Republic v Judicial Service Commission; Karua (Exparte) (Judicial Review Application E1127 of 2020) [2023] KEHC 366 (KLR) (Judicial Review) (27 January 2023) (Judgment)

Neutral citation: [2023] KEHC 366 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

JUDICIAL REVIEW

JUDICIAL REVIEW APPLICATION E1127 OF 2020

J NGAAH, J

JANUARY 27, 2023

BETWEEN

REPUBLIC ..... APPLICANT

AND

JUDICIAL SERVICE COMMISSION ..... RESPONDENT

AND

MARTHA WANGARI KARUA ..... EXPARTE

JUDGMENT

1. By a petition dated 19 December 2019, lodged before the respondent, the applicant sought the removal of Lady Justice Lucy Waruguru Gitari from the office of a judge of this Honourable Court. In the petition, the applicant had largely complained about the manner the learned judge had conducted an election petition which the applicant had lodged in this Court, sitting at Kerugoya, against one Anne Waiguru and others. The petition registered as Election Petition No. 2 of 2017 arose out of the general elections conducted in 2017 and in which the applicant had contested as a gubernatorial candidate for the County of Kirinyaga but lost to Anne Waiguru.

2. By a letter dated 16 March 2020, addressed to the applicant, the respondent dismissed the applicant's petition.

3. The letter read as follows:

> Dear Madam
>
> Petition For Removal of Justice Lucy Waruguru Gitari in Relation to Election Petition No. 2 of 2017 –Hon. Martha Wangari Karua & Another.vs. I.E.B.C. & 3others.

The judicial service commission is in receipt of your above complaint dated 19th December 2019.

Kindly note that upon consideration, the Commission, on 6thMarch 2020 resolved that the complaint be dismissed for raising issues touching on the merits or otherwise of the court's decision, which could be redressed by way of appeal or review.

The commission observed that delving into this complaint would be tantamount to sitting on appeal or review of a court's decision, a mandate which is outside jurisdiction of the Commission and therefore an affront to the decisional independence of the court.

This therefore is to convey to you the above decision of the Commission dismissing your complaint against the above-mentioned Honourable Judge.

Yours faithfully

Signed

Anne. A. Amadi (MRS), CBS

Secretary

Judicial Service Commission"

The letter was copied to the chairperson of the respondent.

4. The applicant was aggrieved by the respondent's decision and, therefore, by an application dated 13 November 2020, she has moved this Honourable Court for judicial review orders which have been captured in the application as follows:

   (a) An order of certiorari do (sic) issue to remove into this Honourable Court and quash the decision of the respondent dismissing the applicant's complaint against the Honourable Lady Justice Lucy Gitari,

   (b) A declaration that the ex parte applicant is entitled to be heard on her complaint before a determination thereof pursuant to section 11 (1) of the *Fair Administrative Action Act*, 2015.

   (c) An order of mandamus do (sic) issue directing the secretary of the respondent to release to the ex parte applicant within seven days the record of its proceedings the dismissed the complaint/ petition summarily.

   (d) An order pursuant to section 11 (1)(c) of the *Fair Administrative Action Act*, 2015 do (sic) issue directing the respondent to give the applicant an opportunity to be heard on her complaint.

   (d) (sic) An order of certiorari do (sic) issue to remove into this Honourable Court and quash the decision of the respondent communicated via letter dated 16th March 2020 and received by the applicant on 15th June 2020.

   (e) An order of mandamus do (sic) issue directed to the respondent to hear denovo the applicant's complaint in strict conformity with *the Constitution*.

   (f) A declaration pursuant to Article 47 (1) that the applicant is entitled to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair."

5. The application is stated to have been filed under Order 53 Rules 1(1) and 2 of the Civil Procedure Rules, the *Judicature Act*, cap. 8; the *Law Reform Act*, cap. 26; and, the *Fair Administrative Action Act*,

2015. It is also based on a statutory statement dated 9 November 2020 and an affidavit sworn by the applicant on even date verifying the facts relied upon.

6. Looking at both the affidavit and the statement, the applicant's complaint against the learned judge and which was the basis of petition to the respondent for the removal of the judge stemmed from a piece of evidence she presented at the court in preparation for the hearing of a petition. The evidence, which has been described in the affidavit as 'electronic evidence' is alleged to have disappeared or lost while in the court's custody. When this fact was brought to the attention of the Honourable Lady Jusice Gitari, the learned judge is said to have assured the applicant that an inquiry into the disappearance of this evidence would be made. Despite this assurance, the learned judge is alleged to have turned around and held, apparently in her judgment, that the applicant did not file the electronic evidence in question.

7. Apart from the complaint about the electronic evidence, the learned judge is said to have denied the applicant a chance of referring to or relying upon such evidence as forms 37A and B which had been filed and presented by Independent Electoral and Boundaries Commission. This commission was one of the respondents in the applicant's petition.

8. According to the applicant, the conduct of the learned judge smacked of incompetence, corruption or inability to perform her judicial duties in accordance with her oath of office and, for this reason, the respondent ought to have investigated the judge after the applicant lodged her petition.

9. It is the applicant's case that if the complaint is not investigated the learned judge's conduct would compromise the administration of justice.

10. The application has been opposed and, to this end, a replying affidavit sworn on 15 June 2021 by Ms. Anne Amadi was filed. Ms Amadi is the secretary to the respondent commission and also the Chief Registrar of the Judiciary.

11. In the affidavit, Ms Amadi has, among other things, laid out the elaborate procedure that the respondent would ordinarily follow whenever a complaint against a sitting judge is presented before it. The applicant's complaint against the learned judge was processed in line with this acknowledged procedure.

12. In particular, on 19 December 2019, the respondent received a complaint against Lady Justice Gitari from the applicant. And this complaint was in respect to Kerugoya Election Petition No. 2 of 2017; Martha Karua & Anor versus Independent Electoral and Boundaries Commission & Others which was presided over by the learned judge. It was the applicant's complaint that the judge had misconducted herself in handling the petition and therefore she ought to be removed from office.

13. On 27 December 2019, the respondent wrote to the applicant acknowledging receipt of the petition. The applicant was further advised that she would be informed of the progress or the outcome of her petition in due course.

14. On 6 March 2020 the applicant's complaint was taken to the internal processing channels within the Judicial Service Commission culminating in the preliminary evaluation according to which it was noted that the complaint raised issues touching on the merits of the court's decision in the election petition.

15. In the respondent's opinion, the applicant's complaint could be addressed by way of an appeal against the learned judge's decision. As a matter of fact, the substratum of the applicant's petition was taken up and heard by way of appeal in the Court of Appeal and the Supreme Court in Martha Wangari Karua v Independent Electoral & Boundaries Commission & 3 Others (2018) eKLR and Martha Wangari Karua v Independent Electoral and Boundaries Commission & 3 Others (2019) eKLR respectively.

16. Although the respondent made its decision to dismiss the complaint on 16 March 2020, it was not until July 2020 that it was communicated to the applicant. The reason for the delay was attributed to the outbreak of the Covid 19 pandemic which led to scaling down of operations in public offices, including the respondent's office.

17. By a letter dated 9 July 2020 the applicant wrote to the respondent seeking information on when her petition was heard. She also sought a record of the proceedings that led to the decision of 6 March 2020. The applicant also demanded an explanation as to why it took long to communicate the decision of the respondent on the applicant's complaint. The respondent responded to this letter on 6 November 2020.

18. It has further been deposed on behalf of the respondent that not all petitions for removal of judges result into oral hearings and that such hearings are not a matter of course. As far as the question of delay is concerned, it has been deposed that the applicant's petition was disposed of within three months of the receipt of the petition. According to the respondent, there was no delay in determination of the petition and if there was any, it was not inordinate by any standards.

19. In the submissions filed on behalf of the applicant, it has been urged that the respondent failed to uphold the provisions of Article 50 (1) of *the Constitution* on the right to a fair hearing. Under that article, every person has a right to have any dispute that can be resolved by application of the law decided in a fair and public hearing before a court or before an independent and impartial tribunal or body.

20. It has also been urged that according to Article 47 of *the Constitution* and the principles of common law, the respondent is under a duty to discharge its mandate and administrative functions in a fair manner.

21. The respondent, it contented, violated these provisions of *the Constitution* when it failed to avail to the applicant the proceedings leading to the impugned decision.

22. The applicant relied on the case of University of Ceylon versus Fernando (1960) 1 WLR 223 where the Privy Council held that in the absence of a prescribed procedure to be followed at the inquiry, the commission which was seized of the enquiry in question was bound to comply with the elementary and essential principles of fairness applicable in discharge of the public officer's function.

23. Also cited in support of the applicant's arguments is the case of Jeremiah Gitau Kiereini versus CMA & Another, Petition No. 371 of 2012 in which Majanja, J. adopted the words of Lord Morris of Borth-Y-Gest in Furnell versus Whangarei High School's Board (1973) AC 600 to the effect that there are no words that are of universal application to every kind of inquiry and every kind of domestic tribunal. That the requirements of natural justice must depend on the circumstances of the case, the nature of the inquiry, the rules under which the inquiry is acting, the subject matter and so forth. However, whatever standard is adopted, one essential is that a person must have a reasonable opportunity of presenting his case.

24. The applicant further relied on the case of Judicial Service Commission versus Mbalu Mutava Musyimi & Another (2015) eKLR where the Court of Appeal held that, while under section 47(1)(c) of the *Judicial Service Act*, No. 1 of 2011, the Judicial Service Commission has to make regulations to guide preliminary procedure for making any recommendations which it is enjoined to make, the commission has the discretion to adopt any fair procedure appropriate to its task. Again, the applicant cited the Supreme Court decision in Martin Wanderi & 106 others versus Engineers Registration Board & 10 Others (2018) eKLR for the proposition that where an act done is ultra vires the mandate of an administrative body, the act is void as there is an outright violation of *the Constitution*.

25. On behalf of the respondent, it was submitted that as much as the Judicial Service Commission cannot bar anybody from complaining about decisions of judges and judicial officers it cannot, and indeed it has no jurisdiction to entertain complaints about the merits of those decisions lest it interferes with the decisional independence of the judges and judicial officers. On this point, the case of Apollo Mboya versus Judicial Service Commission & Another (2020) eKLR was cited. Also cited is the case of Nancy Makokha Baraza versus Judicial Service Commission (2012) eKLR for the argument that the role of the Judicial Service Commission under Article 168 of *the Constitution* is limited to determining whether there is a prima facie case against a judge and not to make the conclusive findings on whether the allegations upon which the case is based have been proved. On the same point the respondent cited the case of Apollo Mboya versus Judicial Service Commission (supra).

26. Like the applicant, the respondent also cited the case of Judicial Service Commission versus Mbalu Mutava Musyimi & Another (supra) for the argument that the duty of the respondent is confined to making a preliminary inquiry and satisfying itself that the petition for removal of a judge has merit. Only then can it make the necessary recommendations.

27. Further, it was submitted that under article 160 (1) of *the Constitution*, a judge of the Superior Court is only subject to *the Constitution* and not beholden to the respondent in discharge of his or her duties. Accordingly, the respondent cannot investigate a judge on whether his or her decision has merits as doing so would be tantamount to interfering with the decisional independence of a judge.

28. On the question of the alleged violation of the applicant's constitutional rights to a fair hearing under Article 50 and to a fair administrative action under Article 47 of *the Constitution*, the respondent relied on the case of Kenya Revenue Authority versus Menginyi Salim Muragani (2010) eKLR and Sopspeter Kioko Munguti versus Nestle Kenya Limited (2013) eKLR for the position that lack of an oral hearing does not necessarily amount to lack of a fair hearing.

29. The first port of call in determination of applications of the nature before court is the interrogation of the grounds upon which relief is sought or, in other words, the grounds upon which the application is made.

30. Order 53 Rule 1(2) states in mandatory terms that the statement accompanying the application must contain, among other things, the grounds upon which the application is made. It reads as follows:

> (2) An application for such leave as aforesaid shall be made ex parte to a judge in chambers, and shall be accompanied by a statement setting out the name and description of the applicant, the relief sought, and the grounds on which it is sought, and by affidavits verifying the facts relied on. (Emphasis added).

And Order 53 Rule 4(1) states unambiguously that no grounds should be relied upon except those specified in the statement accompanying the application for leave.

31. These grounds are not left to speculation and as early as 1985 they were enunciated by Lord Diplock in his dictum in Council of Civil Service Unions versus Minister for the Civil Service (1985) A.C. 374,410 where he set out the three heads which he described as "the grounds upon which administrative action is subject to control by judicial review". These grounds are illegality, irrationality and procedural impropriety. While discussing susceptibility of administrative actions to judicial review and, in the process defining these grounds, the learned judge stated as follows:

> "My Lords, I see no reason why simply because a decision-making power is derived from a common law and not a statutory source, it should for that reason only be immune from judicial review. Judicial review has I think developed to a stage today when without

reiterating any analysis of the steps by which the development has come about, one can conveniently classify under three heads the grounds upon which administrative action is subject to control by judicial review. The first ground I would call "illegality," the second "irrationality" and the third "procedural impropriety." That is not to say that further development on a case by case basis may not in course of time add further grounds. I have in mind particularly the possible adoption in the future of the principle of "proportionality" which is recognised in the administrative law of several of our fellow members of the European Economic Community; but to dispose of the instant case the three already well-established heads that I have mentioned will suffice.

By "illegality" as a ground for judicial review I mean that the decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. Whether he has or not is par excellence a justiciable question to be decided, in the event of dispute, by those persons, the judges, by whom the judicial power of the state is exercisable.

By "irrationality" I mean what can by now be succinctly referred to as "Wednesbury unreasonableness" (Associated Provincial Picture Houses Ltd. v. Wednesbury Corporation [1948] 1 K.B. 223). It applies to a decision which is so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at it. Whether a decision falls within this category is a question that judges by their training and experience should be well equipped to answer, or else there would be something badly wrong with our judicial system. To justify the court's exercise of this role, resort I think is today no longer needed to Viscount Radcliffe's ingenious explanation in Edwards v. Bairstow [1956] A.C. 14 of irrationality as a ground for a court's reversal of a decision by ascribing it to an inferred though unidentifiable mistake of law by the decision-maker. "Irrationality" by now can stand upon its own feet as an accepted ground on which a decision may be attacked by judicial review.

I have described the third head as "procedural impropriety" rather than failure to observe basic rules of natural justice or failure to act with procedural fairness towards the person who will be affected by the decision. This is because susceptibility to judicial review under this head covers also failure by an administrative tribunal to observe procedural rules that are expressly laid down in the legislative instrument by which its jurisdiction is conferred, even where such failure does not involve any denial of natural justice. But the instant case is not concerned with the proceedings of an administrative tribunal at all."

32. These grounds of illegality, irrationality and procedural impropriety are ordinarily regarded as the traditional grounds for judicial review. The court will intervene and may, in exercise of its discretion, grant the remedy for judicial review if any of them is proved to exist. But as Lord Diplock suggested, the list is by no means exhaustive. The learned judge hastened to say that further development of this area of law may yield further grounds on a case by case basis. It is in this spirit, the learned judge suggested, that the principle of proportionality as a further ground for judicial review has been developed.

33. The *Fair Administrative Action Act*, 4 of 2015 has to a greater degree codified these grounds of judicial review. It states in section 7 as follows:

> 7. Institution of proceedings.
>
> (1) Any person who is aggrieved by an administrative action or decision may apply for review of the administrative action or decision to-

(a) a court in accordance with section 8; or

SUBPARA (b)

a tribunal in exercise of its jurisdiction conferred in that regard under any written law.

(2) A court or tribunal under subsection (1) may review an administrative action or decision, if-

(a) the person who made the decision-

(i) was not authorized to do so by the empowering provision;

(ii) acted in excess of jurisdiction or power conferred under any written law;

(iii) acted pursuant to delegated power in contravention of any law prohibiting such delegation;

(iv) was biased or may reasonably be suspected of bias; or

(v) denied the person to whom the administrative action or decision relates, a reasonable opportunity to state the person's case;

(b) a mandatory and material procedure or condition prescribed by an empowering provision was not complied with;

(c) the action or decision was procedurally unfair;

(d) the action or decision was materially influenced by an error of law;

(e) the administrative action or decision in issue was taken with an ulterior motive or purpose calculated to prejudice the legal rights of the applicant;

(f) the administrator failed to take into account relevant considerations;

(g) the administrator acted on the direction of a person or body not authorised or empowered by any written law to give such directions;

(h) the administrative action or decision was made in bad faith;

(i) the administrative action or decision is not rationally connected to-

(i) the purpose for which it was taken;

(ii) the purpose of the empowering provision;

(iii) the information before the administrator; or

(iv) the reasons given for it by the administrator;

(j) there was an abuse of discretion, unreasonable delay or failure to act in discharge of a duty imposed under any written law;

(k) the administrative action or decision is unreasonable;

(l) the administrative action or decision is not proportionate to the interests or rights affected;

(m) the administrative action or decision violates the legitimate expectations of the person to whom it relates;

(n) the administrative action or decision is unfair; or

(o) the administrative action or decision is taken or made in abuse of power.

(3) The court or tribunal shall not consider an application for the review of an administrative action or decision premised on the ground of unreasonable delay unless the court is satisfied that-

(a) the administrator is under duty to act in relation to the matter in issue;

(b) the action is required to be undertaken within a period specified under such law;

(c) the administrator has refused, failed or neglected to take action within the prescribed period.

34. I do not read provision as breaking new grounds for judicial review. Rather, what has been presented as grounds in the foregoing section appeals to me to be, by and large, the traditional judicial review grounds except that they have been broken down into their various, smaller components. Differently put, these 'grounds' would conveniently fall under any of the heads of the traditional grounds of judicial review.

35. Turning to the applicant's application, it is not quite apparent from the statutory statement which of the grounds of judicial review the application is based. It is necessary I reproduce them as set out by the applicant in order to appreciate this conclusion. They read as follows:

" 3. Grounds upon which reliefs are sought

(a) The act complained of constitutes an administrative decision subject to judicial review powers of this court.

(b) The *Fair Administrative Action Act*, 2015 defines "decision" to mean any administrative or say judicial decision made, proposed to be made, or when it made, as the case may be.

(c) *fair administrative action act*, 2015 defines "administrative action" to include-

(i) the powers, functions and duties exercised by authorities or quasi-judicial tribunals; or

(ii) any act, omission or decision of any person, body or authority that affects the legal rights or interests of any person whom such action relates;

(e) (sic) Pursuant to the *Fair Administrative Action Act*, 2015, both an administrative decision and an administrative action are subject to judicial review powers of this Honourable Court and the respondent did not give reasons and/or failed to provide the applicant sufficient reasons as required by Article 47 of *the Constitution* and the Fair Administrative Act (sic).

(f) Article 35 of *the Constitution* and section 4 of the *Access to Information Act* gives the applicant and indeed any citizen (sic) of official information and/or records that contain the necessary information pertaining to their rights.

(g) Applicant did on the 9th day of July 2020 request the respondent through its secretary for the records of its proceedings that dismissed her petition summarily, which request remains unanswered to date in flagrant violation of *the Constitution* and the *Access to Information Act*.

(h) Giving a complainant an opportunity to be heard during the consideration of the complaint is a fundamental requirement of a fair hearing.

(i) The administrative decision is unconstitutional.

(j) *The Constitution* at Articles 47 (1), and 50 (1) sets out requirements for fairness and the failure to meet these minimum criterion is plainly unconstitutional.

(k) There is also real and present danger a number of deserving candidates who have filed complaints against judicial officers could have met a similar fate as the applicant.

(l) the administrative decision is arbitrary.

(m) to the extent that the determination was not preceded by a hearing in which the applicant was given the opportunity to participate in, the same was arbitrary and the exact antithesis of a

decision that respects the principles of constitutionalism and the rule of law.

(n) The administrative decision was ultra vires the powers of the respondent.

(o) the administrative processes in determining the decision was not expeditious and unfair.

(p) The respondent has no authority under *the Constitution* to make determinations of complaints without affording the complainant's opportunity of being heard.

(q) failure to provide reasons and/or sufficient reasons compounded by further failure to disclose information on how the determination was arrived at and the information to provide the process constitutes proof that the determination was opaque and done in an illegal way and is further proof that the determination itself was illegal and unreasonable.

(r) It is just and equitable that the impugned decision of the respondent be subjected to judicial review jurisdiction of this Honourable Court because the same sets a dangerous precedent of arbitrariness in the determination of complaints against judicial officers."

36. There is an obvious lack of precision on which of the grounds the application is grounded to the extent that one cannot out rightly say with any sense of conviction that the application is based on a particular ground of judicial review rather the other.

37. Granted. The applicant has mentioned that the impugned decision is "unconstitutional"; that it is "arbitrary"; that, it was "ultra vires the powers of the respondent"; and finally that the respondent did not provide reasons or sufficient reasons for its decision.

38. In the first place, the applicant has largely left it to court to make up its mind whether any of these grounds constitute the traditional grounds of judicial review of illegality, irrationality or procedural impropriety. Secondly, assuming the grounds of 'unconstitutionality', 'arbitrariness', 'ultra vires' and, 'lack of reasons' constitute the grounds of judicial review, it has not been demonstrated with sufficient particularity or specificity which of the many allegations that the applicant has made against the respondent comprise the grounds of illegality, irrationality or illegality. In the absence of demonstration of this requisite link, the allegations of 'unconstitutionality', 'arbitrariness', 'ultra vires' and, 'lack of reasons' as the blemishes with which the impugned decision is tainted are no more than bare statements which, by themselves, are not sufficient to impeach the respondent's decision.

39. While reiterating the importance of stating grounds for judicial review in concise and precise terms, Michael Fordham in his book, Judicial Review Handbook, at Paragraph 34.1 states as follows:

> " The need to identify and express accurately the possible grounds for judicial review is not simply a matter of analytical nicety. It is one of practical necessity. The provisions of the new order require the accurate identification of (a) potentially applicable grounds and (b) the time at which they arose. Given the frequent presence of multiple targets, the elusive nature of certain grounds, their disarming interrelationship, and the understandable fear of missed opportunity, it is easy to see why public lawyers may feel tempted to 'throw everything'

including grounds which are dangerously close to the inconceivable. This approach is unlikely to endear them to the court." (Emphasis added).

40. The 'new order' referred to in this passage is Order 53 of the Rules of the Supreme Court of England whose provisions are more or less in pari materia with our own Order 53 of the Civil Procedure Rules, 2010. The point, however, is clear that courts will not entertain applications where grounds have not been identified and accurately stated. Stating the grounds in precise terms is not, as it were, a matter of analytical nicety but it is a practical necessity.

41. It follows that where the grounds are not stated or the applicant 'throws everything' at the court in the hope that the court will work out the ground or grounds that can best support his or her application, the application would be fatally defective.

42. But even if it was to be assumed that the grounds had been set out in precise and unambiguous terms, I doubt the instant application would see the light of day. I say so because having considered the correspondence between the applicant and the respondent culminating in the impugned decision, it has not been demonstrated to my satisfaction that the decision is tainted with illegality, irrationality or procedural impropriety.

43. In considering the applicant's application from the perspective of all or any of these grounds, one need not look any further than Article 168 of *the Constitution* and, in particular, clauses (1), (2), (3) and (4) thereof. These provisions read as follows:

168.

(1) A judge of a superior court may be removed from office only on the grounds of—

(a) ...

(b) ...

(c) ...

(e) ...

(2) The removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission.

(3) A petition by a person to the Judicial Service Commission under clause (2) shall be in writing, setting out the alleged facts constituting the grounds for the judge's removal.

(4) The Judicial Service Commission shall consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President.

No doubt the applicant invoked Article 168(2) when she filed a petition before the respondent for removal of Lady Justice Lucy Giatri Waruguru from office.

44. In exercise of its constitutional mandate under clause (4), the respondent considered the petition. Prior to taking this action, the respondent, vide a letter dated 27 December 2020 (the year ought to be 2019 as sworn by Anne Amadi in paragraph 9 of her replying affidavit) not only acknowledged receipt of the

petition but also informed the applicant that she would be informed of the outcome of the petition after the respondent had processed it. That letter read in part as follows:

> " We acknowledge receipt of your above-referenced petition dated 19th December, 2019.
>
> The Judicial Service Commission is now fully seized of the complaint which shall henceforth adopt JSC Petition No. 156/2019 as its reference number. Kindly quote the same in all your future correspondence.
>
> We write to advise that the complaint is being processed in accordance with the law and the progress/outcome shall be communicated to you."

45. As noted earlier in this judgment, the respondent considered the petition and informed the applicant accordingly.

46. My understanding of the applicant's qualm with the decision of the respondent is that she ought to have been given opportunity to appear before the respondent either in person or by her duly appointed representative and heard orally before the respondent could reach the decision it did.

47. At least this is what I hear her saying in some of the averments listed as the grounds upon which relief is sought. In particular, in ground (m) she has stated as follows:

> (m) to the extent that the determination was not preceded by a hearing in which the applicant was given the opportunity to participate in, the same was arbitrary and the exact antithesis of a decision that respects the principles of constitutionalism and the rule of law."

48. According to Article 168 (4) of *the Constitution*, the respondent's obligation is to consider the petition. For obvious reasons, *the constitution* does not detail how the respondent is 'to consider' the petition. Certainly it is a deliberate omission because it is left to the discretion of the respondent to decide how it should 'consider' the petition. *The constitution* does not concern itself with such finer details of how bodies such as the respondent should conduct their day-to-day affairs. Instead, it must have intended the respondent to follow the procedure which is its own and which, at any rate, is necessary if it is to execute effectively and efficiently its mandate.

49. According to Ms Amadi, the procedure adopted in dealing with petitions for removal is as follows:

> " a. The JSC receives a formal written complaint against a judge (usually in the form of a petition for removal) from any aggrieved person, usually a petition;
>
> b. The JSC conducts a preliminary evaluation with a view to determining the admissibility of the petition. A petition is inadmissible when it touches on the merits of a court's decision or is without substance or is mistaken, misconceived, frivolous or vexatious or is hypothetical.
>
> c. Upon preliminary evaluation, the JSC takes one of the following actions:
>
> i) if satisfied that the petition is inadmissible, the JSC dismisses the same and informs the petitioner in writing of the decision to dismiss the petition;
>
> ii) if, on the other hand the JSC establishes that the petition raises reasonable grounds but the facts in support of thereof are insufficient, it may elect to either direct the petitioner to supply further particulars or conduct its own investigations;

iii) if the JSC is satisfied that the petition raises reasonable grounds and the fact in support thereof are sufficient, it is mandatorily required to forward the petition to the judge, who will then be required to respond to the allegations levelled against him/her in the petition within a specified period.

d. Once the judge in question formally responds to the petition and the JSC in receipt thereof, the JSC evaluates the documents collectively, that is the petition, the response thereto and any other relevant material. There after:

i) If the JSC finds that the petition and the response thereto touch on any of the grounds that make the former inadmissible (see para. 8(b) above) it dismisses the same and communicates the decision to dismiss to the petitioner in writing; or

ii) If the JSC finds that the petition and the response thereto disclose sufficient grounds, the JSC admits the petition for hearing. The JSC the (sic) notifies the judge of its decision to proceed with the hearing of the petition, serves the aggrieved petitioner with a copy of the judge's response to the petition and sets down the matter for hearing-whether viva voce or by way of written submissions.

e. Once the aforementioned hearing is done, the JSC makes a decision on whether a ground for removal under article 168 (1) of *the Constitution*, it forwards the petition to the president, who shall within 14 days of receipt suspend the judge in question from office and, acting in accordance with the recommendation of the JSC appoint a tribunal to inquire into the matter expeditiously, report on the facts and make binding recommendations to the President (Article 168 (4, 5 & 7) of *the Constitution*.

f. Once the petition is for the to the president as aforementioned, the JSC becomes functus officio."

50. There is nothing in this procedure that suggests that it is contrary to Article 168 of *the Constitution* or is inconsistent with any of the powers with which the respondent is bestowed under this Article or Article 252 of *the Constitution* which stipulate the general powers and functions of Commissions, such as the respondent, established under *the Constitution*. In particular, it has not been demonstrated to my satisfaction that in adopting this procedure in processing petitions for removal of judges the respondent does not thereby 'consider' the petition as contemplated under *the Constitution*. Neither has it been shown that in exercising its discretion in the manner of handling the petition, the respondent has not performed its task fairly and honestly and to the best of its ability considering that there is no express provision of what 'consideration' of a petition entails.

51. I am of the humble opinion that the fact that all that the respondent considered was the applicant's representation by way of a petition before it reached its determination does not necessarily mean that the applicant was not given the opportunity to be heard. Fair hearing or the right to be heard does not necessarily connote oral hearing.

52. In their book, Judicial Review of Administrative Action, 5th Edition at page 437, para9-012 to 9-013, De Smith, Woolf & Jowell have addressed this point and stated as follows:

> " A fair 'hearing' does not necessarily mean that there must be an opportunity to be heard orally. In some situations, it is sufficient if written representations are considered...Although the general position is that if a person is entitled to be heard, then prima facie he is entitled to put his case orally, there have been a number of contexts where the courts have held that the requirements of fairness have been satisfied by an opportunity to make written representations to the deciding body."

53. In Bushell versus Secretary of State for the Environment (1981) AC 75 Lord Diplock warned against applying to procedures involved in the making of administrative decisions concepts that are appropriate to the conduct of ordinary civil litigation between private parties. The learned judge noted at paragraph 97B-D of the judgment as follows:

> " To over-judicialise' the inquiry by insisting on observance of the procedures of our court of justice which professional lawyers alone are competent to operate effectively in the interests of their clients would not be fair. It would, in my view, be quite fallacious to suppose that at an enquiry of this kind the only fair way of ascertaining matters of fact and expert opinion is by the oral testimony of witnesses who are subjected to close examination... Such a procedure is peculiar to litigation conducted in courts of justice that follow the common law system of procedure..."

54. And in Mahon versus Air New Zealand Ltd (1984) AC 808, 821A Lord Diplock noted that "the technical rules of evidence applicable to civil or criminal litigation form no part of the rules of natural justice."

55. Finally, in Furnell versus Whangarei High Schools Board (1973) AC 660 Lord Morris had this to say at page 679G:

> " It has often been pointed out that the conceptions which are indicated when natural justice is invoked or referred to are not comprised within and are not to be confined within certain hard and fast and rigid rules... Natural justice is but fairness writ large and juridically. It has been described as 'fair play in action'. Nor is it a leaven to be associated only with judicial or quasi-judicial occasions. But as was pointed out by Tucker LJ in Russell versus Duke of Norfolk (1949) 1 ALL ER 109 at 118, the requirements of natural justice must depend on the circumstances of each particular case and the subject matter under consideration."

56. All these authorities point to the conclusion natural justice principles are entirely contextual and the question whether the requirements of natural justice have been met by the procedure adopted in any given case depend very much on the facts and circumstances of the case in point. In this scheme of things, the applicant cannot be heard to argue that natural justice is only visited upon an aggrieved party when that party has been heard orally. In the case at hand, I hold it was sufficient for the respondent, if it deemed it so, to consider the applicant's petition which, for all intents and purposes, comprised the applicant's representations against Lady Justice Gitari, and come to the conclusion that it came to.

57. In short, I am not persuaded that the respondent did not understand correctly the law which regulates its decision making power or that it did not give effect to it. Neither am I persuaded that its decision was so outrageous in its defiance of logic or of accepted moral standards that no sensible person who had applied his mind to the question to be decided could have arrived at that decision.

58. It is worth noting that the respondent's advice to the applicant that her complaint went to the merits of the decision of Lady Justice Gitari and, for that reason, the appropriate forum to dispose of her reservations against the judgment was the appellate court was not farfetched. The applicant appealed to the Court of Appeal and eventually to the Supreme Court. To a greater degree, the two appellate courts addressed the issues upon which the applicant's petition to the respondent was founded. It would of course have been untidy, to say the least, if the respondent was to entertain the applicant's petition and purport to deal with the same issues that were alive before the appellate courts.

59. For the reasons I have given, I would not also say that the respondent's decision was tainted with procedural impropriety. The fact that the respondent considered the applicant's petition is a testimony, by itself, that the applicant was given an opportunity to present her case before it was dismissed. I am satisfied that the respondent considered the applicant's petition and in the respondent's opinion, and for reasons which it communicated to the applicant, the petition did not warrant any further action except to dismiss it.

60. In any event, there was no evidence of any procedural rules that are expressly laid down in the legislative instrument by which the respondent's jurisdiction is conferred and which the respondent did not follow. As far as I can see, the respondent merely complied with the constitutional provision or provisions, considered the petition and dismissed it.

61. The applicant's counsel's letter to the respondent dated 9 July 2020 would suggest that the applicant may have doubted the respondent's communication to the effect that it had indeed considered the petition. That read in part as follows:

> " We have been instructed by our client to acknowledge receipt of your letter dated 16th March, 2020 and request the following information:
>
> 1. The date of hearing of her petition, including composition of the membership who had the petition.
> 2. Proceedings leading to the decision made on 6th March, 2020
> 3. Why it took that long to communicate the decision given the mandatory requirements for expeditious and fair hearing.
>
> Our client is entitled to the information pursuant to the provisions of Article 35 (1) of *the Constitution*."

62. The applicant has urged that this letter was not responded to and has thus escalated her quest for information in the instant application and prayed for:

> " (c) An order of mandamus do (sic) issue directing the secretary of the respondent to release to the ex parte applicant within seven days the record of its proceedings the dismissed the complaint/petition summarily."

63. Article 35 (1) of *the Constitution* which the applicant invoked in her quest for information guarantees, inter alia, the right of access to information held by the State and information held by another person and required for the exercise or protection of any right or fundamental freedom. To actualise the rights under this article, the legislature has enacted *Access to Information Act*, No. 31 of 2016. Its preamble is clear that it is enacted to, among other things, give effect to Article 35 of *the Constitution*. Section 8 thereof provides for the means by which the information may be obtained. It states that the

application for information must be made in writing in a specified language. The public entity from which information is required may also prescribe a form for the making of the application.

Once the application has been made, it is processed and information made available under sections 9, 10 and 11 of the Act.

64. The point is this: As much as the applicant has invoked Article 35 of *the Constitution*, she has sidestepped the provisions of *Access to Information Act* which, as noted, was enacted to give effect to Article 35 of *the Constitution* and, most importantly, which provides the procedure for accessing the information for which the order of mandamus is now sought.

65. Reliefs of judicial review are discretionary in nature and the availability to the applicant of another remedy which is equally convenient, beneficial or effective is a relevant factor in exercise of discretion by a judicial review court against grant of any of the orders for judicial review.

66. This point was taken R vs Peterkin, ex parte Soni, 18 (1972) Imm AR 253 where Lord Widgery CJ stated as follows:

> " The prerogative orders form the general residual jurisdiction of this Court whereby the court supervises the work of inferior tribunals and seeks to correct injustice where no other adequate remedy exists, but both authority and common sense seem to me to demand that the court should not allow its jurisdiction under the prerogative orders to be used merely as an alternative form of appeal when and adequate jurisdiction exists elsewhere."

67. The need to exhaust alternative remedies before moving the court for judicial review reliefs has since been codified in the wake of the enactment of the *Fair Administrative Action Act*, No. 4 of 2015. Section 9(2) of that Act states as follows:

> (2) The High Court or a subordinate court under subsection (1) shall not review an administrative action or decision under this Act unless the mechanisms including internal mechanisms for appeal or review and all remedies available under any other written law are first exhausted.

68. I need not belabour the point save to state that even if the applicant's application was properly before court, the prayer for the order of mandamus to compel the respondent to release certain information would not lie for the simple reason that the application would be premature and, by extension, misconceived.

69. In the final analysis, the inevitable conclusion that I have to reach is that the applicant's application is want of merit. It is misconceived and an abuse of the due process of this Honourable Court. It is dismissed with costs to the respondent. It is so ordered.

SIGNED, DATED AND DELIVERED ON 27 JANUARY 2023

NGAAH JAIRUS

JUDGE