



REPUBLIC OF KENYA



KENYA LAW

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**Mwilu v Judicial Service Commission & another; Dari Limited & another
(Interested Parties) (Petition E086 of 2025) [2025] KEHC 4764 (KLR)
(Constitutional and Human Rights) (10 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 4764 (KLR)

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

PETITION E086 OF 2025

AB MWAMUYE, J

APRIL 10, 2025

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 20, 21, 22, 23, 24, 25 (C), 28, 33, 47, 50, 159,
160, 163, 165 (6), 166, 168, 172, 249, 252, 258, 259 AND SECTION 23 OF PART 5 OF
THE 6TH SCHEDULE OF THE CONSTITUTION OF THE REPUBLIC OF KENYA;**

AND

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

AND

**IN THE MATTER OF THE JUDICIAL SERVICE
ACT, CHAPTER 8A OF THE LAWS OF KENYA**

AND

**IN THE MATTER OF JUDICIAL SERVICE (CODE
OF CONDUCT AND ETHICS) REGULATIONS, 2020**

AND

**IN THE MATTER OF ALL PETITIONS UNDER CONSIDERATION BY
THE JUDICIAL SERVICE COMMISSION (JSC) FOR THE REMOVAL FROM
OFFICE OF ALL SEVEN (7) JUDGES OF THE SUPREME COURT OF KENYA**

AND

**IN THE MATTER OF VIOLATION OF THE RIGHTS OF JUDGES OF THE SUPREME
COURT AGAINST VILIFICATION IN THEIR EXERCISE OF JUDICIAL FUNCTIONS**

BETWEEN

HON LADY JUSTICE PHILOMENA MBETE MWILU PETITIONER

AND



THE JUDICIAL SERVICE COMMISSION 1ST RESPONDENT
THE ATTORNEY GENERAL 2ND RESPONDENT
AND
DARI LIMITED INTERESTED PARTY
NELSON HAVI INTERESTED PARTY

RULING

(On the 2nd Interested Party's Notice of Preliminary Objection dated 04/03/2025 AND whether the Petition herein raises substantial questions of law that merit certification under Article 165(4) of the Constitution for hearing and determination by an uneven bench of not less than three judges)

Introduction and Background

1. This Ruling concerns the two Notice of Preliminary Objections filed in two Constitutional Petitions being Milimani HCCHR Pet. No. E086 of 2025 and Milimani HCCHR Pet. No. E089 of 2025 both of which were dated 04/03/2025 and were filed by the 2nd Interested Party in each Petition, Nelson Havi.
2. The Parties in Milimani HCCHR Pet. No. E086 of 2025 are:
 - i. Petitioner – Hon. Lady Justice Philomena Mbete Mwilu
 - ii. 1st Respondent – Judicial Service Commission
 - iii. 2nd Respondent – Attorney General
 - iv. 1st Interested Party – Dari Limited
 - v. 2nd Interested Party – Nelson Havi
3. The Parties in Milimani HCCHR Pet. No. E089 of 2025 are:
 - i. Petitioner – Hon. Justice Mohammed Kadhar Ibrahim
 - ii. 1st Respondent – Judicial Service Commission
 - iii. 2nd Respondent – Attorney General
 - iv. 1st Interested Party – Kenya Magistrates and Judges Association
 - v. 2nd Interested Party – Nelson Havi
4. Both Petitions challenge and seek the permanent halt of the subsistence and progression of Judicial Service Petitions initiated against the respective Petitioner.
5. While the 2nd Interested Party's Notice of Preliminary Objections dated 04/03/2025 are almost entirely identical, there is a slight variation in each. Accordingly, it is necessary for this Court to articulate the grounds stated in each of the Preliminary Objections.



6. In Milimani HCCHR Pet. No. E086 of 2025, the Notice of Preliminary Objection raised against the Hon. Lady Justice Philomena Mbete Mwilu's Petition states six (6) grounds, namely:

- i. The High Court has no jurisdiction to inquire into proceedings by the 1st Respondent for the appointment to and/or removal from office of the Deputy Chief Justice of the Republic of Kenya under Articles 166 (1) (a) and 168 (4), 5 (a) and (8) of The Constitution of Kenya.
- ii. The High Court has no jurisdiction to inquire into proceedings for the removal from office of the Deputy Chief Justice of the Republic of Kenya as a deputy head of an Arm of the Government of the Republic of Kenya designated by Articles 1(3) (c) and 2(3) and Chapter Ten of The Constitution of Kenya.
- iii. The Deputy Chief Justice of the Republic of Kenya, a deputy head of an Arm of the Government of the Republic of Kenya and a State officer is not "a person" for purposes of institution of a petition for enforcement of the Bill of Rights under Articles 22(1) and (2) of The Constitution of Kenya or institution of a petition for enforcement of The Constitution of Kenya under Articles 258(1) and (2) thereof. The Petitioner cannot therefore, sue in her capacity as Deputy Chief Justice of the Republic of Kenya.
- iv. The Petitioner is bound to pursue the only remedy available to her under Article 168 (8) of The Constitution of Kenya and ought first, to subject herself to the jurisdiction of the 1st Respondent in any event, and the High Court therefore, lacks jurisdiction over the Petitioner's action.
- v. The action by the Petitioner does not raise a reasonable cause of action for a constitutional petition, the action is not justiciable but hypothetical and speculative
- vi. The Notice of Preliminary Objection dated 21st February, 2025 filed before the 1st Respondent by the Petitioner challenging the jurisdiction of the 1st Respondent on the same grounds relied upon in the Petition has not been heard and determined. The filing of this action on the same 7 grounds relied upon in the Notice of Preliminary Objection renders the Petition sub-judice and an abuse of the process of the Court."

7. In Milimani HCCHR Pet. No. E089 of 2025, the Notice of Preliminary Objection raised against the Hon. Mr. Justice Mohammed Kadhar Ibrahim's Petition states four (4) grounds, namely:

- i. The High Court has no jurisdiction to inquire into proceedings by the 1st Respondent for the appointment to and/or removal from office of a Judge of the Supreme Court of Kenya under Articles 166 (1) (a) and 168 (4), 5 (a) and (8) of The Constitution of Kenya.
- ii. A Judge of the Supreme Court of Kenya is not a "person" for the purposes of institution of a petition for enforcement of the Bill of Rights under Articles 22(1) and (2) of the Constitution of Kenya or the institution of a petition for the enforcement of The Constitution of Kenya under Articles 258(1) and (2) thereof.



- iii. The Petitioner is bound to pursue the only remedy available to him under Article 168 (8) of The Constitution of Kenya and ought first, to subject him to the jurisdiction of the 1st Respondent in any event, and the High Court therefore, lacks jurisdiction over the Petitioner's action.
 - iv. The action by the Petitioner does not raise a reasonable cause of action for a constitutional petition, the action is not justiciable but hypothetical and speculative.”
8. The parties filed and exchanged responses and written submissions on the Preliminary Objections, which this Court directed would be heard and determined before and in priority to the hearing and determination of either the interlocutory applications filed by the respective Petitioners or the hearing and determination of the substantive Petition. Due to the overlap, the two Preliminary Objections were heard together by way of highlighting of written submissions on the same day. The Court had also directed the parties to canvass the question of whether the Petition herein raises substantial questions of law that merit certification under Article 165(4) of the Constitution for hearing and determination by an uneven bench of not less than three judges.
9. After hearing the parties, and after considering their respective filings, I have identified the following EIGHT (8) as the issues for determination applicable to both Preliminary Objections, as well as those unique to the respective matter, in which case the same is indicated in the issue:
 - a. Whether an Interested Party may validly raise a Preliminary Objection in a Constitutional Petition in circumstances where the Respondent or Respondents have not done so. [applicable to both Petitions]
 - b. Whether the High Court has jurisdiction to inquire into proceedings by the 1st Respondent, the Judicial Service Commission, in relation to a Petition before the Judicial Service Commission relating to the removal from office of a Deputy Chief Justice and/or a Judge of the Supreme Court of Kenya pursuant to Articles 166 (1) (a) and 168 (4), 5 (a) and (8) of the Constitution of Kenya; and whether the Petitioners should instead follow the procedure set out under Article 168(8) without recourse to the High Court. [applicable to both Petitions]
 - c. Whether the High Court has jurisdiction to inquire into proceedings for the removal from office of the Deputy Chief Justice of the Republic of Kenya as a deputy head of an Arm of the Government of the Republic of Kenya designated by Articles 1(3) (c) and 2(3) and Chapter Ten of The Constitution of Kenya. [raised only in Milimani HCCHR Pet. No. E086 of 2025]
 - d. Whether the Deputy Chief Justice of the Republic of Kenya, a deputy head of an Arm of the Government of the Republic of Kenya and a State officer is "a person" for purposes of institution of a petition for enforcement of the Bill of Rights under Articles 22(1) and (2) of the Constitution of Kenya or institution of a petition for enforcement of the Constitution of Kenya under Articles 258(1) and (2) thereof. [raised only in Milimani HCCHR Pet. No. E086 of 2025]
 - e. Whether a Judge of the Supreme Court of Kenya is a “person” for the purposes of institution of a petition for enforcement of the Bill of Rights under Articles 22(1) and (2) of the Constitution of Kenya or the institution of a petition for the enforcement of the Constitution of Kenya under Articles 258(1) and (2) thereof. [raised only in Milimani HCCHR Pet. No. E089 of 2025]



- f. Whether either or both Petitions raise a reasonable cause of action for a constitutional petition, and whether the action is justiciable and not hypothetical and/or speculative. [applicable to both Petitions]
- g. Whether by dint of the Petitioner in Milimani HCCHR Pet. No. E086 of 2025 filing a Notice of Preliminary Objection dated 21st February, 2025 filed before the 1st Respondent by the Petitioner challenging the jurisdiction of the 1st Respondent on the same grounds relied upon in her Petition, a Preliminary Objection that has not been heard and determined by the 1st Respondent, Milimani HCCHR Pet. No. E086 of 2025 is rendered sub-judice and an abuse of the process of the Court. [raised only in Milimani HCCHR Pet. No. E086 of 2025]
- h. Whether either or both Petitions raise substantial questions of law that merit certification under Article 165(4) of the Constitution for hearing and determination by an uneven bench of not less than three judges. [applicable to both petitions]

Analysis and Determination

A. Whether an Interested Party may validly raise a Preliminary Objection in a Constitutional Petition in circumstances where the Respondent or Respondents have not done so. [applicable to both Petitions]

10. The 2nd Interested Party and the other parties who support the Preliminary Objections, in an issue applicable to both Petitions, submitted that he is entitled in law to raise a Preliminary Objection to a Constitutional Petition on the grounds of jurisdiction, even where neither Respondent has raised the question of jurisdiction, because jurisdiction is central to the competency of the Court to hear and determine the petition before it. They contended that an Interested Party is not a mere bystander who should allow their interests to be affected by a court that doesn't have jurisdiction, and thus an interested party should be allowed to raise a question of jurisdiction even if the respondent(s) has not. The 2nd Interested Party stressed that jurisdiction is a fundamental question that can be raised at any stage by any party, or even by the Court, since it is trite law that "jurisdiction is everything, and without it a court cannot proceed even a single step".
11. The Petitioners and the 1st Interested Party in Milimani HCCHR Pet. No. E086 of 2025, the Kenya Magistrates and Judges Association, took a diametrically opposing view. They submitted that an interested party's role in a constitutional petition is by definition ancillary, and that an interested party cannot introduce a matter that the principal parties themselves have not raised. In particular, they cited the Supreme Court's guidance on the role of interested parties to the effect that an interested party may only support or oppose issues already before the Court, but "may not frame its own fresh issues or introduce new issues for determination by the Court."
12. This principle has been enunciated severally by the Apex Court in cases such as *Methodist Church in Kenya -v- Mohamed Fugicha & 3 Others* (Supreme Court Petition No. 16 of 2014) and *Francis Kariuki Muruatetu & Another -v- Republic* (Supreme Court Petition 15 of 2015), to prevent interested parties from expanding or altering the substantive controversy. Interested parties are to take the case before the court as is, and their participation is limited to articulating their position with regard to the case and how it impacts on their interests.
13. To my mind, the raising of a challenge to jurisdiction by an interested party is not a 'new or fresh issue' or an expansion or contraction of the case by that interested party. Instead, it is an interested party requesting the court to consider and determine a question that the court itself can suo moto raise, the question of whether it has the jurisdiction to hear and determine the matter before it. There is no better



encapsulation of the importance of jurisdiction that the oft quoted passage from the seminal case of the Owners of Motor Vessel “Lilian S” -v- Caltex Oil (Kenya) Ltd. [1989] KLR 1,

“Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”

14. Consequently, it is the finding of this Court that the 2nd Interested Party’s twin Preliminary Objections properly raised pure questions of law that this Court must determine in terms of jurisdiction.

B. Whether the High Court has jurisdiction to inquire into proceedings by the 1st Respondent, the Judicial Service Commission, in relation to a Petition before the Judicial Service Commission relating to the removal from office of a Deputy Chief Justice and/or a Judge of the Supreme Court of Kenya pursuant to Articles 166 (1) (a) and 168 (4), 5 (a) and (8) of The Constitution of Kenya; and whether the Petitioners should follow the procedure set out under Article 168(8) without recourse to the High Court. [applicable to both Petitions]

15. The 2nd Interested Party and the other parties in support of the Preliminary Objections contend that the High Court lacks the jurisdiction to exercise supervisory power over the Judicial Service Commission or to intervene in the process by which the Judicial Service Commission (JSC) processes and progresses petitions for removal of judges received by it pursuant to Article 168 of the Constitution. They did so by likening the JSC to the former Judges and Magistrates Vetting Board established under Section 23 of the Sixth Schedule to the Constitution which was immune from the supervisory powers of and intervention by the High Court. They stated that the JSC is the successor to the Board, and as such the JSC is similarly above and immune from judicial challenges other than appeal to the Supreme Court after the process undertaken by an Article 168 Tribunal.
16. They further argued that, in the alternative, Article 168 of the Constitution contains an implied ouster of the jurisdiction of the High Court, since such jurisdiction would be so fundamental that it would necessarily require to be expressly set out in either Article 165 on the establishment of the High Court or in Article 168 on the removal of judges of the superior courts.
17. The Petitioners and the Kenya Magistrates and Judges Association (KMJA) countered that where the Constitution ousts the jurisdiction of the High Court, the Constitution expressly states so. They pointed to the ouster clauses with respect to the High Court expressed at Article 165(5)(a) with respect to matters falling within the exclusive jurisdiction of the Supreme Court and Article 165(5)(b) with respect to matters falling within the jurisdiction of the Employment and Labour Relations Court and the Environment and Land Court.
18. With respect to the comparison and linkage of the JSC to the former Vetting Board, the Petitioners and the KMJA submitted that the two are not the same, and arose out of two entirely different situations. Further, they argued that in any case the immunity and ouster that the Board enjoyed was expressly provided for under the Constitution in the Sixth Schedule to the Constitution at Section 23(2) which reads:

“A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court.”



19. To my mind, had the Constitution wished to immunize the process leading to the removal of a judge from office pending before the JSC from question in or review by the High Court then nothing would have been easier than for the framers of the Constitution to have reproduced Section 23(2) of the Sixth Schedule to the Constitution in Article 168 or in Article 165. Without such an express ouster clause, then the JSC, when it acts quasi-judicially such as in considering petitions for the removal of a judge of a superior court, falls within the supervisory jurisdiction of the High Court set out under Article 165(6) and (7) of the Constitution.
20. Article 165(6) and (7) set out the supervisory jurisdiction of the High Court in the following terms:
 - “(6). The High Court has supervisory jurisdiction over the subordinate courts and over any person, body, or authority exercising a judicial or quasi-judicial function, but not over a superior court.
 - (7). For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.” [Emphasis Mine]
21. Removal proceedings within the Judicial Service Commission are undoubtedly quasi-judicial in nature. Given that the JSC is not a superior court, a plain reading of Article 165(6) leads to the inescapable conclusion that the JSC while exercising a quasi-judicial function fits into the persons, bodies, or authorities subject to the constitutionally established supervisory jurisdiction of the High Court.
22. Had the framers of the Constitution intended otherwise, nothing would have been simpler than to add the phrase “or the Judicial Service Commission” to the exclusion contained in Clause 6.
23. Furthermore, Article 165(7) empowers the High Court, in exercise of its supervisory jurisdiction, to make any order or to give any direction as it considers appropriate towards ensuring the fair administration of justice, including quashing proceedings before the Judicial Service Commission. The JSC is not insulated from that provision of our apex law by any Article or Clause of the Constitution.
24. This is not a novel question. The High Court’s previous decision in Hon. Lady Justice Philomena Mbete Mwilu -v- JSC & 2 Others (Petition E295 of 2018) affirmed that the High Court has jurisdiction to review and restrain the JSC’s removal process in appropriate circumstances. The High Court proceeded to quash the JSC’s decision to require the Petitioner therein, who is one of the Petitioners herein, to respond to a petition that had been initiated by the DPP and DCI, finding that those state organs lacked locus standi to invoke the removal process and that the JSC’s actions violated the Constitution.
25. In that regard, I find that the High Court’s supervisory jurisdiction under Article 165(6) and (7) extends to the proceedings and decisions of the Judicial Service Commission taken in its capacity under Article 168 of the Constitution and the High Court has jurisdiction to inquire into proceedings by the 1st Respondent, the Judicial Service Commission, in relation to a Petition before the Judicial Service Commission relating to the removal from office of a Deputy Chief Justice and/or a Judge of the Supreme Court of Kenya pursuant to Articles 166 (1) (a) and 168 (4), 5 (a) and (8) of the Constitution of Kenya; and the Petitioners have recourse to the High Court and they are not limited only to the procedure under Article 168(8) without recourse to the High Court.



c. Whether the High Court has jurisdiction to inquire into proceedings for the removal from office of the Deputy Chief Justice of the Republic of Kenya as a deputy head of an Arm of the Government of the Republic of Kenya designated by Articles 1(3) (c) and 2(3) and Chapter Ten of The Constitution of Kenya. [raised only in Milimani HCCHR Pet. No. E086 of 2025]

26. The reasoning under issue (b) above as articulated under Paragraphs (15) to (25) above fully applies to this issue (c) in respect of whether the High Court has supervisory powers and authority with respect to the Judicial Service Commission's processing of a petition to remove a judge of the superior court.
27. I proceed to add that Article 1(3)(c) cited by the 2nd Interested Party in his Preliminary Objection reads "Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution - - the Judiciary and independent tribunals" serves to underscore that the High Court exercises the delegated sovereign power of the People of Kenya; which the People of Kenya exercised to frame Articles 165(6) and (7) in the way they did and also by their choice not to insulate the Judicial Service Commission from the supervisory jurisdiction of the High Court by way of an ouster clause.
28. Article 2(3) cited by the 2nd Interested Party reads "The validity or legality of this Constitution is not subject to challenge by or before any court or other State Organ." Neither the 2nd Interested Party nor any of the parties supporting the Preliminary Objections has shown how the Petitions herein challenge the validity or legality of the Constitution of Kenya. The Petitioners are not saying that the Constitution is invalid or illegal. On the contrary, they appear to be saying that it is a valid and legal supreme law that should and does afford them redress to the High Court in relation to their grievances.
29. Thirdly, the 2nd Interested Party has cited Chapter 10 of the Constitution, which is on 'the Judiciary.' Neither the 2nd Interested Party nor any of the parties supporting the Preliminary Objections has shown how the Petitions contravene the nature, structure, principles, values, or objectives of the Judiciary or the exercise of judicial authority; other than the issue already analyzed and determined on the supervisory jurisdiction of the High Court and the lack of an ouster clause. Indeed, citing an entire Chapter of the Constitution is problematic, and it lacks the specificity that a Preliminary Objection should have.
30. The supervisory jurisdiction of the High Court over other branches of government or bodies especially when they act quasi-judicially or are alleged to have violated a fundamental right or freedom or any other constitutional provision is directly derived from a plain reading of the Constitution. The Constitution of Kenya 2010 was not received deus ex machina. It is a well thought-out creation of the people of Kenya based on their lived experiences across many generations and their desire to live in a better, freer, and more democratic country where the rule of law is respected and upheld. The people of Kenya were clear on the type of High Court they wanted, because they had lived through many decades in which the High Court was perhaps not sufficiently empowered to be the shield and protector of rights and fundamental freedoms that they desired. This is evident in how much more elaborate Article 165 of the Constitution is as compared to Section 60(1) of the former constitution, in particular.
31. The people of Kenya were clear when they promulgated the Constitution of Kenya 2010 that they wanted a decisive break from the dark days of the past where some sections of government and some public bodies and authorities were essentially above the law and beyond any meaningful challenge when they were alleged to have acted unconstitutionally or illegally. As uncomfortable as the capacity for the High Court to intervene in certain processes may sometimes be, it is what the people of Kenya decided to craft for themselves and for future generations. Their will is supreme.



D. Whether the Deputy Chief Justice of the Republic of Kenya, a deputy head of an Arm of the Government of the Republic of Kenya and a State officer is "a person" for purposes of institution of a petition for enforcement of the Bill of Rights under Articles 22(1) and (2) of The Constitution of Kenya or institution of a petition for enforcement of The Constitution of Kenya under Articles 258(1) and (2) thereof. [raised only in Milimani HCCHR Pet. No. E086 of 2025]

E. Whether a Judge of the Supreme Court of Kenya is a "person" for the purposes of institution of a petition for enforcement of the Bill of Rights under Articles 22(1) and (2) of the Constitution of Kenya or the institution of a petition for the enforcement of The Constitution of Kenya under Articles 258(1) and (2) thereof. [raised only in Milimani HCCHR Pet. No. E089 of 2025]

32. These two issues for determination are Siamese Twins as it were, and it is proper that they be analyzed and determined together. They were only identified as separate issues because they were raised separately, once in each Preliminary Objection as indicated. They each raise the same point, that the Petitioners lack the locus standi to institute their respective Petitions before this Court as they are not 'persons' but rather they are offices.
33. The 2nd Interested Party likened the Petitioners to offices like the Office of the Director of Public Prosecutions and the Directorate of Criminal Investigations and sought to apply the locus standi argument that succeeded in Hon. Lady Justice Philomena Mbete Mwilu -v- JSC & 2 Others (Petition E295 of 2018) to the Petitioners.
34. The Counsel for the Petitioners underscored that the styling underscored an essential limb of the Petitions, that the Petitioners were raising grievances concerning the JSC's alleged interference with the judicial independence and the system and hierarchy of the Courts. They also argued that the present Petitions are distinguishable from the locus standi finding in that case because the challenge therein was against the capacity of those two offices to initiate removal proceedings before the JSC, which is not the case in the present Petitions. Additionally, it would be comparable to that earlier case if the Petitions herein were filed by petitioners who described themselves as the "Office of the Deputy Chief Justice" or the " Office of a Judge of the Supreme Court" which is not the case in the present Petitions.
35. Further, the two Petitioners have not approached this Court as "the Deputy Chief Justice of the Republic of Kenya" and a "Judge of the Supreme Court of Kenya" but rather by their respective names, albeit with the honorific that attaches to their names. The honorific as part of a Judge's name has been the practice in the petitions brought by judges of the superior courts. Indeed, the impugned JSC Petitions were themselves styled by the respective complainants against the Petitioners herein in just those terms.
36. For a challenge based on locus standi to succeed it must be a clear cut one that clearly and unimpeachably shows that a petitioner is not a person for the purposes of Articles 22(1) and (2) of the Constitution and/or Articles 258(1) and (2). The current constitutional dispensation, unlike the former one, has a far more expansive and more permissive view on locus standi. The mover of the Preliminary Objections and the Parties who support them have failed to convincingly show that the Petitioners lack the requisite locus standi to approach this Court.



F. Whether either or both Petitions raise a reasonable cause of action for a constitutional petition, and whether the action is justiciable and not hypothetical and/or speculative. [applicable to both Petitions]

37. The 2nd Interested Party has argued that both Petitions do not raise a reasonable cause of action for a constitutional petition because the matters are not justiciable for the reason that they are hypothetical and speculative. Simply put, the 2nd Interested Party and those parties that support the Preliminary Objections submitted that the Judicial Service Commission has merely invited the Petitioners to respond to the complaints, and that in of itself is not a justiciable matter. They further argued that the JSC may very well find that the complaints against the Petitioners are without merit and dismiss the same.
38. In response, the Petitioners dwelt on the dicta in Hon. Lady Justice Philomena Mbete Mwilu -v- JSC & 2 Others (Petition E295 of 2018) to which the three-judge bench found that a judge of a superior court facing what they deem to be an unconstitutional petition or proceedings pending before the JSC can move to the High Court to quash the same even before a final decision has been made by the JSC.
39. This is undoubtedly good law. Article 22(1) on the Enforcement of the Bill of Rights reads as follows:
- “Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.” [Emphasis Mine]
40. Article 22(1) is echoed at Article 165(3)(b) wherein the Constitution vests the High Court with:
- “jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened.” [Emphasis Mine]
41. Furthermore, Article 165(3)(d)(ii) gives the High Court jurisdiction to hear and determine any question respecting the interpretation of the Constitution, including whether anything said to be done under the authority of the Constitution or of any law is in inconsistent with, or is in contravention of, the Constitution.
42. Those three Articles taken together mean that a Petitioner need not wait for the completion of an unconstitutionality or illegality to move to the High Court. A threatened violation of a right or fundamental freedom, or even the initiation of an action that is alleged to contravene the Constitution or a statute, is sufficient basis to move to the High Court. A Petitioner who moves to the High Court at the earliest opportunity is in fact, ironically, limiting the extent of the alleged breach by the alleged offending party(ies); and where that alleged breach involves the expenditure of public funds, that Petitioner’s early action may result in the conservation of scarce public funds that would otherwise have been expended in a completed process that is later quashed if the Petitioner’s petition succeeds.
43. At this juncture it is important for this Court to state clearly and emphatically that it has not at this preliminary stage made any finding as to whether the Petitions herein are likely to succeed or are doomed to fail. All that is required of me, which I have done, is to examine if, after approaching this Court in relation and at an early opportunity, there is at least something that on the face of it raises constitutional questions that cannot be summarily dismissed or which the parties opposite would not need to answer. It is my finding in that regard that the mover of the Preliminary Objections and those parties that support them have failed to demonstrate to the required standard that either or both Petitions do not raise a reasonable cause of action for a constitutional petition, and/or the action is not justiciable and/or it is hypothetical and/or speculative.



G. Whether by dint of the Petitioner in Milimani HCCHR Pet. No. E086 of 2025 filing a Notice of Preliminary Objection dated 21st February, 2025 filed before the 1st Respondent by the Petitioner challenging the jurisdiction of the 1st Respondent on the same grounds relied upon in her Petition, a Preliminary Objection that has not been heard and determined by the 1st Respondent, Milimani HCCHR Pet. No. E089 of 2025 is rendered sub-judice and an abuse of the process of the Court. [raised only in Milimani HCCHR Pet. No. E086 of 2025]

44. The 2nd Interested Party has raised an intriguing point on sub judice and the doctrines of exhaustion and also constitutional avoidance by arguing that since the Petitioner in E086 of 2025 filed a Notice of Preliminary Objection dated 21st February, 2025 filed before the 1st Respondent by the Petitioner challenging the jurisdiction of the 1st Respondent on the same grounds relied upon in her Petition before this Court a Preliminary Objection that has not been heard and determined by the 1st Respondent, Milimani HCCHR Pet. No. E089 of 2025 is rendered sub-judice and an abuse of the process of the Court. The 2nd Interested Party argues that the Petitioner in E086 of 2025 elected to place her grievances before the JSC on the same day as she filed the Petition herein and on the same grounds, and thus she should be allowed to canvass the same at the lowest level that she raised the same.
45. The 2nd Interested Party submitted that not only would the hearing and determination of the Petition in the High Court be sub judice, it would also offend the doctrines of exhaustion and constitutional avoidance with respect to a preliminary objection that the Petitioner herself freely elected to file before the JSC, with the obvious expectation that the JSC would hear and determine it.
46. Counsel for the Petitioner in Milimani HCCHR Pet. No. E086 of 2025 understandably took a different view. Counsel submitted that the High Court's jurisdiction to hear and determine the Petition cannot be eliminated by the Petitioner placing a preliminary objection before a body that the Petitioner avers has no jurisdiction to entertain the complaint filed and to which that body is ill-suited to determine the question of its jurisdiction and may not fairly determine the question since it has an interest in finding that it has jurisdiction.
47. In rejoinder, the 2nd Interested Party countered that it is common for courts, tribunals, and bodies acting quasi-judicially to determine for themselves whether they have jurisdiction to hear and determine the matter before them. The 2nd Interested Party observed that the Preliminary Objections themselves were an invitation to this Court to determine for itself whether it has jurisdiction, and the Judicial Service Commission should similarly be given that same opportunity. The 2nd Interested Party also countered that the High Court should be fostering the development of institutions and enabling them grow, and the High Court can primarily do this by refraining from determining questions that can also be determined by that other body.
48. On sub judice, two sub-issues are in play. Firstly, the rule against sub judice, in terms of the concurrent consideration of the same matter by two competent authorities, is a rule designed to avoid the danger of contradictory findings on the same subject matter. In the present case, the proceedings of the JSC in relation to the impugned actions and processes have been halted by this Court, and thus there is no danger at this stage of contradictory findings.
49. Secondly, sub judice is not an absolute rule. There are rare instances in which the High Court may find it fit and just to consider the same matter that is pending for consideration elsewhere, provided that it is not pending before a Court of higher status. Tying this together with the questions on the doctrines of exhaustion and constitutional avoidance, it is clear to my mind that the High Court is the better and more appropriate forum to hear and determine the questions that are raised in Milimani HCCHR Pet. No. E086 of 2025. This is because in light of the important role played by the Judicial



Service Commission vis-à-vis the constitutional imperatives on judicial independence and the system and hierarchy of courts and the interplay between the complained actions on one hand and the alleged breaches of the Constitution on the other, the determination of those issues falls squarely within the remit of the High Court.

50. Interpretation of the Constitution and the general Enforcement of the Bill of Rights are not roles given to the Judicial Service Commission. They belong to the High Court at first instance, with ability for onward upward appeal from the High Court's decision.
51. Consequently, it is my finding that the Milimani HCCHR Pet. No. E086 of 2025 is not rendered sub judice and an abuse of the process of the Court by dint of the Petitioner in Milimani HCCHR Pet. No. E086 of 2025 filing a Notice of Preliminary Objection dated 21st February, 2025 filed before the 1st Respondent raising the same grounds as her petition.

Conclusion on the Preliminary Objections

52. From the foregoing analysis, it follows that the twin Preliminary Objections have not succeeded. I am satisfied that the Preliminary Objections were not frivolous, vexatious, mischievous, or an abuse of the court process; and accordingly, it would not be just to condemn the losing party to pay costs. Thus, each Party shall bear its own costs for the Preliminary Objections.

H. Whether either or both Petitions raise substantial questions of law that merit certification under Article 165(4) of the Constitution for hearing and determination by an uneven bench of not less than three judges. [applicable to both petitions]

53. Only the 2nd Interested Party was not in favour of certification pursuant to Article 165(4) of the Constitution, which provides that:

“ Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.”
54. The 2nd Interested Party stated that the matter of certification is exclusively for the judge to determine. The 2nd Interested Party also submitted that there was nothing in either Petition that had not already been canvassed in previous court cases; some of which are decisions of the Supreme Court.
55. All the other parties submitted that the two Petitions raise novel issues of a significant legal nature, and which would have consequences that would reverberate across Kenya's judicial landscape and permanently affect the processes of the Judicial Service Commission regardless of whichever outcomes emerge from the Petitions.
56. The question of whether to certify a matter as raising a substantial question of law is one of considerable discretion for the trial court, and it is to be exercised judiciously. The Constitution purposefully left the phrase “substantial question of law” undefined, granting the Court leeway to determine on a case-by-case basis whether a particular matter warrants multiple judges. The test laid down by the Supreme Court of India in the case of *Sir Chunilal V Mehta and Sons Limited -v- Century Spinning and Manufacturing Company Limited* is apt. That five-prong test for determining whether a substantial question of law arises within a matter as set out in that case is as follows:
 - a. Whether directly or indirectly the questions affects the substantial rights of parties;
 - b. Whether the question is of great public importance;



- c. Whether the question is novel and has not been settled in a decision of the apex court;
 - d. Whether the issue is not free from difficulty; and
 - e. Whether there are alternative views and interpretations adopted by the Parties.
57. Similarly, the Indian Supreme Court in Santosh Hazari -v- Purushottam Tiwari [2001] 3 SCC 179 observed that for a question to be “substantial”, “it must be debatable, not previously settled by the law of the land or a binding precedent, and must have a material bearing on the case’s result.”
58. The High Court in Harrison Kinyanjui v Attorney General (2012) and other cases has also emphasized that novelty or complexity alone does not automatically mean a matter is substantial; there should be something more, such as broad public interest or significant implications for constitutional jurisprudence.
59. Having heard from the parties and their counsel, I must make clear from the outset that in determining a question of certification the Court must ensure that it does not delve into the relative merits or demerits of the contested legal and factual positions at issue in the Petition before it. The role of the Judge is to weigh those contested legal and factual positions against the applicable legal tests to determine if on the face of it significant questions of law that warrant certification are raised that. I also note that in the case of Community Advocacy Awareness Trust & Others -v- The Attorney General and Others [HC Pet 243 of 2011] the Court observed that the Constitution does not define what is ‘a substantial question of law’ and the same is left to the individual judge.
60. The High Court has also consistently taken the position that in determining whether there is a substantial question of law, the Judge must take into account the Constitution as a whole and apply the same to the individual case and circumstances before it. Additionally, to my mind it is not sufficient that a matter is of great interest to the public or it raises substantial questions of the public interest alone; the Petition must ultimately raise significant questions of constitutional or statutory law for the same to be fit for certification.
61. It is clear to this Court that the five-prong test for a substantial question of law has been met. The purpose of Article 165(4) was for the High Court, when tasked with charting the course into new constitutional and legal territory, to map the same with three or more High Court judges acting as cartographers. These are most certainly Petitions deserving of a multi-judge bench.

Conclusion and Disposition

62. Consequently, and for the foregoing reasons:
- i. The Notice of Preliminary Objection dated 04/03/2025 in Milimani HCCHR Pet. No. E086 of 2025 be and is hereby dismissed;
 - ii. The Notice of Preliminary Objection dated 04/03/2025 in Milimani HCCHR Pet. No. E089 of 2025 be and is hereby dismissed;
 - iii. Milimani HCCHR Pet. No. E086 of 2025 is certified as raising a substantial question of law pursuant to Article 165(4) of the Constitution;
 - iv. Milimani HCCHR Pet. No. E089 of 2025 is certified as raising a substantial question of law pursuant to Article 165(4) of the Constitution;



- v. Consequently, the matters referred to in (iii) and (iv) above and their respective files be and are hereby referred to the Hon. Chief Justice for empanelment of an uneven bench of Judges being no less than three for hearing and determination;
- vi. Each party in the respective Petition shall bear its own costs in relation to the Notice of Preliminary Objection dated 04/03/2025 therein.

DATED, SIGNED, AND DELIVERED VIRTUALLY ON THIS 10TH DAY OF APRIL, 2025.

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BAHATI MWAMUYE

JUDGE

In the Presence Of:

Counsel for the Petitioners - Mr Julius Kemboi , Mr Jepher Kere

Counsel for 1st Respondent- Ms Maina , Ms Wanja

Counsel for 2nd Respondent – No appearance

Counsel for 1st Interested Party - Mr Okatch , Ms Amutavi

Counsel for 2nd Interested Party - Mr Havi in person

Court Assistant – Ms Neema

