



**Nzioka v Judges and Magistrates Vetting Board & another; Kenya
Magistrates & Judges Association (Interested Party) (Petition 470 of 2014)
[2015] KEHC 6963 (KLR) (Constitutional and Human Rights) (29 May 2015) (Judgment)**

Grace L. Nzioka v Judges and Magistrates Vetting Board & 2 others [2015] eKLR

Neutral citation: [2015] KEHC 6963 (KLR)

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

PETITION 470 OF 2014

I LENAOLA, J

MAY 29, 2015

BETWEEN

HON LADY JUSTICE GRACE L. NZIOKA PETITIONER

AND

JUDGES AND MAGISTRATES VETTING BOARD 1ST RESPONDENT

JUDICIAL SERVICE COMMISSION 2ND RESPONDENT

AND

KENYA MAGISTRATES & JUDGES ASSOCIATION INTERESTED PARTY

JUDGMENT

A Background

1. The Petition dated 18th September 2014 substantially challenges the decision of the Judges and Magistrates' Vetting Board (JMVB), the 2nd Respondent, to determine the suitability of the Petitioner, Hon. Lady Justice Grace Nzioka, to continue serving as a Judge of the High Court.
2. In the said Petition and as a corollary to that main issue are the questions therefore whether the decision of the JMVB to remove her as a Judge was made without jurisdiction and whether that decision was also unreasonable and in breach of the Petitioner's legitimate expectation as well as a breach of the principle of proportionality.



3. The Petition in addition to the above issues, also raises the issue whether the Judicial Service Commission (JSC) ought to be compelled to restore the Petitioner to her duties and also restore her benefits in the office of the High Court.

Factual Background

4. The facts leading to the filing of the Petition are uncontested and its determination will ultimately rest on matters of law only. In any event, it is agreed that the Petitioner joined the Judiciary in 1987 and rose from the rank of District Magistrate II to the position of Judge of the High Court on 2nd September 2011. At the time of her appointment as a Judge, she was serving at the rank of Senior Principal Magistrate.
5. By dint of Section 23 of the Sixth Schedule to the Constitution 2010, all Judges and Magistrates serving as such, prior to 27th August 2010, were to be subjected to a vetting process by the JMVB to determine their suitability to continue serving as such.
6. The Petitioner submitted herself to the vetting process albeit under protest because in her view, having been appointed a Judge after 27th August 2010, she was not subject to vetting other than her interviewed by the JSC. Nonetheless, she complied with the requirements set by the JMVB and on 20th March 2013, the JMVB delivered a decision to the effect that she was not suitable to continue serving as a Judge of the High Court. Subsequently, the JSC, acting on the decision of the JMVB, suspended her from office even as she filed a review application before the JMVB. To date, she remains suspended and her application for review has not been determined.
7. It is the above set of facts and events that triggered the filing of the Petition.

Petitioner's Case

8. The Petitioner, represented by Mr. Nyandieka, relied on her Petition, the Affidavit in support sworn on 18th September 2014 together with its annexures as well as written submissions filed on 10th December 2014, in setting out her case. A further Affidavit in addition was also filed on 15th December 2014.
9. In summary, her case is that;
 - having ceased to be a magistrate in August 2011, her purported vetting by the JMVB was a nullity and of no legal effect.
 - Since the JSC had subjected her to a public vetting and interview, found her suitable to be a Judge and appointed her as such, the determination to the contrary by the JMVB on 20th March 2013 was a decision made without jurisdiction, and was illegal and untenable.
 - Her removal as a Judge, if at all could, only be properly done under Article 168 of the Constitution and not Section 23 of the Sixth Schedule to the Constitution.
 - The JSC's alleged impulsive acceptance of the determination by the JMVB was improper and it ought instead to have exercised its statutory discretion before suspending the Petitioner from office.
 - The decision by the JMVB to communicate its determination concerning the Petitioner to the public was malicious, libellous and her character has since been disparaged while her credit and reputation have suffered immense damage.



10. For the above reasons, she now seeks the following declarations and orders;

- “(a) A declaration that the 1st Respondent’s decision to vet the suitability of the Petitioner to continue service as a Judge and determination that she is not suitable to continue serving as a Judge is unconstitutional.
- (b) A declaration that the 1st Respondent’s decision to vet the suitability of the Petitioner to continue service as a Judge and determination that she is not suitable to continue serving as a Judge is without jurisdiction, unreasonable, illegal, in breach of the Petitioner’s legitimate expectation and the legal principle of proportionality.
- (c) A declaration that the 1st Respondent’s decision to vet the suitability of the Petitioner to continue service as a Judge and determination that she is not suitable to continue serving as a Judge is a breach of the Petitioner’s fundamental rights under Articles 27, 47, 48 and 50 of the Constitution of Kenya.
- (d) An order of certiorari do issue to bring into this Court for purposes of quashing and quash the decision of the 1st Respondent, the Judges and Magistrates Vetting Board, contained in its determination of and concerning Honourable Justice Grace L. Nzioka JMVB/HC/007/2012 dated 20th March 2013.
- (e) An order of mandamus do issue to compel the 2nd Respondent, the Judicial Service Commission, to restore the Petitioner’s duties, obligations and benefits of the office of a Judge of the High Court as appointed pursuant to Article 166 (1) (b) of the Constitution of Kenya.
- (f) An order do issue for compensation by way of damages to the Petitioner, being special, General, exemplary and aggravated.
- (g) Costs of this Petition to be provided for.
- (h) Such other orders as this Honourable Court shall deem just.”

1st Respondent’s Case

- 11. The JMVB responded to the Petition by filing a Replying Affidavit sworn on 16th October 2014 by one, Reuben Chirchir, its Secretary and Chief Executive Officer. Mr. Lubullelah, Advocate, also filed written submissions on its behalf.
- 12. Its case was firstly, that because the Petitioner was serving as a magistrate on or before 27th August 2010, then she was subject to vetting under Section 23 of the Sixth Schedule to the Constitution. That it mattered nor whether her status had since changed from that of a Magistrate to a Judge.
- 13. Secondly, and for the same reason above, the JMVB had the jurisdiction to vet and determine her suitability as a constitutional duty on its part.
- 14. Thirdly, that the JMVB determined that on the basis of her temperament, the Petitioner was not suitable to remain a Judge and that the said ground is set out in Section 18 of the JMVB Act and so the reason for her removal was well embedded in law.



15. Fourthly, that the Petitioner's claims that her constitutional rights were violated or that she was subjected to libellous allegations cannot stand as the JMVB at all times acted within its constitutional and statutory mandate.
16. Lastly, that the Petition was without basis and ought to be dismissed with costs.

2nd Respondent's Case

17. The Judicial Service Commission filed a response to the Petitioner dated 4th December 2014. In that response, Ms. Frida Mokaya, its Registrar, stated that whereas the Petitioner has complained about her removal under Section 23 of the Sixth Schedule to the Constitution, Article 168 of the same Constitution was not available to her because the said Section operates despite Article 168 aforesaid.
18. She also contended that by its decision in Petition 13A of 2013 as consolidated with Petitions 14 and 15 of 2013, the Supreme Court unanimously reached a decision on the contested interpretation of Section 23 aforesaid. That in that case, the Supreme Court held that the JMVB's determination regarding the unsuitability of a Judge or Magistrate to continue serving as such is not subject to review or question by any Court.
19. For the above reasons, the JSC contended that this Court lacks jurisdiction to hear and determine this Petition.
20. Lastly, the JSC also urged the point that the Petition does not disclose any violation of the Constitution and/or any law and the Petitioner's remedy lies in her application for review before the JMVB. That therefore the Petition ought to be dismissed.

The Interested Party's Case

21. The Kenya Magistrates and Judges Association is recorded as being an Interested Party but I do not see any submissions filed by it.

Determination

22. Before I determine the merits or otherwise of this Petition, I note that the 2nd Respondent raised the issue of jurisdiction in view of the decision of the Supreme Court in Petition No.13A of 2013 as consolidated with Petitions No.14 and 15 of 2013. I am familiar with those Petitions where the Appellants were the JMVB, the Law Society of Kenya and the Attorney General while the Respondents were among others, Hon. Justices Mohamed Ibrahim, Roselyne Nambuye, Jeane Gacheche, Riago Omolo, Samuel Bosire, and Joseph Nyamu. All the said Judges had been declared unsuitable to serve as Judges and had challenged *inter-alia* the process leading to that determination. The Supreme Court determined three questions placed before it, including that of the jurisdiction of the JMVB and made the following orders;

- “(a) The Petition before this Court is hereby allowed.
- (b) The Orders of 30th October, 2012 stopping the de-gazettement of Judges or Magistrates found unsuitable to continue in service are hereby discharged.
- (c) The respective Superior Court Divisions or Stations having to adjudicate upon matters of any of the following categories shall list them for mention within 15 days of the date hereof, and shall dispose of them forthwith, in accordance with the terms of this Judgment and these Orders, that is to say;



- (i) alleged lack of jurisdiction or merit on the part of the Vetting Board;
- (ii) alleged want of exclusive competence of the Vetting Board to determine the suitability of a Judge or Magistrate to continue in service;
- (iii) any contest to the Vetting Board's process (or outcome thereof) for determining the suitability of a Judge or Magistrate to continue in service.

(d) The parties shall bear their own respective costs.”

23. Subsequently, a Five Judge bench of the High Court seized with the matters involving all the above Judges, in compliance with the orders of the Supreme Court, heard all the parties in HC. J.R No.29 of 2014 on the import and impact of the Supreme Court's decision to the pending matters involving the vetting process and concluded as follows;
- (i) The High Court has no jurisdiction to question the jurisdiction of the JMVB or the merits of its determinations on the suitability of any Magistrate of Judge to continue serving as such.
 - (ii) The JMVB has the exclusive competence to determine the suitability of any Magistrate or Judge to continue serving as such.
 - (iii) Any contest as to the vetting process or its outcome is outside the jurisdiction of this Court and all the matters involving the above Judges were struck out.
24. In that context, does this Court have jurisdiction to determine the issues raised by the Petitioner? In answer to that question, subsequent to its decision in Petition No.13 of 2013 as consolidated with Petitions Nos.14 and 15 of 2013, the Supreme Court on 19th December 2014 delivered a judgment in Petition No.29 of 2014 and decided that the JMVB had no jurisdiction to “investigate the conduct of Judges and Magistrates who were in office on the effective date on the basis of alleged acts and omissions arising before the effective date, and not after the effective date.”
25. The Supreme Court in making that decision also clarified that it saw no contradiction between its earlier decision in Petition No.13 of 2013 and the latter decision, so that the only issue in which any Court can interrogate and make findings on the determination of suitability of any Judge or Magistrate to continue serving as such, is where the issue is whether the matter or complaint leading to a determination of unsuitability arose after the effective date i.e. 27th August 2010.
26. The Petitioner has not raised such an issue before me and therefore she cannot benefit from that window of jurisdiction.
27. Turning back to the orders sought by the Petition and looking at them against the decision of the Supreme Court in Petition No.13 of 2013, prayer (a) raises issues as to the constitutionality or otherwise of the decision by the JMVB to vet the Petition. That issue is not within the jurisdiction of this Court.
28. Prayer (b) raises issues of the jurisdiction of the JMVB to vet the Petition. Again that issue is outside the mandate of this Court.
29. Prayer (c) raises the issue whether the Petitioner's fundamental rights under Articles 27, 47, 48 and 50 of the Constitution were violated by the JMVB. That issue cannot be addressed by this Court for want of jurisdiction.



30. Prayer (d) seeks that this Court should seize and quash the decision to declare the Petitioner unsuitable to continue serving as a Judge. Again, such an order cannot be issued by this Court due to the exclusive jurisdiction conferred on the JMVB .
31. Prayer (e) seeks an order of mandamus to compel the JSC to restore the Petitioner to her duties, obligations and benefits of office as a Judge of the High Court. This prayer cannot stand alone and is consequential to the earlier prayers which I have found wanting. It follows that it too cannot be granted.
32. Prayer (f) is for an order of compensation by way of special, general and exemplary damages. Like prayer (e) it seeks consequential orders and once I have declined to grant the substantive prayers, its fate is obvious as is the one in prayer (g) for costs and prayer (h) for any other orders that this Court shall deem just to grant.
33. Having so held, and whatever my views on the merits of the Petition, my hands are tied by the decisions of the Supreme Court and I need not address the meaning of Article 163(7) that this Court is “bound by the decisions of the Supreme Court.”
34. Without jurisdiction, then my judicial tools must be put down and the only proper order to make is that the Petition ought to be struck out.
35. As for costs, each Party shall bear its own costs as I am aware that the Petitioner is still before the JMVB for determination of her review application and although the orders I have made do not favour her, I see no need to saddle the Parties with further acrimonious proceedings on costs.
36. The final orders to be made therefore are that the Petition herein is struck out and each party will bear its own costs.
37. Orders accordingly.

DATED, DELIVERED AND SIGNED AT NAIROBI THIS 29TH DAY OF MAY, 2015

ISAAC LENAOLA

JUDGE

In the presence of:

Miron – Court clerk

Mr. Nyandieka for Petitioner

Mr. Lubullelah E. L. for the 1st Respondent

Miss Lipo holding brief for Mr. Issa for 2nd Respondent

Order

Judgment duly delivered.

Copies to be supplied.

ISAAC LENAOLA

JUDGE

29/5/2015

