



**Wasilwa v Judicial Service Commission; Kenya Union of Domestic, Hotels,  
Educational Institutions, Hospitals and Allied Workers & 3 others (Interested Parties)  
(Petition E237 of 2023) [2025] KEELRC 281 (KLR) (7 February 2025) (Judgment)**

Neutral citation: [2025] KEELRC 281 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI  
PETITION E237 OF 2023**

**S RADIDO, CN BAARI & JK GAKERI, JJ**

**FEBRUARY 7, 2025**

**IN THE MATTER OF ARTICLES 1, 2, 3, 10, 20, 21, 22, 23, 24, 25, 28, 40, 47, 50,  
159, 160, 161, 162(2), 165, 168, 172, 249, 258 AND 259 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE EMPLOYMENT ACT, 2007**

**AND**

**IN THE MATTER OF THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, 2011**

**AND**

**IN THE MATTER OF THE FAIR ADMINISTRATIVE ACTION ACT, 2015**

**AND**

**IN THE MATTER OF THE JUDICIAL SERVICE ACT, 2011**

**AND**

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

**AND**

**IN THE MATTER OF JSC PETITION NO. E026 OF 2022  
ARISING FROM KERICHO ELRC CAUSE NO. 10 OF 2016**

**BETWEEN**

**JUSTICE HELLEN WASILWA ..... PETITIONER**

**AND**

**JUDICIAL SERVICE COMMISSION ..... RESPONDENT**

**AND**



**KENYA UNION OF DOMESTIC, HOTELS, EDUCATIONAL INSTITUTIONS,  
HOSPITALS AND ALLIED WORKERS ..... INTERESTED PARTY**  
**EDGAR MUTAI ..... INTERESTED PARTY**  
**RUTH NGELECHEI ..... INTERESTED PARTY**  
**CHARLES KOROS ..... INTERESTED PARTY**

**Failure by JSC to consider an objection on its jurisdiction is a violation of the right to fair administrative action of the objector**

*Justice Hellen Wasilwa filed a constitutional petition challenging the Judicial Service Commission's (JSC) handling of a complaint against her. The JSC initiated proceedings despite her objection that JSC lacked jurisdiction to challenge the validity of a judge's decision made in exercise of their judicial authority. JSC failed to consider her objection. The ELC held that the failure by the JSC to determine the threshold objections by the petitioner, amounted to violation of the right to fair administrative action guaranteed under article 47 of the Constitution and the Fair Administrative Action Act.*

Reported by John Ribia

***Constitutional Law*** – fundamental rights and freedoms – right to fair administrative action – objection to Judicial Service Commission's jurisdiction – failure of JSC to consider the objection - whether failure by the Judicial Service Commission to consider an objection on its jurisdiction to entertain a petition which challenged the validity of a decision of a judge exercising their judicial authority was a violation of the objector's right to fair administrative action – Constitution of Kenya, articles 25, 28, 47 and 160.

**Brief facts**

Justice Hellen Wasilwa filed a constitutional petition challenging the Judicial Service Commission's (JSC) handling of a complaint against her. The complaint stemmed from her 2022 ruling in Kericho ELRC Cause No. 10 of 2016, which nullified a land transfer linked to workers' dues. The JSC initiated proceedings despite her objection that JSC lacked jurisdiction to challenge the validity of a judge's decision made in exercise of their judicial authority. JSC failed to consider her objection. The petitioner alleged that failure to consider her objection was a violation of the right to fair administrative action, her rights to judicial independence, fair administrative action, and fair trial.

**Issues**

Whether failure by the Judicial Service Commission to consider an objection on its jurisdiction to entertain a petition which challenged the validity of a decision of a judge exercising their judicial authority was a violation of the objector's right to fair administrative action.

**Held**

1. The resolution by the JSC to entertain the complaint the judge was an administrative decision amenable to review under article 47 of the Constitution as read with the Fair Administrative Action Act. A Judge was immune as long as his or her conduct did not deliberately prevent parties in litigation from enjoying their rights as guaranteed by law.
2. The petitioner questioned the respondent's jurisdiction to entertain a petition which challenged the validity of a decision of a judge exercising their judicial authority. The record did not indicate how the respondent addressed the threshold jurisdictional, competence or foundational questions posed by the petitioner.
3. The failure by the respondent to consider and decide on (or disclose the reasons thereof) on the threshold challenges raised by the petitioner constituted a fundamental legal misstep not in tandem with the right to fair administrative action as contemplated by article 47 of the Constitution and the Fair Administrative Action Act. It was such a threshold decision by the respondent which should be



- subjected to judicial scrutiny and review, otherwise the court stood to usurp a jurisdiction of the trier of facts at the first instance, which mandate did not belong to it.
4. It was incumbent upon the respondent to address these questions at the first opportunity they were raised by the petitioner. The objections were in the nature of a preliminary objection going to jurisdiction.
  5. The respondent proceeded as if no threshold objections had been raised. The objections went to the question about whether the respondent had the jurisdiction to entertain the complaints. The respondent ought to have determined the threshold objection raised by the petitioner before proceeding to consider the substantive complaint.
  6. The failure by the respondent to consider and decide on (or disclose the reasons thereof) on the threshold challenges raised by the petitioner constituted a fundamental legal misstep not in tandem with the right to fair administrative action as contemplated by article 47 of the Constitution and the Fair Administrative Action Act.
  7. Such a threshold decision by the respondent which should be subjected to judicial scrutiny and review, otherwise the court stood to usurp a jurisdiction of trier of facts at the first instance, which mandate did not belong to it.

*Petition allowed.*

### **Orders**

- i. *Declaration issued that the failure by the respondent to determine the threshold objections by the petitioner, amounted to violation of the right to fair administrative action guaranteed under article 47 of the Constitution and the Fair Administrative Action Act.*
- ii. *The respondent was directed to consider and decide the threshold legal questions raised by the petitioner.*
- iii. *Each party was to bear its costs.*

### **Citations**

#### **Cases**

1. *Bellevue Development Company Ltd v Gikonyo & 3 others* (Petition 42 of 2018; [2020] KESC 43 (KLR)) — Explained
2. *Judicial Service Commission v Mbalu Mutava & another* (Civil Appeal 52 of 2014; [2015] KECA 741 (KLR)) — Explained
3. *Mboya & another v Judicial Service Commission & another; Rawal & 5 others* (Interested Parties) (Petition 204 & 218 of 2016 (Consolidated); [2020] KEHC 9225 (KLR)) — Explained
4. *Rai & 3 others v Rai & 4 others* (Civil Application 307 of 2003; [2007] KECA 21 (KLR)) — Explained
5. *Shollei v Judicial Service Commission & another* (Petition 34 of 2014; [2022] KESC 5 (KLR)) — Explained
6. *Mukisa Biscuit Manufacturing Co Ltd v Westend Distributors Ltd* ((1969) EA 696) — Explained

#### **Statutes**

1. *Constitution of Kenya* — article 1, 2, 3, 10, 20, 21, 22, 23, 24, 25, 28, 40, 41, 47, 50, 159, 160, 161, 162(2), 165, 168, 171, 72, 249, 258, 259 — Cited
2. *Employment Act* (cap 226) — In general — Cited
3. *Employment And Labour Relations Court Act* (cap 8E) — In general — Cited
4. *Fair Administrative Action Act* (cap 7L) — In general — Cited
5. *Judicial Service Act* (cap 8A) — In general — Cited

#### **Advocates**

*Ongoya & Wambola Advocates* for Petitioner

*Kemboi Chambers Advocates* for Interested Parties



## JUDGMENT

1. On January 18, 2022, Justice Hellen Wasilwa (the petitioner) delivered a ruling in Kericho ELRC Cause No 10 of 2016, KUDHEIHA v Management of Tea Hotel & 3 others in which she ordered:
  - a. An order of mandatory injunction is issued compelling the Chief Land Registrar, Kericho to cancel the illegal entries on LR No Kericho Municipality Block 4/295 measuring 5.831 acres.
  - b. The honourable court issues orders setting aside the purported sale and eventual transfer of LR No Kericho Municipality Block 4/295 to Ravji Devji Chhabhadia, Kanji Devji Chhabhadia, Chandrakant Devji Chhabhadia and Shashikant Kanjibhai Pindoriya.
  - e. The claimant is free to institute proper execution proceedings devoid of fraud after accounts are rendered by the auctioneer.
  - f. The costs of this application be borne by the claimants.
2. The firm of Kemboi Chambers Advocates, on behalf of former employees of Tea Hotel, Kericho (interested parties) and purchasers thereafter lodged a complaint with the Judicial Service Commission (the respondent) on 17 May 2022, accusing the petitioner of misconduct in the way she handled the proceedings before her. The firm requested that investigations be conducted with a view to have the petitioner removed from the office of Judge.
3. On October 5, 2022, the respondent wrote to the petitioner informing her that it had deliberated on the complaint, and requiring that she makes a response to the complaint within 21 days.
4. The petitioner wrote to the respondent on October 21, 2022, indicating that she had been away on official business and had only received the request for a response that same day.
5. The petitioner requested the respondent to grant her more time to respond because she would be travelling out of the country for an International Association of Women Judges Conference in Kampala, and would return on October 31, 2022, and further that she would need to call for the court file from Kericho Law Courts.
6. The petitioner requested the respondent to allow her until 21 November 2022 to respond. The petitioner responded to the complaint through a letter dated November 7, 2022.
7. On April 19, 2023, the respondent wrote another letter to the petitioner. The contents of the letter were not disclosed to the court.
8. The petitioner replied on May 2, 2023 to the respondent's letter dated April 19, 2023.
9. The respondent then formed a panel to review the complaint against the petitioner with the directions that the Panel hears the parties and make recommendations.
10. The panel set a hearing date of August 8, 2023, but the hearing was adjourned to September 12, 2023.
11. However, on September 12, 2023, the petitioner's advocate confirmed that she was ready for the hearing but also requested for an adjournment on the ground that the petitioner was out of the country and was unwell.



12. The advocate for the complainants opposed the application for adjournment but the respondent allowed the adjournment on condition that the petitioner met the costs. The hearing was rescheduled to September 26, 2023.
13. On this day, the complainants' case was taken and closed. The petitioner also testified after which she sought for an adjournment to call a witness. The hearing was adjourned to October 11, 2023 for further hearing and submissions.
14. On October 9, 2023, the petitioner's advocate wrote to the respondent requesting that the proceedings of October 11, 2023 be rescheduled because the petitioner was unwell.
15. The respondent indulged the petitioner, granted a last adjournment and set hearing for November 8, 2023. The respondent directed that the petitioner appear in person with an advocate of her choice if the advocate on record would not be available.
16. On October 27, 2023, the petitioner's advocate wrote to the respondent seeking another adjournment, and the reason was that the petitioner was unwell and would be travelling to India.
17. On November 8, 2023, the hearing could not proceed because the Petitioner's advocate had been taken ill and the hearing was pushed to 20 November 2023.
18. On November 14, 2023, the petitioner wrote to the respondent that her choice of advocate was the advocate on record and the advocate was the only one who could represent her.
19. The advocate on her part wrote to the respondent on November 16, 2023 seeking an adjournment of the hearing set for 20th november 2023 to 2024.
20. The respondent considered the requests and directed that the hearing proceed on November 21, 2023.
21. On November 21, 2023, the petitioner's advocate sent an advocate to hold her brief. The advocate informed the respondent that the advocate on record was unwell. The respondent adjourned the hearing to 10 January 2024. The parties were directed to file and exchange submissions.
22. On December 16, 2023, the petitioner lodged a petition with this court alleging that the proceedings before the respondent emanated from her exercise of judicial functions, and therefore her right as a judge to judicial independence were under threat (articles 25, 28, 41, 47, 50, 159(1), 160(5), 168 and 171(1) of the Constitution were cited).
23. The petitioner further contended that her rights to fair labour practices and fair administrative action as underscored by articles 41 and 47 of the Constitution had been jeopardised or were under jeopardy. Articles 25 and 50 of the Constitution were also pleaded.
24. The remedies sought by the petitioner were:
  - i. A declaration that the respondent lacks the legal authority to entertain a petition or complaint which challenges the validity of a decision of a judge exercising his or her judicial authority.
  - ii. A declaration that the respondent, by conducting proceedings impugning a decision that has been challenged to, and is pending in, a higher court violates the independence of the judiciary, abdicates its duty to promote and facilitate the independence of the judiciary and usurps the judicial authority vested in courts contrary to articles 1(3) and 159(1) and 171(1) of the Constitution.
  - iii. A declaration that the respondent, by subjecting the petitioner to proceedings on a complaint purely based on decisions made by her in lawful exercise of her judicial authority without any



evidence or allegation that she failed to exercise independence of mind, or her decisions were influenced by incapacity, incompetence or corruption acts ultra vires, article 168(1) of the Constitution of Kenya.

- iv. A declaration that the respondent, by subjecting the petitioner to proceedings on a complaint purely based on decisions made by her in exercise of her lawful judicial authority without any evidence or allegation that she failed to exercise independence of mind, or her decisions were influenced by incapacity, incompetence or corruption violates the immunity of the petitioner in respect of anything done or omitted to be done in good faith in lawful performance of a judicial function contrary to article 160(5) of the Constitution.
  - v. A declaration that the respondent, by subjecting the petitioner to proceedings on a complaint purely based on decisions made by her in her lawful exercise of her judicial authority and which is her duty without any evidence or allegation that she failed to exercise independence of mind, or her decisions were influenced by incapacity, incompetence or corruption denies, violates, infringes and threatens the petitioner's rights to fair labour practices and reasonable working under article 40 of the Constitution of Kenya.
  - vi. A declaration that the respondent, by subjecting the petitioner to proceedings on a complaint purely based on decisions made by her in her lawful exercise of her judicial authority without any evidence or allegation that she failed to exercise independence of mind, or her decisions were influenced by incapacity, incompetence or corruption, which complaint is not rationally connected to the purpose of article 168 of the Constitution, denies, violates, infringes and threatens the petitioner's right to fair administrative action which requires administrative action to be lawful, contrary to article 47 of the Constitution.
  - vii. A declaration that the respondent by curtailing the petitioner's advocate from cross-examining the complainant's witnesses on what is the most material issue in the matter, namely, what was res judicata in the subject decision, the respondent violated the petitioner's right to fair trial.
  - viii. A declaration that the respondent, by requiring the petitioner to file her written submission, then call her witness and highlight the submission violated on the same day denies, violates, infringes and threatens the petitioner's right to fair administrative action and the right to fair trial contrary to articles 47, 50 and 25 of the Constitution.
  - ix. A declaration that the respondent by making biased decisions and comments during its proceedings namely, changing the day of hearing without sufficient notice to the Petitioner, condemning the petitioner to pay costs of adjournment when she was legally out of the county, refusing to accommodate her to appear online during proceedings while entertaining the counsel for the complainants to appear online and being rude to the Petitioner denied, violated, infringed the rights to dignity, fair administrative action and fair trial contrary to articles 28, 47, 50 and 25 of the Constitution.
  - x. An order dismissing the proceedings in JSC Petition number 026 of 2022 with costs to the petitioner herein.
  - xi. Costs of this petition be awarded to the petitioner.
25. Filed together with the petition was a motion seeking interim injunctive reliefs which the court granted at the *ex-parte* stage on December 20, 2023, and confirmed on January 17, 2024 (the orders were extended from time to time pending the determination of this petition).



26. The respondent filed a notice of preliminary objection and grounds of opposition to the motion on December 20, 2023.
27. The interested parties filed replying affidavits in opposition to the petition and motion on January 19, 2024.
28. The petitioner filed a supplementary affidavit on February 2, 2024 and the respondent filed a replying affidavit in response to the petition on February 5, 2024.
29. The court determined the preliminary objection on May 13, 2024.
30. Consequently, the court gave directions on the hearing and determination of the petition on 13 May 2024.
31. As a result, the petitioner filed her submissions on July 29, 2024, and the respondent on September 16, 2024.
32. The interested parties did not file submissions.
33. The petitioner set out the Issues for adjudication as:
  - i. Whether the complaint/accusations against the petitioner to or by the JSC relate to a decision made by a judge in the exercise of her judicial authority?
  - ii. Whether the JSC's authority as provided for by the *Constitution* include the authority to review and determine the correctness of a decision of a court?
  - iii. Whether there was a breach of petitioner's rights in the proceedings?
  - iv. What are the appropriate reliefs.
34. The respondent identified the issues in dispute as:
  - i. Whether the respondent's role of investigating the complaint against the petitioner is *ultra vires* and a threat to the independence of the Judiciary?
  - ii. Whether the petitioner was accorded fair administrative action during the proceedings?
35. The court has considered the petition, affidavits and submissions.
36. The court perceives the singular issue for determination to be whether there was a fundamental procedural misstep *vis-a-vis* the mandate of the respondent in processing complaints for the removal of a judge.

The mandate of the Judicial Service Commission in processing complaints for removal of a judge: Was there a fundamental procedural misstep?
37. To contextualise the proceedings before the respondent, it is imperative to set out the complaint against the petitioner in extenso.
38. The complaint in material parts alleged:

RE: Complaint Against Hon Justice Hellen Wasilwa In Respect To Kericho Employment and Labour Relations Court Matter: ELRC Cause No 10 of 2016; *Kudbeiba v Management of Tea Hotel and 3 others*

The above matter refers,



We have been instructed by our clients; Former Employees of Tea Hotel (claimants) & Purchasesin respect to the case herein to address you tersely as follows:

That our client submits its complaint against Hon. Justice Hellen Wasilwa through this letter dated the May 17, 2022 where it has enumerated several misdeeds by the Hon. Judge and seeks that your good office does investigate the Honourable Hellen Wasilwa Judge's conduct and take the necessary steps.

On the April 3, 2019 the honourable court before Hon. Justice Monica Mbaru sitting in Nakuru Employment and Labour Relations Court delivered its judgement against the applicant with costs to the respondent's advocates in favour of claimant workers declared redundant by the applicant (Tea Hotel Limited) without a single pay.

The applicant (Tea Hotel Limited) had sued the respondents (Kudheihha and the purchasers) vide a series of applications therein claiming among other things fraudulent acquisition and sale by public auction on January 19, 2019 of its land parcel being LR No Kericho Municipality Block 4/295 that had been marked to be sold by agreement of the parties (Tea Hotel Limited) and KUDHEIHA Kericho Branch (Claimants workers representative) to enable payment of workers dues as calculated by both the employees union and employer being Tea Hotel Limited but the court dismissed the suits dated March 9, 2019 and December 16, 2019 since the sale was sanctioned by the applicant themselves to meet the cost of the workers dues being redundancy fees. Pension dues, salary arrears and other statutory deductions. The same is subject to an appeal.

In the judgement on the April 3, 2019, the Hon Judge Justice Monica Mbaru clearly indicated the sale of Kericho Municipality Block 2/295 by way of public auction was above board since the same was initiated by the applicant (Tea Hotel Limited) themselves to enable footing of workers dues amounting to Kenya Shillings 51,463,693.30/= up from 47,980,306.55 and 33,142,600 earlier agreed before the court ordered for parties further negotiations upon redundancy *vide* a letter dated March 19, 2018 (See Copy attached), at paragraph 4 of page 8 of the judgement (See Copy attached), the Honourable judge stated that :- "The title document now issued to the purchasers and which is the primary and prima facie document of title confirm the subject property and title to Land Parcel Kericho Municipality Block 4/295 was held by Brooke Bond until title transferred to the purchasers on December 19, 2019". This closed the impending dispute hence final payment of workers' dues.

The applicant in their application NYR 38 dated May 11, 2020 and NYR 52 filed by the Purchasers and as well claimants in contesting the applicant applications appealed to the Court of Appeal in Nyeri sitting in Nairobi where vide a ruling dated January 29, 2021 the said application was dismissed with costs in favour of the respondents (Claimants and the Purchasers) (See Copy attached).

On April 26, 2021 the applicant (Tea Hotel Limited) through its 3<sup>rd</sup> Counsel on record again shoved back to the same High Court (Employment and Labour Relations Court) before a new Judge Hon. Justice Hellen Wasilwa sitting in Nakuru replicating similar application and as well seeking similar orders already determined by Hon. Justice Monica Mbaru, and Hon. Justice Marete and same application determined before the court of appeal in Nyeri sitting in Nairobi prompting us to file a notice of preliminary objection that the court lacked jurisdiction, the matter was Res Judicata and should not be entertained by a Judge sitting in the same concurrent jurisdiction and determining a matter already determined by his colleague had direct replication that the Hon. Judge was appealing the decision of a fellow Judge.

The Judge later gave an adverse ruling dated January 19, 2022 contrary to his colleague Hon Monica Mbaru decision on April 13, 2019. (See Copies attached for the said rulings).

Our clients shudder with trepidation as to where the court found and/or overruled a fellow judge decision that pave way for the payment of workers dues on their final dues. It is a mystery to the claimant



workers for Hon. Judge failing to note that this was an employment matter and all the discussions arriving at the sale of Kericho Municipality Block4/295 was a decision arrived at by the workers and the employer (Tea Hotel Limited) and the decision of Hon. Justice Mbaru was consistent to the interest of workers, The employees' dues and statutory rights were calculated in concert between the claimants representatives and the employer (Tea Hotel Limited) and the mode of payments was arrived at as well as which property to sell being Kericho Municipality Block4/295 to save Kericho Municipality Block4/313 that was earlier marked for sale (See copies attached).

Both Hon Justice hellen wasilwa's rulings dated July 8, 2021 and January 19, 2021 was in the claimants' view aimed at aiding the respondent (Tea Hotel Limited) justify and illegal subversion of their rights since the matter had already been handled by Hon. Justice Monica Mbaru and the workers could not be Vexed Twice before the same court of concurrent jurisdiction over a matter handled in the same seat of justice. The honourable judge on his own frolic in order to defeat workers' rights and trash judicial precedents and being extraneous failed to deliver justice deserving to more than 78 former employees of Tea Hotel Limited who had worked tirelessly up-to retirement level with no pay others with accruing salary arrears, in aid of the applicant' case the Hon. Judge Hellen wasilwa was biased and denied the claimant workers justice.

The court bite its own jerry twice and failed to uphold the workers' rights on a matter already determined. It is a travesty of justice.

Furthermore the Hon. Judge did not consider the previous rulings delivered by Hon. Marete sitting in the same court, correspondences between the employer and the claimant workers, consents, judgement, lists of claimants members and how much was to be paid and the instruction from the firm of Orina then on record for the applicant to sell LR No Kericho Municipality Block 4/295 in order to save LR No Kericho Municipality Block 4/313 as agreed by the parties where Hon Justice Monica Mbaru at At paragraph 4 of page 8 of the judgement dated April 3, 2019 had protected the sale to uphold workers' rights and payments of their total claim. (See copy attached). The claimants had filed its exhibits which were relied on in ELC No 10 of 2016 including various rulings and how LR No Kericho Municipality Block 4/313 with a bad title and unrenewed lease was served in order to enable sale of LR No Kericho Municipality Block 4/295 which has a good title and the lease was renewed hence good for sale.

The Hon Judge's main aim despite knowing his jurisdictional mandate and having daringly handle land matters not with his purview aided the applicants (Tea Hotel Limited) and in doing so legitimized revocation of title in respect to land LR No Kericho Municipality Block 4/295 that was issued by the same court before Hon Justice Monica Mbaru vide orders dated November 4, 2019 and November 20, 2019 as per law required. It is shocking that the Hon. Court could fail to consider documents that were filed by the claimants but decided to practice travesty of justice. (See copies of Orders issues By Hon. Justice Monica Mbaru attached and the title documents including certificate of sale issued by the same court.)

The Hon Judge forcefully handled the Kericho file ELRC No 10 of 2016 despite our protest and despite a new Judge Hon Justice Makau being posted to handle Kericho Employment and Labour Relations Court matters. He choose to handle the matter by manipulation in order to enhance his underneath tendencies to subvert justice.

There is a litany of misconduct in the manner in which the Hon. Judge has conducted the matter herein and there is need that your good office does intervene and proceed to do investigations thereof with a view to taking the necessary action and also set the matter for hearing.

Hon Hellen Wasilwa conduct is unbecoming given the weighty nature of the matter and evidence placed before her that she chooses to neglect, our demand which we posit is immediate termination of



Hon Judge from continued sitting and eroding the image of the judiciary pending determination of the case herein and immediate investigation. Employees are now in agony based on his ruling.

The Honourable Judge respectively issued orders in vain in his ruling failing to note that the claimant members had been paid off their dues upon successful litigation before the same court and there is no possibility that they could get back again to court on another new claim. At page 64 paragraph 2 the Hon Judge noted that:

“The claimant is free to institute proper execution proceedings devoid of fraud after the accounts are rendered by the auctioneer.”

This is coming at a time when the workers had been paid off their claim and auction done within the limits of the law. A total travesty of justice.

It is our plea that the Hon. Judge conduct be relieved of his duties and be dismissed for her conduct unbecoming.

Yours faithfully,

Kemboi Chambers

39. Upon receipt of the complaint, the petitioner responded through a letter dated 7 November 2022 in which she stated:

.....  
.....

The complainants had an option to seek for review if indeed I had made a mistake on cancelling their sale. They had an opportunity to show that the sale was valid by producing any evidence they had before me. They chose not to.

The complainants have since filed an appeal before the Court of Appeal as per attached notice. It is my view that they are now seeking to prosecute their appeal through JSC which should not be the case. Since the matter is pending before the Court of Appeal, it would also be a miscarriage of justice for me to comment on the said matter further and I therefore rest my case and request the JSC to consider my response and disregard the complaints against me as mere witch hunt and clear me of the said complaints accordingly.

40. The petitioner made another response on May 2, 2023 wherein, she contended:

I wish to refer to my response to this matter dated November 7, 2022 which I wholly adopt as my evidence plus all the attachments thereto. I wish to also attach the ruling of the Court of Appeal on ELRC CC No E002/2022 on the same cause and state that the Petitioner has already appealed my ruling in ELRC Cause No 10 of 2016 and he is therefore proceeding to prosecute his appeal before the Court of Appeal and the JSC which is an abuse of the court process. (Exh 1) ....

I wish to reiterate that the proceedings of the court in Cause 10 of 2016 are *res ipsa loquuta* of what transpired before me and if per chance I made any error it was an error made in the course of my work which was made in good faith and I should therefore not be condemned due to such error as provided in law and as has been determined in various causes as exemplified hereunder.

1. *Apollo Mboya v JSC & another, Justice Kalpana Rawal & 4 Interested Parties* where it was held that: JSC (respondent) should avoid complaints which invite



it to analyse a judgment or ruling to determine alleged incompetence of the judge who authored the decision.

2. *Bellevue Development Company Ltd v Francis Gikonyo & 7 others* (2020) eKLR, the SCOK held that immunity of judges and judicial officers who discharge their functions in good faith should be upheld and if there are errors in the judgment or ruling an appeal or review suffices.
3. In *Jasbir Singh Rai & 3 others v Tanlocham Singh Rai & 4 others* (2007) eKLR that held that when a judge makes a wrong decision, it is described as a mistake of law and disciplinary proceedings should not be commenced against the judge or judicial officer simply because of the "mistake of law."
4. At 160(1) & (5) of the *Constitution* provides as follows;

160 Independence of the judiciary

1. In the exercise of judicial authority, the judiciary, as constituted by article 161 shall be subject only to this Constitution and law and shall not be subject to the control or direction of any person or authority.
5. A member of the judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.

The Bangalore principles on judicial conduct stresses the need for independent and impartial judiciaries where individual judicial officer or judge is able to discharge judicial functions independently and competently. The principles also encourage judiciaries to uphold judicial competence and diligence, promote judicial immunity as necessary, in instance of stable accountable and independent judiciaries.

My position is that I discharged my duty as a judge in good faith and the petitioner have already chosen to appeal the decision as per law and this petition should not be entertained by the Judicial Service Commission.

41. The petitioner in her 2 responses was raising threshold legal and competency foundational questions as to whether the respondent had the legal jurisdiction to entertain the complaint. In other words, the Petitioner was questioning or challenging the respondent's jurisdiction or legal competence to entertain the complaint or proceed it to a hearing.
42. The respondent set out how it processed the complaint in paragraphs 19, 20, 21, 22, 23, 38 and 39 of the replying affidavit thus:
  19. Where the Commission receives a complaint in the nature stipulated under article 168(4), it carries out a preliminary evaluation with a view to determining the admissibility or otherwise of the same. If in the opinion of the Commission the complaint does not raise reasonable and justifiable grounds for removal of a judge, the same is dismissed.
  20. If satisfied that the complaint discloses sufficient grounds, the Commission forwards the complaint to the judge requiring the judge to respond to the allegations made within a specified



period. Upon receipt of the judge's response, the Commission evaluates the complaint, the judge's response and any other relevant material, and dismisses the complaint if satisfied with the response.

21. Where the Commission is of the opinion that the judge has not exculpated themselves in the response, the Commission admits the complaint for oral hearing. The parties to the complaint are then served with hearing notices and requested to file and exchange any documents and statements to be relied upon by either of them at the hearing.
22. At the hearing of the complaint, parties prosecute their respective sides of the case and are granted their rights to an expeditious, efficient, lawful, reasonable and procedurally fair process, including representation by advocates of their choice.
23. Upon hearing of the matter, the Commission then makes a decision whether a ground for removal has been disclosed or not. If a ground has been disclosed, the complaint is forwarded to the President, who is required to appoint a Tribunal within 14 days under article 168(5) of the *Constitution*. Further, the President shall, within 14 days after receiving the petition, suspend the judge from office.
- .....
38. The petitioner eventually responded to the complaint vide a letter dated November 7, 2022. On 2<sup>nd</sup> May 2023, the petitioner herein wrote a further response to the petition in which she asserted that an appeal had been filed against her ruling and proceeded to forward the ruling of the Court of Appeal in ELRC No E022 of 2022. Further, she asserted judicial immunity with respect to her decision and proceeded to cite a number of judgments in support of her view .....
39. Her responses together with the complaint were tabled before the Commission and upon deliberation it was resolved that a Panel from amongst members of the Commission be set up to review the complaint, hear the parties and make a recommendation to the Commission.
43. The narration by the respondent suggests that the respondent may have considered the threshold questions or objections raised by the petitioner.
44. It is not open to debate that the resolution to entertain the complaint was an administrative decision amenable to review under article 47 of the *Constitution* as read with the *Fair Administrative Action Act*.
45. Courts have weighed in on the role of the respondent in the handling of a complaint against a judge of a superior court.
46. The overriding principle is that a Judge is immune as long as his or her conduct does not deliberately prevent parties in litigation from enjoying their rights as guaranteed by law.
47. The High Court considered the role of the respondent in *Mboya & another v Judicial Service Commission & another; Rawal and 5 others (Interested Parties)* (2020) KEHC 9225 (KLR), where it stated:

of the three sub-issues, the final one is whether the JSC can conduct a merit review of a judgment or ruling in order to determine whether there was misconduct on the part of a Judge or a Judicial Officer. The JSC appears to agree with Justices Ibrahim Ojwang and Njoki Ndung'u that it does not have powers to conduct a merit review of the decision of a Judge or Judicial Officer. I won't find any difficulty in agreeing with that position.



Whenever a party is aggrieved by the decision of a Judge or Judicial Officer the way to go is to file an appeal or seek review. This position of the law was clearly enunciated by Ibrahim SCJ, in *Yusuf Gitau Abdalla v Building Centre (K) Ltd & 4 others* [2014] eKLR as cited by Dr Mutunga in Salat case as follows:

...Courts of justice have the jurisdiction to do justice and not injustice. However, the law acknowledges that judges are human and are fallible hence the judicial remedies of appeal and review.

It cannot be said, as suggested by Justices Ojwang and Njoki Ndungu, that judgments and rulings are entirely a no-go-zone for the JSC. Nevertheless, the JSC should avoid complaints which invite it to analyse a judgment or ruling in order to determine alleged incompetence of the Judge or Judicial Officer who authored the decision...

It is appreciated that the JSC cannot block anybody from complaining about the merits of the decision of Judges and Judicial Officers. However, once the JSC determines that the complaint is about merits of the decision, it should drop such a complaint like a hot potato without even bothering to ask the Judge or Judicial Officer to respond to the complaint...

48. In *Judicial Service Commission v Mbalu Mutava & another* (2015) eKLR, the Court of Appeal (Ouko JA) rendered himself thus:

In considering the petition, the Commission conducts a preliminary inquiry to satisfy itself that the complaint is not frivolous, lacking in substance, unfounded or hypothetical. That it has at least some probative value. The inquiry is not intended to lead to a final decision but is designed only for receiving information for the purpose of a recommendation on which a subsequent and final decision may be found. While so engaged, the Commission does not conduct a formal hearing at which witnesses are called and cross-examined. The process merely seeks to determine if the petition discloses a prima facie ground or grounds to warrant the presentation of the petition to the President...

49. In *Bellevue Development Company Ltd v Gikonyo & 3 others* (2020) KESC 43 (KLR), the Supreme Court stated:

A Judge, in our view, thus remains unquestionably immune as long as he does not take actions that intentionally and plainly prevent litigants from enjoying their constitutional and statutory rights. The duty imposed on a Judge then, is only to recognize that his own decisions may sometimes be in error and to ensure that orders affecting important constitutional rights can be reviewed or appealed in another court. But the conduct of a Judge who acts *mala fides* or unlawfully may thus trigger proceedings before the Judicial Service Commission and may ultimately lead to his removal thus the need for extreme care in the enjoyment of immunity” .....

Suing a Judge or Judicial Officer for rendering an unfavourable decision rather than appeal or seek a review was in our opinion a misconception and a step in the wrong direction on the part of the petitioner. As a court, we are cognizant of the fact that at times litigants may feel aggrieved by some of the decisions that Judges and Judicial Officers make...

50. From the assertions, it emerges that the respondent considers both the factual and legal foundation of a petition at the first instance and decides as to whether it meets the constitutional threshold as set out in article 168 of the *Constitution*. At this threshold stage, the respondent does not call upon the judge complained against to make a response.



51. If the petition passes the initial threshold stage, the respondent invites the concerned judge to make a response. The respondent evaluates the response and decides whether to dismiss the complaint or not.
52. In this court's view, this stage is critical. It is critical because it gives the judge concerned an opportunity to raise any legal threshold questions for consideration by the respondent.
53. The petitioner herein, raised these legal threshold questions in her responses. These were that an appeal was pending before the Court of Appeal and that she was exercising or performing her judicial functions which could not be reviewed by the respondent.
54. The record placed before this court does not indicate how the Respondent addressed or determined the threshold jurisdictional, competence or foundational questions posed by the petitioner.
55. It was incumbent upon the respondent to address these questions at the first opportunity they were raised by the petitioner.
56. These objections were in the nature of a preliminary objection going to jurisdiction.
57. The respondent sits as a quasi-judicial tribunal when it sits to consider the removal from office of a judge.
58. In *Shollei v Judicial Service Commission & another* (Petition 34 of 2014) (2022) KESC 5(KLR) the Supreme Court gave guidelines which the respondent should consider and these included that respondent should comply with the procedure set out in article 47 of the Constitution and the Fair Administrative Action Act.
59. The respondent did not give the petitioner any response on her threshold objections or inform her how, when or whether the objections would be determined.
60. The respondent proceeded as if no threshold objections had been raised. These objections went to the question of whether the respondent had the jurisdiction to entertain the complaints.
61. In the celebrated case of *Mukisa Biscuit Manufacturing Co Ltd v Westend Distributors Ltd* (1969) EA 696, the Court of Appeal had this to say:

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 parties are bound by the contract giving rise to the suit to refer the dispute to arbitration.
62. In the same spirit the respondent ought to have determined the threshold objection raised by the petitioner before proceeding to consider the substantive complaint.
63. The failure by the respondent to consider and decide on (or disclose the reasons thereof) on the threshold challenges raised by the petitioner constituted a fundamental legal misstep not in tandem with the right to fair administrative action as contemplated by article 47 of the Constitution and the Fair Administrative Action Act.
64. It is such a threshold decision by the respondent which should be subjected to judicial scrutiny and review, otherwise the court stands to usurp a jurisdiction of trier of facts at the first instance, which mandate does not belong to it.



## **Conclusion and Orders**

65. The court has concluded that the process taken by the respondent was tainted by a fundamental legal misstep.
66. This therefore begs the question what would be the appropriate remedies or orders.
67. Considering that the proceedings before the respondent have not been concluded and in light of the above, the court orders:
- i. A declaration be and is hereby issued that the failure by the respondent to determine the threshold objections by the petitioner, amounts to violation of the right to fair administrative action guaranteed under article 47 of the Constitution of Kenya and the Fair Administrative Action Act.
  - ii. The respondent is directed to consider and decide the threshold legal questions raised by the petitioner.
68. Considering the nature of the relationship between the petitioner and the respondent, each party to bear own costs.

**DELIVERED, DATED and SIGNED IN NAIROBI ON THIS 7<sup>TH</sup> DAY of FEBRUARY 2025.**

**RADIDO STEPHEN, MCI Arb**

**JUDGE**

**CHRISTINE N. BAARI**

**JUDGE**

**DR. JACOB GAKERI**

**JUDGE**

Appearances

For Petitioner Ongoya & Wambola Advocates

For Respondent G & A Advocate, LLP

For Interested Parties Kemboi Chambers Advocates

Court Assistants Wangu Mugo

Esther Sakwanda

Mwakua Fred

