Kinuthia v Judicial Service Commission; Mumbi & 3 others (Interested Parties) (Petition 251 of 2019) [2020] KEHC 9224 (KLR) (Constitutional and Human Rights) (10 February 2020) (Judgment)

Zack Kinuthia v Judicial Service Commission; Ngugi Grace Mumbi & 3 others (Interested Parties) [2020] eKLR

Neutral citation: [2020] KEHC 9224 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 251 OF 2019

LA ACHODE, JA MAKAU & AK NDUNG'U, JJ

FEBRUARY 10, 2020

BETWEEN

ZACK KINUTHIA .... PETITIONER

AND

JUDICIAL SERVICE COMMISSION .... RESPONDENT

AND

HON. LADY JUSTICE NGUGI GRACE MUMBI .... INTERESTED PARTY

HON. LADY JUSTICE OMONDI HELLEN AMOLO .... INTERESTED PARTY

HON. JUSTICE TUIYOT FRANCIS .... INTERESTED PARTY

HON. ATTORNEY GENERAL .... INTERESTED PARTY

Failure to consider a judge for elevation on the basis of a pending petition for removal from office is an infringement on the right to fair hearing and the rules of natural justice

The petition sought among other orders a declaration that any appointment of a judge to any court ranking above the court in which a judge was serving while there was a pending petition for their removal from office was unconstitutional. The court held that failure to consider a judge for elevation on the basis of a pending petition for removal from office was an infringement on the right to fair hearing and the rules of natural justice.

Reported by Kakai Toili

Constitutional Law *– fundamental rights and freedoms – enforcement of fundamental rights and freedoms – right to fair hearing and rules of natural justice – where a petition was filed for the removal of several High Court judges from office – where the petitioner sought to block the Judicial Service Commission from considering* *those judges from being appointed as Court of Appeal judges - whether preventing a judge from being considered for elevation on the basis of a pending petition for removal from office amounted to infringement on the right to a fair hearing and rules of natural justice – Constitution of Kenya, 2010, articles 27, 47, 50(1)and 2(a).*

Constitutional Law *- constitutional petitions - form of a constitutional petition - duty to plead with reasonable precision constitutional provisions infringed or threatened by infringement – whether it was mandatory to set out the constitutional provisions infringed or threatened by infringement in a constitutional petition.*

Constitutional Law *- constitutional petitions – parties – interested parties - what was the nature of an interested party in a constitutional petition – Constitution of Kenya, 2010, article 159; Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013, rule 2.*

Constitutional Law *- constitutional petitions – institution of constitutional petitions – where there was an alternative remedy provided by statute - whether it was mandatory to exhaust alternative remedies provided for by statute before instituting a constitutional petition.*

Jurisdiction *– jurisdiction of the High Court – jurisdiction to interfere with decisions of constitutional commissions - whether the High Court could interfere with the decision-making process of the Judicial Service Commission - Constitution of Kenya, 2010, articles 165(3) and 172.*

Constitutional Law *– Judiciary – judicial officers – judges – removal of judges from office - what was the process of removal of a judge from office – Constitution of Kenya, 2010, articles 27, 47, 50 and 168.*

Brief facts

The petitioner had filed a petition before the respondent seeking the removal of five High Court judges namely the interested parties and two other judges. The petitioner alleged that he filed the petition for removal of the judges as he was aggrieved that the 1st, 2nd and 3rd interested parties neglected to exercise their judicial functions with due diligence, resulting in gross misconduct in *Philomena Mbete Mwilu v. Director of Public Prosecution and others*, Petition 295 of 2018.

The respondent upon the receipt of the petition for removal of the 1st, 2nd and 3rd interested parties wrote to the petitioner informing him that it had given directions for the specific judges to be notified of the complaint and submit their responses. The petitioner further wrote to the respondent opposing the candidature of the 1st, 2nd and 3rd interested parties as Court of Appeal judges, ahead of their interviews with the respondent. The petitioner claimed that the 1st, 2nd and 3rd interested parties' decision in the case of *Philomena Mbete Mwilu v Director of Public Prosecution and others* was calculated to ensure a specific outcome thus the 1st, 2nd and 3rd interested parties were not impartial and true to their oath of office.

Issues

i. Whether preventing a judge from being considered for elevation on the basis of a pending petition for removal from office would amount to infringement on the right to a fair hearing and rules of natural justice.
ii. Whether it was mandatory to set out the constitutional provisions infringed or threatened by infringement in a constitutional petition.
iii. What was the nature of an interested party in a constitutional petition?
iv. Whether it was mandatory to exhaust alternative remedies provided for by statute before instituting a constitutional petition.
v. Whether the High Court could interfere with the decision-making process of the Judicial Service Commission.
vi. What was the process of removal of a judge from office?

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 160

(5). A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.

Article 165

1. *Subject to clause (5), the High Court shall have—*

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

i. *the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;*

Article 166

1. *The President shall appoint—*
    1. *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*
    2. *all other judges, in accordance with the recommendation of the Judicial Service Commission.*

(4). Each judge of the Court of Appeal shall be appointed from among

persons who have—

1. *at least ten years' experience as a superior court judge; or*
2. *at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or*
3. *held the qualifications mentioned in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years.*

Article 172

1. *The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall—*
    1. *recommend to the President persons for appointment as judges;*
    2. ...
    3. *appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;*
    4. ...
    5. ...
2. *In the performance of its functions, the Commission shall be guided by the following —*
    1. *competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary; and*
    2. ...

Held

1. The petition revolved around the discharge of the mandate of the respondent. It challenged the constitutionality of the interviews and recommendations by the respondent of the 1st, 2nd and 3rd interested parties for appointment as judges of the Court of Appeal. The law on the legal threshold of a constitutional petition was well settled. Under article 165 (3)(d)(ii) of the Constitution, the High Court had jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of the question whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of the Constitution. The court had not shied away from that jurisdiction.
2. The Constitution dispensed powers among various constitutional organs. Where it was alleged that any of those organs had failed to act in accordance with the Constitution, then the courts were

empowered by article 165(d)(ii) to determine whether anything said to be done under the authority of the Constitution or of any law was inconsistent with, or in contravention of the Constitution.

3. An applicant whose claim was that a constitutional right had been infringed, or was threatened with infringement, had to set out specifically, what provisions were infringed or threatened with infringement, by whom and the manner in which they were infringed or threatened to be infringed. The onus was on the petitioner to show a *prima facie* case of violation of their constitutional right. A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure.

4. From the petition, other than reproducing the provisions of articles 2, 3(1), 10, 19, 159(1), 159(2) and 159 2(e) at part C of the petition under paragraphs 14, 15, 16, 17, 18, 19 and 20 of the amended petition, there was no specific pleading of the particular breach or threat of breach of any constitutional provision by the respondent in the conduct of the interviews and subsequent recommendations for appointment of the interested parties as judges of appeal. A petition like the instant one was determined based on the grounds raised in its support and which grounds ought to demonstrate the particular breach or threat of breach of the Constitution that was complained of.

5. From the grounds enumerated at page 5 of the petition at paragraphs 21, 22, 23 and 24, one could be forgiven for drawing the inference that the petition was against the interested parties yet it was not, it was against the respondent. An interested party was one who had a stake in the proceedings, though not party to the cause *ab initio*. An interested party was one who would be affected by the decision of the court when it was made, either way. Such persons felt that their interest would not be well articulated unless they appeared in the proceedings, and championed their cause.

6. The grounds in support of the petition found in paragraphs 21 to 24 of the petition related to specific breaches by the 1st, 2nd and 3rd interested parties as well as two (2) other judges who sat with the 1st, 2nd and 3rd interested parties in a bench that determined *Philomena Mbete Mwilu v Director of Public Prosecutions and Others* in a judgment delivered on May 31, 2019. Those grounds were specific against the interested parties and fell short of raising any specific violations of the Constitution by the respondent.

7. The petition was against the respondent and should be clear on the constitutional provisions allegedly infringed by the respondent but not necessarily the interested parties. Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 defined an interested party to mean a person or entity that had an identifiable stake or legal interest or duty in the proceedings before the court but was not a party to the proceedings or could not be directly involved in the litigation. The petitioner having identified the respondent as the appropriate party to be sued was obligated to set out clearly the provisions he claimed had been infringed or violated by the respondent and show how those articles were infringed in relation to him.

8. The petitioner had failed to disclose how and in what manner, the respondent had violated or threatened to violate any of the cited provisions of the Constitution. The burden was on the petitioner to demonstrate the breach or threat thereof, a burden that the petitioner had failed to discharge. He did not plead at all the provisions infringed by the respondent and the manner of the alleged infringements.

9. The petitioner's complaint was that the 1st, 2nd and 3rd interested parties were interviewed and recommended for appointment as judges of the Court of Appeal by the respondent despite the fact that there was a pending petition for their removal. However, the petition as drawn seemed to invite the court to take a position on the alleged impropriety of the 1st, 2nd and 3rd interested parties in the determination of HC Petition No. 295 of 2018. The court declined that invitation. The petition lodged before the respondent for the removal of the 1st, 2nd and 3rd interested parties was live before the body mandated under article 168 of the Constitution to adjudicate upon it. Making any pronouncement on the petition for removal of the 1st, 2nd and 3rd interested parties would be prejudicial

to a fair hearing and determination of the petition. The court ought not to preempt the finding that the respondent would ultimately make in the fullness of time lest the court fell foul of the doctrine of exhaustion.

10. It was imperative that where a dispute resolution mechanism existed outside courts, it was to be exhausted before the jurisdiction of the courts was invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brew, as was bound to happen. The exhaustion doctrine was a sound one and served the purpose of ensuring there was a postponement of judicial consideration of matters to ensure that a party was first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. That accorded with article 159 of the Constitution which commanded courts to encourage alternative means of dispute resolution. The petition for removal was pending before the respondent and the process had not been exhausted. The respondent had to be given the opportunity to exercise its legal mandate, all the while the court being wary not to substitute or replace the opinion of the respondent with its own.

11. Like all constitutional organs, the respondent, in carrying out its function of recruitment and removal was bound by the provisions of Chapter Six of the Constitution on leadership and integrity. It was thus expected that the recommendations for appointment of judges had to be a result of a rigorous and thorough process of interviews and investigations and should it be shown that the respondent had recommended a person who would not bring honour, public confidence and integrity to the office of judge, the court would not hesitate to apply the appropriate sanctions within the law.

12. It would be desirable to have any petition for the removal of a judge disposed of before any interviews, if and when vacancies arose for the appointment of judges to any court ranking above their position. However, that was only an ideal situation. Realities on the ground proved that the contrary was true.

13. The receipt of petitions for removal of a judge(s) from office was a continuous process which depended on when particular complaints by an individual or body against a judge arose or when the respondent on its own motion initiated the process, or, when a ground for removal arose. Under article 168(4) of the Constitution, the respondent was mandated to consider such a petition, and either dismiss it or if satisfied that the petition disclosed a ground for removal under article 168(1) of the Constitution, send the petition to the President.

14. There was no gain saying that the respondent had no control over the timings of the lodging of petitions for removal of a judge(s) before it. It was probable, like in the instant matter, that scheduled interviews or appointments of judges could coincidentally arise when a petition(s) for removal of a judge who was a candidate for elevation had been filed.

15. According to the Constitution and the Judicial Service Act, the process of determining the suitability of a judge who was a candidate for elevation to a court of a rank higher than the court he/she was serving in was the preserve of the respondent, whether or not there was a pending petition for removal. In carrying out that mandate, the respondent, like any other organ of the state, was bound to follow the principles of the Constitution and the law. The court could therefore not interfere with the decision-making.

16. Taking judicial notice under section 59 of the Evidence Act, the decision of the five-judge bench which was impugned and which formed the basis of the petition for removal of the interested parties and 2 others, was subject of two pending appeals at the Court of Appeal. The court could not delve into the propriety or otherwise of the judgment of the case which had been filed at the High Court without infringing on the *sub judice* rule. Even without the appeals, the court could not purport to sit on appeal on a decision of a properly constituted court of concurrent jurisdiction.

17. Article 160(5) of the Constitution existed for the sole purpose of safeguarding the independence of the Judiciary in decision-making in matters before the courts. That was what was commonly referred to as decisional independence. A clear distinction had to be drawn between complaints which arose from judicial decisions made in good faith, that an aggrieved party should address through the appellate

system of the courts and any other complaints against a judicial officer which should be addressed through disciplinary procedures by the respondent as provided under the law.

18. There was a need to uphold the constitutional rights of a judge facing a petition for removal during the process of filling of vacancies in a superior court. Those were, the right to a fair hearing enshrined in article 50(1), the right to fair administrative action under article 47, the right to equality and freedom from discrimination under article 27 and the right to the presumption of innocence under article 50(2)(a) of the Constitution. Locking out a judge from being considered for elevation on the basis of a pending petition for removal would amount to an infringement on the right to a fair hearing and rules of natural justice.

19. No one should be condemned unheard. It would be against the Constitution, statute and rules of natural justice if the interested parties were to be barred from the interviews on the basis of a petition that had not been heard. Having regard to the right to the presumption of innocence, even where there was a pending petition for the removal of a judge, ultimately, the balance tilted in favour of judges who had applied and qualified to be appointed for the simple reason that if they were barred and eventually the petition before the respondent was dismissed, it could not be possible to remedy the situation since the vacancies would not be available. Conversely, if the appointment was made and it was established that the judges were culpable, nothing stopped the removal process from taking its legal course.

20. The petitioner had not brought to the attention of the court any constitutional or statutory provision that barred the appointment of any judge to any court ranking above the court in which such a judge was serving if there was a pending petition for removal of such judge. The procedure for handling complaints against judges was set out in article 168 of the Constitution and the procedure adopted by the petitioner to bar the elevation of the interested parties to the Court of Appeal on account of a pending petition for removal was not provided in law.

21. The interested parties continued being legally in office as judges of the High Court of Kenya. The pendency of a petition for removal did not affect their positions as judges until the provisions of article 168 of the Constitution were triggered upon the hearing of the petition for removal. It was thus clear that once the respondent had considered the petition before it and was satisfied (if at all) that the petition disclosed a ground for removal under article 168(1) of the Constitution, it would send the petition to the President with the recommendation and the President would within fourteen (14) days of receipt, suspend the judge from office and proceed to appoint a tribunal in accordance with the recommendation of the respondent. It was then, and only then, that the judge would be legally out of office on suspension and subsequently removed should the tribunal make that finding.

22. The interested parties being legally in office as judges of the High Court had the legal right to apply to fill the vacancies at the Court of Appeal as they duly did. If the respondent was satisfied upon interview of their qualifications to scale higher in the judicial hierarchy, nothing stopped the respondent in exercise of its independence in the process of recruitment of judges from recommending the appointments of the 1st, 2nd and 3rd interested parties as it had done.

23. The respondent was mandated by law to interview and recommend to the President the names of persons to be appointed as judges. The process of recruitment of a judge by the respondent was an administrative action that ought to be expeditious, lawful, reasonable and procedurally fair guided by article 47(1) of the Constitution. If a right or fundamental freedom of a person was likely to be adversely affected that person had a right to be given written reasons for the action.

24. The rights of judges in office faced with petitions for removal from office were not subservient to the rights of a complainant against them. In the circumstances, a balancing act of the rights of judges who wished to present themselves as candidates to meet a legitimate expectation to compete for available vacancies if qualified, and those of a petitioner who had petitioned for the removal of such a judge, was delicate. It called for proper application of articles 27, 47, 50(1) and 50(2) of the Constitution.

25. The continued implementation of the Constitution continued to open up new frontiers and or *lacuna* that required remedial measures either under the Constitution itself or the operationalizing Acts of Parliament. No wonder, the clamour for amendment of no less than the Constitution itself.

26. The principles of good governance, integrity, transparency and accountability demanded an expeditious and time bound process through which a petition for removal of a judge could be determined. Time was nigh for the amendment of the law to stipulate timelines within which such petitions should be disposed of. That would be beneficial to the administration of justice and to the affected judge(s). The need to clear allegations against a judge expeditiously could not be gainsaid.

Petition dismissed; each party to bear its own costs.

Citations

Statutes

None referred to

Advocates

None mentioned

JUDGMENT

Introduction

1. The Petitioner herein, Zack Kinuthia, is a male adult and a resident of Murang'a County.

2. The Respondent, the Judicial Service Commission, is established under Article 171 (1) of the Constitution and is tasked to, among other functions, recommend to the President persons for appointment as Judges.

3. The 1st, 2nd and 3rd Interested Parties are High Court judges who have been recommended by the Respondent for appointment to fill vacancies in the Court of Appeal.

4. The 4th Interested Party, the Attorney General, is the principal legal adviser to the Government pursuant to Article 156 of the Constitution.

The Petitioner's Case

5. The Petitioner through a petition dated 26th June, 2019 and amended on 5th July, 2019 sought the following orders;

    I. A declaration that any appointment of a judge to any court ranking above the court in which a judge is currently serving while there is a pending petition for their removal from office is unconstitutional.

    II. An order that in the event any or all of the three candidates seeking to fill Court of Appeal vacancies namely Hon. Lady Justice Ngugi Grace Mumbi; Hon. Lady Justice Omondi Hellen Amolo; and Hon. Mr. Justice Tuiyot Francis are successful, an injunction is hereby issued barring the respondent from declaring them successful until the petitioner's petition, dated June 12, 2019, for the removal of the three judges from office, is heard and determined.

    III. An injunction is hereby issued restraining the respondent from recommending any of the three candidates namely, Hon. Lady Justice Ngugi Grace Mumbi; Hon. Lady Justice Omondi Hellen Amolo; and Hon. Mr. Justice Tuiyot Francis, to the President for appointment as judges to fill the vacancies in the Court of Appeal.

IV. An injunction be issued suspending the swearing in of the three candidates namely, Hon. Lady Justice Ngugi Grace Mumbi; Hon. Lady Justice Omondi Hellen Amolo; and Hon. Mr. Justice Tuiyot Francis, in the event that the respondent reaches a decision to the effect that any of the three candidates is part of the successful pool to fill vacancies in the Court of Appeal, until the Petitioner's petition, dated June 12, 2019, for the removal of the three judges from office is heard and determined.

V. That each party bears its own cost.

VI. Any other orders that the Honourable Court may deem just and fit to grant.

6. The Petition was filed contemporaneously with a Notice of Motion seeking orders restraining the respondent from declaring the results of the 1st, 2nd and 3rd Interested Parties, who had sought to be appointed as Court of Appeal judges, pending the hearing and determination of the application and the petition herein. That Notice of Motion was dispensed with to fast track the Petition.

7. A brief background to the Petitioner's case is that he filed a petition before the Respondent seeking the removal of 5 High Court judges, namely, Hon. H.A Omondi, Hon. Mumbi Ngugi, Hon. Francis Tuiyot, Hon. E.C Mwita and Hon. W. M. Musyoka. The Petition before the Respondent was filed after the five (5) Judges rendered their decision in the case of Hon. Philomena Mbete Mwilu vs. The Director of Public Prosecution and others, Petition 295 of 2018. The Petitioner filed his Petition for removal before the Respondent as he was aggrieved that the 1st, 2nd and 3rd Interested Parties neglected to exercise their judicial functions with due diligence, resulting in gross misconduct in the Hon. Philomena Mbete Mwilu case (supra).

8. The Petitioner contends that despite the 1st, 2nd and 3rd Interested Parties establishing that the DPP acted within the law, they proceeded on a fishing expedition with the intention that the Petitioner in the Hon. Philomena Mbete Mwilu case did not stand trial. He also faulted the bench for finding that the Directorate of Criminal Investigation (DCI) illegally obtained evidence against the Petitioner as a result of gaining access to her accounts with IBL, through the use of a court order, which the bench stated, had no bearing on her accounts, and that the DCI thereby misrepresented facts and misused the court order.

9. The Respondent upon the receipt of the petition for removal of the 1st, 2nd and 3rd Interested Parties wrote to the Petitioner through its letter dated 13th June, 2019 informing him that the Respondent had given directions for the specific Hon. Judges to be notified of the complaint and submit their responses. The Petitioner on 17th June, 2019 further wrote to the Respondent opposing the candidature of the 1st, 2nd and 3rd Interested Parties as Court of Appeal judges, ahead of their interviews with the Respondent.

10. The Petition is based on the ground that the 1st, 2nd and 3rd Interested Parties were in breach of Article 10 of the Constitution and Rule 4(2) and 4(3) of the Judicial Code of Conduct and Ethics, 2016. The Petitioner claims that the 1st, 2nd and 3rd Interested Parties' decision in the case of Hon. Philomena Mbete Mwilu case, was calculated at ensuring a specific outcome thus the 1st, 2nd and 3rd Interested Parties were not impartial and true to their oath of office.

11. The Petitioner submitted that the suitability of an applicant for the position of judge must be considered in a wide sense, that is, beyond the scope of Article 166(2) of the Constitution and must be assessed against Article 10 of the Constitution. That the Respondent has the duty to uphold the provisions of Article 10 of the Constitution, and in doing so it would be unconstitutional to elevate the 1st, 2nd and 3rd Interested Parties as judges of the Court of Appeal while there is a pending dispute regarding their competencies.

12. The Petitioner cited the case of Republic vs. Speaker of the Senate & another Ex parte Afrison Export Import Limited & Another [2018] eKLR where Mativo J held that administrators must be seen by everyone to be making the decision fairly and impartially and not because of their own private interest in the matter. The Petitioner further advanced that this court has supervisory jurisdiction on bodies such as the Respondent and that it should therefore direct the Respondent to immediately determine the complaint lodged by the Petitioner, before the Interested Parties are sworn in as Court of Appeal Judges. The Petitioner also urges that the matter is a public interest litigation suit and each party should be directed to bear its own costs.

The Respondent's Case

13. On the 28th June, 2019, the Respondent filed its grounds of opposition to the application and averred that the application is; without merit, fatally bad in law, an abuse of court process and that the applicant has failed to satisfy the conditions for the grant of conservatory orders. They also filed their response to the Petition denying the allegations contained in the Petition. The Respondent further raised a preliminary objection dated 25th October, 2019 and asserted that the Petition is fatally defective, bad in law and an abuse of the court process and violates Article 160 (1) and 160(5) of the Constitution.

14. The Respondent urges that the Petitioner's only contention is that the 1st, 2nd and 3rd Interested Parties are not fit for elevation as judges of the Court of Appeal until the petition for their removal is heard and determined. It contends that there is no constitutional or statutory reason barring the appointment of any judge to any court ranking above the court in which the judge is currently serving pending a petition of removal of such a judge.

The 1st, 2nd and 3rd Interested Parties' Case

15. The Interested Parties filed their grounds of opposition to the petition on 30th October, 2013 challenging the jurisdiction of this court to determine the dispute claiming that the laid down procedure for the removal of judges should be in accordance with Article 168 of the Constitution. They also aver that in accordance with Article 160 (5) of the Constitution, judges are not liable for any act done or omitted to be done in good faith in the lawful performance of their duties as judicial officers.

16. To emphasize on the issue of judicial independence the 1st, 2nd and 3rd Interested Parties cited the Canadian Case of Her Majesty The Queen vs. Marc Beauregard (1986) 2 S. C. R 56, where the principle of judicial independence was defined to be, the complete liberty of individual judges to hear and decide the cases that come before them, without any external interference in the way that a judge conducts his case and makes his decision. They argue that judges enjoy judicial independence when making their decisions and their removal can only be on the grounds set out in Article 168 of the Constitution.

17. The 1st, 2nd and 3rd Interested Parties assert that they can be appointed while there is a pending petition before the Respondent. They add that if a judge were to be barred from recommendation simply because of a petition filed at the Respondent, then such a judge would be highly prejudiced in the event that the petition before the Respondent is dismissed as the vacancy may not be available. They also contend that it would go against the principles of natural justice to condemn them, unheard and cite the case of Republic vs. National Land Commission & 2 Others Ex parte Archdiocese of Nairobi Kenya Registered Trustees (St. Joseph Mukasa Catholic Church Kahawa West (2018) eKLR).

The 4th Interested Party's Case

18. In their written submissions, it is the 4th Interested Party's case that because the interviews have been conducted by the Respondent and the names of the successful candidates have been forwarded to the President for formal appointment, then prayers (b) and (c) have been overtaken by events. They argue that the only issue for determination is whether the appointment of the 1st, 2nd and 3rd Interested Parties as judges pending the hearing and determination of the petition for their removal from office is unconstitutional.

19. It is urged that under Article 166 (1)(b) of the Constitution, the President is required to appoint judges in accordance with the recommendation of the Respondent. Further that the Respondent is mandated to recommend to the President persons for appointment as judges. They advance that Article 166 (2) and (4) of the Constitution read together with the First Schedule of the Judicial Service Act provide for the qualifications of a Court of Appeal Judge.

20. It is contended that the Petitioner has failed to demonstrate that the law for the appointment of judges was not followed. It is also pointed out that the Petitioner failed to demonstrate with evidence that indeed, the 1st, 2nd and 3rd Interested Parties in the Hon. Philomena Mbete Mwilu case, neglected to exercise their judicial functions with due diligence and that they were not free from extraneous influences, inducement, pressure, threats or interference, direct or indirect, from outside quarters as alleged in the amended petition. It is urged that the Interested Parties were interviewed and recommended for appointment as judges, and in any event, the Petitioner has recourse in accordance with Article 168 of the Constitution.

Analysis and Determination

21. We have carefully considered the petition, the responses thereto and the submissions from all the parties, as well as the oral highlights of the submissions made by the parties on the 19th December, 2019. We note that prayers (ii) and (iii) have been overtaken by events.

22. Flowing from the petition, responses and the submissions, the issues for determination crystalize into;

    1. Whether the petition meets the threshold of a constitutional petition.

    2. Whether the appointment of a Judge to any court ranking above the court in which a Judge is currently serving while there is a pending petition for their removal from office is unconstitutional.

    3. Whether the reliefs sought should be granted.

Whether the petition meets the constitutional threshold.

23. The petition revolves around the discharge of the mandate of the Respondent. It challenges the constitutionality of the interviews and recommendation by the Respondent of the 1st, 2nd and 3rd Interested Parties for appointment as Judges of Appeal. The law on the legal threshold of a constitutional petition is well settled.

24. Under Article 165 (3)(d) (ii) the High Court has jurisdiction to hear any question respecting the interpretation of the Constitution including the determination of:

> "(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;"

25. The court has not shied away from this jurisdiction and in the case of Judicial Service Commission vs. Speaker of the National Assembly and 8 Others [2014] eKLR the Supreme Court stated:

> "The Constitution dispenses powers among various constitutional organs. Where it is alleged that any of these organs has failed to act in accordance with the Constitution, then the courts are empowered by Article 165(d)(ii) to determine whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of the Constitution."

26. An applicant whose claim is that a constitutional right has been infringed, or is threatened with infringement, must set out specifically, what provisions are infringed or threatened by infringement, by whom and the manner in which they are infringed or threatened to be infringed. The onus is on the Petitioner to show a prima facie case of violation of their constitutional right. In the case of Anarita Karimi Njeru vs. Republic (No.1) (1979) eKLR, the court (Trevelyan & Hancox JJ.) had this to say on the drafting of constitutional petitions:

> "If a person is seeking redress from the High Court on a matter which involves a reference to the Constitution, it is important (if only to ensure that justice is done to his case) that he should set out with a reasonable degree of precision that of which he complains, the provisions said to be infringed, and the manner in which they are alleged to be infringed."

27. The law is further enunciated in the case of Godfrey Paul Okutoyi (suing on his own behalf and on behalf of and representing and for the benefit of all past and present customers of banking institutions in Kenya) vs. Habil Olaka - Executive Director (Secretary) of the Kenya bankers Association being sued on behalf of Kenya Bankers Association) & Another Petition 457 of 2015 [2018] eKLR where Mwita J held thus:

> "A party should only file a constitutional petition for redress of a breach of the Constitution or denial, violation or infringement of, or threat to a right or fundamental freedom. Any other claim should be filed in the appropriate forum and in the manner allowed by the applicable law and procedure."

28. The principle was affirmed by the Court of Appeal in Mumo Matemu vs. Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR where the court rendered itself thus:

> "The principle in Anarita Karimi Njeru (supra) that established the rule that requires reasonable precision in framing of issues in constitutional petitions is an extension of this principle. What Jessel, M.R said in 1876 in the case of Thorp vs Holdsworth (1876) 3 Ch. D. 637 holds true today:
>
> The whole object of pleadings is to bring the parties to an issue, and the meaning of the rules…was to prevent the issue being enlarged, which would prevent either party from knowing when the cause came on for trial, what the real point to be discussed and decided

was. In fact, the whole meaning of the system is to narrow the parties to define issues, and thereby diminish expense and delay, especially as regards the amount of testimony required on either side at the hearing."

(43) The petition before the High Court referred to Articles 1, 2, 3, 4, 10, 19, 20 and 73 of the Constitution in its title. However, the petition provided little or no particulars as to the allegations and the manner of the alleged infringements. For example, in paragraph 2 of the petition, the 1st respondent averred that the appointing organs ignored concerns touching on the integrity of the appellant. No particulars were enumerated. Further, paragraph 4 of the petition alleged that the Government of Kenya had overthrown the Constitution, again, without any particulars. At paragraph 5 of the amended petition, it was alleged that the respondents have no respect for the spirit of the Constitution and the rule of law, without any particulars."

29. In a nutshell, the Petitioner's grounds in the amended petition are that by interviewing and recommending the 1st, 2nd and 3rd Interested Parties for appointment as judges of appeal while there was a pending petition for their removal, the act by the Respondent is unconstitutional.

30. We note from the petition that other than reproducing the provisions of Articles 2, 3(1), 10, 19, 159(1), 159(2) and 159 2(e) at Part C of the Petition under paragraphs 14, 15, 16, 17, 18, 19 and 20 of the amended petition, there is no specific pleading of the particular breach or threat of breach of any constitutional provision by the Respondent in the conduct of the interviews and subsequent recommendations for appointment of the Interested Parties as Judges of Appeal.

31. Suffice it to state that a petition like the one before court is determined based on the grounds raised in its support and which grounds ought to demonstrate the particular breach or threat of breach of the Constitution that is complained of. In the instant petition, the grounds enumerated at Page 5 of the amended petition at paragraphs 21, 22, 23 and 24 read as follows:

21: The 1st, 2nd and 3rd Interested Party contributed to a breach of Article 10 of the Constitution which requires Judges to observe the rule of law, exercise good governance and act with integrity, transparency and accountability in discharging their judicial functions.

22: The 1st, 2nd and 3rd Interested Party contributed to a gross breach of Rule 4(2) of the Judicial Code of Conduct and Ethics, 2016 which obligates a judge to exercise judicial authority independently on the basis of the judge's assessment of the facts, and in accordance with a conscientious understanding of the law, free of any extraneous influences, inducements, pressures, threats or interference, direct or indirect, from any quarter or for any reason.

23: The 1st, 2nd and 3rd Interested Party breached Rule 4(3) of the Judicial Code of Conduct and Ethics, 2016 which provides that a Judge shall not deviate from the law to appease people, to avoid criticism, or to advance an illegitimate interest.

24: The Judges' determination was calculated at ensuring a specific outcome in spite of glaring facts or law that would have seen the matter determined otherwise, if they were impartial and true to their oath of office.

32. From these grounds, one may be forgiven for drawing the inference that the petition herein is against the Interested Parties yet it is not. It is against the Respondent. The Supreme Court of Kenya in Communications Commission of Kenya and 4 Others vs. Royal Media Services Ltd and 7 Others,

Petition No. 14 of 2014 [2014] eKLR, while making reference to its decision in Mumo Matemo case defined an interested party thus:

> "(An) interested party is one who has a stake in the proceedings, though he or she was not party to the cause ab initio. He or she is one who will be affected by the decision of the court when it is made, either way. Such a person feels that his or her interest will not be well articulated unless he himself or she herself appears in the proceedings, and champions his or her cause."

33. The grounds in support of the petition found in paragraphs 21 to 24 of the petition relate to specific breaches by the 1st, 2nd and 3rd Interested Parties as well as two (2) other judges who sat with the 1st, 2nd and 3rd Interested Parties in a bench that determined Petition No. 295 of 2018, Hon. Philomena Mbete Mwilu vs. The Director of Public Prosecutions and Others in a judgement delivered on 31st May, 2019. These grounds are specific against the Interested Parties and fall short of raising any specific violations of the Constitution by the Respondent in accordance with the threshold laid down in Anarita Karimi Njeru vs. Republic (supra).

34. The petition before us is against the Respondent and should be clear on the constitutional provisions infringed by the Respondent but not necessarily the Interested Parties. Rule 2 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and procedure Rules, 2013 defines an "interested party" to mean a "person or entity that has an identifiable stake or legal interest or duty in the proceedings before the court but is not a party to the proceedings or may not be directly involved in the litigation". The Petitioner having identified the Respondent as the appropriate party to be sued is obligated to set out clearly the provisions he claims have been infringed or violated by the Respondent and show how these Articles are infringed in relation to him.

35. The cumulative effect of the above is that the Petitioner has failed to disclose how and in what manner, the Respondent has violated or threatened to violate any of the cited provisions of the Constitution. The burden was on the Petitioner to demonstrate the breach or threat thereof, a burden that the Petitioner has failed to discharge. He did not plead at all the provisions infringed by the Respondent and the manner of the alleged infringements.

Whether the appointment of a judge to any court ranking above the court in which a judge is currently serving while there is a pending petition for removal from office is unconstitutional.

36. The Petitioner's case in the amended Petition is that by interviewing and recommending the 1st, 2nd and 3rd Interested Parties for appointment as Judges of Appeal during the pendency of a petition for their removal, the Respondent acted unconstitutionally.

37. The background to the Petitioner's complaint is that on the 10th June, 2019, he lodged a petition for removal from office of five High Court Judges, namely Hon. H.A Omondi, Hon. Mumbi Ngugi, Hon. Francis Tuiyot, Hon. E.C Mwita and Hon. W.M Musyoka. The said petition was triggered by the determined judgment of the aforementioned Judges in High Court of Kenya Petition No. 295 of 2018 Hon. Philomena Mbete Mwilu vs. The Director of Public Prosecutions and Others delivered on 30th May, 2019.

38. It is the Petitioner's contention that the Judges adverted to contributed to the breach of Article 10 of the Constitution, rule 4(2) and 4(3) of the Judicial Code of Conduct and Ethics 2016 and that their determination in the aforementioned case was calculated to ensure a specific outcome.

39. In response, the Respondent states that the qualifications and the procedure for appointment of a Judge of the Court of Appeal is provided under Article 166 of the Constitution and section 30 of the Judicial Service Act while the procedure for removal is provided under Article 168 as well as section 31 of the Act. They argue therefore, that there is no provision either in the Constitution or the Act that bars any person against whom a petition for removal is pending, from applying or being appointed as a Judge of the Court of Appeal.

40. The 1st, 2nd and 3rd Interested Parties echo the sentiments of the Respondent and add that the petition for their removal is pending consideration and determination before the Respondent and cannot therefore prevent them from taking up the appointments for which they are qualified and merit to take up. They argue that if they are barred and the petition before the Respondent is eventually dismissed it may not be possible to remedy the situation since the vacancies may not be available. On the other hand, if the appointment is made, and it is established that they are culpable, nothing prevents their removal.

41. The 4th Interested Party avers that the interviews and recommendations for appointment of the 1st, 2nd and 3rd Interested Parties as Judges of Appeal was regular and done in accordance with Article 166(2) and (4) which spells out the qualifications of a Judge of the Court of Appeal. It is urged that under Article 160(5), a member of the Judiciary is not liable in an action in respect of anything done or omitted to be done in good faith, in the lawful performance of a judicial function. The 4th Interested Party also submits that the Petitioner has not demonstrated with evidence that the Judges in dealing with HC Petition 295 of 2018 neglected to exercise their judicial functions with due diligence, that they were not free of extraneous influences, inducement, pressure, threats or influence, direct or indirect, from outside quarters.

42. As an appropriate spring board, it is important to lay down the constitutional and statutory provisions that are applicable. The Respondent is established under Article 171(1) of the Constitution. Its functions are provided for under Article 172(1) as follows:

> "(1) The Judicial Service Commission shall promote and facilitate the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice and shall—
>
> (a) recommend to the President persons for appointment as judges;
>
> (b) ...
>
> (c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament;
>
> (d) ...
>
> (e) ...
>
> (2) In the performance of its functions, the Commission shall be guided by the following —
>
> (a) competitiveness and transparent processes of appointment of judicial officers and other staff of the judiciary; and
>
> (b) ..."

The Respondent is an independent commission which under the provisions of Article 249(2)(b) is not subject to direction or control by any person or authority.

43. On the appointment of Judges, Article 166(1) provides that:

" 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."

44. In so far as appointment as a Judge of the Court of Appeal is concerned, the qualifications are spelt out in Article 166(4) which provides thus:

" Each judge of the Court of Appeal shall be appointed from among persons who have—

(a) at least ten years' experience as a superior court judge; or

(b) at least ten years' experience as a distinguished academic or legal practitioner or such experience in other relevant legal field; or

(c) held the qualifications mentioned in paragraphs (a) and (b) for a period amounting, in the aggregate, to ten years."

45. The independence of a member of the Judiciary in the discharge of judicial functions is secured under Article 160(5) which states thus:

" A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function."

46. On the removal of Judges, Article 168 provides inter alia that a Judge of a superior court may be removed from office only on the grounds of inability to perform the functions of office arising from mental or physical incapacity; breach of code of conduct prescribed for Judges of the superior courts by an Act of Parliament; bankruptcy; incompetence; or gross misconduct or misbehavior. The removal process may be initiated by the Respondent acting on its own motion, or by any person petitioning the Respondent in writing setting out the alleged facts constituting grounds for removal.

47. The procedure to be followed in selecting applicants to be recommended to the president for appointment as Judges is set out under the First Schedule to the Judicial Service Act Parts I, II and III. Part III specifically provides for review of applications and background investigation of candidates. The Respondent's duty at this stage is to establish whether the candidate meets the minimum constitutional and statutory requirements for position of judge.

48. Part V of the First Schedule provides that the criteria for evaluation of individual applicants is guided by professional competence, communication skills, integrity, fairness, good judgment, legal and life experience and a demonstrable commitment to public and community service.

49. Article 172 of the Constitution mandates the Respondent to among other functions;

> "Promote and facilitate the independence and accountability of the Judiciary and the efficient, effective and transparent administration of justice; recommend persons for appointment as judges and receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary."

50. In the instant Petition, the Petitioner's complaint is that the 1st, 2nd and 3rd Interested Parties were interviewed and recommended for appointment as Judges of the Court of Appeal by the Respondent despite the fact that there was a pending petition for their removal. However, the petition as drawn seems to invite the court to take a position on the alleged impropriety of the 1st, 2nd and 3rd Interested Parties in the determination of HC Petition No. 295 of 2018.

51. We decline that invite for the following reasons. First, that the petition lodged before the Respondent for the removal of the 1st, 2nd and 3rd Interested parties is alive before the body mandated under Article 168 to adjudicate upon it. We are of the considered view, that making any pronouncement on the petition for removal of the 1st, 2nd and 3rd Interested Parties would be prejudicial to a fair hearing and determination of the said petition. This court ought not to preempt the finding that the Respondent would ultimately make in the fullness of time lest we fall foul of the doctrine of exhaustion.

52. The Court of Appeal (Waki, Nambuye & Kiage, JJ.A.) in Geoffrey Muthinja & Another vs. Samuel Muguna Henry & 1756 Others [2015] eKLR rendered itself on the doctrine of exhaustion thus:

> "We see this as the crux of the matter in this and similar cases. It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call the moment a storm brews within churches, as is bound to happen. The exhaustion doctrine is a sound one and serves the purpose of ensuring there is a postponement of judicial consideration of matters to ensure that a party is first of all diligent in the protection of his own interest within the mechanisms in place for resolution outside of courts. This accords with Article 159 of the Constitution which commands Courts to encourage alternative means of dispute resolution."

In the instant case, the petition for removal is pending before the Respondent and the process has not been exhausted. In our view, the Respondent must be given the opportunity to exercise its legal mandate, all the while the court being wary not to substitute or replace the opinion of the Respondent with its own.

53. Like all constitutional organs, the Respondent, in carrying out its function of recruitment and removal, is bound by the provisions of Chapter Six of the Constitution on leadership and integrity. It is thus expected that the recommendations for appointment of judges must be a result of a rigorous and thorough process of interviews and investigations and should it be shown that the Respondent has recommended a person who shall not bring honour, public confidence and integrity to the office of judge, this court would not hesitate to apply the appropriate sanctions within the Law.

54. In the case of Kenya Youth Parliament & 2 Others vs. Attorney General & 2 Others, Constitutional Petition No. 101 of 2011 [2012] eKLR a three-judge Bench of the High court stated:

> "We state here, with certain affirmation, that in an appropriate case, each case depending on its own peculiar circumstances, facts, and evidence, this court clothed with jurisdiction

as earlier stated, would not hesitate to nullify and revoke an appointment that violates the spirit and letter of the Constitution but the court will hesitate to enter into the arena of merit review of a constitutionally mandated function by another Organ of State that has proceeded with due regard to procedure. The court's intervention would of necessity be pursuant to a high threshold." (emphasis ours.)

55. We are of the view that it would be desirable to have any petition for the removal of a judge disposed of before any interviews, if and when vacancies arise for the appointment of judges to any court ranking above their current position. However, this is only an ideal situation. Realities on the ground prove that the contrary is true.

56. The receipt of petitions for removal of a judge(s) from office is a continuous process which depends on when particular complaints by an individual or body against a Judge arise or when the respondent on its own motion initiates the process, again, when a ground for removal arises. Under Article 168(4), the Respondent is mandated to consider such a petition, and either dismiss it or if satisfied that the petition discloses a ground for removal under Clause (1), send the petition to the President.

57. There is no gain saying that the Respondent has no control over the timings of the lodging of petitions for removal of a judge(s) before it. It is probable, like in the instant matter, that scheduled interviews or appointment of judges may coincidentally arise when a petition(s) for removal of a Judge who is a candidate for elevation has been filed. Should the existence of the petition be a bar to the interview and (if successful) to the appointment of such a judge to the court higher in rank?

58. From our reading of the Constitution and the Judicial Service Act, it is our considered view that the process of determining the suitability of a Judge who is a candidate for elevation to a court of a rank higher than the court he/she is currently serving in is the preserve of the Respondent, whether or not there is a pending petition for removal. We emphasize that in carrying out that mandate, the respondent, like any other organ of the state, is bound to follow the principles of the Constitution and the law. This court cannot interfere with the decision making thereof. As held in Kenya Youth Parliament & 2 Others (supra) the Court must hesitate to enter into the arena of merit review of a constitutionally mandated function of another organ of state.

59. The second reason why we decline the invite, taking judicial notice under section 59 of the Evidence Act, is that the decision of the five-judge bench which is impugned and which forms the basis of the petition for removal of the Interested Parties and 2 others, is now subject of two (2) pending appeals at the Court of Appeal at Nairobi being Civil Appeal No. 298 of 2019 Hon. Philomena Mbete Mwilu vs. The Director of Public Prosecutions and 5 Others and Civil Appeal No. 314 of 2019 The Director of Public Prosecutions and 5 Others vs. Hon. Philomena Mbete Mwilu & 3 Interested Parties.

60. In view of the above, this court cannot delve into the propriety or otherwise of the judgment in High Court Petition No. 295 of 2018 without infringing on the sub judice rule. Even without the appeals, we are alive to the fact that we cannot purport to sit on appeal on a decision of a properly constituted court of concurrent jurisdiction.

61. The third reason is in respect of the law relating to the immunity of a member of the Judiciary from liability in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. Article 160(5) of the Constitution provides that:

> "A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function."

62. The importance of the immunity of Judges in execution of their judicial functions was succinctly put in the case of Sirros vs. Moore [1974] 3 WLR 459, where the Court of Appeal in England stated thus:

> "If the reason underlying this immunity is to ensure "that they may be free in thought and independent in judgment" it applies to every Judge whatever his rank. Each should be protected from liability to damages when he is acting judicially. Each should be able to do his work in complete independence and free from fear. He should not have to turn the pages of his books with trembling fingers, asking himself: If I do this, shall I be liable to an action. He may be mistaken in fact. He may be ignorant in law. What he does may be outside his jurisdiction – in fact or in law – but so long as he honestly believes it to be within his jurisdiction, he should not be liable...He should not be plagued with allegations of malice or ill-will or bias or anything of the kind..."

63. Citing the Sirros Case above in Jasbir Singh Rai & 3 others vs. Tarlochan Singh Rai & 4 others, Civil App. Nai 307 of 2003 (154/2003 UR) [2007] eKLR, Bosire J.A (as he then was) reiterated the principle thus:

> "It is quite clear from the above quotation that the independence of Judges goes beyond immunity against suits. It extends even to aspects in which Judges may be made to feel so uncomfortable by allegations of impropriety being made against them as to make them want to defend themselves. The policy relating to independence of Judges ensures that Judges work without worrying about engaging counsel to draft documents to answer allegations of impropriety against them in matters they handle in the course of their work as Judges..."

64. Article 160(5) therefore exists for the sole purpose of safe guarding the independence of the Judiciary in decision making in matters before the courts. This is what is commonly referred to as "decisional independence."

65. We are of the view that a clear distinction must be drawn between complaints which arise from judicial decisions made in good faith, that an aggrieved party should address through the appellate system of the courts, and any other complaints against a judicial officer which should be addressed through disciplinary procedures by the Respondent as provided under the Constitution and the law.

66. The fourth reason is the need to uphold the constitutional rights of a Judge facing a petition for removal during the process of filling of vacancies in a court of higher rank. These are, the right to a fair hearing enshrined in Article 50(1), the right to fair administrative action under Article 47, the right to equality and freedom from discrimination under Article 27 and the right to presumption of innocence under Article 50(2)(a).

67. It is our view that locking out a Judge from being considered for elevation on the basis of a pending petition for removal would amount to an infringement on the right to a fair hearing and rules of natural justice. The Court of Appeal (Okwengu, G.B.M. Kariuki & Kiage JJ.A.) in Judicial Service Commission vs. Gladys Boss Shollei & Another [2014] eKLR held thus:

> "Apart from the need for independence and impartiality, the right to a fair hearing under Article 50(1) of the Constitution encompasses several aspects. These include, the individual being informed of the case against her/him; the individual being given an opportunity to present her/his side of the story or challenge the case against her/him; and the individual having the benefit of a public hearing before a Court or other independent and impartial body."

68. This principle is buttressed in the case of Chief Constable Pietermaritzburg vs. shim 1908 29 NLR 338 341 cited by Odunga J in Judicial Review Misc. App. 61 of 2018, Republic vs. County Director of Education, Nairobi & 4 Others Ex-parte Abdukadir Elmi Robleh, [2018] eKLR as follows:

> "It is a principle of common law that no man shall be condemned unheard, and it would require very clear words in the statute to deprive a man of that right. To the applicant, this court's decision shows that the audi alteram partem rule would only be excluded if parliament intended its exclusion, irrespective of whether or not the rights of individuals are affected. The audi alteram partem rule ensures a free and impartial administrative process within which decisions and cognizance of facts and circumstances, occur altogether openly."

69. The Petitioner has prayed inter alia that the 1st, 2nd and 3rd Interested Parties be restrained from being appointed as Judges of the Court of Appeal pending hearing of their petition for removal. As stated earlier on in this judgment, no one should be condemned unheard.

70. This proposition is supported by the Supreme Court of Uganda in the case of The Management Committee of Makondo Primary School and Another vs. Uganda National Examination Board, H.C Civil Misc. Application No. 18 of 2010 which was followed with approval by Lenaola J (as he then was) in Mandeep Chauhan vs. Kenyatta National Hospital and 2 Others [2013] eKLR stated:

> "It is a cardinal rule of natural justice that no one should be condemned unheard. Natural justice is not a creature of humankind. It was ordained by the divine hand of the Lord God hence the rules enjoy superiority over all laws made by humankind and that any law that contravenes or offends against any of the rules of natural justice, is null and void and of no effect. The rule as captured in the Latin Phrase 'audi alteram partem' literally translates into 'hear the parties in turn', and has been appropriately paraphrased as 'do not condemn anyone unheard'. This means a person against whom there is a complaint must be given a just and fair hearing."

71. In the instant Petition, the Petitioner lodged a petition for removal of the Interested Parties and two others on 10th June, 2019. Of note is that the Petitioner acknowledges that the Respondent on receipt of the petition, indeed wrote to him (Petitioner) in a letter dated 13th June, 2019 indicating that the Respondent had given directions for the specific Judges to be notified to submit their responses thereto.

72. In the meantime, three (3) of the above Judges (the 1st, 2nd and 3rd Interested Parties) had applied to the Respondent to fill announced vacancies in the Court of Appeal. The Petitioner wrote to the Respondent on 17th June, 2019 in opposition to their candidature. The Respondent however had by then interviewed the 1st Interested Party (12th June, 2019) and subsequently the 3rd Interested Party (17th June, 2019) and the 2nd Interested Party (24th June, 2019) in that order.

73. The Petitioner's contention is that the Respondent had hastily recommended the 1st, 2nd and 3rd Interested Parties for their appointment as Court of Appeal judges but has failed to expeditiously determine the complaint against them which is a clear indication that it is not interested in making a determination on the complaint. However, in the circumstances, and taking into account the chronology of the events herein above, we find that the 1st, 2nd and 3rd Interested Parties needed sufficient time to file their responses by dint of Article 50(2)(c) which provides for a party to be given adequate time to prepare a defence.

74. From the foregoing, we are satisfied that it would be against the Constitution, statute and rules of natural justice if the Interested Parties would have been barred from the interview on the basis of a petition that had not been heard.

75. Having regard to the right to presumption of innocence, even where there is a pending petition for the removal of a judge, ultimately, the balance tilts in favour of a judge who has applied and qualified to be appointed for the simple reason that if he or she is barred and eventually the petition before the Respondent is dismissed, it may not be possible to remedy the situation since the vacancies may not be available. Conversely, if the appointment is made and it is established that the judge is culpable, nothing stops the removal process from taking its legal course.

76. We have anxiously considered the Petition herein and note that the Petitioner has not brought to the attention of this court any constitutional or statutory provision that bars the appointment of any judge to any court ranking above the court in which such a judge is serving if there be a pending petition for removal of such judge. The procedure for handling complaints against judges is well set out in Article 168 of the Constitution and the procedure adopted by the Petitioner in this case to bar the elevation of the Interested Parties to the Court of Appeal on account of a pending petition for removal is not provided in law.

77. Notably, the Interested Parties continue being legally in office as Judges of the High Court of Kenya. The pendency of a petition for removal does not affect their positions as Judges until the provisions of Article 168 are triggered upon the hearing of the petition for removal.

78. It is thus clear that once the Respondent has considered the petition before it and is satisfied (if at all) that the petition discloses a ground for removal under Article 168(1), it shall send the petition to the President with the recommendation and the President shall within fourteen (14) days of receipt thereof, suspend the Judge from office and proceed to appoint a tribunal in accordance with the recommendation of the Respondent. It is then, and only then, that the Judge would be legally out of office on suspension and subsequently on removal should the tribunal so find.

79. The Interested Parties being legally in office as Judges of the High Court have the legal right to apply to fill the vacancies at the Court of Appeal as they duly did. If the Respondent be, as it was, satisfied upon interview of their qualifications to scale higher in the judicial hierarchy, nothing stops the Respondent in exercise of its independence in the process of recruitment of judges from recommending the appointments of the 1st, 2nd and 3rd Interested Parties as it has done.

80. The Respondent is mandated by law to interview and recommend to the President the names of persons to be appointed as Judges. The process of recruitment of a Judge by the Respondent is an administrative action that ought to be expeditious, lawful, reasonable and procedurally fair guided by Article 47(1). If a right or fundamental freedom of a person is likely to be adversely affected that person has a right to be given written reasons for the action. In Judicial Service Commission v Mbalu Mutava & Another [2015] eKLR the Court of Appeal (Githinji, Nambuye, Karanja, Mwera & Ouko, JJ.A.) held that:

> " The act by the JSC of initiating the process of removal of a judge, either on its own motion through information or through investigation; the act of receiving the petition from a member of the public, the consideration of the petition, the process by which it satisfies itself whether or not the petition discloses a ground for removal, the determination of that question; the act of formulating a petition and the recommendation, and the act of sending the petition to the President are indistinguishably a series of administrative actions which adversely affects a judge forming a single whole – an administrative action within the

meaning of Article 47(1). It is true that it was performing a constitutional mandate but in performing that mandate JSC was subject to the Constitution and, in this case, subject to 1st respondent's constitutional right to fair administrative action. I have no doubt that on this aspect the High Court made a correct finding."

81. The rights of a Judge in office faced with this scenario are not subservient to the rights of a complainant against him or her. In the circumstances, a balancing act of the rights of a Judge who wishes to present himself/herself as a candidate to meet a legitimate expectation to compete for available vacancies if qualified, and those of a Petitioner who has petitioned for the removal of such a Judge, is delicate. It calls for proper application of Articles 27, 47, 50(1) and 50(2). We associate ourselves with the sentiments of the court in ABH vs. Board of Management & 3 Others [2016] eKLR where Anyara Emukule J stated thus:

> "...It is important to bear in mind and to observe on the outset, while interpreting any provision of the Bill of Rights that human rights are of equal status, and therefore of equal importance. The court therefore walks upon a tight rope and must maintain a balance between the competing claims, keeping in mind the universal principle that every person while exercising his own rights must not hurt or harm other person's rights, or put differently, your right starts where mine stop. The ancient Romans who spoke Latin put it thus - "sic utere tuo ut alienum nonlaodas." (one's right should not cause injury to another).

82. Before we conclude, we observe that the continued implementation of the Constitution of Kenya 2010 continues to open up new frontiers and or lacuna that require remedial measures either under the Constitution itself or the operationalizing Acts of Parliament. No wonder, the current clamour for amendment of no less than the Constitution itself.

83. The principles of good governance, integrity, transparency and accountability demand an expeditious and time bound process through which a petition for removal of a judge can be determined. We are of the considered view that time is nigh for the amendment of the Law to stipulate timelines within which such petitions should be disposed of. This would be beneficial to the administration of justice and to the affected judge(s). The need to clear allegations against a judge expeditiously cannot be gainsaid.

Is the Petitioner entitled to the reliefs sought?

84. We have carefully considered the Petition before us, the responses, the rival submissions, the Constitution and the applicable law, and on the material before us, we are satisfied that this Petition lacks in merit and we accordingly proceed to dismiss it.

Costs

85. Costs always follow the event. However, in the circumstances of this case, and considering that this is a public interest matter, we make an order that each party bears its own costs.

DATED, DELIVERED AND SIGNED THIS 10TH DAY OF FEBRUARY, 2020.

....

L. A. ACHODE

PRINCIPAL JUDGE

....

J. A. MAKAU

JUDGE

....

A. K. NDUNGÚ

JUDGE