



**Mwangi v Attorney General & 2 others; Judicial Service Commission & 2 others  
(Interested Parties) (Constitutional Petition E048 of 2022) [2024] KEHC 14791 (KLR)  
(Constitutional and Human Rights) (22 November 2024) (Judgment)**

Neutral citation: [2024] KEHC 14791 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
CONSTITUTIONAL PETITION E048 OF 2022**

**EC MWITA, J  
NOVEMBER 22, 2024**

**BETWEEN**

**JONATHAN MUNENE MWANGI ..... PETITIONER**

**AND**

**THE ATTORNEY GENERAL ..... 1<sup>ST</sup> RESPONDENT**

**CABINET SECRETARY, TREASURY ..... 2<sup>ND</sup> RESPONDENT**

**SALARIES AND RENUMERATION COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**AND**

**JUDICIAL SERVICE COMMISSION ..... INTERESTED PARTY**

**KENYA JUDGES WELFARE ASSOCIATION ..... INTERESTED PARTY**

**KENYA MAGISTRATES AND JUDGES ASSOCIATION ... INTERESTED PARTY**

**Withdrawal of hardship allowance of judicial officers and staff is unlawful and discriminatory**

*The petitioner challenged the withdrawal of hardship allowances (40% of basic salary) for judges, judicial officers, and staff in designated hardship areas, arguing it was unconstitutional and discriminatory. The Salaries and Remuneration Commission (SRC) justified the decision based on its mandate and a 2014 study abolishing percentage-based allowances. The Attorney General contested the court’s jurisdiction, but the court ruled it had authority under article 165(3). The court found the withdrawal violated Articles 27, 47, and 160(4) of the Constitution, ordered reinstatement with arrears, and deemed the case a public interest litigation with no cost award.*

Reported by John Ribia



**Jurisdiction** – jurisdiction of the High Court – jurisdiction of the High Court vis-à-vis the jurisdiction of the Employment and Labour Relations Court – dispute on discrimination of judiciary staff and officers by the Salaries and Remuneration Commission - whether the High Court had the jurisdiction to determine a dispute on discrimination of judicial staff and officers or that was the sole preserve of the Employment and Labour Relations Court - Constitution of Kenya articles 2(4), 3(1), 10(2), 27, 160(1), 162(2), 165(3), and 230(4); Employment And Labour Relations Court Act (cap 8E) section 12; Evidence Act (cap 80) sections 107, and 109.

**Constitutional Law** – fundamental rights and freedoms – freedom against discrimination – where the Salaries and Remuneration Commission - whether the directive by the Salaries and Remuneration Commission withdrawal of hardship allowance of some judicial officers and staff while received the allowance was discriminatory - whether the directive by the Salaries and Remuneration Commission withdrawal of hardship allowance of some judicial officers and staff was unlawful - Constitution of Kenya articles 2(4), 3(1), 10(2), 27, 160(1), 162(2), 165(3), and 230(4); Employment And Labour Relations Court Act (cap 8E) section 12; Evidence Act (cap 80) sections 107, and 109.

### **Brief facts**

The petitioner challenged the decision to stop paying hardship allowances (40% of basic salary) to judges, judicial officers, and staff in designated hardship areas. The hardship allowance had been approved by the Judicial Service Commission (JSC) in 2011, implemented in 2012, and incorporated into the Judiciary Transfer Policy of 2015.

The petitioner argued that the withdrawal was unconstitutional, discriminatory, and violated legitimate expectations. The Attorney General and the Cabinet Secretary claimed the matter fell within the Employment and Labour Relations Court’s jurisdiction. SRC defended its actions, stating it was the only body mandated to review State officers’ remuneration, citing a 2014 study that led to a circular abolishing percentage-based allowances. SRC also claimed it never directed the Treasury to stop payments.

The court found that withdrawing the hardship allowance without notice or consultation violated Articles 27, 47, and 160(4) of the Constitution and ordered its reinstatement with arrears. The petition was deemed a public interest litigation, and no costs were awarded.

### **Issues**

- i. Whether the High Court had the jurisdiction to determine a dispute on discrimination of judicial staff and officers or that was the sole preserve of the Employment and Labour Relations Court.
- ii. Whether the directive by the Salaries and Remuneration Commission withdrawal of hardship allowance of some judicial officers and staff while received the allowance was discriminatory.
- iii. Whether the directive by the Salaries and Remuneration Commission withdrawal of hardship allowance of some judicial officers and staff was unlawful.

### **Held**

1. Jurisdiction was the power or authority given to a court to hear and determine disputes before it. Challenge to jurisdiction was a threshold and fundamental question that the court had to determine promptly. If the court determined that it had no jurisdiction to hear the matter, that was the end. The court should not take any further step, but down its tools.
2. Article 162(2) (a) of the Constitution as read with section 12 of the Employment and Labour Relations Court (ELRC) Act, granted jurisdiction to the ELRC to determine disputes that arose out of employer-employee relationship and related matters. Article 165(3) authorized the High Court to decide all matters other than those reserved for other courts as contemplated in article 162(2); matters reserved for the exclusive jurisdiction of the Supreme Court and Employment and Labour Relations Court and Environment and Land Court and those restricted by article 165(5) and 165(6). Article 165(6) stated that the High Court had supervisory jurisdiction over subordinate courts and over any person or body exercising judicial or quasi-judicial function, but not over a Superior Court. Whether



- or not the High Court had jurisdiction to hear and determine the petition must be viewed through the prism of article 165(3)(b) and (d).
3. The petition centered on whether rights of judges, judicial officers and judicial staff were violated and further whether the impugned action amounted to discrimination, which falls within the jurisdiction of this court under article 165(3)(b) of the Constitution.
  4. Jurisdiction of the ELRC was not limited to disputes arising out of a contract of employment between an employee and employer. The court could also determine any constitutional violations of the rights of any party arising from an employee-employer relationship. For the ELRC to entertain a petition premised on the breach of a party's fundamental rights under the constitution, the alleged constitutional breach must be ancillary and incidental to the matters contemplated under section 12 of the ELRC Act.
  5. There had been no demonstration that there existed an employer-employee relationship between the respondents and judges, judicial officers and judicial staff, to make the matter fall within the jurisdiction of the ELRC. The High Court had jurisdiction to hear and determine the petition.
  6. Hardship allowance within the judiciary was approved by the JSC on October 19, 2011 and effected on January 2012. It had been in place and was being paid up to 2019 when Salaries and Remuneration Commission (SRC) moved to stop it following what SRC stated was a study that was conducted in 2014 following which, it issued a circular dated December 10, 2014 to the Public Service. SRC admitted that hardship allowance was being paid to judges, judicial officers and judicial staff working in hardship areas.
  7. Judges, judicial officers and judicial staff who had been working in hardship areas were as of right, then entitled to hardship allowance as communicated to them by the Judiciary at the time of their posting to such areas, something they had no control over. Some of the officers worked in those areas under those terms and were later transferred to other areas while still owed the allowances.
  8. With regard to Judges, the hardship allowance became part of their terms of service so long as they worked in those areas acquiring constitutional protection thus, could not be taken away to their disadvantage without offending article 160(4) of the Constitution. Judges working in the hardship areas could not be paid hardship allowance while judicial officers and judicial staff were not yet they were from the same institution doing the same work, albeit in different levels. That would create differential treatment, a discrimination prohibited by article 27(1) of the Constitution which entitled every person to equality before the law and equal protection and equal benefit of the law.
  9. It was not clear how hardship allowance for judicial officers and judicial staff was stopped or withheld if SRC stated it was not responsible. Withholding of the allowance was unlawful and without justification.
  10. Although SRC had stated that it carried out a study on hardship allowances, it had not demonstrated that it engaged the Judiciary on the issue of hardship allowance and that those to be affected (judges, judicial officers and judicial staff) were given an opportunity to be heard on the issue. Best practice in such a process would have required that SRC engaged the JSC and representatives of all stakeholders before deciding to withdraw the allowance.
  11. Judges, judicial officers and judicial staff who worked in hardship areas planned their lives based on the promise that they would receive the allowance. The decision to pay the allowance to those working in hardship areas as a basis for incentive and or compensation must have been deemed necessary and was intended to achieve something. In that regard, SRC could not whimsically and arbitrarily withdraw the allowance without consultation with the judiciary and or those to be affected, given that the allowance had been in place since it was effected in 2012.
  12. The allowance had even been previously paid to those who had worked in the hardship areas before they were transferred and replaced by other officers and were owed arrears. Further, the allowance was contained in the Judiciary Transfer policy whose lawfulness has not been challenged. SRC could



thus, not act in total disregard of this policy and without seeking to address the concerns that led to introduction of the hardship allowance as a percentage of the basic salary of those working in hardship areas. Withdrawal of the hardship allowance was a violation of article 27, 47 and 160(4) of the Constitution.

13. Damages were personal in nature and are payable to the individual whose rights were found to have been violated or infringed since they were meant to vindicate the rights violated and deter future violations.

*Petition partly allowed.*

### **Orders**

- i. *Declaration issued that the directive by the Salaries and Remuneration Commission to the Cabinet Secretary, National Treasury or Principal Secretary National Treasury to stop paying some Judges, judicial officers and judicial staff working in designated hardship areas hardship allowance at the rate of 40% of their basic salary while others had been paid the allowance amounted to differential treatment and discriminatory contrary to article 27 of the Constitution.*
- ii. *Declaration issued that the directive by Salaries and Remuneration Commission to the Cabinet Secretary or Principal Secretary, National Treasury to stop payment of hardship allowance to Judges working in designated hardship areas at the rate of 40% of their basic salary was a violation of article 160(4) of the Constitution, unconstitutional and invalid.*
- iii. *An order of mandamus was issued compelling the Cabinet Secretary, and or Principal Secretary, National Treasury to pay Judges, judicial officers and judicial staff serving in the designated hardship areas the approved hardship allowance at the rate of 40% of their basic salary from October 1, 2019.*
- iv. *An order of mandamus was issued compelling the Cabinet Secretary and or Principal Secretary, National Treasury to immediately pay Judges, judicial officers and judicial staff who were transferred from hardship areas with unpaid hardship allowance between October 1, 2019 and their respective dates of transfer hardship allowance currently in arrears.*
- v. *No order of costs.*

### **Citations**

#### **Cases**

1. Cami Graphics Limited v Chief Registrar of the Judiciary & 2 others; Commissioner of Lands & 4 others (Interested Parties) (Constitutional Petition 543 of 2022; [2024] KEHC 2999 (KLR)) — Followed
2. Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (Petition 14, 14A, 14B & 14C of 2014 (Consolidated); [2014] KESC 53 (KLR)) — Followed
3. County Public Service Boards National Consultative Forum & 47 others v Salaries and Remuneration Commission (Petition E029 of 2023; [2024] KEELRC 1279 (KLR)) — Explained
4. In the Matter of the Interim Independent Electoral Commission (Applicant) (Constitutional Application 2 of 2011; [2011] KESC 1 (KLR)) — Explained
5. James Nyasora Nyarangi & 3 others v Attorney General (Anti-Corruption and Economic Crime Petition 298 of 2008; [2008] KEHC 3906 (KLR)) — Followed
6. John Kimanu v Town Clerk (Kangema (Petition No. 1030 of 2007)) — Followed
7. Kenya National Examination Council v Republic Exparte Geoffrey Gathenji Njoroge & 9 others (Civil Appeal 266 of 1996; [1997] KECA 58 (KLR)) — Followed
8. Macharia & another v Kenya Commercial Bank Limited & 2 others (Application 2 of 2011; [2012] KESC 8 (KLR)) — Followed
9. Owners Of The Motor Vessel “Lillian S v Caltex Oil (Kenya) Ltd (Civil Appeal 50 of 1989; [1989] KECA 48 (KLR)) — Applied
10. Peter Mwangi Gahuiru v Attorney General & others (Petition No. 304 of 2023) — Mentioned



11. Peter Ngari Kagume & 7 others v Attorney General (Constitutional Application 128 of 2006; [2009] KEHC 4179 (KLR)) — Followed
12. Public Service & 2 others v Eric Cheruiyot & 17 others ((Civil Appeal No. 119 of 2017) (consolidated)) — Explained
13. Republic v Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & another (Miscellaneous Application 615 of 2017; [2018] KEHC 9433 (KLR)) — Followed
14. Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others (Constitutional Petition 436 of 2017; [2019] KEHC 7830 (KLR)) — Followed
15. R.M. v Attorney General (NBI HCCC No. 1351 of 2002) — Mentioned
16. Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties) (Petition 208,185 and 339 of 2019; [2020] KEHC 10370 (KLR)) — Followed

#### **Statutes**

1. Constitution of Kenya, 2010 — article 2(4);3(1);10(2);27(1)-(7);160(1);162(2);165(3)230(4) — Cited
2. Employment And Labour Relations Court Act (cap 8E) — section 12 — Cited
3. Evidence Act (cap 80) — section 107,109 — Cited

#### **Texts**

1. (2015), Transfer Policy & Guidelines for Judicial Officers

#### **Advocates**

None mentioned

## **JUDGMENT**

1. Jonathan Munene Mwangi, (the petitioner) a citizen and public interest litigant, filed this petition against the Attorney General (AG), Cabinet Secretary for the National Treasury (CS) and Salaries and Remuneration Commission (SRC) as the respondents. Joined in the petition were the Judicial Service Commission (the JSC), Judges Welfare Association (JWA) and Kenya Magistrates and Judges Association (KMJA) as interested parties.
2. SRC is a constitutional Commission whose mandate is to set and regularly review remuneration and benefits of State officers and advise the national and county governments on the remuneration and benefits of all other public officers.
3. The JSC's is also a constitutional commission with the mandate to promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice, while the KJWA and KMJA are associations of Judges and Magistrates intended to promote and protect interests and welfare of their members (judges and judicial officers).
4. The petition is supported by an affidavit and written submissions.
5. The gravamen of this petition is the decision by SRC and CS made on October 1, 2019 to stop payment of hardship allowance (40% of basic salary) to Judges, judicial officers and judicial staff stationed in hardship areas without notice. The allowance was approved by the JSC on October 19, 2011 and effected on January 1, 2012 and is contained in the Judiciary transfer policy.
6. The petitioner states that the decision was made despite the fact that judges, judicial officers and judicial staff who preceded their colleagues were paid and even some of their current colleagues serving in those hardship areas continue to paid hardship allowance. This has thus, created differential treatment which is discriminatory and unconstitutional.



7. The petitioner argues that the decision to stop payment of hardship allowance was sanctioned the CS on the advice of SRC despite the fact that the judge's remuneration and benefits are processed and paid through the Consolidated Fund Services in accordance with the constitution and cannot be withdrawn.
8. The petitioner argues that judges, judicial officers and staff working in hardship areas are entitled to hardship allowance at the rate of 40% of their basic salary. And since they had received hardship allowance, it created a legitimate expectation that those working in hardship areas would receive the hardship allowance.
9. The petitioner relies on the *Transfer Policy & Guidelines for Judicial Officers, 2015* and the case of *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* [014] eKLR on legitimate expectation.
10. The petitioner again relies on article 27(1)-(7) of the *Constitution* and the decision in *James Nyasora Nyarangi & 3 others v Attorney General* [2008] eKLR citing the cases of *RM v Attorney General* (NBI HCCC No 1351 of 2002) *RM (suing throu' next Friend) Josephine Kavinda & another v The Attorney General*; and *Harksen v Lane & others* 1998 (1) SA 300 (CC) to assert that failure to pay hardship allowance to some Judges, judicial officers and judicial staff working in hardship areas while paying the allowance to others amounts to discrimination.
11. On the unconstitutionality of the directive by SRC to the CS, the petitioner argues, relying on articles 10(2), 27(4) and 160(1) of the *Constitution*, that SRC and the CS did not provide justification for their actions. The petitioner takes the view, that implementation of decisions that go against the principle of equality resulted in discrimination against the affected Judges, Judicial officers and judicial staff thereby rendering the actions unjust and inequitable. The directive is also arbitrary, oppressive and capricious thus, amounts to unreasonable variation of the judges' benefits and is unconstitutional.
12. Relying on the decisions in *Kenya National Examination Council v Republic Ex parte Geoffrey Gathenji Njoroge & 9 others* [1997] eKLR; and *Republic v Principal Secretary, Ministry of Internal Security & another ex parte Schon Noorani & another* [2018] eKLR, the petitioner asserts that all the requirements for granting mandamus orders have been met.
13. The CS and SRC owe a constitutional duty to those affected to act within the limits of their mandate not to interfere with the Transfer Policy and Guidelines for Judicial Officers, 2015). The CS and SRC also owe those affected a duty to act fairly, give equal treatment, non-discrimination, accountability as well as fair remuneration without varying the same to the disadvantage of the parties.
14. On damages, the petitioner argues that the affected Judges, Judicial officers and judicial staffs are entitled to damages due to violation of their rights. In this regard, the petitioner relies on, among others, the decisions in *Reuben Njuguna Gachukia & another v Inspector General of the National Police Service & 4 others* [2019] eKLR citing *Minister of Health & Others v Treatment Action Campaign & Others* (2002) 5 LRC 216; *Siewchand Ramanoop v The AG of T&T*, PC Appeal No 13 of 2004; *Zipporah Seroney & 5 others v Attorney General* [2020] eKLR; *Peter Mauki Kaijenja & 9 others v Chief of the Defence Forces & another* [2019] eKLR; and *Gitobu Imanyara & 2 others v Attorney General* [2016] eKLR.
15. It is the petitioner's case that the impugned decision violated and continues to violate articles 160(4), 27(4), 10(2), 2(4), and 3(1) of the *Constitution*. The petitioner, therefore, seeks the following reliefs:
  1. A declaration that the failure by CS and SRC failure to pay some Judges, judicial officers and staff working in designated hardship areas hardship allowance at the rate of 40% of



their basic salary while paying other judicial officers and staff the said allowance amounts to discrimination contrary to article 27 of the Constitution.

2. A declaration that SRC's directive to the CS to stop payment of hardship allowance to Judges working in designated hardship areas at the rate of 40% of their basic salary is unconstitutional and invalid.
3. A declaration that SRC's directive to CS varying the hardship allowance payable to Judges, judicial officers and staff working in designated hardship areas from 40% of basic salary is in contravention of article 160 of the Constitution and thus invalid.
4. An order of *mandamus* does issue compelling the CS to pay Judges, judicial officers and staff serving in the designated hardship areas the approved hardship allowance at the rate of 40% of their basic salary from October 1, 2019 with interest from October 1, 2019 to date of payment.
5. An order of *mandamus* to issue compelling the CS to immediately pay Judges, judicial officers and staff who were transferred from hardship areas with unpaid hardship allowance between October 1, 2019 to their respective date of transfer and those working in designated hardship areas hardship allowance currently in arrears with interest from October 1, 2019 to date of payment.
6. Damages for violation of Judges, judicial offices 'and staff's rights.
7. Any other relief that this court may deem just and expedient in the circumstances.
8. That the costs of this Petition be provided for.

#### **Response by AG and CS**

16. The AG has opposed through written submissions filed on its behalf and that of the CS on December 14, 2023. Ms Kiramana, acting for the AG has also associated herself with the 3<sup>rd</sup> respondent's submissions. She further argues that this matter falls outside the jurisdiction of this court. According to the AG, under article 162(2) of the Constitution this matter falls within the jurisdiction of Employment and Labour Relations Court (ELRC).
17. Ms Kiramana again takes the position that the court having made the order of February 7, 2022 transferring this matter to the ELRC, it exhausted its jurisdiction, became functus officio and cannot set aside that order. Any party dissatisfied with that order can only appeal against that decision.

#### **Response by SRC**

18. SRC has filed a replying affidavit sworn by Anne R Gitau its CEO, in response to the petition. The gist of SRC's response is that it is the only body with the mandate to either set or review remuneration and benefits for State officers. For that reason, the actions by the JSC to set hardship allowance for Judicial Officers on October 19, 2011, was in breach of article 230(4) of the Constitution and was, therefore, unconstitutional, null and void.
19. SRC argues that the decision to stop payment of hardship allowance was informed by a study of all allowances payable in the public service conducted in September 2014 which revealed that there existed significant variations on allowances payable across the public service institutions. As a result, SRC issued a circular (RefNo SRC/ADM/CIR/1/13 Vol III (126) dated December 10, 2014 to the Public Service abolishing allowance as a percentage of the salary.



20. SRC states that by letter dated November 26, 2019, the Chief Registrar of the Judiciary (CRJ) confirmed the position of the hardship allowances as pleaded by the petitioner and requested SRC to approve and ratify the allowance at the rate of 40% of the basic salary for stations designated as hardship areas for purposes of capturing the payment in the payroll system. According to CRJ, this would assist the National Treasury seek authority from the Directorate of Personnel Management in order to pay the allowance to the Judges on a monthly basis.
21. SRC *vide* letter dated December 10, 2020, informed CRJ that hardship allowance would be paid in line with its Circular dated 10<sup>th</sup> December 2014. *vide* another letter dated June 21, 2022, SRC communicated to CRJ on the hardship allowances set for Judges in hardship areas. SRC asserts, therefore, that it discharged its constitutional mandate to set and review the remuneration and benefits for state officers in the Judiciary, including hardship allowance for judge and judicial officers.
22. Regarding withdrawal of hardship allowance, SRC argues that judicial officers are neither employed by nor engaged as officers in its service. As such, SRC's mandate is limited to only setting and reviewing their remuneration and benefits. SRC neither withdrew nor directed the CS to withhold payment of hardship allowance for judicial officers as alleged by the petitioner.
23. SRC contends that the petition does not disclose the identity of judicial officers stationed in designated hardship areas who receive hardship allowances and those who do not. Without this disclosure, the claim of discrimination cannot stand. That the petitioner has also not adduced tangible evidence, such as payslips to demonstrate that judicial officers in hardship areas have not received hardship allowance from October 1, 2019. The petitioner has not proved any of the alleged breaches of the constitution by SRC. It relies on sections 107 and 109 of the *Evidence Act* to argue that the burden is on the petitioner to prove his case on a balance of probabilities.
24. SCR again relies on *John Kimanu v Town Clerk, Kangema* (Petition No 1030 of 2007) that a petitioner must state the provisions of the constitution infringed, the manner of infringement and the nature and extent of the injury suffered to prove violations of any rights in the Bill of Rights. Further reliance is placed on *Peter Ngari Kagume & 7 others v Attorney General* [2009] eKLR, that the court is deaf to speculation and imaginations and must be guided by evidence of probative value.
25. SRC again relies on *Salaries and Remuneration Commission & another v Parliamentary Service Commission & 15 others; Parliament & 4 others (Interested Parties)* [2020] eKLR with regard to its powers and functions.
26. The interested parties did not file responses or submissions to the petition. They did not take part in these proceedings.

### **Determination**

27. I have considered the petition, response and submissions made on behalf of the parties. I have also considered the decisions relied on by both sides. Two issues arise for determination. Whether This court has jurisdiction and whether the decision to stop hardship allowance to judges, judicial officers and judicial staff working in hardship areas was unlawful or should be sustained.

### **Jurisdiction.**

28. The AG has raised a jurisdictional issue arguing that this court has no jurisdiction to hear and determine this matter. According to the AG, this is a matter to be determined by the ELRC also taking the position that the court having transferred this matter to the ELRC, it became functus official.



29. On this issue, I have seen a ruling by Mrima J. dated 31<sup>st</sup> January 2023. In that ruling the learned Judge set aside the order issued on 7<sup>th</sup> February 2022 transferring the matter to the ELRC and recalled the matter to this court for hearing and determination. In that respect, the argument that the court became functus officio has no place.
30. The respondents' main argued is that this court has no jurisdiction to hear and determine this petition. According to the respondents, the matter should be heard by the ELRC as required by article 162(2) of the Constitution. The petitioner on his part, maintains that the court has jurisdiction because the petition is grounded on the violation of constitutional rights, including the right from discrimination.
31. Jurisdiction is the power or authority given to a court to hear and determine disputes before it. Challenge to jurisdiction is a threshold and fundamental question that the court has to determine promptly. If the court determines that it has no jurisdiction to hear the matter, that is the end. The court should not take any further step, but down its tools. (See Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (*supra*).
32. In Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others [2012] eKLR, the Supreme Court stated:
- (68) A court's jurisdiction flows from either the Constitution or legislation or both. Thus, a court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law...without jurisdiction, the court cannot entertain any proceedings...Where the Constitution exhaustively provides for the jurisdiction of a court of law, the court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.
33. In re the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011 [2011] eKLR, after referring to Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Limited (*supra*), the Supreme Court again stated:
- [30] The Lillian 'S' case establishes that jurisdiction flows from the law, and the recipient-court is to apply the same, with any limitations embodied therein. Such a court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.
34. Under article 162(2)(a), Parliament was to establish courts with equal status to the High Court to hear and determine disputes relating to Employment and Labour Relations (ELRC) and Environment and Land Court (ELC). Parliament enacted the Employment and Labour Relations Court Act, 2011, establishing the ELRC (s 4) section 12 of the Act, provides for the jurisdiction of the ELRC. That court has exclusive, original and appellate jurisdiction to determine all disputes referred to it in accordance with article 162(2) of the Constitution, the provisions of the Act, and any other written law that extends jurisdiction to that court.
35. Jurisdiction of the ELRC under section 12 of the Act, is on disputes relating to, or arising out of employment between an employer and an employee; an employer and a trade union; an employers' organisation and a trade union's organisation; between trade unions; between employer organisations; an employers' organisation and a trade union; a trade union an employer's organisation or a federation and a member thereof; concerning registration and election of trade union officials; and disputes relating to the registration and enforcement of collective agreements.



36. Article 162(2)(a) of the *Constitution* read with section 12 of the *ELRC Act*, are clear that the core jurisdiction of the ELRC is to determine disputes that arise out of employer-employee relationship and related matters.
37. The jurisdiction of this court, on the other hand, is provided for in article 165(3) of the *Constitution*. This court has jurisdiction to, among others, determine the question whether (b) a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; (d) hear any question respecting the interpretation of the Constitution, including the determination of—(ii) the question whether anything said to be done under the authority of the constitution or of any law is inconsistent with, or in contravention of, the Constitution.
38. The import of article 165(3) is that it authorises this court (High Court) to decide all matters other than those reserved for other courts as contemplated in article 162(2); matters reserved for the exclusive Jurisdiction of the Supreme Court and Employment and Labour Relations Court and Environment and Land Court and those restricted by article 165(5) and 165(6). Article 165(6) states that the High Court has supervisory jurisdiction over subordinate courts and over any person or body exercising judicial or quasi-judicial function, but not over a superior court.
39. From the sweep of the constitutional authorisation given to the High Court, it has wide jurisdiction to hear and determine various matters that may be brought before it. Whether or not this court has jurisdiction to hear and determine this petition must, therefore, be viewed through the prism of article 165(3)(b) and (d).
40. This petition alleges violation of the right from discrimination, a right in the Bill of Rights. The petitioner claims that hardship allowance was whimsically and arbitrarily withdrawn without notice or explanation. There is no allegation of there being an employer-employee relationship between the respondents and judges, judicial officers and judicial staff to make the matter a dispute between an employer and employee.
41. Based on the issue raised in this petition, it is clear to me, that it centres on whether rights of judges, judicial officers and judicial staff were violated and further whether the impugned action amounted to discrimination, which falls within the jurisdiction of this court under article 165(3)(b) of the *Constitution*.
42. As this court observed in *Cami Graphics Limited v Chief Registrar of the Judiciary & 2 others; Commissioner of Lands & 4 others (Interested Parties)* [2024] KEHC 2999 (KLR):
- (22) Where a party moves this court under article 22 of the *Constitution*, the court has jurisdiction in terms of article 23(1) as read with article 165(3)(d) to determine the petition. However, the claim must be that the action complained of violates or threatens a right or fundamental freedoms and the relief sought must be aimed at redressing that violation.
43. In *Public Service & 2 others v Eric Cheruiyot & 17 others* (Civil Appeal No 119 of 2017) (consolidated), the Court of Appeal observed that jurisdiction of the ELRC is not limited to disputes arising out of a contract of employment between an employee and employer. The court can also determine any constitutional violations of the rights of any party arising from an employee-employer relationship.
44. The Court of Appeal however went on to emphasise that “fore the court to entertain a petition premised on the breach of a party’s fundamental rights under the constitution, the alleged constitutional breach must be ancillary and incidental to the matters contemplated under section 12 of the Act.”



45. It is plain from the pleadings before this court, that the petition was brought under article 22 as read with articles 23(1) and 165(3) of the *Constitution*, alleging what the petitioner perceives to have been a constitutional infraction. The petitioner wanted this court to exercise its jurisdiction under article 165(3)(b) to investigate and determine whether there was infringement of rights in the Bill of Rights. There has been no demonstration that there exists an employer-employee relationship between the respondents and judges, judicial officers and judicial staff, to make the matter fall within the jurisdiction of the ELRC. I therefore find and hold that this court has jurisdiction to hear and determine this petition.

#### **Whether withdrawal of hardship allowance was lawful.**

46. The next issue is whether withdrawal of hardship allowance was lawful and should be sustained. The facts in this petition are not disputed. Judges, judicial officers and judicial staff working in areas designated as hardship areas were entitled to hardship allowance at the rate of 40% of their basic salary. The allowance was introduced in 2011 and effected in 2012. It was also captured in the *Judiciary Transfer Policy*, 2015. Payment of the allowance was, however, stopped or withdrawn in 2019 without notice or explanation to the parties concerned. The petitioner took the view, that since judges, judicial officers and judicial staff stationed in hardship areas had been receiving hardship allowance, it created a legitimate expectation that officers working in those areas would receive the allowance.
47. SRC has argued that it is the only body with the mandate to either set or review remuneration and benefits for State officers. For that reason, the actions by the JSC to set hardship allowance for Judicial officers on 19<sup>th</sup> October 2011, was in breach of article 230(4) of the *Constitution* and was, therefore, unconstitutional, null and void.
48. According to SRC, the decision to stop payment of hardship allowance was informed by a study on allowances payable in the public service conducted in September 2014 which revealed various allowances payable across the public service institutions. SRC thus, issued a circular (Ref No. SRC/ADM/CIR/1/13 Vol III (126) on December 10, 2014 to the “Public Service” abolishing allowances as a percentage of the basic salary.
49. According to SRC, CRJ confirmed through letter dated November 26, 2019, that hardship allowance was being paid and requested SRC to ratify the allowance at the rate of 40% of the basic salary for stations designated as hardship areas for purposes of capturing the payment in the payroll system, so as to assist the National Treasury seek authority from the Directorate of Personnel Management in order to pay the allowance to the Judges concerned on a monthly basis.
50. However, SRC declined through letter dated December 10, 2020, informing CRJ that hardship allowance would be paid in line with its circular of December 10, 2014. By letter dated June 21, 2022, SRC communicated to CRJ on the hardship allowances set for Judges in hardship areas. SRC argues, therefore, that it discharged its constitutional mandate to set and review the remuneration and benefits for state officers in the Judiciary, including hardship allowance for judge and judicial officers.
51. From the contestations above, it emerges clearly that hardship allowance within the judiciary was approved by the JSC on October 19, 2011 and effected on January 1, 2012. It had been in place and was being paid up to 2019 when SRC moved to stop it following what SRC states was a study that was conducted in 2014 following which, it issued a circular dated December 10, 2014 to the Public Service.
52. I have seen and read the circular from SRC. The circular refers to a study conducted on allowances payable in the public service which was concluded in September 2014. SRC’s circular does not state who was consulted and whether the judiciary was consulted during the study and whether those



- earning the allowance were also consulted and or informed regarding the intention to withdraw the allowance.
53. SRC further admits that the letter from the CRJ dated November 26, 2019 confirmed that hardship allowance was being paid to judges, judicial officers and judicial staff working in hardship areas. It was only on June 21, 2022 that SRC communicated to the CRJ on the hardship allowances it had set for Judges in hardship areas.
  54. Judges, judicial officers and judicial staff who had been working in hardship areas were as of right, then entitled to hardship allowance as communicated to them by the Judiciary at the time of their posting to such areas, something they had no control over. Some of these officers worked in those areas under those terms and were later transferred to other areas while still owed the allowances.
  55. With regard to judges, the hardship allowance became part of their terms of service so long as they worked in those areas acquiring constitutional protection thus, could not be taken away to their disadvantage without offending article 160(4) of the *Constitution*.
  56. In *Peter Mwangi Gabuiri v Attorney General & others* (Petition No 304 of 2023) the court held that the allowance is a benefit attaching to the office of judge to be enjoyed by the holder of that office and is protected by article 160(4) of the *Constitution* as long as the judge works in the hardship area. The allowance was at the time, part of the benefits payable to judges, judicial officers and judicial staff working in those areas, thus created a legitimate expectation which could not be withdrawn at whims and without their knowledge or explanation.
  57. In that respect, judges working in the hardship areas could not be paid hardship allowance while judicial officers and judicial staff were not yet they were from the same institution doing the same work, albeit in different levels. This would create differential treatment, a discrimination prohibited by article 27(1) of the *Constitution* which entitles every person to equality before the law and equal protection and equal benefit of the law.
  58. Further, I note the argument by SRC that judicial officers are not officers within its rank and it neither withdrew nor advised/directed the CS to withhold payment of their hardship allowance as alleged by the petitioner. This raises the question of on what basis then, hardship allowance for judicial officers and judicial staff was stopped or withheld if SRC was not responsible. Withholding of the allowance was thus, if anything, thus unlawful and without justification.
  59. Although SRC has stated that it carried out a study on hardship allowances, it has not demonstrated that it engaged the Judiciary on the issue of hardship allowance and that those to be affected (judges, judicial officers and judicial staff) were given an opportunity to be heard on the issue. Best practice in such a process would have required that SRC engages the JSC and representatives of all stakeholders before deciding to withdraw the allowance.
  60. In this respect, I agree with the court's observation in *County Public Service Boards National Consultative Forum & 47 others v Salaries and Remuneration Commission* [2024] KEELRC 1279 (KLR) that:
    - [26] ...in undertaking its functions and powers as conferred per article 230 (4)(a) and (b) the respondent cannot act suo moto without responding to proposed or communicated needs of the national and county governments as submitted to it by way of proposals or recommendations. In other words, the respondent does not serve its own created real or perceived needs, but, it is established and exists to address requests presented to it by relevant authorities in the national and county governments towards exercising and discharging its constitutional and statutory powers and functions.



61. Judges, judicial officers and judicial staff who worked in hardship areas planned their lives based on the promise that they would receive the allowance. The decision to pay the allowance to those working in hardship areas as a basis for incentive and or compensation must have been deemed necessary and was intended to achieve something. In that regard, SRC could not whimsically and arbitrarily withdraw the allowance without consultation with the judiciary and or those to be affected, given that the allowance had been in place since it was effected in 2012.
62. The allowance had even been previously paid to those who had worked in the hardship areas before they were transferred and replaced by other officers and were owed arrears. Further, the allowance is contained in the Judiciary Transfer policy whose lawfulness has not been challenged. SRC could thus, not act in total disregard of this policy and without seeking to address the concerns that led to introduction of the hardship allowance as a percentage of the basic salary of those working in hardship areas.
63. In the circumstances, I find and hold that withdrawal of the hardship allowance was a violation of article 27, 47 and 160(4) of the Constitution.

### **Damages.**

64. The petitioner has also prayed for damages due to these violations. It is a principle of law that damages are payable where violation of constitutional rights and fundamental freedoms has been proved. However, damages are personal in nature and are payable to the individual whose rights are found to have been violated or infringed since they are meant to vindicate the rights violated and deter future violations.
65. In this case, the petition was filed as a public interest litigation and not by those whose rights were said to have been directly violated or infringed by the actions complained of. In that respect, I am not persuaded that damages are allowable in the circumstances of this petition

### **Conclusion**

66. Having considered the petition, responses and arguments by parties, I come to the following conclusions. First, that this court has jurisdiction to hear and determine this petition. The petition is not between an employer and employees and does not raise an issue that is incidental to a contract of employment between an employer and employee. The issues raised in the petition falls within the jurisdiction of this court under article 165(3) (b) of the Constitution.
67. Second, the argument that this court is functus official has no merit since the order transferring the petition to the ELRC was set aside that the petition recalled to this court for hearing and determination.
68. Third, the decision by SRC and CS to withdraw hardship allowance payable to judges working in areas designated as hardship areas or the advice on its withdrawal violated article 160(4) of the Constitution. The allowance was part of the judges' benefits once transferred to those areas and could not therefore be withdrawn as this violated article 160(4) of the Constitution if there was no equivalent replacement.
69. Regarding Judicial officers and judicial staff, SRC admitted that it neither withdrew nor advised withdrawal the allowance. In that respect, any withholding or withdrawal of their hardship allowance had no basis and was not justifiable. In any case, payment of hardship allowance to judges only leaving judicial officers and judicial staff working in the same areas though in different cadres, would result into differential treatment in violation of article 27 of the Constitution. The allowance was also withdrawn



without consultation or hearing the judiciary or those to be affected in violation of article 47 of the Constitution.

## **Disposal**

70. In the circumstances and based on the above conclusions, the court makes the following declarations and orders which it considers appropriate.
1. A declaration is hereby issued that the directive by the Salaries and Remuneration Commission to the Cabinet Secretary, National Treasury or Principal Secretary National Treasury to stop paying some Judges, judicial officers and judicial staff working in designated hardship areas hardship allowance at the rate of 40% of their basic salary while others had been paid the allowance amounted to differential treatment and discriminatory contrary to article 27 of the Constitution.
  2. A declaration is hereby issued that the directive by Salaries and Remuneration Commission to the Cabinet Secretary or Principal Secretary, National Treasury to stop payment of hardship allowance to Judges working in designated hardship areas at the rate of 40% of their basic salary is a violation of article 160(4) of the Constitution thus, unconstitutional and invalid.
  3. An order of *mandamus* is hereby issued compelling the Cabinet Secretary, and or Principal Secretary, National Treasury to pay Judges, judicial officers and judicial staff serving in the designated hardship areas the approved hardship allowance at the rate of 40% of their basic salary from October 1, 2019.
  4. An order of *mandamus* is hereby issued compelling the Cabinet Secretary and or Principal Secretary, National Treasury to immediately pay Judges, judicial officers and judicial staff who were transferred from hardship areas with unpaid hardship allowance between October 1, 2019 and their respective dates of transfer hardship allowance currently in arrears.
  5. This being a public interest litigation, there will be not on costs.

**DATED AND DELIVERED AT NAIROBI THIS 22<sup>ND</sup> DAY OF NOVEMBER 2024**

**E C MWITA**

**JUDGE**

