REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

CONSTITUTIONAL PETITION NO. E110 OF 2025

KENNEDY ECHESA LUBENGU...PETITIONER

VERSUS

JUDICIAL SERVICE COMMISSION……………………………1ST RESPONDENT

ATTORNEY GENERAL………….………………………………….2ND RESPONDENT

AND

ALDRIN OJIAMBO T/A ACORN LAW
ADVOCATES LLP…………………………………………….INTERESTED PARTY

JUDGMENT

Introduction

1. This petition raises allegations touching on the conduct of a sitting Judge of the High Court being investigated by the judicial Service Commission. While the subject matter is unquestionably sensitive, this Court is constitutionally obligated to hear and determine all matters properly brought before it, regardless of the status of the parties involved.
2. We therefore approach the petition with the full measure of decisional independence expected of us under the Constitution of Kenya and shall evaluate the issues that the petition raises, strictly on the basis of the material placed before us, the law and the governing constitutional principles. As we do so, we are conscious of the fact that

there exists no parallel constitutional forum vested with jurisdiction to hear and determine constitutional petitions of this nature outside the courts established under the Constitution. Accordingly, this Court cannot abdicate its duty. Moreover, the judicial office does not confer any immunity from scrutiny on the office holder, where the law requires an inquiry and this Court shall therefore, in undertaking its constitutional mandate, neither shield nor prejudice the Judge concerned, but shall remain guided solely by its oath and the essentials of justice for all the parties before the court.

3. The Petition essentially seeks the interpretation and enforcement by this Court, of the constitutional and statutory protection applied to the process of handling complaints and or petitions against Judges of superior courts before the Judicial Service Commission.
4. The Petition challenges the manner in which the Judicial Service Commission (JSC) is handling the petition filed against Lady justice Dorah Chepkwony, a sitting Judge of the High Court, following a petition filed by the Interested Party, an advocate of the High Court of Kenya, which petition called on the JSC to consider the Judge's conduct of allegedly delaying to render a bail application ruling in a criminal trial and for losing the criminal court file.
5. The Petitioner, who is an Advocate of the High Court of Kenya maintains that the procedure adopted by the Judicial Service Commission in handling petitions against

the Judge and judges generally, infringes on the learned Judge's right to fair administrative action and the right to a fair hearing as guaranteed by Articles 47 and 50(1) of the Constitution respectively. That the process violates the Judicial Service Act and that the procedure adopted by the Judicial Service Commission affects not only the right of the affected Judge but also has a negative impact on the independence of the judiciary and the dignity and security of all Judges of superior Courts in this country.

6. The Petitioner asserts that the steps taken by the Judicial Service Commission (JSC) in handling the complaint against the Judge, requiring her to appear for an oral hearing of the petition lodged against her by the advocate representing the accused person in the criminal case which the learned Judge was handling, for an alleged delayed ruling on an application for bail pending trial and loss of the criminal court file wherein the Interested Party's client is the accused person, was undertaken in a manner inconsistent with Articles 47, 50, 160, and 172 of the Constitution.

7. The petitioner argues that since the JSC lacks any written rules or regulations that guide it in handling complaints against Judges, the JSC as an administrative body has not demonstrated that in handling the complaints against Judges, it adheres to constitutional principles of procedural fairness. He asserts that the Commission in attempting to hear a petition which has the potential for removal of the Judge, when there are no codified rules and regulations in place to direct how the Commission will

handle any such complaints or petitions made against the Judge, infringes the constitutional guarantees of fair administrative action under Article 47 of the Constitution.

8. The petitioner further asserts that the JSC has failed to enact those regulations as required by Section 47 of the Judicial Service Act, besides violating the principles of a fair hearing, maintaining that this failure creates a situation where the Judge's security of tenure as guaranteed under the Constitution is compromised.

9. The petitioner also alleges that the Judicial Service Commission is attempting to review the merits of the decision of the learned Judge in the criminal case, thereby exercising jurisdiction that it is devoid of, thereby interfering with the decisional independence of the Judge, noting that the ruling allegedly delayed was already delivered.

10. The Petitioner further challenges the jurisdiction of the Judicial service Commission to entertain the petition against the Judge, in view of the fact that the allegedly delayed ruling was already delivered and that therefore the JSC proceedings are *res judicata* the ruling by the Judge.

11. The Judicial Service Commission, which is the primary Respondent, opposes the petition and contends that the petition is premature (not ripe), misconceived and an unwarranted interference with its constitutional mandate to consider complaints against Judges. It asserts that it acted within its powers under Articles 172(1)(c) and

168 of the Constitution and that the impugned proceedings represent routine preliminary steps that have been applied in previous and other pending petitions against Judges, in accordance with the rules of natural justice and fair administrative action, which steps, according to JSC, do not infringe upon judicial independence of Judges. According to the Commission, the petition amounts to an attempt to shield the Judge from lawful inquiry.

12. The Interested Party, being the complainant/Petitioner who initiated the petition before the JSC against the concerned Judge, is an advocate of the High Court of Kenya. He supports the 1st Respondent Commission's position. Additionally, he challenges the *locus standi* of the Petitioner to institute these proceedings and urges this Court to refrain from intervening in an ongoing process constitutionally reserved for the JSC.

13. In summary, this judgment determines issues of jurisdiction, locus standi (standing), ripeness/exhaustion, the justiciability of the petition as well as the legitimacy and procedural correctness of the actions taken by the JSC and if there are any appropriate remedies available for the petitioner, given the circumstances.

<u>The Petitioner's Case</u>

14. The Petition is dated 4th March 2025 and is brought pursuant to Articles 2,10, 22, 47, 50, 73, 159, 160, 165, 168, 171, 172 and 259 of the Constitution, the Judicial Service Act, The Fair Administrative Action Act and the Judicial Code of Conduct. It is

supported by the affidavit of Kennedy Echesa Lubengu, the Petitioner, sworn on 4th March 2025. The Petitioner describes himself as an Advocate of the High Court of Kenya, an Academician, scholar and a public-spirited citizen of Kenya.

15. The 1st Respondent, the Judicial Service Commission (JSC) is a Constitutional Commission established under Article 171 of the Constitution and constituted as a body corporate with perpetual succession and a common seal under Article 253 of the Constitution.

16. The 2nd Respondent is the Attorney General of the Republic of Kenya and the principal legal adviser to the National Government and is established under Article 156 of the Constitution.

17. The Interested Party is an advocate of the High Court of Kenya and the Petitioner in the subject Judicial Service Commission Petition, filed against the Judge, being JSC **Petition 29 of 2023: Acorn Law Advocates LLP vs. Hon. Lady Justice Dorah Chepkwony.**

18. The Petition seeks the following reliefs:

    a) A DECLARATION that the Constitutional jurisdiction of the 1st Respondent does not extend to merit review of any matter lawfully conducted, transacted or decided by a Judge or Judicial Officer in the course of the exercise of his or her judicial authority, functions and discretion.

b) ***A DECLARATION that matters lawfully conducted, transacted or decided by any Judicial Officer, within the judicial discretion and authority of the office holder, are protected by Article 160 of the Constitution from interference or influence by any party, save for lawful Appellate review where available as provided by law.***

c) ***A DECLARATION that the 1st Respondent has no jurisdiction to admit, hear, consider or determine in any manner whatsoever matters that are the subject of ongoing judicial proceedings.***

d) ***DECLARATION that until the 1st Respondent gazettes regulations defining the precise procedures for Petitions in accordance with Section 47 of the Judicial Service Act, it is a breach of the principles of natural justice and the rights of any judicial officer to a fair, transparent and impartial process as enshrined in Article 47 of the Constitution to purport to proceed with any JSC Petition.***

e) ***An Order do issue prohibiting the 1st Respondent, its officers, servants or agents from considering, admitting to hearing or convening to hear any JSC Petitions until the Judicial Service Commission Gazettes regulations defining the precise procedures for Petitions in accordance with Section 47 of the Judicial Service Act.***

12. The Petitioner's case as pleaded is that the Petition filed with JSC by the interested party against the Lady Justice Dorah Chepkwony in relation to **Milimani HCCR Case No. E097 of 2021 Republic versus Francis Kinyua Gitonga** is *res judicata*, as the ruling which is the subject of the Petition before the 1st Respondent was already delivered and that the criminal matter is still pending hearing and determination before the High Court, Criminal Division.

13. The Petitioner states that the Interested Party only accuses the Hon. Judge on grounds of bias and seeks to have the Honourable Judge disciplined over the fact that there was delay in the delivery of the ruling; that there exist two rulings in the same matter which rulings were delivered by the Judge and another Judge of the High Court who is not party to the petition, and also on the merit of the ruling.

14. According to the Petitioner, the Interested Party is labouring under gross misapprehension that JSC sits in an appellate position; that it can conduct a merit review of a case that a judge has determined; and that it has jurisdiction to discipline a Judge on the premise that it or any party disagrees with the Ruling of a competent court.

15. The Petitioner contends that the Interested Party filed the complaint before the JSC purely in an attempt to use it as a tool of intimidation against the Judge in the hope of extracting favourable decisions from the High Court.

16. The Petitioner further asserts that since its establishment in 2011, the JSC has failed, neglected and/or declined to gazette the required regulations and rules of procedure contemplated under Section 47 of the Judicial Service Act to govern the conduct of disciplinary proceedings against Judges and that in the circumstances, it has been and continues to be impossible for Judges to understand the rules of engagement or procedure adopted by the JSC in handling complaints against Judges.

17. The Petitioner further avers that the 1st Respondent (JSC) has persisted in this vein despite the fact that there are Court Orders in place compelling the promulgation of the regulations. It is also his case that the procedure for fair hearing dictates and demands that any party accused before a Tribunal must face a defined process with clear cut rules of engagement. This, according to the Petitioner, will prevent proceedings from being conducted arbitrarily and would instead set the rules of engagement which both the complainant and the respondent can adhere to.

18. The petitioner further states that despite the Supreme Court delivering judgment on 17th February 2022, in **Petition Number 34 of 2014; Gladys Boss Shollei v. Judicial Service Commission & Another and that at paragraph 79,** directing the JSC to gazette the requisite regulations and rules of procedure for handling of complaints against Judges and judicial officers within 90 days from the date of the Judgement, to date, the JSC has no rules and regulations governing the handling of petitions or complaints against Judges, to the detriment of not only his client's

fundamental rights to fair process, but also the rights of all other Judges who may find themselves before the Commission.

19. The Petitioner asserts that this absence of regulations or codified procedures for handling of complaints against Judges renders proceedings before the JSC arbitrary and liable to subjectivity and lack of fair or transparent administrative action. The Petitioner reiterates that the JSC must therefore gazette the required regulations and rules of procedure as contemplated under Section 47 of the Judicial Service Act before it proceeds with the Petitions before it.

20. The Petitioner cites Article 22 of the Constitution which empowers every person to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated, or infringed or is threatened such as the Petitioner herein.

21. He further avers that the Constitutional requirements of fair administrative action under Article 47 and under statute demand that the JSC must be clothed with jurisdiction in the first instance, it's actions must be lawful and within the constitutional principles of transparency, accountability and natural justice. This, according to the Petitioner is absent from the JSC's conduct.

22. The Petitioner further states that the Petition filed before the Commission, particularly challenging the merit decisions of the High Court are thinly veiled

attempts to challenge the exercise of judicial mandate and discretion by the Petitioner's client and her fellow Judges in their capacities as Judges.

23. It is also the Petitioner's contention that the actions of the JSC violate the principles of judicial independence as enshrined in Articles 159, 160, 171, and 172 of the Constitution.

24. The Petitioner states that the JSC as established under Article 171 is mandated to promote and safeguard judicial independence, while Article 172 delineates its functions, which do not include reviewing judicial decisions or exercising appellate jurisdiction.

25. According to the Petitioner, by purporting to scrutinize and review judicial determinations, the JSC is acting *ultra vires*, thereby contravening the Constitution and violating the doctrine of separation of powers under Articles 1 and 159.

26. It is the Petitioner's further case that if the JSC is permitted to assume oversight over judicial decision-making, this will erode, the decisional independence of all Judges and Judicial Officers in Kenya.

27. Further, that the aforesaid oversight will render the exercise of judicial functions subject to review by litigants through the JSC and in so doing, will place the JSC in the position of being a threat to the very judicial independence and impartiality of the Courts that the 1st Respondent is constitutionally mandated to jealously protect under Article 172 and the Judicial Service Act.

28. Additionally, the Petitioner asserts that these actions contravene the established international standards on judicial independence, including the Bangalore Principles of Judicial Conduct, Article 10 of the Universal Declaration of Human Rights and Article 14 of the International Covenant on Civil and Political Rights, all of which emphasize the necessity of an impartial and independent judiciary free from external influence.

29. The Petitioner argues that the Interested Party's Petition against the Judge concerns issues which are actively pending before the Courts, making it inconceivable that the JSC would entertain parallel proceedings that risk causing embarrassment to both itself and the Courts already seized of the matters.

30. The Petitioner further contends that the JSC's assumption of jurisdiction over matters pending judicial determination amounts to a clear breach of his client's constitutional rights, particularly the right to a fair hearing under Article 50 and the right to fair administrative action under Article 47.

31. The Petitioner maintains that by initiating proceedings on issues under judicial consideration, the JSC engages in an unlawful, unjust, and procedurally improper process lacking any legal basis, rendering the entire exercise unconstitutional, null and void.

32. Additionally, the Petitioner notes that Article 159(2)(b) obligates Courts to administer justice without delay and to prevent procedural abuse, yet the JSC's

intrusion into ongoing judicial matters disrupts the orderly delivery of justice and creates unnecessary encroachments and inconsistencies in legal determinations. Further, that Section 6 of the Civil Procedure Act expressly bars the trial or determination of matters already in issue in earlier proceedings before a competent Court.

33. The Petitioner further states 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 process, if allowed to infringe on matters where the JSC has no jurisdiction to initiate any inquiry, will only serve to intimidate Judges who are exercising their Judicial functions and this will cause a constitutional crisis given the fact that the JSC's decisions are amendable to judicial review.

34. The Petitioner also states that the Petition before the JSC constitutes an unsubstantiated attack devoid of particulars on the Court and therefore in essence an attack on the whole judiciary. Additionally, that the JSC rules of process are non-existent. He also argues that it is evident that the JSC is proceeding in an abstract and amorphous manner in dealing with complaints lodged against judicial officers. This, according to the Petitioner, is in defiance of Court rulings and ought not to be allowed to persist as it ultimately results in a denial of fair proceedings before the JSC contrary to Articles 10 and 47 of the Constitution, which mandate transparency, accountability, fair administrative action and adherence to the rule of law.

35. The Petitioner reiterates that the lack of a structured and fair process also violates Sections 4 (1) and 4(3), of the Fair Administrative Action Act, 2015 which require that affected persons are given prior notice, reasons for decisions and an opportunity to be heard. He maintains that both he and his client are entitled to certainty and predictability in disciplinary processes, a right protected under Article 47(1) of the Constitution. He argues that the JSC's arbitrary and unclear approach to disciplinary proceedings violates this guarantee and undermines the rule of law.

36. The Petitioner also highlights that his client, the Hon. Judge, imminently stands to suffer irreparable injury and infringement of her rights as the Constitution is very clear on the inevitable consequences of an adverse finding by the JSC.

37. He states that his client would be automatically suspended from office and a tribunal formed by the President to hear her case, and given the gravity of these consequences, her rights under Articles 27, 28, 47 and 50 of the Constitution guaranteeing equality before the law, dignity, fair administrative action and a fair hearing are at risk of violation.

38. Further, that this Court exercises its supervisory jurisdiction under Article 165(6) to review the conduct of the proceedings before the JSC and determine their legality and propriety ab initio, before the issue becomes moot and the Petitioner's client suffers irreversible harm.

39. The Petitioner further asserts that all state organs are constitutionally obligated under Articles 10 and 259 to uphold national values and principles such as the rule of law, transparency, accountability, and fair administrative action standards. According to the Petitioner, the JSC has failed to meet these standards in its handling of the matter.

The 1st Respondent's Response

40. In response the 1st Respondent, the Judicial Service Commission (JSC/ the Commission) filed a replying affidavit sworn on 26th March 2025 by Hon. Winfridah Mokaya, the Chief Registrar of the Judiciary and the Secretary to the Judicial Service Commission.

41. The 1st Respondent (JSC) states that it is established by Article 171 of the Constitution and its functions are set out under Article 172. That as set out in the Constitution, the core mandate of the Commission is to promote and facilitate the independence and accountability of the judiciary.

42. According to the 1st Respondent, Article 168 of the Constitution provides for removal of Judges of superior courts and provides under Article 168 (2) that the removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission.

43. It is stated that Article 168 (3) of the Constitution provides for the format of a petition for removal of a Judge and provides that a petition by a person to the Judicial

Service Commission under Article 168 (2) shall be in writing, setting out the alleged facts constituting the grounds for the judge's removal.

44. Further, that pursuant to its mandate under Article 168, the Commission on 2nd May 2023, received a petition dated 28th April 2023, from the firm of Acorn Law Advocates-LLP lodged against the Honorable Lady Justice Dorah Chepkwony, Judge of the High Court. That the petition had been lodged on behalf of the accused person in **Nairobi High Court Criminal Case No. 097/2021, Republic versus Francis Kinyua Gitonga**. The Petition is said to have been duly acknowledged and registered as **JSC Petition No. 29/2023, Acorn Law Advocates-LLP-vs- Hon. Lady Justice Dorah Chepkwony**.

45. In the Petition before the JSC, it is alleged that the Hon. Lady Justice Chepkwony had delayed in the delivery of a Ruling on an application for bail by the accused person, and that the alleged delay was for a period exceeding 1 year.

46. According to the JSC, the Petition was tabled before the Commission in its meeting of 15th January,2024 and upon that deliberation, it was resolved that the Honourable Judge be requested to respond to the Petition.

47. That through a letter dated 18th January,2024, the Honourable Judge was notified of the decision of the Commission and that she was requested to submit her response to the Petition within 21 days from the date of the letter, which 21 days lapsed on or about 9th February,2024.

48. That in a further letter dated 30th January,2024, the Petitioner was notified of the decision of the Commission of 15th January,2024 in which it was resolved that the Honourable Judge be requested to submit a response to the Petition.

49. It is the 1st Respondent's contention that the Honourable Judge did not respond to the Petition within the 21 days as requested and a further request for a response to the Petition was made to her vide a letter dated 31st May 2024 and forwarded via email of 4th June 2024.

50. Again, it is contended that the Honourable Judge did not respond to the Petition as requested vide the letter of 31st May 2024 prompting the Commission to make a further request.

51. The 1st Respondent contends that the several letters and reminders for the Honourable Judge to submit her response to the Petition did not elicit any response, and that the matter was re-tabled before the Commission on 30th August 2024 and the Commission resolved that the Honourable Judge be given a further opportunity to respond to the petition. This is said to have been communicated through a letter dated 18th September 2024.

52. Again, it is contended that the Judge did not respond to the Petition as requested through the letter dated 18th September 2024 and the several other previous letters and that in its meeting of 26th November,2024 and upon consideration, it was resolved that the Petition be admitted for oral hearing and that both the Petitioner and

the Honourable Judge be invited to appear before a Panel of the JSC, appointed to hear the petition. The decision was allegedly communicated to the Honourable Judge and the Petitioner vide a letter dated 9th December,2024, and that in the same letter, the Honourable Judge was implored to submit her response to the Petition.

53. According to the 1st Respondent, in the letters to the Honourable Judge and the Petitioner dated 9th December,2024, the Commission notified the parties of their right to legal representation, the right to cross-examine witnesses during the hearing, the right to file any documents, to call witnesses and to file witness statements in support of their respective cases.

54. The 1st Respondent states that through letters dated 20th January,2025, the Honourable Judge and the Petitioner were both notified that the Petition had been scheduled for oral hearing before the Commission Panel on 5th February,2025 and that they were both required to appear on the scheduled date to prosecute their respective cases.

55. The Commission avers that on 24th January 2025, the Honourable Judge appointed the firm of Wamalwa & Echesa Company Advocates to represent her in the Petition, and that in an email communication dated 4th February 2025, the Advocate on record for the Honourable Judge wrote to the JSC requesting for an adjournment of the matter on the scheduled date of 5th February 2025.

56. The 1st Respondent's avers that as at the time of filing this response to this petition, the Honourable Judge was yet to file a response to the Petition before the JSC and that when the JSC petition came up for hearing on 5th February 2025 as earlier scheduled and communicated, the Honourable Judge through counsel on record sought an adjournment on the ground that she was still putting together a defence to the Petition and thus needed more time. The Commission is said to have considered the application for adjournment and noted that the Petition was filed on 3rd May 2023 and that the Honourable Judge had been served with seven (7) letters requesting her to respond and further that at the pre-hearing conference held on 24th January,2025, the Honourable Judge was granted seven (7) more days to file a response but had not.

57. The Commission is said to have been concerned that the Honourable Judge ought to have given instructions to counsel on time. That, nonetheless, the Commission in the spirit of fairness and impartiality, allowed the prayer and granted the adjournment. The Honourable Judge it is stated, was therefore granted seven (7) more days to file and serve her response to the Petition and the oral hearing was adjourned to 5th March,2025.

58. The 1st Respondent states that on 12th February 2025, the Honourable Judge filed her response to the Petition generally denying the allegations in the Petition stating that the delay in delivery of the ruling in question was in her opinion not inordinate.

59. According to the 1st Respondent, the Hon Judge did not at any point raise any preliminary issues regarding the jurisdiction of the Commission to entertain the Petition and that neither did she infer to the Petition as raising issues that touched on the merit or otherwise of her ruling in the criminal case nor alleged lack of rules of procedure to govern the processing of petitions before the Commission.

60. The 1st Respondent asserts that what can be discerned from the Petition initiated against the Judge by the interested party herein are allegations of delay in the delivery of a Ruling for a period over (1) one year and the retention of a Court file beyond the allowed timeframe and that therefore, this Honourable Court ought to audit the process as enumerated in the preceding paragraphs with a view of ascertaining the JSC's compliance with the rules of natural justice and principles of fair administrative action.

61. On the petitioner's allegation that the Petition by the Interested party before the Commission touches on the merits of the Honourable Judge's judicial decision and that therefore this would curtail decisional independence or judicial discretion, the 1st Respondent contends that the Honourable Judge in her response did not raise these issues before the Commission either in the preliminary or in her response dated 12th February,2025. Further, that had the said issues been raised, the proper forum for ventilating such issues is at the Commission and not before this Court or any other forum.

62. The 1st Respondent avers that even if the Petition before the Commission had raised issues touching on the merit or otherwise of her the Judge's decision, the Commission is the only body mandated under the Constitution to consider such issues.

63. On the contention by the Petitioner that the Commission has failed to enact rules of procedure to govern the processing of Petitions against Judges as required of it under Section 47 of the Judicial Service Act and as directed by the Supreme Court in **Gladys Boss Shollei vs. JSC** (supra) case, the 1st Respondent states that this argument is based on a misapplication of the law as Section 47 of the Judicial Service Act provides for regulations and states that the Commission may make regulations for the better carrying out of the purposes of this Act which may include preliminary procedures for making any recommendations required to be made under the Constitution. That the formulation of the regulations is therefore in the discretion of the Commission.

64. The 1st Respondent nonetheless concedes that on 17th February 2022, the Supreme Court in its Judgment delivered in the **Gladys Boss Shollei vs. JSC** (supra) case, formulated guiding principles for the Commission to apply in undertaking the disciplinary process contemplated under Article 172 (1)(c) of the Constitution and that the apex Court also directed the Commission to publish and publicize procedures for its disciplinary and investigative processes, and that such publication

be undertaken and effected through the Kenya Gazette, within 90 days from the date of the judgment.

65. The 1st Respondent states that on 13th October 2023, the Commission filed a Notice of Motion application seeking enlargement of the ninety-day period and that in its ruling delivered on 17th February 2023, the Supreme Court declined to grant the prayer for enlargement sought for reason that it was *functus officio* and found that the draft manual attached to the Commission's application was the requisite legal instrument contemplated under Section 47 of the Judicial Service Act which empowers the Commission to make regulations for the better carrying out of its purpose.

66. The Judicial Service Commission is said to have developed the Draft Judicial Service (Processing of Petitions & Complaints Procedures) Regulations as contemplated under Section 47 (1) (c) of the Judicial Service Act; and that the Commission, in compliance with the Constitutional imperative on public participation, the regulations have been circulated to various stakeholders and written memoranda received from various stakeholders. These Regulations are said to be awaiting stakeholder validation before being forwarded to Parliament for enactment.

67. Additionally, that although the Commission's development of the Regulations was simply for enhancing its efficiency in the discharge of its mandate, it is important to note that these regulations are only meant to enhance the operations of the

Commission but do not in any way affect the exercise of the constitutional mandate conferred by Articles 168 and 172 of the Constitution.

68. It is the 1st Respondent's further position that in the exercise of its mandate under Article 168(4) of the Constitution it is not subject or sub-servient to any statutory enactment, rules or regulations. Further, that Article 168(9) only contemplates Parliament enacting legislation for the procedures of the Tribunal and not the Commission.

69. The 1st Respondent also states that in the *Justice Chitembwe* case, the Supreme Court held that the principles laid down by the Court in the **Gladys Boss Shollei Case** were not applicable in proceedings involving a Judge and that the Commission had ensured that the proceedings before it had been undertaken in consonance with the Constitution. The Supreme Court is said to have therefore affirmed the correct position in law that the threshold to be applied was whether the proceedings before the Commission were in consonance with the Constitution.

70. The 1st Respondent maintains that the Commission always adheres to the provisions of the Constitution, the Judicial Service Act, the Fair Administrative Action Act and the rules of natural justice that are adequate to address any issues on process that may arise. The Commission is said to have since 2012 recommended twelve (12) Petitions to the President to appoint a Tribunal for the removal of judges and that the

process adopted by the Commission in the preliminary inquiries has not been impugned nor been the subject of any complaint in any of the 12 Petitions.

71. It is reiterated that the Commission has established a fair and robust process for reviewing and considering petitions submitted to it for removal of Judges and has since the promulgation of the 2010 Constitution, considered 992 Petitions against Judges from 2011 to date. That out of these, 925 Petitions have been finalized and the remaining 67 are at different stages of processing.

72. The 1st Respondent states that the processing of the enumerated Petitions before the Judicial Service Commission were all taken through a disciplinary process which unfolds through a structured sequence of steps- First, that once a complaint is received, the Commission conducts a preliminary assessment to determine its admissibility and that if in the Commission's view, the complaint does not disclose reasonable or justifiable grounds for the removal of a Judge, it is rejected at this initial stage.

73. According to the 1st Respondent, if the Commission forms the opinion that the complaint may contain sufficient grounds, it then transmits the Petition to the concerned Judge and requires a response within a specified period. After receiving the Judge's reply, the Commission evaluates the Petition, the response and any other relevant material and where the Judge's explanation is found satisfactory, the Petition is dismissed. However, if the Commission considers that the Judge has not

adequately addressed the allegations, the matter is escalated and the Petition is admitted for an oral hearing. At that point, it is asserted, that all the parties are issued with hearing notices and directed to file and exchange any documents or witness statements they intend to rely on during the preliminary hearing.

74. The Commission emphasizes that any party may raise preliminary objections or issues at any stage of its inquiry, and the Commission will render a determination on those issues. That during the hearing itself, both the Complainant and the Judge are afforded a full opportunity to address the allegations, present their cases and enjoy all the procedural rights guaranteed under fair administrative action such as legal representation, cross-examination of witnesses and the right to seek an adjournment among others.

75. Further, that once the preliminary hearing concludes, the Commission then determines whether a valid ground for removal has been disclosed or not, and if such a ground is disclosed, the Petition is forwarded to the President, who must appoint a tribunal within (14) fourteen days. It is contended that if the threshold is not met, the Commission dismisses the Petition. The Commission is said to have in the processing of the Petition against the Honourable Judge adhered to the above detailed process.

76. According to the 1st Respondent, given the elaborate process, the apprehension by the Petitioner and the Honourable Judge that the Petition before the Commission will not be fairly considered or that the process is not clear is therefore not well founded.

77. On the issue of *res judicata* raised by the Petitioner, the 1st Respondent's take is that the question before the Commission is not about the propriety of the Ruling but on an alleged delay in the delivery of the Ruling. Further, that there is no pending nor has there been any other Petition before the Commission between the 1st Interested Party and the Honourable Judge to warrant the invocation of the doctrine of *res judicata*.

78. That, in any event, the Civil Procedure Act and Rules do not apply to proceedings before the Commission on Petitions against Honourable Judges and that the Commission is not a court of law.

79. The 1st Respondent further contends that the issues raised before this Court, and which are the subject of the Ruling in the criminal matter, are fundamentally different from the issues raised in the petition before the Commission. Further, that the issue before the trial Court was on an application for bail whereas the issue before the Commission relates to an alleged delay in delivery of a Ruling and retention of the Court file beyond the allowed timeframe. As such, that the doctrine of *res judicata* is not applicable in the circumstances.

The Interested Party's Response

80. In response to the Petition, the Interested Party Acorn Law Advocates LLP filed a replying affidavit sworn by Colbert Ojiambo on 27th August 2025.

81. The Interested Party's contention is that the Petitioner lacks the *locus standi* to institute these proceedings as there is no nexus between the cause of action herein and the Petitioner. He relies on Articles 22(2)(a)(c) and 258(2)(a)(c) which according to him, require the Petitioner to demonstrate that he has an interest. He also states that the Petitioner must show that the Honourable Judge cannot sue on her own behalf or act in her own name, which he has not.

82. According to the Interested Party, the Petitioner has not shown whether the matter has been filed in public interest and how the public stands to suffer a disadvantage when the Honourable Judge is called to answer for her conduct in dispensation of justice. Further, that the Petitioner is neither an association acting in the interest of one or more of its members nor is he acting as a member of, a group or class of persons, or in the interest of group or class of persons as contemplated under Articles 22(2)(b)(d) and 258(b)(d).

83. It is contended that the Petitioner has concealed relevant facts in an attempt to mislead this Court, and that the facts of the case leading to the JSC Petition 29 of 2023: Acorn Law Advocates LLP vs. Hon. Lady Justice Dorah Chepkwony, are that an application for bail in **HCCR/097/2021 R V FRANCIS KINYUA** was placed before the Honourable Judge for hearing and disposal on 9th February 2022.

84. That the Honourable Judge proceeded with the application by way of written submissions and the ruling was scheduled to be delivered on 5th May 2022.That the said ruling was not delivered as scheduled, and no date was set in the matter. The matter, it is contended remained inactive until 9thSeptember 2022 when the Advocate on record wrote a complaint to the Presiding Judge over the delay and inactivity on the file, and it is on the basis of the complaint, that the Deputy Registrar issued a mention date before the Judge on 20th September 2022.

85. According to the Interested Party, thereafter, the matter was mentioned before the Learned Judge severally on 6th October 2022, 27th October 2022, 10th November 2022, 17th November 2022, 30th November 2022 and 8th December 2022. That the purpose of these mentions was to take directions on the ruling or take a ruling date.

86. The Interested Party states that the Learned Judge scheduled the ruling for 27th October 2022, on which date she verbally informed the parties that she has allowed the application for bail, but required the accused person to avail the contact details of the surety before she could set the bail terms. The Ruling, it is contended was left pending as the search for a surety commenced.

87. The Interested Party states that before setting the terms for bail, the Learned Judge was transferred to Kiambu and she left with Court file and the pending ruling. The Court file eventually, it is stated got lost in her custody and the ruling was never finalized or delivered to the parties.

88. It is contended that again, the matter was left in limbo and remained inactive without a date until the advocate for accused lodged a complaint on 28th April 2023 before the Judicial Service Commission, which complaint is the subject of the proceedings in **JSC Petition 29 of 2023: Acorn Law Advocates LLP vs. Hon. Lady Justice Dorah Chepkwony.**

89. That after the complaint had been lodged and the Learned judge made aware of it, she purported to write a ruling and back dated it to 21st October 2022, and the said ruling is said to have been delivered in Kiambu, lending credence to the fact that the Learned Judge must have left with the file to Kiambu and lost it there.

90. According to the Interested Party, the CTS record does not show any activity for 21st October 2022, a further indication that the said date of delivery of the ruling was fictitious and fabrication intended to hoodwink the Judicial Service Commission. Further, that the purported ruling is incomplete and handed with no orders disposing off the application.

91. The Interested Party's further case is that at the time of lodging the complaint, the Complainant was not aware of the purported ruling and that he only stumbled upon it on the Kenya law report website. That upon inquiry from the National Council of Law Reporting, he was informed that the purported ruling was sent to them by the Learned Judge on **16th February 2024,** 1 year and 4 months later after the purported date of delivery.

92. In response to the Complaint, the learned Judge is said to have alleged that she delivered the ruling at Nairobi on 29th October 2022, which according to the Interested Party, curiously was a Saturday. The Interested Party further states that there was no notice of delivery of ruling issued to the parties.

93. That due to the conflicting dates on when the purported ruling was delivered, the Interested Party maintained the position that no such ruling was delivered on any of the said dates and that the purported ruling was an afterthought, created after the event with an anticipated defence in mind.

94. It is contended that not having obtained a ruling on the application for bail, more than a year later, on 28th April 2023, the interested party wrote a complaint letter to the Chief Justice, and copied the 1st Respondent herein. The complaint is said to have raised two primary concerns and these were the delay in delivering a ruling for a period of more than (1) one year and the loss of the court file, which made it difficult to take a mention date or even to progress the matter.

95. The Interested Party states that he had been informed by the registry that the Hon. Judge had left with the court file to her new station, however that the original Court file was never found, and that on 24th October, 2023, Hon. Lady Justice Kavedza authorized the opening of a skeleton file so as to progress the matter.

96. That the complaint lodged at the Judicial Service Commission is on allegations of delay in the delivery of a ruling for a period of over one (1) year and the loss of a

court file, and that therefore, it is not true that the matter before the JSC is a review of the merit or otherwise of the ruling delivered by the Hon. Judge as alleged by the Petitioner.

97. The Interested Party further contends that the process being undertaken by the 1st Respondent is purely an internal inquiry to enable it establish if there are any grounds for removal of the Judge, and that therefore, it is not true that the 1st Respondent is conducting a disciplinary process as alleged by the Petitioner.

98. It is contended that the JSC has no jurisdiction or powers to discipline judges, and therefore the demand that 1st Respondent puts in place regulations defining precise procedure for disciplinary proceedings is misconceived and misplaced.

99. The Interested Party states that the decision in **Petition Number 34 of 2014, Gladys Boss Shollei v Judicial Service Commission,** and in particular para.79, is clear that the matter before the Supreme Court in the above case was in relation to disciplinary proceedings of judicial officers by the JSC and not Judges.

100. The Interested Party states that Judges are never a subject of disciplinary proceedings before the JSC and the Constitution together with the Judicial Service Commission Act on the powers and functions of the JSC is clear that the power to discipline by the JSC is restricted to judicial officers and staff, and it does not extend to judges.

101. The 1st Interested Party states that Section 47 of the Judicial Service Act empowers the JSC to make regulations, including regulations which a may provide for the 'code

of conduct and ethics for the Judges, judicial officers and staff'. It is stated that the said code of conduct and ethics for judges does not amount to a code of disciplinary procedure, and as such, the Petition is misconceived to the extent that it is premised on lack of rules and procedures for the conduct of disciplinary proceedings against Judges.

102. On the issue of want of fair administrative action in the proceedings before the JSC, the Interested Party urges the Court to audit the process as enumerated by the Chief Registrar of the Judiciary and Secretary of the Judicial Service Commission.

103. The Interested Party reiterates the JSC's position that Honourable Judge did not in her response raise these issues before the Judicial Service Commission either in the preliminary or in her response dated 12th February 2025 and that had the same been raised, the proper forum for ventilating such issues is the Judicial Service Commission and not before this Court or any other forum.

104. On the alleged *res judicata*, the Interested Party contends that the question before the Judicial Service Commission is not about the propriety of the ruling but on **the delay in the delivery of the ruling and loss of a court file.** Further, that there is no pending nor has there been any other Petition before the Judicial Service Commission between the Honourable Judge and the Interested Party to warrant the invocation of the doctrine of *res judicata*.

105. It is asserted that the Hon. Judge has been given an opportunity to appear before the Judicial Service Commission and to defend herself against the Interested Party's allegations in his complaint and upon which the same will be evaluated and considered fairly. That all the issues raised by the Hon. Judge in the instant Petition are grounds for challenging the Interested Party's Petition before the Judicial Service Commission at the preliminary enquiry. The Interested Party in conclusion states that the Petition dated 4th March, 2025 lacks merit, premature and should be dismissed with costs.

Submissions

106. Parties filed written submissions which they wholly adopted in canvassing the Petition.

The Petitioner's Submissions

107. The Petitioner's submissions are dated 27th August 2025. It is submitted that Article 160(1) of the Constitution expressly provides that in the exercise of judicial authority, a judicial officer shall not be subject to the control or direction of any person or authority. This includes administrative bodies such as the Judicial Service Commission.

108. The Petitioner also submits that the proceedings initiated before the Judicial Service Commission against Honourable Judge, based on judicial decisions rendered by her

in the lawful exercise of her judicial mandate, flagrantly violate Article 160 of the Constitution of Kenya, which guarantees judicial independence, and the Bangalore Principles of Judicial Conduct, which protect judges from undue influence.

109. That the 1st Respondent's mandate under Article 172 of the Constitution and Section 13 of the Judicial Service Act is limited to dealing with complaints relating to misconduct, incapacity, or breach of the judicial code of conduct, and does not include revisiting or evaluating the legal correctness of judicial decisions.

110. The Petitioner relies on the case of **Mboya & another v Judicial Service Commission & another; Rawal & 5 others (Interested Parties) [2020] KEHC 9225 (KLR)**, where the court is said to have observed that the Judicial Service Commission has no power to conduct a merits review of a judge's decision, and that any party dissatisfied with a ruling must pursue the proper appellate or review mechanisms instead of using the disciplinary process.

111. The Petitioner submits that the Interested Party's complaint invites the Judicial Service Commission to make a merit-based review of a judicial determination, which is ultra vires and amounts to usurpation of appellate power vested exclusively in the Courts by Article 165 of the Constitution of Kenya, 2010.

112. The Petitioner refers to Article 47(1) of the Constitution which he states guarantees every person the right to administrative action that is lawful, reasonable and procedurally fair. He further submits that Section 4(3) of the Fair Administrative

Action Act requires the administrative body to give prior notice of its processes and to disclose the applicable procedures.

113. It is submitted that despite a binding judgment by the Supreme Court in **Shollei v Judicial Service Commission & another [2022] KESC 5 (KLR),** where the Judicial Service Commission was directed to gazette rules of procedure within 90 days, the 1st Respondent has blatantly failed to comply.

114. The Petitioner further submits that in the absence of these regulations, the Hon. Judge is exposed to arbitrary, subjective and unpredictable proceedings, contrary to the principles of legality, procedural fairness and the rule of law under Articles 10 and 47 of the Constitution. The Petitioner relies on the case of **Joseph Mbalu Mutava v Attorney General & another [2014] KEHC 7535 (KLR),** where the court is said to have held that in carrying out its functions, the JSC is performing an administrative function and is required to comply with the Constitution and specifically Article 47.

115. According to the Petitioner, the principle of decisional independence lies at the heart of judicial authority under the Constitution. He refers to Article 160(1) of the Constitution of Kenya in support of this position.

116. The Petitioner submits that the complaint lodged against his client does not allege any acts of corruption, impropriety, bias, or incapacity, but instead, the complaint is founded entirely on dissatisfaction with the Honourable Judge’s decision-making

process, including alleged delay, variation from a previous ruling, and the reasons given for her decision. These according to the Petitioner are all squarely within the scope of judicial reasoning and discretion, and any scrutiny of such matters falls within the appellate jurisdiction, not the disciplinary jurisdiction of any authority.

117. The Petitioner relies on the case of **Bellevue Development Company Ltd v Gikonyo & 3 others [2020] e KLR,** where the Supreme Court is said to have emphasized that the independence of judicial officers is not subject to compromise, and that disciplinary mechanisms must never be used to control judicial outcomes.

118. Further submission is that the complaint in JSC Petition No. 29 of 2023 amounts to an invitation to the JSC to interrogate the judicial thought process of the Honourable Judge, and that the very act of entertaining such a complaint not only offends Article 160(1) of the Constitution but also undermines the constitutional doctrine of separation of powers and the principle of decisional independence. It is argued that this creates a chilling effect whereby judges may become fearful of disciplinary proceedings each time they issue rulings that displease one party.

119. The Petitioner submits that complaints rooted in a party's dissatisfaction with a judge's exercise of discretion or reasoning must be addressed through the proper judicial channels, namely, appeal or review, not by disciplinary sanction, as to do otherwise would render judicial independence illusory and make judges answerable to administrative authorities for their judicial functions.

120. The petitioner relies on the case **Wasilwa v Judicial Service Commission; Kenya Union of Domestic, Hotels, Educational Institutions, Hospitals and Allied Workers & 3 others (Interested Parties) [2025] KEELRC 281 (KLR)** where the Court concluded that entertaining a complaint without first resolving jurisdictional objections was a fundamental legal misstep, thereby rendering the proceedings unconstitutional. This case, according to the Petitioner, reinforces the point that where a complaint arises from a judge's decision, the JSC must halt its proceedings until it determines whether such a matter is within its constitutional remit, as to proceed otherwise is to risk unlawful intrusion into decisional independence.

121. The Petitioner further submits that the actions of the JSC undermines this framework by purporting to review a judicial ruling and threatening disciplinary consequences based on legal reasoning adopted by a judge in a pending matter. It is submitted that by proceeding to hear a matter whose subject is res judicata and pending in court, the JSC violates Section 6 of the Civil Procedure Act and creates a parallel process which threatens the institutional autonomy of the Judiciary.

122. It is submitted that the Petition raises foundational constitutional questions about the independence of the Judiciary, and the scope of the JSC's mandate. That the Commission's failure to gazette rules of procedure, its usurpation of judicial authority, and its pursuit of proceedings grounded in the merits of a lawful judicial decision render its actions unconstitutional.

123. The Petitioner urges this Court, to protect the constitutional principles of decisional independence, legality, and procedural fairness by allowing the Petition and granting the prayers sought.

The 1st Respondent's Submissions

124. The 1st Respondent filed written submissions dated 2nd October 2025. It submits that the Petition as lodged before suffers two procedural and preliminary defects, the first one being that it has been lodged by a third party without locus standi ostensibly on behalf of a sitting High Court Judge as an Advocate representing the said Judge outside the remits of Articles 22 and 258 of the Constitution of Kenya.

125. The second one being that the Petition purports to invoke the jurisdiction of this Court prematurely because the Commission has neither investigated nor considered any of the issues raised in the Petition before it so as to warrant judicial intervention at this point.

126. The 1st Respondent submits that as a general rule, every person has a right, under Article 22(1) of the Constitution, to institute proceedings claiming violation or denial of a right or fundamental freedom. However, that Article 22(2) limits the extent of participation of third parties to institute the proceedings contemplated in Article 22(1) to five instances only, being a person acting in their own interest, a person acting on behalf of another person who cannot act in their own name, a person acting as a member of, or in the interest of, or a group of class of persons, a person acting in

public interest and an association acting in the interest of one or more of its members.

127. The 1st Respondent submits that these limits are replicated in the Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013 ('Mutunga Rules') and Article 258 as regards contravention of the provisions of the Constitution. It argues that it is not in doubt that the present Petitioner lodged this Petition as an Advocate and scholar with instructions from the Honourable Judge. This, it is submitted, implies that the Petitioner was hired for his legal services, which enabled him to assume the position of the Honourable Judge to lodge the present Petition.

128. The 1st Respondent submits that the Petitioner has neither alleged that the Petition was filed in the public interest nor in the Petitioner's own interest. Further, that it is clear from the proceedings that he is not acting as a member of, or in the interest of, or a group of class of persons, nor is he representing an association acting in the interest of one or more of its members.

129. The 1st Respondent submits that it is therefore left for the Petitioner to prove, as alleged, that he is acting on behalf of another person who cannot act in their own name. That no evidence or even allegation has been tendered to show that Honourable Judge cannot act in her own name.

130. The 1st Respondent relies on the decision in **Law Society of Kenya vs Commissioner of Lands & Others [2001] eKLR** which was cited with approval by this Court in **Pawa Africa v Co-operative Bank & 2 others (Civil Appeal E029 of 2023) [2025] KEHC 11119 (KLR) (24 July 2025) (Judgment)** where it was held that locus standi signifies a right to be heard, and that a person must have sufficiency of interest to sustain his standing to sue in a court of law.

131. The 1st Respondent submits that, without sufficient interest in the matter, the Petitioner cannot and should not be allowed to prosecute the petition since locus is a preliminary issue.

132. The 1st Respondent also submits that the Petition herein is not yet ripe for this Court to determine, and that this is evident from the order sought in the Petition and that the allegations raised by the Petitioner relate to an inchoate constitutional process, which the JSC has yet to consider and determine the next course of action.

133. That the question of the ripeness of the subject matter, it is submitted, touches on this Honourable Court's jurisdiction. The 1st Respondent relies on the locus classicus case of **Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd [1989] eKLR** on the issue of jurisdiction.

134. It is also submitted that while this Court has the jurisdiction to determine whether a right or fundamental freedom in the Bill of Rights has been denied, violated or threatened, this jurisdiction can only be invoked in accordance with other principles

of law like ripeness and justiciability. The 1st Respondent submits that despite this overarching and extensive jurisdiction, not all petitions purportedly filed under Article 165 can be adjudicated if the subject matter is neither ripe nor justiciable.

135. The Petitioner is said to have prematurely invoked the jurisdiction of this Court by calling on it to hear or determine an issue whose subject matter is indefinite and before another constitutionally mandated body.

136. That as submitted in the background above, the mandate of the Commission in considering whether the petition disclosed a ground for the removal of a Judge is an exclusive, sequential and elaborate process reserved only for the Commission.

137. The 1st Respondent relies on Article 168 (2), (3) and (4) which is said to set out the process for removal from office of a judge of a superior court. The Commission submits that in this respect, it is only when it renders it’s finding on disclosure of a ground for removal of the Judge that a claim for unconstitutionality of the process can be called into question. That as such, it would be improper to challenge, as has been done, the constitutionality or otherwise of the petition before the Commission at this stage, this is because those very issues are before the Commission and such a challenge is therefore not ripe for determination.

138. The 1st Respondent also relies on the case of **Faraj & 3 others v Police & 2 others (Constitutional Petition 165 of 2020) [2022] KEHC 287 (KLR) (27 April 2022)**

(Judgment) where Mativo J (as he then was) is said to have held that Courts should shun adjudicating over issues that have alternative recourse for redress

139. A three-judge bench of this Honourable Court (Ogola, Mrima and Mugambi, JJ) is said to have reiterated the importance of judicial restraint at paragraph 27 of its Ruling No. 1 in the case of **Rigathi Gachagua & Others vs Speaker of the National Assembly & Others- HCCHRPET No. E522 of 2024 (Unreported).**

140. That in giving credence to the importance of observing the doctrine of ripeness amongst others, the Court in **Abdallah v Building Centre (K) Limited & 4 others (Petition 27 of 2014) [2014] KESC 50 (KLR) (13 August 2014) (Directions),** is said to have posited that, courts cannot be allowed to weigh in on controversies simply because judges feel like deciding the merits.

141. The case of **Jesse Kamau & 25 others v Attorney General [2010] KEHC 3172 (KLR)** is also relied on, where the Court is said to have quoted the discussion by **Laurence H. Tribe in his book American Constitutional Law, second Edition, by Ralph S Tyler Jr Professor of Constitutional Law at Harvard University on the doctrine of justiciability.**

142. The 1st Respondent urges this Court to dismiss the Petition and instead allow the Commission to conclude the hearing and consideration of the Petition before it, after which the Court can scrutinize the process adopted by the Commission. The 1st Respondent relies on the case of **Rigathi Gachagua & Others vs Speaker of the**

National Assembly & Others- HCCHRPET No. E522 of 2024 (Unreported), where the court is said to have observed that intervening would be premature because the constitutionally mandated impeachment process is still ongoing before the Senate, which will address the issues raised, and the Petitioners can still seek judicial relief if they are ultimately dissatisfied with the outcome.

143. It is submitted that it is self-evident from its very title "Delayed Ruling for over 1 year in application for bail in **HCCR/097/2021 – Republic v. Francis Kinyua**" that the Petition is firmly anchored on delay. That the text and tenor of the petition are consistent with that grievance, and nowhere does it purport to question the propriety, correctness, or substance of the Judge's Ruling.

144. According to the 1st Respondent, it is telling that the Petitioner has not, and indeed cannot, point to any paragraph of the Petition before the Commission where the Interested Party seeks to impugn the merits of the Judge's decision, and that the absence of such particularization is not accidental but is a natural consequence of the fact that no such challenge exists within the Petition.

145. The 1st Respondent further submits that, the Honourable Judge herself, in her response filed before the Commission, addressed only the allegations of delay, and she could therefore not be called upon to answer to any complaint about the merits of her decision, because none had been raised. That this further underscores that the Petition was, and remains, confined solely to the issue of delay.

146. The 1st Respondent, it is submitted, urges that Article 168 preserves judicial independence by establishing clear grounds and procedures for a Judge's removal, allowing the Commission either on its own motion or upon a petition to assess the facts and, if satisfied that removal grounds exist, recommend to the President the formation of a Tribunal.

147. The 1st Respondent also relies on the case of **Bellevue Development Company Ltd v Gikonyo & 3 others (Petition 42 of 2018) [2020] KESC 43 (KLR) (15 May 2020) (Judgment),** where the court is said to have noted that judicial immunity protects a judge except where they act in bad faith or unlawfully, and that while judges must allow their decisions affecting constitutional rights to be reviewed or appealed, misconduct that intentionally hinders litigants' rights may trigger JSC proceedings and potential removal.

148. The 1st Respondent also submits that at no point would the Commission review the merits of the said Ruling to evaluate extrinsic or judicial factors in the Ruling except as may be related to the issue of delay, that is the date of the Ruling. That the need for this review of evidence presented to the Commission was corroborated by Ouko, JA in **Judicial Service Commission v Mbalu Mutava & another [2015] eKLR** where the Judge is said to have confirmed that the duty of the Commission is confined to making a preliminary inquiry to satisfy itself that the petition for the removal of a judge has merit.

149. That the Commission is not an end in itself but merely designed as an inquiry and this would mean that the Commission has jurisdiction to determine and investigate the complaint, through hearing both parties in order to substantiate the allegations against the Petitioner. The Commission also relies on the case of **Mboya & another v Judicial Service Commission & another; Rawal & 5 others (Interested Parties) (Petition 204 & 218 of 2016 (Consolidated)) [2020] KEHC 9225 (KLR) (Constitutional and Human Rights) (14 May 2020) (Judgment),** where the court is said to have observed that Article 168 limits the Commission's disciplinary role to investigating allegations against judges and deciding whether to recommend a tribunal, and that once it forwards a petition to the President, its mandate ends. That only the tribunal acts as the trial body and can determine whether a judge's conduct breached the Constitution and that the Judicial Service Commission has no further or residual powers beyond its investigative function.

150. The 1st Respondent submits that in the case of **Chitembwe vs. Tribunal Appointed to Investigate into the Conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court (Petition E001 of 2023) [2023] KESC 114 (KLR) (28 December 2023) (Judgment)** the court found that the findings in the Gladys Boss Shollei Case were not applicable in proceedings involving removal of a Judge.

151. It is submitted that the exercise of the mandate under Article 168(4) of the Constitution is not subject to or subservient to any statutory enactment, rules or

regulations. Further, that Article 168(9) only contemplates Parliament enacting legislation for the procedures of the Tribunal and not the Commission.

152. It is the 1st Respondent's submission that the absence of subsidiary regulations does not and cannot nullify the exercise of the Commission's mandate under Article 168 of the Constitution, as its processes are firmly anchored in a broad and robust legal framework, which has consistently guided it in the discharge of its constitutional functions.

153. The 1st Respondent argues that the applicable framework comprises Article 168 of the Constitution, which sets out the principles governing petitions for the removal of judges; the Judicial Service Act, 2011, which defines the Commission's mandate over complaints and disciplinary processes; the Fair Administrative Action Act, 2015, which secures fair administrative procedures under Article 47; the Employment Act, 2007, which protects fair labour practices; the Judiciary Human Resource Policies and Procedures Manual (2014), which outlines administrative and disciplinary procedures; and the Judicial Service Code of Conduct and Ethics Regulations, 2020, which sets ethical obligations and accountability standards for judicial officers.

154. It is submitted that this legal framework has consistently guided the Commission in its processes, and most of its decisions have withstood judicial scrutiny without

being faulted on procedural grounds, and that as such the argument that the absence of Section 47 regulations creates a procedural vacuum is therefore untenable.

155. On the issue of costs, the 1st Respondent submits that costs follow the event, and the successful party is to be awarded costs unless the court has a good reason to direct otherwise. The 1st Respondent relies on the case of **Republic vs Rosemary Wairimu Munene, Ex-parte Applicant Ihururu Dairy Farmers Co-operative Society Ltd, Judicial Review No. 6 of 2914**, cited with approval in the case of **Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another (2016) eKLR** wherein the court is said to have observed that it has discretion in awarding costs, and that although the general rule is that costs follow the event, this principle is not meant to punish the losing party but to compensate the successful party for the effort expended in the litigation. The case of **Farah Awad Gullet vs CMC Motors Group Limited (2018) eKLR** is also relied on to support this position.

156. The 1st Respondent submits that although it is acknowledged that the Petitioner may have lodged the suit as a constitutional petition in which an order for costs would ordinarily not issue, the Petitioner, an Advocate of the High Court, has blatantly misinterpreted the law on locus standi and key facts, and therefore the Court should award costs, as the Petition is merely an attempt to undermine the 1st Respondent's constitutional independence.

The Interested Party's submissions

157. The Interested Party filed written submissions dated 27th August 2025.

158. In his submissions the Interested Party relies on the case of **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2014] eKLR** for the definition of locus standi. The Interested Party relies on Articles 22 and 258 of the Constitution which he submits, provide for locus standi to file judicial proceedings, representative or otherwise.

159. According to the Interested Party, Articles 22(2)(a)(c) and 258(2)(a)(c) require the Petitioner to demonstrate that he has an interest, and he must show that the Honourable Judge cannot sue on her own behalf or act in her own name, which he has not.

160. The Interested Party states that the Petitioner has not demonstrated that the matter is brought in the public interest or shown any public disadvantage arising from the Judge being required to answer for her conduct, noting that the public cannot speak to the Judge's state of mind. It is further submitted that therefore, no public-interest basis exists for a private citizen to litigate on the Judge's behalf, as the complaint before the Commission is personal to the Judge. It is also submitted that a party suing in the public interest needs not to establish "sufficient interest" but must show the stakes that constitute public interest to justify locus standi.

161. In support of this position, the Interested Party relies on the case of **Trusted Society of Human Rights Alliance vs. Nakuru Water and Sanitation Services Company**

and Another [2013] eKLR where the court is said to have observed that under Article 258(1), any person may initiate proceedings to enforce or protect the Constitution only if they demonstrate "sufficient interest" through actual or threatened injury to their own legal rights, and noted that the Petitioner does not qualify, as he is neither acting on his own interest nor on behalf of any group or association as contemplated under Articles 22(2)(b)(d) and 258(b)(d).

162. That on the other hand, C.K. Kariuki J in **Republic v Judicial Service Commission; Dari Limited & 2 others (Interested Parties); Esho (Exparte Applicant) (Judicial Review E002 of 2025) [2025] KEHC 4761 (KLR) (11 April 2025) (Ruling)** handed down the conditions that a person must establish in regards to initiating proceedings to protect or enforce the Constitution under provisions of Article 258 (2).

163. The Court of Appeal in **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR)** is said to have interpreted a 'person' under Articles 22(2), 258(2) of the Constitution and Rule 4(2) of the Mutunga Rules to mean that when a legal wrong or constitutional/legal violation causes or threatens injury to a person or a specific class who, due to poverty, helplessness, disability, or socio-economic disadvantage, cannot seek relief themselves, any member of the public may bring an application in the High Court under Articles 22 and 258 for appropriate directions, orders, or writs.

164. The Interested Party's submission is that the Honourable Judge who is the subject of these proceedings does not in any way meet the definition of a person or class of person defined by the Court of Appeal in the above case or satisfy the conditions laid down in **Republic v Judicial Service Commission; Dari Limited & 2 others** (Supra).

165. The Interested Party also relies on the case of **Owners of the Motor Vessel "Lillian S v Caltex Oil (Kenya) Ltd [1989] eKLR** where the court is said to have given a guide that the limits of jurisdiction could only be imposed by the statute, charter, or commission under which the court is constituted, and may be extended or restricted by the like means.

166. It is submitted further that; it is only when the Commission renders its finding whether a ground for removal of the Honourable Judge has been established that a claim for unconstitutionality of the process can be called to question. As such, that the challenge on the unconstitutionality or otherwise of the petition before the Commission cannot arise at this stage.

167. Further that the Judicial Service Commission is yet to appraise all the evidence in support of the Petition by the Interested Party and the Honourable Judge's responses to consider whether a ground has been disclosed. That such a constitutional petition before this Honourable Court against an inchoate and unripe complaint petition that

is live before the Judicial Service Commission therefore offends the doctrine of ripeness

168. The Interested Party also relies on the case of **Abdallah v Building Centre (K) Limited & 4 others (Petition 27 of 2014) [2014] KESC 50 (KLR) (13th August, 2014) (Directions)** where the court is said to have held that courts cannot intervene in disputes merely because judges wish to rule on the merits.

169. On the issue of costs, it is submitted that costs follow the event, and the successful party is to be awarded costs unless the court has a good reason to direct otherwise. The Interested Party also relies on the cases of **Republic vs Rosemary Wairimu Munene, Ex-parte Applicants Ihururu Dairy Farmers Co-operative Society Ltd, Judicial Review No. 6 of 2914, cited with approval in the case of Cecilia Karuru Ngayu vs Barclays Bank of Kenya & Another [2016] eKLR and the case of Farah Awad Gullet vs CMC Motors Group Limited (2018) eKLR.**

170. The Interested Party reiterates that the Petitioner may have invoked the 'public interest" in lodging this Petition in which an order for costs would ordinarily not issue, however, that owing to the fact that the Petitioner is an Advocate of the High Court of Kenya who lacks locus standi to institute this suit, and who flagrantly concealed material facts on the issues presented in the complaint petition before the Judicial Service Commission, this Honourable Court ought to issue an order as to costs.

Analysis and Determination

171. We have considered the petition, grounds and supporting affidavit as well as the responses thereto and the respective parties' written submissions. In our view, the following issues emerge for determination:

    i. ***Whether the petitioner herein, being an advocate representing the Judge in the JSC Petition which seeks the removal of the Judge, has locus standi to bring this Constitutional Petition to challenge the Petition filed by the interested party before the JSC***

    ii. ***Whether the Petition is ripe or justiciable for consideration by this Court and whether the petition is premature for want of exhaustion of remedies***

    iii. ***Whether the Judicial Service Commission has jurisdiction to entertain the petition filed by the Interested Party against the Judge***

    iv. ***Whether absence of regulations on handling of complaints and or petitions against a judge renders the administrative process under Article 168 of the Constitution and Section 47 of the Judicial Service Act unconstitutional and illegal***

    v. ***Whether the Petition by the Interested party against the Judge is res judicata the ruling already rendered in the criminal case which the learned Judge Dorah Chepkwony was handling***

    vi. ***Whether the petitioner is entitled to the reliefs sought***

vii. ***What orders should this Court make***

viii. ***Whether costs are payable and by who?***

Whether the petitioner herein, being an advocate representing the Judge in the JSC Petition which seeks the removal of the Judge, has locus standi to bring this Constitutional Petition to challenge the Petition filed by the interested party before the JSC

172. The Interested Party who is an advocate and the petitioner before the JSC and the Commission have raised a preliminary objection against the petitioner; namely, that the Petitioner an advocate was not the proper party to bring this petition on behalf of his client, the Judge and that therefore, he has no *locus standi* to file this petition on behalf of his client, a sitting Judge. This Court in the determination of this Petition finds that the question of *locus standi* should be addressed at this preliminary jurisdictional stage due to the inability of the court to adjudicate further, if the Petitioner is found to be lacking the locus standi to bring this petition.

173. On the other hand, the petition exposes a major contradiction in the *locus standi* analysis. Therefore, this court is compelled to deal with this dilemma first because it is necessary to understand how the question of *locus standi* is answered in this case before moving on to the rest of the question of *locus standi*. The source of this

dichotomy or confusion about *locus standi* arises because one advocate has been told that he has no entitlement to bring a constitutional petition on behalf of his client and yet another advocate representing the opposition and interested party has been allowed to file a complaint with the JSC that initiated the same subsequent process creating this petition. This, in our view, presents an additional layer of confusion regarding the nature of the standing doctrine in relation to the timing of the establishment of an individual's standing.

174. We now briefly discuss this apparent contradiction. The Interested Party advocate acting on behalf of his client and the petitioner before the JSC and the JSC have raised a preliminary objection against the petitioner; namely, that the Petitioner an advocate was not the proper party to bring this petition, and that therefore, he has no *locus standi* to file this petition on behalf of his client, a sitting Judge.

175. This Court must however clarify that it will address the objection by the Interested Party and the 1st respondent without intruding into the Jurisdiction of the JSC and further without allowing procedural objections to be used in a manner that is contrary to the principles of fairness and natural justice.

176. It is important to state that this Court has not been asked to determine the locus standi of the (Interested Party) petitioner in the JSC Petition lodged against the Judge, as that is not a matter within the jurisdiction of this Court to determine. As was observed by the Court of Appeal in the case of the **Owners of the Motor Vessel**

"Lillian S" vs. Caltex Oil (Kenya) Ltd (1989), jurisdiction determines whether or not the Court may proceed and issue any orders or make any declarations. Accordingly, it is neither appropriate nor practicable for this Court to speculate or express an opinion as to whether the Interested Party had *Locus Standi* in relation to the petition now before the JSC.

177. Therefore, whereas the two petitions have a factual connection with juristic factors that may prove helpful to this Court in developing an understanding of the two petitions, this Court's jurisdiction cannot be extended by way of parity of reasoning or by concerns of fairness and or for equitable outcomes.

178. Thus, while this Court cannot decide whether the Interested Party had the necessary standing before the JSC, as that is a matter within the remit of the JSC to decide, the Interested party's objection to the present petition on account of the petitioner lacking locus standi is still relevant for purposes of assessing the *bona fides*, consistency and equitable weight of the preliminary objection that he advances before this Court, to wit, that his professional colleague, the petitioner herein, has no locus standi to bring this petition challenging the petition filed by the interested party before the JSC against the Judge, who happens to be the present petitioner's client in the said JSC petition.

179. The JSC and the interested party advocate contend that the petition herein does not fall within the purview of Articles 22 and 258 of the Constitution and that the

petitioner has not demonstrated sufficient interest in the matter to warrant him petitioning this Court, instead of his client, the Judge who is facing a complaint/ petition before the JSC, which complaint and proceedings before the JSC are personal to the Judge, and not her advocate or any other person.

180. The principle that a party cannot both approbate and reprobate is well established in jurisprudence. The Supreme Court in the case of **Bia Tosha Distributors Limited v Kenya Breweries Limited & 6 others (Petition 15 of 2020) [2023] KESC 14 (KLR) (17 February 2023) (Judgment),** repeatedly stated thus, emphasizing that a litigant cannot approbate a legal position in one forum and disavow it in another when convenient. The apex Court stated as follows at paragraphs 36 and 127 of the decision:

> ***36. It was ingenious for the respondents to turnaround and raise expiry of contract that was never the subject of the court proceedings and determination. Even if that were to be the case, it was absurd that the 1st, 4th and 5th respondents would on one hand invoke the expiry of the contract to justify noncompliance with the court orders while at the same time relying on the same 'expired' contract to refer the matter to the arbitrator. One could not simultaneously simply approbate and reprobate. Moreover, the order of the Court of Appeal affirmed that as at August 11, 2016, when the contract relied upon by the respondents had ostensibly expired, the parties were still trading.***

That was the trading arrangement that both superior courts below preserved during the pendency of the hearing.

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….127……"

181. In other words, a party cannot approbate and reprobate at the same time. That is to say, a party cannot be allowed to choose which part of the same transaction to respect and which one to reject. Parties must maintain consistency in their procedural positions, lest they weaponize procedure to the detriment of substantive justice.

182. The basis for objection by the Interested Party in this case is founded on an advocate's duty to safeguard their client's interest, and his inability to do so by filling the petition in his own name as opposed to the client Judge filing the petition through her advocate.

183. Inconveniently however, the Interested Party is the petitioner and principal initiator of the petition against the same Judge before the JSC wherein he claimed that the Judge had inordinately delayed the ruling on a bail application by the advocate's client and that the Judge had also lost that client's criminal trial court file.

184. Although this inconsistency does not affect the actual merits of the objection, our view is that it nevertheless has the effect of reducing the moral authority of the objection and therefore the persuasiveness and indicative of a likelihood of abuse in terms of procedural objections.

185. In essence therefore, the Interested Party is suggesting that whilst an advocate can file a complaint to the JSC regarding a Judge with respect to matters affecting the advocate's client, another advocate acting on behalf of his own client, who is a Judge, against whom a petition is lodged before the JSC by an advocate, cannot petition this Court claiming that his client's rights are threatened with violation or are violated by the JSC proceeding to hear the petition against her.

186. This Court will therefore proceed to determine the question of *locus standi* of the present petitioner independently and solely by reference to the Constitution.

<u>What then is, and why is locus standi important?</u>

187. The Constitution of Kenya 2010 enshrines the concept of *"Locus Standi,"* or the legal standing to bring an action before a court of law or tribunal in pursuit of justice. This means that only those persons who possess a sufficient and legitimate stake in the outcome of a case will be able to successfully petition the courts to hear their claims, and courts will only have the jurisdiction to hear the petitions of individuals who have standing. Locus Standi is therefore a means of controlling the conduct of courts and ensuring that courts only take part in resolving cases where there are actual, justifiable controversies between parties.

188. In **Ferreira v Levin NO and Others, Vryenhoek and Others v Powell NO and Others 1996 1 BCLR 1 (CC),** the majority bench held that a person has standing to challenge a law if it adversely affects their rights, even if the harm is potential, like the risk of future prosecution based on compelled testimony. The judgment highlighted the importance of allowing individuals to act in the public interest to achieve legal certainty about the constitutionality of laws, especially given challenges in accessing justice in South Africa. The Constitutional Court stated as follows, at paragraphs 160, 1165-168 concerning locus standi in constitutional petitions:

> ***"[160] … The Applicants' desire to secure a ruling on the constitutionality of the Section cannot be characterized as being hypothetical or academic. It raises a***

real and substantial issue as far as the Applicants are concerned, and I have no doubt that they have an interest in having that issue resolved. Whether that interest is sufficient to give them standing to challenge the constitutionality of Section 417(2)(b) is the matter to which I now turn.

[165] Whilst it is important that this Court should not be required to deal with abstract or hypothetical issues, and should devote its scarce resources to issues that are properly before it, I can see no good reason for adopting a narrow approach to the issue of standing in constitutional cases. On the contrary, it is my view that we should rather adopt a broad approach to standing. This would be consistent with the mandate given to this Court to uphold the Constitution and would serve to ensure that constitutional rights enjoy the full measure of the protection to which they are entitled.8 Such an approach would also be consistent in my view with the provisions of Section 7(4) of the Constitution on which counsel for the Respondents based his argument. I will deal later with the terms of this Section and the purpose that it serves.

[166] The Canadian courts accept that persons have a standing to challenge unconstitutional law if they are liable to conviction for an offence under the law even though the unconstitutional effects are not directed against [them] per se.9 It is sufficient for the accused to show that he or she is directly affected by the unconstitutional legislation. If this is shown "...it matters not whether he is the

victim". Thus, in the Morgentaler case (cited above) a male doctor was entitled to challenge the constitutionality of legislation dealing with abortion under which he was liable to be prosecuted, although the rights upon which the constitutional challenge were based were the rights of pregnant women, which did not and could not vest in the male doctor. Although corporations do not have rights under the Canadian Charter and cannot institute Charter challenges in their own behalf, they can challenge the constitutionality of a statutory provision at a criminal trial on the grounds that it infringes the rights of human beings and is accordingly invalid.11 Where, as in the present case, the impugned Section of the Companies Act has a direct bearing on the Applicants' common law rights, and noncompliance with the Section has possible criminal consequences, they have sufficient standing in my view to secure a declaration from this Court as to the constitutionality of the Section.

[167] I do not read Section 7(4) as denying the Applicants this right. The Section deals with the situation where "...an infringement of or threat to any right entrenched in this Chapter is alleged..." It therefore applies specifically to the jurisdiction vested in the courts by Section 98(2)(a) and 101(3)(a) of the Constitution to deal with "any alleged violation or threatened violation of any fundamental right entrenched in Chapter 3". But Section 98(2) vests a general jurisdiction in this Court to interpret, protect and enforce the provisions of the

Constitution. Section 7(4) in dealing with the Section 98(2)(a) jurisdiction provides that where an infringement or threat to the infringement of a constitutional right is alleged, any of the persons referred to in Section 7(4)(b) will have standing to bring the matter to "a competent court of law". The category of persons empowered to do so is broader than the category of persons who have hitherto been allowed standing in cases where it is alleged that a right has been infringed or threatened, and to that extent the Section demonstrates a broad and not a narrow approach to standing.12 Section 7(4) does not, however, deal specifically with the jurisdiction vested in this Court by the other subSections of Section 98(2). Section 98(2)(c) vests in this Court the jurisdiction to enquire into "the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed before or after the commencement of this Constitution." The constitutionality of a law may be challenged on the basis that it is inconsistent with provisions of the Constitution other than those contained in Chapter 3. Neither Section 7(4) nor any other provision of the Constitution denies to the Applicants the right that a litigant has to seek a declaration of rights in respect of the validity of a law which directly affects his or her interests adversely.

[168] Once it is accepted, as Ackermann J has, that the issue of constitutionality has to be tested objectively and not subjectively, there is no valid reason for

denying persons in the position of the Applicants standing to secure a ruling on the validity of a law that directly affects their interests. Even if Section 7(4) were to be read extensively as applying by inference to all the subSections of Section 98(2), I would not see it as an obstacle to the Applicants' case. In that event it would have to be read as meaning "where an infringement of or threat to any right entrenched in this Chapter [or any dispute over the constitutionality of any executive or administrative act or conduct or threatened administrative act or conduct of any organ of the state, or any enquiry into the constitutionality of any law, including an Act of Parliament, irrespective of whether such law was passed or made before or after the commencement of this Constitution...] is alleged" the persons referred to in paragraph (b) shall have standing. There would be no need on this extensive interpretation of the Section to construe Section 7(4)(b)(i) as meaning that the person acting in his or her own interest must be a person whose constitutional right has been infringed or threatened. This is not what the Section says. What the Section requires is that the person concerned should make the challenge in his or her own interest. It is for this Court to decide what is a sufficient interest in such circumstances. In my view, on the facts of the present case, the Applicants have a sufficient interest to seek such a ruling. If that is so they can rely on the argument that viewed objectively

Section 417(2)(b) is inconsistent with the Constitution because it infringes the right to a fair trial guaranteed by Section 25(3).

189. The above decision by the South African Constitutional Court significantly changed the approach to legal standing in constitutional cases, moving away from common law.

190. The law on locus standi for constitutional petitions in Kenya is envisioned in Articles 22 and 258 of the Constitution which Articles are basically identical in the sense that once one Article is cited, then the other Article is equally cited. The Articles provide that:

(1) Every person has the right to institute court proceedings claiming that a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened.

(2) In addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by—

(a) a person acting on behalf of another person who cannot act in their own name;

(b) a person acting as a member of or in the interest of, a group or class of persons;

(c) a person acting in the public interest; or

(d) an association acting in the interest of one or more of its members.

191. The Court of Appeal in the case of **Mumo Matemu v Trusted Society of Human Alliance & 5 others [2013] eKLR** held as follows regarding locus standi:

"28. It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view, the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of history. Today, by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights, on behalf of another person who cannot act in their own name, or as a member of, or in the interest of a group or class of persons, or in the public interest. Pursuant to Article 22 (3) aforesaid, the Chief Justice has made rules contained in Legal Notice No. 117 of 28th June 2013 -The Constitution of Kenya (Protection of Rights and Freedoms) Practice and Procedure Rules, 2013-which, in view of its long title, we take the liberty to baptize, the "Mutunga Rules", to inter alia, facilitate the application of the right of standing. Like Article 48, the overriding objective of those rules is to facilitate access to justice for all persons. The rules also reiterate that any person other than a person whose right or fundamental freedom under the Constitution is allegedly denied, violated or infringed or threatened has a right of standing and

can institute proceedings as envisaged under Articles 22 (2) and 258 of the Constitution.

29.It may therefore now be taken as well established that where a legal wrong or injury is caused or threatened to a person or to a determinate class of persons by reason of violation of any constitutional or legal right, or any burden is imposed in contravention of any constitutional or legal provision, or without authority of law, and such person or determinate class of persons is, by reason of poverty, helplessness, disability or socio-economic disadvantage, unable to approach the court for relief, any member of the public can maintain an application for an appropriate direction, order or writ in the High Court under Articles 22 and 258 of the Constitution."

192. In the **Mumo Matemu** case above cited, the Court of Appeal further stated as follows regarding locus standi:

"However, we must hasten to make it clear that the person who moves the court for judicial redress in cases of this kind must be acting bona fide with a view to vindicating the cause of justice. Where a person acts for personal gain or private profit or out of political motivation or other oblique consideration, the Court should not allow itself to be seized at the instance of such person and must reject their application at the threshold. The time is now propitious at this stage of our constitutional development where we can state as was stated by the Supreme

Court of India in the case of S.P. Gupta v President of India & Others AIR [1982] SC 149 that:

The view has therefore been taken by the courts in many decisions that whenever there is a public wrong or public injury caused by an act or omission of the State or a public authority which is contrary to the Constitution or the law, any member of the public acting bona fide and having sufficient interest can maintain an action for redressal of such public wrong or public injury. The strict rule of standing which insists that only a person who has suffered a specific legal injury can maintain an action for judicial redress is relaxed and a broad rule is evolved which gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper but who has sufficient interest in the proceeding. There can be no doubt that the risk of legal action against the State or a public authority by any citizen will induce the State or such public authority to act with greater responsibility and can thereby improve the administration of justice. Lord Diplock rightly said in Rex v Inland Revenue Commrs. [1981] 2 WLR 722 at p. 740.

'It would, in my view, be a grave lacuna in our system of public law if a pressure group, like the federation, or even a single public-spirited taxpayer, were prevented by a outdated technical rules of locus standi from bringing the matter to the attention of the court to vindicate the rule of law and get the unlawful

conduct stopped… It is not, in my view, a sufficient answer to say that judicial review of the actions of officers or departments of central government is unnecessary because they are accountable to Parliament for the way in which they carry out their functions. They are accountable to Parliament for what they do so far as regards efficiency and policy, and of that Parliament is the only judge; they are responsible to a Court of Justice for the lawfulness of what they do, and of that the Court is the only judge.'

This broadening of the rule of locus standi has been largely responsible for the development of public law, because it is only the availability of judicial remedy for enforcement which invests law with meaning and purpose or else the law would remain merely a paper parchment, a teasing illusion and a promise of unreality. It is only by liberalizing the rule of locus standi that it is possible to effectively police the corridors of powers and prevent violations of law."

193. From the above decision, it follows that the scope of *locus standi* is quite broad, although the petitioner must demonstrate that they are within the confines of the prescribed categories under Article 258 of the Constitution.

194. In our understanding, every person who institutes a constitutional petition has to demonstrate that they are eligible under one of the classes set out above. Thus, the wide scope of *locus standi* does not in itself accord an automatic right to anyone invoking the provisions of Article 22 and 258 of the Constitution.

195. For example, in **Mwilu v Judicial Service Commission & 2 others; Director of Public Prosecutions & another (Interested Parties) (Petition E245 of 2020) [2021] KEHC 245 (KLR) (Constitutional and Human Rights) (12 November 2021) (Judgment),** *(The Mwilu Case)*, the petitioner contended that the JSC abdicated its mandate by failing to ascertain whether the DPP and the DCI had the ***locus standi*** to file petitions for the removal of a judge from office. It was her case that the two do not qualify to be the "any person" envisaged by Article 168(2) of the Constitution and therefore they could not file a petition for the removal of a judge from office. After interpreting and applying the various constitutional provisions and principles, the High Court persuasively held, *inter alia*, and in interpreting meaning of the term 'person' under Articles 22 and 168 (2) and 260 of the Constitution that:

> ***"322. We have examined various constitutional provisions in which the word "person" is positioned. In our view, the phrase "any person" as used in Article 168(2) is similar in its use in all the other provisions in the Constitution where the word "person" is used. For instance, Article 22(1) of the Constitution provides that:***
>
> ***"Every person has the right to institute court proceedings claiming that a right or a fundamental freedom in the Bill of Rights has been denied, violated or infringed, or is threatened."***

<u>323.Our understanding of Article 22(1) is that it is only a natural or legal person and not a State organ who can petition for redress of violation of rights and fundamental freedoms. In Mohamed Feisal & 19 others v Henry Kandie, Chief Inspector of Police, OCS, Ongata Rongai Police Station & 7 others; National Police Service Commission & another (Interested Party) [2018] eKLR the Court in interpreting Article 22(1) held that the provision meant that any member of society was at liberty to approach the High Court to adjudicate on the infringement or violation of a right or rights.</u>

<u>329. It is therefore apparent that where the drafters of the Constitution wanted to refer to State organ or person or both, they clearly and expressly stated so.</u>

<u>330. Similarly, the "any person" envisioned by the framers of the Constitution in Article 168(2) must be a person or a determinate class of persons and not a State organ. If it were not so, Article 260 would not have belaboured to define the phrases 'person,' 'State organ' and 'State officer' independently. It would simply have defined person to include State officer."</u>

196. The Court found that from the constitutional point of view, DPP and DCI had no locus standi to initiate petitions for removal of a judge. Thus, it is not every other person that has the locus standi to initiate proceedings before a tribunal or a court of law.

197. The Supreme Court in **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others (2014) eKLR** held that:

> ***"[349] ...Although Article 22(1) of the Constitution of gives every person the right to initiate proceedings claiming that a fundamental right or freedom has been denied, violated or infringed or threatened, a party invoking this Article has to show the rights said to be infringed, as well as the basis of his or her grievance. This principle emerges clearly from the High Court decision in Anarita Karimi Njeru v. Republic, (1979) KLR 154: the necessity of a link between the aggrieved party, the provisions of the Constitution alleged to have been contravened, and the manifestation of contravention or infringement. Such a principle plays a positive role, as a foundation of conviction and good faith, in engaging the constitutional process of dispute settlement."***

198. The 2010 Constitution nonetheless liberalized the traditional doctrine of *locus standi*. Under Articles 22(1) and 258(1), reproduced above which provide that every person may institute court proceedings alleging a violation, threatened violation, or contravention of the Constitution. This reform was intended to broaden access to justice and facilitate public interest litigation. As was stated by the Supreme Court of Kenya in **Mumo Matemu v Trusted Society of Human Rights Alliance & Others [2014] eKLR,** while standing is now widely available, it is not unlimited: a petitioner must still demonstrate a sufficient interest or connection to the

constitutional question raised. This requirement is dictated by reason of, *Locus standi* preserves the separation of powers and protects the courts from being drawn into matters that are more appropriately handled by other state organs.

199. Further, in **Coalition for Reform and Democracy (CORD) & Another v Republic of Kenya & Another [2015] eKLR,** the High Court observed that standing ensures that judicial resources are applied to genuine disputes warranting constitutional adjudication and prevents courts from issuing orders in matters lacking a live or legitimate controversy.

200. The doctrine of locus standi is therefore applied as a safeguard against frivolous or vexatious litigators. As was observed in **John Wekesa Khaoya v Attorney General [2013] eKLR,** even under a liberalized framework, courts must ensure that petitions disclose a justiciable issue. Further, that speculative, academic or disputes brought with an improper motive should not be permitted. This sieving preserves judicial time and protects respondents from unnecessary litigation. The Court stated in the above case of **John Wekesa** that:

> ***[4] In this matter, the locus standi of the Petitioner to file a public interest litigation is not in issue. In any event, the locus standi to file judicial proceedings, representative or otherwise, has been greatly enlarged by the Constitution in Article 22 and 258 of the Constitution which ensures unhindered***

access to justice. The matter in question is; whether the Petitioner should pay court fees on this Petition albeit he had filed it without paying court fee."

201. Since *Locus standi* enhances the legitimacy of judicial remedies, judicial orders must only be sought and issued to parties who have a proper legal and factual foundation to request relief. Without proper standing, the court risks pronouncing judgments in abstract or hypothetical terms, thereby undermining the rule of law and constitutional governance.

202. Even in public interest litigation, standing provides a structured avenue through which the court may intervene responsibly. The Supreme Court in the above cited **Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others [2014] eKLR** reaffirmed that courts are not advisory bodies and may act only when approached by a party with proper standing in a live dispute. This ensures that constitutional adjudication is both legitimate and authoritative.

203. It is for the reasons contained in the above cited decisions that this Court must consider and determine whether in the instant petition, the petitioner had locus standi to initiate the petition and if so, whether the petition wa brought in the public interest. To do so, we must establish what constitutes a public interest matter and who qualifies as a legitimate party to sustain a public interest claim. We find some decisions to be useful guides this aspect of public interest.

204. In **Brian Asin & 2 others v Wafula W. Chebukati & 9 others [2017] eKLR** the Court discussed this concept of public interest as follows:

"58. According to Black's Law Dictionary [40] "Public Interest Litigation means a legal action initiated in a court of law for the enforcement of public interest or general interest in which the public or class of the community have pecuniary interest or some interest by which their legal rights or liabilities are affected.

59. While dealing with the question of "bona fides" of a petitioner, especially in the case of a person approaching the Court in the name of Public Interest Litigation, the Indian Supreme Court in the case of Ashok Kumar Pandey vs. State of West Bengal [41] held as hereunder: -

"Public interest litigation is a weapon which has to be used with great care and circumspection and the judiciary has to be extremely careful to see that behind the beautiful veil of public interest an ugly private malice, vested interest and/or publicity seeking is not lurking. It is to be used as an effective weapon in the armory of law for delivering social justice to the citizens. The attractive brand name of public interest litigation should not be used for suspicious products of mischief. It should be aimed at redressal of genuine public wrong or public injury and not publicity oriented or founded on personal vendetta. As indicated above, Court must be careful to see that a body of persons or member of public, who approaches the court is acting bona fides and not for personal gain or

private motive or political motivation or other oblique consideration. The Court must not allow its process to be abused for oblique considerations. Some persons with vested interest indulge in the pastime of meddling with judicial process either by force of habit or from improper motives. Often, they are actuated by a desire to win notoriety or cheap popularity. The petitions of such busy bodies deserve to be thrown out by rejection 40. at the threshold, and in appropriate cases with exemplary costs."

205. Long before the promulgation of the 2010 Constitution, in **Alfred Njau, Aluchio Liboi, Joseph Muya Mukabi, Peter Inyangala, Akhonya Analo and Jacob Gichigo v City Council of Nairobi (Civil Appeal 74 of 1982) [1983] KECA 56 (KLR) (Civ) (28 June 1983) (Judgment),** the Court of Appeal stated as follows where the High Court Judge had found that the appellant had no locus standi in the matter before him:

"The term locus standi means a right to appear in Court and, conversely, as is stated in Jowitt's Dictionary of English Law, to say that a person has no locus standi means that he has no right to appear or be heard in such and such a proceeding. Therefore, the effect of the judge's finding here, which was made after hearing the evidence, and not treated as an isolated issue, the latter course being disapproved in the particular circumstances of that case by the House of Lords in IRC v National Federation of Self Employed and Small Businesses Ltd

(supra), was that the appellant had no right to bring or to appear in this suit against the Council.

Capacity to sue is a matter of mixed law and fact, which is to be decided on legal principles (with common sense coming into it) and not a matter of discretion. The learned judge, with respect, erred when he decided that the appellants had no locus standi in the matter to which the suit related. The second ground of appeal succeeds.

Lack of locus standi and lack of a cause of action are two different things. Cause of action is the fact or combination of facts which give rise to a right to sue whereas locus standi is the right to appear or be heard, in court or other proceedings; literally it means a place of standing - see Jowitt's Dictionary of English Law (2nd Edn). To say that a person has no cause of action is not necessarily tantamount to shutting the person out of the court but to say he has no locus standi means he cannot be heard, even on whether or not he has a case worth listening to.

As I have said above, locus standi involves the right to be heard and then determine whether there is or there is no reasonable cause of action or defence. The appellants had in paragraph 19 of the plaint alleged that they derived their tenancies direct from the Council."

206. In **Priscilla Nyokabi Kanyua v Attorney General and the IIEC[2010] eKLR**, a constitutional petition which was initiated and concluded just before the promulgation of the Constitution in August 2010 brought by the petitioner, a civil society activist seeking declarations that prisoners be allowed to vote in the referendum for the proposed draft Constitution of Kenya, which was to be held on 4th August 2010.In his Judgment, the now late Mukunya J (RIP) observed that the question of standing had brought a problem for public law litigants for a long time and held that the claimant had standing to bring the case as an officer of Kituo cha sheria, a Human Rights, non-governmental organization despite the fact that she had not been authorized by the inmates to act as their representatives. The learned Judge further stated:

> ***"Many people whose fundamental rights are violated not actually be in a position to approach the court for relief, for instance, because they are unsophisticated and indigent, which in effect means that they are incapable of enforcing their fundamental rights, which then remain merely on paper... When large numbers of persons are affected in this way, there is merit in one person or organization being able to approach the court on behalf of all those persons whose rights are allegedly infringed."***

207. As reproduced above, Articles 22 and 258 of the Constitution, whose wording is materially identical, constitute the most explicit and authoritative provisions on

standing under the 2010 constitutional dispensation. Article 22(1) empowers ***"every person" to institute court proceedings alleging a violation or threatened violation of a right or fundamental freedom in the Bill of Rights,*** while Article 258(1) grants ***"every person" the right to institute proceedings claiming that the Constitution "has been contravened, or is threatened with contravention.***

208. These provisions deliberately broaden locus standi and remove the restrictive impediments that characterised the former constitutional order, thereby permitting every person the right to institute court proceedings, ***claiming*** that the Constitution has been contravened, or is threatened with contravention and secondly, in addition to a person acting in their own interest, court proceedings under clause (1) may be instituted by- a) a person acting on behalf of another person who cannot act in their own name; b) a person acting as a member of, or in the interest of, a group or class of persons; c) a person acting in the public interest; or d)An association acting in the interest of one or more of its members.

209. The use of the term *'claiming'* under Article 22 as read with Article 258 of the Constitution is central to the expanded concept of locus standi in Kenyan law. Additionally, the enactment of the Fair Administrative Action Act, 2015 has further codified and expanded the principles relating to *locus standi* in administrative law. Section 7(1) of the Act expressly provides that ***"any person who is aggrieved by an administrative action or decision may apply for review of the administrative action***

or decision,” while Section 5(2) reinforces that position by providing that ***“every person has the right to administrative action which is expeditious, efficient, lawful, reasonable and procedurally fair.”***

210. These provisions of the Fair Administrative Action Act mirror the broad standing contemplated under Articles 22 and 258 of the Constitution and affirm that any person aggrieved by an administrative action, such as the impugned proceedings before the Judicial Service Commission, has the right to seek judicial redress.

211. This statutory framework therefore removes any doubt that standing in administrative law and where there are allegations or claims of violation or threatened violation of the Constitution matters, is intentionally wide and not restricted to persons personally subjected to the administrative decisions.

212. The aim of the Fair Administrative Action Act is to regulate administrative action, ensure that decisions of administrative, judicial or quasi-judicial bodies are confined within the law and provide a mode of access to redress.

213. Additionally, Article 3 of the Constitution places an obligation on every person, natural or juristic to respect, uphold and defend the Constitution thereby bestowing *locus standi* on anyone to institute proceedings seeking judicial enforcement of the Constitution, whether those person’s rights and fundamental freedoms have been denied, violated, infringed or are threatened with infringement or not.

214. Comparing the present constitutional space on locus standi and the former constitutional dispensation, previously, the standards for establishing locus standi were markedly restrictive. The term ***"aggrieved person"*** was judicially interpreted to mean only a person who had suffered a direct loss, injury, or specific prejudice, or one who was personally and immediately affected by the impugned administrative or public action.

215. Courts consistently held that no individual was competent to enforce the rights of another and that only the person directly injured by an administrative decision could invoke judicial review or constitutional remedies. As a result, standing was confined to a narrow, individualized notion of grievance, thereby excluding public interest litigants and preventing the courts from addressing broader constitutional or systemic violations.

216. Thus, as seen above and as pronounced by the Courts in the post 2010 era, that position has since been fundamentally transformed such that the previously strict and exclusionary interpretation of the phrase *"aggrieved person"* has been broadened by the courts, with standing now being determined through a flexible, purposive and constitution-centered lens.

217. Courts have affirmed that a petitioner need only demonstrate a *"sufficient interest"* in the matter, and not a direct personal injury. Indeed, even a person who may be considered a stranger to the immediate dispute may competently institute

proceedings where the person shows that they act in good faith, in the public interest or with the intention of preventing a violation or acting in defence of the Constitution.

218. This modern approach reflects the express democratic will of the people of Kenya at Articles 1, 3, 10, 22, 23, 27, 47,50 and 258, which open the doors of constitutional litigation to any person seeking to uphold, defend or enforce the Constitution.

219. In **Attorney-General (Gambia) v Njie [1961] 1 All ER 504,** Lord Denning stated that the expression *"aggrieved person"* encompasses ***"a person who has a genuine grievance because an order has been made which prejudicially affects his interests."*** The revered Judge emphasised that the concept is not confined to a person suffering direct personal injury but extends to any individual with a legitimate and bona fide grievance arising from the impugned action. This definition was widely adopted as a guiding principle in determining standing, particularly in public law proceedings. The respected Judge further stated thus:

> ***"The words 'person aggrieved' are of wide import and should not be subjected to a restricted interpretation. They do not include, of course, a mere busy body who is interfering in things that do not concern him but they do include a person who has a genuine grievance because an order has been made which prejudicially affects his interests. "Rights of determinate class of persons Is a class of persons***

organized under a society or association or even a trade union to represent them or protect and promote their collective interests.”

220. The Court of Appeal in **Randu Nzai Ruwa & 2 others v Secretary, the Independent Electoral and Boundaries Commission & 9 others [2016] eKLR - Civil Appeal 9 of 2013,** the ***MRC Case***, can best be described as the key that unlocked access to justice. The case identified the question of *locus standi* as the central issue for determination. In his judgment, Ouko JA (as he then was) observed that the impugned decision of the High court had effectively “*slammed the door to the fountain of justice*” in the faces of the appellants by applying an unduly restrictive interpretation of standing. The learned Judge noted that under the former constitutional regime, standing was confined to a party who was directly aggrieved and whose interests were immediately and personally affected by the challenged action.

221. This narrow approach, the Court held, had the practical effect of limiting access to justice which right is guaranteed under Article 48 of the Constitution, by excluding from the courts’ doors all litigants who were not directly harmed, branding them as “*meddlesome busybodies.*” The Court of Appeal recognized that such a conservative standard was incompatible with the transformative character of the 2010 Constitution, which deliberately broadened access to constitutional remedies.

222. Ouko JA (as he then was) further observed that Articles 22 and 258 of the Constitution marked a decisive departure from the restrictive and exclusionary standing requirements of the former constitutional order. He emphasised that under the 2010 Constitution, locus standi has evolved into a broad, liberal and purposive standard intended to facilitate, not obstruct access to justice. In affirming this shift, the learned Judge relied on the Court of Appeal decision in **Mumo Matemu v Trusted Society of Human Rights Alliance & Another, Civil Appeal No. 290 of 2012**, where the Court emphatically held that the stringent locus standi constraints of the past had been buried in the annals of history. The Court observed that the Constitution today gives standing to any member of the public who is not a mere busybody or a meddlesome interloper, and who acts in good faith to institute proceedings challenging any violations under the Bill of Rights.

223. The above judicial pronouncement underscores that the modern constitutional framework welcomes litigants who raise genuine constitutional concerns, regardless of whether they are directly affected, provided their actions are bona fide and intended to safeguard the Constitution.

224. In delivering the unanimous judgment of the Court of Appeal in the above ***MRC Case***, Ouko JA (as he then was) held that the learned Judges of the High Court had fundamentally erred by disregarding the appellants' unequivocal contention that they

were no longer members of the MRC and by relying on the proscribed organization's proposed constitution to unjustifiably bar them access to justice.

225. The Court of Appeal emphasized that, under the 2010 Constitution, the appellants did not need to belong to a registered association to approach the court; and that even as individual citizens, they were constitutionally entitled to challenge conduct they perceived as a violation or threatened violation of their own rights or of the rights of other persons.

226. The Court of Appeal affirmed that the appellants deserved to be heard on the merits of their complaint and that the High Court's invocation of inherent jurisdiction and discretion to close the doors of constitutional adjudication was improper, inconsistent with Articles 22 and 258 and ultimately antithetical to the Constitution's deliberate commitment to broad, purposeful and meaningful access to justice.

227. P. Kiage JA in a precise and powerful concurring opinion, underscored the incompatibility of the High Court's approach with the spirit and text of the 2010 Constitution. He observed that to bar a litigant from the seat of justice on the basis of a preconceived categorization that he is undeserving of being heard, particularly in complaints alleging violations of constitutional rights, is wholly out of step and indeed discordant with and anachronistic to the present constitutional order. In his own emphatic words, the learned eloquent Judge faulted the High Court observing that:

"The High Court drew a line and shut out the appellants from being heard on the merits of their not-insubstantial burdens, pains and travails without at all hearing them. That move by that court was a drastic, draconian and dramatic negation of the entire access to justice project in the circumstances of this case, and I would not endorse it."

228. The observations made by the learned Judges of Appeal in the *MRC* case capture the constitutional imperative that courts must not, through rigid or antiquated notions of standing, defeat the right of every person to be heard on alleged or threatened constitutional violations.

229. In the end, the Court of Appeal upheld the right of every person to enter the courts unrestrained and be availed the instruments of justice. The decision of the High Court was overturned.

230. Concerning public interest litigation, in **Mumo Matemu v. Trusted Society of Human Rights Alliance and 5 Others, SC Civil Application No. 29 of 2014; [2014] eKLR,** Njoki Ndungu, SCJ in her concurring opinion discussed the essence of public interest litigation by holding that:

"[89] Public Interest Litigation plays a transformative role in society. It allows various issues affecting the various spheres of society to be presented for litigation. This was the Constitution's aim in enlarging locus standi in human rights and constitutional litigation. Locus standi has a close nexus to the right of

access to justice. In instances where claims in the interest of the public are threatened by administrative action to the detriment of constitutional interpretation and application, the Court has discretion on a case-by-case basis, to evaluate the terms and public nature of the matter vis a vis the status of the parties before it. This discretion is drawn from the command of Article 259 (1), to interpret the Constitution in a manner that promotes its values and purposes, advances the rule of law, human rights and fundamental freedoms, permits the development of the law and contributes to good governance."

[92] The Constitution enlarges the capacity to file a claim in defence of the Constitution thereby laying the basis for rights and constitutional enforcement. Article 3(1) provides that "every person has an obligation to respect, uphold and defend this Constitution." It further defines "person" to "include a company, association or other body of persons whether incorporated or unincorporated." The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules 2013, adopts the constitutional definition of person. Article 258(1) in turn provides that "every person has the right to institute court proceedings, claiming that this Constitution has been contravened or is threatened with contravention." <u>In constitutional adjudication therefore, the traditional strictures of locus have been broken to allow every person the</u>

<u>capacity to file a constitutional claim</u>. This resonates with the holding of the Court of Appeal in this very matter, at paragraph 27 that:

"Moreover, we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broader context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hurdles on access to the courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. In the case at hand, the petition was filed before the High Court by an NGO whose mandate includes the pursuit of constitutionalism and we therefore reject the arguments of lack of standing by counsel for the appellant. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus stand to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution..."

231. The Supreme Court in **the above Mumo Matemu case** confirmed that locus standi under the 2010 Constitution is intentionally expansive and that courts must avoid unwarranted technical restrictions that impede access to justice. Moreover, Article

159(2)(d) requires courts to administer justice without undue regard to procedural technicalities.

232. The issue in the instant petition, in our view, from the material placed before us, is not whether an advocate can file proceedings *"in his own name, "while advocating for the rights of his client.* but whether the proceedings are in substance directed at respecting, upholding, protecting and defending the Constitution, or protecting and promoting identifiable rights, interests or the proper administration of justice.

233. Applying all the above principles to this case, as espoused in judicial pronouncements in interpreting Articles 22, 48 and 258 of the Constitution, we are satisfied that the petitioner herein has sufficient interest in the matter of the Petition lodged against the Judge by the interested party herein and that he has *locus standi* to initiate these proceedings as a public-spirited citizen of Kenya and an advocate of this Court, whether representing his client, the learned Judge or not, alleging or claiming that her rights are violated or threatened with violation; and in the promotion and protection of the Constitutional values espoused in Article 10, some of the provisions which are alleged to be violated or threatened with violation.

234. We are further fortified by the Supreme Court's decision upholding the Court of Appeal decision in the now famous **Mumo Matemu** case where the Court of Appeal highlighted that:

“These provisions have been the subject of judicial interpretation in many recent decisions. For instance, the Supreme Court Civil Appeal No. 290 of 2012, Mumo Matemo v Trusted Society of Human Rights Alliance and another, in which the Court, like the Supreme Court emphasized that;

"27 Moreover we take note that our commitment to the values of substantive justice, public participation, inclusiveness, transparency and accountability under Article 10 of the Constitution by necessity and logic broadens access to the courts. In this broad context, this Court cannot fashion nor sanction an invitation to a judicial standard for locus standi that places hardles on access to courts, except only when such litigation is hypothetical, abstract or is an abuse of the judicial process. We hold that in the absence of a showing of bad faith as claimed by the appellant, without more, the 1st respondent had the locus standi to file the petition. Apart from this, we agree with the superior court below that the standard guide for locus standi must remain the command in Article 258 of the Constitution.

It still remains to reiterate that the landscape of locus standi has been fundamentally transformed by the enactment of the Constitution in 2010 by the people themselves. In our view the hitherto stringent locus standi requirements of consent of the Attorney General or demonstration of some special interest by a private citizen seeking to enforce a public right have been buried in the annals of

history. Today by dint of Articles 22 and 258 of the Constitution, any person can institute proceedings under the Bill of Rights.

The Court further held that a legal wrong or injury to a person or to a determinate class of persons, the person or a member of the determinate class of persons, or even a member of the public can maintain an application under Articles 22. Pursuant to Article 22(3), as I have said, the Chief Justice has made the Mutunga Rules which, inter alia provide for the application of the right of standing. Specifically Rule 4 confirms that a person as an individual acting in his/her own interest, who alleges a denial, violation or infringement of any right or fundamental freedom under the Constitution may apply to the High Court for protection. Although the Mutunga Rules had not been made when the appellants filed their applications, I have made reference to them to demonstrate that the intention of the framers of the Constitution from which those rules are derived, was to allow any person who genuinely believed that there was a violation of fundamental freedoms and constitutional rights to approach the court for redress.

I come to the conclusions on this ground that the strict common law rule of standing which insists that a person or group of people will only have the requisite locus standi if they can show that they have a personal and sufficient interest in the matter, a greater interest than that of the rest of the public, has

now been evolved and broadened under the Constitution. The Constitution today gives standing to any member of the public who is not a mere busy-body or a meddlesome interloper, and who acts in good faith to institute proceedings challenging any violations under the Bill of Rights.”

235. As to whether the learned Judge against whom a petition was filed by the interested party and therefore who was directly affected by the proceedings before the JSC, should have been the right party to this petition as opposed to her advocate, Rule 5 of **The Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (**Mutunga Rules) provides that:

(b) A petition shall not be defeated by reason of the misjoinder or non-joinder of parties, and the Court may in every proceeding deal with the matter in dispute.

(c) Where proceedings have been instituted in the name of the wrong person as petitioner, or where it is doubtful whether it has been instituted in the name of the right petitioner, the Court may at any stage of the proceedings, if satisfied that the proceedings have been instituted through a mistake made in good faith, and that it is necessary for the determination of the matter in dispute, order any other person to be substituted or added as petitioner upon such terms as it thinks fit.

(d) The Court may at any stage of the proceedings, either upon or without the application of either party, and on such terms as may appear just—

(i) order that the name of any party improperly joined, be struck out; and

(ii) that the name of any person who ought to have been joined, or whose presence before the court may be necessary in order to enable the court adjudicate upon and settle the matter, be added.

236. In the persuasive decision in **Rose Wangui Mambo & 2 others v Limuru Country Club & 17 others [2014] KEHC 7683 (KLR),** where the High Court (Bench) held that Article 22 entitles every person to move this Court claiming that a fundamental right has been infringed or is threatened with infringement. The learned Judges stated as follows:

"Rule 2 of the Constitution (Protection of Fundamental Rights and Freedoms) Practice and Procedure Rules, 2013 (hereafter "the Rules') defines the term 'respondent' to mean, "a person who is alleged to have denied, violated or infringed, or threatened to deny, violate or infringe a right or fundamental freedom." Further, Rule 5(a) of the Rules states that "Where the petitioner is in doubt as to the persons from whom redress should be sought, the petitioner may join two or more respondents in order that the question as to which of the respondent is liable, and to what extent, may be determined as between all parties.

<u>It is also worth mentioning that according to the Rules, a petition cannot be defeated by reason of the misjoinder or non-joinder of parties. The Court in such</u>

an instance is mandated to deal with the matter in dispute according to Rule 5(b) of the a Rules, while Rule 5(d) allows the Court at any stage of the proceedings, (either upon or without the application of either party) to order that the name of any party improperly joined be struck out and that the name of any person who ought to have been joined or whose presence before the Court may be necessary in order to enable the Court adjudicate upon and settle the matter be added.

...As was observed in Mwangi Stephen Mureithi v Daniel Toroitich Arap Moi, Nairobi Petition No. 625 of 2009 [2011] eKLR in reference to the then Section 84(1) of the repealed Constitution;

"Needless to say, it is clear from the above provisions of the Constitution that a person who alleges (not "proves") that his fundamental rights have been contravened has a Constitutional right to seek redress in the High Court. ***It would amount to grave injustice to lock out a petitioner from filing his claim purely because the respondent believes that the claim has no merit. [emphasis added]***

237. We reiterate that in the instant petition, not only is the petitioner claiming that his client's rights to fair administrative action and fair hearing are threatened with violation, but that by the JSC summoning the Judge for a hearing of the petition filed against her by the interested party, absent any procedural safeguards to guarantee

those rights, is acting in an opaque and unpredictable manner and that the JSC in so doing is equally violating the constitutional principles espoused in Article 10 of the Constitution. Finally, it is important to note that under Article 3(1) of the Constitution, every person has an obligation to respect, uphold and defend the Constitution.

238. For all the above reasons and supported by a myriad of judicial pronouncements in support of the petitioner's quest, we are satisfied that the petitioner has locus standi to bring this petition and we decline to accept the invitation to find that the petitioner has no *locus standi* to initiate these proceedings. Accordingly, the objection challenging the petitioner's *locus standi* is overruled and dismissed.

Whether the Petition is ripe or justiciable for consideration by this Court and therefore whether the petition is premature for want of exhaustion of remedies

239. The other very important jurisdictional issue raised by the 1st Respondent, the JSC and the interested party is whether this petition was ripe for this Court to entertain. The 1st Respondent Commission contended that the Petition herein is not yet ripe for this Court to determine, since the JSC has yet to consider and determine the next course of action in the petition that is pending before it.

240. The Commission accuses the petitioner of not exhausting the process for consideration of the petition against the judge and instead, petitioning this Court and seeking to halt a constitutionally guaranteed process. It has urged this Court to

decline jurisdiction in this matter arguing that the matter is not yet ripe for determination by this Court and that the petitioner has approached the Court prematurely.

241. The petitioner on the other hand maintains that the petition was ripe for consideration by this Court because the judges' constitutional rights were being threatened with violation in that the JSC has no predictable rules of engagement in the handling of complaints and petitions against Judges, despite the Courts including the Supreme Court decrying the lack of the rules and even directing the JSC to put in place the said rules withing 90 days, in the ***Shollei case.***

242. The question we answer therefore, is whether, the fact that there is an ongoing process before the Judicial Service Commission which is a constitutionally mandated body to handle complaints against Judges, can be a bar to the High Court hearing and determining this Petition, where the Petitioner is raising issues of the threat, infringement and or violation of rights and the constitutional values and principles.

243. Jurisdiction of this Court is derived from the Constitution at Article 165 and various statutes. That being the case, this Court cannot arrogate itself jurisdiction that it does not have. In **Misc. Application No.639 of 2005 Boniface Waweru Mbiyu v Mary Njeri& Another,** J.B Ojwang J. (as he then was) had this to say on jurisdiction:

> ***"The entry point into any court proceeding is jurisdiction. If a court lacking jurisdiction to hear and determine a matter overlooks that fact and determines***

the matter, its decision will have no legal quality and will be a nullity. Jurisdiction is the first test in the legal authority of a Court or tribunal, and its absence disqualifies the Court or tribunal from determining the question."

244. In **Matemu v Trusted Society of Human Rights Alliance & 5 others (Civil Appeal 290 of 2012) [2013] KECA 445 (KLR) (26 July 2013) (Judgment),** the Court of Appeal reiterated the well-known established principle that jurisdiction of any court provides the foundation for its exercise of judicial authority. The Court stated:

"As a general principle, where a court has no jurisdiction, it has no basis for judicial proceedings much less judicial decision or order. The applicable standard remains the statement of the Court of Appeal in The Owners of Motor Vessel "Lillian S" v Caltex Oil Kenya Ltd [1989] KLR 1 where it was stated:

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

245. The Supreme Court in **Communications Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 Others [2014] eKLR**, warned that a court should

refrain from determining issues that are abstract, hypothetical or premature and which have not fully crystallized.

246. As a general rule, courts are reluctant to interfere in ongoing proceedings before a constitutionally mandated body such as the JSC. This restraint is necessary and it reflects respect for institutional competence, the separation of powers, and the avoidance of piecemeal litigation. Courts will will not intervene merely because the process may lead to an adverse outcome, or the affected judge disputes the merits of the allegations.

247. This general rule, however, is not absolute as courts may exercise jurisdiction to intervene before a threshold determination where the challenge is directed not at the merits, but at the lawfulness of the process itself.

248. Intervention is however justified where it is alleged that the subject body or authority is alleged to be acting without jurisdiction or ultra vires, is proceeding in the absence of mandatory regulations, applying no ascertainable standards for threshold assessment, breaching natural justice in a manner that cannot be cured later, acting under structural bias or conflict of interest, or exercising unfettered discretion inconsistent with the principle of legality. In such cases, the court cannot be said to be usurping the authority's mandate but is doing so is ensuring that the authority acts within the bounds of the law. In other words, a court of law cannot decline jurisdiction where the Constitution or the law has conferred it with jurisdiction.

249. The Commission contends that intervention should only be after the thresh hold is reached by the Commission. Should that be the case?

250. In **Kenya Power & Lighting Company Limited v Benzene Holdings Limited t/a Wyco Paints [2016] eKLR**, the Court quoted from **Halsbury's Laws of England 4th Edn. Vol. 37 Para. 14** on the inherent jurisdiction of the Court where it is stated that:

> ***"The jurisdiction of the court which is comprised within the term "inherent" is that which enables it to fulfil itself, properly and effectively, as a court of law. The overriding feature of the inherent jurisdiction of the court is that it is part of procedural law, both civil and criminal, and not part of substantive law; it is exercisable by summary process, without plenary trial; it may be invoked not only in relation to the parties in pending proceedings, but in relation to anyone, whether a party or not, and in relation to matters not raised in litigation between the parties; it must be distinguished from the exercise of judicial discretion; it may be exercised even in circumstances governed by rules of court. The inherent jurisdiction of the court enables it to exercise control over process by regulating its proceedings, by preventing the abuse of the process and by compelling the observance of the process … In sum, it may be said that the inherent jurisdiction of the court is a virile and viable doctrine and***

has been defined as being the reserve or fund of powers, a residual source of powers, which the court may draw upon as necessary whenever it is just or equitable to do so, in particular to ensure the observance of the due process of law, to prevent improper vexation or oppression, to do justice between the parties and to secure a fair trial between them.”

251. In **P.M. Mwilu v Judicial Service Commission & 2 others; Director of Public Prosecutions & another (Interested Parties) (Petition E245 of 2020) [2021] KEHC 245 (KLR) (Constitutional and Human Rights) (12 November 2021) (Judgment)** the High Court Bench of three was confronted with similar and related issues of-

i. Whether the Judicial Service Commission (JSC) was subject to the supervisory jurisdiction of the High Court.

ii. whether the High Court was usurping the jurisdiction of the JSC under Article168(2) of the Constitution to deal with complaints against judges by subjecting JSC proceedings to the supervisory jurisdiction of the High Court; and

iii. whether judicial officers subject to JSC proceedings were required to await the outcome of the JSC proceedings before approaching the High Court on the alleged violation of her constitutional rights and fundamental freedoms.

252. In resolving the triple issues above, the High Court, citing other decisions, held that:

1. ***The jurisdiction of the High Court was derived from Article 165(3)(d) of the Constitution. Article 23 of the Constitution specifically granted the High Court jurisdiction to hear and determine applications for redress of a denial, violation or infringement of, or threats to, a right or fundamental freedom in the Bill of Rights. 2. The mandate of the High Court included the interpretation of the Constitution and the determination of any question as to whether anything purportedly done under the authority of the Constitution or statute was in compliance with the Constitution.***
   3. ***Article 165(6) of the Constitution vested the High Court with supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function. The High Court in the exercise of its supervisory jurisdiction was empowered to call for the record of any proceedings before such a body, authority or tribunal and make any orders or give any directions it considered appropriate to ensure the proper administration of justice.***
   4. ***In exercising its authority under Article 168(2) of the Constitution, the Judicial Service Commission (JSC) was carrying out an administrative function which was a quasi-judicial function and thus subject to the High Court's supervisory jurisdiction. In considering a petition for the removal of a judge from office, the JSC had a duty to ensure compliance with the***

Constitution and where it failed to do so, the High Court was mandated to step in and steady the ship.

253.The Court in the above **Mwilu** case further held that:

1. ***The doctrine of exhaustion of remedies required that the constitutional and statutory avenues provided for resolution of disputes should first be resorted to before invoking court action. Besides the anchorage of the doctrine of exhaustion of remedies as espoused in Article 159(2) of the Constitution, the doctrine was further given statutory recognition by Section 9(1), (2), (3) & (4) of the Fair Administrative Action Act, 2015 which stipulated that before approaching the courts for judicial review of any administrative action, an applicant had to first exhaust the available internal dispute resolution mechanisms. However, the court could, on application, in exceptional circumstances exempt a party from resorting to alternative internal dispute resolution mechanism.***
2. ***The position held by the respondents and the interested parties was that the petitioner should await the conclusion of the process before the JSC before she could approach the High Court on the alleged violation of her constitutional rights and fundamental freedoms. That argument was not convincing for two reasons: <u>there was no alternative dispute resolution mechanism provided for a judge who was facing a petition for removal and</u>***

who was aggrieved by any of the processes of the JSC. Any person aggrieved by an administrative action deemed to be violating or threatening to violate their constitutional rights in ongoing proceedings was entitled to appeal against the decision or seek a remedy from the High Court and such a person could not be told to wait for the conclusion of the administrative process before approaching the court.

3. ***The petitioner was not expected to undergo the JSC process for her removal from office and thereafter approach the court after a decision had been made. It was within her constitutional right to seek the court's intervention before the conclusion of the process, where she felt that her rights were denied, violated or infringed or were threatened.*** ***…[emphasis added]***

254. It is important to highlight that the contention by the Commission in this petition that the matter was not ripe for this Court and that the petitioner should have exhausted the process before the JSC prior to approaching this Court is similar to the objections that were raised by the same Commission in the **Mwilu** case.

255. In **Faraj & 3 others v Police & 2 others [2022] KEHC 287 (KLR**) the Court stated:

> ***"…the doctrine of ripeness and the doctrine of avoidance. Like res judicata or the doctrine of exhaustion, these two doctrines can preclude a court from entertaining a case. Constitutional avoidance has been defined as a preference***

for deciding a case on any basis other than one which involves a constitutional issue being resolved. As a principle, constitutional avoidance has been linked to the doctrine of justiciability. In broad terms, justiciability governs the limitations on the constitutional arguments that the courts will entertain. It encompasses three main principles: standing, ripeness, and mootness. The avoidance doctrine was fortified in Sports and Recreation Commission v Sagittarius Wrestling Club and Anor. …"

256. We reiterate that the doctrine of ripeness is primarily designed to avoid premature adjudication. Speaking on the justification for the doctrine, **Luis Franceschi et al, The Constitution of Kenya, A Commentary**, noted *inter-alia*:

"The rationale for the doctrine of ripeness is to prevent a party from prematurely approaching a court when the party has not been subjected to prejudice."

257. Expounding on the same issue, the Supreme Court in **Attorney-General & 2 others v Ndii & 79 others; Prof. Rosalind Dixon & 7 others [2022] KESC 8 (KLR)** noted:

"61. The doctrine of ripeness focused on when a dispute had matured into an existing substantial controversy deserving of judicial intervention. The doctrine of ripeness prevented a party from approaching a court before that party had been subject to prejudice, or the real threat of prejudice, as a result of the legislation or conduct challenged.

63.Ripeness discouraged a court from deciding an issue too early. It therefore required a litigant to wait until an action was taken against which a judicial decision could be grounded and a court was able to issue a concrete relief. That approach shielded a court from dealing with hypothetical issues that had not crystalized."

258. Further, in **Wanjiru Gikonyo and Others v National Assembly of Kenya and 4 Others [2016] KEHC 5536 (KLR),** it was explained that:

"Effectively, the justiciability dogma prohibits the court from entertaining hypothetical or academic interest cases. The court is not expected to engage in abstract arguments. The court is prevented from determining an issue when it is too early or simply out of apprehension, hence the principle of ripeness. An issue before the court must be ripe, through actual matrix, for determination…The court ought not to determine issues which are not yet ready for determination or is only of academic interest having been overtaken by events. The court ought not to engage in premature adjudication of matters through either the doctrine of ripeness or of avoidance. It must not decide on what the future holds either."

259. In **K K B v S C M & 5 others (Constitutional Petition 014 of 2020) [2022] KEHC 289 (KLR) (22 April 2022) (Ruling),** Mativo, J. (as he then was) also expressed himself on the doctrine as follows:

"In summation, the doctrines of ripeness and constitutional avoidance shun to deal with a constitutional issue where there exists another legal course which can give the litigant the relief he seeks. In other words, a constitutional issue is not ripe for determination until the determination of the constitutional issue is the only course that can give the litigant the remedy he seeks. Both constitutional avoidance and ripeness avert the determination of the constitutional issues until it becomes very necessary to the extent that it is the only course available to assist the litigant's cause…"

260. Additionally, in the case of **Faraj & 3 others v Police & 2 others** (supra) Mativo, J. (as he then was) stated:

"The doctrine of avoidance is primarily viewed by courts from the position that although a court could take up a matter and hear it, it would still decline to do so if there is another mechanism through which the dispute could be resolved. In that regard, the Supreme Court stated in Communication Commission of Kenya & 5 Others v Royal Media Services Ltd & 5 others (at para 256) that the principle of avoidance means that a Court will not determine a constitutional issue when a matter may properly be decided on another basis…"

261. The Supreme Court in **Petitions 14, 14A, 14B & 14C of 2014 (Consolidated) Communications Commission of Kenya & 5 others v Royal Media Services**

Limited & 5 others [2014] eKLR (29th September 2014) (Judgment) extensively discussed the doctrine of ripeness thus:

"[256] The appellants in this case are seeking to invoke the "principle of avoidance", also known as "constitutional avoidance". The principle of avoidance entails that a Court will not determine a constitutional issue, when a matter may properly be decided on another basis. In South Africa, in S v. Mhlungu, 1995 (3) SA 867 (CC) the Constitutional Court Kentridge AJ, articulated the principle of avoidance in his minority Judgment as follows [at paragraph 59]:

"I would lay it down as a general principle that where it is possible to decide any case, civil or criminal, without reaching a constitutional issue, that is the course which should be followed."

[257] Similarly the U.S. Supreme Court has held that it would not decide a constitutional question which was properly before it, if there was also some other basis upon which the case could have been disposed of (Ashwander v. Tennessee Valley Authority, 297 U.S. 288, 347 (1936)).

[258] From the foundation of principle well developed in the comparative practice, we hold that the 1st, 2nd and 3rd respondents' claim in the High Court, regarding infringement of intellectual property rights, was a plain copyright-infringement claim, and it was not properly laid before that Court as a

constitutional issue. This was, therefore, not a proper question falling to the jurisdiction of the Appellate Court…

The doctrine of ripeness and constitutional avoidance gives credence to the concept that the Constitution does not operate in a vacuum or isolation. It has to be interpreted and applied in conjunction with applicable legislation together with other available legal remedies. Where there are alternative remedies, the preferred route is to apply such remedies before resorting to the Constitution. The possibility of the elevation of any dispute to a constitutional issue is what is sought to be averted by the doctrines of ripeness and constitutional avoidance. It is borne out of a realization that all legislative or common-law remedies are part of the legal system…"

262. In the above cited ***Mwilu*** case, the High Court bench found that a judge of a superior court facing what they deem to be an unconstitutional petition filed against them or proceedings pending before the JSC can move to the High Court to quash the same even before a final decision has been rendered by the JSC.

263. Our pinon is that the threshold decision itself is a Jurisdictional issue in the sense that the determination whether a petition meets the threshold for removal of a Judge is a jurisdictional fact. It follows therefore, that if the threshold is not lawfully defined or applied, the JSC lacks authority to proceed further. Additionally, an administrative or

quasi-judicial body cannot lawfully decide whether it has jurisdiction by using an unlawful process.

264. The duty of the court is to ensure that jurisdictional facts are established lawfully and procedurally fairly before a process with grave consequences such as removal of a judge through a tribunal is allowed to continue. Article 23 of the Constitution grants on the High Court the Authority to uphold and enforce the Bill of Rights. In doing so, the High Court has jurisdiction, in accordance with Article 165, to hear and determine applications for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of Rights.

265. In the instant case, the petitioner has raised very serious issues which include absence of regulations to govern initiation of petitions, screening or filtering mechanisms, standards for sufficiency and procedural rights of not only the affected Judge but all Judges of superior Courts, at the threshold stage.

266. In our view, this Court may intervene before the threshold decision because, any subsequent decision would be tainted by initial illegality, there being no opportunity for the affected Judge to approach this Court after the threshold is reached and a tribunal recommended. This in our view, will cause harm to judicial independence and the reputational image of the affected Judge will be immediate and irreversible.

267. In such circumstances, therefore, requiring the affected judge to "wait and see" would effectively condone an unlawful process, noting that illegality is not cured by

completion of the process. The power to intervene in such proceedings is not in abstract. It is derived from the Constitution at Articles 22, 23 and 258.

268. Article 165 (3) of the Constitution confers on the High Court (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Under sub Article 3(d) (ii), that jurisdiction extends to 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.*

269. Additionally, the High Court is clothed with supervisory jurisdiction under Article 165(6) of the Constitution over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court. In the exercise of this supervisory jurisdiction, the High Court under Article 165 (7) may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6) and may make any order or give any direction it considers appropriate to ensure the fair administration of justice.

270. The Judicial Service Commission is a constitutional body that exercises not only administrative authority but also quasi-judicial function, as far as its mandate to initiate *Suo motu,* receive and consider petitions regarding the conduct of Judges and recommending to the President the establishment of a tribunal for removal of Judges is concerned. It is not insulated or immune from judicial supervision under Article

165 (6) and (7) of the Constitution, noting that under Article 165(5), the Constitution only bars the High Court from exercising jurisdiction reserved for the courts contemplated in Article 162 and the Supreme Court. Consequently, a decision of JSC to receive and hear a petition concerning the conduct of a judge challengeable before the High Court.

271. Closely associated with ripeness is the doctrine of exhaustion, which requires litigants to first pursue and conclude the dispute resolution mechanisms provided by the Constitution or statute before invoking the Court's jurisdiction. This doctrine has been a consistent feature in Kenyan jurisprudence. In **Speaker of the National Assembly v Karume [1992] KLR 21**, the Court of Appeal held that where the Constitution or statute sets out a clear procedure for redress, that procedure must be strictly followed.

272. This exhaustion principle was reaffirmed in **Mutanga Tea & Coffee Company Ltd v Shikara Limited & Another [2015] eKLR,** where the Court of Appeal emphasized that the exhaustion doctrine promotes orderly dispute resolution, institutional competence and judicial economy. Similarly, in **Geoffrey Muthinja Kabiru & 2 Others v Samuel Munga Henry & 1756 Others [2015] eKLR,** the Court stressed that exhaustion is no longer a matter of mere convenience but a constitutional imperative aimed at preventing courts from becoming the first port of call-in disputes assigned to specialized fora.

273. Applied to JSC relating to the alleged conduct of the Judge subject of the petition by the interested party, the doctrine of exhaustion recognizes that the Constitution contemplates a comprehensive and self-contained mechanism for handling petitions or complaints against judges. Within this framework, a judge under inquiry is expected to be afforded constitutional and statutory safeguards, including notice, disclosure of evidence against the Judge and the right to be heard, before any adverse decision is reached, warranting appointment of a Tribunal by the President, to inquire into the alleged conduct of a judge.

274. In **Judges and Magistrates Vetting Board & 2 Others v Centre for Human Rights and Democracy & 11 Others [2014] eKLR**, the Supreme Court affirmed that courts must respect the functional space assigned to bodies tasked with oversight of the Judiciary, intervening only where there is a clear violation of constitutional rights or jurisdictional overreach. In that case, the Courts were constrained from intervening in matters which were before the Judges and Magistrates Vetting Board by the ouster clause in Section 23(2) of the Sixth Schedule to the Constitution that prevented the High Court or any other court from exercising jurisdiction to review the decisions of the Judges and Magistrates Vetting Board. Additionally, it stopped the High Court from exercising original jurisdiction in claims brought as a consequence of the decisions of the Vetting Board.

275. The JSC contends that the Petition is premature, speculative and offends the doctrine of ripeness because the Petitioner has not been heard by the JSC; and that no threshold determination under Article 168(4) has yet been made. The Petitioner submits that the Preliminary Objection is misconceived, legally unsustainable, and must be dismissed because ripeness does not require waiting for a final decision where the process itself is unconstitutional, unfair, opaque, and already violating rights under Articles 47 and 50 of the Constitution.

276. As earlier stated, the doctrines of ripeness and exhaustion are not absolute. Section 9(4) of the Fair Administrative Action Act recognizes exceptional circumstances under which the Court may intervene despite the existence of alternative remedies. Such circumstances include where the administrative body lacks jurisdiction, where the remedies provided are inadequate or ineffective, or where fundamental rights are under immediate threat of violation and cannot await the full administrative process. The Court of Appeal in **Republic v National Environment Management Authority Ex Parte Sound Equipment Ltd [2011] eKLR** held that courts retain residual jurisdiction to intervene where an administrative process is tainted with illegality, irrationality, procedural unfairness or bad faith.

277. Thus, these doctrines serve not as rigid barriers but as constitutional safeguards ensuring that the Court only assumes jurisdiction where a dispute has fully ripened and where the primary constitutional mechanisms have been meaningfully engaged

or demonstrably failed. The doctrines preserve the principle of institutional complementarity, recognized in the **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR** case, which decision calls on Courts to act with deference and prudence in matters constitutionally committed, in the first instance, to independent bodies such as the JSC.

278. The doctrine of ripeness prevents judicial intervention in hypothetical or abstract matters. It does not prevent courts from intervening where rights violations are immediate, ongoing, or imminent. In other words, ripeness and exhaustion doctrines do not require a final decision where the process is alleged to be unconstitutional. In **Mumo Matemu v Trusted Society of Human Rights Alliance & 5 Others [2013] eKLR**, the Court of Appeal held that courts may intervene midstream where the integrity of the process, is in question.

279. In **International Centre for Policy and Conflict v AG & Others [2013] eKLR** it was stated that a matter is ripe if the threat to constitutional rights is imminent, direct, and not illusory.

280. In **Mbalu Mutava v JSC [2015] eKLR**, it was stated that fair administrative action applies from the first step the JSC takes in considering a complaint against a judge and that the disciplinary process triggers constitutional rights at inception.

281. In **Trusted Society of Human Rights Alliance v AG [2012] eKLR** it was stated that Courts are permitted to intervene early to arrest unconstitutional processes.

282. In the **Mwilu** (supra) case, the High Court bench, citing other decisions, found that a Judge of a superior Court facing what they deemed to be an unconstitutional petition or proceedings pending before JSC can move to the High Court to quash the same even before a final decision has been rendered by the JSC, The Court stated, *inter alia:*

> ***"230. We have carefully considered the arguments by the respondents and the Interested Parties that by filing this petition, the petitioner has violated the doctrine of exhaustion of alternative remedies. In our understanding, fortified by the above cited cases and the provisions of Article 159 (2) (d) of the Constitution and Section 9(4) of the Fair Administrative Action Act, the doctrine is applicable where the Constitution or statute provides an effective, sufficient and adequate alternative dispute resolution mechanism to a person who is aggrieved by the decision of an administrator or an administrative body.***
>
> ***231. In the case before us, the respondents and the Interested Parties contend that the Petitioner should await the conclusion of the process before the JSC before she can approach this Court on the alleged violation of her constitutional rights and fundamental freedoms. We find this argument not convincing for two reasons: first, there is no alternative dispute resolution mechanism provided for a judge who is facing a petition for removal and who is aggrieved by any of the processes of the JSC. Secondly, any person aggrieved by an administrative action***

deemed to be violating or threatening to violate their constitutional rights in ongoing proceedings is entitled to appeal against the decision or seek a remedy from this Court and such a person cannot be told to wait for the conclusion of the administrative process before approaching the Court. This position is fortified by the statement of the Court in Stanley Munga Githunguri v Republic [1986] eKLR that:

" Mr Chunga argued that Prohibition ought not to be granted where alternative remedies are available to an applicant. He said the applicant would be entitled to defend himself. He referred to appeal after conviction, bail pending appeal, review by the High Court. Mr Chunga must have been speaking lightly for the impracticability of his proposition is brightly apparent. What kind of a mad man who has an opportunity to apply for Prohibition would opt for a trial, the risk of conviction and imprisonment?"

232. We are guided by the above authority that the petitioner was not expected to undergo the JSC process for her removal from office and thereafter approach the Court after a decision had been made. In our view, it was within her constitutional right to seek the Court's intervention before the conclusion of the process, where she felt that her rights were denied, violated or infringed or were threatened."[emphasis added]

283. Further, the High Court in the above case stated as follows, citing the Mbalu Mutava and Nancy Barasa cases:

"215.There is sufficient case law which confirms that in exercising its authority under Article 168(2), the JSC is carrying out an administrative function which is a quasi-judicial function and thus subject to this court's supervisory jurisdiction. We are fortified on this point by the decision of the Court of Appeal (per E. M. Githinji JA) in Judicial Service Commission v Mbalu Mutava & another [2015] eKLR where it was held that:"(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 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."

216.Earlier, in <u>Nancy Makokha Baraza</u> (supra) it was affirmed that in considering a petition for the removal of a judge from office, the JSC has a duty to ensure compliance with the Constitution and where it fails to do so, this Court is mandated to step in and steady the ship. This is what the Court stated:

> ***"71.… If JSC, a State organ does something or omits to do something under the Constitution, and which contravenes that Constitution, that act or omission, if proved before the High Court, shall be invalid. If the process of removal of a judge as instigated or commenced by the JSC is unconstitutional, wrong, unprocedural or illegal, then this Court has the jurisdiction to address the grievances of the affected party. This court has jurisdiction to give a generous and sustainable full measure of the fundamental rights and freedoms. The question before us is whether JSC has interpreted its Constitutional mandate in a patently wrong and unreasonable fashion to require the intervention and proper guidance of this court…"***

284. From the above exposition, we have no reason to differ with the above holdings, and applying the principles espoused in the above cited **Mwilu, Barasa and Mbalu** cases, we find that, the petitioner having been instructed by the Judge to represent her in the petition before the JSC and having become aware of the alleged breach or threatened breach of the Judges' right to fair administrative action and to a fair hearing as well as the alleged threatened breach of Constitutional values and

principles; and this Court having earlier on found that the petitioner has the necessary *locus standi* to bring this petition, we further find that the doctrine of ripeness and exhaustion of remedies as important as they are, are not properly invoked in this Petition.

285. We thus hold that the High Court has jurisdiction to intervene before the JSC determines whether the threshold for removal of the Judge has been met, where the challenge raises questions of legality, jurisdiction, procedural fairness or constitutional compliance. Such intervention, in our view, is not premature. It is preventive, ensuring that a constitutionally grave process that may remove a Judge from office, commences and proceeds only under a lawful, regulated and fair legal and constitutional framework. This oversight mechanism ensures that the JSC acts lawfully, transparently and justly in its functions.

286. In so holding, this Court is aware and it cautions itself that it has no jurisdiction to deal with the issues of merit that are the subject of what is before the JSC. Merit of the allegations against the Judge as presented in the Petition to JSC by the interested party being is reserved only for the Commission in exercise of its powers under Article 168 (2), (3) and (4) of the Constitution.

Whether JSC has jurisdiction to entertain the Petition lodged against the Judge

287. The Petitioner also contends that that the JSC has no jurisdiction to entertain the petition against the Judge. He also avers that the complaint before the JSC is on the

merits of the decision by the judge, since the Ruling in the criminal case on bail pending trial was already delivered. He further argues that the matter is *res judicata* the ruling in the criminal case.

288. The Petitioner further claims that the JSC in proceeding to consider the Petition without regulations to guide the process, the Commission would be acting without jurisdiction since the procedure to be adopted during the process would remain opaque and unknown to the affected judge.

289. In response to the above assertions by the Petitioner, the JSC denies that the petition before it is on the merits of the decision by the judge. The Commission maintains that the Petition filed by the interested party against the Judge relates to the delay in delivery of a ruling by the judge in the criminal case and a claim that the judge lost the criminal case file.

290. The JSC further argues that it would guarantee fairness in handling the petition and that therefore this Court need not intervene at this stage. The Commission further states that it has always ensured that in handling petitions against judges, the process has been fair and that the affected judges have been accorded a fair hearing, as espoused in the law.

291. The JSC further contends that the Petitioner ought to have allowed the Commission to process the petition and that if at all the judge would be aggrieved by the decision

of the Commission then, the learned Judge would be at liberty to move the Court for appropriate reliefs.

292. The JSC maintained that it has the requisite jurisdiction to deal with the Petition against the Judge and urged this Court to dismiss this Petition and allow the process commenced before the Commission to continue.

293. The interested party on his part supports the position taken by JSC and contends that the petition is premature and that the court should leave the matter to the JSC for the Commission to process the same as they have always done in the past, in connection with similar Petitions concerning judges.

294. The Petitioner in a rejoinder argues that it is not possible for the JSC to deliver justice to his client or to any other judge without the Commission first putting in place the necessary regulations to govern the processing of petitions against Judges.

295. The issues raised on jurisdiction of JSC and whether this Court should intervene in a matter which was pending hearing before JSC are not novel. They have been determined in other cases including the Mwilu case, and that position has not changed.

296. We have already found that this court has jurisdiction to intervene and that therefore the petition is ripe and justiciable.

297. In resolving this issue of jurisdiction of the Judicial Service Commission (JSC) we briefly examine the Constitutional and statutory architecture of the JSC, backed by judicial pronouncements.

298. Jurisdiction for a Court or any quasi- judicial body flows from the Constitution and or statute and according to the JSC, Articles 168 and 172 confer on the Commission the power to inquire into any complaint concerning the removal of a Judge.

299. The Supreme Court in **SC-Application-No-E008-of-2023-Megvel-Cartons-Limited-vs- Diesel Care Limited, Registrar of Titles & Commissioner of Lands** in a ruling rendered on 21st day of April 2023, stated as follows regarding jurisdiction of the Court:

> ***" iv. We reiterate the well-known line, that jurisdiction is everything and that without it, a court has no power to make one more step; that a court's jurisdiction flows from either the Constitution or legislation or both; and that jurisdiction cannot be expanded through judicial craft or innovation. See Owners of the Motor Vessel "Lillian S" v Caltex Oil (Kenya) 6 S.C Application No. E008 of 2023 Ltd [1989] eKLR and Samuel Kamau Macharia & Another v. Kenya Commercial Bank & 2 Others, SC Application No. 2 of 2011; [2012]***

eKLR. v. It follows that we must, in limine, be satisfied that the applicant has properly invoked the jurisdiction of this Court…”

300. In **Samuel Kamau Macharia & anor vs Kenya Commercial Bank Ltd & 2 Others [2012] eKLR,** the Supreme Court held:

> ***“A Court’s jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law.”***

301. The jurisdiction of JSC to deal with complaints raised Judges is anchored in Article 168 (1), (2), (3), and (4) of the Constitution. The Article provides that:

> ***(1) A judge of a superior court may be removed from office only on the grounds of;-***
>
> ***(a) inability to perform the functions of office arising from mental or physical incapacity;***
>
> ***(b) a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;***
>
> ***(c) bankruptcy;***
>
> ***(d) incompetence; or***

(e) gross misconduct or misbehaviour.

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

(3) A petition by a person to the Judicial Service Commission

under clause (2) shall be in writing, setting out the alleged facts constituting the grounds for the judge's removal.

(4) The Judicial Service Commission shall consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President.

(5) The President shall, within fourteen days after receiving the petition, suspend the judge from office and, acting in accordance with the recommendation of the Judicial Service Commission....

302. The above Constitutional provision is authoritative enough and it expressly pronounces that the JSC is the Constitutional body that the people of Kenya entrusted with the responsibility of dealing with complaints and petitions against judges and the process of removal of a Judge from office starts with JSC all the way to the President appointing a tribunal that eventually makes binding recommendations to the President.

303. The Article empowers JSC, to, on its own motion initiate the process leading to the removal of a Judge or upon the receipt of a complaint from any person. The JSC states that in this instance, it was moved by the interested party's complaint against the Judge, prompting the Commission to write to the Judge, requiring her to respond to the Petition. It contends that in writing to the Judge, it was within the remit of its constitutional mandate to receive and act on the petition lodged by the interested party.

304. Our quick finding on the issue of jurisdiction of JSC is that Article 168 (1) of the Constitution empowers the JSC, upon the receipt of the complaint against a Judge, to consider whether the Petition discloses any of the grounds for his or her removal.

305. The mandate of the JSC under Article 172 includes the promotion of an independent and accountable judiciary. A reading of this Article reveals that although the JSC has the jurisdiction to discipline judicial officers, registrars and staff of the judiciary, it has no power to discipline a Judge. Its role as far as the discipline of Judges is concerned, is limited to receiving and considering complaints that may involve a Judge and establishing whether the complaint meets the threshold for removal of a Judge. The JSC if satisfied that there are proven grounds for removal, sends the petition to the President to trigger the formation of a tribunal to inquire into the matter.

306. In the circumstances, we are satisfied that JSC is possessed of jurisdiction to receive and consider petitions or complaints against Judges and that in the instant case, it did not act *ultra vires* in receiving the petition against the Judge.

<u>Whether the Judicial service Commission was engaged in merit review of the complaint against the affected Judge</u>

307. On whether the JSC in receiving the petition against Judge Dorah Chepkwony embarked on a merit review of her decision, we have perused the petition filed before the JSC by the interested party. Contrary to what the Petitioner alleges that the Commission is engaged in merit review of the decision of the Judge, a reading of the Petition reveals that the complaint by the interested party before the Commission only mentions the alleged loss of a court file and the delay in the delivery of a ruling on bail application in the criminal case which the learned Judge was handling. There is no mention on the content or merits of the ruling which the petitioner claims that it was delivered by the Judge. Furthermore, even the JSC itself rightly concedes that it does not have jurisdiction to engage in merit review of judicial determinations.

308. Accordingly, it is our finding and holding that the contention by the Petitioner that JSC has no jurisdiction to entertain the petition against the Judge because in doing so, it is engaged in a merit review of the decision of the Judge in the criminal case is devoid of substance and merit.

<u>Whether the decision of JSC to summon the Judge for hearing of the petition offending the doctrine of Res judicata the ruling on the bail application in the criminal case which the Judge was handling</u>

309. The Petitioner further challenges the jurisdiction of the Judicial service Commission to entertain the petition against the Judge, arguing that the allegedly delayed ruling was already delivered and that therefore the JSC proceedings are res judicata the ruling by the Judge.

310. On the issue of res judicata raised by the Petitioner, the Commission contends that the question before the Commission is not about the propriety of the Ruling but on an alleged delay in the delivery of the Ruling. Further, that there is no pending nor has there been any other Petition before the Commission between the 1st Interested Party and the Honourable Judge to warrant the invocation of the doctrine of res judicata.

311. The interested party supports the Commission's position that the question before the Judicial Service Commission is not about the propriety of the ruling but on the delay in the delivery of the ruling and loss of a court file. Further, that there is no pending nor has there been any other Petition before the Judicial Service Commission between the Honourable Judge and the Interested Party to warrant the invocation of the doctrine of res judicata.

312. The principle of *res judicata* is provided for in Section 7 of the Civil Procedure Act (Cap 21 Laws of Kenya) as follows:

7. Res judicata

No Court shall try any suit or issue in which the matter directly and substantially in issue has been directly and substantially in issue in a former suit between the same parties, or between parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court.

313. This being a constitutional petition, as to whether the doctrine of res judicata is applicable in such matters was considered by the Supreme Court in **Kenya Commercial Bank Limited v Muiri Coffee Estate Limited & another [2016] eKLR (Muiri Coffee case**) stated as follows:

"(52) Res judicata is a doctrine of substantive law, its essence being that once the legal rights of parties have been judicially determined, such edict stands as a conclusive statement as to those rights. It would appear that the doctrine of res judicata is to apply in respect of matters of all categories, including issues of constitutional rights. Such a perception has a basis in comparative jurisprudence; in the Ugandan case of Hon. Norbert Mao v. Attorney-General, Constitutional Petition No. 9 of 2002; [2003] UGCC3, the petitioner brought an action on behalf

of 21 persons from his constituency, for declarations under Article 137 of the Uganda Constitution, and for redress under Article 50 of that Constitution. The matter arose from an incident in which officers of the Uganda Peoples Defence Forces attacked a prison, and abducted 20 prisoners, killing one of them. Unknown to the petitioner, another action had already been filed under Article 50, seeking similar relief; and Judgment had been given in Hon. Ronald Reagan Okumu v. Attorney-General, Misc. Application No.0063 of 2002, High Court HCT 02 CV MA 063 of 2002. The Constitutional Court dismissed the petition, on a plea of res judicata, declining the petitioner's pleas that certain important constitutional declarations now sought, had not been accommodated in the earlier Judgment."

314. In **John Florence Maritime Services Limited & another v Cabinet Secretary, Transport and Infrastructure & 3 others [2021] eKLR** the Supreme Court reaffirmed its decision in the ***Muiri Coffee*** (supra) case that the doctrine of *res judicata* was available as a defence in constitutional litigation and stated that:

"(81) We reaffirm our position as in the Muiri Coffee case that the doctrine of res judicata is based on the principle of finality which is a matter of public policy. The principle of finality is one of the pillars upon which our judicial system is founded and the doctrine of res judicata prevents a multiplicity of suits, which would ordinarily clog the Courts, apart from occasioning unnecessary costs to the

parties; and it ensures that litigation comes to an end, and the verdict duly translates into fruit for one party, and liability for another party, conclusively…

(82) If we were to find that the doctrine does not apply to constitutional litigation, the doctrine may very well lose much of its legitimacy and validity. We say this in light of the fact that constitutional tenets permeate all litigation starting with the application of Article 159 of the Constitution in both civil and criminal litigation, and its application now embedded in all procedural statutes. Further Article 50 on right to fair hearing and Article 48 on access to justice are fundamental rights which every litigant is entitled to. Such a holding may very well lead to parties, that whenever they need to circumscribe the doctrine of res judicata, they only need to invoke some constitutional provision or other."

315. However, the apex Court warned that albeit the doctrine of res judicata lends itself to the promotion of the orderly administration of justice, it should not be invoked where there is potential for substantial injustice arising from the failure of the court to hear a constitutional matter or issue on its merits. Additionally, that before a court can arrive at a conclusion that a matter is res judicata, it must examine the entirety of the circumstances as well as address the factors for and against exercise of such discretionary power.

316. In an earlier case of **Accredo AG & 3 others v Steffano Ucceli & another [2019] eKLR,** the Court of Appeal acknowledged the need to apply the doctrine of *res judicata* in constitutional litigation in the rarest and clearest of cases.

317. From the above judicial pronouncements, it is clear to us that whenever the defence of *res judicata* is raised, the Court is enjoined to examine the decision said to have settled the issues in question, the parties' pleadings and the entire record of the previous case and compare it with the matter before it in order to ascertain whether the parties are the same or litigating under the same title, the issues under consideration are similar and the issues have been determined with finality by a court of competent jurisdiction. This scrutiny meets the test laid by the Court of Appeal in **Independent Electoral & Boundaries Commission v Maina Kiai & 5 others [2017] eKLR** that:

> "***Thus, for the bar of res judicata to be effectively raised and upheld on account of a former suit, the following elements must all be satisfied, as they are rendered not in disjunctive, but conjunctive terms;***
>
> > ***(a)The suit or issue was directly and substantially in issue in the former suit.***
> >
> > ***(b)That former suit was between the same parties or parties under whom they or any of them claim.***
> >
> > ***(c)Those parties were litigating under the same title.***

(d)The issue was heard and finally determined in the former suit.(e)The court that formerly heard and determined the issue was competent to try the subsequent suit or the suit in which the issue is raised.”

318. We have considered the arguments by the parties on this issue of res judicata and the petition filed by the interested party as against the Judge before the JSC. We find that there is absolutely no basis upon which the petitioner claims that since the ruling which was allegedly delayed was delivered, then the JSC had no basis to summon the Judge over the same or that summoning the Judge over a delayed but delivered ruling amounts to res judicata the decision which was allegedly delayed by the Judge.

319. We have already found that there is no material on record to suggest that the JSC was in any way concerned with the merits of the ruling by the Judge. We have said enough of what the petition before the JSC is all about. We shall repeat it here for emphasis that the petitioner in the JSC petition complained about the inordinate delay in the delivery of the ruling for bail and the loss of the criminal court file. Nothing more, and we say no more.

Whether the proceedings before the JSC respecting the petition filed against the Judge offend her constitutional rights and principles of procedural fairness and fair hearing on account of lack of regulations to guide the process of handling of

petitions against Judges as contemplated under Section 47(2) (c) of the judicial Service Act

320. On another very significant front, the Petitioner challenges the process of receiving and considering petitions against Judges by the JSC on the basis that the JSC has since its inception in 2011 failed to formulate and enact Regulations on the exercise of its mandate under Article 168 of the Constitution and as required by Section 47 of the Judicial Service Act. The Petitioner therefore seeks to have the JSC prohibited from receiving, considering and admitting to hearing or convening to hear any petitions against Judges until the JSC gazettes regulations defining precise procedures for handling of Petitions, in accordance with Section 47 of the Judicial Service Act.

321. The petitioner, in relation to the affected Judge, argues that if the JSC is to be allowed to proceed with the hearing of the petition against the affected Judge, in the absence of regulations to govern the process, his client, the Judge, would be greatly prejudiced and so would be, any other Judge who may have petitions pending against them before the JSC. The petitioner contends that presently, the process of handling complaints against judges remains opaque and that a Judge faced with a petition has no idea on the procedure that the JSC would adopt in processing the complaint or petition.

322. The petitioner therefore asserts that his client, Judge Dorah Chepkwony and all other Judges against whom petitions have been mounted and are pending consideration by the JSC cannot be assured of a procedurally fair process in line with Articles 47 and 50 (1) of the Constitution.

323. In response, the JSC has asserted, quite strongly, that it observes the right to a fair hearing and that it also ensures compliance with Article 47 of the Constitution whenever it handles a complaint against a Judge. In its submissions, at paragraphs 51 and 52 of its Replying Affidavit, the JSC enumerated that process. It nonetheless conceded that it does not have in place any regulations for processing complaints or petitions against judges. The Commission enumerates the process that it follows in handling complaints against Judges and Judicial Officers.

324. Article 47 (1) of the Constitution guarantees every person the right to fair administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Under Article 47 (3), Parliament shall enact legislation to give effect to the rights in clause (1) and that legislation shall—

(a) provide for the review of administrative action by a court or, if appropriate, an independent and impartial tribunal; and

(b) promote efficient administration

325. In 2015, Parliament enacted the Fair Administrative Action Act to implement Article 47 of the Constitution. Section 4 of the Act reiterates Article 47 (1) of the

Constitution, providing that administrative action to be taken expeditiously, efficiently, lawfully while Section 7 provides for institution of proceedings for review of the administrative action or decision by any person who is aggrieved by an administrative action or decision. These two Sections of the Fair Administrative Action Act are so elaborate in what they provide for. However, under Section 4(6), the Act acknowledges that there could be another procedure provided for under any other written law and which conforms to the principles espoused in Article 47 hence that procedure shall be applied by the person or body making an administrative decision.

326. The Judicial Service Act, Cap 8A of Laws of Kenya was enacted in 2011. The long title states:

An Act of Parliament to make provision for judicial services and administration of the Judiciary; to make further provision with respect to the membership and structure of the Judicial Service Commission; the appointment and removal of judges and the discipline of other judicial officers and staff; to provide for the regulation of the Judiciary Fund and th establishment, powers and functions of the National Council on Administration of Justice, and for connected purposes.

327. Section 47 of the Judicial Service Act provides for regulations and it stipulates as follows:

47. Regulations

(1) The Commission may make regulations for the better carrying out of the purposes of this Act. (2) Without prejudice to the generality of subSection (1), such regulations may provide for—

(a) the code of conduct and ethics for judges, other judicial officers and staff;

(b) the administration and management of the services and facilities of the Commission for the discharge of judicial functions;

(c) preliminary procedures for making any recommendations required to be made under the Constitution;

(d) the financial procedures of the Commission;

(e) orientation and training for judicial officers and staff;

(f) the management of issues of conflict of interest;

(g) performance appraisal system of the Judiciary; (h) the security of judicial officers and staff; and

(i) mainstreaming of gender and regional equity in the Judiciary.

(3) Regulations made under this Section shall be presented to the National Assembly for debate and approval before they take effect

328. Section 1(c) contemplates the making of regulations preliminary procedures for making any recommendations required to be made under the Constitution while

subsection (3) mandates that the regulations made under the Section must be presented to the National Assembly for debate and approval before they take effect.

329. Section 4 of the Judicial Service Act provides for standards of service and states:

4. Standard of service

> ***In the exercise of the powers or the performance of the functions conferred by this Act, the Commission and the Judiciary shall, among other things—***
>
> ***(a) have the technical, infrastructural and administrative competence to ensure that the requirements of the judicial process are fulfilled;***
>
> ***(b) adopt quality service as a core principle and, to uphold this principle, the Commission and the Judiciary shall formulate a modern and constantly updated scheme of judicial and other training for all categories of Judges, judicial officers and staff of the Commission;***
>
> ***(c) be guided in their activities by the relevant provisions of the Constitution;***
>
> ***(d) uphold the judicial service code of conduct and ethics as may, by regulations, be prescribed; (e) be non-partisan and non-political in orientation and operations;***

(f) promote and uphold honesty and integrity in its operations, and give fulfilment to all values essential for the discharge of judicial functions; and

(g) apply and promote such other positive values as the Commission may, by regulations, prescribe.

330. In our reading of the above provisions, it is our humble view that the Judicial Service Act was not enacted in vain. It is an important statute that prescribes certain standards of service to be applied by the JSC and contemplates a specific procedure for handling complaints against Judges and provides a means of developing the said procedure through regulations which must comply with the Constitutional principles under Article10 on public participation and approval by the National Assembly before those regulations can be implemented. The JSC has acknowledged that indeed, the regulations for handling of petitions against Judges are necessary but since 2011, it has no such regulations in place.

331. It should also be recalled that the JSC decisions that culminate into dismissal of complaints against Judges are not reported. Therefore, a Judge facing a complaint of a similar nature before the JSC cannot benefit from precedent from JSC yet there are no known criteria for determining the threshold applied in exercising the discretion by JSC. To inject objectivity, consistency, certainty and predictability, the need for regulations to govern the petition handling process becomes imperative.

332. Whereas this Court agrees with the submission by counsel for the JSC and the interested Party that JSC does not discipline judges, it is the JSC that triggers the process that may lead to the removal of a Judge thus procedural fairness in its processes assumes greater importance. In **Milimani HC Miscellaneous Civil Application No. 461 of 2016 Soweto Residents Forum CBO versus The Principal Secretary, Ministry of Transport, Housing and Urban Development**, Mativo J (as he then was) persuasively held that:

> ***"The decision-maker must understand correctly the law that regulates his decision-making power and must give effect to it. The second issue that can be argued under illegality is fettering discretion. This heading for judicial review entails considering whether an administrative body or a Government Official actually exercised the power it has, or whether because of some policy it has adopted, it has in effect failed to exercise its powers as required. In general terms the courts accept that it is legitimate for public authorities to formulate policies that are legally relevant to their powers, consistent with the purpose of the enabling legislation, and not arbitrary, capricious or unjust. An illegality also occurs where a body exercised a power which was within its functions but exceeded the scope of power that is legally conferred to it."***

333. The Constitution does not provide a specific procedure for the JSC to utilize in exercising its mandate under Article 168 (4) of the Constitution. That said, JSC

cannot fail to exercise its mandate for lack of regulations or rules. The Commission must however ensure fair administrative action and other constitutional dictates are fully met in their handling of petitions against Judges. The question is how does the Commission measure the threshold for meeting the constitutional dictates?

334. The JSC in its wisdom has agreed with the petitioner that indeed, there is need for regulations and in that regard, it has developed the regulations as mandated by Section 47 of the Judicial Service Act, which regulations are currently undergoing public participation. However, it claims that there is no mandatory constitutional or statutory provision for JSC to develop regulations to govern the complaints handling mechanism.

335. The concession by the Commission that although it has no regulations in place to guide it in the handling of complaints or petitions against Judges, but that it is in the process of developing the said regulations to accord with Section 47 of the Judicial service Act, is an indication that indeed, having the regulations in place is not a question of discretion for the JSC.

336. Additionally, although the Constitution at Article 168(10) only provides that Parliament shall enact legislation providing for the procedure of a tribunal appointed to inquire into the conduct of a Judge once the JSC sends the petition to the President and such Tribunal is appointed; and whereas the Constitution does not provide for the procedure for JSC in its consideration of petitions against Judges, to determine

whether the petitions meet the threshold for removal of Judges, the central issue is whether a constitutional Commission exercising power to conduct preliminary inquiries and making decisions that may lead to removal of a judge from office can do so in compliance with the constitutional requirements for fair administrative action and fair hearing espoused in Articles 47 and 50(1) respectively, through unwritten, undisclosed and non-codified practices.

337. The Constitution at Article 259 provides for how it should be construed as follows:

259. Construing this Constitution

(1) This Constitution shall be interpreted in a manner that—

(a) promotes its purposes, values and principles;

(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;

(c) permits the development of the law; and

(d) contributes to good governance.

338. Article 47 of the Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair. Article 50(1) guarantees the right to a fair hearing, which in our view, includes full disclosure of the applicable procedure and a reasonable opportunity to prepare a defence.

339. Under Article 168 (2) of the Constitution, the JSC may initiate on its own motion or on a petition by any other person, to the JSC, the removal of a Judge. Article 168(4) mandates the JSC to consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President. Under clause (5), the President is mandated, upon receipt of the petition from JSC, to suspend the Judge from office and acting on recommendations of JSC, appoint a tribunal which shall inquire into the matter expeditiously and report the facts and make binding recommendations to the President.

340. Article 168 must therefore be interpreted as stipulated in Article 259 in a manner that promotes its purposes, values and principles; advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights; permits the development of the law; and contributes to good governance. In our view, this Article 168 must be read together with other Articles of the Constitution especially Articles 47 and 50(1).

341. In the matter of the **Tribunal to Investigate the Conduct of the Hon. Mr. Justice (Prof.) Jacton B. Ojwang, at para 305,** the tribunal affirmed that the dismissal of a constitutional office holder from office is a grave and final decision. It not only impacts livelihoods, but also affects reputations, impinges on character and lowers the esteem ascribed to and erodes confidence in public office in the body politic. Additionally, the decision to suspend a judge is of great weight in terms of

importance. This is because, the judge's position, reputation and character are at stake and has serious ramifications in terms of integrity and future employment of the judge as a public officer.

342. Moreover, in the ***Mwilu*** case (supra), the Court addressed this issue of lack of rules to guide JSC in handling of petitions against Judges and stated- as paraphrased by Kenya law:

1. ***The importance of rules to govern administrative action that could result in adverse outcomes for the person who was being taken through such a process could not be gainsaid. The argument by the petitioner that the lack of rules governing the proceedings before the JSC for the removal of a judge made the actions and decisions of the JSC oppressive, capricious and whimsical was not without merit. There was sufficient illustration from the past proceedings conducted by the JSC that showed that a judge undergoing a process before it could be forgiven for perceiving that the procedures of the JSC were akin to a mirage which was seeable but unreachable and kept changing from case to case and depended on the judge appearing before the JSC.***
2. ***An apt illustration could be deduced from the petitioner's complaint that previously, petitions for removal of judges had been placed before subcommittees of the JSC whose findings would later be subjected to the full Commission for adoption or rejection. According to the petitioner, no reason***

was given for subjecting her directly to the full Commission. The response by the JSC was that due to the importance of the offices of the Chief Justice and the Deputy Chief Justice, it was decided that any petition for the removal of a holder of any of the two offices would be considered by the whole Commission. That position was a departure from the earlier position adopted in the case of the first Deputy Chief Justice under the Constitution of Kenya, 2010 because the petition for her removal was first submitted to a subcommittee before the decision of the subcommittee was adopted by the full commission.

3. ***The lack of rules therefore allowed the JSC to whimsically keep changing its procedures thereby resulting in unpredictable and inconsistent handling of complaints against judges. Although the court deprecated the effect of lack of regulations on the right to fair administrative action before the JSC, the law remained that lack of regulations was not sufficient to stop the JSC from executing its constitutional mandate so long as the JSC complied with the constitutional dictates.***

4. ***The JSC had been involved in several litigations where lack of rules and regulations to govern its procedures for removal of judges under Article 168 of the Constitution had been raised and pronouncements made on the importance of having those rules. The necessity of having rules was a statutory requirement as stipulated by Section 47(2)(c) of the Judicial Service Act. The High Court***

was informed that the rules were pending before the National Assembly for approval. The court urged the JSC to take a proactive initiative and have the rules approved because they could not be pending before the legislature in perpetuity.

5. ***Despite the petitioner being a member of the JSC and having participated in cases involving judges, judicial officers and staff members without the rules, that in itself did not give justification to the JSC to operate or to ignore the importance of the rules. The petitioner was only one of the Commissioners of JSC.***

343. The High Court in the above case also cited the case of **Service Commission v Mbalu Mutava & another [2015] eKLR** where it was stated that:

"The JSC has power under s 47(1) (c) of JS Act to make regulations to provide for preliminary procedures for making any recommendations required to be made under the Constitution but no such regulations have been made. In the absence of any constitutional or statutory procedure the JSC has administrative discretion to adopt any fair procedure appropriate to its task."

344. The issue is, which is this fair procedure that the JSC has adopted, appropriate to its task? And is that procedure known to all complainants and Judges who have petitions against them whenever they appear before the JSC for hearing? Do those

procedures, assuming they exist, 15 years of JSC's existence, promote fair administrative action and the right to a fair hearing?

345. In the instant petition and in the JSC's detailed affidavit sworn by Hon Wilfrida Mokaya, she spelt out what JSC claims is considered to be the procedure applied by JSC in handling of complaints against Judges. However, no such procedure exists on paper. It remains an unwritten rule and therefore a secret weapon used by the JSC in handling petitions against Judges. The procedure as deposed in the affidavit, for example, does not provide for timelines within which a petition once lodged against a Judge, ought to be finalized. That ommission alone violates the principle of expedition stipulated in Article 47 and the Fair Administrative Action Act.

346. Nit is no surprise, therefore, that members of the public have complained that it takes forever to have a petition against a judge to be heard and finalized. Where there is no open, definite, known procedure for handling petitions against Judges, there is bound to be delay because there are no standards to measure efficiency of the process. Efficiency is one of the values espoused in Article 47 of the Constitution while transparency and accountability are values of good governance espouse din Article 10. This delay diminishes public confidence in the Judicial Service Commission and the judiciary as an institution which is constitutionally and by under the Judicial Service Act, mandated to promote judicial integrity among other such positive values as the Commission may, by regulations, prescribe.

347. In **Baker v Canada (Minister of Citizenship and Immigration), [1999] 2 SCR 817**, the Supreme Court of Canada persuasively held that the values underlying the duty to procedural fairness relate to the principle that the individual(s) affected should have the opportunity to present their case fully and fairly. The Court stated as follows:

> ***"The duty of procedural fairness is flexible and variable and depends on an appreciation of the context of the particular statute and the rights affected. The purpose of the participatory rights contained within it is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its statutory, institutional and social context, with an opportunity for those affected to put forward their views and evidence fully and have them considered by the decision-maker. Several factors are relevant to determining the content of the duty of fairness:***
>
> ***(1) the nature of the decision being made and process followed in making it;***
>
> ***(2) the nature of the statutory scheme and the terms of the statute pursuant to which the body operates;***
>
> ***(3) the importance of the decision to the individual or individuals affected; (4) the legitimate expectations of the person challenging the decision;***
>
> ***(5) the choices of procedure made by the agency itself. This list is not exhaustive."***

348.On the factors affecting the content of the duty of fairness, the Court had this to say:

"(1) <u>Factors Affecting the Content of the Duty of Fairness</u>

21.The existence of a duty of fairness, however, does not determine what requirements will be applicable in a given set of circumstances. As I wrote in Knight v. Indian Head School Division No. 19, [1990] 1 S.C.R. 653, at p. 682, "the concept of procedural fairness is eminently variable and its content is to be decided in the specific context of each case". All of the circumstances must be considered in order to determine the content of the duty of procedural fairness: Knight, at pp. 682-83; Cardinal, supra, at p. 654; Old St. Boniface Residents Assn. Inc. v. Winnipeg (City), [1990] 3 S.C.R. 1170, per Sopinka J.

22. Although the duty of fairness is flexible and variable, and depends on an appreciation of the context of the particular statute and the rights affected, it is helpful to review the criteria that should be used in determining what procedural rights the duty of fairness requires in a given set of circumstances. <u>I emphasize that underlying all these factors is the notion that the purpose of the participatory rights contained within the duty of procedural fairness is to ensure that administrative decisions are made using a fair and open procedure, appropriate to the decision being made and its</u>

statutory, institutional, and social context, with an opportunity for those affected by the decision to put forward their views and evidence fully and have them considered by the decision-maker.

23, Several factors have been recognized in the jurisprudence as relevant to determining what is required by the common law duty of procedural fairness in a given set of circumstances. One important consideration is the nature of the decision being made and the process followed in making it. In Knight, supra, at p. 683, it was held that "the closeness of the administrative process to the judicial process should indicate how much of those governing principles should be imported into the realm of administrative decision making". The more the process provided for, the function of the tribunal, the nature of the decision-making body, and the determinations that must be made to reach a decision resemble judicial decision making, the more likely it is that procedural protections closer to the trial model will be required by the duty of fairness. See also Old St. Boniface, supra, at p. 1191; Russell v. Duke of Norfolk, [1949] 1 All E.R. 109 (C.A.), at p. 118; Syndicat des employés de production du Québec et de l'Acadie v. Canada (Canadian Human Rights Commission), [1989] 2 S.C.R. 879, at p. 896, per Sopinka J.

24.A second factor is the nature of the statutory scheme and the "terms of the statute pursuant to which the body operates": Old St. Boniface, supra, at p. 1191. The role of the particular decision within the statutory scheme and other surrounding indications in the statute help determine the content of the duty of fairness owed when a particular administrative decision is made. Greater procedural protections, for example, will be required when no appeal procedure is provided within the statute, or when the decision is determinative of the issue and further requests cannot be submitted: see D. J. M. Brown and J. M. Evans, Judicial Review of Administrative Action in Canada (loose-leaf), at pp. 7-66 to 7-67.

25. A third factor in determining the nature and extent of the duty of fairness owed is the importance of the decision to the individual or individuals affected. The more important the decision is to the lives of those affected and the greater its impact on that person or those persons, the more stringent the procedural protections that will be mandated. This was expressed, for example, by Dickson J. (as he then was) in Kane v. Board of Governors of the University of British Columbia, [1980] 1 S.C.R. 1105, at p. 1113:

> ***<u>A high standard of justice is required when the right to continue in one's profession or employment is at stake. . . . A disciplinary suspension can have grave and permanent consequences upon a professional career.</u>***

As Sedley J. (now Sedley L.J.) stated in R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery, [1994] 1 All E.R. 651 (Q.B.), at p. 667:

> ***<u>In the modern state the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since Ridge v. Baldwin [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for example by requiring contentious evidence to be given and tested orally, what makes it "judicial" in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.</u>***

<u>The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.</u>

26. Fourth, the legitimate expectations of the person challenging the decision may also determine what procedures the duty of fairness requires in given

circumstances. Our Court has held that, in Canada, this doctrine is part of the doctrine of fairness or natural justice, and that it does not create substantive rights: Old St. Boniface, supra, at p. 1204; Reference re Canada Assistance Plan (B.C.), [1991] 2 S.C.R. 525, at p. 557. As applied in Canada, if a legitimate expectation is found to exist, this will affect the content of the duty of fairness owed to the individual or individuals affected by the decision. <u>If the claimant has a legitimate expectation that a certain procedure will be followed, this procedure will be required by the duty of fairness:</u> Qi v. Canada (Minister of Citizenship and Immigration) (1995), 33 Imm. L.R. (2d) 57 (F.C.T.D.); Mercier-Néron v. Canada (Minister of National Health and Welfare) (1995), 98 F.T.R. 36; Bendahmane v. Canada (Minister of Employment and Immigration), [1989] 3 F.C. 16 (C.A.). <u>Similarly, if a claimant has a legitimate expectation that a certain result will be reached in his or her case, fairness may require more extensive procedural rights than would otherwise be accorded:</u> D. J. Mullan, Administrative Law (3rd ed. 1996), at pp. 214-15; D. Shapiro, "Legitimate Expectation and its Application to Canadian Immigration Law" (1992), 8 J.L. & Social Pol'y 282, at p. 297; Canada (Attorney General) v. Human Rights Tribunal Panel (Canada) (1994), 76 F.T.R. 1. Nevertheless, the doctrine of legitimate expectations cannot lead to substantive rights

outside the procedural domain. This doctrine, as applied in Canada, is based on the principle that the "circumstances" affecting procedural fairness take into account the promises or regular practices of administrative decision-makers, and that it will generally be unfair for them to act in contravention of representations as to procedure, or to backtrack on substantive promises without according significant procedural rights.

27. Fifth, the analysis of what procedures the duty of fairness requires should also take into account and respect the choices of procedure made by the agency itself, particularly when the statute leaves to the decision-maker the ability to choose its own procedures, or when the agency has an expertise in determining what procedures are appropriate in the circumstances: Brown and Evans, supra, at pp. 7-66 to 7-70. While this, of course, is not determinative, important weight must be given to the choice of procedures made by the agency itself and its institutional constraints: IWA v. Consolidated-Bathurst Packaging Ltd., [1990] 1 S.C.R. 282, per Gonthier J.

28. I should note that this list of factors is not exhaustive. These principles all help a court determine whether the procedures that were followed respected the duty of fairness. Other factors may also be important, particularly when considering aspects of the duty of fairness unrelated to participatory rights. The values underlying the duty of procedural fairness

relate to the principle that the individual or individuals affected should have the opportunity to present their case fully and fairly, and have decisions affecting their rights, interests, or privileges made using a fair, impartial, and open process, appropriate to the statutory, institutional, and social context of the decision." [emphasis added]

349. From the above persuasive but very useful decision, we have no doubt that a high standard of justice is required when the right to continue in one's profession or employment is at stake, noting that a finding that the petition against a Judge meets the threshold for removal and therefore the presentation of the findings to the President to appoint a tribunal to inquire into the conduct of a Judge can have grave and permanent consequences upon the Judge's professional career.

350. As was correctly observed by **Sedley J. (now Sedley L.J.)** in **R. v. Higher Education Funding Council, ex parte Institute of Dental Surgery, [1994] 1 All E.R. 651 (Q.B.), at p. 667** cited in the above Baker v Canada case at paragraph 25 and it is worth reproducing here:

"In the modern state, the decisions of administrative bodies can have a more immediate and profound impact on people's lives than the decisions of courts, and public law has since Ridge v. Baldwin [1963] 2 All E.R. 66, [1964] A.C. 40 been alive to that fact. While the judicial character of a function may elevate the practical requirements of fairness above what they would otherwise be, for

<u>example by requiring contentious evidence to be given and tested orally, what makes it “judicial” in this sense is principally the nature of the issue it has to determine, not the formal status of the deciding body.</u>

<u>The importance of a decision to the individuals affected, therefore, constitutes a significant factor affecting the content of the duty of procedural fairness.”[emphasis added</u>

351. In the instant case, JSC concurs that regulations are in the process of being developed to guide it in the handling of petitions against Judges and the Commission has annexed the draft regulations as annexture WM-15 to the affidavit sworn by the Secretary to the Commission. The title of the annexed document is: **JUDICIAL SERVICE (PROCESSING OF PETITIONS AND COMPLAINTS PROCUDURES) REGULATIONS, 2025. PART II** of the said annexture concerns **PROCEDURE FOR PROCESISING PETITIONS AGAINST JUDGES. PART III** is on **PROCEDURE FOR INITIATING THE REMOVAL OF A JUDGE FROM OFFICE ON THE COMMISSION’S OWN MOTION** while **PARTS IV** and **V concern PROCEDURES FOR PROCESSING COMPLAINTS AGAINST JUDICIAL OFFICERS AND JUDICIAL STAFF** respectively. The said Regulations are said to be made pursuant to Section 47(1) of the Judicial Service Act.

352. The regulations which are in draft form and undergoing public and stakeholder consultations at Part I clause 4 are very clear on the general principles which the Commission will apply when processing petitions and complaints. The draft regulations explain the process of handling petitions including preliminaries and the procedure at the hearing of petitions. Those draft regulations, according to Section 47 of the Judicial Service Act, must be presented to Parliament for enactment. The question therefore is whether having regulations in place is discretionary, bearing in mind the binding decision in the Shollei case where the Supreme Court directed JSC to make regulations within 90 days for handling of complaints against judicial officer?

353. We highlight here that although the Supreme Court did not address the issue of regulations for processing of petitions against Judges, that issue was not before it for determination and therefore the apex Court could not have gone on a frolic of its own determining issues which were not placed before it. However, the principles espoused in that decision are quite relevant to this case and this Court being the court with original jurisdiction in matters Articles 22, 23 and 258, cannot shy away from pronouncing itself on what is clearly a failure to exercise a constitutional duty to develop regulations for handling of petitions against Judges.

354. In our humble view, and taking into account the Supreme Court's decision in the ***Shollei*** case, which went further to interpret the provisions of Article 50(2) of the

Constitution to align it with Articles 19 and 20 of the Constitution, although the enabling framework may appear, on its face, to grant the JSC a discretion to make regulations, that discretion must be interpreted in light of the consequences of the power being exercised, as stated in the ***Baker v Canada*** case above.

355. In the **Shollei** case, the Supreme Court stated as follows regarding how courts had contradicted themselves on the applicability of Article 50(1) and (2) of the Constitution:

> ***"Although the right to a fair trial was encompassed in the right to a fair hearing in the Constitution, a literal construction of Article 50(1) and 50(2) of the Constitution could be misconstrued in some quarters to mean that Article 50(1) dealt with the right to fair hearing in any disputes including those of a civil, criminal or quasi criminal nature whereas Article 50(2) was limited to accused persons thereby arguing that the protection of such right only related to criminal matters. That was not an acceptable interpretation or construction within the parameters of Articles 19 and 20 of the Constitution on the Bill of Rights, which called for an expansive and inclusive construction to give a right its full effect."***

356. We opine that where a statutory or constitutional body is empowered to take decisions that may extinguish fundamental rights or constitutional status, in this case, the security of tenure of a Judge; and the exercise of that power is ongoing and not merely imaginary; and the absence of regulations creates a real risk of arbitrariness,

unequal treatment or procedural unfairness, then the discretion to regulate ripens into a duty to make those regulations.

357. In such circumstances, our view is that the failure to make regulations is not a neutral omission but a dereliction of constitutional responsibility. The courts have consistently held that where procedural safeguards are essential to the lawful exercise of power, an authority may not lawfully proceed in the absence of those procedural safeguards.

358. Thus, Judges, as holders of constitutional office, are entitled to constitutional guarantees to procedural fairness commensurate with the gravity of the allegations and consequences that flow from the process of handling complaints and petitions seeking their removal from office. In the absence of regulations, affected judges are left without notice of applicable procedures, clarity on evidentiary standards, assurance of equal treatment or protection against ad hoc or shifting processes. This in itself undermines both natural justice and the legitimate expectation that disciplinary or removal proceedings will be conducted under a known, predictable and lawful framework.

359. In our view, Judicial independence is not merely a personal privilege of judges but a structural guarantee for the public. Judges exercise judicial authority delegated to them by the people of Kenya through Articles 1 and 159 of the Constitution. A petition process governed by opaque, makeshift or improvised and temporary

procedures exposes Judges to the perception and reality of political or institutional pressure. Regulations, in our humble opinion, serve as a buffer against abuse, protecting both Judges and the integrity of the Judicial Service Commission itself, while assuring those who file petitions against judges that indeed, the process of handling those petitions and or complaints is transparent and fair to them too.

360. Without regulations, the JSC's actions risk being perceived as arbitrary, selective or outcome-driven, thereby eroding public confidence in the judiciary and in constitutional governance.

361. We reiterate that JSC cannot lawfully continue to process petitions capable of leading to removal of a Judge, until such regulations are put in place, gazetted and applied consistently. In view of our findings herein, the discretion to make regulations must be construed as a duty, arising from the combined demands of legality, procedural fairness, judicial independence and the rule of law. As we pronounce ourselves on this issue, we are alive to the provisions of Article 3 of the Constitution which places a duty on every person to respect, uphold and defend the Constitution.

362. **GRANT HUSCROF,** in his writing "**From Natural Justice to Fairness: Thresholds, Content, and the Role of Judicial Review" ADMINISTRATIVE LAW IN CONTEXT, 2nd Edition, C. Flood, L. Sossin, eds., Emond Montgomery, Forthcoming 2012** writes as follows:

"In general, the duty of fairness requires two things, both of which are modern restatements of venerable natural justice protections: (1) the right to be heard, and (2) the right to an independent and impartial hearing.11 Fairness is a common-law concept and, subject only to compliance with the Canadian Charter of Rights and Freedoms (the Charter), may be limited or even ousted by ordinary legislation. Such is its importance, however, that courts will require specific legislative direction before concluding that this has occurred. In Kane v. Bd. of Governors of U.B.C., Justice Dickson put the point this way: "To abrogate the rules of natural justice, express language or necessary implication must be found in the statutory instrument."12 This is justified on the basis that courts presume that the legislature intended procedural protection to apply, even if nothing is said. As Justice Byles stated in Cooper v. Board of Works for Wandsworth District, "[A]lthough there are no positive words in a statute requiring that the party shall be heard, yet the justice of the common law will supply the omission of the legislature."13 On this approach, the courts acknowledge the supremacy of the legislature and at the same time confer heightened, quasi-constitutional protection upon the common-law duty of fairness.14"

363. Still on the duty to procedural fairness in preliminary inquiries, **GRANT HUSCROF** posits at page 155 that:

"Public inquiries may have significant consequences for those required to be involved and fairness protection will be provided here as well, <u>often pursuant to legislation codifying the duty (to procedural fairness)</u>.29 Fairness protection may be required for ostensibly preliminary decisions, where a formal determination is made subsequently, if the preliminary decision has de facto finality. For example, invariable acceptance by the ultimate decision-maker of the results of an investigation or advice from a preliminary decision-maker suggests that the real decision is being made at the preliminary stage, and in order for the duty of fairness to do its work, it should apply here."

364. In our opinion, a high degree of procedural protection is imposed on the JSC and hence, the JSC's other argument that absence of regulations has not in any way affected the manner of handling complaints against Judges or that the regulations which they are developing are merely to enhance their efficiency in handling petitions against Judges cannot hold.

365. Furthermore, if such regulations were less important in matters involving processes that may lead to removal of Judges, the Supreme Court could not have decried the absence of Regulations for handling complaints against judicial officers in the **Shollei vs Judicial Service Commission & another [2022] KESC 5 (KLR)-*the*** *Shollei* case, with the Supreme Court directing the Commission to put regulations in place within 90 days.

366. We emphasize here that the need for Regulations is not an invention by the concerned Judge to shield her from the JSC process of handling the petition against her as filed by the interested party herein. It is a question of the rule of law and transparency, which values the JSC as a constitutional Commission is bound by, as dictated by Article 10 of the Constitution. If that were not the case, JSC could not have acknowledge the significance of regulations and the efforts being put in place to comply with the Supreme Court's directives in the ***Shollei*** Case. This exercise is in the public domain.

367. For example, the JSC in its recent engagement with stakeholders and more specifically with the Judges of The Supreme Court as posted on the JSC's fakebook page[1] which is open to the public, on 1st December, 2025 at 11.04 it posts as follows, with a full caption of some Commissioners of the JSC and some Judges of the Supreme Court:

> "***The Commission engaged the Judges of the Supreme Court on the Judicial Service (Processing of Petitions and Complaints Procedures) Regulations, 2025. This engagement forms part of a broader series of consultative forums organized by the JSC with key stakeholders.***

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[1] Accessed at **osprdtoenS18h12ltre0D1021uul 165fa84c1mb 7M340i:17A 4am11ee0** on 18/12/2025

<u>The involvement of diverse actors in the development of these Regulations is vital to safeguarding the rule of law, enhancing transparency and promoting fair administrative practices. The Regulations seek to establish clear, consistent and efficient procedures for the management and processing of petitions filed against Judges, as well as complaints lodged against Judicial Officers and staff.” (emphasis added)</u>

368. In considering Petitions against judges, the JSC, just like all other bodies entrusted with the making of administrative or quasi-Judicial decisions affecting the rights of individuals, is expected to be efficient and to strictly abide by the rules of natural justice.

369. The Constitution is a framework document and its implementation is through legislation, subsidiary legislation, policies and guidelines. No doubt, the Constitution expects the JSC to adopt clear, transparent, predictable, consistent fair and accessible procedures for efficient and expeditious handling of complaints against Judges, considering the serious consequences that flow from the process, that may lead to removal of a Judge.

370. In our view, unwritten informal practice of handling complaints and petitions against Judges does not satisfy the Constitutional threshold and obligation to ensure procedural fairness. To that extent, therefore, we find that procedural fairness is

undermined where the JSC as a decision-maker employs unclear or discretionary methods which, in essence, border on arbitrariness.

371. In our most considered view, any hearing that would involve the calling of witnesses as indicated to the Judge in the letter summoning her must be conducted within the framework of a procedure that is predictable to all the parties.

372. This Court further observes that the regulations would greatly assist the complaint handling process by JSC, by clearly specifying the essential elements of each ground contemplated under Article 168 of the Constitution. Such detailing would ensure that a Judge against whom a petition or complaint is lodged is sufficiently apprised of the case to be met, thereby enabling an informed and meaningful response and facilitating the effective exercise of the rights guaranteed under Articles 47 and 50 of the Constitution.

373. It is also important to note that presently there is nothing to guide the JSC in determining the threshold of a complaint that merits action by the President, yet the JSC has a Constitutional duty to ensure that frivolous complaints against Judges are sieved.

374. Absence of regulations, it is impossible to tell what is expected of the complainant in the JSC proceedings to establish any of the grounds under Article 168 of the Constitution and the rights of the affected Judge in responding to such a complaint.

375. It is thus important for regulations to be put in place to guide the process, just like the Tribunal proceedings would have to be conducted in accordance within a defined procedure as contemplated by Article 168(10).

376. A Judge like any other citizen, has a right to be treated fairly and subjected to a procedurally fair process. Articles 47 and 50 (1) of the Constitution on the right to fair administrative action and to a fair hearing respectively, must be observed because the decision on whether or not a tribunal should be constituted to inquire into the conduct of a Judge has grave irredeemable consequences for the holder of the office of a Judge.

377. Procedural fairness must be observed throughout the process from the point of receipt of the complaint to its consideration and during the tribunal proceedings, should that ensue. This is important because the formation of a tribunal culminates in the suspension of the Judge from office.

378. It is equally important to note that the Constitution does not provide for lesser measures to be taken against a Judge who has a complaint filed against them regardless of the gravity of the complaint. See **Mboya & another v Judicial Service Commission & another; Rawal & 5 others (Interested Parties.** The JSC should therefore be meticulous in its processes in order to ensure that no Judge is subjected to the process of a tribunal without sufficient cause.

379. Needless to state that the moment proceedings under Article 168 of the Constitution are triggered, a Judge's image immediately comes under scrutiny and therefore, notwithstanding the eventual outcome of the tribunal process, the public is bound to form an opinion about the Judge and that has its own bearing on public confidence in the Judge even after being cleared by the tribunal.

380. Under Article 172 (1) of the Constitution, the Judicial Service Commission is mandated to promote and facilitate the independence and accountability of the judiciary and ensure the efficient, effective and transparent administration of justice. The JSC is therefore under a constitutional obligation to guard against erosion of public confidence in the office of a Judge by ensuring that only complaints that satisfy them that there exists any one of the grounds for action against a Judge are sent to the President.

381. In **Davis Gitonga Karani vs JSC, Petition No. 3 of 2021** the disciplinary procedures of JSC were yet again called to question, with the Supreme Court reminding the JSC as a major employer in one arm of the government. The Supreme Court recited the principles laid out in the **Gladys Boss Shollei v Judicial Service Commission & another Petition 34 of 2014 [2022] eKLR** case where the apex Court highlighted the fact that due to the respondent being a major employer in one arm of the government, and further due to having the question of applicable administrative procedure arising, it saw it fit to lay down principles to guide the

courts in considering matters concerning disciplinary proceedings before the respondent.

382. The present situation where the JSC has no prescribed procedure of dealing with Petitions presents a constitutional and jurisdictional question on how then JSC can efficiently and effectively exercise its mandate in line with the principles laid down by the Supreme Court in the **Shollei case**, without violating Articles 10, 25, 47 and 50 of the Constitution.

383. The JSC's argument that it followed internal historical practices guided by the principles of natural justice in handling such petitions cannot be accepted by any court of law now, after courts, over time, have decried the lack of regulations or complaints handling mechanisms by the JSC, particularly because those 'practices' were not disclosed to the Judge prior to the intended hearing of the petition filed against her.

384. It is now common knowledge that Article 47 of the Constitution relieves the burden of handling administrative matters by common law as was held by Majanja J (RIP) in **Dry Associates Ltd v Capital Markets Authority [2012] eKLR** *inter alia***,** that:

as follows with regard to Article 47:

"Article 47 is intended to subject administrative processes to constitutional discipline hence relief for administrative grievances is no longer left to the realm

of common law ... but is to be measured against the standards established by the Constitution."

385. Additionally, procedural fairness in the 2010 Constitutional dispensation as was stated in the **Shollei case** by the Supreme Court, requires predictable and known procedures and a party must know in advance the framework within which their rights will be adjudicated. Similarly, a fair hearing includes knowledge of both the allegations and the procedure that will be applied.

386. In our view, therefore, a right that depends on the benevolence or discretion of the administrator as is in the present case is not a constitutional right and the Court will not permit a person to be subjected to a process whose contours shift depending on internal practices or institutional memory.

387. We are further fortified on this point by the decision of the Supreme Court in the case of **The Judiciary & 2 Others vs LMN (Petition E040 of 2024) [2025] KESC 53 (KLR) (Judicial Review) (15th August 2025)** (Judgment) where the Court held that:

> ***"Article 47 of the Constitution guarantees every person the right to administrative action that is expeditious, efficient, lawful, reasonable, and procedurally fair. In furtherance of this constitutional imperative, and pursuant to Article 47(3), Parliament enacted the Fair Administrative Actions Act to provide the necessary legislative framework for its implementation. <u>This Court</u>***

has had occasions to interpret or apply Article 47 of the Constitution and the Act in appeals involving judges, judicial officers, and staff on one hand and the JSC on the other hand.

It became necessary for the Court in Shollei Vs Judicial Service Commission & another [2022] KESC 5 (KLR) to lay down certain principles to guide not only the courts but also the JSC in matters concerning disciplinary proceedings involving judicial officers and staff. These are the principles:

a. The JSC shall comply with the procedure set out in Article 47 of the Constitution and the Fair Administrative Actions Act.

b. JSC shall always give an employee reasonable time to defend himself or herself.

c. An employee shall be informed the basis of complaint(s) or who his or her accusers to enable the employee defend themselves.

d. JSC shall furnish an employee with details of allegations against him or her.

e. JSC must always be clear from the start whether the administrative action against an employee is of an investigatory nature or of a disciplinary nature. Should an investigatory process turn into a disciplinary one, an employee must be accorded fresh notice to prepare his/her defence (emphasis added).

f. An employee should be accorded a public hearing if he/she desires to have one. A decision to decline such a request must be accompanied with reasons which shall be given to the employee.

g. An employee shall be given detailed reasons for any administrative action/decision by JSC.

h. An employee should access and receive any relevant documents relating to his/her matter. Any decision to the contrary must be accompanied by a written reason.

i. An employee shall be accorded the opportunity to attend proceedings, in person or in the company of an expert of his/her choice.

j. An employee undergoing disciplinary proceedings shall be given an opportunity to call witnesses, be heard; cross- examine witnesses; and request for an adjournment of the proceedings upon providing good reasons and where necessary to ensure a fair hearing.

388. Although the above decision concerned a judicial officer and not a judge, the principles espoused therein are relevant to this case, noting that no such procedures exist for handling of complaints or petitions against judges, which is the subject of this petition.

389. The above decision overrides and supersedes all other decisions where courts below the Supreme Court have made reference to standards of procedural fairness, which, more often than not, mirrors the common law position on procedural fairness. Although the JSC does not conduct proceedings for removal of a Judge, the receipt and consideration of a Petition for removal is the seminal phase of the removal of a Judge from office.

390. The investigative role of the JSC therefore cannot be downplayed. The President cannot form a tribunal to remove a judge from office without the JSC first considering a petition and satisfying itself that grounds for removal of a Judge as enumerated in Article 168 (1) have been disclosed. The material that the JSC sends to the President for consideration in setting up the tribunal forms the basis of the tribunal proceedings thus the procedure leading to acquisition of such material must be clearly documented and should be in conformity with Article 47 of the Constitution.

391. That procedure used by the JSC must be available for scrutiny even by the tribunal, to satisfy itself that, among others, the material relied on to set-up the tribunal was lawfully acquired thus the need for regulations.

392. Our endless emphasis is that the JSC must, in its duty to defend the Constitution and promotion of Constitutionalism must ensure that there is an independent and accountable Judiciary in Kenya, in line with Articles 3, 172 and 249 of the

Constitution. The Commission must therefore strive to have a robust mechanism for dealing with complaints against Judges and Judicial officers which would in turn bolster public confidence in the institution of the Judiciary. The procedure developed in this regard would shed light on matters stated above, such as the expected time frame within which a complaint once made would be resolved and detail what is expected of each party involved in the complaint/ Petition.

393. Any disciplinary measures and procedures should be regulated by law and designed procedures to prevent abuse of the preliminary inquiry process such that a Judge should never be surprised or exposed to ambush when appearing before the JSC. The Judge must know beforehand what to expect.

394. The Opinion no. 3 of the Consultative Council of European Judges (CCJE) to the attention of the Committee of Ministers of the Council of Europe on the principles and rules governing judges' professional conduct, in particular ethics, incompatible behaviour and impartiality (**Consultative Council of European Judges) in its Opinion No. 3, at para. 67**, noted that individuals alleging to have suffered due to a Judge's professional misconduct should be able to submit a complaint, which could then lead to the initiation of disciplinary proceedings. However, the Council observed that:

''they cannot have a right themselves to initiate or insist upon disciplinary action. There must be a filter, or judges could often find themselves facing disciplinary proceedings, brought at the instance of disappointed litigants."

395. We find the above statement relevant to these proceedings and circumstance of this petition. And we reiterate that the JSC in its rules of procedure or regulations governing the handling of petitions or complaints against Judges should set time lines within which complaints should be lodged against a Judge in order to guard against witch-hunting by mischief makers and disgruntled litigants long after a Judge has dealt with their matters. This will ensure that a Judge in the discharge of his functions remains free to make decisions without fear of complaints being raised against him or her, thus, the need for clarity, predictability and consistency by the JSC in its complaints handling mechanism.

396. See also **Legal regulation of the prevention of abuse of the procedure of disciplinary complaint against a judge – international standards and national practice in England and Wales.** In England and Wales, they have **The Judicial Discipline (Prescribed Procedures) Regulations 2023 which are very elaborate and they provide mechanisms for handling complaints against Judges.**

397. Additionally, the JSC sits as the guardian of public interest in ensuring that the Judiciary is independent and the importance of an independent Judiciary need not be emphasized. The Judiciary in the interpretation and application of the law presides

over private and public law disputes that rattle litigants at times, thus complaints are bound to arise but the judges and judicial officers must be protected from frivolous and unmeritorious complaints.

398. Once the institutional and decisional independence of the Judiciary and Judges is secured, the rule of law shall flourish and the Human Rights and freedoms of the people will be respected, protected, upheld and enforced in an environment that respects the rule of law.

399. The Petitioner has questioned the continued handling of complaints by the JSC against Judges without a regulatory frame-work. In our opinion this complaint is not without merit in that a Judge against whom a complaint is lodged has no means of telling whether any inquiries directed to them by JSC to respond to, are purely administrative inquiries or are likely to culminate into a process that may lead to their removal from office.

400. The matter of removal of a Judge from office should never be trivialized for it has consequences not only to the Judge but also to the institution of the Judiciary and greatly impacts on the administration of justice.

401. It is however, not the position of this bench that Judges are immune from scrutiny. This is because, Judicial independence and even security of tenure of a Judge in accompanied by judicial accountability. The point we seek to emphasize is that judges too have guaranteed constitutional human rights like all other members of

society. Judges have a right to Fair Administrative Action under Article 47 of the Constitution and their right to a fair hearing as guaranteed by Article 50 of the Constitution cannot be limited.

402. In **Petition No. 4 of 2020 Between Hon. Mr. Justice Martin Mati Muya, The Tribunal Appointed to Investigate the conduct of Justice Martin Mati Muya, Judge of The High Court,** the Supreme Court observed that:

"To warrant removal of a judge on any of these grounds, the Judicial Service Commission (the Commission), upon being satisfied that the complaint against the judge constitutes any of grounds for the removal of a judge, will send the petition to the President, who, for his part, will suspend the judge from office and appoint a tribunal to inquire into the complaint. By Article 168(8) of the Constitution, a judge, who is aggrieved by a decision of the Tribunal, may challenge it to the Supreme Court.

403. The JSC must therefore be satisfied that prima facie, the complaint is meritorious and discloses one of the grounds set out under Article 168 of the Constitution. The Supreme Court in its first ever determination under Article 168 (8) in the case of **Joseph Mbalu Mutava v. Tribunal appointed to Investigate the conduct of Justice Joseph Mbalu Mutava, Judge of the High Court of Kenya [2019] eKLR,** laid down the following broad principles, in so far as they are relevant here, regarding removal of a judge on the ground of gross misconduct:

i. Unlike its jurisdiction under Article 163(4), the Supreme Court, as the first and only appellate Court in such matters, has a more expansive jurisdiction since, it is required to re-evaluate and re-assess the evidence on record in order to establish whether the Tribunal misdirected itself leading to a wrong conclusion.

ii. Judges are presumed to be independent and to act without the control of anyone in deciding cases before them.

iii. Judges should always ensure that their conduct is beyond reproach in the eyes of a reasonable observer. They must always uphold the principle that justice must not only be done but be seen to be done.

iv. Once the President has received a petition from the Commission, he is constitutionally bound to appoint a Tribunal.

v. The standard of proof, whether in direct or circumstantial evidence, is one which is neither beyond reasonable doubt nor on a balance of probabilities (emphasis added).

404. It is our considered view that the standards set by the Supreme Court must be met at the stage of determining whether a complaint merits a recommendation to the president for formation of a tribunal otherwise the concerned Judge could easily be exposed to the rigorous process of defending themselves before a tribunal on

baseless complaints. The process of a tribunal is never easy for anyone for it takes an emotional, psychological and economic toll on a judge.

405. Accordingly, the concern by the Petitioner that the Commission is proceeding with the petition against his client, Judge Dorah Chepkwony, without any regulations in place to guide the process, raises a valid concern on the potential contravention of the Constitution.

406. The Supreme Court in the **Martin Muya case** (supra) had this to say concerning the removal of a judge:

> ***" [192] Removal of a judge from office for whatever reason is not a light matter. That is why there are only very limited specific circumstances for the removal. Removal from office is the only and most severe sanction available for discipline of a judge. Unlike Kenya, some jurisdictions have made provision for lesser measures, such as reprimand. Guideline VI.1(a)(ii)-(iii) of the Latimer House Guidelines makes recommendation for the Chief Justices to exercise some powers to impose disciplinary measures short of removal, save that no judge should be reprimanded in public.***
>
> ***[193] England and Wales, and in some instances in the United States, have adopted a range of graduated options from the admonition to reprimand.***

[194] In the former, the Lord Chief Justice under the Constitutional Reform Act may give a judicial office holder formal advice, or a formal warning or reprimand, for disciplinary purposes (but this does not restrict what he may do informally).

[195] Making reference to the Ouko Report (supra), the Tribunal, in its report, suggested alternative disciplinary measures that will take into consideration the gravity of the allegations and provide for a range of disciplinary measures that may be taken against a judge in such circumstances. The Ouko Report had recommended that there be a provision in the Constitution for sanctions against Judges of less serious misconduct, misdemeanor or unprofessional conduct not warranting removal of a judge from office. It noted that at the time (and indeed today), the only disciplinary control the Chief Justice, as the head of the Judiciary exercises over Judges in such situations is limited to things like transfers, withdrawal of official work, refusal to grant permission to attend conferences or workshops or refusal to grant leave.

[196] There are, however, arguments against the use of graduated sanctions against sitting judges on the ground that it may compromise the public and litigants respect for judicial decisions. It is also argued that it is demeaning to the office. While there is no evidence to substantiate these claims, and remembering that in other jurisdictions this graduated sanctions are now commonplace,

however in the wisdom of Kenyans, under the current legal framework, the Constitution provides only for the procedures for removal of Judges, and there are no equivalent procedures for disciplinary action against a Judge for misconduct not warranting removal."

407. As earlier stated, and at the risk of repeating ourselves here, our Constitutional architecture does not permit any recourse to other measures by the JSC in matters concerning petitions or complaints against Judges thus, the need for a fair, effective, efficient, expeditious, predictable and transparent process of handling complaints or petitions filed against them.

408. Before we conclude on this issue of want of regulations, having stated above that Judges are not immune from scrutiny, we must briefly address speak to the bare minimum ethical conduct expected of a Judge. This, off course, is governed by the Judicial Code of conduct for Judges. We are therefore only paraphrasing here for emphasis.

Basic ethical conduct expected of a judge

409. On becoming a judge, adhering to high ethical standards and code of conduct is imperative. Judges are expected to be competent, remain independent and maintain impartiality. They must be fair and exhibit integrity in their decisions and dealings. While upholding the principles of the Constitution, Judges are expected to act without fear, favour or prejudice during the promotion of justice. Compliance with

these ethical standards is of paramount importance and the JSC has a duty to ensure that Judges are free from any threats of removal whenever they discharge their duties fairly, impartially and in good faith. Judges must never be made to look over their shoulders to see who is watching or listening before they pronounce themselves on any matter, judicially.

410. We echo the Supreme Court in the **Martin Muya (supra) case**, where the Supreme Court remarked as follows:

> ***"[1] When many years ago Lord Bowen L.J., in Leeson v. General Council of Medical Education and Registration (1889), L. R. 43 C. D. 385 famously compared Judges to Ceaser's wife, that they should be beyond suspicion, he was merely emphasizing that the standard of conduct expected of a judge is much higher than that of an ordinary citizen; that the credibility of the judicial system is dependent upon the Judges who man it; and that, public confidence in the Judiciary requires every judge to act with integrity, impartiality and intellectual honesty without the slightest whiff of improper conduct or behaviour.***
>
> ***[2] The public rightly expects the highest standard of behaviour from a judge, hence the protection extended to judges and the Judiciary by the Constitution, which provides for judicial independence. For the purpose of this appeal, it demands that a judge shall not be removed for misconduct or misbehaviour,***

unless the judge has fallen far too short of that standard of conduct or behaviour as to demonstrate that he or she is no longer fit to remain in office.

[3] The Basic Principles on the Independence of the Judiciary adopted by the United Nations General Assembly in 1985 was formulated as minimum aspirations to assist Member States in securing and promoting the independence of the judiciary within the framework of their national legislation. In its pertinent parts, it provides that;

11. The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law.

12. Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists.

18. Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unable to discharge his or their duties. Those very principles are repeated word for word in Principle IV: Independence of the Judiciary of the Latimer House Guidance on Parliamentary Supremacy and Judicial Independence (1998).

[5] Upon appointment, judges make a solemn declaration that they will adjudicate cases before them impartially and do Justice without fear, favour, bias or other influence. Their decisions are made in accordance with the

Constitution and the law and they are not liable in an action or suit in respect of a decision made in good faith and in the lawful performance of judicial function. See Article 165(5) of the Constitution.

[6] Likewise, a judge is guaranteed tenure of service until attaining the retirement age unless he or she is shown to be unable to perform the functions of office due to mental or physical incapacity; is in breach of a code of conduct; is bankrupt; is proved to be incompetent in the performance of judicial duties; or has committed acts amounting to gross misconduct or misbehaviour. See Article 168. (1) of the Constitution.

[7] To warrant removal of a judge on any of these grounds, the Judicial Service Commission (the Commission), upon being satisfied that the complaint against the judge constitutes any of grounds for the removal of a judge will send the petition to the President, who, for his part, will suspend the judge from office and appoint a tribunal to inquire into the complaint. By Article 168(8) of the Constitution, a Judge, who is aggrieved by a decision of the Tribunal, may challenge it to the Supreme Court."

411. This Court fully agrees with the position taken by the Supreme Court in the above case and in addition, we observe that since Kenya has no graduated scheme or framework for disciplining judges and considering that the only recourse open to the JSC is to recommend the removal of a Judge from office once the threshold for such

removal is established, the inquisitorial process leading to the recommendation for the formation of a tribunal must be fair, transparent, accountable, predictable and consistent.

412. In Australia for instance, **"The Courts Legislation Amendment (Judicial Complaints) Act 2012 (Cth)** amended the legislation to assist the Chief Justice/Chief Judge to deal with complaints about judges, to provide immunity from suit for the Chief Justice/Chief Judge as well as participants assisting the Chief Justice/Chief Judge in the complaints handling process, and to exclude from the operation of the Freedom of Information Act 1982 (Cth) documents of a court arising in the context of consideration and handling of a complaint about a judge.

413. The complaints procedure does not, and cannot, provide a mechanism for disciplining a judge. It does, however, offer a process by which complaints by a member of the public about judicial conduct can be brought to the attention of the Chief Justice/Chief Judge and where appropriate, the judge concerned, and it provides an opportunity for a complaint to be dealt with in an appropriate manner. It should be noted that in some cases a considered response cannot be provided until the proceeding giving rise to the complaint has been finalized.

414. It is this kind of mechanism that the Petitioner argues is lacking in Kenya and as a result, Judges facing complaints have no means of telling whether any inquiries

made to them by JSC in relation to any complaint are administrative or are likely to lead to the disciplinary process being invoked.

415. The requirement for Judges to be accountable is non-negotiable but that accountability mechanism must be clear in order to avoid abuse of process that could be initiated for ulterior motives by persons who lodge complaints against Judges.

416. **Elliot Bulmer in a Primer for Constitution Makers, Primer 5 Judicial Tenure, Removal, Immunity and Accountability; International IDEA Constitution-Building © 2017 International Institute for Democracy and Electoral Assistance (International IDEA) Second edition, First published in 2014 by International IDEA** states as follows:

> ***"In pursuit of a judiciary that is neutral and independent, but at the same time accountable and held to standards of competence and integrity, the same principles of balance must be applied to the immunities of judges once appointed and to the process of removing them from office:***
>
> > ***a) Judges should not be subject to arbitrary removal.***
> >
> > ***b) They should not be dependent on the appointing authorities (whether because they are personally indebted to these authorities for their initial appointment, or because they hope for future promotion).***
> >
> > ***c) They should not be subject to political interference or any undue influence that undermines independence or neutrality.***

d) Judges also need to be held accountable, however, with mechanisms in place to discipline and possibly remove judges who neglect their duties or abuse their position of trust."

417. Therefore, in order to achieve the desired degree of accountability and independence of the judiciary, the process of handling complaints against Judges must remain objective and the JSC cannot achieve this without a clear procedure on how it undertakes the process of considering complaints initiated against Judges, now that Article 168 empowers JSC itself on its own motion to initiate a petition against a Judge. Without regulations passed by Parliament, the JSC would become a Judge in its own cause.

418. The need for these regulations becomes apparent especially when one looks at the question of timelines in processing complaints before the JSC. Presently, a Judge who has a complaint against them before the JSC can remain anxiously waiting for the determination of the mater indefinitely, thereby eroding their dignity and diminishing their morale to serve Kenyans.

419. It is also not healthy to have a Judge continue serving unsure of their status since, as stated elsewhere in this judgment, our Constitutional design does not make room for any other disciplinary measures other than removal from office of a Judge**. (see Mboya & another v Judicial Service Commission & another; Rawal & 5 others (Interested Parties) (Petition 204 & 218 of 2016 (Consolidated)) [2020] KEHC**

9225 (KLR) (Constitutional and Human Rights) (14 May 2020) (Judgment). Neither is there any right of appeal once the Commission determines that the threshold for removal has been met.

420. In the JSC's own website, on frequently asked Questions on complaints and petitions with JSC, the JSC has formulated some questions and in question 8, it asks as follows:

"8. What can one do if dissatisfied with the JSC determination of a complaint/petition?"

421. The answer to that question is given as follows:

"A complainant/petitioner who is dissatisfied with the decision of the Commission upon hearing and final determination has no right of appeal."

422. That being the case, a Judge should never live under a constant threat or fear of removal because that compromises delivery of service to the public. The JSC should therefore borrow from international best practices and ensure that with regulations in place, complaints against judges are expeditiously processed.

423. In a research project paper by the **Library of Congress**: **Judicial Tenure: The Removal and Discipline of Judges in Selected Countries; The Law Library of Congress* Kersi B. Shroff, at paragraph 17** states:

"A charge or complaint made against a Judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate

procedure. The Judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge."

424. In the case of the JSC, it has had at its disposal the necessary constitutional and statutory backing to generate regulations to attain such standards to guide the process envisaged under Article 168(4) of the Constitution since 2011. No reason whatsoever has been advanced by the JSC in defense of this Petition to justify the inertia. In the Mwilu case, the Commission was heard swearing that the said regulations were with the National Assembly. At paragraph 299 of that decision, the Court observed as follows:

> ***"299.We further observe that the JSC has been involved in several litigations where lack of rules and regulations to govern its procedures for removal of judges under Article 168 of the Constitution has been raised and pronouncements made on the importance of having those rules. The necessity of having rules is a statutory requirement as stipulated by Section 47 (2) (c) of the JSA. This Court was informed that the rules are pending before the National Assembly for approval. We can only urge the JSC to take a proactive initiative and have those rules approved because they cannot pend before the legislature in perpetuity. In saying so, we appreciate the fact that under***

the Statutory Instruments Act, 2013, such rules must be legislated by Parliament.”

425. That was in 2020 when that petition wa filed, close to more than five years ago. Today, the regulations are undergoing public participation for validation.

426. Article 7 of the Universal Declaration of Human Rights declares that all persons are ***equal before the law and are entitled without any discrimination to equal protection of the law. All are entitled to equal protection against any discrimination in violation of this Declaration and against any incitement to such discrimination.’’***

427. Judges must therefore not be subjected to unknown processes that would unprocedurally remove them from office, when, on a daily basis they are engaged in the promotion and protections of rights of all persons who appear before them. If the Judges are on the wrong, they must however face justice. This Justice can only be achieved if the JSC complaint handling mechanism is transparent as contemplated in Article 10 of the Constitution and that JSC in accordance with Article 249 of the Constitution acts in a manner that prima facie promotes Constitutionalism.

428. In the **Appointment, Tenure and Removal of Judges under Commonwealth Principles; A Compendium and Analysis of Best Practice: Published and Distributed by The British Institute of International and Comparative Law Charles Clore House, 17 Russell Square, London WC1B 5JP** it reads:

"As the Privy Council stated in Re Chief Justice of Gibraltar (2009), [2010] 2 LRC 450 removal can only be justified where the shortcomings of the judge are so serious as to destroy confidence in the judge's ability to properly perform the judicial function. This statement shows that the bar for removal is set fairly high. The Privy Council also indicated that whereas the international standards set out in the Bangalore Principles of Judicial Conduct are relevant to evaluating the behaviour of judges, conduct falling short of those standards does not automatically constitute grounds for removal."

429. The regulations once in place, would guide the complainant/petitioner, the affected Judge and the JSC in determining what is required of each one of them during the period of submitting, responding and considering the Petition. The absence of the regulations is therefore a matter that this court cannot take lightly.

430. It is not enough to say that there is an elaborate procedure adopted in the past yet that procedure is not known to the Judges and is only known to the Commission and largely depends on the discretion of the Commission as constituted at any one given time.

431. We have said enough, we need not say more on the significance and centrality of regulations for handling complaints against judges.

432. For the foregoing reasons, this Court finds that to allow the proceedings pending before the JSC against the Petitioner's client and any other Judge as pleaded, absent

of regulations would be to countenance an illegality and an unconstitutionality, which we hereby refuse. The Petitioner's case on the necessity for regulations to guide the process is therefore merited.

433. The merit or otherwise of the complaint/ Petition against the Judge before the JSC is not a matter for this Court but for the JSC under Article 168(4) of the Constitution. We say no more.

<u>On the Petitioner's allegations of violation of the doctrine of separation of powers</u>

434. The Petitioner further contends that the 1st Respondent's assumption of jurisdiction over judicial decisions directly contravenes the principle of separation of powers. This court has considered that contention and submission and as earlier stated in this judgment, we are not persuaded that the JSC has by way of its letters to the Judge attempted to interrogate the merits of the Ruling by the Judge. All that the interested party has complained about is the delay in the delivery of the ruling and the loss of a court file in the criminal case which the learned Judge was handling.

435. Accordingly, the challenge to the JSC petition on the ground of separation of powers and merit review of the decision by the Judge is found to be devoid of merit.

<u>Whether the petitioner is entitled to the reliefs sought and what orders should this court make</u>

436. The Petitioner sought the following reliefs:

a) A DECLARATION that the Constitutional jurisdiction of the 1st Respondent does not extend to merit review of any matter lawfully conducted, transacted or decided by a Judge or Judicial Officer in the course of the exercise of his or her judicial authority, functions and discretion.

b) A DECLARATION that matters lawfully conducted, transacted or decided by any Judicial Officer, within the judicial discretion and authority of the office holder, are protected by Article 160 of the Constitution from interference or influence by any party, save for lawful Appellate review where available as provided by law.

c) A DECLARATION that the 1st Respondent has no jurisdiction to admit, hear, consider or determine in any manner whatsoever matters that are the subject of ongoing judicial proceedings.

d) DECLARATION that until the 1st Respondent gazettes regulations defining the precise procedures for Petitions in accordance with Section 47 of the Judicial Service Act, it is a breach of the principles of natural justice and the rights of any judicial officer to a fair, transparent and impartial process as enshrined in Article 47 of the Constitution to purport to proceed with any JSC Petition.

e) An Order do issue prohibiting the 1st Respondent, its officers, servants or agents from considering, admitting to hearing or convening to hear any JSC Petitions until

the Judicial Service Commission Gazettes regulations defining the precise procedures for Petitions in accordance with Section 47 of the Judicial Service Act.

437. Having considered the petition as a whole, we make the following orders:

1. ***A declaration is hereby made that the Constitutional jurisdiction of the Judicial Service Commission does not extend to merit review of any matter lawfully conducted, transacted or decided by a Judge in the course of the exercise of his or her judicial authority, functions and discretion. However, in the case of the petitioner's client, Judge Dorah Chepkwony, the court finds that there was no evidence of merit review by JSC, of the ruling rendered by the learned Judge in the criminal case which she was handling.***
2. ***The court finds that the petitioner had the locus standing to bring this petition.***
3. ***On the issue of ripeness, justiciability and exhaustion of remedies, the Court finds that the petition is ripe and justiciable and that this Court has jurisdiction to intervene in proceedings pending before JSC, before the Commission makes a determination as to whether a threshold for removal of a judge has been met, where the challenge raises questions of legality, jurisdiction, procedural fairness or constitutional compliance.***
4. ***The court finds that the Judicial Service Commission had jurisdiction to receive the petition lodged by the interested party against Judge Dorah Chepkwony.***

5. ***The Court finds that the doctrine of res judicata is not applicable to the circumstances of this Petition.***
6. ***The court finds that the claim of violation of the doctrine of separation of powers was not proved***
7. ***The Court hereby issues a declaration that until the JSC gazettes regulations contemplated under Section 47 of the Judicial Service Act, for handling of petitions against Judges, including the petitioner's client, the Commission cannot lawfully proceed with the processing or hearing of any petition lodged against any judge.***
8. ***The court hereby issues a declaration that the absence of such regulations violates Articles 47 and 50 of The Constitution and that allowing the JSC to proceed with the processing and of petitions against judges without regulations would amount to condoning an illegality.***
9. ***The Court declines to examine the merits of the complaint before the JSC, noting that merit issues fall squarely within the Commission's constitutional mandate.***
10. ***The court hereby issues an order prohibiting the Judicial Service Commission from considering or processing for hearing any petitions lodged against Judges until the regulations contemplated under Section 47 of the Judicial service Act are promulgated and implemented.***

11. ***The Court declines to prohibit the JSC from receiving complaints and or petitions against Judges as that would interfere with the Commissions' constitutional mandate.***
12. ***Prayers b and c of the petition are declined as no basis was laid in the petition for the grant of these orders as framed.***
13. ***The Court makes no order as to costs, this being a public interest litigation.***

Dated, Signed and Delivered at Nairobi in open Court, with parties' counsel appearing virtually via Microsoft Teams this 18th Day of December, 2025

R.E. ABURILI
JUDGE(PRESIDING)

J.M. CHIGITI, SC
JUDGE

A.M. MUTETI
JUDGE