



**REPUBLIC OF KENYA**

**IN THE HIGH COURT OF KENYA**

**AT NAIROBI**

**PETITION NO. 340 OF 2016**

**IN THE MATTER OF THE CONSTITUTION OF THE REPUBLIC OF KENYA.**

**IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS OR FUNDAMENTAL FREEDOMS UNDER ARTICLES 1,2,3,10,19,20,21,22,23,24,27,28,41,43,47 AND 50 OF THE CONSTITUTION OF KENYA.**

**AND**

**IN THE MATTER OF SECTIONS 3&4 PART II, FIRST SCHEDULE OF THE JUDICIAL SERVICE ACT NO. 1 OF 2011**

**AND**

**IN THE MATTER OF THE APPOINTMENT TO THE OFFICE OF THE CHIEF JUSTICE OF THE REPUBLIC OF KENYA AS PRESCRIBED UNDER ARTICLE 166 OF THE CONSTITUTION OF KENYA.**

**AND**

**IN THE MATTER OF CERTIFICATE OF GOOD CONDUCT**

**AND**

**IN THE MATTER OF HONOURABLE JUSTICE G.B.M. KARIUKI**

**AND**

**IN THE MATTER OF DOCTRINE OF REASONABLENESS AND PROPORTIONALITY**

**AND**

**IN THE MATTER OF THE DOCTRINE LEGITIMATE EXPECTATION**

**AND**

**IN THE MATTER OF THE INHERENT JURISDICTION OF THIS HONOURABLE COURT AND THE GENERAL PRINCIPLES OF THE NATURAL JUSTICE AND THE RULE OF LAW**

**AND**

**IN THE MATTER OF THE CONSTITUTION OF KENYA (PROTECTION OF RIGHTS AND  
FUNDAMENTAL FREEDOMS) PRACTICE AND PROCEDURE RULES, 2013.**

**BETWEEN**

**HON. G.B.M. KARIUKI.....1<sup>ST</sup> PETITIONER**

**VERSUS**

**DIRECTOR OF CRIMINAL INVESTIGATIONS.....1<sup>ST</sup> RESPONDENT**

**INSPECTOR GENERAL OF POLICE.....2<sup>ND</sup> RESPONDENT**

**THE HON. ATTORNEY GENERAL.....3<sup>RD</sup> RESPONDENT**

**THE JUDICIAL SERVICE COMMISSION.....4<sup>TH</sup> RESPONDENT**

**RULING**

1. By a humble petition dated 9<sup>th</sup> August 2016 and filed in court on the same day, the petitioner Honourable Justice G.B.M. Kariuki judge of the Court of Appeal petitions this court seeking the following orders to issue against the Director of Criminal Investigations, the Inspector General of Police, the Hon Attorney General and the Judicial Service Commission:

- a. A declaration that the actions by the respondents violated the petitioner's right to an administrative action that is expeditious, lawful reasonable and procedurally fair;
- b. A declaration that the 1<sup>st</sup> respondent breached the values and principles of Article 110 of the Constitution of Kenya 2010;
- c. A declaration that the 1<sup>st</sup> respondent violated the petitioner's right to receive the certificate or good conduct.
- d. An order directed at the 1<sup>st</sup> and 2<sup>nd</sup> respondents, their agents, officers or employees compelling the issuance of a certificate of good conduct to the petitioner.
- e. A declaration that the 1<sup>st</sup> respondent caused damage to the petitioner in stifling his ability to apply for the position of the Chief Justice of the Republic of Kenya by depicting him as not fit to apply.
- f. A declaration that the 4<sup>th</sup> respondent in demanding a certificate of good conduct from the applicant for the office of the Chief Justice imposed a condition that was not in accordance with the Constitution and further that the petitioner is entitled to submit his application for the post of Chief Justice without the need for certificate of good conduct and to be interviewed.
- g. An award of general damages for violations of the fundamental rights of the petitioner as may be assessed the court.
- h. Any other or further relief that this Honourable court may deem fit and just.
- i. Costs of the petition.

2. The petition is brought under the provisions of Articles 1,2,3,10,19,20,21,22,23,24,27,28, 41, 43, 47 and 50 of the Constitution of Kenya, Sections 3,4,Part II, First Schedule of the Judicial Service Act No.1 of 2011, Article 166 of the Constitution and the Constitution of Kenya( Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013.

3. The facts giving rise to the petition herein are that the 4<sup>th</sup> Respondent, the Judicial Service Commission placed advertisements inviting applicants for the vacant positions of the Chief Justice, Deputy Chief Justice and a judge of the Supreme Court of Kenya. The advertisements were sent out on 17<sup>th</sup> June 2016 a day after the then Chief Justice Dr Willy Mutunga retired from office on 16<sup>th</sup> June 2016. The petitioner avers that the he was an intending applicant for the position of Chief Justice of the

Republic of Kenya and that the said applications were to close on 8<sup>th</sup> July 2016 at 5.00pm.

4. That to enable the petitioner submit his application for the said positions before deadline, he required amongst other things a certificate of good conduct and therefore he duly lodged the application for the certificate of good conduct on 27<sup>th</sup> June 2016 and paid the requisite fees of shs 1,000/-

5. That on the same day of lodging of the application for the certificate of good conduct, an Inspector of Police Allan Muluma visited the Supreme Court building and took finger prints from several judges intending to apply for the aforesaid vacancies including the petitioner whose fingerprints samples were among those taken. That the petitioner had a legitimate expectation that the certificate of good conduct would be issued in good time to enable him submit all the requirements in good time and that such issuance would be a matter of course since in 2011 he had been issued with one as required by the Judges and Magistrates Vetting Board; and in 2012 when he was applying to join the Court of Appeal.

6. The petitioner therefore enlisted the Registrar of the Court of Appeal to do errands for him and to collect on his behalf the certificate of good conduct from CID Headquarters off Kiambu Road.

7. It is alleged that the 1<sup>st</sup> respondent declined to issue the said certificate of good conduct to the Petitioner and instead purported that there were records/documents that it required before issuing the certificate which in his view was a charade.

8. That on 8<sup>th</sup> July 2016 at 5.04 pm, a day after the closure of the application for the advertised positions, the Registrar of the Court of Appeal received communication from the CID Headquarters at Kiambu Road feigning ignorance of the fact that the petitioner had no criminal record as it referred to a case which was determined in 2009 in his favour.

9. The petitioner believes that the delay in issuing him with a certificate of good conduct was malicious and intended to sabotage his application for the position of Chief Justice, which fact he had disclosed while lodging his said application for the certificate.

10. That the petitioner claims that the 1<sup>st</sup> respondent was under a duty to issue the certificate of good conduct in the absence of any criminal record, a fact that was known to that office. He avers that the refusal to issue him with the certificate of good conduct is in breach of Part III of the Public Officers Ethics Act 2003 because the 1<sup>st</sup> respondent:

1. Failed to act honestly;
2. Did not carry out his duty in a way that can maintain public confidence in the integrity of his office.
3. He failed to maintain professionalism and accepted standards of performance of his duties.
4. He did not discharge his responsibility in accordance with the Rule of Law;
5. He exhibited malice by sabotaging the petitioner's application.
6. He had police officers in other stations that collaborated with his office to violate the petitioner's guaranteed rights under the Constitution to vie for the position of Chief Justice.

11. The petitioner also claims that he has been greatly injured by actions/inactions of the 1<sup>st</sup> respondent and by extension those of the 2<sup>nd</sup> and 3<sup>rd</sup> respondents which matter has great implication on the petitioner's professional life; and goes against administrative action as enshrined in the 2010 Constitution.

12. He denies that he has since 2012 when he last got such certificate of good conduct been engaged in any crime, vice and or had ceased to be a man of good standing in the society hence the refusal to issue him with the certificate of good conduct is unreasonable and without any lawful justification.

13. The above facts as set out in the petition are the same facts relied on in the petitioner's

interlocutory application by way of notice of motion dated 9<sup>th</sup> August 2016 under certificate of urgency wherein the petitioner seeks orders for:

1. Spent
2. A mandatory injunction do issue directed at the 1<sup>st</sup> and 2<sup>nd</sup> respondents, their agents, officers or employees compelling the issuance of a certificate of good conduct to the petitioner/applicant.
3. That a mandatory injunction do issue directed to the 4<sup>th</sup> defendant compelling inclusion of the petitioner in the list of candidates vying or shortlisted to fill the vacancy of the office of the Chief Justice of the Republic of Kenya.
4. That this Honourable court be pleased to issue any further orders it deems fit and just to ensure that justice is maintained.
5. That costs of this application be in the cause.

14. The interlocutory application is supported by the affidavit sworn by Honourable G.B.M. Kariuki as reproduced in the facts relied on herein above, annexing several documents including;

- a) A copy of advertisement for the vacancy for Chief Justice of the Republic of Kenya made on 17<sup>th</sup> June 2016 extracted from <http://www.newkenyajobs.com>,
- b) Copy of certificate of good conduct No. 018926 issued to the petitioner on 16<sup>th</sup> January 2012.
- c) Letter dated 8<sup>th</sup> July 2016 from M.K.K. Serem Registrar Court of Appeal to the petitioner conveying the communication from the ACID regarding the processing of the certificate of good conduct applied for by the petitioner.
- d) Signal dated 30<sup>th</sup> June 2016 from Allan Mulama, CID to Kamukunji Police station inquiring on the status of Criminal Case No. 162/90/08 –Attempted murder against the petitioner directing urgent submission of trial results so as to enable police process clearance certificate for the petitioner;
- e) Judgment in CM Criminal 1655/2008 delivered on 15<sup>th</sup> October 2009.

15. When the matter came up before me on 10<sup>th</sup> August 2016 under the Vacation Rules with a certificate of urgency, as a duty judge, I certified the application as urgent and directed the petitioner to effect service of the petition and the application upon the respondents forthwith for interpartes hearing on 16<sup>th</sup> August 2016.

16. The petitioner's advocate, Mr Mungai did effect service of the petition and application upon the respondents on 11<sup>th</sup> August 2016 as per the affidavit of service sworn and filed in court by Esther Kabura, the process server.

17. When the matter came up for interpartes hearing before me on 16<sup>th</sup> August 2016 as scheduled, Mr Mungai advocate for the petitioner/applicant was present while the 1<sup>st</sup> and 2<sup>nd</sup> and 3<sup>rd</sup> respondents were represented by Mr Moimbo. The 4<sup>th</sup> respondent, Judicial Service Commission was not represented.

18. The court also notes that none of the respondents filed any formal appearances and or any replying affidavits to the notice of motion or the petition. Mr Moimbo sought for an adjournment which the court declined to grant, paving way for the petitioner/applicant to argue the notice of motion dated 9<sup>th</sup> August 2016 ex parte.

19. In his submissions in support of the Notice of Motion, Mr Mungai submitted relying on the petition, facts as presented above and supporting affidavit of the petitioner.

20. The petitioner's counsel's submissions basically replicated the said facts as deposed by the petitioner/applicant, adding that the delay in issuing the petitioner with certificate of good conduct and instead requesting for proceedings by the 1<sup>st</sup> respondent was mischievous since the petitioner had been tried and acquitted in 2009 as per the judgment annexed. That since it is the 1<sup>st</sup> respondent's office which investigated the case involving the petitioner, and caused him arrest and arraignment in court, and the petitioner's prosecution having been conducted by the police, there was no doubt that the case for which a signal was being sent asking for proceedings, the 1<sup>st</sup> respondent was well aware of. Further, that the 1<sup>st</sup> respondent took too long to give feedback since the finger prints for the petitioner were taken the same day of the application for the certificate. The petitioner complained that it would appear that the 1<sup>st</sup> respondent chooses when to be efficient and when not. That since the reasons for the certificate of good conduct were known, there is no justification for denial of the said certificate.

21. That the 1<sup>st</sup> respondent should not be allowed to frustrate a citizen's rights to apply for a constitutional office through delays.

22. According to the petitioner, the right to fair administrative action is a fundamental right which should not be violated and that if the 1<sup>st</sup> respondent is left to get away with its actions, then it is made to be a gate keeper on who becomes a Chief Justice and or who becomes a Judge IN THIS GREAT Republic of Kenya.

23. Further, that the framework for appointment of judges is informed by the history of the Executive Arm of Government meddling with appointment of judges. The petitioner urged the court to find that not only was Article 47 of the Constitution of Kenya violated but that it should go further and declare that the requirement for a certificate of good conduct is in fact unconstitutional since Article 167 of the constitution gives the criteria for one to become a Chief Justice of Kenya. Further, that the justification for certificate of good conduct are not clear since there are no mechanisms by the 1<sup>st</sup> respondent to determine who behaves well. Further, that the 1<sup>st</sup> respondent can only determine if one had a criminal record.

24. In addition, it was submitted that the only threshold required is integrity as stipulated in Chapter Six of the Constitution and the Leadership and Integrity Act. Counsel submitted that it is unconstitutional to limit the petitioner's rights. No precedent was cited by the petitioner's counsel.

25. Mr Moimbo counsel for the 1<sup>st</sup>, 2<sup>nd</sup> and 3<sup>rd</sup> respondents indicated to court that he had nothing to say, even on a point of law, in response to the submissions made by the petitioner's advocate.

### **Determination.**

26. I have carefully considered the petitioner/applicant's Notice of Motion dated 9<sup>th</sup> August 2016, the supporting affidavit, the annexures and the facts relied on in support of the main petition subject of these proceedings. I have also considered the constitutional provisions as well as statutory law relied on by the petitioner/applicant.

27. In my humble view, the notice of motion seeks for mandatory injunctive orders, to compel the 1<sup>st</sup> and 2<sup>nd</sup> respondents to issue the petitioner/applicant with a certificate of good conduct; and compelling the 4<sup>th</sup> respondent to include the petitioner /applicant in the list of candidates vying or shortlisted to fill the vacancy of the office of the Chief Justice of the Republic of Kenya. The issue for determination is whether the petitioner/applicant has satisfied the court for the grant of a mandatory injunction(s).

28. The test on whether to grant a mandatory injunction at this interlocutory stage as prayed in this matter which is not even defended was set out in the case of **Shepherd Homes Ltd V Sandham**[1971] 1 Ch 34 and in [1979] 3 W.L.R. 348 by Megary J where the learned judge stated that:

*“It is plain that in most circumstances a mandatory injunction is likely, other things*

*being equal, to be more drastic in its effect than a prohibitory injunction. At the trial of the action, the court will of course grant such injunction as the justice of the case requires but at the interlocutory stage, when the final result of the case cannot be known and the court has to do the best it can, I think the case has to be unusually strong and clear before a mandatory injunction can be granted even if it is sought to enforce a contractual obligation.”*

29. The above decision was adopted in the case of **Kenya Breweries Ltd & 2 Others V Washington Okeyo [2002] e KLR** wherein the Court of Appeal pronounced that:

*“ The test whether to grant a mandatory injunction or not is correctly stated in Vol.24 Halsbury’s Laws of England 4<sup>th</sup> Edition paragraph 948 which reads:*

*A mandatory injunction can be granted on an interlocutory application as well as at the hearing, but, in the absence of special circumstances it will not normally be granted. However, if the case is clear and one which the court thinks it ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempted to steal a match on the plaintiff.....a mandatory injunction will be granted on an interlocutory application.”*

30. Also, in **Locabail International Finance Ltd V Agro Export and Others[1986], ALL ER 901** at page 901 it was stated that:

*“ A mandatory injunction ought not to be granted on an interlocutory application in the absence of special circumstances and then only in a clear case either where the court thought that the matter ought to be decided at once or where the injunction was directed at a simple and summary act which could be easily remedied or where the defendant had attempted to steal a match on the plaintiff.*

*Moreover, before granting a mandatory interlocutory injunction the court had to feel a high degree of assurance that at the trial it would appear that the injunction had rightly been granted, that being a different and higher standard than was required for a prohibitory injunction. The principles of law enunciated by these decisions have received full approval by the court within our jurisdiction. See the case of Belle Maison Limited VS Yaya Towers Limited HCC 2225 of 1992, per Bosire J (as he then was) and the Ripples Limited Vs Kamau Mucuha HCC No. 4522 of 1992 per Mwera J.”*

31. The passage in Halsbury's Laws of England volume 24 paragraph 948 is germane to the same issue of when to grant an interlocutory injunction. It reads:

*"A mandatory injunction can be granted on an interlocutory application, as well as at the hearing, but, in the absence of special circumstances, it will not normally be granted. However, if the case is clear and one which the court thinks ought to be decided at once, or if the act done is a simple and summary one which can be easily remedied, or if the defendant attempts to steal a march on the plaintiff, such as where, on receipt of notice that an injunction is about to be applied for, the defendant hurries on the work in respect of which complaint is made so that when he receives notice of an interim injunction it is completed, a mandatory injunction will be granted on an interlocutory application. "*

32. Besides the above specific principles, principles, the general principle for grant of interlocutory injunctions were enunciated in the **Giella Vs Cassman Brown [1973] E.A. 358** case as adopted in many cases including the Court of Appeal’s decisions in **Tende Drive Villas Ltd V David Kamau & 4 Others [2005] e KLR** that:

***“ First the applicant must show a prima facie case with a probability of success at the trial secondly an interlocutory injunction will not be granted unless the applicant would suffer an injury which cannot be compensated in damages. Thirdly if the court is in doubt, it should decide the application on a balance of convenience. It must be appreciated that an interlocutory injunction is a discretionary equitable remedy and accordingly, the same will not be granted where it is shown that the applicant’s conduct with respect to matters pertinent to the suit does not meet the approval of the court of equity.”***

33. The questions that this court must pose and answer are whether the application by the petitioner/applicant satisfies the 3 conditions in the **Giella Vs Cassman Brown** (supra) case and in addition, whether this is a simple and clear case where the court can issue a mandatory injunction, compelling the respondents to issue the petitioner with a certificate of good conduct and to include him the list of shortlisted candidates for the positions of Chief Justice of Kenya.

34. First and foremost, this court notes that the petitioner’s counsel did not attempt to submit on any of the principles applicable in application for an injunction let alone a mandatory injunction. He nonetheless focused on violations of his client’s constitutional rights to fair administrative action of expediency and the unconstitutionality of the requirement for a certificate of good conduct demanded by the Judicial Service Commission, in the process of recruiting a Judge or Chief Justice.

35. This court is however alive to the fact that the threshold for the issuance of conservatory interim orders in a constitutional petition is as propounded by the Supreme Court in **Gatirau Peter Munya Vs Dickson Mwenda Githinji and 2 Others Petition 2/2013 (SC)** where the Supreme Court of Kenya pronounced itself thus:

***“Conservatory orders bear a more decided public law connotation: for these are orders to facilitate ordered functioning within the public agencies, as well as to uphold the adjudicatory authority of the court, in the public interest. Conservancy orders, therefore, are not unlike interlocutory injunction, linked to such private party issues as the prospects of irreparable harm occurring during the pendency of success in the applicant’s case for order of stay. Conservatory orders consequently should be granted on the inherent merit of a case bearing in mind the public interest, the constitutional values and the proportionate magnitudes and priority levels attributable to the relevant causes.”***

36. In the Supreme Court of Canada case of **Potash Corp of Saskatchewan Inc V Mosaic Potash Esterhazy Ltd Partnership [2011] SJ No. 627(CA)** the court stated:

***“ .....the strength of the case, irreparable harm and a balance of convenience , consideration, although prescribed and necessary parts of the analysis mandated by the Supreme Court, are nonetheless not usefully seen as an inflexible straight jacket. Instead, they should be regarded as the framework in which a court will assess whether an injunction is warranted on any particular case. The ultimate focus of the court must always be on the justice and equity of the situation in issue.....there are important and considerate interconnections between the three tests. They are not water tight compartments.”***

37. Thus, in constitutional petition, courts do not restrictively apply the principles espoused in **Giella Vs Cassman Brown** and those set out in the grant of mandatory interlocutory injunctions but give prominence to public interest considerations, which principle this court subscribes to and as was echoed by Muriithi J in **Mombasa Branch Vs Mombasa County Council Constitution 3/2014** that:

***“ With respect, although the counsel for respondents submitted on the basis of the standard of prima facie case with regard to temporary injunctions in civil cases as established by the decision on Giella Vs Cassman Brown [1973] EA 358, the test for***

*the grant of conservatory orders under constitutional applications must be qualified to take into account the premium that the constitution places upon the enjoyment of fundamental rights. such premium is to be seen in the easy access to the court that is granted to the applicants in terms of locus standi and the formality of documentation ( See Article 22 of the Constitution). In such circumstances the balance of convenience test upon an arguable case being demonstrated by the applicant is more appropriate to preserve the enjoyment of rights pending hearing and determination of the petition for breach of fundamental human rights and freedoms. Needless to state, in terms of Article 24 of the Constitution the balance of convenience must involve balancing the rights of the applicant against the rights of others whose enjoyment of those or other rights may be jeopardized or affected by the enjoyment by the applicant of the rights in question.”*

38. In applying the above principles to this application, the court is alive to the truism that the prayers sought herein are indeed interlocutory in nature and that the main petition is still pending and therefore it must not make definitive or final findings that may prejudice or embarrass the hearing of the main petition.

39. Therefore, I would narrow the issue for determination to one only and that is, whether the applicant/petitioner has established an arguable case and therefore whether the balance of convenience tilts in his favour in the circumstances of this case.

40. The applicant/petitioner avers that he was an intending applicant (**not an applicant**) for the vacant position of the Chief Justice of Kenya as advertised by the Judicial Service Commission on 17<sup>th</sup> June 2016. The said advertisement required that the applicant must, among other requirements, submit copies of clearance certificate from the Directorate of Criminal Investigations; Kenya Revenue Authority; Higher Education Loans Board; Law Society of Kenya; Advocates Complainants Commission; Ethics and Anti-corruption Commission and a recognized Credit Reference Bureau.

41. The petitioner/applicant also avers that he lodged the application for a certificate of good conduct with the 1<sup>st</sup> respondent on 27<sup>th</sup> June 2016 and on the same day the Inspector of Police Mr Mulama From DCI went to the Supreme Court and took his finger prints and those of other intending applicants but that to date, no such certificate has been given to the petitioner, with the Director of Criminal Investigations(DCI) only communicating on 8<sup>th</sup> July 2016 a day after the time for lodging the application for the post of Chief Justice lapsed on 7<sup>th</sup> July, 2016.

42. The petitioner claims that all other judges who applied for certificate of good conduct were issued with theirs timeously but that in his case, the 1<sup>st</sup> respondent feigned ignorance of the outcome of the criminal case which the petitioner was charged with, tried and acquitted in 2009. Further, that in any event, in 2011 and 2012 the 1<sup>st</sup> respondent did issue the petitioner with certificate of good conduct as requested then for vetting with the Judges and Magistrates vetting Board and for position of the judge of Court of Appeal respectively.

43. The petitioner considers the 1<sup>st</sup> respondent's delay and or refusal to issue him with certificate of good conduct mischievous and a gate keeping act intended to frustrate and curtail his bid to climb to the helm of the Judiciary as the next Chief Justice of the Republic of Kenya. He also claims that the delay in issuing him with the said certificate of good conduct is a denial of his right to fair administrative action to expeditious service and to apply for the job of Chief Justice besides being discriminatory because all other judges were issued with the certificate of good conduct.

44. As against the 4<sup>th</sup> respondent, the petitioner claims that the inclusion of the requirement for certificate of good conduct in the advertisement is unconstitutional since the threshold for Chief Justice is in Article 167 of the Constitution and the Leadership and Integrity Act as contemplated in Chapter Six of the Constitution.

45. Having considered all the above matters which are uncontroverted, I am of the view that the applicant has not satisfied this court that he is entitled to the mandatory injunctions sought at this interlocutory stage for the following reasons:

1. That the applicant/petitioner knew of the advertisements placed on 17<sup>th</sup> June 2016 and when the time for applications would lapse, which was on 7<sup>th</sup> July 2016 at 5.00 pm.
2. That the petitioner waited until 27<sup>th</sup> June 2016 nearly 10 days later when he lodged the application for certificate of good conduct with the 1<sup>st</sup> respondent.
3. That the 1<sup>st</sup> respondent acted with alacrity when he dispatched Inspector Allan Muluma to the Supreme Court on 28<sup>th</sup> June, 2016, only a day after such application was lodged by the applicant to take the finger prints of the applicant and other intending applicants for the advertised vacancies.
4. That on 30<sup>th</sup> June 2016 three days later, a signal was sent by the 1<sup>st</sup> respondent to Kamukunji Police Station seeking to know the status of the criminal trial wherein the applicant was charged with the offence of attempted murder.
5. That there is no evidence to show that the 1<sup>st</sup> respondent deliberately delayed to facilitate issuance of certificate of good conduct to the applicant or that he has refused to issue such certificate to the petitioner/ applicant, considering that the signal directed urgent submission of the trial results in a criminal case to enable processing of police clearance certificate for the petitioner. I do not, in the circumstances see any evidence of *malafides* on the part of the police.
6. The view of this court is that the 1<sup>st</sup> respondent does not merely exist to issue out clearance certificates but to issue such clearance certificates, after verification of an applicant's particulars hence the signal to the Kamukunji police station being dispatched to verify the information on the applicant's standing.
7. That there is no evidence that the Registrar of the Court of Appeal, whom the applicant sent to run errands on his behalf, was frustrated by the 1<sup>st</sup> respondent since the only communication the Registrar received and submitted to the petitioner/applicant was the signal. The Registrar has not sworn any affidavit to express what kind of frustrations he underwent in the hands of the 1<sup>st</sup> respondent if at all.
8. That the applicant did not mention what efforts he or the Registrar of the Court of Appeal made between 28<sup>th</sup> June and 7<sup>th</sup> July 2016 to obtain the clearance certificate from the 1<sup>st</sup> respondent.
9. That there is absolutely no evidence that, other than for the certificate of good conduct, the petitioner/applicant had taken the trouble to gather all the other necessary requirements or reports and completed an application form for the advertised vacancy of Chief Justice ready for submission to the Judicial service Commission.
10. That there is absolutely no evidence that it is the certificate of good conduct and nothing else that prevented the applicant from lodging an application for the advertised vacancy of Chief Justice.
11. That there is no reason advanced by the applicant why the applicant/petitioner on realizing that there was delay, and before 7<sup>th</sup> July 2016 he could not personally contact the 1<sup>st</sup> respondent to establish the cause of the delay.
12. In addition, there is nothing apparent to show that the applicant/petitioner's application for position of Chief Justice if submitted to the Judicial service Commission could not have been considered in the absence of the certificate of good conduct as the certificate of good conduct was only one of the required accompanying documents. Further, failure to avail the said certificate of good conduct at the application stage by the applicant would, in my humble view, not be a valid reason for non consideration of an application for the position since it is not a constitutional or statutory requirement and the petitioner/applicant may well be in a position at the time of the interview once shortlisted for the position to explain his reasons for the failure to secure the same at the time of lodging his application.
13. The claim that the requirement for certificate of good conduct by the Judicial Service Commission is unconstitutional by the applicant at this stage is an afterthought since the applicant admitted that on two occasions in 2011 and 2012, he was required to submit to the Judges and Magistrates Vetting Board the same certificate and when applying for Judge of Appeal and he did

apply for the said certificate of good conduct and was issued with the same. I am fortified by Regulations 7 and 8 of the First Schedule empowers the Commission to undertake Reference checks and Background investigations on the Applications even after the short listing has been done hence nothing would prevent the Commission from acting on its own motion to obtain such documents from the relevant authorities..

14. In addition, this court has not been given reasons why only the requirement for a certificate of good conduct would be unconstitutional and a gate keeping exercise by the 1<sup>st</sup> and 2<sup>nd</sup> respondents in the selection of Judges and not the other listed requirements like clearance certificates from Kenya Revenue Authority, HELB ACC, EACC and Credit Reference Bureau. Neither has the court been shown evidence of discrimination against the petitioner/applicant by the respondents, noting that the 4<sup>th</sup> respondent Judicial Service Commission has not rejected the applicant's application as none has been presented before it for consideration. To that extent, the Commission owes no duty to the petitioner/applicant who has not submitted to its jurisdiction.
15. As correctly pronounced by Hon Odunga J in JR314 of 2016, in his judgment delivered this morning, those additional requirements are handmaidens in determining the applicant's integrity which according to Regulation 13, encompass demonstrable consistent history of honesty and high moral character in professional and personal life; Respect for professional duties arising under the codes of professional and judicial conduct; and Ability to understand the need to maintain propriety and the appearance of propriety. And that the mere fact that the Commission included extraneous matters in the advertisement does not warrant the quashing of the said advertisement in the circumstances of this case."
16. In the view of this court, and in the current constitutional dispensation, standards matter. Visibly high standards of behaviour by public office-holders may not be a sufficient condition for high levels of public trust. But they are a necessary one. There can be little doubt that current levels of trust are considerably higher following the problems of the last decade in appointment of Judges and or of the Chief Justice in Kenya.
17. There is also no evidence that the applicant made the 1<sup>st</sup> respondent aware that the purpose for which the certificate of good conduct was required was the specific application to the position of Chief Justice and that it was required instant or on or before 7<sup>th</sup> July 2016, for this court to believe that the 1<sup>st</sup> and 2<sup>nd</sup> respondents are hell bent to scuttle the petitioner/applicant's endeavour to rise to the helm of the position of Chief Justice of the Republic of Kenya.
18. That between 8<sup>th</sup> July 2016 when the signal by the 1<sup>st</sup> respondent was communicated to the petitioner/applicant and the time of filing this petition and application for mandatory injunctive orders on 9<sup>th</sup> August 2016, is one month taken by the petitioner/applicant which is way after the Judicial Service Commission had received and considered the various applications submitted by other applicants for the advertised positions and proceeded to shortlist candidates and released a time table for interviews which interviews have commenced today and are continuing as I deliver this ruling.
19. An injunction is an equitable remedy and is therefore issued in the discretion of the court. It is trite law that no one is entitled to the aid of a court of equity when that aid has become necessary through his or her own fault and neither does equity relieve a person of the consequences of his or her own rashness. In addition, a court of equity will not assist a person in extricating himself or herself from the circumstances that he or she has created.
20. There is also no evidence that the applicant even lodged his application for the post of Chief Justice without a certificate of good conduct but that such application was rejected for want of a certificate of good conduct.
21. In my honest view, the petitioner/applicant herein whom I have so much respect for has suffered a self created hardship. His own delay in seeking for the certificate of good conduct and his failure to demonstrate that he applied for the position of Chief Justice to warrant an order for him to be considered or be short listed for the interview put him in this uncertain position. He has not even sought to submit the application out of the time stipulated.
22. Pursuant to the First Schedule to the Judicial Service Act, procedures for appointment of Judges are spelt out. Under Section 2 thereof which is the interpretation section, '**Applicant**' means **any person making an application to the Commission for consideration as a judge**. In the instant case, the petitioner herein does not qualify to be considered for short listing for the advertised

position of Chief Justice for the very simple reason that he did not lodge his application with the Commission for consideration.

23. Section 4(2) of the First Schedule is clear that **each applicant** seeking consideration for nomination and recommendation for appointment to a judicial office shall complete and file the prescribed application form and comply with all requirements described therein. Under section three (3) thereof, the prescribed application form requires an **applicant** to provide back ground information which may be relevant to determine qualifications for office including criminal record.
24. Furthermore, what is required under section 4 of the Schedule, apart from sample writings and photographs is just information. Therefore, demanding any other requirements would indeed be external what is contemplated under Regulation 4 and hence the non compliance with such extraneous requirements which may nonetheless be necessary cannot be the basis for not short listing an applicant who has otherwise met all the minimum constitutional and statutory requirements for the position of Chief Justice.
25. However, as I have stated earlier, the petitioner herein has not demonstrated to this court that he applied for the advertised position of Chief Justice and that the Judicial Service Commission has refused to consider his application for short listing purposes. He has also not sought for leave to enlarge the times stipulated under the Act for submission of the application for consideration by JSC. That is the point at which this matter is distinguishable from the **Petition No 314 of 2016** as consolidated with **JR 306 of 2016 between TRUSTED SOCIETY OF HUMAN RIGHTS ALLIANCE & 3 others vs Judicial Service Commission and Another** decided on by Hon Justice Odunga this morning in the sense that in that petition, the affected persons had applied for the position's but the Commission had not considered them for short listing on account among others, that they did not attach all the documents required in the advertisement.
26. Accordingly, I find that this court has not been shown how the Judicial Service Commission contributed to the applicant's predicament since it never received any application from the petitioner/applicant for the position of Chief Justice for consideration.
27. In the view of this court, if the applicant met all the constitutional and statutory requirements for consideration for the position of Chief Justice of the Republic of Kenya, as averred, and did not consider any additional requirements set by the Judicial Service Commission to be relevant or constitutional, nothing prevented him from submitting his application without those extraneous requirements and challenging any rejection thereof by the Commission on the basis that additional requirements were/are unconstitutional.
28. Further, the petitioner/applicant had the liberty to seek to challenge the constitutionality of the additional requirements immediately the advertisements were placed in the media, without seeking to comply with those requirements. Instead, when he was confronted with bottlenecks of delayed issuance of the certificate of good conduct is when he sought to have the additional requirements declared unconstitutional. In my view, that is an afterthought which is bereft of good faith.
29. This court underscores that the failure by the applicants to obtain the certificate of good conduct from the 1<sup>st</sup> and 2<sup>nd</sup> respondents before closure of applications deadline cannot be the sole basis for him not being considered by the Judicial Service Commission as there was no such application submitted by the petitioner to the Judicial Service Commission capable of being considered by the Commission.
30. PART V section 30 of the Judicial Service Act deals with the recruitment of Judges in a transparent manner through a Selection Panel constituted by the Commission for that purpose and the procedure to be followed is as stipulated in the First Schedule to the Act. That procedure, in my view, is necessary and intended to instill public confidence in the whole process of getting suitable candidates for appointment to the positions of Judges and it cannot be wished away as a whitewash or a witch-hunt to attract public cynicism.
31. Furthermore, Regulations 7 and 8 of Part III to the First Schedule empowers the Commission to undertake Reference checks and Background investigations on the Applicants even after the short listing has been done but of course after considering an application placed before the Commission. In addition, in my humble view, the Commission can still consider and shortlist an applicant who has not submitted the required documents and give a candidate an opportunity to explain their reasons for the failure to secure the same, at the interview stage. And since such clearance certificates required to be submitted by the applicants with the applications are not considered conclusive evidence of their contents, the Commission could on its own accord seek for more

accurate information on the same, even after interviews.

32. For those reasons, this court declines to order a mandatory injunction compelling the 1<sup>st</sup> and 2<sup>nd</sup> respondents to issue the petitioner/applicant with a certificate of good conduct as there is no evidence that the said respondents have deliberately refused, neglected and or declined to issue him with such certificate of good conduct.
33. The court further declines to order for the petitioner/applicant's short listing for an interview for the post of Chief Justice of the Republic of Kenya by the Judicial Service Commission as there is no evidence that the petitioner/applicant did lodge or submit any application for the advertised position of Chief Justice with the Commission, an application capable of being considered on its merits, and for his inclusion in the list of shortlisted candidates to be interviewed for the position of Chief Justice of the Republic of Kenya, however qualified he may be. Applying the short cut route to that position is a spatter in the face of the clear statutory provisions.
34. The balance of convenience in this case does not tilt in favour of the applicant who has failed to establish an arguable petition.
35. On the basis of the above reasons, this court declines to grant the mandatory injunctions sought even if the application was not defended as the applicant has failed to satisfy the court that the orders sought from this court are merited. Accordingly, I find the application before me dated 9<sup>th</sup> August, 2016 a shooting star and proceed to dismiss the same and make no orders as to costs.

Dated, signed and delivered in open court at Nairobi this 29<sup>th</sup> day of August, 2016.

**R.E.ABURILI**

**JUDGE**

**In the presence of:**

Mr Mungai and Mr Kahonge Advocates for the petitioner/applicant

N/A for the respondents

Court Assistant: Adline