



Loduna & 2 others v Judicial Service Commission & 2 others (Petition 480 of 2012) [2013] KEHC 3990 (KLR) (Civ) (30 April 2013) (Judgment)

ALBERT LUKORU LODUNA & 2 OTHERS V JUDICIAL SERVICE COMMISSION & 2 OTHERS [2013]eKLR

Neutral citation: [2013] KEHC 3990 (KLR)

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

CIVIL

PETITION 480 OF 2012

DAS MAJANJA, J

APRIL 30, 2013

BETWEEN

**ALBERT LUKORU LODUNA 1ST PETITIONER
WYCLIFE AKUTA 2ND PETITIONER
SAMUEL KINYANJUI 3RD PETITIONER**

AND

**JUDICIAL SERVICE COMMISSION 1ST RESPONDENT
HON. JUSTICE SILA MUNYAO 2ND RESPONDENT
ATTORNEY GENERAL 3RD RESPONDENT**

Procedural fairness does not universally require an oral hearing for a person affected by an administrative action.

The case highlighted how complaints brought against candidates before the Judicial Service Commission, who were seeking appointment as judges, could be handled. The persons lodging the complaints concerning the candidates could do so in writing and the Judicial Service Commission would inquire into them during the recruitment process.

Reported by Lynette A. Jakakimba

Constitutional Law - judges - appointment of judges - mandate of the Judicial Service Commission in appointment of judges - legality of appointment process by the Judicial Service Commission - public participation in appointment of judges - right to oral hearing to present complaints against the appointment of a judge - Constitution of Kenya, 2010 articles 166, 172 and 248; Judicial Service Act, No. 1 of 2011, First Schedule paragraph 8.



Brief facts

The petitioners had challenged the decision by the Judicial Service Commission (JSC) recommending the 2nd respondent (Justice Munyao) for appointment by the President as a judge of the Environment and Land Court. The petitioners claimed that the JSC failed to investigate their complaints concerning the conduct and integrity of Justice Munyao while he was in private practice.

Issues

- i. Whether the High Court had jurisdiction to inquire into the legality of the process of appointment of a High Court judge.
- ii. Whether the Judicial Service Commission (JSC) discharged its mandate in accordance with the constitutional and statutory provisions regarding the appointment of the 2nd respondent as a judge.
- iii. Whether the petitioners were entitled to an oral hearing to present their complaints against the appointment of the 2nd respondent as a judge.

Relevant provisions of the Law

Judicial Service Act

Paragraph 8 of the First Schedule

“8. (1) The Commission shall, within thirty days of the reference check, investigate and verify, in consultation with the relevant professional bodies or any other person, the applicant’s professional and personal background for information that could pose a significant problem for the proper functioning of the courts should the applicant be appointed.

(2) The background investigation and verification referred to under subparagraph (1) may continue until the time the Commission votes on its nominations.”

Held

1. The High Court had jurisdiction to inquire into the legality of the appointment of a High Court judge based on the principle of legality which was firmly founded on the supremacy of the Constitution.

2. The inquiry into the eligibility or otherwise of an individual’s suitability for judgeship was within the mandate of the JSC. The role of the court was to ensure that the fidelity of the Constitution was maintained in the appointment process - *John Waweru Wanjohi & Others v the Attorney General & Others, Kipngetich Maiyo & Others v the Kenya Land Commission Selection Panel Nairobi consolidated Constitutional Petitions Nos. 373 of 2012 and 426 of 2012 (Unreported)*.

3. The JSC was one of the constitutional Commissions recognized under the provisions of article 248 of the Constitution. Its functions, as set out in article 172 of the Constitution, included recommending to the President persons for appointment as judges.

4. The First Schedule to the Judicial Service Act contained detailed provisions relating to the procedure for appointment of judges and the criteria for determining their qualifications. The processes involved but were not limited to initial review of compliance with constitutional and statutory requirements, reference and background checks and vetting all the way to the taking of votes on the individual applicants by members of the JSC. The procedures also provided for public participation by requiring that the applicants and shortlisted candidates were duly advertised and the interviews were conducted in public.

5. Paragraph 8 of the First Schedule of the Judicial Service Act obliged the JSC to investigate and verify, “in consultation with the relevant professional bodies or any other person.” It was in this respect that the Secretary to the Commission and Chief Registrar of the High Court wrote a letter to the Law Society of Kenya (LSK) to verify whether the 2nd respondent was an advocate of good standing and the LSK confirmed that he was and that he had not been convicted on any disciplinary offences. The process adopted by the JSC in making the necessary inquiry was thus in accordance with the statutory provisions.

6. Although the requirement for procedural fairness required that a person who was affected by an administrative action be heard, that requirement did not universally demand an oral hearing. Whether an oral



hearing was necessary was dependent on the circumstances of the case and the nature of the decision to be made - *Karina v Transport Licensing Board* [2004] 2 KLR 466 and *R v Army Board of the Defence Council, ex p. Anderson* [1992] QB 169, 187. What was important was that the JSC evaluated the evidence and submissions made and arrived at an informed decision.

7. The verbatim proceedings of the 2nd respondent's interview showed that he was indeed interviewed extensively on the nature of his practice prior to his appointment as judge, the allegations about the claims filed and generally the matters raised by the petitioners. Therefore the JSC cannot be faulted for dealing with the matter in the manner it did particularly given that it had received a response from the LSK regarding the standing of the Judge.

8. The Advocates Act prescribed the manner in which the discipline of advocates was enforced, either through the Advocates Disciplinary Tribunal or the Advocates Complaints Commission. The processes buttressed the provisions of paragraph 8 of the First Schedule to the JSC Act which required JSC to consult the relevant professional bodies as these bodies were mandated by their respective statutes or constitutive instruments to discipline their members or to investigate complaints from members of the public.

9. The petitioners did not place any material before the court to show that any complaint had been raised by the petitioners in accordance with the provisions of the Advocates Act or to any other authority for that matter against the 2nd respondent. The JSC therefore could not, at least in the circumstances of the case, constitute itself as the relevant regulatory and disciplinary authority for advocates.

10. The JSC was well within its constitutional and statutory mandate in the manner in which it conducted the proceedings leading to the nomination and subsequent appointment of the 2nd respondent.

Petition dismissed.

Orders

- i. *Petition dismissed.*
- ii. *Costs not awarded as the petition sought to uphold fidelity to the Constitution by entrenching transparency and integrity in our institutions.*

Citations

Statutes

None referred to

Cases

1. *John Waweru Wanjohi & Others v the Attorney General & Others, Kipngetich Maiyo & Others v the Kenya Land Commission Selection Panel Nairobi consolidated Constitutional Petitions Nos. 373 of 2012 and 426 of 2012* (Unreported).
- 2 *Karina v Transport Licensing Board* [2004] 2 KLR 466 .
- 3 *R v Army Board of the Defence Council, ex p. Anderson* [1992] QB 169, 187.
4. *Consumer Federation of Kenya v Attorney General and 2 Others Nairobi Petition No. 2 of 2012* (Unreported).
5. *Ex-Chief Peter Odoyo Ogada and 10 Others v Independent Electoral and Boundaries Commission and 14 Others Nairobi CA Civil Appeal No. 307 of 2012* (Unreported).
6. *International Centre for Policy & Conflict and 5 others v the Attorney General & 4 others, Nairobi Petition 552 of 2012, [2013]eKLR.*
7. *Okoti Omtatah v Attorney General & 2 others, Nairobi Petition No. 92 of 2011 [2011]eKLR.*
8. *Federation of Women Lawyers Kenya (FIDA-K) and Others v Attorney General and Another, Nairobi Petition No. 102 of 2011 [2011]eKLR.*

Advocates

Mr Issa instructed by the Issa and Company Advocates for 1st respondent.



JUDGMENT

1. The petitioners challenge the decision by the Judicial Service Commission (“JSC”) recommending the 2nd respondent (“Justice Munyao”) for appointment by the President as a judge of the Environment and Land Court. The Court is one of the two specialised superior courts with the status of the High Court established under Article 162(2) of the Constitution and governed by the Environment and Land Court Act (No. 19 of 2011).
3. The petitioners claim the JSC failed to investigate their complaints concerning the conduct and integrity of Justice Munyao while he was in private practice. They contend that had the JSC given their complaints due weight it would have found him unsuitable for appointment and, in view of the constitutional demands on leadership and integrity, would have refrained from recommending his appointment to the President.
4. Prior to his appointment as a Judge and at the time material to the complaint, Justice Munyao was practising in the name and style of Sila Munyao and Company Advocates. For purposes of this judgment, reference to Justice Munyao shall also be reference to his firm unless the context dictates otherwise.
5. In their petition dated the 18th October 2012 supported by the affidavit of Samuel Kinyanjui, the 3rd petitioner, the petitioners seek the following reliefs;
 - a) A declaration that the decision and recommendation by the 1st Respondent to the 4th Respondent that the 2nd Respondent be appointed a judge of the Environment and Land Court is contrary to the Constitution.
 - b) A declaration that the 2nd Respondent does not meet or pass the mandatory stipulations in Chapter Six of the Constitution on integrity and is unfit to hold the office of a judge.
 - c) An injunction to restrain the 4th Respondent from appointing the 2nd respondent as a judge of the Environment and Land Court
 - d) The Petitioners be paid the costs of this petition
 - e) Such other orders or reliefs as this Honourable Court may deem fit.

Factual background

2. In May 2012, the JSC published in the local dailies the list of the applicants for the position of judge of the Environment and Land Court and thereafter a list of the shortlisted candidates who had met the minimum criteria for appointment. Justice Munyao was one of those shortlisted. Following the notice, Directline Assurance Company Limited (“Directline”) by a letter dated 22nd May 2012, signed by the 3rd petitioner who is its Legal Advisor, wrote to the JSC claiming that Justice Munyao was not fit to be recommended for appointment as a judge. The letter stated as follows;

22nd May 2012

The Secretary, Judicial Service Commission



Box 30041-00200, Nairobi Dear Sir/Madam, Ref: Sila Munyao Of Sila Munyao & Company Advocates-his Application For The Position Of A Judge Of The Environment & Land Court

This applicant is not fit to be a judge, let alone an advocate of the High Court of Kenya. Let the following documentary evidence speak for itself;

[Schedule of Sundry Court Cases Filed Without Instructions Using Unlawfully Acquired Documents filed In Kapenguria, Vihiga And Kapsabet Courts]

We also enclose a copy of a demand letter which we wrote to Sila Munyao on 27th March 2012 and was also hand delivered to the advocate which letter has elicited.....dead silence.

Needless to say, proceedings are in hand to have this advocate, at the very least disbarred as the advocate's pettifogging has cost this company substantial losses in unrecoverable legal costs.

We have recently addressed ourselves to the Law Society of Kenya along similar lines and the undersigned confirms his availability and willingness to be interviewed on the information herein contained.

Yours faithfully Signed Samuel Kinyanjui Legal Adviser Paragraph 3.

3. The letter by Directline singled out two claims; SRMCC No. 28 of 2008 and SRMCC No. 27 of 2008 filed at the Kapenguria Law Courts on behalf of the 1st and 2nd petitioners respectively by Justice Munyao. It was alleged that the 1st and 2nd petitioner's never gave instructions to Justice Munyao to act on their behalf. The letter also noted that the 45 cases filed at the Kapenguria, Vihiga and Kapsabet Law Courts were dismissed due non-attendance of the plaintiffs in those cases.
4. After conducting interviews, the JSC recommended that sixteen successful candidates be appointed as judges of the Environment and Land Court. The President accepted this recommendation and by Gazette Notice No. 14346 dated 5th October 2012, Justice Munyao and the other Judges were duly appointed. The Judges took the oath of office and are currently undertaking their judicial duties.

The Petitioners' Case

6. The petitioners' claim is that the JSC failed to act constitutionally and judicially by recommending to the President the appointment of Justice Munyao as a judge of the Environment and Land Court despite having been supplied with substantial documentary evidence of the unprofessional conduct and lack of integrity on the part of the Judge. The petitioners' contend that JSC deliberately ignored weighty issues relating to the want of integrity, fidelity, professionalism and leadership of Justice Munyao's suitability to hold State office.
7. The petitioners contend that despite the overwhelming evidence forwarded to it, the JSC failed to make a proper inquiry into the complaints against the Judge in order to verify the allegations made against him. Mr Kinyanjui, acting on his own behalf and on behalf of the other petitioners, claimed that during the interview process, the JSC treated the issues raised by the petitioners in a 'very cavalier and off-hand manner.'
8. The petitioners contend that the position of judge demands impeccable standards of integrity and moral character and hence the JSC violated constitutional standards by recommending the



appointment of Justice Munyao. The petitioners relied on paragraph 13(c) of the Provisions Relating to the Procedure for Appointment of Judges contained in the First Schedule to the Judicial Service Act, Act No. 1 of 2011 (“JSC Act”) which includes, as part of qualification criteria for the applicants for the position of judge, “demonstrable consistent history of honesty and high moral character in professional and personal life.”

9. The petitioners anchored their case on the decision in *Trusted Society of Human Rights Alliance v Attorney General and Others*, Nairobi Petition No. 229 of 2012 [2012]eKLR where the court quashed the appointment of the Chairperson of the Ethics and Integrity Commission on account of insufficient inquiry into the integrity of the candidate. The court stated that, “...a procedure cannot be deemed to have been legitimately and substantively satisfied if it appears from available evidence that the appointment process was designed in such a way that no proper inquiry into the pertinent issues related to the appointment which were known to the appointing authorities was conducted.”
10. Mr Kinyanjui submitted that the JSC did not carry out a proper inquiry into the allegations of suitability of the Justice Munyao and any such inquiry purportedly carried out was perfunctory and shallow. He stated that he not summoned to answer to allegations contained in his letter dated 22nd May 2012. He stressed that a proper inquiry would have involved summoning him or other petitioners for questioning and clarification of the allegations against the candidate.
11. It is the petitioners’ case that the appointment of Justice Munyao was in blatant violation of the constitutional stipulations set out in Chapter Six of the Constitution on “Leadership and Integrity” and as such the petition must be allowed to vindicate the Constitution.

Respondents’ Case Paragraph 12.

12. The JSC opposed the petition based on the replying affidavit of Honourable Gladys Boss Shollei, the Secretary to the Commission and Chief Registrar of the High Court, sworn on 2nd November 2012.
13. JSC contended that it acted within its constitutional and statutory power and mandate and that the public interviews it carried out were competitive, rigorous, transparent and fair. In order to put the petitioner’s case within the context of JSC’s mandate, learned counsel for the JSC, Mr Issa, relied on the case of *Federation of Women Lawyers Kenya (FIDA-K) and Others v Attorney General and Another*, Nairobi Petition No. 102 of 2011 [2011]eKLR where the learned Judges held that, “...We think that the role and the powers of the JSC have been clearly defined by the JSC Act and by the Constitution. Generally, it can be assumed that any person who meets the criteria and standards set has a legitimate expectation to be recommended for appointment. Those who finish in the top group of candidates counting judicial traits, academic promise, ethnic and geographical diversity and gender consideration are entitled to be recommended for appointment. It would be unfair, unjust and unconstitutional to exclude persons who come within the threshold set by Article 27, Article 172 and the JSC Act for appointment.” He further cited the case of *Andrew Okoiti Omtatah v Attorney General & 2 others*, Nairobi Petition No. 92 of 2011 [2011]eKLR to buttress the position.
14. In response to the petitioners’ arguments that they were not accorded the opportunity to be heard on their complaints, JSC submitted that the 1st and 2nd petitioners never presented any complaints to the JSC despite its call for such complaints from the public in accordance with First Schedule to the JSC Act. Accordingly, JSC could not be faulted as the petitioners had not shown that they presented their grievances and that JSC refused or failed to act accordingly. Counsel cited the case of *International Centre for Policy & Conflict and 5 others v the Attorney General & 4 others*, Nairobi Petition 552 of 2012, [2013]eKLR. In that case the petitioners sought orders from the court to disqualify certain candidates from running for elective office on account of allegations that they had breached the



provisions of Chapter Six of the Constitution yet no complaint had been made against them before the Independent Electoral and Boundaries Commission (“IEBC”) in the first instance. The court stated as follows, “[107] Matters would be different if IEBC had failed and/or refused to carry out its Constitutional mandate. It has not been demonstrated that the petitioners or any other person for that matter presented their grievances regarding the nomination of 3rd, 4th and 5th Respondents to IEBC and it failed or refused to act.”

15. Mr Issa submitted no complaint had been filed with the Advocates Complaints Commission or the Advocates Disciplinary Committee under the Advocates Act (Chapter 16 of the Laws of Kenya) and none of the petitioners has commenced any prosecution against the judge. He further submitted that complaint made by Directline was in respect of cases pending before the Kapenguria Law Courts and it would be improper for the JSC to make a decision that would affect determination of the pending cases. Counsel emphasised that in both the cases, the defendants, duly defended on instructions of Directline, had filed counterclaims against Justice Munyao.
16. Hon. Shollei deposed that in accordance with the provisions of paragraph 8 (1) of the First Schedule to the JSC Act she wrote to the Secretary of the Law Society of Kenya (“LSK”) a letter dated 12th June 2012 requesting for information on all the candidates shortlisted for the Land and Environment Court. The Secretary of the LSK duly responded to her by a letter dated 22nd June 2013 which set out the circumstances under which an advocate is considered to be of good standing. The letter confirmed that Justice Munyao was a member of good standing.
17. JSC discounted petitioners’ assertion that they were not given an oral hearing regarding the written complaint. In any case Mr Issa submitted that an opportunity to be heard does not necessarily involve an oral hearing as was held in the case of *Karina v Transport Licensing Board* [2004] 2 KLR 466. Apart from the fact that the petitioners’ did not lodge any complaint, JSC stated that it took into account all the facts and the law before arriving at its decision and it could not be faulted on that account. JSC also submitted a record of the verbatim interview proceedings which it contended demonstrated that the allegations against Justice Munyao were investigated. JSC’s case that it considered all these factors and concluded that the allegations did not warrant disqualification of the judge.
18. Justice Munyao opposed the petition based on his replying affidavit sworn on 25th January 2013. Apart from adopting the position taken by the JSC, Mr Weda, learned counsel the 2nd respondent, stated that the petitioners did not file any complaint against the Justice Munyao and only Directline did so. Counsel submitted that the petition was an affront to the independence of the Judiciary and the Constitution as the process of removal of a Judge is clearly set out in Article 168 and therefore the petition was incompetent and should be struck out.

Analysis and determination

19. In my ruling of 3rd December 2012, I declined to dismiss the petition in limine on the basis of the 2nd respondent’s preliminary objection that the court had no jurisdiction to inquire into the legality of the process of appointment of a High Court Judge. I held that the High Court has jurisdiction to satisfy itself of the legality of the appointment based on the principle of legality which is firmly founded on the supremacy of the Constitution. Consequently, this judgment deals with the examination of the legality of the process of appointment.
20. I find it necessary to point out from the outset that the purpose of the present inquiry is not to re-evaluate the eligibility or otherwise of the Justice Munyao’s suitability for judgeship. This is a matter within the jurisdiction of the JSC. In the case of *John Waweru Wanjohi & Others v the Attorney General & Others, Kipngetchi Maiyo & Others v the Kenya Land Commission Selection Panel Nairobi*



consolidated Constitutional Petitions Nos. 373 of 2012 and 426 of 2012 (Unreported), where the appointment of Commissioners to the National Land Commission was challenged, I stated that, “The court must of course be careful not to usurp the powers and functions of the various constitutional and statutory bodies involved in appointments. The role of the court is to ensure that the fidelity of the Constitution is maintained.”

21. In a more recent case *Ex-Chief Peter Odoyo Ogada and 10 Others v Independent Electoral and Boundaries Commission and 14 Others* Nairobi CA Civil Appeal No. 307 of 2012 (Unreported), the Court of Appeal in an appeal from the decision of the High Court to set aside the decision of the IEBC naming a Constituency during the delimitation process observed that, “In this regard, we are not oblivious to the fact that the body or organ performing statutory duties has discretion when handling matters falling in its sphere. There is a margin of discretion conferred by the Constitution and the law upon those who make decisions and the test of rationality ensures that any legislation or official act is confined within the purposes set by law. It is the insistence that decisions must be rational that limits arbitrariness and not discretion by itself. Where a body like the IEBC applied its mind to the constitutional and statutory requirements, regarding delimitation, reaching a rational conclusion, the courts should not review that decision. It will have passed the test of reasonableness, because a constitutional review is not for error but for legality. And here the High Court found neither error nor illegality.”
22. The main issue for determination is whether the JSC discharged its mandate in accordance with the constitutional and statutory provisions regarding the appointment of Justice Munyao.

Mandate of the JSC

23. The JSC is one of the constitutional Commissions recognised as under the provisions of Article 248. It is established under Article 171 and its functions, set out in Article 172, include recommending to the President persons for appointment as judges.
24. In addition to these specific functions and powers, the JSC just like all other constitutional commissions and independent offices is required, under Article 249, to amongst other things promote constitutionalism, protect the sovereignty of the people and secure the observance by all State organs of democratic values and principles. Under Article 249(2), such commissions are subject only to the Constitution and are independent and not subject to direction or control by any person or authority. The JSC is also bound by the national values and principles of governance set out in Article 10 and in this respect I would adopt the words of Hon. Justice Musinga in *Andrew Okioti Omtatah v Attorney General* (supra) where he stated that, “In my view, the provisions of Article 172(2) of the Constitution are key in guiding this process One of the national values stated under Article 10 of the Constitution which binds all state organs, state officers, public officers and all persons whenever any of them applies or interprets the Constitution or any law is transparency. One of the ways of promoting transparency in a recruitment exercise of this nature is where the recruiting panel openly lists the names of successful applicants and the grade or marks awarded to the top three or four of the applicants, forward the report to the President then afford him an opportunity to exercise his discretion accordingly.”
25. Article 166 sets out the formal qualification for persons to be appointed a judge of a superior court and it, inter alia, requires such persons to, “have a high moral character, integrity and impartiality.” These requirements on integrity are reinforced by Chapter Six of the Constitution. In the case of *International Centre for Policy & Conflict and 5 others v Attorney General & 4 others* (supra at paras 133,134) the High Court observed that, “In addition, the Constitution and particularly the provisions of Chapter Six are aimed at improving the lives of citizens through good governance. The



processes by which public institutions conduct public affairs, manage public resources, and guarantee the realization of human rights must be in a manner that is free of abuse and with due regard for the rule of law. Impeccable moral and ethical standards on the part of State officers are important prerequisites, in inspiring confidence in the citizens. They also influence, motivate, and enable others to contribute towards the effectiveness and success of the public institutions in which State officers serve or lead.... We are also persuaded in this regard by the decision of the Supreme Court of India in *The Centre for PIL and Another vs The Union of India Writ Petition (C) N0. 348 of 2010*, that the integrity of State officers is crucial in maintaining institutional integrity.”

The Selection Process

26. The germane point of contest in the present matter surrounds the adverse complaints leveled against the Justice Munyao by Directline in the letter dated 22nd May 2012.
27. The First Schedule to the JSC Act contains detailed provisions relating to the procedure for appointment of Judges and the criteria for determining their qualifications. The provisions under the First Schedule map out procedures to ensure that applicants are fairly evaluated and that the most qualified are nominated. The processes involve but not limited to initial review of compliance with constitutional and statutory requirements, reference and background checks and vetting all the way to the taking of votes on the individual applicants by members of the JSC. The procedures also provide for public participation by requiring that the applicants and shortlisted candidates are duly advertised and the interviews are conducted in public.
28. Paragraph 8 of the First Schedule obliges the JSC to investigate and verify, “in consultation with the relevant professional bodies or any other person.” It is in this respect that Hon. Shollei wrote a letter to the LSK to verify whether Justice Munyao was an advocate of good standing and the LSK confirmed that he was and that he had not been convicted on any disciplinary offences. I find and hold that the process adopted by the JSC in making the necessary inquiry was in accordance with the statutory provisions.
29. The other issue is whether the petitioners were entitled to an oral hearing. It has been held that although the requirement for procedural fairness requires that a person to be affected by an administrative action be heard, that requirement does not universally demand an oral hearing. As to whether an oral hearing is necessary is dependent on the circumstances of the case and the nature of the decision to be made (see *Karina v Transport Licensing Board (Supra)* and *R v Army Board of the Defence Council, ex p. Anderson* [1992] QB 169, 187) What is important is that the JSC evaluates the evidence and submissions made and arrives as an informed decision. In the *R v Army Board of the Defence Council, ex p. Anderson (Supra)* the court stated as follows, “It will also depend upon whether there are substantial issues of fact which cannot be satisfactorily resolved on the available written evidence. This does not mean that whenever there is a conflict of evidence in the statements taken, an oral hearing must be held to resolve it. Sometimes such a conflict can be resolved merely by the inherent unlikelihood of one version or the other. Sometimes the conflict is not central to the issue for determination and would not justify an oral hearing. Even when such a hearing is necessary, it may only require one or two witnesses to be called and cross-examined.”
30. One of the ways in which the JSC engenders public participation, as a national value, is by dealing with complaints made by members of the public. It has been emphasized that every public institution has wide latitude in implementing public participation and how this is effected will depend on the context of each case and situation (see *Consumer Federation of Kenya v Attorney General and 2 Others Nairobi Petition No. 2 of 2012 (Unreported)*). It is therefore not necessary that an oral hearing be



conducted at each stage and the principles that I have elucidated in the foregoing paragraph apply with equal force.

31. I have studied the record of the verbatim proceedings of Justice Munyao's interview attached to Hon. Shollei's deposition and he was indeed interviewed extensively on the nature of his practice prior to his appointment, the allegations about the claims filed and generally the matters raised in the letter by Directline. I am satisfied that the JSC cannot be faulted for dealing with the matter in the manner it did particularly given that it had received a response from the LSK regarding the standing of the Judge. As the 1st and 2nd petitioners did not make any complaint to the JSC, it was not necessary for the JSC to call Directline or the 3rd petitioner to present oral evidence.
32. I think it is also important, at this juncture, to understand the background to the complaint raised by Directline. Directline is an insurance company and part of its obligation under the relevant laws concerning third party motor vehicle insurance is to defend claims lodged by injured pedestrians and passengers. Thus the claims lodged by the 1st and 2nd petitioners are effectively defended Directline. It is therefore Directline which instructed it advocates acting for the defendants to amend the respective statements of defence to include a counterclaim with Justice Munyao as a defendant claiming that he did not have instructions to maintain the 1st and 2nd petitioners' claims against the defendants in the original claim. I therefore agree with the respondents that JSC could not deal with the matters which were pending determination in court as it would be in direct breach of the sub-judice rule. JSC, in my view, would have to exercise extreme caution in embarking on such a course particularly given its special position as the body that appoints magistrates.
33. The facts as I have found make it clear that the case of *Trusted Society of Human Rights Alliance v Attorney General and Others* (supra) relied on by the petitioners may be distinguished. In this case the appointing authority, the JSC, actually took into account and interrogated the candidate-judge on the complaints expressed in the letter by Directline in addition to other relevant factors.
34. If I may digress, in the letter dated 22nd May 2012, Directline stated that, "proceedings are at hand to have this advocate, at the very least disbarred We have recently addressed ourselves to the Law Society of Kenya ..." This claim, it turns out, was not borne out by the confirmation by the LSK that the learned Judge was a member of good standing. I think this bring to fore an issue that is increasingly becoming common. That is parties using the court to deal with matters that are within the purview of other constitutional and statutory bodies. In the case of advocates, the Advocates Act prescribes the manner in which the discipline of Advocates is enforced, either through the Advocates Disciplinary Tribunal or the Advocates Complaints Commission. These processes buttress the provisions of paragraph 8 of the First Schedule to the JSC Act which require that JSC to consult the relevant professional bodies as these bodies are mandated by their respective statutes or constitutive instruments to discipline their members or to investigate complaints from members of the public. The petitioners have not placed any material before the court to show that any complaint has been raised by the petitioners in accordance with the provisions of the Advocates Act or to any other authority for that matter. The JSC therefore could not, at least in the circumstances of this case, constitute itself as the relevant regulatory and disciplinary authority for advocates.
35. A similar point was made in the case of *International Centre for Policy & Conflict and 5 Others v Attorney General & 4 Others* (supra) concerning the enforcement of the provisions of Chapter Six of the Constitution. The court observed as follows; "[136] We are in agreement with the Petitioners that an inquiry into the integrity of a candidate for State office whether appointed or elected, is an essential requirement for the enforcement of Chapter Six of the Constitution. The nature and procedures of such inquiry is for Parliament to decide by way of legislation enacted pursuant to Article 80 of the Constitution. The relevant legislation in this respect includes the Leadership and Integrity Act



2012, the Ethics and Anti-Corruption Commission Act 2011, the IEBC Act 2011, the Public Officer Ethics Act 2003 and the Political Parties Act 2011. These Acts provide mechanisms under which inquiry may be made concerning the integrity of the person who aspires to public office. 137. In our view, the key question is whether this Court is the right forum, in the first instance, to undertake an assessment of the integrity of persons presenting themselves for public office. The court ideally operates in an environment of competing legal claims founded on evidence. However, in the private sector, the enforcement of general standards of ethical conduct or professional responsibilities are, by their nature, generally collegial exercises, where peers must judge the conduct of those within their own group, profession, or own organization. In the public sector, enforcement of ethics is, to a large extent, similar to the above procedure in the private sector save that the same is regulated by statute. The mechanisms of inquiry would be set out in the parent statute. Such institutions, for example the IEBC and Ethics and Anti-Corruption Commission (EACC) are bestowed with the necessary powers to conduct, inquire and take disciplinary action. [138] The Court should not descend into that arena of inquiry. Its proper role is to ensure that the inquiry is undertaken to the acceptable standards set by the Constitution. This is what distinguishes the present petitions from the one in the Trusted Society of Human Rights Alliance case (supra). In the Trusted Society case some form of inquiry had been undertaken, and the Court found that despite the said inquiry, there were still unresolved questions about the integrity of the candidate in question. There is no evidence before us of any such inquiry having been undertaken in respect of the 3rd and 4th Respondents' integrity by the relevant institutions established by statute..."

Disposition

34. In conclusion, I find that the JSC was well within its constitutional and statutory mandate in the manner in which it conducted the proceedings leading to the nomination and subsequent appointment of Justice Munyao. It is therefore not necessary to address the applicability of Article 168 of the Constitution which deals with the removal of judges. Consequently, the petition dated 18th October 2012 must be dismissed and is hereby dismissed.
35. The petition seeks to uphold fidelity to the Constitution by entrenching transparency and integrity in our institutions and in the circumstance I shall not award costs.

DATED and DELIVERED at NAIROBI this 30th day of April 2013.

D.S. MAJANJA

JUDGE

Mr Kinyanjui instructed by Samuel Kinyanjui, Advocates for the petitioners.

Mr Issa instructed by the Issa and Company Advocates for the 1st respondent.

Mr Weda instructed by Weda and Company Advocates for the 2nd respondent.

