**Judicial Service Commission v Salaries and Remuneration Commission & another (Petition 274 of 2016) [2018] KEHC 4765 (KLR) (Constitutional and Human Rights) (30 July 2018) (Judgment)**

*Judicial Service Commission v Salaries and Remuneration Commission & another [2018] eKLR*

Neutral citation: [2018] KEHC 4765 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**PETITION 274 OF 2016**

**EC MWITA, J**

**JULY 30, 2018**

**BETWEEN**

**JUDICIAL SERVICE COMMISSION ..... PETITIONER**

**AND**

**SALARIES AND REMUNERATION COMMISSION ..... 1ST RESPONDENT**

**ATTORNEY GENERAL ..... 2ND RESPONDENT**

**The Salaries and Remuneration Commission does not have the mandate to limit the number of remunerable meetings that a constitutional commission can have.**

*The main issue was whether a decision by the Salaries and Remuneration Commission to cap the number of remunerable meetings held by a constitutional commission to eight meetings a month for purposes of reducing the commission's expenditure, was a violation of the commission's financial and administrative independence. The High Court held that The Salaries and Remuneration Commission did not have the mandate to limit the number of remunerable meetings that a constitutional commission could have.*

Reported by Beryl A Ikamari

***Constitutional Law*** *- constitutional commissions - Salaries and Remuneration Commission - extent of the mandate of the Salaries and Remuneration Commission - whether the Salaries and Remuneration Commission could determine the number of remunerable meetings that a constitutional commission could have - Constitution of Kenya 2010, article 230(4)(a).*

***Constitutional Law*** *- constitutional commissions-independence of constitutional commissions - Judicial Service Commission - constitutionality of a decision by the Salaries and Remuneration Commission to cap the number of remunerable meetings that the Judicial Service Commission could have to eight meetings a month - whether*

*the decision violated the financial and administrative independence of the Commission - Constitution of Kenya 2010, articles 172 & 230(4)(a); Judicial Service Act, No 1 of 2011, section 22(4).*

**Brief facts**

The 1st respondent's mandate was to determine salaries and allowances for state and public officers in Government. On December 19, 2013, the 1st respondent wrote a letter addressed to the petitioner's chairperson detailing its determinations on remuneration and benefits of the petitioner's officers. The 1st respondent set the sitting allowances and also limited the number of the Petitioner's remunerable meetings to 8 meetings a month, effective from the date of the letter.

The petitioner stated that before a limitation was placed on the remunerable number of sittings it could have, it ought to have been consulted. It elaborated that the limitation interfered with its independence and the wide mandate it had in recruitment of judges, judicial officers and staff, handling promotions and handling disciplinary cases. The petitioner contended that the decision was made *ultra vires* the mandate of the 1st respondent and it interfered with its independence and mandate contrary to articles 249(2)(b) and 172 of the Constitution and section 22(4) of the Judicial Service Act. The petitioner sought various reliefs from the Court against that decision.

**Issues**

i. Whether the mandate of the Salaries and Remuneration Commission included determinations on the number of remunerable meetings that a constitutional commission could have, for purposes of reducing the commission's expenditure.

ii. Whether a decision by the Salaries and Remuneration Commission to cap the number of remunerable meetings held by a constitutional commission to eight meetings a month for purposes of reducing the commission's expenditure, was a violation of the commission's financial and administrative independence.

**Held**

1. Under article 230(4)(a) of the Constitution, the 1st respondent's mandate was to set and regularly review the remuneration and benefits of all State officers and to advise the National and County Governments on the remuneration and benefits of all other public officers. In undertaking that mandate, the 1st respondent was required to take into account, the following:-
    a. the need to ensure that the total public compensation bill was fiscally sustainable;
    b. the need to ensure that the public services were able to attract and retain the skills required to execute their functions;
    c. the need to recognise productivity and performance; and
    d. transparency and fairness.
2. Article 249(2) of the Constitution provided that the constitutional commissions and holders of independent offices were subject only to the Constitution and the law and were independent and not subject to direction or control by any person or authority. The effect of the provision was that constitutional commissions and independent offices were independent in the execution of their mandate and they should not take directions from any person or authority. Further, article 249(3) of the Constitution was to the effect that each commission and independent office would have sufficient financial allocation to enable it discharge its mandate.
3. The 1st respondent's mandate was limited to setting and reviewing remuneration and benefits for state officers and advising the National and County Governments on the issue of remuneration and benefits of public officers. That mandate did not extend to superintending how an independent commission utilized its budgetary allocations.
4. Section 22(4) of the Judicial Service Act provided that the Judicial Service Commission shall hold such number of meetings, in such places, at such times and in such manner as the Commission shall consider necessary for the discharge of its functions under the Constitution and the Act. The Legislature did not

deem it necessary to limit the number of monthly sittings that the petitioner could have. It appreciated the unique and possibly heavy mandate of the Petitioner and thought it was inappropriate to limit the sittings. The Legislature in its enactment gave the petitioner discretion on the number of meetings to have in order to discharge its constitutional mandate.

5. The 1st respondent had no mandate to limit the petitioner's remunerable monthly sittings. Any attempt by the 1st respondent to restrict the petitioner from holding more than eight remunerable meetings a month was not only *ultra vires* its constitutional and statutory mandate but also clearly unconstitutional and illegal.
6. The petitioner enjoyed financial and administrative independence and was accountable to Parliament. Parliament and not the 1st respondent was the organ that was mandated to oversee how the petitioner expended its budgetary allocation. Therefore, the 1st respondent could not restrict the number of the petitioner's remunerable monthly sittings as a way of reducing the Petitioner's expenditure.

*Petition allowed.*

***Orders***

i. *A declaration was issued to the effect that the role of the Salaries and Remuneration Commission under article 230(4) (a) of the Constitution was limited to setting the remuneration and benefits of State Officers serving in the Judicial Service Commission and not to determining the number of remunerable meetings the members of the Judicial Service Commission could have in discharging their mandate.*
ii. *A declaration was issued to the effect that the decision of the Salaries and Remuneration Commission to cap remunerable meetings for members of the Judicial Service Commission to eight (8) meetings a month was made ultra vires its powers under article 230(4) (a) of the Constitution and was a violation of the provisions of article 172 of the Constitution and section 22(4) of the Judicial Service Act.*
iii. *An order for certiorari was issued to quash the decision of the Salaries and Remuneration Commission contained in the letter dated December 19, 2013, capping the remunerable meetings for members of the Judicial Service Commission to not more than eight (8) meetings a month.*
iv. *An order of Prohibition was issued to prohibit the Salaries and Remuneration Commission from interfering in any way with the work and constitutional independence of the Petitioner.*
v. *No order as to Cost.*

**Citations**

***East Africa***

*Centre for Human Rights Education and Awareness & 2 others v John Harun Mwau & 6 others* [2012] 2 KLR 261 – (Mentioned)

*Communications Commission of Kenya & 5 others v Royal Media Services Limited and 5 others* Petition 14, 14 A, 14 B & 14 C of 2014 (Consolidated) –(Explained)

*In the Matter of the Interim Independent Electoral Commission* Constitutional Application No 2 of 2011 – (Mentioned)

*In the Matter of the National Land Commission* Advisory Opinion Reference No 2 of 2014 – (Followed)

*Judicial Service Commission v Speaker of the National Assembly and 8 others* Petition No. 518 of 2013 – (Followed)

*Kenya National Commission on Human Rights (KNHCR) v Attorney General & another* Petition 132 of 2013 (Explained)

*Kenya Union of Domestic Hotels, education and Allied Workers Union (KUDHEHIA) v Salaries and Remuneration Commission & Attorney General* Petition No 294 of 2013 –(Mentioned)

*Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others* Civil Appeal No196,195 & 203 of 2015 (Consolidated) - (Mentioned)

***South Africa***

1. *New National Party v Government of the Republic of South Africa & others* (CCT9/99) [1999] ZACC 5 – (Explained)

**Statutes**

***East Africa***

1.Constitution of Kenya, 2010 articles 22, 23(3) (f); 156,171(1); 172; 230(1) (4)(a) (5); 249(2) (b); 252(1) (d) ;260 – (Interpreted)

2.Judicial Service Act, 2011(Act No 1 of 2011) sections 3,19; 22(4); 41 – (Interpreted)

3.Office of the Attorney General Act, 2012 (Act No 49 of 2012) section 5 – (Interpreted)

4.Salaries and Remuneration Act 2011(Act No 10 of 2011) section 11 – (Interpreted)

5.Teachers Service Commission Act, 2003 (Act No 12 of 2003) section 37(3) – (Interpreted)

## JUDGMENT

### Introduction

1. In 2010, the people of Kenya adopted a Constitution that introduced constitutional commissions and independent offices. It also assigned each commission and each independent office functions and mandate. Some of the commissions so established are the Judicial Service Commission, the petitioner, established under Article 171(1) of the Constitution with mandate stipulated under Article 172 including to promote and facilitate the independence, accountability of the judiciary and the efficient, effective and transparent administration of justice and the Salaries and Remuneration Commission, the 1st respondent established under Article 230(1), whose mandate include; determining salaries and allowances for state and public officers at the two levels of government.

2. In exercise of this mandate, the 1st respondent determined and set allowances for members of the petitioner and further. It also fixed the maximum number of meetings the petitioner could hold in a month at 8, a fact that did not go down well with the petitioner prompting the filing of this petition.

### The Petition

3. In a Petition dated 30th June 2016, the petitioner, sued the 1st respondent, and the Attorney General, the 2nd respondent, whose duties under Article 156 of the Constitution include being the principal legal adviser to the national government, representing the national government in civil cases, promoting, protecting and upholding the rule of law and defending public interest

4. The Petitioner contended that it is a policy making institution and an integral part of the Judiciary, an arm of the national government; that owing to its unique role as an independent Commission, coupled with its constitutional mandate, it has representation drawn from both the national government and the private sector, notably; the Chief Justice who is the Chairperson, the Attorney General, judges from the Supreme Court, Court of Appeal and High Court, a magistrate, advocates' representatives, a representative of the Public Service Commission and two representatives for the public.

5. The petitioner stated that as a Commission, it plays a fundamental role in the implementation of the Judiciary's Transformation, and alongside its mandate under the Constitution, it is required to hold a number of crucial meetings. The Petitioner averred that initially, remuneration of its Commissioners had been set by the Public Service Commission prior to the establishment of the 1st Respondent under Section 41 of the Judicial Service Act No 1 of 2011, and in cognizance of the responsibility placed on the petitioner, the Public Service Commission never placed a limit on the number of monthly meetings the petitioner could hold in fulfillment of its mandate and objectives.

6. The petitioner further averred that pursuant to Article 230(4) (a), the 1ST respondent held a meeting on 18th December 2013 with the aim of setting remuneration and benefits for petitioner's Commissioners; that by letter dated 19th December 2013 addressed to the Chief Justice and Chairperson of the petitioner, the 1st respondent communicated its decision on remuneration and benefits of its state officers. It was contended that apart from fixing sitting allowances, the 1st respondent also placed a cap on the number of meetings the petitioner can hold in a month at eight. The 1st respondent further set the effective date of implementation of its decision for the same day, 19th December 2013.

7. The Petitioner went on to contend that its mandate is constitutionally sue generis such that the 1st Respondent ought to have first sought the opinion of the 2nd Respondent before capping its number of remunerable meetings to eight a month. The Petitioner averred that it was incumbent upon the 2nd Respondent who is not only a member of the Judicial Service Commission but also mandated under Section 5 of the Office of the Attorney General Act, No. 49 of 2012, to advice the 1ST respondent against interfering with the independence of the Petitioner by placing a limit on the number of remunerable meetings it can hold. The petition contended that the 1st respondent's decision to restrict its sittings to eight remunerable meetings a month amounted to an attempt to control and interfere with its wide mandate ranging from recruitment of judges, judicial officers and staff, handling promotions, to handling disciplinary cases within the institution.

8. The petitioner was also of the view, that commissions are equal in status and thus the 1st respondent's decision amounts to administrative intrusion and an attempt to subject one Constitutional commission to the control of another contrary to Article 249(2) (b) of the Constitution, thus inhibiting the petitioner's ability to discharge its mandate effectively. The petitioner averred that paragraphs 3(1), 6(1) and 7(1) to the First Schedule of the Judicial Service Act provide strict timelines within which to advertise, receive applications and conduct interviews which are to be determined by the number of applicants.

9. The petitioner stated that at the time of filing this petition, it was engaged in interview to fill vacancies in the Supreme Court as required by the Judicial Service Act and was also engaged in interviews for recruitment of judges for the Environment and Land Court and other senior staff of the Judiciary. The petitioner pleaded, by way of example, that it had indeed received 162 applications for the post of judges and 73 applicants had been shortlisted in the ongoing process which required 18 days of interviews with a maximum of 4 interviewees a day.

10. The petitioner contended that the 1st respondent's decision was ultra vires its constitutional mandate prescribed in Articles 230(4)(a) and(5) of the Constitution and amounts to interference with the constitutional mandate and administrative independence of the petitioner contrary to Articles 249(2) (b), 172 of the Constitution and Section 22(4) of the Judicial Service Act. The petitioner contended that the 1st respondent's decision, if allowed to stand, will inhibit its ability to discharge its functions as prescribed by the constitution and the law. The petitioner therefore sought the following reliefs;

    i) A declaration that the role of the 1st Respondent under Article 230(4)(a) of the Constitution is limited to setting the remuneration and benefits of State Officers serving in the Petitioner herein and not to determining the number of meetings the members of the Petitioner may hold in discharging their mandate.

    ii) A declaration that the decision of the 1st Respondent to cap the remunerable meetings for members of the Petitioner to not more than eight (8) meetings a month was made ultra vires its powers as under Article 230(4) (a) of the Constitution.

iii) A declaration that the decision of the 1st Respondent to cap the remunerable meetings for members of the Petitioner to not more than eight(8) meetings in a month is in breach of the provisions of Article 172 of the Constitution and Section 22(4) of the Judicial Service Act No. 1 of 2011.

iv) A declaration that the 1st Respondent ought to have consulted the 2nd Respondent herein prior to making the decision to cap the petitioners remunerable meeting to eight (8) a month.

v) An order for Certiorari do issue to remove into this Honourable Court and quash the decision of the 1st Respondent in the letter dated 19th December 2013, to cap the remunerable meetings for members of the petitioner to not more than eight(8) meetings a month.

vi) An order of Prohibition to issue to prohibit the 1st Respondent from in any way interfering with the work and constitutional independence of the petitioner.

vii) Cost of the Petition.

**1st Respondent's response**

11. The 1st respondent filed a replying affidavit on the 27th July 2016 by Anne Gitau sworn on 26th July 2016. Ms. Gitau deposed that the 1st respondent is established under Article 230(1) of the Constitution with the mandate of setting and reviewing remuneration and benefits of all state officers and has a duty to advise the national and county governments on the remuneration and benefits of all other public officers; and that its mandate is augmented by section 11 of the Salaries and Remuneration Act 2012, which highlights its functions that must be exercised in accordance with the principles set out in Article 230(5) of the Constitution.

12. The deponent stated that in June 2011, prior to the establishment of the 1st respondent, Public Service Commission (PSC) set the remuneration of members of the petitioner but did not set a salary for the members because the petitioner's members were to serve on part time basis. The number of monthly sittings was also not capped. Ms. Gitau deposed that failure to limit the number of monthly meetings for the petitioner lead to drawing of sitting allowances for meetings that had not been properly convened, a practice that made payment of allowances to the petitioner's commissioners fiscally unsustainable and raised public outcry, leading the 1st respondent to review the remuneration and benefits of state officers with the petitioner and capped its monthly sittings to eight upon its establishment.

13. It was deposed that after the review, remuneration and benefits of the Petitioner's state officers were set taking into account the principles in Article 230(5) and the immense responsibility placed on members of the petitioner. The 1st respondent also took into account the fact that commissioners within the petitioner were making provision for entertainment and special responsibility allowance which they were not entitled to. This, Ms. Gitau deposed, was besides the fact that members still enjoyed salaries and benefits from tax payers as majority of them were drawn from the public sector where they were in full time employment.

14. The 1st respondent stated that it had been willing to discuss additional allowances payable to members of the petitioner under the "task force allowance" when sufficient reasons are provided. This, it was contended, entails special assignments to be handled within a specified time frame and requiring work to be done outside ordinary working hours. Ms. Gitau stated that it had by virtue of this special assignment, when the petitioner was engaged in conducting interviews and disciplinary hearings,

consented to and allowed the petitioner to have more than 8 remunerable sittings per month for a period of 6 months.

15. According to Ms. Gitau, a series of letters were exchanged between it and the Petitioner over extension of the period for the task force allowance to facilitate interviews for judges of the High Court and the Environment and Land Court. It was stated that in a letter dated 28th June 2016 the 1st respondent requested for a meeting with the petitioner on among others, the issue of remuneration of the petitioner's members, but despite agreeing to have the meeting, the petitioners rushed to institute this petition.

16. MS.Gitau denied that he respondent overstepped its mandate or made ultra-vires decisions. She maintained that determining sitting allowance and setting the number of paid meetings per month was within the 1st respondent's mandate and that the 1st respondent merely performed its duties under Article 230(4) of the Constitution. She was of the view that the petition was brought in bad faith and that the petitioner seeks to prevent the 1st respondent from carrying out its constitutional and statutory mandate.

17. The 2nd Respondent did not file a response to the petition but relied on their written submissions.

**Petitioner's submissions**

18. Mr. Issa, learned counsel for the petitioner, submitted highlighting their written submissions, that Article 172 of the Constitution, as read with section 3 of the Judicial Service Act, (the Act), confer autonomy on the judiciary and the petitioner, subject only to the Constitution and the law. Learned counsel relied on the case of Judicial Service Commission v Speaker of the National Assembly and 8 others [2014] eKLR for the submission that the import of the Judicial Service Act in relation to Article 172 was to free Judiciary's administrative process from interference from other organs.

19. Learned counsel contended that under Section 22(4) of the Act, the petitioner is empowered to hold such number of meetings in such places and at such times as it deems necessary for the discharge of its functions under law. He went on to submit that Section 19(4) of the Act further gives the petitioner the power to constitute committees or panels for effective discharge of its mandate.

20. It was Mr. Issa's submission that from these constitutional and legal provisions, the attempt by the 1st respondent to cap the number of meetings the petitioner can hold in a month is both unlawful and unconstitutional. Learned counsel argued that the 1st respondent's mandate is as outlined and restricted in Article 230(4) of the Constitution and Section 11 of the Salaries and Remuneration Act and, therefore, any attempt to expand its mandate beyond the constitutional and legal limit is manifestly unlawful.

21. Mr. Issa submitted at length on the importance of Article 249(2) of the Constitution, contending that it provides for the independence of commissions and holders of independent offices. Learned counsel argued that the independence envisaged in Article 249(2) is a shield against influence or interference from external forces, including the government, political and or commercial interests. It was learned counsel's further submission, that the petitioner must be seen to be carrying out its functions free of orders, instructions or any other intrusion. He relied on the case of Communications Commission of Kenya & 5 others v Royal Media Services Limited and 5 others [2014] eKLR for that submission.

22. According to learned counsel, only the Constitution and the law can stand in the way of the petitioner when it comes to its independence. He was of the view, that the import of Article 249(2) is to ensure that various constitutional Commissions and independent offices carry out their functions without

taking orders or instructions from other organs or authorities, and relied on the case of Re The Matter of the Interim Independent Electoral Commission [2011] eKLR in that regard.

23. Mr. Issa, submitting further on the meaning of the term "independence" argued that it includes functional independence which is synonymous to operational independence and financial independence. With regard to functional or operational independence, learned counsel submitted, relates to the commission's exercise of autonomy in the discharge of its functions without directions or orders from other state organs or authorities, and that this is at times referred to as administrative functional independence manifested through the procedure for composition and appointment of commissioners. In relation to financial independence, learned counsel posited that it entails the ability of the petitioner to access funds which it reasonably requires for the discharge of its functions.

24. Learned counsel further contended with regard to independence, that perception of independence is vital since outward acts show that the petitioner is carrying out its functions free from external interferences. In support of this submission, counsel relied on the case of Re The Matter of the National Land Commission [2015] eKLR and New National Party v Government of the Republic of South Africa & others (CCT9/99) [1999] ZACC 5.

25. In light of the petitioner's independence, counsel argued that its functional autonomy would be an illusion if the 1st respondent's decision was left to stand in terms of the number of meetings the petitioner can hold in a month. Counsel further submitted that to let the 1st respondent proceed in such a manner would be to subject the petitioner to micro management by the 1st respondent which is unconstitutional and a threat to the petitioner's independence.

26. With regard to the submission on the ultra vires act of the 1st respondent, learned counsel contended that the decision offended Articles 240(4) (a) and 172 of the Constitution, Section 22(4) of the Judicial Service Act and Section 11 of the Salaries and Remuneration Commission Act. Counsel argued therefore, that the decision is irrational and illegal since it amounts to paralyzing the functions of the petitioner. He further faulted the 1st respondent for failing to seek advice from the 2nd respondent before making the impugned decision. Counsel contended that under Section 5 of the Office of the Attorney General Act, the 2nd respondent has the duty to advice state organs and independent commissions, which advice the 1st respondent did not seek. He urged the court to allow the petition as prayed.

**1st Respondent's submissions**

27. Miss Kitur, learned counsel for the 1st respondent submitted that it acted in accordance with its mandate under Article 230(4) of the Constitution. Learned counsel contended that members of the petitioner are state officers as defined in Article 260 of the Constitution and therefore, setting their remuneration and benefits fall squarely within the 1stt respondent's mandate as prescribed in Article 230(4). It was submitted that members of the petitioner serve on part time basis and therefore Section 41 of the Judicial Service Act initially prescribed remuneration in terms of allowances pending establishment of the 1st respondent since there were no full time appointments in place then

28. Learned counsel submitted that in light of this mandate, the 1st respondent was constitutionally competent to set and review the remuneration and benefits of members of the petitioner. Counsel contended that it was within the 1st respondent's constitutional mandate under Article 230(4) to set a limit on the petitioner's number of remunerable meetings. According to counsel, remuneration of the petitioner's officers is based on allowance per sitting since it usually sits part time, thus the amount earned by members of the petitioner is dependent on the number of sittings. Learned counsel contended that if the 1st respondent is mandated to set remuneration and benefits of public officers, it

is essentially mandated to set not only the amount payable per sitting but also the number of sittings per month.

29. Learned counsel disputed the petitioner's contention that the 1st respondent acted ultra vires its powers, contending that the doctrine of ultra vires only exists in the realm of administrative law with the aim of controlling the exercise of powers vested upon administrative agencies by law. According to counsel, the 1st respondent's ability to determine remuneration and benefits for public officers has a constitutional underpinning and is not founded in statute and therefore, the respondent could not have acted ultra vires its powers.

30. Counsel went on to submit that the 1st respondent's decision to limit the petitioner's monthly meetings is neither irrational nor illegal. According to learned counsel, the 1st respondent considered and took into consideration the fact that instances would arise when the petitioner would have to take up special tasks that would require specific amount of time within set time frames that would be outside the ordinary workings of the petitioner. In resolving this, counsel submitted, the 1st respondent had in place a task force framework to accommodate such instances, and all that is required is for the petitioner to request the 1st respondent to have more sittings than the ordinary eight sittings a month. It was learned counsel's submission that the petitioner had in fact made use of the task force allowance framework previously hence there was no problem.

31. Miss Kitur further argued that the 1st respondent had in no way capped the number of meetings the petitioner can convene but merely capped the number of remunerable meetings it can hold. It was contended that members of the petitioner were at liberty to hold as many meetings as lawfully required but they can only draw sitting allowance for eight sittings per month. Counsel went on to submit that obligations imposed on the petitioner by the Constitution and statute in terms of meetings is catered for under the special responsibility Allowance.

32. With regard to the orders sought for judicial review, learned counsel contended that reliefs prescribed in Articles 23(3) (f) and 22 of the Constitution, are only available in proceedings relating to the Bill of Rights which, in so far as the petition is concerned, has not been violated. In relation to interference with the independence of the petitioner, counsel contended that independence emanates from the Constitution to which the petitioner is subject. According to learned counsel, Article 249(2) (b) should not be construed as isolation from other government bodies active in public governance; hence the petitioner and other players in public governance are interdependent. Counsel relied on the Supreme Court's decision in Re The matter of the Interim Independent Electoral Commission [2011] eKLR

33. According to learned counsel, the 1st respondent's decision limiting the number of paid meetings the petitioner can hold in a month was in line with the mandate bestowed upon it by the Constitution and does not in any way amount to a functional or financial interference with the petitioner's independence. Reliance was place on the case of Teachers Service Commission (TSC) v Kenya National Union of Teachers (KNUT) & 3 others [2015] eKLR, where the Court noted that independence of the TSC under Articles 230(4) (b) and 252(1) (d) read with Section 37(3) of the TSC Act is limited constitutionally and TSC is required to obtain advice of SRC pursuant to Article 23(4) (b). Counsel urged the court to dismiss the petition with costs.

**2nd Respondent's submissions**

34. Miss Gitiri, learned counsel for the 2nd respondent submitted, highlighting their written submission, that both the petitioner and the 1st respondent are independent commissions established under the Constitution each with specific mandate. It was submitted that under Article 249(2) (b) of the Constitution, commissions and holders of independent offices are subject only to the Constitution

and the law and are not subject to the direction or control of any person or authority. Learned counsel contended that the 1st respondent's mandate is contained in Article 230(4 of the Constitution and highlighted in Section 11 of the Salaries and Remuneration Act. Counsel argued that it is evident that the 1st respondent's mandate is to determine salaries and allowances of state and public officers and making recommendations on such matters.

35. Counsel relied on a number of decisions where courts have upheld that the mandate of the 1st respondent is one not only provided for by statute but also by the constitution, intended to cure mischief in public finance and deal with the complexity in determining salaries and benefits of public officers. Reference was made to the case of Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others [2015] eKLR; Kenya Union of Domestic Hotels, education and Allied Workers Union(KUDHEHIA) v Salaries and Remuneration Commission & Attorney General (Petition No. 294 of 2013) and Kenya National Commission on Human Rights (KNHCR) vs Attorney General & another [2015] eKLR for the submission that when it comes to matters of salaries, remuneration and benefits of public officers, this mandate falls squarely on the 1st respondent as a commission.

36. It was Miss Gitiri's contention that the 1st respondent's decision to cap the petitioner's monthly sittings to eight was not ultra vires because it did not overstep its constitutional mandate. Counsel was of the view, that although the petitioner and 1st respondent are independent commissions with different mandate, they are nevertheless interdependent. In support of this submission counsel relied on the case of Re The matter of the Interim Independent Electoral Commission [2011] eKLR for the submission that despite the requirement that independent commissions function free from the direction or control of any person or authority, this independent is not to be construed as a detachment, isolation or disengagement from other players in public governance. Counsel took the view, that commissions cannot plead independence as an end in itself to public governance tasks.

37. Counsel, referring to holding by Mwilu J A (as she then was) in the case of Teachers Service Commission (TSC) v Kenya Union of Teachers (KNUT) & 3 others [2015] eKLR, submitting that the carrying out of the 1st respondent's constitutional mandate of advising on salary benefits for purposes of the sustainability of the national wage bill cannot be construed to be exercising superiority over a fellow Commission. Counsel contended, therefore, that where in the course of the exercise of a commission's mandate, such mandate touches on the mandate of another commission, the roles can only be said to be complementary but not an infringement. In that regard, counsel contended that the 1st respondent's decision was not unconstitutional or ultra vires its mandate.

38. Learned counsel further contended that if and when need arises for the Petitioner to hold more than the prescribed eight sittings a month, the petitioner can proceed under the task force initiative put in place by the 1st respondent. Counsel urged the Court to take a purposive and harmonious interpretation of the Articles of the Constitution concerned and give them a holistic reading. Reliance was placed on the case of Centre for Human Rights Education and Awareness & 2 others v John Harun Mwau & 6 others [2012] eKLR in this regard. Counsel submitted, therefore, that the petitioner had failed to demonstrate a violation of Article 249(2) (a) and (b) by the 1st respondent and urged that the petition be dismissed with costs.

**Determination**

39. I have carefully considered this Petition; the response thereto; submissions by Counsel for the parties and the authorities relied on. This petition seeks this court's determination on the delimitation of the mandate of the 1st respondent and more so, whether there is any other mandate beyond that of setting

and reviewing remuneration and benefits of state officers and the duty to advise the national and county governments on the remuneration and benefits of other public officers. Put differently, the question is whether the 1st respondent could constitutionally and legally set the maximum number of remunerable meetings the petitioner can hold in a month.

40. The Petitioner contends that there is no other mandate bestowed on the 1st respondent beyond determining salaries and allowances of her commissioners. According to the petitioner, the 1st respondent's attempt to limit its remunerable settings to eight (8) a month is an interference with its independence and constitutional mandate. The respondents on their part argue that the 1st respondent was within its mandate to dictate the number of sittings the petitioner should have in a month as a way of ensuring that there is no wastage of public resources.

41. The petitioner and 1st respondent are constitutional commissions established under Articles 171(1) and 230(1) of the Constitution respectively, with their respective mandate prescribed in Articles 172(1) and 230(4) (a). The 1st respondent's mandate is (a) to set and regularly review the remuneration and benefits of all State officers; and (b) to advise the national and county governments on the remuneration and benefits of all other public officers. Sub Article 5 provides that (5) in performing its functions, the 1st respondent shall take into account- (a) the need to ensure that the total public compensation bill is fiscally sustainable; (b) the need to ensure that the public services are able to attract and retain the skills required to execute their functions; (c) the need to recognise productivity and performance; and (d) transparency and fairness.

42. By letter dated 19th December 2013, the 1st respondent communicated to the petitioner its decision in so far as remuneration and benefits of state officers serving within the petitioner are concerned. Apart from setting remuneration and allowances, the 1st respondent went a step further and capped the maximum remunerable settings the petitioner can have in a month at 8, an action the petitioner saw as an infringement on its mandate. The petitioner's attempt to have the issue it considered was unconstitutional resolved amicably since it related to two constitutional commissions, was unsuccessful.

43. The petitioner and 1st respondent are independent constitutional commissions. Article 249 of the Constitution provides for the objects, authority and funding of commissions and independent offices. It states that:- (1) the objects of the commissions and the independent offices are to— (a)to protect the sovereignty of the people; (b) to secure the observance by all State organs of democratic values and principles; and (c)to promote constitutionalism. Sub Article 2 proclaims independence of commissions and independence offices thus; (2) "the commissions and the holders of independent offices— (a) are subject only to this Constitution and the law; and (b) are independent and not subject to direction or control by any person or authority."

44. The import of Article 249(2) is to the effect that constitutional commissions are independent in the execution of their mandate and should not take directions from any person or authority. That is; they are neither under the control of any person or authority in the performance of their duties and discharge of their functions nor should they receive direction in the performance of their duties. The Article is also clear that (3) Parliament shall allocate adequate funds to enable each commission and independent office to perform its functions and the budget of each commission and independent office shall be a separate vote, which means each commission and independent office is to have sufficient financial allocation to enable it discharge its mandate.

45. In that context, commissions and independent offices have operational, administrative, decisional and financial independence when discharging their constitutional mandate. They do not therefore seek direction or permission from any other person or authority on how they should perform

their constitutional mandate. The people of Kenya, while adopting the Constitution, decided that commissions and independent offices act independently and perform their constitutional mandate to the exclusion of other organs of state, authorities or persons.

46. The Supreme Court underscored the independence of commissions and independent offices, in Re The matter of Interim Independent Electoral Commission[2011]eKLR stating;

> (59) It is a matter of which we take judicial notice, that the real purpose of the "independence clause", with regard to Commissions and independent offices established under the Constitution, was to provide a safeguard against undue interference with such Commissions or offices, by other persons, or other institutions of government. Such a provision was incorporated in the Constitution as an antidote, in the light of regrettable memories of an all-powerful Presidency that, since Independence in 1963, had emasculated other arms of government, even as it irreparably trespassed upon the fundamental rights and freedoms of the individual. The Constitution established the several independent Commissions, alongside the Judicial Branch, entrusting to them special governance-mandates of critical importance in the new dispensation; they are the custodians of the fundamental ingredients of democracy, such as rule of law, integrity, transparency, human rights, and public participation. The several independent Commissions and offices are intended to serve as 'people's watchdogs' and, to perform this role effectively, they must operate without improper influences, fear or favour: this, indeed, is the purpose of the "independence clause".

47 . In the case of Communication commission of Kenya & 5 Others v Royal Media Services limited & 5 others [2014] eKLR the Supreme Court again stated with regard to independence contemplated by the Constitution;

> " '[I]ndependence' is a shield against influence or interference from external forces. In this case, such forces are the Government, political interests, and commercial interests. The body in question must be seen to be carrying out its functions free of orders, instructions, or any other intrusions from those forces. However, such a body cannot disengage from other players in public governance.
>
> > "How is the shield of independence to be attained" In a number of ways. The main safeguard is the Constitution and the law. Once the law, more so the Constitution, decrees that such a body shall operate independently, then any attempt by other forces to interfere must be resisted on the basis of what the law says. Operationally however, it may be necessary to put other safeguards in place, in order to attain 'independence' in reality. Such safeguards could range from the manner in which members of the said body are appointed, to the operational procedures of the body, and even the composition of the body. However, none of these 'other safeguards' can singly guarantee 'independence'. It takes a combination of these, and the fortitude of the men and women who occupy office in the said body, to attain independence. "

48. This was also emphasized in the case of Re the Matter of the National Land Commission (supra) where the Supreme Court again observed at paragraph 186, that "Clearly, independence, as an attribute of the various constitutional commissions, is not an end in itself. Ultimately, what matters to the people, from the governance-docket, is the operational benefits that flow from the role of the public agency in question."

49. Speaking of independence attributes, the South African Constitutional Court observed in the case of New National Party v Government of Republic of South Africa & others (CCT9/99)[1999]ZACC5 that:

> (98) In dealing with the independence of the Commission, it is necessary to make a distinction between two factors, both of which, in my view, are relevant to "independence". The first is "financial independence". This implies the ability to have access to funds reasonably required to enable the Commission to discharge the functions it is obliged to perform under the Constitution and the Electoral Commission Act. This does not mean that it can set its own budget. Parliament does that. What it does mean, however, is that Parliament must consider what is reasonably required by the Commission and deal with requests for funding rationally, in the light of other national interests. It is for Parliament, and not the executive arm of government, to provide for funding reasonably sufficient to enable the Commission to carry out its constitutional mandate. The Commission must accordingly be afforded an adequate opportunity to defend its budgetary requirements before Parliament or its relevant committees.
>
> (99) The second factor, "administrative independence", implies that there will be control over those matters directly connected with the functions which the Commission has to perform under the Constitution and the Act. The executive must provide the assistance that the Commission requires "to ensure [its] independence, impartiality, dignity and effectiveness". The department cannot tell the Commission how to conduct registration, whom to employ, and so on; but if the Commission asks the government for assistance to provide personnel to take part in the registration process, government must provide such assistance if it is able to do so. If not, the Commission must be put in funds to enable it to do what is necessary".

51. It is clear from the jurisprudence flowing from the above decisions that commissions and independent offices are to function without intrusion on their mandate by any other state organ, authority or person. In that regard, the mandate of the 1st respondent is provided for in the Constitution and amplified in the Salaries and Remuneration Act, first; to set and regularly review the remuneration and benefits of State officers; and second, to advise the national and county governments on the remuneration and benefits of other public officers. In doing so, the 1st respondent has to take into account the principles in Article 230(5).

52. It is therefore clear to me, that the 1st respondent's mandate is limited to setting and reviewing remuneration and benefits for state officers, and advising the governments at the two levels on the issue of remuneration and benefits of public officers under them. That mandate does not, in my view, extend to superintending how the petitioner as an independent commission, utilizes its budgetary allocations. That is a mandate that lies on other state organs but not on the 1st respondent.

53. Section 22(4) of the Judicial Service Act provides that "the commission shall hold such number of meetings, in such places, at such times and in such manner as the commission shall consider necessary for the discharge of its functions under the constitution and this Act. The National Assembly did not deem it necessary to limit the number of monthly sittings the petitioner could have. It must have appreciated the unique and possibly heavy mandate the petitioner has to discharges and, therefore, the National Assembly in its wisdom thought it was inappropriate to limit the settings. It allowed the petitioner discretion to hold such number of meetings as it considers necessary in the discharge of its constitutional mandate.

54. That being the position in law, there was no way the 1st respondent could assume mandate it does not have and limit the petitioner's monthly remunerable sittings through some resolution in violation of clear constitutional and statutory provisions. Any attempt by the 1st respondent to restrict the petitioner from holding more than eight remunerable meetings a month is not only ultra vires her constitutional and statutory mandate but also clearly unconstitutional and illegal. Any such move had to have a rational connection between the 1st respondent's desire to limit the meetings, the decision thereof and the reasons therefor which the Court is unable to fathom. To my mind, the 1st respondent's action was clearly aimed at stifling rather than enhancing the petitioner's independence. It is against not only the spirit of the constitution but violates the petitioner's operational independence too.

55. The 1st respondent cannot hide behind minimizing wastage of public resources as a reason for capping the petitioner's sittings. In the case of Judicial Service Commission v Speaker of the National Assembly & 8 Others [2014]eKLR the Court held that "JSC is a creature of the Constitution, an independent commission subject only to the Constitution and the law and, as provided under Article 249 (2), is not subject to direction or control by any person or authority. Like other constitutional commissions and independent offices, the JSC must however operate within the confines of the Constitution and the law. The court did observe, and I agree with the observation, that while enjoying financial and administrative independence, JSC is accountable to Parliament. To my mind, that is the organ mandated to oversee how the petitioner expends it budgetary allocation and not the 1st respondent in the form of restricting the petitioner's number of remunerable monthly sittings as a way of reducing the petitioner's expenditure.

56. The fact that there is a mechanism for checking performance of commissions and independence offices was captured in the words of the Supreme Court in Re The Matter of the National Land Commission (supra) thus;

> " [189] ...Article 249(3) establishes a mechanism by which Parliament is to allocate adequate funds to commissions, to enable them to perform their functions. Article 254 sets up further mechanisms for the guidance of commissions and independent offices, in the discharge of their functions: as soon as practicably possible, at the end of each financial year, they are to submit a report to President and to Parliament; at any time, the President, the National Assembly or the Senate may require a commission or holder of an independent office to submit a report on a particular issue; and, every report required to be submitted by the commissions and independent bodies shall be published and publicised. These Articles establish mechanisms of checks and balances, directed towards the workings of the Constitutional Commissions, by other State organs".

57. It must also be appreciated that the National Assembly enacted section 19 of the Judicial Service Act that confers on the petitioner discretion to constitute committees and panels as it deems fit and appropriate for effective discharge of its constitutional mandate. That cannot happen if the 1st respondent's decision was to remain because it would interfere with both financial and administrative independence of the petitioner which cannot be limited by the 1st respondent.

58. The respondents have argued that the rational for limiting the meetings was for purposes of minimizing the petitioner's expenditure. As I have already stated, that is not within the 1st respondent's mandate and I am unable trace anywhere among its functions both in the Constitution and the Act, the 1st respondent's power to set the number of meetings the petitioner as a state organ must have. Parliament

which has legislative power did not find it necessary to limit meetings and for that reason, no other institution may purport to interfere by overreaching its mandate.

59. In the premise, therefore, taking into account the independence contemplated in Article 249(2) of the Constitution, I do not think the 1st respondent acted within its mandate when it attempted to limit the discretion granted to the petitioner by the National Assembly to hold such meetings as it deemed appropriate in the discharge of its constitutional mandate. It is a mandate the 1st respondent does not have and its decision is not only irrational and lacks bonafides but flies in the face of the Constitution and the law. Holding otherwise would be to strain the language of Article 230(4) and (5) of the Constitution as read with section 11 of the Salaries and Remuneration Act on the 1st respondent's mandate beyond what the constitution and the law intended.

60. In the end, therefore, I am satisfied that the petition dated 30th June 2016, is meritorious and is allowed. I make the following orders;

    (a) A declaration is hereby issued that the role of the Salaries and Remuneration Commission under Article 230(4) (a) of the Constitution is limited to setting the remuneration and benefits of State Officers serving in the Judicial Service Commission and not to determining the number of remunerable meetings the members of the Judicial Service Commission may hold in discharging their mandate.

    (b) A declaration is hereby issued that the decision of the Salaries and Remuneration Commission to cap remunerable meetings for members of the Judicial Service Commission to eight (8) meetings a month was made ultra vires its powers under Article 230(4) (a) of the Constitution and is a violation of the provisions of Article 172 of the Constitution and Section 22(4) of the Judicial Service Act.

    (c) An order for Certiorari is hereby issued quashing the decision of the Salaries and Remuneration Commission contained in the letter dated 19th December 2013, capping the remunerable meetings for members of the Judicial Service Commission to not more than eight (8) meetings a month.

    (d) An order of Prohibition is hereby issued prohibiting the Salaries and Remuneration Commission from interfering in any way with the work and constitutional independence of the petitioner.

    (e) No order as to Cost.

**DATED SIGNED AND DELIVERED AT NAIROBI THIS 30TH DAY OF JULY 2018**

**E C MWITA**

**JUDGE**