



**Watako v Judicial Service Commission; Chitembwe (Interested Party) (Petition E037 of 2022) [2022] KEELRC 13326 (KLR) (30 November 2022) (Ruling)**

Neutral citation: [2022] KEELRC 13326 (KLR)

**REPUBLIC OF KENYA  
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT KISUMU  
PETITION E037 OF 2022**

**S RADIDO, J**

**NOVEMBER 30, 2022**

**IN THE MATTER OF THE CONSTITUTION OF KENYA**

**AND**

**IN THE MATTER OF REMOVAL FROM OFFICE OF THE  
HONOURABLE JUSTICE SAID JUMA CHITEMBWE**

**AND**

**IN THE MATTER OF ARTICLES 27, 31, 47, 50,  
166, 168, 171 AND 172 OF THE CONSTITUTION**

**AND**

**IN THE MATTER OF THE JUDICIAL SERVICE COMMISSION**

**AND**

**IN THE MATTER OF JUDICIAL DUTY, THE CONSTITUTION AND THE LAW**

**AND**

**IN THE MATTER OF THE JUDICIAL SERVICE  
(CODE OF CONDUCT AND ETHICS) REGULATION**

**BETWEEN**

**KASSIM WATAKO ..... PETITIONER**

**AND**

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

**AND**

**SAID JUMA CHITEMBWE ..... INTERESTED PARTY**



## RULING

1. Kassim Watako (the petitioner) instituted this petition against the Judicial Service Commission (the commission), alleging that the removal proceedings against Hon Justice Said Juma Chitembwe (the interested party) were in violation of the Constitution and violated the interested party's rights.
2. Filed with the petition was a motion under a certificate of urgency seeking orders, including an order restraining the tribunal formed to inquire into the question of the removal of the interested party from continuing with its work.
3. When the file was placed before the court on 31 August 2022, it directed the petitioner to serve the commission and the interested party.
4. Upon service, the commission filed a notice of preliminary objection contending:
  - (1) That the petition and application, both dated August 29, 2022 as drawn and instituted herein, are in substance an abuse of the court's process and ought to be struck out in limine for the reasons that:
    - (a) the substance thereof, namely the removal of the judge from office in accordance with article 168 of the Constitution involve a judge (the interested party herein) in his personal capacity. The interested party is capable of instituting the present proceedings in his own name and it has not been demonstrated that he cannot act in his own name in such a personal matter.
    - (b) Therefore, the petitioner not only lacks *locus standi* to institute the instant proceedings but has also failed to demonstrate/disclose any personal interest therein.
    - (c) Consequently, the proceedings offend the spirit of article 22(1) & (2) of the Constitution as read with rule 4(1) & (2) of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013 (hereinafter the Mutunga Rules 2013).
  - (2) That without prejudice to the foregoing, the petition and application both dated August 29, 2022 as drawn and instituted herein are in substance an abuse of the court process and an attempt at forum shopping because:
    - (a) All the relevant parties including the respondent, the interested party and the tribunal conducting the investigations into the conduct of the interested party (which notably is not a party despite the petitioner seeking orders against it) are ordinarily based and sitting in Nairobi. Thus, the court at Nairobi would be best placed to hear and determine the instant petition.
    - (b) The tribunal investigating the conduct of the interested party and the Attorney General (against whom orders are sought) have not been joined to these proceedings.
    - (c) It is therefore not only unreasonable but also in contravention of rule 8(1) of the Mutunga Rules, 2013 for the petitioner to take the determination thereof outside the geographical jurisdiction of the High Court in Nairobi.
  - (3) That further and without prejudice to the foregoing, we invite this court to note that the petition and application both dated August 29, 2022 as drawn and instituted herein are an



abuse of the court's process and an attempt at reviving issue raised in similar proceedings because:

- (a) The interested party instituted similar proceedings before the High Court at Nairobi *vide* Constitutional Petition No E511 of 2021: Hon Justice Said Chitembwe v Judicial Service Commission & 5 others. The said party also sought interim relief to stop the respondent herein from considering the petitions for his removal from office but withdrew the same *vide* notice dated February 24, 2022 after failing to get the interim reliefs.
  - (b) Therefore, the interested party ought to be estopped from seeking to revive similar issues for determination either directly or through a third party (the petitioner herein) since the issue of his removal from office is currently before the tribunal investigating his conduct.
- (4) That further in line with paragraph 3 above, we invite this court to note that the petition and application both dated August 29, 2022 as drawn and instituted herein are incompetent, premature for determination by this honourable court and fatally defective because:
- (a) The interested party herein participated in the proceedings before the High Court at Nairobi in his personal capacity and is doing the same before the tribunal investigating his conduct.
  - (b) Therefore, since the issue is currently before a competent tribunal, the proceedings before this court are moot and unripe for determination by the court till either:
    - (i) The tribunal finalises its proceedings and makes its recommendations in accordance with article 168(7)(b) of the Constitution after which the interested party would be free to seek redress at the Supreme Court in accordance with article 168(8) of the Constitution; or
    - (ii) The interested party approaches the High Court in Nairobi under its supervisory jurisdiction in accordance with article 165(6) of the Constitution.
- (5) That based on the aforesaid reasons, the jurisdiction of this honourable court has been erroneously invoked.
- (6) That in the premises, the petition and application both dated August 29, 2022 are not properly before this honourable court and as such this honourable court should down its tools.
5. The commission also filed a replying affidavit sworn by its secretary on 19 September 2022 (the petitioner filed a further affidavit on 28 October 2022).
  6. Pursuant to directions issued on 4 October 2022, the commission filed its submissions on the preliminary objection on 14 October 2022 and the petitioner on 17 November 2022.
  7. The court has considered the record, notice of preliminary objection and submissions and makes the following findings.
  8. One, the commission resolved that a petition be submitted to the President to appoint a tribunal to investigate the question of removal of the interested party from the office of judge on 27 April 2022.
  9. The commission's constitutional role ceased at that point in time. The interested party participated in those proceedings and was thus capable of raising complaints on alleged breach or violation of his constitutional rights at the time.



10. Two, the President, upon receipt of the petition, appointed a tribunal as demanded by the constitution to investigate the conduct of the interested party.
11. Three, the tribunal is a distinct body from the commission, and it would be legally reckless of this court to intervene or interfere with its proceedings in a suit where it and or the Honourable Attorney General have not been made parties.
12. Four, the legal theatre where the proceedings sought to be stopped took place in Nairobi.
13. Although the petitioner has indicated in his affidavits that he has addresses in Kitale and Kakamega, he should have filed the proceedings in Nairobi.
14. Five, the assertions advanced by the petitioner should have properly formed the interested party's defence before the commission and tribunal.
15. For the above reasons, the court finds the petition an abuse of the court process, and it is hereby dismissed with costs to the respondent.

**DELIVERED THROUGH MICROSOFT TEAMS, DATED AND SIGNED IN KISUMU ON THIS 30TH DAY OF NOVEMBER 2022.**

**RADIDO STEPHEN, MCIARB**

**JUDGE**

**Appearances**

For Petitioner Okoth & Co. Advocates

For Respondent Muma & Kanjama Advocates

Court Assistant Chrispo Aura

