



REPUBLIC OF KENYA

High Court at Nairobi (Nairobi Law Courts)

Petition 480 of 2012

ALBERT LUKORU LODUNA ..... 1<sup>ST</sup> PETITIONER

WYCLIFFE AKUTA ..... 2<sup>ND</sup> PETITIONER

SAMUEL KINYANJUI ..... 3<sup>RD</sup> PETITIONER

AND

JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT

SILAS MUNYAO ..... 2<sup>ND</sup> RESPONDENT

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

OFFICE OF THE PRESIDENT ..... 4<sup>TH</sup> RESPONDENT

COMMISSIONER FOR THE IMPLEMENTATION

OF THE CONSTITUTION ..... 4<sup>TH</sup> RESPONDENT

RULING

Introduction

1. The subject of this ruling is a preliminary objection raised by the 2<sup>nd</sup> respondent, Honourable Justice Sila Munyao. The issue is whether a High Court judge, duly appointed, can be subject of a suit to remove him from office on the basis of a complaint raised about the appointment procedure.

2. It is common ground that Honourable Justice Sila Munyao, was appointed by His Excellency the President in accordance with the advice of the Judicial Service Commission (the JSC) on 3<sup>rd</sup> October 2012 as evidenced by **Gazette Notice No. 14346**.

Petitioner's Case

3. The petitioner's case as set out in the petition dated 18<sup>th</sup> October 2012 and it seeks the following reliefs from the court.

(a) *A declaration that the decision and recommendation by the 1<sup>st</sup> respondent to the 4<sup>th</sup>*

respondent that the 2<sup>nd</sup> respondent be appointed a judge of the Environment and Land Court is contrary to the Constitution.

(b) A declaration that the 2<sup>nd</sup> respondent does not meet or pass the mandatory stipulation in Chapter Six of the Constitution on integrity and is unfit to hold the office of a judge.

(c) An injunction to restrain the 4<sup>th</sup> respondent from appointing the 2<sup>nd</sup> respondent as a judge of the Environment and Land Court.

(d) The petitioners be paid the costs of this petition.

(e) Such other order and relief as this court may deem fit.

4. The petition is supported by the affidavit of Samuel Kinyanjui, an advocate of the High Court and the 3<sup>rd</sup> petitioner, sworn on 18<sup>th</sup> October 2012. In addition to the petition, the petitioners filed an originating Notice of Motion dated 18<sup>th</sup> October 2012, in which they sought inter alia, a conservatory order that, “this court be pleased to issue a conservatory or an injunction restraining the 4<sup>th</sup> respondent from appointing the 2<sup>nd</sup> respondent as a judge of the Environment and Land Court Division of the High Court.”

5. The petition is opposed by the 1<sup>st</sup> respondent, the JSC, by way of the affidavit of the Chief Registrar of the Judiciary and Secretary to the JSC, Honourable Gladys Boss Shollei. The 2<sup>nd</sup> respondent has filed a Notice of the Preliminary objection dated 26<sup>th</sup> October 2012.

### **The Preliminary Objection**

6. The preliminary objection filed by the 2<sup>nd</sup> respondent states as follows;

(1) The 2<sup>nd</sup> respondent has already been recommended [Article 172(1)(a)] for appointment by the President and the President appointed him as a judge of the Land and Environment with effect from 1.10.2012 through Gazette Notice No. 14346 dated 3/10/2012 [Special Issue Vol 1 CXIV – No. 95 Dated 5<sup>th</sup> October 2012]. His removal is now governed by Article 168(2) of the Constitution.

(2) Prayers (a), (b) and (c) of the petition dated 18.10.2012 have been overtaken by events and would contravene the provisions of Article 160(1) and 168 of the Constitution.

(3) The Court is being invited to look into the matters, facts and law in Kapenguria SRMCC No 27 of 2008 and SRM CC No 28 of 2008 which are still pending in contravention of the sub judicial rule.

(4) The petition is mischievous, an abuse of the court process meant to intimidate, harass and humiliate the 2<sup>nd</sup> respondent in order to interfere with the independence of the judiciary.

(5) The provisions of the Leadership and Integrity Act, 2012 are not applicable in the circumstances alluded to this petition.

(6) The petition is attempting to use the provisions of the Constitution in the Leadership and Integrity Act, 2012 retrospectively and in breach of the 2<sup>nd</sup> respondent's fundamental rights.

(7) The 1<sup>st</sup> respondent supported the 2<sup>nd</sup> respondent's preliminary objection.

7. I consider that only grounds 1 and 2 above are matters which fall within the meaning of a preliminary objection as set out by Sir Charles Newbold in the famed case of **Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd [1973] EA** as the issue goes to the jurisdiction of

this court and the primary fact upon which the objection is based is not in dispute.

### **Appointment, Tenure and Removal of Judges**

8. This case turns on the interpretation of the provisions of the Constitution concerning the appointment of judges and I will set out the material parts before I consider the parties' arguments and make the determination.

9. Under **Article 172 (a)**, the Judicial Service Commission, established under **Article 171**, is empowered to, "**recommend to the President persons for appointment as judges.**" The appointment, tenure and removal of judges is provided for in **Articles 166, 167 and 168** of the Constitution which, at the material parts, provide as follows;

**166(1) The President shall appoint—**

**(a) the Chief Justice and the Deputy Chief Justice, in accordance with the recommendation of the Judicial Service Commission, and subject to the approval of the National Assembly; and**

**(b) all other judges, in accordance with the recommendation of the Judicial Service Commission.**

**(2) Each judge of a superior court shall be appointed from among persons who—**

**(a) hold a law degree from a recognised university, or are advocates of the High Court of Kenya, or possess an equivalent qualification in a common-law jurisdiction;**

**(b) possess the experience required under clause (3) to (6) as applicable, irrespective of whether that experience was gained in Kenya or in another Commonwealth common-law jurisdiction; and**

**(c) have a high moral character, integrity and impartiality.**

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**167. (1) A judge shall retire from office on attaining the age of seventy years, but may elect to retire at any time after attaining the age of sixty-five years.**

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**(5) The Chief Justice and any other judge may resign from office by giving notice, in writing, to the President.**

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

**(a) inability to perform the functions of office arising from mental or physical incapacity;**

**(b) a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament; Tenure of office of the Chief Justice and other judges.**

**(c) bankruptcy; (d) incompetence; or**

**(e) gross misconduct or misbehaviour.**

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

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

- (4) *The Judicial Service Commission shall consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President.*
- (5) *The President shall, within fourteen days after receiving the petition, suspend the judge from office and, acting in accordance with the recommendation of the Judicial Service Commission—*
- (a) *in the case of the Chief Justice, appoint a tribunal consisting of—*
- (i) *the Speaker of the National Assembly, as chairperson;*
- (ii) *three superior court judges from common-law jurisdictions;*
- (iii) *one advocate of fifteen years standing; and*
- (iv) *two other persons with experience in public affairs; or*
- (b) *in the case of a judge other than the Chief Justice, appoint a tribunal consisting of—*
- (i) *a chairperson and three other members from among persons who hold or have held office as a judge of a superior court, or who are qualified to be appointed as such but who, in either case, have not been members of the Judicial Service Commission at any time within the immediately preceding three years;*
- (ii) *one advocate of fifteen years standing; and*
- (iii) *two other persons with experience in public affairs. (6) Despite Article 160 (4), the remuneration and benefits payable to a judge who is suspended from office under clause (5) shall be adjusted to one half until such time as the judge is removed from, or reinstated in, office.*
- (7) *A tribunal appointed under clause (5) shall—*
- (a) *be responsible for the regulation of its proceedings, subject to any legislation contemplated in clause (10); and*
- (b) *inquire into the matter expeditiously and report on the facts and make binding recommendations to the President.*
- (8) *A judge who is aggrieved by a decision of the tribunal under this Article may appeal against the decision to the Supreme Court, within ten days after the tribunal makes its recommendations.*
- (9) *The President shall act in accordance with the recommendations made by the tribunal on the later of—*
- (a) *the expiry of the time allowed for an appeal under clause (8), if no such appeal is taken; or*
- (b) *the completion of all rights of appeal in any proceedings allowed for under clause (8), if such an appeal is taken and the final order in the matter affirms the tribunal's recommendations.*
- (10) *Parliament shall enact legislation providing for the procedure of a tribunal appointed under this Article.*

### **The Submissions**

10. Mr Weda, counsel for the 2<sup>nd</sup> respondent, argued that upon appointment of a judge, the JSC became *functus officio* as it had performed its function under **Article 171** and **172(1)(a)** as read with **Article 166(1)(b)**. He submitted that the Court cannot reverse the steps taken through a petition of the

kind filed and now that the subject is a duly appointed judge, he cannot be removed from his position except in accordance with the Constitution. That in order to remove a duly appointed judge, there are specific grounds for removal set out in **Article 168(2)** and any complaint in respect of the grounds must be lodged with the JSC. That the petition filed herein is not one envisaged under **Article 168(2)**. Counsel asserted that these provisions protect the independence of the judiciary.

11. Mr Kinyanjui, the 3<sup>rd</sup> petitioner and counsel for the 1<sup>st</sup> and 2<sup>nd</sup> petitioner, submitted that their case is dealing with the 2<sup>nd</sup> respondent's acts prior to his appointment and the issue is whether the petitioner is a fit and proper person to be appointed. Counsel submitted that the High Court has firmly established that it has the jurisdiction, power and mandate to interrogate a process leading to the appointment of any public official and this interrogation covers not only the formalities but also the substance. Counsel asserted that the Judiciary was subject to the Constitution and to hold that the process of appointment cannot be interrogated, if it is unlawful, is to undermine the Constitution.

12. Ms Mutua, who appeared for the JSC, adopted on the submissions made by Mr Weda and relied on the affidavit of Honourable Shollei to oppose the petition.

### **Analysis and determination**

13. The issue for determination requires consideration of the various provisions of the Constitution and I think the principle of the harmonisation is the guiding principle in such an endeavour. This principle was set out in the case of ***Olum v Attorney General of Uganda [2002]2 EA 508*** where the Supreme Court of Uganda stated, *‘the entire Constitution has to be read as an integrated whole and no one particular provision destroying the other but each sustaining the other. Constitutional provisions must be construed as a whole in harmony with each other without insubordinating any one provision to the other.’*

14. The provisions regarding the appointment, tenure and removal of judges are to be read and applied as against two key provisions of the Constitution. First, **Article 159(1)** which vests judicial authority of the people of Kenya in the courts and tribunals established by the Constitution. The second is **Article 160**, which provides that in exercise of judicial authority, ***“The Judiciary – shall be subject only to this Constitution and the law shall be subject only to this Constitution and the law shall not be subject to the control or direction of any person or authority.”*** These two provisions protect the judiciary from unnecessary interference; formal and informal, except as provided by the Constitution.

15. It is not disputed that, the 2<sup>nd</sup> respondent was duly appointed through the procedures provided by the Constitution and the ***Judicial Service Act, 2011***. The petitioners' grievance is that they have damning evidence of the ***“2<sup>nd</sup> respondent's malfeasance and unprofessional conduct and nefarious activity calling into question his integrity and suitability for appointment as a judge”*** which entitle the Court to investigate in order to satisfy itself that the Constitution was followed.

16. Although counsel appearing in the matter did not cite any cases to support their positions. I drew their attention to a trilogy of cases which I considered relevant to the matter at hand and asked the parties to comment on them. These three cases are ***Federation of Women Lawyers of Kenya (FIDA – K) and Others v Attorney General and Others Nairobi Petition No. 102 of 2011 (Unreported)***, ***Trusted Society of Human Right Alliance v Attorney General Nairobi Petition No. 299 of 2012 (Unreported)*** and ***Jeanne W. Gacheche and 6 Others v Judges and Magistrate's Vetting Board and Others Nairobi Judicial Review No. 295 of 2011, 433, 434 and 438 of 2012 (Unreported)***.

17. In the ***Federation of Women Lawyers of Kenya (FIDA – K) Case (Supra)***. The issue as stated by the judges in that case was, ***“In short .... whether the JSC violated the provisions of Article 27 of the Constitution in making recommendation of five judges to the President for appointment as judges of the Supreme Court and secondly whether the court has jurisdiction to issue orders as sought without contravening Article 168 of the Constitution.”***

18. In answering the question of jurisdiction vis-a-vis its relation to the process of removal of a

judge the court had this to state, ***“In our view the jurisdiction of this court under Article 165 is completely different from that of a Tribunal under Article 168 .... The jurisdiction of this court is dependent on the process and constitutionality of appointment. In this sense, if the JSC, a state organ does anything or omits to do something under the authority of the Constitution and which we find contravenes that Constitution, that act or omission when so before the High Court shall be invalid.... Accordingly, we find and hold that we have the requisite jurisdiction. We think the objection raised by the respondents against the petition as concerns our powers to determine the dispute is without merit.”***

19. The second case was that of ***Trusted Society of Human Right Alliance (Supra)***. In this case, the court was requested to intervene in the appointment of the Chairperson of the Ethics and Anticorruption Commission. The respondents argued that the petitioner had the opportunity to present its complaints against suitability of the candidate before the relevant selection panel and the Parliamentary Committee. In answer to this argument, the court adopted the findings in the FIDA-K case and stated as follows, ***“[59] We have already noted that anybody has a right to bring a Petition challenging the constitutionality of an action, and it should not matter that the Petitioner did not present any complaints during the selection or vetting process. The fact that the person who was appointed does not meet the constitutional threshold will not change merely because the person who brings the matter to Court did not raise it during the selection process, and the Court cannot shy away from making such a determination if sufficient evidence is presented before it. Needless to say, the Petitioner must exercise vigilance to file such a case within a reasonable time following the appointment. In addition, the Court must be satisfied that the constitutional challenge is not brought in bad faith or merely for purposes of harassing or delaying legitimate governmental processes. In this case, it has not been alleged that the Petitioner willfully sat on information and delayed bringing it to light in order to obstruct the appointment process through Court action. On the contrary, the evidence that has emerged shows that the Petitioner knew that the information it had was raised in Parliament. It, therefore, had a right to expect that the matter would be thoroughly investigated and debated before the appointment was made. The Petitioner’s specific argument is that this was neither done by Parliament nor by the Executive as it had expected. It therefore follows that this was the earliest point in the process when the Petitioner could bring the challenge. Consequently, we hold that the Petition is not moot.”***

20. The third and more recent case is that of ***Jeanne W Gacheche and 6 others v Judges and Magistrate’s Vetting Board Others (Supra)***. The corpus of this case was whether the High Court had jurisdiction, in light of the provisions of **section 23** of the **Sixth Schedule** to Constitution, to inquire into the legality or otherwise of the determination of the Board despite a limitation to the High Court’s jurisdiction. In considering the provisions of the **Sixth Schedule**, the court noted, ***“in spite of the gallant effort to insulate the vetting process from the operation of constitutional provisions .... we observe that the drafter did not deem it fit to exclude the operation of Article 165 to the vetting process....”*** The Court concluded that it had jurisdiction to interrogate the process and determine whether it was within the Constitution.

21. Mr Weda’s comment on these three cases was that they do not apply to the present circumstances and that the petitioner ought to have invoked judicial review provisions to enable the court examine the process. Counsel also stated that the Court must have in mind independence of the judiciary, conflict of interest and embarrassment of the judicial officer.

22. On the other hand, Mr Kinyanjui submitted that the three cases established the general principle of legality and that independence of the judiciary cannot exist outside the parameters of the Constitution.

23. These cases, I think establish the principle of legality which is firmly founded on the Supremacy of the Constitution. It is from the Constitution that all powers and functions flow and the principle of the rule of law recognised in the Preamble and **Article 10(2)(a)** means that nothing is beyond the prying eye of the High Court to satisfy itself that the State organ, office or any person acted within the four corners of the Constitution. Under **Article 165(3)(d)(ii)**, the High Court has jurisdiction to hear any question respecting the interpretation of the Constitution including the, ***“question whether anything said***

***to be done under authority of this Constitution or of the law is inconsistent with, or in contravention of, this Constitution.***” Article 258 (1) which grants, ***“Every person has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention.”*** These provisions of the Constitution and the trilogy of cases I have cited firmly entrench the principal of legality which is the central function of the High Court to adjudicate.

24. The case of ***FIDA –K Case***, at least on the preliminary issue, is on all fours with the present case. The learned judges clearly elucidated the principle that the jurisdiction of the court is not taken away merely because the President has exercised his authority to appoint a judge. I think a contrary view would undermine the legality principle which has since been affirmed in the latter two cases.

25. It follows therefore that any notion of embarrassment to the judge or the fact that another High Court judge may be in a conflicted position to determine the issues at hand must give way to the dictates of the Constitution and its values. If there is any interference with the independence of the judiciary, it is clearly provided for by the Constitution itself.

### **Conclusion and disposition**

26. I therefore find and hold that the High Court has jurisdiction to inquire into the process of appointment of a Judge of the High Court to satisfy itself of the legality of the appointment. The petitioners are entitled to be heard on prayer (a) of the petition and consequently the preliminary objection raised is dismissed with no order as to costs.

27. In exercise of my inherent jurisdiction, I also strike out the 3<sup>rd</sup> and 4<sup>th</sup> respondents; the Office of the President and the Commission for the implementation of the Constitution. The interests of the State are well represented by the Attorney General as a party and I do not think the Commission for the Implementation of the Constitution has anything to do with the appointment of judges of the superior courts.

**DATED and DELIVERED at NAIROBI** this 3<sup>rd</sup> day of December 2012

**D. S. MAJANJA**

**JUDGE**

Mr A. Kinyanjui instructed by Alexander Kinyanjui Advocates for the petitioner.

Mr Weda instructed by Weda and Company Advocates for the 2<sup>nd</sup> respondent.

Miss Mutua instructed by the Issa and Company Advocates for the 1<sup>st</sup> respondent.