



**Mwirigi v Judicial Service Commission & 2 others (Constitutional Petition E059 of 2026)
[2026] KEHC 4668 (KLR) (Constitutional and Human Rights) (19 March 2026) (Ruling)**

Neutral citation: [2026] KEHC 4668 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
CONSTITUTIONAL PETITION E059 OF 2026**

B MWAMUYE, J

MARCH 19, 2026

**IN THE MATTER OF: ARTICLES 1, 2, 3, 10, 22, 23, 165(2)(D)(I), 171, 172,
248 (2)(E), 249, 251, 252 AND 253, 258 OF THE CONSTITUTION OF KENYA**

AND

**IN THE MATTER OF: VIOLATION OF ARTICLES 1, 2, 3, 10, 172
& 249 AND CHAPTER SIX OF THE CONSTITUTION OF KENYA**

AND

IN THE MATTER OF: ARTICLES 73, 75, 77 AND 260 OF THE CONSTITUTION

AND

IN THE MATTER OF: SECTIONS 3, 4 AND 18 OF THE JUDICIAL SERVICE ACT

AND

**IN THE MATTER OF: SECTIONS 6, 7, 8, 11 AND 13 OF
THE LEADERSHIP AND INTEGRITY ACT CAP 185 C**

AND

**IN THE MATTER OF: SECTIONS 8, 9, 25 AND 32 OF THE CONFLICT-OF-INTEREST
ACT**

AND

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

BETWEEN

ERIC MURIUKI MWIRIGI PETITIONER

AND



THE JUDICIAL SERVICE COMMISSION	1 ST RESPONDENT
ISAAC RUTTO	2 ND RESPONDENT
THE NATIONAL ASSEMBLY	3 RD RESPONDENT

RULING

(On the 1st, 2nd and 3rd Respondents' Preliminary Objections)

1. The Petitioner/Applicant filed a Petition dated 29th January 2026 and a Notice of Motion Application of even date both of which revolve around the allegations that the 2nd Respondent, the Vice Chairperson of the Judicial Service Commission, allegedly attended and participated in a 'political party meeting' while donning party colours; and which conduct the Petitioner avers violates various values and obligations under the Constitution as well as various statutory provisions including the Judicial Service Act, the Leadership and Integrity Act and the Conflict-of-Interest Act.
2. The Petitioner's Notice of Motion Application dated 29th January 2026 seeks the following orders, verbatim:
 - "i. That this Application be certified urgent, service be dispensed with and the same be heard ex parte in the first instance.
 - ii. That pending the inter partes hearing of this Application, an interim conservatory order be issued temporarily halting interviews for recruitment of High Court and Environment and Land Court Judges by the 1st Respondent, scheduled to commence 4th February 2026 and any other decisions or processes of the Judicial Service Commission, including the imminent recruitment of Judge of the Supreme Court.
 - iii. That in alternative to the prayers sought in 2 above, pending the inter partes hearing of this Application an interim conservatory order be issued temporarily barring the 2nd Respondent from participating in the process of interviewing High Court and Environment and Land Court Judges set to commence on 4th February 2026 and in any other decisions or processes of the Judicial Service Commission including the imminent recruitment of Judge of the Supreme Court.
 - iv. That, pending the hearing and determination of the petition filed in the National Assembly and received on the 29th of January 2026 (copy annexed herein) an interim conservatory order be issued temporarily barring the 2nd Respondent from participating in the process of interviewing High Court and Environment and Land Court Judges set to commence on 4th February 2026 Page 6 of 77 and in any other decisions or processes of the Judicial Service Commission including the imminent recruitment of Judge of the Supreme Court.
 - v. That pending the hearing and determination of the petition filed herewith, an interim conservatory order be issued temporarily barring the 2nd Respondent from participating in the process of interviewing High Court and Environment and Land Court Judges set to commence on 4th February 2026



and in any other decisions or processes of the Judicial Service Commission including the imminent recruitment of Judge of the Supreme Court.

vi. That the Honourable Court be pleased to issue such and further orders in the interest of justice.

vii. That the costs of this Application be in the cause. “

3. The Petition dated 29th January 2026 on its part seeks the following prayers and reliefs, verbatim:

“i. A declaration that a member of the Judicial Service Commission cannot be politically partisan and must maintain political neutrality at all times during his tenure in office.

ii. An order of injunction/conservatory order prohibiting the 2nd Respondent from undertaking any actions, decisions, duties or functions of the Judicial Service Commission as he is tainted by partisanship and lack of political neutrality pending the outcome of the Article 251 process.

iii. A declaration that any actions, decisions or proceedings of the Judicial Service Commission undertaken post the filing of this petition and the Petition filed with the 3rd Respondent, in which the 2nd Respondent plays a role, including the interviews scheduled to commence on 4th February 2026 for vacancies in the High Court, Environment and Land Court, and Supreme Court, pending the outcome of the Article 251 process are unconstitutional, null and void.

iv. A declaration that the 2nd Respondent violated Chapter Six of *the Constitution* by simultaneously holding the offices of Member of the Judicial Service Commission and member of the National Governing Council of the UDA Party.

v. A declaration that the 2nd Respondent's conduct on 26th January 2026, including attending and participating in a political party meeting while donning party colours, constitutes a serious violation of Articles 10, 73, 75, 77, 160, 172, and 249 of *the Constitution*, as well as the *Judicial Service Act*, *Leadership and Integrity Act*, and Conflict of Interest Act.

vi. A permanent injunction enjoining the Judicial Service Commission from undertaking any actions, duties, functions, decisions or proceedings with the 2nd Respondent's participation, including the interviews scheduled to commence on 4th February 2026 for vacancies in the High Court, Environment and Land Court, and Supreme Court, pending the outcome of the Article 251 process.

vii. Costs of this Petition shall be borne by the 2nd Respondent personally, as his actions should not cost the taxpayers.

viii. Any further or other relief as this Honourable Court may deem just and expedient to grant.”

4. The Petitioner, in commendable full, voluntary, and earliest possible disclosure, also stated that simultaneously to his pursuit of court process through these proceedings he has contemporaneously presented a petition to the 3rd Respondent, the National Assembly, seeking the inquiry into the



aforementioned alleged conduct of the 2nd Respondent pursuant to the provisions of Article 251 of *the Constitution*.

5. Each Respondent filed a Notice of Preliminary Objection challenging this Court's jurisdiction, current adjudicative authority, and the current justiciability of both the Application and the Petition based on the admitted fact of the Petitioner having filed a simultaneous separate process before the National Assembly; and which process all parties agree is still pending full consideration and determination by the Honourable and August House of Parliament.
6. The 1st Respondent's Preliminary Objection is dated 30th January 2026, the 2nd Respondent's Preliminary Objection is dated 30TH January 2026, and the 3rd Respondent's Preliminary Objection is dated 2nd February 2026. This Ruling is with respect to all three Preliminary Objections.
7. The 1st Respondent's Preliminary Objection is grounded on the contentions that, verbatim:
 - a. *The Constitution* of Kenya, 2010 sets out distinct procedure and grounds for removal of a Commissioner of a Chapter 15 Commission including the 1st Respondent.
 - b. The mandate and power to assess the veracity, validity, or legitimacy of a Petition for removal of a member of an independent Commission is vested, solely, in the National Assembly, hence the invitation for the Court to do so would amount to an unconstitutional exercise of power.
 - c. The Application for conservatory orders is premature and speculative as it is founded on the assumption that the National Assembly, acting under Article 251(3) of *the Constitution*, shall be satisfied that a ground for removal of the Commissioner has been established yet the National Assembly may ultimately dismiss the petition for lack of merit.
 - d. In so far as the Application seeks to bar the 2nd Respondent from participating in the affairs of the 1st Respondent, the Application invites this Honourable Court to exercise a power that *the Constitution* vests solely and exclusively in the President under Article 251(4)(a) contrary to the doctrine of separation of powers.
 - e. No material has been placed before this Honourable Court exhibiting violation of a Constitutional prerogative by the 1st Respondent to warrant grant of orders barring it from exercising its constitutional mandate.
 - f. The 1st Respondent has been mis joined in these proceedings for the reasons that:
 - g. a cause of action which relates to an individual member of the Commission does not amount to a cause of action against the Commission itself.
 - h. proceedings for removal of a commissioner does not, and ought not, to affect the activities and affairs of the 1st Respondent as has been pleaded.
 - i. until the President has exercised his powers under Article 251(4) of *the Constitution* to suspend a commissioner to whom proceedings for removal have been initiated, and a Tribunal for that purpose has been constituted, there



would be no constitutional basis for the exclusion of such Commissioner from participating in the activities of the 1st Respondent.

j. The Court’s jurisdiction has been prematurely and irregularly invoked. “

8. The 2nd Respondent’s Preliminary Objection is grounded on the contentions that, verbatim:

- “ a. This Honourable Court lacks jurisdiction to entertain the Petitioner’s Petition and Application to the extent that it is a disguised attempt to circumvent the express provisions of Article 251 of *the Constitution* of Kenya, 2010, and usurp the Constitutional mandate and authority of the National Assembly in the removal of Commissioners of Independent Constitutional Commissions.
- b. There is already an ongoing constitutional process commenced by the Petitioner herein in respect of which no decision or action has been taken by the National Assembly. To that extent, the Petitioners’ Notice of Motion and Petition are speculative and deal with prospective anticipatory circumstances rather than current or probable events.
- c. The Petition is non justiciable having been instituted contrary to the doctrine of ripeness, justiciability, constitutional avoidance, principle of separation of powers, and the doctrine of exhaustion.
- d. The Petitioner’s Petition and Notice of Motion Application filed therewith are non-starters, bad in law and an abuse of the court processes.”

9. The 3rd Respondent’s Preliminary Objection is grounded on the contentions that, verbatim:

- “ a. Article 251(2) of *the Constitution* vests the 3rd Respondent with the exclusive mandate to consider petitions for removal of office of any member of a constitutional commission on any of the grounds specified under Article 251(1) of *the Constitution*.
- b. National Assembly Standing Order 220-230 sets out the procedure for processing of the said petitions for removal from office of a member of a commission of independent office. The material parts of National Assembly Standing Order 220 provide as follows:

“Submission of a Petition

220.

- (1) A petition to the House shall be—
 - (a) submitted to the Clerk by the petitioner and reported to the House by the Speaker; or
 - (b)
- (2) Notwithstanding paragraph (1)(b), a Member shall not be eligible to present a petition on his own behalf.



- (3) The Clerk shall, within seven days of the date of receipt of the petition, review the petition to ascertain whether the petition meets the requirements of these Standing orders and of the law
 - (4) Where the Clerk considers that a petition does not comply with paragraph (3), the Clerk may give such directions as are necessary to ensure that the petition is amended to comply with that paragraph.
 - (5) The Clerk shall, if satisfied that the petition meets the requirements under paragraph (3), forward the petition to the Speaker for tabling in the House.”
- c. The 3rd Respondent is actively seized of 2 petitions for removal of the 2nd Respondent from office as a member of the 1st Respondent. One of the 2 petitions is by the Petitioner in this matter, received on 30th January 2026. Under National Assembly Standing Order 220 (3), the 7-days’ timeframe for the 3rd Respondent to scrutinise the petitions with regard to their compliance with the requirements in *the Constitution* and the law, and decide on their admissibility, is yet to expire.
 - d. The Application is therefore premature. Issuing any of the prayers sought in the Application is not in public-interest and will interfere with active parliamentary proceedings by presupposing that petition before the 3rd Respondent have been admitted.
 - e. This Honourable Court lacks therefore jurisdiction to hear and determine the Petition and the Application as the issues raised are actively under consideration by the National Assembly.
 - f. The Conflict-of-Interest Act, 2025 has codified a comprehensive code for addressing the issues raised in the Application.”
 - g. The Petition and the Application are a gross abuse of process.
10. The Petitioner submits, in opposition, that the Respondents’ Objections do not satisfy the threshold of a true preliminary objection. While the Petitioner concedes that the parliamentary proceedings were filed by him and are still pending, he disputes a number of facts and legal arguments as articulated by the Respondents, including the status and effect of the parliamentary petition. Thus, the Petitioner argues that all three Preliminary Objections are heavily reliant on contested facts and thus fail the tests set out in the leading cases of *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors Ltd* [1969] EA 696 for the rule that a proper preliminary objection must be founded on a pure point of law, and on *Republic v Public Procurement Administrative Review Board & 2 Others Ex Parte Selex Sistemi Integrati* [2008] eKLR for the proposition that where factual contest, discretion, or evaluation is required, a preliminary objection is improper.



11. The Petitioner situates the High Court’s constitutional jurisdiction to hear and determine the present Petition and its Application as being founded on a plain and ordinary reading of Articles 23 and 165, and that jurisdiction to his mind is not and cannot be ousted by Article 251.
12. He contends that the court retains constitutional power to interpret *the Constitution* and to issue conservatory and declaratory relief where necessary to preserve the substratum of a live dispute and protect constitutional values.
13. In support, he cites Benjamin v Attorney General & 55 others [2026] KESC 5 (KLR) for the principle that the existence of an alternative constitutional or statutory process does not automatically bar constitutional relief where that alternative is inadequate, and In the Matter of the Interim Independent Electoral Commission [2011] KESC 1 (KLR) for the broader proposition that constitutional organs do not operate in isolation and that judicial intervention may be complementary rather than intrusive. He also invokes Cabinet Secretary for the National Treasury and Planning & 4 others v Okoiti & 52 others; Bhatia (Amicus Curiae) [2024] KESC 63 (KLR) to argue that constitutional review extends not only to enacted laws but also to acts done under constitutional authority.
14. The 1st Respondent’s position is that the Petition and Motion improperly invite the High Court to enter a constitutional field that Article 251 has reserved to a structured removal process involving the National Assembly, the President and, if necessary, a tribunal. It argues that the Petitioner had already invoked Article 251 before the National Assembly and could not then ask the court to bar the 2nd Respondent from performing JSC functions pending that process. In its view, the Petition is premature, speculative, and an attempt to have the court assess the validity and merits of a removal complaint that *the Constitution* has placed before Parliament in the first instance.
15. On separation of powers, the 1st Respondent submits that once *the Constitution* assigns a function to another organ, the court must show deference and intervene only upon demonstrated illegality or constitutional violation by that organ. It relies on Institute for Social Accountability & another v National Assembly & 5 others [2022] KESC 39 (KLR) for the principle that one branch of government should not usurp the functions of another; on Pevans East Africa Ltd & another v Chairman, Betting Control & Licensing Board & 7 others [2018] KECA 332 (KLR) for the proposition that courts must give constitutionally mandated bodies “sufficient leeway” and only intervene where their conduct is unconstitutional or manifestly irrational; and on Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others [2013] KECA 445 (KLR) to argue that separation of powers allows checks and balances, but not judicial takeover of functions constitutionally vested elsewhere. It also cites Mayama v National Assembly & 2 others [2024] KEHC 16496 (KLR) to reinforce that courts should defer to constitutional bodies unless proven constitutional breach is shown.
16. The 1st Respondent also contends that the Petition wrongly conflates allegations against the 2nd Respondent with a cause of action against the JSC itself, and that until the President exercises the suspension power under Article 251(4)(a), there is no constitutional basis for excluding the 2nd Respondent from the Commission’s affairs. It argues that entertaining the Petition would erode the security of tenure of commissioners and other constitutional office holders by creating a precedent where mere filing of a removal petition can trigger court imposed functional exclusion. In its supplementary response, it further says the Petition before the High Court is not just about conservatory orders but attacks the admissibility of the entire Petition, and that preserving the parliamentary petition is unnecessary because that petition stands independently of the court proceedings.



17. The 2nd Respondent similarly submits that the Petition is substantively about removal or suspension from a constitutional commission but disguised as a human rights petition. The 2nd Respondent therefore argues that the Motion and Petition both violate the constitutional design by bypassing the National Assembly and the President’s respective roles under Article 251 in favour of a direct action in the High Court.
18. In support of this argument, the 2nd Respondent cited a number of cases where courts declined jurisdiction over petitions that amounted, in substance, to removal of commissioners outside Article 251, including *Agumba v Wafula Chebukati (The Chairman, IEBC) & another* (Constitutional Petition E390 of 2022) [2022] KEHC 13996 (KLR).
19. In the supplementary submissions, the 2nd Respondent adds a distinct mootness argument by arguing that the core purpose of both the Petition and the Motion was to stop the 2nd Respondent from participating in High Court judge interviews that commenced on 4 February 2026; and that by the time the court determines the matter, those interviews will already have begun or concluded. The 2nd Respondent therefore contends the substratum has been overtaken by events and the case has become academic.
20. The 3rd Respondent submits that the Court should “down its tools” because *the Constitution* vests the initial consideration of a removal petition in the National Assembly; a route which the Petitioner has already invoked. The 3rd Respondent argues that the Petition and Notice of Motion before this Court therefore offend institutional comity, separation of powers, and the respect required for *the Constitution* when it prescribes an express procedure.
21. The 3rd Respondent further submits that the Petitioner’s request for the Court to restrain the 2nd Respondent from discharge of office functions is, in effect, an attempt to suspend a constitutional office holder, which is a power assigned to the President once the National Assembly has been satisfied that a petition lodged before it discloses a ground under Article 251(4).

Issues for determination

22. Having considered the pleadings, the supporting affidavit, the three Notices of Preliminary Objection, and the parties’ written and supplementary submissions, the Court identifies the following issues for determination:
 - a. Whether each Notice of Preliminary Objection meets the legal threshold; and
 - b. Whether, in view of Article 251 of *the Constitution*, the Petition and Notice of Motion offend the doctrine of separation of powers and the doctrines of constitutional avoidance and exhaustion.

Analysis and determination

Whether each Notice of Preliminary Objection meets the legal threshold

23. A preliminary objection is not an omnibus means for summarily defeating a case brought to court but rather it is a narrow instrument for determining pure points of law that, if upheld, dispose of the matter without the need for fact-finding. The Supreme Court restated the Mukisa Biscuit principle in *Joho & another v Shahbal & 2 others* (Petition 10 of 2013) [2014] KESC 34 (KLR) by stating:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose



of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration... ..a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.

24. The second defining feature of a preliminary objection is that it proceeds on the assumption that the pleaded facts are correct. Thus, it is not the proper vehicle where the Court must interrogate contested facts, evaluate evidentiary matters, or make factual findings to determine the objection.
25. Applying those principles to the three preliminary objections before me, I am satisfied that the core objections on jurisdiction, separation of powers, constitutional avoidance/exhaustion, and sub judice are pure points of law fully capable of being determined on the face of *the Constitution* and the pleadings, and with no reliance on contested facts or requiring fact-finding.
26. The preliminary objections rely purely on the factual matrix set-out by the Petitioner himself. They then proceed to apply their interpretations of the relevant provisions of *the Constitution* to that factual matrix. This is the quintessential nature of a preliminary objection.
27. Thus, this Court finds and holds that each of the three Preliminary Objections are properly preliminary objections and meet the requisite legal criteria for the same.

Whether, in view of Article 251 of *the Constitution*, the Petition and Notice of Motion offend the doctrine of separation of powers and the doctrines of constitutional avoidance and exhaustion

28. The High Court has broad constitutional jurisdiction, including jurisdiction to interpret *the Constitution* and determine whether anything done under the authority of *the Constitution*, or any law is inconsistent with it as provided under Article 165(3)(d)), and jurisdiction to grant appropriate reliefs, including conservatory orders, in constitutional litigation under Article 23(3)).
29. Article 251 provides a detailed process for removal of a member of a commission (other than an ex officio member) or holder of an independent office.

- “(1) A member of a commission (other than an ex officio member), or the holder of an independent office, may be removed from office only for--
 - (a) serious violation of this Constitution or any other law, including a contravention of Chapter Six;
 - (b) gross misconduct, whether in the performance of the member’s or office holder’s functions or otherwise;
 - (c) physical or mental incapacity to perform the functions of office;
 - d) incompetence; or
 - (e) bankruptcy.
- (2) A person desiring the removal of a member of a commission or of a holder of an independent office on any ground specified in clause (1) may present a petition to the National Assembly setting out the alleged facts constituting that ground.



- (3) The National Assembly shall consider the petition and, if it is satisfied that it discloses a ground under clause (1), shall send the petition to the President. (4) On receiving a petition under clause (3), the President--
- (a) may suspend the member or office holder pending the outcome of the complaint; and
 - (b) shall appoint a tribunal in accordance with clause (5).
- (5) The tribunal shall consist of--
- (a) a person who holds or has held office as a judge of a superior court, who shall be the chairperson;
 - (b) at least two persons who are qualified to be appointed as High Court judges; and
 - (c) one other member who is qualified to assess the facts in respect of the particular ground for removal.
- (6) The tribunal shall investigate the matter expeditiously, report on the facts and make a binding recommendation to the President, who shall act in accordance with the recommendation within thirty days. (7) A person suspended under this Article is entitled to continue to receive one-half of the remuneration and benefits of the office while suspended.
30. In *Agumba v Wafula Chebukati (The Chairman, IEBC) & another*, the petition sought, among other reliefs, declarations of unfitness and interim restraint of a constitutional office holder outside the Article 251 framework. The case is similar to this present one that similarly seeks to restrain a constitutional office holder from exercising office responsibilities separate from an Article 251 removal process and a presidential suspension.
31. Allowing either the Petition or the Motion would amount to this Court usurping the functions constitutionally vested in other organs under the detailed procedure set out under Article 251 of *the Constitution*.
32. Specifically, if this Court were to grant the interim relief sought by prohibiting a Commissioner of a Constitutional Commission from exercising functions of office pending a removal petition whose screening and transmission threshold has not been met, it would effectively insert into *the Constitution* an additional stage of interim exclusion unknown to Article 251. A court is not permitted to rewrite constitutional text to create remedies that displace a constitutionally allocated procedure. That is precisely the caution embedded in the Supreme Court's insistence that jurisdiction must be conferred, not assumed as it was decided in the case of *Macharia & another v Kenya Commercial Bank Ltd & 2 others* [2012] KESC.
33. Thus, it is manifestly clear that the present Petition and its interlocutory motion offend the doctrine of separation of powers. In *Institute for Social Accountability & another v National Assembly & 5 others*, the Supreme Court stated that separation of powers requires that "one arm of government should not usurp functions belonging to another arm."
34. The Petition and its Notice of Motion Application, indisputably invite the High Court to usurp the powers, jurisdiction, and decision-making ability of the National Assembly, the President of the Republic, and the constitutional tribunal. This offends the doctrine of separation of powers.



35. The doctrine of constitutional avoidance and exhaustion reinforces the same point. The Court of Appeal, in *Speaker of the National Assembly v Karume* (Civil Application 92 of 1992) [1992] KECA 42 (KLR), held that “where there is a clear procedure for the redress of any particular grievance prescribed by *the Constitution* or an Act of Parliament, that procedure should be strictly followed.”
36. The Court of Appeal, in *Muthinja & another v Henry & 1756 others* (Civil Appeal 10 of 2015) [2015] KECA 304 (KLR), explained the constitutional rationale behind the doctrine by saying that “It is imperative that where a dispute resolution mechanism exists outside courts, the same be exhausted before the jurisdiction of the courts is invoked. Courts ought to be the fora of last resort and not the first port of call.”
37. The Petitioner has on his own account, already invoked the constitutionally prescribed mechanism under Article 251 by petitioning the National Assembly. The design of Article 251 anticipates that the preliminary screening and satisfaction as to disclosure of a ground is the business of the National Assembly, and that the question of suspension pending outcome is then a discretion vested in the President.
38. Therefore, in the circumstances, a parallel court process, seeking functionally similar interim consequences of exclusion from office functions pending outcome, presents precisely the risk that constitutional avoidance and separation of powers doctrines are intended to manage.
39. In *Toili & 2 others v Speaker, the National Assembly & 2 others* (Petition E548 of 2022) [2025] KEHC 1148 (KLR), the Court referred to South African Constitutional Court jurisprudence - *Democratic Alliance v President of South Africa and Others* (CCT 122/11) [2012] ZACC 24; 2012 (12) BCLR 1297 (CC); 2013 (1) SA 248 (CC), emphasizing that while courts may review constitutionality, they should “strive to preserve to the Legislature its rightful role in a democratic society.” This perspective aligns with the position in *Institute for Social Accountability & another v National Assembly & 5 others* [2022] KESC and *Mumo Matemu* that deference is not abdication, but rather a respect for the constitutional architecture and processes that the People of Kenya designed.
40. In the present matter, the Petition and Motion ask this Court to make determinations and issue interim and final orders whose practical effect is to suspend the 2nd Respondent from participating in the core functions of the Judicial Service Commission of which he is a Commissioner pending the outcome of an Article 251 process. That invites the Court to not only usurp powers, authority, and decision-making expressly given by *the Constitution* to other organs but it also invites the Court to:
 - a. Act on apprehension of what Parliament may and may not do; and
 - b. To fill an alleged ‘constitutional vacuum’ by crafting interim and final measures through judicial decisions that *the Constitution* does not provide.
41. The High Court’s role is to interpret, apply, uphold, and enforce *the Constitution*; not to restructure its provisions to cure perceived lacunae through judicial craft.
42. This Court is also mindful that the Motion and the Petition as presented both in terms of findings and declarations on one hand and orders sought on the other require the same inquiry into facts, consideration of evidence, analysis of facts and law, and decisional-outcome as the various stages of the Article 251 process. That is plainly a breach of both the doctrine of separation of powers as well as the doctrines of constitutional avoidance and exhaustion.



43. It is therefore the finding of this Court that, in view of the provisions of Article 251 of *the Constitution*, the Petition and Notice of Motion offend the doctrine of separation of powers and the doctrines of constitutional avoidance and exhaustion.

Conclusion and Final Orders

44. For the foregoing reasons, the Court makes the following orders:

- a. The Preliminary Objections by the 1st, 2nd and 3rd Respondents are upheld on the grounds of jurisdictional and constitutional competence, separation of powers, and constitutional avoidance and exhaustion;
- b. The Petition dated 29th January 2026 and the Notice of Motion of even date are hereby struck out as incompetent and premature; and
- c. Each party shall bear its own costs in the matter.

It is so ordered. File Closed Accordingly.

DATED, SIGNED AND DELIVERED VIRTUALLY THIS 19TH DAY OF MARCH 2026

BAHATI MWAMUYE MBS

JUDGE

In the presence of: -

Counsel for 1st and 3rd Respondent – Mr. Mubarak

Counsel for 2nd Respondent – Mr. Kiplagat

Counsel for 11th Respondent - Mr. Maiga

