the appellant in the face of any contempts so committed. Whether what value of security pending this Appeal be ordered.
19. Whether memorandum of Appeal too General and or too vague to the further too irrelevant to the record and therefore judgement of Trial Magistrate.
20. Whether Mary Njeri Mwangi lack any locus standi in this instant Appeal and/or before the Trial Magistrate .
21. Whether the instant Appeal ought to be struck out summarily.
22. Whether the suit Milling Machine alias the suit Perkins Engine existed intact as at the material time of the Barter Agreement and whether who ought to provide replacement if at all of the said suit Milling Machine alias the Perkins Engine.
23. Whether the legal counsel for the appellant also was defence counsel for the said Daniel Mwangi Mithanga in Civil Suit No.SRMCC 72/85 further whether the legal counsel concealed any material facts thereof.
24. Whether who ought to be condemned with costs of this appeal and at what rate.

DATED AT NAKURU this 14<sup>th</sup> day of June 1996.

  
 SAMSON NDENDERU KIGAMBA  
 RESPONDENT

  
 SAMSON NDENDERU KIGAMBA  
 APPROVED RESPONDENT

BOWRY MARAGA & CO. ADVOCATES  
 APPROVED FOR/ON BEHALF OF APPELLANT

## LITIGATION BY RESPONDENT BEFORE THE APPELLATE JUDGE ON

ON 18 MAY, 1999 IN NAKURU HCCIVIL APPEAL NO.49/95

I oppose the Appeal and urge the Honourable Court to dismiss it on the following grounds then allow the cross-appeal:-

1. The Appeal offend Section 65(1), 76(1) and 95 of the Civil Procedure Act Cap 21 read with Order XXXIX rules 2 (1, 2, and 3) of the Civil Procedure Rules.

On 31st March, 1995 the Trial Magistrate the Hon. J. G. Kingori granted stay of execution and ordered the suit Engine deposited into Court as Security pending Appeal. No suit Engine have been deposited into court to date.

On 17th August, 1995 Mr. Maraga the Counsel for the defendant admitted before the Chief Magistrate, the Hon. Mr. W.K. Tuiyot that No Suit Engine had been deposited into Court.

On 6th June, 1995, the Hon. Lady Justice S. C. Ondeyo in her order found that:-

"The Engine is therefore Not in Court". This instant Honourable Court ought Not hear the appellants who have disobeyed Court Orders with impunity. I rely on decisions in following case Law Authorities:-

- (i) Re VGM Holdings Ltd. (1941) 2 ALLER 417.
- (ii) Mawani Vs Mawani (1978) KLR 159.
- (iii) Hadkinson Vs Hadkinson (1952) 2 ALLER 567
- (iv) X LTD. Vs Morgan - Grambian (Publishers) (1990) 2 ALL ER 1

That alone is enough to dispose of the matter and dismiss the Appeal.

2. The constitution of the Appellants on this appeal lack Locus Standii. Mary Njeri Mwangi has No Letters of Grant of the Administration of the Estate of the defendant Daniel Mwangi Muthanga since deceased. The Letters of Grant of the Administration of the Estate of the late Daniel Mwangi Muthanga is in the name and title of Trufena Wairimu Mwangi.

The inclusion of appellant Mary Njeri Mwangi is incurably fatal to the instant appeal.

A copy of Letters of Grant of Administration in Nakuru, the Succession Cause No. 185/1990 issued to Trufena Wairimu Mwangi is at page 28 and 29 of the additional Record of Appeal dated 31th May, 1999 by Respondent.

3. The Record of Appeal is defective. It omits vital documents for fair ends of justice. The Record of Appeal suffer from fraudulent misrepresentation and concealment of material facts. Vital Documents omitted include:-

- (a) Memorandum of Cross-Appeal lodged on 12th June, 1995 duly served upon Counsel for appelants on 30th June, 1995 at 8.40 a.m.
- (b) Statement of Agreed issued lodged on 26th March, 1997 duly served on 24th April, 1997.
- (c) Certificate of Delay dated 28th April, 1995.
- (d) Orders of Trial Court dated:-

- (i) 31st May, 1989 disobeyed
- (e) Written submissions by Plaintiff in Lower Court dated 24th October, 199
- (f) Correspondences on Suit Engine and on Mr. Kurgat.
- (g) Decree dated 20th February, 1995 disobeyed.

The amended Decree offend Section 72 of the Civil Procedure Act. The amendment ought to be grounds of Appeal. In the premises and since Decree dated 20th February, 1995 have not been filed before this Hon. Court the Appeal is incurably fatal. No Decree has been lodged in Court Appeal file.

4. The Counsel for the appellant seeks to rewind the clock. The Appeal seeks to achieve what cross-examination would have achieved. The defence Counsel abandoned to cross-examine the Plaintiff in the Lower Court on 16th October, 1987 on grounds to consult with a Mr. Kurgat whom the Counsel procured witness summons on. See page 4 of the Proceedings of the lower Court. On 10th August, 1994 the cross examination proceeded without Mr. Kurgat. The Appeal therefore offend Section 107 of the Evidence Act Cap. 80. It was upon defence to produce Mr. Kurgat to testify in Court. The Trial Court was NOT party in the Suit.
5. The Appeal offend Section 68 proviso (a) (ii) of the Civil Procedure Act Cap. 21. The Appellants have vandalised the suit Engine meant to defeat justice. The remains of the suit Engine are present in Court premises. The Order of the Chief Magistrate W. K. Tuiyot dated 18th July, 1995 is disobeyed. The Chief Magistrate Ordered the dismantled components be assembled into the suit Engine. This order could not and cannot be implemented because vital components are missing. The Order appeals at page 9 of the proceedings following the judgement. Also see the proceeding of the Hon. Lady Justice S.C. Ondeyo in Nakuru H.C. Misc. Application No.61/95 at Page 4 after Ruling.
6. The Counsel for the Appellant and the Counsels for the defendant both alike are not qualified to appear and litigate the matter. They have not filed their annual practicing certificates and annual licence pursuant to my Letter dated 11th May, 1999 served on them on 11th May, 1999. See copy in the Court file.

I apply that the instant Appeal be dismissed with costs and the Cross-Appeal allowed. No reply to the cross-Appeal has been filed so far. In the Cross-Appeal I pray that:-

- (a) Mesne profits be enhanced from Ksh.3,000 to Ksh.8,000 per month upon finding the lower Cour award too unordinately low. The Suit Engine was used as a Saw-Mill plant. The Lower Court proceedings support the fact that the suit Engine was a Saw-Mill. Its output capacity is capable of 7 tons of Timber on average per day. See the written submissions by plaintiff in the lower court.
6. Taxed costs be reviewed as per my bill of costs dated 11th April, 1995.

I rely on the following:-

- (a) Case Law Authorities as per Notices dated and filed on 20th July, 1998 and 14th July, 1998 in the Court file.

That is all.

**LAW COURTS  
RECEIVED**

SNK14

17 JUN 1995

**NAKURU**

IN THE HIGH COURT OF KENYA

AT NAKURU

CIVIL APPEAL NO. 49 OF 1995

(An appeal from the judgment of J.G. Kingori Esq. RM in Nakuru RMCC No. 1 of 1986)

TRUFENA WAIRIMI MWANGI

MARY NJERI MWANGI

(as Legal Representatives of the late

Daniel Mwangi Mithanga).....APPELLANTS

VERSUS

SAMSON NDEJERU KIGAMBA.....RESPONDENT

MEMORANDUM OF APPEAL

The Appellants above named being aggrieved by the decision of J. G. Kingori Esq. Resident Magistrate delivered on or about the 20th February, 1995 or the 13th March, 1995 in Nakuru RMCC No. 1 of 1986 hereby appeal to this court against the said decision upon the following grounds namely:-

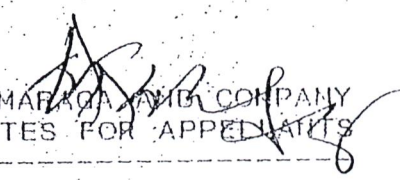
1. The learned trial magistrate erred in law in not realising that Joshua Kimama Wanjema Pw 2 having agreed to buy the milling machine on 30th August, 1983 from M/s. Golden Star Auctioneers but failed to pay for it until 16th July, 1985 when the machine had already been repossessed by the said Auctioneers and sold to the late Daniel Mwangi Mithanga the agreement between the said Wanjema and Golden Star Auctioneers was void for failure of consideration.
2. The learned trial magistrate erred in law in not realising that M/s. Pannel Bellhouse & Mwangi having not revoked their authority to M/s. Golden Star Auctioneers had no business accepting payment from a purported purchaser without first consulting the said Auctioneers to ascertain if the machine had been sold or not.
3. The learned trial magistrate erred in law in not appreciating that Mr. Kurgat the proprietor of Golden Star Auctioneers could not be called to testify as he had died.

...../2

4. The learned trial magistrate erred in awarding the Plaintiff mesne profits at the rate of Shs. 3000/= per month without any basis at all.
5. The learned trial magistrate erred in law in awarding damages far beyond his pecuniary jurisdiction.
6. The learned trial magistrate erred in not holding that the Respondent did nothing to mitigate his loss and awarding damages for an unreasonably long period.
7. The decision was against the weight of evidence.

WHEREFORE the Appellants pray that the appeal be allowed with costs in this court and the court below and the decision of the Magistrate be set aside or altered.

DATED at Nakuru this 7<sup>th</sup> day of June 1995.

  
BOWRY MARAGA AND COMPANY  
ADVOCATES FOR APPELLANTS

Drawn & Filed By:-

M/s. Bowry Maraga & Co.,  
Advocates,  
Belpar House,  
Court Road,  
P.O. Box 671,  
NAKURU

To Be Served Upon:-

Mr. Samson Henderu Kigamba,  
P.O. Box 139,  
ELBURGON

THE REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAKURU

CIVIL APPEAL NO. 49 OF 1995

(AN APPEAL FROM THE JUDGEMENT OF J. G. KINGORI  
ESQ, RM IN NAKURU RMCC NO. 1 OF 1986)

TRUFENA WAIRIMU MWANGI

MARY NJERI MWANGI

(AS LEGAL REPRESENTATIVES OF THE LATE

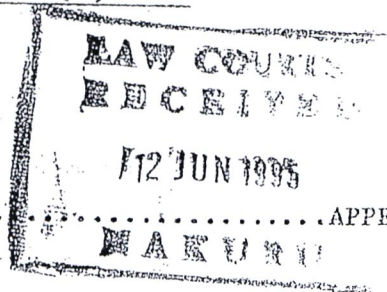
DANIEL MWANGI MITHANGA) .....

APPELLANT

V E R S U S

SAMSON NDENDERU KIGAMBA .....

RESPONDENT



MEMORANDUM OF CROSS APPEAL BY RESPONDENT

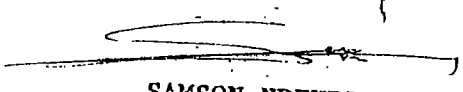
The Respondent above named being aggrieved by the judgement of J. G. Kingori Esq, Resident Magistrate delivered on the 20th February, 1995 in Nakuru RMCC No. 1 of 1986 hereby cross appeal to this Honourable Court against the said judgement upon the following grounds inter alia:-

In reply to Memorandum of Appeal by appellant:-

1. The Saw Milling Perkins Engine was by for a 110ft x 110ft Plot out of land parcel situate in SHACHANGANI Trading Center in Mukinyai Farmers Company Limited owned by Appellant. Which barter sale agreement was drafted/effectuated on 12th April, 1984 before one certain Robert Mungai Mbugua PW3. Further the alleged repossession was actually done by M/s. Kenna Auctioneers in Execution of orders obtaining in Nakuru RMCC No. 72 of 1985 Between M/s. Mariosouli Farmers Company Limited as Plaintiff and Daniel Mwangi Mithanga as Defendant all without privity to gistoff suit Nakuru RMCC No. 1 of 1986 that is RMCC No. 72 of 1985 not involve RMCC NO. 1 of 1986.
2. The issue of the sale of the suit perkins engine to M.s. Golden Star Auctioneers from M/s. Pannel Bell House & Mwangi Irrelevant to suit RMCC No. 1 of 1986: Further property in suit Perkins engine legally and properly passed by M/s. Pannel Bellhouse & Mwangi to Joshua Kimama Wanjema as per evidence of J. R. Watling PW 4.
3. The trial Magistrate legally correct in holding/appreciating that Mr. Kurgat ought to have been summoned to Court by Defence who (Defence) otherwise Appellant delighted in numerous adjournments rather than produce the said Mr. Kurgat in witness dock.
4. Respondent shall counter claim that the trial Magistrate erred in law and in fact in awarding Plaintiff mesne profit at rate of Kshs. 3,000.00 per month which rate is inordinately too low based on the mitigation By Plaintiff /Respondent in written submissions for Mesne profit at rate of Kshs. 8,000.00 per month contrasted with Kshs. 14,000.00 per month as Saw Mill was hired out by Daniel Mwangi Mithanga and market rate ruling in the Saw Milling Industry consider in the 120 HP Engine rating of suit perkins engine AND Respondent shall invoke section 120 evidence act cap 80 Laws of Kenya. See prosection PENO/FW 2 & 4.

5. The Respondent shall counter claim Appellant tactfully misled trial Magistrate into making award after Appellant opposed transfer of trial proceeding to High Court in Nakuru Misc. Civil Suit Number 129 of 1994 and Respondent shall invoke section 120 evidence Act Cap 80.
6. The Respondent shall counter claim the appellant fraudulently introduced and pleaded issues irrelevant to suit obtaining in paragraph numbers 1, 2 and 3 of Memorandum of appeal contrasted with paragraph Numbers 2, 3 and 4 of statement of defence in trial proceedings in lower Court. Further appellant persistently advanced evidence on repossession of suit engine by M/s. Kenna Auctioneers obtaining in Nakuru SRMCC No. 72 of 1985 and Respondent shall invoke sections 114 Penal code Cap Act 63 Laws of Kenya.
7. Respondent shall counter claim the trial magistrate's judgement legal and naturally logical in Absence of any evidence to counter evidence of PW 1, PW2, PW3 on Barter sale agreement plus evidence of PW4 on legal and equitable lien of suit engine in favour of PW2. Passed onto PW1 and subsequently to Daniel Mwangi Mithanga.
8. The Respondent shall counter claim this Honourable Court ought not hear the Appellant who has committed contempt of court order falling to depositing suit engine vide order Mr. J. G. Kingori. Trial Magistrate further the Respondent shall reply on Doctrine of functus officio on order of Mr. Obongi esq. vis-a-vis the order of the said J. G. Kingori esq. See proceedings and Ruling in Nakuru High Court MISC. Application NO. 61 of 1995.
9. The Respondent shall counter claim appeal incompetent as Memorandum of Appeal incompetent as Memorandum of Appeal too general further irrelevant to trial Magistrates proceeding and judgement further and abuse of process of court out to delay harvest of fruits of judgement and shall invoke section 79b Cap 21CFA Act.
10. The Respondent shall counter claim Mary Njeri Mwangi not backed by any<sup>2</sup> letter of Administration of the Estate of Daniel Mwangi Mithanga the Appellant and Respondent shall invoke doctrine of Locus standi against Mary Njeri Mwangi as appellant in the Appeal herein. The Respondent shall invoke orders 11 rule 2 and Order 23 rule 4 Civil Procedure rules 1978.
11. The Respondent shall counter claim trial Magistrate erred in law and in fact in recording evidence of Mary Njeri DW 1 allegedly without any letter of Administration of the Estate of Daniel Mwangi Mithanga and/or no any power of Attorney issues by Daniel Mwangi Mithanga and/or any other legal document in support of claim of being wife of Daniel Mwangi Mithanga for which Respondent shall invoke doctrine of locus standi against evidence of Mary Njeri Mwangi in the trial proceedings.
12. REASONS WHEREFORE: the Respondent pray for order that inter alia
  1. This Appeal be dismissed summarily with costs.
  2. The award of Mesne profits at the rate of Kshs. 3,000 per month by the Trial Magistrate be enhanced to Kshs. 8,000 per month.
  3. The certificate of costs at Kshs. 16,683.00 by the taxation master the Hon. Mr. Obongi be taxed afresh.

DATED at NAKURU this 12th day of June, 1995

  
**SAMSON NDENDERU KIGAMBA**  
**RESPONDENT**

**DRAWN & FILED BY:-**

Samson Ndenderu Kigamba

P O Box 139,

**ELBURGON**

**SERVE UPON**

Bowry, Maraga & Company

Advocates

P O Box 671

**NAKURU**

# **CLEARANCE CERTIFICATES**

**Law Society of Kenya**

Lavington, opp Valley Arcade,  
 Gitanga Road  
 P.O Box 72219-00200 Nairobi, Kenya  
 Dropping Zone 149 – Revlon Plaza  
 Tel: 020-8155295, +254 720 904983  
 Email: lsk@lsk.or.ke  
 Website: www.lsk.or.ke

Ref: P.105/980/78

---

**CERTIFICATE OF GOOD STANDING\***

This is to certify that

**MARAGA DAVID KENANI**

is an Advocate of the High Court of Kenya having been admitted to the Bar on the 16<sup>th</sup> day of September 1978 and a Member of the Law Society of Kenya in good standing.

There are no complaints against him, nor does he have any past or pending causes before the Advocates Disciplinary Tribunal.

Issued on this 20<sup>th</sup> day of June 2016

  
 MERCY K. WAMBUA  
SECRETARY/CEO



*\*This certificate is not valid without an embossed seal.*

Isaac Okero (President), Faith Waigwa (Vice-President)  
 Manthi Masika, Alex Gatundu, Alan Kosgey (General Membership Representatives)  
 Edwin Sifuna, Harriette Chiggai, Jemator Dorothy, (Nairobi Representatives)  
 Godfrey Kitiwa, Annet Nyukuri, David Njoroge, Jane Masai, (Upcountry Representatives)  
 Grace Okumu (Coast Representative)



No. 029475

# HIGHER EDUCATION LOANS BOARD



## Certificate of Clearance

UNIVERSITY STUDENT LOAN

This Certificate is awarded to MARAGA DAVID KENANI

ID No. 0330884 University Registration No. G34/211/74

University attended UNIVERSITY OF NAIROBI

For having repaid in full the Principal Loan and interest thereon.

Signature CEO/BOARD SECRETARY

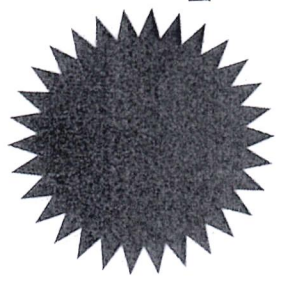
Date 19 August 2011

Date

Date 19 August 2011

Signature HEAD OF OPERATIONS

Date



C. 24A



Nº 838641

NATIONAL POLICE SERVICE  
DIRECTORATE OF CRIMINAL INVESTIGATIONS

DIRECTORATE OF CRIMINAL INVESTIGATIONS  
P. O. Box 30036-00100 GPO  
NAIROBI, KENYA

Ref. No. **538481 / 2016**

Date **22/06/2016**

**POLICE CLEARANCE CERTIFICATE**

*I hereby certify that the fingerprints recorded from .....*

**DAVID KENANI MARAGA**

*holder of ID/Passport No. **0330884** ..... have been searched in Criminal Records Office's database with/without previous record. The validity of the information on this Certificate is as of the date of issue.*

**REMARKS IN CASE OF PREVIOUS RECORD**

**OFFENCE(S)**.....

**RESULTS OF TRIAL**.....

**DATE**.....

**NIL**

*This Certificate has been issued without any alteration or erasure.*



**(J.M.Jeremiah)**

*For: Director, Directorate of Criminal Investigations*

(P.T.O.)



CRN No. 6035057

# CRB Certificate

Date of issue: 20 Jun 2016

S/No. 11166

We hereby confirm, having searched TransUnion records, that;

**DAVID KENANI MARAGA**

of National ID No 0330884

Has a Credit Report with status as:

No adverse listing

Paid

Paying

Not paid

This Certificate has been issued without any alteration or erasure. The validity of the information on this certificate is as at the date of issue.

TransUnion Authorised Signatory

**TRANSUNION**

Prosperity House,  
Westlands Road, Off Museum Hill  
P.O. Box 46406 - 00100

Nairobi  
Tel: +254203751799/ 3713603/2/4  
Mobile: 072205072/ 0724253296

TransUnion Authorised Signatory

J43512U20N {8726C95A-6FD9-485A-B5C4-9163F497B883}

The conclusions herein are based on information obtained from public record and other third-party sources. TransUnion makes no representation as to the accuracy of this information and shall not be liable for any loss, damage or claim whatsoever, howsoever arising following the use of or reliance upon the opinions expressed herein.

# THE ADVOCATES COMPLAINTS COMMISSION

35

Telephone No.: +254-20-251915/227461  
Fax No.: +254-20-315317

SHERIA HOUSE  
5TH FLOOR  
P.O. BOX 48048-00100  
NAIROBI

Your Ref:.....

Our Ref: **CC/1/1/VOL. IX (29)**.....



21<sup>st</sup> June, 2016, 20.....

Hon. Mr. Justice D. K. Maraga

Judge of Appeal

P. O. Box 30187-00100

NAIROBI.

Dear Sir,

RE: CLEARANCE CERTIFICATE: HON. MR. JUSTICE D. K. MARAGA

I refer to your letter of 20<sup>th</sup> June, 2016.

Please note that according to records held by this Commission, there are no pending complaints against Hon. Justice D. K. Maraga.

Yours faithfully

BEUTTAH SIGANGA  
CHAIRMAN  
ADVOCATES COMPLAINTS COMMISSION

*Please quote our reference when replying*

Committed to the Eradication of Dishonesty and Incompetence in the Legal Profession in Kenya

673



# KENYA REVENUE AUTHORITY

ISO 9001:2008 CERTIFIED

OUR REF: KRA/CDTD/HO/81

YOUR REF: KNA/DC/FPT/2016

① D/Committee

10<sup>th</sup> October, 2016

The Clerk  
National Assembly  
Clerk's Chambers  
Parliament Buildings  
P.O. Box 41842-00100,  
NAIROBI

② WASIKU  
pls deaf  
FA  
12/10

Dear Sir,

## INVITATION FOR VETTING BY THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS.

We refer to your letter dated 5<sup>th</sup> October, 2016 on the subject matter herein.

We hereby confirm that **Hon. Justice David Kenani Maraga** has complied with all his Tax obligations and consequently has been issued with a Tax Compliance Certificate (TCC) number KRANKU4238282016 valid until 21<sup>st</sup> June, 2017.

Yours faithfully,

**Elizabeth Meyo**  
**For Commissioner of Domestic Taxes**



*Tulipe Ushuru Tujitegemeo*



D/D/Corumbas



680



**ETHICS AND ANTI-CORRUPTION COMMISSION**

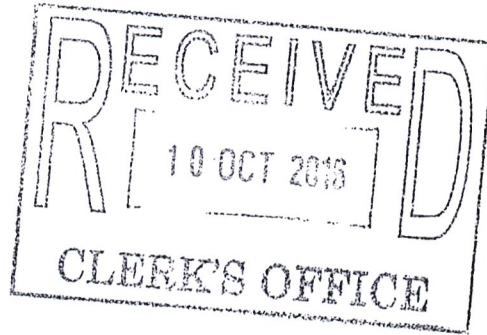
INTEGRITY CENTRE (Valley Rd./Jakaya Kikwete Rd. Junction) P.O. Box 61130 – 00200, NAIROBI, Kenya  
TEL.: 254 (020) 2717318 / 2720722, MOBILE: 0729 888881/2/3  
Fax: 254 (020) 2717473 Email: [eacc@integrity.go.ke](mailto:eacc@integrity.go.ke) Website: [www.eacc.go.ke](http://www.eacc.go.ke)

When replying please quote:

**OUR REF: EACC.7/10/5 VOL. III (37)**

**7<sup>th</sup> October, 2016**

**Justin Bundi, CBS**  
Clerk  
Clerk's Chambers  
National Assembly  
Parliament Buildings  
P O Box 41842 – 00100  
**NAIROBI**



**RE: INVITATION FOR VETTING BY THE DEPARTMENTAL COMMITTEE ON JUSTICE AND LEGAL AFFAIRS**

We acknowledge receipt of your letter referenced KNA/DC/FPT/2016 dated 5<sup>th</sup> October 2016 on the above subject.

We wish to confirm that we have no outstanding issues or ongoing investigations against **Hon. Justice David Kenani Maraga**.

Please note that the absence of records in the Commission's database is not a guarantee of absolute integrity of the nominee.

**MICHAEL K. MUBEA**  
**DEPUTY SECRETARY/CEO - TECHNICAL SERVICES**  
**FOR: SECRETARY/CHIEF EXECUTIVE OFFICER**

*EKI/tnm*

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pls deep  
FA  
12/10

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# **RECOMMENDATIONS IN SUPPORT**

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30<sup>th</sup> June 2016

Judicial Service Commission (JSC)  
Nairobi, Kenya.

Dear Sir/Madam.

**Ref: The Honorable Justice David Maraga : Streamlining Electoral Disputes Resolution (EDR) Regime in Kenya**

I am pleased to write this recommendation for the above referenced person regarding the subject matter, Streamlining and Strengthening Electoral Dispute Resolution Regime in Kenya, which the honorable Justice Maraga has worked tirelessly on. Upon the promulgation of the Constitution of Kenya 2010, and the enactment of Election Sector Laws, the complexity of the elections under the new constitution became apparent. This was particularly so because of the new introduction in the Constitution that required the holding of six elective offices contemporaneously. The first elections held under the new Constitution in 2013 promised among other things fierce competition that predictably resulted in overwhelming disputes being lodged with the Judiciary. Among the first people to appreciate the significance of the 2013 elections with regard to dispute resolution, was the Hon. Judge Maraga. In the intervening period, a few of us working on governance, democracy and elections discussed with the then Chief Justice, Hon Willy Mutunga, on the need to establish a mechanism for dealing with the election disputes post 2013 elections. This led to the formation of the Judiciary working Committee on Elections (JWCEP), which was later transformed into the Judiciary Committee on Elections (JCE). Justice Maraga played a prominent role in both committees.

My interaction with the Hon. Judge has been through numerous working relationship on the need to strengthen EDR in Kenya. In the period before 2013 elections, Hon. David Maraga, was instrumental in conceptualizing and developing a programme that saw the induction of Judges and Magistrates on principles of EDR that informed the election petitions lodged after the 2013 elections. The Judge also participated in the discussions around reforming election disputes resolution pre 2013, that culminated into progressive reforms for example allowing Magistrate Courts to handle petitions arising from County Assembly Elections. Judge Maraga also worked with the Electoral Institute for Sustainable Democracy in Africa (EISA), and other stakeholders namely the IEBC, JWCEP, PPDT to develop the Regulations required to operationalise the Election Laws and brought out useful insights on aspects that concerned EDR.

The challenges and shortcoming noted during the 2013 elections brought out weaknesses in the constitutional, legal and administrative framework for elections in Kenya. Since 2013, JCE and Judge Maraga have worked with key stakeholders to strengthen and review the election laws and election dispute resolution in Kenya. These efforts culminated into the transformation of JCE into a permanent Judiciary Committee, deliberations and drafting of Election Law Reforms Bills, and refining the EDR processes in Kenya. Throughout all these efforts, the Hon. Judge demonstrated leadership, commitment, courage, resilience, character and a high degree of judgement that added

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Professor Tom Lodge (United Kingdom), Justice Lewis M. Makame (Tanzania), Justice Anastasia Msosa (Malawi),  
Dr Christiana Thorpe (Sierra Leone), Ms Rona Tip (South Africa)

value to the agenda of strengthening and consolidating electoral democracy in Kenya. For this reason, and as somebody who has worked with him in Kenya, I strongly recommend him for the position of the Chief Justice.

Sincerely,



Felix Odhiambo Owuor  
Country Director-EISA Kenya



# NAIROBI CENTRAL SEVENTH-DAY ADVENTIST CHURCH

P.O BOX 47033 - 00100 GPO NAIROBI. TEL: 2721461 Mobile: 0722-294668 E-mail: nrbcnda@nbnet.co.ke Website: www.nairobicentralsda.org

June 29, 2016

**The Judicial Service Commission  
Supreme Court Building  
NAIROBI**

Dear Sir/Madam

**Re: Justice David Maraga**

**Letter in support of application for the position of Chief Justice, Republic of Kenya**

We write to you in support of an application lodged by Bro. David Maraga for the position of Chief Justice, Republic of Kenya.

We, as the fraternity of the fellowship of the Seventh-day Adventist Church, unreservedly present to you Bro. Maraga as a commendable, creditable and worthy candidate for the position of Chief Justice.

Bro. Maraga has served the Church as an elder and bible study leader for many years. He has, also, assisted in planting Seventh-day Adventist Churches in many areas in Kenya. He is a dedicated and focused person with great energy and motivation for any task that he sets up to undertake. He is an ethical, upright and principled individual; virtues that will greatly enhance the work and image of the Judiciary.

We recommend the candidature of Bro. Maraga and wholeheartedly endorse him for the position of Chief Justice of the Republic of Kenya.

Yours faithfully

  
**PASTOR JACOB AKALI**  
Senior Pastor





**KITUO CHA SHERIA**  
**LEGAL ADVICE CENTRE**  
*we care for justice*

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4<sup>th</sup> July, 2016

The Judicial Service Commission  
Supreme Court Building  
Nairobi

Dear Sir / Madam

Re: Our Support for Hon. Justice David Maraga in his Application for the Post of the Chief Justice, Republic of Kenya.

We are writing to you with regard to the aforementioned.

Kituo cha Sheria considers Honorable Justice Maraga as a jurist of good repute who, in his career, first as an Advocate of the High Court of Kenya and later as a Judge of the Superior Courts has distinguished himself as an eminent and notable contributor to the growth of Jurisprudence and strong Advocate of human rights.

We confirm that Hon. Justice Maraga has been a good friend of KITUO for many years and has supported the work of KITUO in the provision of legal aid and representation for the poor and marginalized people in Kenya.

We therefore send this as a message of support and wish him well in his application.

If you have any further comment and/or need clarification, please do not hesitate to contact us.

With kind regards,

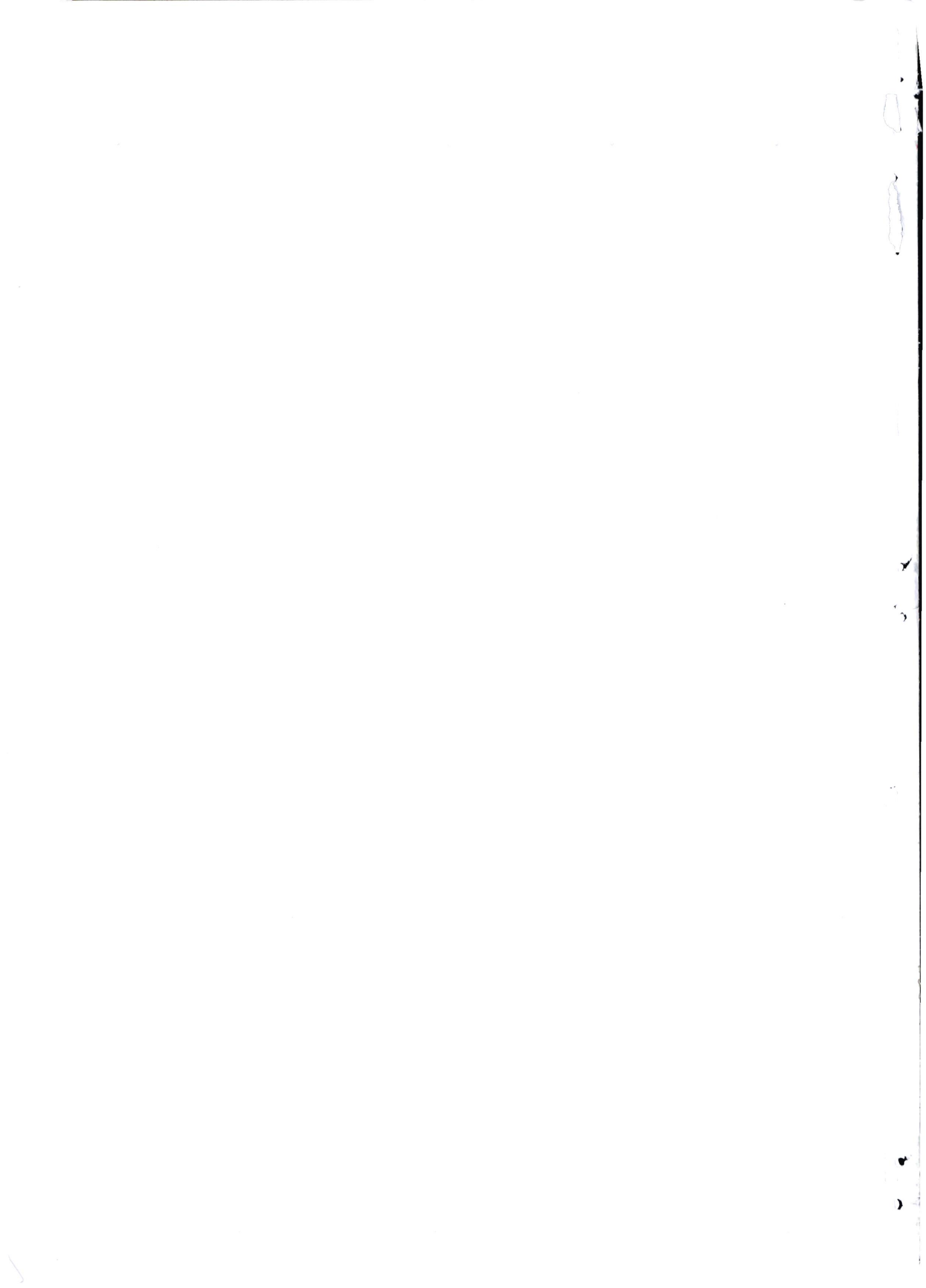
Gertrude N. Angote,  
Executive Director

I CERTIFY THAT THIS IS  
A TRUE COPY OF THE  
ORIGINAL.

HILLARY CHACHA ODERA  
ADVOCATE  
COMMISSIONER FOR OATHS  
P. O. Box 51236 - 00200  
NAIROBI



# **PROFESSIONAL REFERENCE**





**UNIVERSITY OF NAIROBI**  
**COLLEGE OF HUMANITIES & SOCIAL SCIENCES**  
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P.O Box 30197  
 00100 G.P.O.  
 Nairobi,  
 Kenya.

10 October 2016

**The Clerk of the  
 Kenya National Assembly  
 Parliament Buildings  
 P.O. Box 41842-00100  
 NAIROBI**

Dear Sir,

**Professional Reference for Justice David Kenani Maraga**

I have known Justice Maraga for about ten years as a Judge of the High Court, as a graduate student at the School of Law, University of Nairobi where I am a Law Professor and Dean, as the Presiding Judge of the Court of Appeal in Kisumu; as the chair of the Judiciary Committee on Elections tasked with overseeing election petition hearings arising after the 2017 elections within the prescribed period in the constitution; and as the Chairman of the Tribunal Investigating Justice Joseph Mbalu Mutava in which I am a member.

He has the requisite professional competence to serve as the Chief Justice of the Republic of Kenya. Justice Maraga has high intellectual capacity which is evidenced by his pursuit and completion of his Master of Laws (LLM) course in record time. His engagement with our undergraduate and graduate students as a guest lecturer demonstrates his intellectual prowess and public spirited nature. He takes initiative and volunteered to teach and interact with the students in a classroom environment. This illustrates that he is diligent and has no difficulty rising to challenges and volunteering for tasks, however onerous.

Engagement with university students requires a high level of understanding of legal issues and intellectual dexterity as the students tend to be inquisitive. Justice Maraga has not shied away from this task illustrating that he is confident and has no fear of whatever questions may be asked of him by the students dealing with substantive or procedural legal questions. The students rate him highly as a lecturer and give the feedback that he is thorough and answers all their questions competently. Offering to teach and interacting with professors teaching at University demonstrate Justice Maraga's capacity, adaptability and flexibility to work with a variety of people old and young. This trait is also demonstrated through his work as a Presiding Judge in Kisumu and as Chair of both the Elections Committee and the Justice Mutava Tribunal.

He has contributed immensely to bridging the gap between the bench and the academy by offering his services in both graduate and undergraduate classes in the areas of human rights and socio-economic rights. His contribution as a guest lecturer has enabled our students to get much valued insights from the bench and greatly enriched their learning experience.

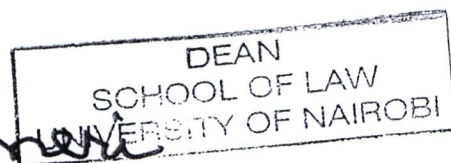
Justice Maraga is meticulous in his written and oral presentations as evidenced by the rulings I have witnessed him giving in the Tribunal and in his explanations of the work of the Elections Committee. He is an effective communicator in his oral and written accounts and is particularly keen to contribute to a future where all Kenyans, irrespective of their gender, ethnicity, political affiliation and station in life enjoy the full range of human rights. This illustrates his commitment to the tenets of fairness, impartiality and justice.

Justice Maraga has gained a lot of experience as a Judge of the High Court between 2003 and 2011 and as a Court of Appeal Judge since 2011. He has executed his duties with diligence. From my interaction with Justice Maraga, he is a person of his word, keeps time and is honest and trustworthy in his dealings with his superiors, colleagues and subordinates. He does not shy away from complex situations, is a patient listener and decisive. As a member of the Tribunal he chairs, I can also opine that he is a good leader as well as a team player. He leads the team to cooperatively make decisions without abdicating his role as the Chair when he has to guide the team on issues of law and procedure.

Justice Maraga has been involved in a broad range of legal practice areas including: legal practice; research; consultancy; and the administration of judicial officers in courts and committees. The experience he has gained over the years, coupled with his experience as a judge, presiding judge and chair of a committee and a tribunal make Justice Maraga an exceptionally well qualified candidate for the post of Chief Justice.

Should you require any further information pertaining to Justice Maraga, I will be happy to avail it. I can be easily reached on email at: deanlaw@uonbi.ac.ke and by telephone on 254-733-726511.

Yours sincerely,



**Patricia Kameri-Mbote, SC, EBS**

*Professor of Law and Dean, School of Law*  
**UNIVERSITY OF NAIROBI**