Ndungu; Mboya (Interested Party) (Petition 218 of 2016) [2016] KEHC 7272 (KLR) (Constitutional and Human Rights) (6 June 2016) (Ruling)

Njoki S. Ndungu v Judicial Service Commission & another [2016] eKLR

Neutral citation: [2016] KEHC 7272 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

PETITION 218 OF 2016

JL ONGUTO, J

JUNE 6, 2016

IN THE MATTER OF

HON LADY JUSTICE NJOKI S NDUNGU ..... PETITIONER

AND

APOLLO MBOYA ..... INTERESTED PARTY

Breach of a legitimate expectation for failure to be notified and invited for hearing against a complaint lodged against a party

The applicant was a judge of the Supreme Court and she alleged violation of her constitutional rights as a result of the actions taken by the Judicial Service Commission (JSC) in receiving a complaint from the interested party. The applicant sought orders of stay pertaining to part of the complaint. The court highlighted the key elements for the grant of conservatory orders. The court further found that the failure to notify and invite the applicant of the hearing date of the complaint against her and on the face of the facts of the case may be construed to be a breach of the applicant's legitimate expectation.

Reported by Kakai Toili

Constitutional Law *– doctrine of legitimate expectation – breach of the doctrine of legitimate expectation - whether the failure to invite a judicial officer to the hearing of a complaint against her after promising to invite her was a breach of the doctrine of legitimate expectation.*

Civil Practice and Procedure *– orders – conservatory orders - what were the key elements for the grant of conservatory orders.*

Brief facts

The applicant was a judge of the Supreme Court and had filed the petition alleging violation of her constitutional rights as a result of the actions taken by the respondent, the Judicial Service Commission (JSC) in receiving a complaint from the interested party. She stated that the JSC undertook investigations and rendered

a decision on the complaint. The applicant was aggrieved by the decision and thus filed the petition together with the instant application seeking orders of stay pertaining to part of the complaint.

Issues

i. Whether failure to notify and invite a party to the hearing of a complaint against them was a breach of the doctrine of legitimate expectation.

ii. What were the key elements for the grant of conservatory orders?

Held

1. The principles for the grant of conservatory orders were well settled. By dint of article 23 of the Constitution, the court was vested with the jurisdiction to grant such orders. The key elements for the grant of conservatory orders were that;
    1. an applicant must establish a *prima facie* case with a likelihood of success;
    2. the denial to grant the orders must not render the substantive petition nugatory; and
    3. public interest must tilt in favour of the applicant.
2. Even in the absence of a respondent, it was still incumbent upon an applicant to meet the criteria for the issuance of conservatory interim orders. Based on the evidence, the petitioner had demonstrated that she had a *prima facie* case.
3. The applicant was never invited to appear before the JSC despite the JSC informing her and committing that it would invite her. There was, in the context of procedural fairness, a genuine legitimate expectation on the part of the applicant that she would receive the benefit of being invited for the hearing as promised. The promise to notify the applicant of the hearing date was clear and unambiguous. Certainly, the applicant's expectation was also reasonable. The failure to then notify and invite the applicant come the hearing date and on the face of the facts of the case may be construed to be a breach of the applicant's legitimate expectation.
4. As there was a possibility that the JSC could reach an adverse finding in regard to the applicant (and ultimately it did), it was under an obligation to accord the applicant an opportunity to appear before it. The applicant had made out a *prima facie* case with a likelihood of success which warranted the invocation of the court's jurisdiction for hearing and determination.
5. The petition shall not in any way be rendered nugatory as the court shall still be seized with the jurisdiction to determine whether any of the applicant's constitutional rights had been violated and granted any appropriate relief as the circumstances may require. The JSC had already returned a verdict of misconduct which was under challenge in the petition.
6. Public interest did not tilt in favour of the applicant that was because the subject matter revolved around the question of discipline of judges of the Supreme Court *vis-à-vis* the mandate of the JSC. Being a constitutional body mandated to undertake the discipline of judicial officers or jump start the process as far as judges were concerned, it would be against the public interest to halt the mandate of the JSC. Furthermore, balancing the interest of the applicant and the greater public interest to see a constitutional body undertake its constitutional obligations, the balance lay in favour of public interest.
7. The court ought to always exercise a lot of reticence before interfering with organs or bodies under constitutional compulsion to exercise powers and functions specifically donated by the Constitution. It would not be appropriate to immediately and at an interlocutory stage stop the JSC on its tracks given that in the circumstances of the case the process of consideration of a complaint under article 168 of the Constitution had already commenced.
8. The court could not close its eyes to the fact that the applicant may indeed be prejudiced if the JSC decided not to observe the provisions of article 47 of the Constitution as promoted by the Fair Administrative Actions Act, No 4 of 2015. The prejudice would be disastrous. It may be ruinous but only depending on which way the JSC decided. In such circumstances counsel of prudence would dictate that the court invites the doctrine of proportionality and act in the best interests of both parties.

9. The applicant had established that she had a *prima facie* case. The applicant had also shown that she may suffer prejudice, if the application was not granted and the JSC proceeded as they may arbitrarily wish. On the other hand, public interest as did constitutional values would dictate that constitutional bodies and organs be allowed to operate with minimal or no interference at all. There ought to be no unnecessary superintendence of constitutional bodies.
10. The applicant asked the court to grant such orders as may be deemed appropriate, that was one of those cases where an omnibus prayer may be invited and applied by the court. The JSC must operate within the confines of the Constitution even as it was allowed to proceed with its mandate. The individual rights and fundamental freedoms guaranteed by the Constitution must also be protected.

Petition partly allowed.

Orders

i. *Pending the hearing of the petition, the JSC was at liberty to proceed and process the complaint by the interested party against the applicant save only that the JSC must in all circumstances substantively comply with and observe the provisions of both article 47 of the Constitution as well as the provisions of the Fair Administrative Action Act, No. 4 of 2015 and in particular afford the applicant a hearing prior to making any further decision(s) on the complaint.*
ii. *The costs of the application shall abide any order on costs made upon determination of the petition.*
iii. *The hearing of the petition was to be fast tracked.*
iv. *There shall be liberty to either party to apply.*

Citations

Cases

Kenya

Board of Management of Uhuru Secondary School v City County Director of Education & 2 others Petition 359 of 2015; [2015] KEHC 2174 (KLR) - (Explained)

Communications Commission of Kenya & 5 others v Royal Media Services & 5 others Petitions 14, 14A, 14B & 14C of 2014; [2015] KESC 13 (KLR) - (Mentioned)

Judicial Service Comission v Mbalu Mutava & another Civil Appeal 52 of 2014; [2015] KECA 741 (KLR) - (Explained)

Kilonzo, Diana Kethi & others v Independent Electoral and Boundaries Commission & 10 others Civil Appeal 309 of 2013; [2014] KECA 353 (KLR) - (Mentioned)

Suleiman v Amboseli Resort Limited Civil Case 1078 of 2003; [2004] eKLR; [2004]2 KLR 589 - (Mentioned)

United Kingdom

Schmidt & another v Secretary of State for Home Affairs [1969] 1 All ER 904,906 - (Mentioned)

Statutes

Kenya

1. Constitution of Kenya, 2010 articles 23; 47; 168; 171; 172 - (Interpreted)
2. Fair Administrative Actions Act (cap 7L) In general - (Cited)
3. Judicial Service Act section 3 (cap 8A) - (Interpreted)

Advocates

None mentioned

RULING

Introduction

1. The instant petition was filed against the backdrop of some rather tragicomic weeks and months for the judiciary of the Republic of Kenya. Two superior court judges are each facing a tribunal to investigate their conduct and possibly recommend their removal as judges. Two others continue to litigate over their retirement age. The courts are also riddled with cases filed by or against the Judicial Service Commission.

2. The petitioner, Hon Lady Justice Njoki S Ndungu, describes herself as an Advocate of the High Court of Kenya of 26 years standing. She is a Judge of the Supreme Court of Kenya. She filed the petition on May 26, 2016 before this court against the respondent, the Judicial Service Commission ("JSC"), a constitutional body established under article 171 of the *Constitution* and whose functions are stipulated under article 172 of the *Constitution*. Learned counsel Mr Apollo Mboya was also impleaded as an interested party.

3. The petitioner ("the applicant") filed the petition alleging violation of her constitutional rights as a result of the actions taken by the JSC in receiving a complaint from the interested party. It is stated that the JSC supposedly undertook investigations and rendered a decision on the complaint. The applicant is aggrieved by the decision rendered by the JSC and has filed the petition together with an application seeking orders of stay pertaining to part of the complaint.

4. This ruling relates to the notice of motion application dated May 26, 2016 filed by the applicant seeking for orders thus:

    1. ...

    2. An interim conservatory order do issue prohibiting the Judicial Service Commission, its officers, servants or agents from considering, admitting to hearing or convening to hear, any further part of the Judicial Service Commission petition filed by Mr Apollo Mboya or any matters related thereto pending the hearing and determination of this application inter partes.

    3. A conservatory order do issue prohibiting the Judicial Service Commission, its officers, servants or agents from considering, admitting to hearing or convening to hear, any further part of the Judicial Service Commission petition filed by Mr Apollo Mboya or any matters related thereto until the issues of the jurisdiction and mandate of the Judicial Service Commission are heard and determined through this petition.

    4. Any other orders that this honourable court deems fit."

The Applicant's Case

5. The applicant has sought the above orders on the grounds that on October, 9 2015, the interested party filed a petition (" the Mboya petition") with the JSC seeking *inter alia* the removal of three judges of the Supreme Court on the allegation that they had downed their tools and refused to offer judicial service to the Kenyan people. The applicant was one of the judges in question. The applicant states that on various dates thereafter, the applicant sought proper particulars of the Mboya petition as she was unable to respond appropriately to the non-specific allegations that had been asserted in the Mboya petition. There was however no riposte by the JSC.

6. The applicant contended that the interested party thereafter filed further grounds allegedly in support of the Mboya petition on October 21, 2015. The interested party also sought to rope in two more Supreme Court judges as respondents in the Mboya petition. In that context, the applicant sought for further particulars of the said further grounds from the JSC and also from the interested party. Again no response was forthcoming and this, the applicant argued, curtailed her right to respond to the Mboya petition.

7. It was the applicant's other contention that the foregoing notwithstanding, on February 22, 2016, and without prejudice to her legal rights, she filed an affidavit in response to the Mboya petition and soon thereafter, she received a letter dated February 29, 2016 from the JSC. In the letter, the applicant was informed that a special committee had been set up to hear the Mboya petition as well as the additional grounds that had been subsequently filed. Additionally, the letter indicated that the hearing dates for the Mboya petition would be communicated to her in due course.

8. The applicant averred that without being accorded a hearing or even the opportunity to be heard, she later received a letter dated May 9, 2016 from the JSC which stated that the petition had been considered together with her response therein and that a conclusion had been reached that her conduct was unbecoming of a judge of the Supreme Court and amounted to misconduct. Further, that the said conduct however did not warrant the recommendation for the formation of a tribunal by the President as required under article 168 of the *Constitution*. Accordingly, the letter indicated that she had been admonished for misconduct and that the additional grounds were still under consideration and she would be informed of the outcome in due course.

9. As a result of the foregoing, the applicant asserted that the decision by the JSC infringed on her right to a fair hearing and that she is apprehensive that her fundamental rights are likely to be further trampled on by the JSC in the event that she does not promptly procure the protection of this court.

10. In her affidavit in support of the application, the applicant deponed that neither the interested party nor the applicant ever attended any hearings of the Mboya petition by the JSC. As such, she averred that it was inconceivable how the JSC managed to reach a purported considered decision on a matter they had never heard and more so, how it was able to make conclusive adverse findings against a Judge of the Supreme Court in the manner it did. The applicant, by reason of the foregoing, was prompted into writing to the JSC on the May 10, 2016 seeking urgent clarification on how the JSC proceedings had been conducted. Once again there was no response from the JSC.

11. As such, the applicant is apprehensive that her fundamental rights are likely to continue being infringed by the JSC in the event that the present application does not succeed.

12. It was the applicant's further deposition that there is a legal vacuum in the JSC processes as the JSC has never gazetted rules defining its procedures for handling petitions filed before it. Consequently, summed the applicant, the JSC seemed to be conducting an ad hoc process that is open to perceptions of or actual bias, abuse of authority, lack of consistency and transparency and failure to adhere to fundamental tenets of fair process as enshrined in the Constitution.

13. According to the applicant, there is absolutely no factual, constitutional, statutory or legal basis for the findings arrived at and the resolution to admonish her adopted by the JSC. The Mboya petition was based on the exercise of judicial mandate and discretion together with her fellow judges in their respective capacities as judges of the Supreme Court. The applicant therefore argued that this was bound to erode, if not completely destroy, the independence of, not only the Supreme Court, but also the independence of all judges and other judicial officers if it was to be accepted that the JSC has the mandate to scrutinise or review such matters. In the applicant's further view, the foregoing would

render the exercise of judicial functions subject to review by litigants through the JSC process. In doing so, the JSC would be a threat to the very independence and impartiality of the courts that the JSC is constitutionally mandated to jealously protect under article 172 and section 3 of the *Judicial Service Act*.

14. The applicant further asserted that there is a real threat to the public confidence in the judicial process and the freedom from interference with the same, which will cause untold damage to the judiciary. That the JSC process, if allowed to infringe on matters where the JSC clearly has no jurisdiction to initiate any inquiry, will only serve to intimidate judges who are exercising their judicial functions and this would cause a constitutional crisis. Additionally, that there is evidently and imminently, a great danger of the JSC standing as judge and jury in its own cause if it engages in merit review of the decisions of courts.

15. It was the applicant's final contention that she imminently stands to suffer irreparable injury and infringement of her rights at a personal level in that the Constitution is very clear on the inevitable consequences of an adverse finding by the JSC. She would be automatically suspend from office and a tribunal formed by the President to hear her case. The applicant concluded that it is thus imperative that this court reviews the conduct of the JSC and determine the legality or otherwise therein before the matter becomes moot.

The Respondent's Case

16. The JSC although served, have not hitherto participated in the proceedings. I hasten to add that on June 2, 2016, a letter written by the law firm of Messrs Muma & Kanjama Advocates was received by the Deputy Registrar in charge of the relevant division of this court. The letter urged that I mention the matter prior to delivery of my ruling. The letter was placed before me on June 3, 2016, but I was unable to act on the same for the simple reason, inter alia, that there was no evidence that the JSC had indeed appointed the said law firm to appear and make any representations on its behalf.

The Interested Party's Case

17. The interested party proceeded *propria persona*. He opposed the application through oral submissions made with the permission of the court.

18. The interested party argued that the applicant is merely seeking immunity from article 168 of the *Constitution* and that she is seeking the immunity so that she may continue to engage in misconduct.

19. The interested party submitted that the applicant is jumping the gun since all the parties herein do not know whether they would be invited to appear before the JSC, and as such, no party can anticipate any prejudice. Further, that there is no threat of violation and a proper hearing must take place at the tribunal.

20. According to the interested party, the applicant has been adjudged to have behaved in an unbecoming manner and that constitutes misconduct. In the interested party's view, there is a determination already and as such, the horse has already bolted. Additionally, that the applicant seeks to injunct a constitutional body from performing a constitutional mandate, the court must be very careful as the orders sought herein have a direct bearing on the Constitution.

21. For the above stated reasons, the interested party urged the court to dismiss the application.

Discussion and Determination

22. The key issue for determination is whether this court should allow the application and grant the interlocutory orders sought or any of them.

23. The applicant primarily prays for conservatory orders. The principles for the grant of conservatory orders are well settled. By dint of article 23 of the *Constitution*, this court is vested with the jurisdiction to grant such orders. In the case of *Board of Management of Uhuru Secondary School v City County Director of Education & 2 others* [2015] eKLR this court rendered the position that:

> "(25) Foremost, the applicant ought to demonstrate a *prima facie* case with a likelihood of success and that in the absence of the conservatory orders he is likely to suffer prejudice. As was stated by Musinga J (as he then was) in the case of *Centre for Rights Education and Awareness and 7 others v Attorney General* [HCCP No 16 of 2011]:
>
> > "[Arguments] in this ruling relate to the prayer for a conservatory order in terms of prayer 3 of the petitioner's application and not the petition. I will therefore not delve into a detailed analysis of facts and law. At this stage, a party seeking a conservatory order only requires to demonstrate that he has a prima facie case with a likelihood of success and that unless the court grants the conservatory order, there is real danger that he will suffer prejudice as a result of the violation or threatened violation of the Constitution".
>
> (26) It is in my view not enough to merely establish a prima facie case and show that it is potentially arguable. Potential arguability is not enough to justify a conservatory order but rather there must also be evident a likelihood of success. The *prima facie* case ought to be beyond a speculative basis. In these respects, I would quickly make reference to M Ibrahim J (as he then was) in the case of *Muslims for Human Rights [MUHURI] & others v Attorney General & others* CP No 7 of 2011, who whilst agreeing with Musinga J's statement in *Centre for Rights Education and Awareness [CREAW] and 7 others v Attorney General* (*supra*) stated as follows:-
>
> > "I would agree with my brother that an applicant seeking conservatory orders in a Constitutional case must demonstrate that he has a *prima facie* case with a likelihood of success" (emphasis).
>
> (28) Recently the same pertinent observations were made by Ngugi J and Muriithi J sitting separately in *JimaldinAdan Ahmed & 10 others v Ali Ibrahim Roba and 2 others* [2015] eKLR and *Micro Small Enterprises Association of Kenya (Mombasa Branch) v Mombasa County Government* [2014] eKLRrespectively.
>
> (29) Once the applicant has established to the court's satisfaction a *prima facie* case with a likelihood of success the court is then to decide whether a grant or a denial of the conservatory relief will enhance the constitutional values and objects of the specific right or freedom in the Bill of rights: see *Patrick Musimba v The National Land Commission & 4 others* HCCP 613 of 2014

(No 1) [2015] eKLR and also *SatroseAyuma & 11 others v Registered Trustees of Kenya Railways Staff Retirements Benefits Scheme* [2011] eKLR.

(29) Thirdly, flowing from the first two principles, is whether if an interim conservatory order is not granted, the petition or its substratum will be rendered nugatory. It is indeed the business of the court to ensure and secure so far as possible that any transitional motions before the court do not render nugatory the ultimate end of justice. In these respects the case of *Martin Nyaga Wambora v Speaker of the County Assembly of Embu & 3 others* CP No 7 of 2014, is relevant, especially paragraphs [59] [60] and [61] thereof.

(30) The fourth principle which emerges from the various cases and is well captured by the Supreme Court of Kenya in the case of *Gatirau Peter Munya v Dickson Mwenda Githinji & 2 others* [2014] eKLR is that the court must consider conservatory orders also in the face of the public interest dogma.

(31) Finally, the court is to exercise its discretion in deciding whether to grant or deny a conservatory order. The court must consequently consider all relevant material facts and avoid immaterial matters. The court will consider the applicants credentials, the *prima facie* correctness of the availed information, whether the grievances are genuine legitimate and deserving and finally whether the grievances and allegations are grave and serious or merely vague and reckless: see *Centre for Human Rights and Democracy & 2 others v Judges and Magistrates Vetting Board & 2 others* CP No 11 of 2012 as well as *Suleiman v Amboseli Resort Ltd* [2004] 2 KLR 589."(Emphasis added)

24. The key elements for the grant of conservatory orders thus remain that an applicant must establish a *prima facie* case with a likelihood of success; the denial to grant the orders must not render the substantive petition nugatory; and public interest must tilt in favour of the applicant.

25. Foremost, there is need for me to point out that there is no doubt that the instant petition raises weighty issues and questions of law which go to the very root of the JSC's remit to consider petitions for the removal of a judge of any of the superior courts. Questions of both procedure and substance of such remit will have to be addressed at the substantive hearing of the petition. In the interim though, the court is now called upon to determine an interlocutory application and the court is not expected to make any definitive findings of law or fact save the very obvious.

26. I must also point out that even in the absence of a respondent, it is still incumbent upon an applicant to meet the criteria for the issuance of conservatory interim orders.

27. Applying the above principles to the present case, firstly, I have no hesitation in stating that I am satisfied that the petitioner has demonstrated that she has a *prima facie* case. I say so, based on the evidence before me. It is evidently clear that the applicant was never invited to appear before the JSC despite the JSC informing her and committing that it would invite her. This is patently palpable in the letter dated 29 February, 2016 addressed to the applicant by the JSC which stated, partly, thus:

> " I wish to convey the decision of the Judicial Service Commission meeting held on February 29, 2016 that a special committee of the Commission be set up to hear the petition filed against your honour by Mr Apollo Mboya dated October 9, 2015 and additional grounds dated October 21, 2015.
>
> We shall communicate the date of the hearing in due course.

Yours faithfully," [emphasis]

28. Clearly, there was to be expected that the letter would self-generate into a promise to give the applicant a hearing. On that basis, it is apparent also that there was, in the context of procedural fairness, a genuine legitimate expectation on the part of the applicant that she would receive the benefit of being invited for the hearing as promised: see *Schmidt & another v Secretary of State for Home Affairs* [1969] 1 All ER 904,906 and also *Communications Commission of Kenya & 5 others v Royal Media Services & 5 others* SCK Petition No 14 of 2014. The promise to notify the applicant of the hearing date was clear and unambiguous. Certainly, the applicant's expectation was also reasonable. The failure to then notify and invite the applicant come the hearing date , in my view, and on the face of the facts of this case as currently availed by the applicant may be construed to be a breach of the applicant's legitimate expectation.

29. Additionally, as there was a possibility that the JSC could reach an adverse finding in regard to the applicant (and ultimately it did), it was under an obligation to accord the applicant an opportunity to appear before it. For that proposition, I am duly guided by the decision of the Court of Appeal in *Judicial Service Comission v Mbalu Mutava and another*, Civil Appeal No 52 of 2014[2015]eKLR where it was stated that:

> "JSC as a state organ exercises the functions specified in article 172. However, not all its decision adversely affects the rights or legal position of any person. What is an administrative action targeted by article 47(1) will depend on a proper construction of article 47(1) in conjunction with relevant provisions of the Constitution including article 10 relating to national values, article 21, on the bill of rights, article 73 on leadership and integrity and the empowering provisions of the Constitution or law on the basis of which the decision is made or contemplated to be made. In other words, it will largely depend on characteristics of the decision, the nature and substance of the decision and the objective it is intended to achieve. An administrative action includes an administrative decision which adversely affects or is likely to affect any person made or contemplated to be made by certain public officers, state officers and state organs in the national and county executives pursuant to a power conferred by the Constitution or any written law.
>
> (28) The act by 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 judgeforming 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." [emphasis mine]

30. The Court of Appeal went on to state that :

> "It has been contended, and correctly so, that JSC at this stage is making a preliminary decision and its duty is to find out if there is a *prima facie* case. It has been held that there is no difference in principle so far as observance of rules of natural justice is concerned between decisions which are final and which are not (*Wiseman v Borneman*; *Evans Rees – supra*), that there is no absolute rule and that it all depends on the circumstances of the case. Further, I have already observed that the principle of fair administrative action applies to the proceedings in question.
>
> (42) In summary, the relevant Commonwealth authorities dealing with the representation to the President for removal of a judge, *Barnwell v AG* [1994] 3LRC 30; *Rees v Crane* (*supra*) and the local cases –*Ole Keiwua* and *Nancy Makhoha Baraza*; show that the Constitution does not exclude rules of natural justice and that the rules of fairness require that a judge be given a notice of the allegation and an opportunity to make a representation in answer to the allegations before a decision to make a representation to the President for appointment of a tribunal to inquire into the allegations is made by the JSC. These are two of the three foundational features of natural justice as identified by Lord Hodson in *Ridge v Baldwin* (*supra*). These principles have been incorporated as right to fair administrative action by the phrase "procedurally fair" in article 47(1). The JSC has set a precedent in *Nancy Makhoha Baraza's* case and in this case of the fair procedure that it would adopt in these types of cases."

31. Based on the foregoing, I am satisfied that the applicant has made out a *prima facie* case with a likelihood of success which warrants the invocation of this court's jurisdiction for hearing and determination.

32. On whether the petition will be rendered nugatory if the conservatory orders sought are not granted, I hold the view that the petition shall not in any way be rendered nugatory as this court shall still be seized with the jurisdiction to determine whether any of the applicant's constitutional rights have been violated and grant any appropriate relief as the circumstances may require. I state so as well with the knowledge that the JSC has already returned a verdict of misconduct which is now under challenge in this very Petition.

33. On the third principle as to public interest, in my view, public interest does not tilt in favour of the applicant. I hold so because, the subject matter revolves around the question of discipline of judges of the Supreme Court *vis-à-vis* the mandate of the JSC. Being a constitutional body mandated to undertake the discipline of judicial officers or jump start the process as far as judges are concerned, it would be against the public interest to halt the mandate of the JSC. Furthermore, balancing the interest of the applicant and the greater public interest to see a constitutional body undertake its constitutional obligations, the balance lies in favour of public interest.

34. It has been severally stated that this court ought to always exercise a lot of reticence before interfering with organs or bodies under constitutional compulsion to exercise powers and functions specifically donated by the Constitution: see for example *Diana Kethi Kilonzo & others v Independent Electoral and Boundaries Commission & 10 Others* [2014]eKLR. It would appear that it would not be appropriate to immediately and at an interlocutory stage stop the JSC on its tracks given that in

the circumstances of this case the process of consideration of a complaint under article 168 of the *Constitution* had already commenced.

35. The court however cannot close its eyes to the fact that the applicant may indeed be prejudiced if the JSC still decides not to observe the provisions of article 47 as now promoted by the *Fair Administrative Actions Act*, No 4 of 2015. The prejudice as submitted by the applicant's counsel "would be disastrous". I tend to agree, it may be ruinous but only depending on which way the JSC decides.

36. In such circumstances counsel of prudence would dictate that the court invites the doctrine of proportionality and acts in the best interests of both parties: see Ojwang J (as he then was) in *Suleiman v Amboseli Resort Limited* [2004] 2 KLR 589.

37. The applicant has established that she has a prima facie case. the applicant has also shown that she may suffer prejudice, if the application is not granted and the JSC proceeds as they may arbitrarily wish. On the other hand, public interest as do constitutional values would dictate that constitutional bodies and organs be allowed to operate with minimal or no interference at all. There ought to be no unnecessary superintendence of constitutional bodies.

38. The applicant asked the court to grant such orders as may be deemed appropriate. I view it that this is one of those cases where an omnibus prayer may be invited and applied by the court. The JSC must operate within the confines of the *Constitution* even as it is allowed to proceed with its mandate. The individual rights and fundamental freedoms guaranteed by the *Constitution* must also be protected.

39. In the circumstances of this case, whilst I would not restrain the JSC from proceeding with a process already commenced, being that of interrogating and considering the complaint by the interested party, I feel obliged to make a specific intervention. The intervention ought to be along the very lines of the letter by JSC dated 29 February 2016. It is only appropriate that I do so.

Disposition

40. Based on my discussion and determinations above, I make the following orders:

    a. Pending the hearing of the petition, the JSC is at liberty to proceed and process the complaint by the interested party against the applicant save only that the JSC must in all circumstances substantively comply with and observe the provisions of both article 47 of the *Constitution* as well as the provisions of the *Fair Administrative Action Act*, No 4 of 2015 and in particular afford the applicant a hearing prior to making any further decision(s) on the complaint.

    b. The costs of the application shall abide any order on costs made upon determination of the petition.

    c. The hearing of the petition herein is to be fast tracked.

    d. There shall be liberty to either party to apply.

41. Orders accordingly.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 6TH DAY JUNE, 2016

J.L.ONGUTO

JUDGE