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African Commission on Human & Peoples' Rights		*Commission Africaine des Droits de l'Homme & des Peuples*

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Communication 524/15

Peter Odiwuor Ngoge & 3 Others

v.

The Republic of Kenya

Adopted by the
African Commission on Human and Peoples' Rights
during the 23rd Extra-Ordinary Session, from the 13 to 22 February 2018
Banjul, The Gambia

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Commissioner Soyata Maiga
Chairperson of the African Commission
on Human and Peoples' Rights

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Dr. Mary Maboreke
Secretary to the African Commission on
Human and Peoples' Rights

Communication 524/15: Peter Odiwuor Ngoge & 3 Others v. The Republic of Kenya

Summary of the Complaint

1. The Secretariat of the African Commission on Human and Peoples' Rights (the Secretariat), received a complaint on 15 December 2014 from Peter Odiwuor Ngoge (the Complainant), representing himself and his clients, John Mwangi Muhia, Charles Muema, and Bronx Estate Limited (the Victims), against the Republic of Kenya (Respondent State), a State Party to the African Charter on Human and Peoples' Rights (the African Charter).[1]

2. The Complainant submits that he is an advocate of the High Court of Kenya, and practices in the law firm O. P. Ngoge & Associates.

3. The Complainant submits that on 08 June 2012 the Victims, represented by the Complainant, filed a constitutional petition (No. 269) seeking the intervention of the High Court of Kenya for enforcement of their fundamental human rights, which they claimed to have been violated by the Director of Public Prosecutions and four other Respondents. The alleged violations include the arrest and detention of Mr Muhia for the alleged offence of breaking and entering and stealing the hotel goods of the fourth Respondent, as well as setting the bail at an "unconscionable and unreasonable" amount and the attempt to execute the committal orders against both Mr Muhia and Mr Meuma, for alleged contempt of the orders of the Business Premises Tribunal issued on 02 December 2011 (execution of which had been stayed, according to the Complainant, on 05 January 2012). [2]

4. The Complainant alleges that Justice Mumbi Ngugi on 25 September 2012 halted the hearing of the constitutional petition of 08 June 2012 and postponed it indefinitely to give the Attorney-General and the Respondents' advocates time to file their responses belatedly. The petition was listed for mention for further directions on 15 October 2012.

5. The Complainant avers that on 15 October 2012 Justice Ngugi did not sit and instead, Justice Majanja directed that the case be relisted for mention on 02 November 2012 before Justice Ngugi. However, the Complainant claims that the Respondent's advocates who were present in court on 15 October 2012 deliberately failed to serve

[1] The Republic of Kenya ratified the African Charter on 23 January 1992.

[2] Original Complain Annexes, p 11.

him with a mention Notice and that the Deputy Registrar also did not issue a mention Notice for him to attend court on 02 November 2012. However, the mention did not take place on 02 November 2012, and the Complainant submits that the case was instead listed on 05 November 2012, again without his knowledge. The Complainant further submits that upon *ex parte* hearing of the Respondents on 05 November 2012, Justice Ngugi issued a further mention date for 19 November 2012 which the Respondents also failed to serve on the Complainant, again resulting in his absence.

6. The Complainant claims that on 19 November 2012 Justice Ngugi arbitrarily directed that the Complainant should come to court on 03 December 2012 to explain why the petition should not be dismissed for want of prosecution. The Justice instructed the Deputy Registrar to give notice of this to the Complainant, and while the notice was issued on 20 November 2012, the Complainant avers that it was not served on him and that no affidavit of service was filed on record to confirm service of the notice.

7. The Complainant submits that Justice Ngugi on 03 December 2012 proceeded to dismiss the case with costs to the Respondents without delving into the merits of the constitutional petition, and without first satisfying herself that the notice to show case dated 20 November 2012 had been properly served on the Complainant.

8. The Complainant submits that, aggrieved by this decision, he filed the Notice of Motion dated 29 July 2013 seeking the intervention of the High Court to set aside the *ex parte* orders of 03 December 2012 and re-admit the constitutional petition. This Notice of Motion was dismissed on 17 October 2013. Thereupon the Complainant lodged civil appeal No. 337 of 2013, civil appeal No. 339 of 2013 and civil application No. NAI 307 of 2013 in the Kenyan Court of Appeal in November 2013 with the aim of overturning the dismissal orders of 03 December 2012 and 17 October 2013, restoring the original 08 June 2012 constitutional petition to a hearing on merits and staying the criminal proceedings emanating from the decision of the Business Premises Tribunal. These civil appeals and application were still pending undetermined by the Court of Appeal at the time of the submission of this Complaint to the African Commission on Human and Peoples' Rights (the Commission).

9. The Complainant avers that the Respondent State curtailed the provisions of the African Charter by permitting Justice Ngugi to dismiss the aforesaid constitutional petition, thereby exposing the Victims to unlawful arrest, criminal prosecution and loss of business arising out of the orders of the Business Premises Rent Tribunal in case No. 806 of 2011. The Complainant further avers that these violations are exacerbated by the undue delay of the Court of Appeal to set-down the above mentioned civil appeals for urgent hearings and disposal.

10. The Complainant further alleges that the Respondent State permitted Justice Ngugi to allow advocates of the Respondents to fix *ex parte* hearing or mention dates of the constitutional petition without the Complainant's involvement and to also dismiss the aforesaid constitutional petition in violation of various provisions of the rules published by the Chief Justice of Kenya,[3] the Civil Procedure Rules of 2010, and the Constitution of Kenya, thereby subjecting the Complainant and the Victims to unfair and unlawful treatment, discrimination and condemnation contrary to the provisions of the African Charter.

11. Through the unlawful dismissal of the constitutional petition, the Complainant alleges, Justice Ngugi deliberately created a rift of misunderstanding between the Complainant and his clients (the Victims) which could trigger a complaint against him, and which the Law Society of Kenya would use to disbar him from legal practice in violation of his socio-economic rights.

12. The Complainant avers that the deliberate dismissal of the petition was part of the widespread unlawful treatment, intimidation, harassment, and economic sanctions his firm is being subjected to by the Respondent State with the aim of crippling his legal practice as a punishment in retribution following previous exposure by him of official wrongdoings in his capacity as a human rights defender.

13. The Complainant submits that he has lodged the Complaint with the Commission because local judicial remedies are not effectively available to him and to his clients and that such local remedies cannot be pursued without hindrances, owing to mistrust and lack of professional respect between him and the Judiciary of the Respondent State.

14. The Complainant also indicates that the petition has never been presented before any other international dispute settlement forum or before any other treaty body for settlement or adjudication.

Articles alleged to have been violated:

15. The Complainant alleges violation of Articles 2, 3, 4, 5, 6, 7, 8, 12, 15, 19, 22, and 24 of the African Charter.

Prayers:

16. The Complainant requests the Commission to:

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[3] Rules published by the Chief Justice under Article 22 of the Constitution.

a. Request reparations in the form of general damages of Kenya shillings 10 billion to be assessed and awarded to the Victims to redress violations of their fundamental human rights;
b. Request that the Respondent be blocked or restrained from pursuing the criminal prosecutions against the Victim arising from the orders of the Business Premises Rent Tribunal case;
c. Request that general damages of Kenya shillings 300 billion be assessed and awarded to the Complainant for the deprivation of effective local judicial remedies; and
d. Request payment of interest on (a) and (c) above and costs of the petition.

Procedure:

17. The Secretariat received the Complaint on 15 December 2014 and acknowledged receipt of the same on 17 March 2015.

18. The Commission considered the Complaint during its 18th Extra-Ordinary Session held from 29 July to 07 August 2015 and decided to be seized of the matter.

19. By correspondences of 12 August 2015 the Secretariat transmitted the seizure decision to the parties and requested the Complainant to submit on admissibility within sixty (60) days.

20. On 02 December 2015 the Complainant's submissions on admissibility were received at the Secretariat, which were subsequently forwarded to the Respondent State on 08 December 2015 requesting the latter to submit their written submissions on admissibility within sixty (60) days. The Complainant submitted his admissibility submissions together with the admissibility submissions for three other Communications pending before the Commission,[4] from which is it possible to ascertain that he submitted the same submissions on all four Communications.

21. On 17 December 2015 the Ministry of Foreign Affairs of the Respondent State acknowledged receipt of the Complainant's submissions on admissibility.

[4] Communication 516/15 - Peter Odiwuor Ngoge and Everlyene Iburata Ekea v. The Republic of Kenya; Communication 525/15 - Peter Odiwuor Ngoge and 105 Others v. The Republic of Kenya; and Communication 535/15 - Peter Ngoge and Joseph Njau v. The Republic of Kenya, the facts of which differ and therefore they cannot be joined.

22. On 06 January 2016 a second copy of the same submissions by the Complainant on admissibility reached the Commission, of which the Secretariat acknowledged receipt on 8 March 2016.

23. On 08 March 2016 by Ref: ACHPR/COM/524/15/KEN/387/16 the Secretariat transmitted the Complainant's submissions on admissibility to the Respondent State for the second time. The submissions were received by the Respondent State on 21 March 2016 according to DHL tracking records.

24. On 18 May 2016 by Note Verbale Ref: ACHPR/COM/524/15/KEN/1007/16 and letter Ref: ACHPR/COM/524/15/KEN/1006/16 the Secretariat informed the Parties that the Communication was deferred during the 58th Ordinary Session of the Commission.

25. On 21 July 2016 by letter Ref: ACHPR/COM/524/15/KEN/1386/16 and Note Verbale Ref: ACHPR/COM/524/15/KEN/1385/16 the Secretariat informed the Parties that the Respondent State would be granted an extension of thirty (30) days within which to submit their overdue submissions on admissibility.

26. On 22 November 2016 by letter Ref: ACHPR/COM/524/15/KEN/1836/16 and Note Verbale Ref: ACHPR/COM/524/15/KEN/1837/16 the Secretariat informed the Parties that the deadline for submissions by the Respondent State was 25 August 2016 and that the Commission will proceed to decide on admissibility based on information received within the timelines stipulated.

27. Consideration of the admissibility of the Communication was subsequently deferred until the present 23rd Extra-Ordinary Session of the Commission.

Admissibility

The Complainant's Submissions on Admissibility

28. The Complainant submits that in **Jawara vs. The Gambia**, the Commission formulated three major criteria for admission of Communications for hearing on merit; that is the local remedy must be available, effective and sufficient. The Complainant further submits that a remedy is considered available if the petitioner can pursue it without impediment and is sufficient if it is capable of redressing the complaint.

29. Furthermore, the Complainant submits that if the applicant cannot turn to the Judiciary in his country because of a generalized fear for his life, local remedies would be considered to be unavailable to him.

30. The Complainant avers that local remedies are either unavailable, insufficient or not effective at all and cannot therefore be accessed freely by him without coming into contact with artificial impediments, hindrances and hurdles placed on the Complainant's way, which barriers are utilized by agents of the Respondent State to impede the Complainant as a legal practitioner and to the detriment of his clientele.

31. The Complainant further avers that the ruling of the Vetting of Judges & Magistrates Board of Kenya, delivered on 25th April 2012, constitutes an express and unequivocal official public admission on the part of the Respondent State to the effect that local remedies are either unavailable, insufficient or are not effectively accessible at all by the Complainant and his clientele, without coming face to face with artificial impediments unlawfully erected on the way by agents of the Respondent State to impede or delay access to justice. The Complainant avers that this is because the Vetting Board did not utilise the information supplied to it by the Complainant in order to remove or vet out recalcitrant judicial officers, thereby exposing the Complainant and his clients to revenge, retribution and retaliation by the said judicial officers as well as retribution from their friends, sympathizers and colleagues in the Government of the Respondent State, the Bar and the Bench.

32. The Complainant submits that he submitted complaints to the Judicial Service Commission of Kenya, the Office of the Chief Justice, the Vetting of Judges and Magistrates Board of Kenya, the Office of the former Prime Minister, the Minister of Justice and Constitutional Affairs, the Office of the Attorney General, the Office of the Government Ombudsman, the Kenya National Commission on Human Rights and to the Law Society of Kenya.

33. However, the Complainant submits that the complaints were treated with disdain, suspicion and contempt, deliberately prejudiced, trivialized and either filed away, deflected or dismissed or refused without conducting thorough investigations or inquiries into the serious allegations.

34. The Complainant argues that he and his clients were denied access to effective local remedies through, *inter alia*, the following actions by the judiciary: disqualifying themselves from hearing the Complainant's cases deliberately to prolong or delay conclusion of the cases; subjecting the Complainant to "massive deliberate selective

or differential application of the Rule of Law"; taking an unreasonably long time to dispose of Appeals filed in the Court of Appeal to delay exhaustion of local remedies; dismissing cases without delving into the merits and thereby depriving the Complainant and his clients of access to justice and triggering a continuous wave of appeals, which appeals are expensive and time consuming in view of the case backlog of about eight (8) years in the Court of Appeal; unreasonably delaying delivery of Judgment and Rulings to disorient the Complainant and his clients and to keep them anxiously waiting sometimes for years without knowing the outcome of litigation; threatening and intimidating the Complainant [without any lawful basis] with arrest and imprisonment; and ensuring that nearly all the Complainant's cases are delayed or defeated by using all tricks or means available, regardless of their merit, with the objective of ultimately crippling or grounding the Complainant's legal practice.[5]

35. Furthermore, the Complainant submits that by dismissing his complaints or altogether refusing to act on them, the concerned agencies of the Respondent State reduced the noble constitutional process of vetting of Judicial officers into a gimmick or a mere public relations exercise and thereby hoodwinked on judicial reforms.

The Commission's Analysis on Admissibility

36. The Commission recalls that Article 56 of the African Charter sets out seven requirements that a Communication brought under Article 55 of the African Charter must satisfy in order to be Admissible, which apply conjunctively and cumulatively.[6]

37. Despite the fact that the Commission requested the Respondent State to submit its arguments and evidence on admissibility in accordance with Rule 105(2), no response has been received. In such cases the Commission has held that in the absence of a response from the Respondent State, it must decide on the facts provided by the Complainant.[7] However, the Commission also notes that the Complainant only submitted arguments on the admissibility of the Communication with regards to Article 56(5) of the African Charter. The Commission in its jurisprudence has held that in such cases it will still examine the admissibility of a Communication in respect of

[5] The Complainant gives twenty-seven examples of how the Kenyan judiciary has denied him access to effective local remedies, which are not reproduced here in full.

[6] See Communication 304/2005 - FIDH & Others v. Senegal (2006) ACHPR, para 38.

[7] See Communication 25/89, 47/90, 56/91, 100/93 (1995) ACHPR, para 40. *See also* Communication 60/91, Communication 159/1996, Communication 276/03 and Communication 292/04.

each condition based on the available information.[8] Accordingly, the Commission undertakes the following analysis on admissibility on the basis of the Complainant's submissions on Article 56(5), in addition to information provided in the original Complaint.

38. In relation to the requirement in Article 56(1) of the African Charter, which provides that Communications should indicate their authors even if the latter requests anonymity, the Commission notes that the identity and the address of the Complainant is indicated in the Communication, and accordingly finds that the Communication satisfies Article 56(1) of the African Charter.

39. In accordance with Article 56(2) of the African Charter, the Communication must show a prima facie case[9] and must be compatible with the AU Constitutive Act and the African Charter. In relation to the present Communication, the Commission notes that it is alleged that Articles 2, 3, 4, 5, 6, 7, 8, 12, 15, 19, 22, and 24 of the African Charter have been violated. These alleged violations fall within the *rationae materiae* jurisdiction of the Commission. Further, the Respondent State is a State Party to the African Charter, accordingly the Communication falls within the *rationae personae* jurisdiction of the Commission. The Commission has *rationae temporis* jurisdiction, since the alleged violations took place in the period from 2012 to 2014, which is well after the ratification of the Charter by the Respondent State in 1992. Given that the Communication is not incompatible with either the AU Constitutive Act or the African Charter, and it indicates a prima facie violation of the African Charter, the Commission finds that the Communication satisfies Article 56(2) of the African Charter.

40. Article 56(3) of the African Charter provides that Communications shall be considered if they are not written in disparaging or insulting language directed at the State concerned and its institutions or to the Organization of African Unity [now African Union]. In *Ilesanmi v Nigeria* the Commission defined *disparaging* as "to speak slightingly of... or to belittle" and *insulting* as "to abuse scornfully or to offend the self

[8] Communication 304/05 – FIDH and others v Senegal (2006) ACHPR para 38; Communication 338/07 - Socio-Economic Rights and Accountability Project (SERAP) v Nigeria (2010) ACHPR para 43; and Communication 284/03 - Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v Zimbabwe (2009) ACHPR para 81; and Communication 299/05 - Anuak Justice Council v Ethiopia (2006) ACHPR para. 44; Communication 328/06 - Front for the Liberation of the State of Cabinda v Republic of Angola (2013) ACHPR para. 38.

[9] See Communication 333/06 - Southern Africa Human Rights NGO Network & Others v. Tanzania (2010) ACHPR Para 51

respect or modesty of [someone or an institution]".[10] In *Zimbabwe Lawyers for Human Right v Zimbabwe* the Commission stated that "[i]n determining whether a certain remark is disparaging or insulting and whether it has dampened the integrity of the judiciary, or any other state institution, the Commission has to satisfy itself whether the said remark or language is aimed at unlawfully and intentionally violating the dignity, reputation or integrity of a judicial officer or body and whether it is used in a manner calculated to pollute the minds of the public or any reasonable man to cast aspersions on and weaken public confidence in the institution. The language must be aimed at undermining the integrity and status of the institution and bring it into disrepute."[11] In *Eyob B. Asemie v the Kingdom of Lesotho*, the Commission indicated that it must further "make sure that the ordinary meaning of the words used are not in themselves disparaging."[12]

41. As an example of insulting language, the Commission can rely on its decision in *Ligue Camerounaise des Droits de l'Homme v Cameroon*,[13] where it declared that the use of words such as "Paul Biya must respond [sic] to crimes against humanity"; "30 years of the criminal neo-colonial regime incarnated by the duo Ahidjio/Biya"; "regime of torturers"; and "government barbarisms", does amount to insulting language.[14]In the present case, the admissibility submissions of the Complainant refer to 'recalcitrant' judicial officers, as those who had been protected during the vetting process in which he, the Complainant, had submitted 'damning evidence' and who together with their 'friends, sympathizers, and colleagues' are now seeking 'revenge' and 'retribution' against the Complainant. According to the Oxford dictionary, 'recalcitrant' entails "having an obstinately uncooperative attitude towards authority or discipline". By calling the judges recalcitrant, the Complainant is thus implying that the judges were somehow unreasonably and self-interestedly trying to prevent justice from being done. In the use of the words 'revenge' and 'retribution', the Complainant makes the entire judiciary of Kenya out to be pernicious, spiteful, hostile and malevolent.

42. Clearly the above characterizations of the judiciary are disparaging and undermine the dignity, reputation and integrity of the judicial officers as well as the judiciary as an institution. In addition, the assertions that his complaints were treated with disdain

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[10] Communication 268/03 - Ilesanmi vs. Nigeria (2005) ACHPR paras 37-40.

[11] Communication 293/04 – Zimbabwe Lawyers for Human Rights v Zimbabwe (2008) AHRLJ 120 (ACHPR 2008) para 51.

[12] Communication 435/12 Eyob B. Asemie v the Kingdom of Lesotho para 59.

[13] Communications 65/92 – Ligue Camerounaise des Droits de l'Homme vs. Cameroon (1997) ACHPR.

[14] As above, para 13.

and deliberately prejudiced are not substantiated at all while being serious allegations which cast aspersions on and would result in a weakening of public confidence in the judicial institution. Consequently, the Commission finds that Article 56(3) of the Charter is not satisfied.

43. In relation to Article 56(4) of the African Charter, the Commission takes note of the fact that the Communication includes documents filed by the Complainant in the High Court and the Court of Appeal of Kenya, the Business Premises Rent Tribunal, among others. In light of the fact that there is no evidence that any of the information provided is based exclusively on news disseminated through the media, the Commission consequently finds that the requirement of Article 56(4) has been met.

44. Article 56(5) requires that Communications be submitted after exhausting local remedies, if any, unless it is obvious that this procedure is unduly prolonged.

45. In its jurisprudence, the African Commission has held that for the domestic remedies referred to in Article 56(5) of the African Charter to be exhausted, they must be available, effective and sufficient, stipulating that, "a remedy is considered available if the petitioner can pursue it without impediment; it is deemed effective if it offers a prospect of success; and it is found sufficient if it is capable of redressing the complaint."[15] If the domestic remedies do not meet these criteria, a Victim may not have to exhaust them before complaining to an international body. However, the Complainant needs to be able to show that the remedies do not fulfil these criteria in practice, not merely in the opinion of the Victim or that of his or her legal representative.[16]

46. The Complainant argues that despite not having exhausted local remedies, he does not have to do so since local remedies are unavailable, insufficient or not effective at all. He bases this on the assertion that his relationship with the Kenyan judiciary is one of 'mistrust and lack of professional respect', and he argues that local remedies are unavailable, insufficient or not effective because of artificial impediments, hindrances and hurdles placed on his way.

47. The first argument of the Complainant to this end is that the ruling of the Vetting of Judges & Magistrates Board of Kenya constitutes an express and unequivocal official public admission on the part of the Respondent State to the effect that local remedies are either unavailable, insufficient or are not effectively accessible at all by the

[15] Communication 147/95-149/96 - Sir Dawda K. Jawara v. The Gambia (2000) ACHPR, para 32.

[16] Communication 284/03 - Zimbabwe Lawyers for Human Rights & Associated Newspapers of Zimbabwe v. Zimbabwe (2009) ACHPR, para 101.

Complainant and his clientele. However, the complainant does not refer to the content of this ruling in making his argument, merely referring the Commission to the relevant pages of the annexes. Unfortunately, the referenced pages of the evidence submitted do not contain the referenced matter, and the Commission was thus not able to review the Vetting Board ruling. The Complainant further argues that the failure of the Vetting board to remove 'recalcitrant judges' whom he had named, exposes him "to revenge, retribution and retaliation" by judicial officers and their friends for having exposed their "official wrongdoings." This is a very strong assertion, which is not backed up by arguments or evidence, and the Commission thus cannot make a finding of unavailability, insufficiency or effectiveness of local remedies based on this statement.

48. The second argument made by the Complainant in order to support his allegation that there is general mistrust and lack of professional respect between himself and the judiciary and that there are artificial impediments being placed on his way, is through listing examples of ways in which he alleges that the Kenyan judiciary has, through various interactions that he had with them, denied him effective local judicial remedies. The Commission has held in its jurisprudence that "it is incumbent on every complainant to take all necessary steps to exhaust, or at least attempt the exhaustion of, local remedies. It is not enough for the complainant to cast aspersion on the ability of the domestic remedies of the State due to isolated or past incidences".[17] For nineteen (19) of the twenty-seven (27) allegations of ways in which the State structures attempt to deny him remedies, there is no evidence whatsoever provided to support the assertions. These allegations are also phrased in a very general manner, such as the claim that the Complainant is subjected to "massive deliberate selective or differential application of the Rule of Law". Such assertions do not meet the Commission's specificity requirements and thus do not allow the Commission to investigate the claims.[18]

49. With regard to another of the twenty-seven (27) allegations, namely the reference to 'threatening and intimidating your humble petitioner [without any lawful basis] with arrest and imprisonment', the judge who ordered this is named, thereby giving a clear indication that this was an isolated incident before a specific judge. For a further five allegations the Complainant refers the Commission to specific pages of the annexes, which references do not correlate with the annexes, and thus the Commission is not able to rely on any evidence in this regard in coming to its finding.

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[17] Anuak Justice Council v Ethiopia para 58.

[18] See Communication 104/94, 109/94 and 126/94 Center for the Independence of Judges and Lawyers v. Algeria, and Others, paras 5-6.

50. In addition, for four of the allegations the Complainant makes cross-references to other Communications currently before the Commission. In this regard, the only Communication which can be considered is Communication 432/12 Peter Odiwuor Ngoge v Republic of Kenya, being the only cited case which has been declared admissible before the Commission. In this Communication the Commission declined to engage with the argument that domestic remedies are not available owing to a "serious breakdown of trust and professional etiquette,"[19] since it had already found that there had been undue prolongation of the domestic processes which were attributable to the Respondent State. The fact that in this one case there was evidence of a prolongation of the processes by the State is thus not enough to establish a general trend of prejudice. The Commission in its jurisprudence has held that a remedy is effective if it offers a prospect of success. Based on the lack of evidence produced by the Complainant, the allegations about the ways in which the State and its subsidiaries have denied him effective local remedies amount to no more than allegations lacking material basis.

51. A third argument which the Complainant submits as part of the allegation that the Respondent State is denying him local remedies, is the allegation that when he attempted to submit complaints about the prejudices which he allegedly suffered at the hands of the judiciary to the Judicial Service Commission, the Office of the Chief Justice, the Office of the Attorney General and others, his complaints were dismissed without inquiry into the serious allegations that they raise. The State was given an opportunity to respond to this and they have not produced any evidence to the contrary. However, while this may have been relevant on the merits to reach a finding on prejudice against the Complainant on the side of state institutions, it is not relevant in the context of exhaustion of local remedies as part of an admissibility analysis. This is because the local remedies that have to be exhausted are judicial remedies[20] and these actions were extra-judicial and thus cannot serve as justification for why local *judicial* remedies do not have to be exhausted.

52. The Complainant, in providing evidence about the present case focuses mainly on the process before the High Court. One of the Complainant's allegations against the judiciary is that his cases are dismissed without delving into the merits. In the current case the constitutional petition was dismissed after a decision of lack of due diligence and without delving into the merits, and the Notice of Motion to set aside this

[19] See para 59 of Communication 432/12 Peter Odiwuor Ngoge v Republic of Kenya.
[20] Cudjoe v Ghana (2000) AHRLR 127 (ACHPR 1999) para 13.

dismissal was also dismissed. However, since the Complainant was thereafter able to appeal to the Court of Appeal, which he had in fact done, this by itself is not sufficient reason to apply the exception to the exhaustion of local remedies requirement.

53. The remaining argument which the Complainant raises in the original Complaint is that there is an undue prolongation of the processing of his cases in this matter before the Courts, and in this regard he specifically avers that there was an undue delay on the part of the Court of Appeal to set down civil Appeal No. 337 of 2013, civil Appeal No. 339 of 2013 and civil Application No. NAI 307 of 2013 for hearings and disposal, in view of the urgent circumstances of the constitutional petition dated 08 June 2012. However, this allegation was not repeated nor substantiated in the Admissibility submissions. In the Admissibility submissions the Complainant only made a general allegation that the Court of Appeal takes an unreasonably long period to dispose of appeals brought by him.

54. In its jurisprudence, the Commission has held that, if the domestic remedies are prolonged, this may amount to an exception to the exhaustion of domestic remedies requirement in the event that the process has not only been prolonged but that this has been done so "unduly." Whereas there are no standard criteria used by the Commission to determine if a process has been unduly prolonged, the Commission has tended to treat each Communication on its own merits. The Commission held that in interpreting the rule, it takes into consideration "the circumstances of each case, including the general context in which the formal remedies operate and the personal circumstances of the applicant". The Commission's jurisprudence further makes it clear that the burden of proof is on the Complainant to provide evidence as to why they could not exhaust local remedies.[21]

55. From the evidences provided by the Complainant, the Commission was able to ascertain that civil Appeal No. 337 of 2013 had been submitted to the Court of Appeal on 29 November 2013, and that the other two cases were also submitted around the same time. This Complaint was received at the Commission on 15 December 2014, approximately one year after the lodgement of the three cases with the Court of Appeal. Due to the absence of any explanation by the Complainant as to what transpired during that year, it is extremely difficult to assess whether this could constitute an undue delay. It is the view of the Commission that the Complainant has thus not satisfied the burden of proof in indicating that the cases pending before the

[21] Anuak Justice Council v Ethiopia para 50.

Court of Appeal had been unduly prolonged. However, the Commission also has to take into account the circumstances of the case, including the general context in which the formal remedies operate. The Complainant in his Admissibility submissions notes the eight year backlog in the Kenyan Court of Appeal, which could be an indication that within that system it would not be unusual for a case to be pending for one year. In light of these considerations the Commission finds that the exception to the exhaustion of local remedies because the remedy has been unduly prolonged does not apply in the current case.

56. For these reasons, the Commission holds that none of the exceptions to the requirement of exhaustion of local remedies apply and accordingly finds that Article 56(5) of the African Charter has not been met.

57. Article 56(6) of the African Charter provides that the Commission shall consider Communications which "are submitted within a reasonable period from the time domestic remedies are exhausted or from the date the Commission is seized of the matter." In its jurisprudence the Commission has held that where a matter has not been concluded, time has not begun to run such as to afford the Complainant the opportunity to bring this complaint.[22] For this reason, given the finding above that there was no exhaustion of local remedies, the Commission finds that Article 56(6) of the African Charter is not met.

58. In relation to Article 56(7) of the Charter, the Commission does not find evidence which indicates that the issues and claims in the Communication have been brought before, or settled by any other international forum. Accordingly, the Commission finds that Article 56(7) of the African Charter has been satisfied.

59. For the reasons set out above, the Commission finds that Article 56 (1), (2), (4) and (7) have been met, but that the Complainant has failed to meet the criteria for Article 56 (3), (5) and (6).

Decision of the African Commission on Admissibility

60. In view of the above, the African Commission on Human and Peoples' Rights:

[22] Communication 322/2006 – Tsatsu Tsikata v Republic of Ghana, para 53.

i. Declares the Communication inadmissible for failure to comply with Articles 56(3), 56(5) and 56(6) of the African Charter;

ii. Notifies its decision to the parties in accordance with Rule 107(3) of its Rules of Procedure.

Done in Banjul, The Gambia, during the 23rd Extra Ordinary Session of the African Commission on Human and Peoples' Rights, from 13 to 22 February 2018.