**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 88 OF 2019**

***(Before Hon. Lady Justice Maureen Onyango)***

**HON. MR. JUSTICE D. K. NJAGI MARETE** **CLAIMANT**

***VERSUS***

**JUDICIAL SERVICE COMMISSION** **1ST RESPONDENT**

**THE TRIBUNAL TO INVESTIGATE THE CONDUCT OF THE**

**HON. MR. JUSTICE D. K. NJAGI MARETE PROPOSED** **2ND RESPONDENT**

**AND**

**KENYA JUDGES AND MAGISTRATES ASSOCIATION PROPOSED INTERESTED PARTY**

**RULING**

By an application made through a motion dated 26th May 2020 and filed (date stamped by the court) on 8th June 2020 (the **Application**) the Petitioner/Applicant therein seeks the following orders –

1. Spent

2. That the Proposed 2 Respondent and Interested Party be joined in these proceedings as the 2nd Respondent and Interested Party respectively;

3. That there be a stay of proceedings at the Proposed 2 Respondent scheduled for 4 June, 2020 pending the hearing and determination of this application

4. That there be a stay of proceedings at the Proposed 2 Respondent pending the hearing and determination of this Petition;

5. That in the alternative, this Court do make such other and/or further interlocutory orders and/or directions as it may be, in the circumstances of this matter deem just, necessary and expedient for the hearing and determination of this Application;

6. That the costs of this Application be provided for.

The Application is made under Section 12(3)(1) of the Employment and Labour Relations Court Act, Articles 41(1), 47, 50, 160(5) and 165(6) and (7) of the Constitution 2010 and all other enabling provisions of the Laws of Kenya. The grounds on the face of the Application and the supporting affidavit of GITOBU IMANYARA, Counsel for the applicant, raise the following grounds –

i. That following the appointment of a tribunal to investigate the conduct of the applicant by His Excellency the President of the Republic of Kenya pursuant to Article 168(5) of the Constitution of Kenya 2010, the Tribunal has scheduled the hearing of the matter on 4th June 2020, having served notice of the same upon the applicant on 26th May 2020.

ii. That the Tribunal, who is the Proposed 2nd Respondent intends to rely on a draft complaint manual whose copy has never been availed to the applicant despite repeated requests.

iii. That the manual has not gone through procedures of adoption under the Statutory Instruments Act and as such cannot be a legal document upon which disciplinary hearing can be premised by the Proposed 2nd Respondent.

iv. Further, that the Respondent has failed to enact Regulations pursuant to **Section 47(2)(c)** of the Judicial Service Act, despite recommendations by the Tribunal to investigate the conduct of the Honourable Mr. Justice (Prof.) Jackton B. Ojwang, Judge of the Supreme Court of Kenya.

v. It is further stated that the determination of the proposed 2nd Respondent has far reaching implications on all pending and future tribunals established pursuant to Article 168(5) of the Constitution of Kenya 2010 and that this being the first time the issue is coming up for determination by the Judiciary, it is in the interest of justice to stay the hearing by the proposed 2nd Respondent, pending determination of the application herein and the petition.

vi. That the blatant failure and/or refusal by the Respondent to enact the said Regulations offends the principles of procedural fairness, fair administrative action and essentially tramples on the Applicant's constitutional rights.

vii. That the delay by the Respondent in enacting the Regulations impedes the Applicant's ability to carry out his judicial functions during the pendency of these investigations and has compromised his judicial independence contrary to Article 160 of the Constitution.

viii. That the delay by the Respondent has rendered the complaint against the Applicant a tool of intimidation and control of the Judge thus undermining the independence of the Applicant and the Judiciary.

ix. That it is the Applicant's contention that the allegations that the Applicant in the exercise of his judicial authority was bound by decisions of judges of coordinate jurisdiction is a legal fiction not based on any provision of the constitution, statutory law, precedent or judicial code of conduct and cannot therefore be a basis for recommending the setting up of the Proposed 2nd Respondent to investigate a Judge.

x. That the resultant effect of the delay and/or blatant failure to enact the Regulations breaches, contravenes and/or threatens the provisions of Articles 168(1) and 172(1) of the Constitution which require the Respondent to promote and facilitate the independence and accountability of the Judiciary; and the efficient, effective and transparent administration of justice.

xi. That the actions of the 1st Respondent contravene the National Values and Principles of governance as espoused in Article 10 of the Constitution.

The 1st Respondent filed grounds of opposition to the application as follows –

1. The motion is fatally defective, bad in law and an abuse of the process of this Court;

2. The motion is without merit;

3. The motion has been overtaken by events and is res judicata;

4. The Petitioner/Applicant is guilty of inordinate delay;

5. The 1st Respondent is *functus officio*;

6. The Petitioner/Applicant has failed to satisfy the grounds for stay of proceedings before the Tribunal.

The Proposed 2nd Interested Party filed a replying affidavit sworn on 19th June, 2020 by Josiah Musili, Joint Secretary to the Proposed 2nd Respondent (the **Replying Affidavit**). Therein, he deposes that upon appointment, the Proposed 2nd Respondent (the **Tribunal**) set out its procedures and schedules on conducting investigations and hearing in consultation with the three Judges whose conduct it was established to investigate among them the applicant. That during the Tribunal's pre-trial conference on 26th November, 2019, the Applicant was represented by his Counsel on record when directions were given on hearing from February 2020, with the concurrence of Applicant's Counsel.

It was the deponent's deposition that at the pre-trial, Counsel for the Applicant raised various issues including the draft complaint manual and the enactment of regulations by the Judicial Service Commission which issues were comprehensively addressed by the Tribunal at the pre-trial as is evident from the Hansard attached to the application at page 88 of the application. The Tribunal sat on various dates including 21st January, 12th February, 17th February and 16th March 2020 with the Petitioner and his Counsel in an attempt to have the matter heard in vain.

The deponent further deposed that the Tribunal set the matter for hearing and due to the prevailing circumstances brought about by COVID 19 pandemic asked Counsel for the Applicant to confirm attendance by either physical appearance or virtually. By letters dated 28th May 2020 and 2nd June 2020 Counsel for the Applicant informed the Tribunal that it would seek an adjournment on 4th June 2020 as the Applicant was locked out of Nairobi due to the lockdown yet his personal attendance was necessary.

It was the deponent's deposition that on 4th June, 2020, the Petitioner's Counsel's brief was held by a Mr. Ratemo when the matter was adjourned and fresh hearing dates fixed for 4 days starting 29th June, 2020. That the Tribunal categorically noted that the matter had been inordinately delayed by Counsel for the Applicant as this was the sixth time the matter had been fixed for hearing.

The deponent deposed that from the foregoing, it is clear that the Application herein is a further attempt to scuttle the hearing. That it is in the interest of justice that the court declines the application as the same was brought in bad faith. That the Petitioner is guilty of laches in commencing these proceedings against the Tribunal as the Tribunal was appointed on 31st May, 2019, a week after the filing of the Petition and the first application and has no justifiable reason for filing the instant application after 1 year.

He deposed that the Petition does not disclose any cause of action

as against the Tribunal as the petitioner has not set out any violations or sought any reliefs against the Tribunal either in its Application or the Petition to warrant joinder of the Tribunal as a party in these proceedings.

Further, he deposed that the Respondent having submitted the petition to the President and the President having appointed the Tribunal it is *functus officio*. That the Tribunal is well seized of the matter and the documents sought and matters raised by the Petitioner in his application and Petition are beyond the scope of the Tribunal as they rest squarely with the Respondent.

The issues being raised by the Respondent are legal issues which can be substantively submitted to the Tribunal during hearing. Further, the order seeking stay of the proceedings of the Tribunal in the Application was sought in the same proceedings through the Petitioner's Application dated 23rd May 2019, and was heard on merit by this Court and dismissed. As such, the Application is *res judicata.*

It was the deponent's deposition that the Application is not in the public interest as the delay in the hearing of the petition at the Tribunal goes against effective use of public funds as the same will cost the public due allowances for Tribunal members and costs of running the Tribunal interalia.

**Submissions**

The application was heard on 26th June 2020. There was no appearance for the Proposed Interested Party who has never entered appearance in the matter.

Mr. Mungu Counsel appearing for the Petitioner/Applicant relied on the grounds on the face of the Application and the Supporting Affidavit. He submitted that the parties proposed to be joined in the petition are essential parties. He submitted that the petition raises grave issues against the Respondent. That it is the flawed procedure by the Respondent that the Tribunal is born of. That at the time of filing, the Tribunal had not been established. Had it been in place, it would have been a party. Counsel submitted further that one of the grounds for not granting the orders in the first application was that the Tribunal was not a party. Now that it is constituted, the circumstances have changed. The Tribunal is the ultimate actor in the process so that if the Petitioner is successful, the Tribunal will have to fold up as any decision of the Court will have to be implemented by the Tribunal.

He submitted that in the event of the Petition succeeding, the Petitioner would have to initiate other proceedings to implement the Court's decisions if the Tribunal is not joined. The Tribunal draws its mandate from the Constitution and is independent. It is not automatic that it would be bound by the decision.

On the contention by the Respondents, Counsel submitted that two prayers are sought against the Tribunal and the basis of setting up the Tribunal is the foundation of the proceedings. He submitted that the interim orders were thus sought on the following grounds:

> i) If the proceedings are not halted, the Petitioner will have to go through two processes that are related. This will be very expensive for the Petitioner who technically has no job and has to fund the processes.
>
> ii) Upholding the dignity of this Court, if the High Court is the only body trying the issues raised and its decisions are the only ones then that would be the basis of upholding the Court's dignity. The tribunal proceedings would only lead to two conflicting decisions and would raise the issue of *sub judice* when the High Court is superior. Further that the Tribunal is not free. Both members and premises of the Tribunal are being paid for. It would mean that there are high costs. Halting the process would stop unnecessary expenditure.
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> iii) Interest of justice must be upheld. The Petitioner moved this Court before the Tribunal was set up. He has raised serious issues. The Tribunal is not tied to rules of Court. There is every chance that the Tribunal would conclude before the petition and render it nugatory.

With respect to the grounds of opposition filed by the Respondent, Counsel submitted that the Respondent's contention of waste of judicial time, the Petitioner submitted that such position cannot be made by a party who is sought to be joined. That hearings of cases are controlled by vacation, competing litigant, COVID – 19 and understaffing of Court. All of which are relevant factors supporting the Petitioner's contention that no time has been wasted.

Mr Mungu submitted that Counsel for the Tribunal has informed the Court of the proceedings of the Tribunal which show that the Tribunal is ready to conclude the Petitioner without consideration of what the Petitioner is going through.

With respect to the ground that the Tribunal is *functus officio*, Counsel submitted that the Tribunal and JSC are joined at the hip. He further

submitted that the issues being raised are issues of law. The Tribunal's jurisdiction is very narrow and cannot capture what is being complained of.

Counsel further submitted that *res judicata* is a legal prayer that applies to suits and not applications and that making interim applications within a suit can never be *res judicata.* He submitted that an application can be made at any time and as many times depending on the prevailing circumstances. The circumstances have since changed.

He submitted that if the Court joins the new party, it ought to grant the interim orders prayed for.

Mr. Mungu also submitted that while it is argued by the Respondents that time and money dictates that the Tribunal proceeds quickly, the contention is however asking that the Court sacrifices justice at the altar of expediency so that justice must prevail over money audits.

In conclusion, Counsel prayed that the Court syncs its proceedings with the Tribunal by setting timelines with the Tribunal.

Mr. Wamaasa, Counsel for the Respondent relied on grounds of opposition filed on behalf of the respondent to oppose the Application. He submitted that the application has been brought with inordinate delay and that in any event, a similar application was dismissed on 12$^{th}$ June 2019. He submitted that apart from failure to join the Tribunal, this Court held that the Petitioner had not established any violation of his constitutional rights.

Mr. Wamaasa further submitted that the circumstances have not changed. The Petitioner has not stated how any of his rights have been violated and the only circumstance that changed is the establishment of the Tribunal. By the time of the Ruling on the first application on 8$^{th}$ June 2019, the Tribunal had been established. He submitted that the Petitioner being a Judge ought to have known these circumstances and should have immediately moved to file the Application.

It was Counsel's submission that the application lacks merit and is an abuse of the process of the Court. The Petitioner is also guilty of inordinate delay. Since Counsel for the Petitioner submitted that the Tribunal is an independent body, the Petitioner should thus be comfortable with the investigation by the Tribunal.

Ms. Mbilo, Counsel for the Tribunal opposed the Application and relied on the Replying affidavit and Grounds of opposition filed on 23$^{rd}$ June, 2019. She submitted on the limited jurisdiction of this Court in light of the process provided for under Article 161 of the Constitution with respect to the removal of a Judge.

Counsel submitted that the Petitioner has failed in the Application and Petition to show how the Respondent and the Tribunal have violated his rights. That as such, the Court lacks jurisdiction to determine this matter. Further, that the Application is premature as the process of the Tribunal is on-going and the Petitioner has reprieve to the Supreme Court if he has any grievance.

With respect to the issue of *res judicata*, Counsel mirrored the submissions by Counsel for the Respondent in this regard that circumstances have not changed, as the Tribunal has not been joined and nothing has changed that would warrant orders being granted.

Counsel submitted that an order for joinder is not as of right, is discretionary and sufficient grounds must be laid before the Court. The Tribunal has not yet handled the matter. There is no fear expressed by the Petitioner that the Tribunal will violate his rights. It would be in the interests of justice that the Tribunal is allowed to conclude the matter.

Ms. Mbilo submitted that the Petitioner has to demonstrate that he will suffer irreparable loss. Petitioner is still on suspension earning half salary. If he is successful, he would be reinstated. The balance of convenience thus tilts in favour of denying the orders. Since public interest overrides individual interest, it is in the public interest to hear the suit of the Tribunal. The Petitioner stands to suffer no loss. She submitted that the orders of stay should thus not be granted. Counsel further submitted that the Application is an afterthought and the Petitioner is guilty of latches.

Ms. Mbilo further submitted that the Application is brought in bad faith as the Tribunal was set up by Gazette Notice of 4$^{th}$ June, 2019. The Petitioner was represented by his Advocate on 4$^{th}$ June, 2020 at the Tribunal and the Advocate agreed with the Tribunal's hearing date and did not disclose to the Tribunal that there was a case. The Petitioner is as such guilty of non-disclosure.

Counsel submitted that the Petitioner served the Application on 10$^{th}$ June, 2020. It has not been explained why the application was not brought earlier. The Petitioner stated at the Tribunal hearing that there would be no further adjournment. She submitted that none of the orders sought in the application touch on constitutional violations by the Tribunal. The Tribunal is being joined as a Respondent, not Interested Party. She thus prayed for dismissal of the Application.

In a brief rejoinder, Mr. Mungu submitted that it was not enough for the Respondent to say the Application is bad in law, defective or an abuse of Court process. These are contentions that can only be drawn from facts and no facts were presented by Counsel for the Respondent. There was no replying affidavit upon which these conclusions can be drawn.

Counsel submitted that stay of proceedings is statutory, whereas interim injunction is a common law principle. Stay of proceedings is spelt out while an injunction is equitable.

He reiterated that *res judicata* is not applicable to applications. Further, he submitted that orders need not be sought in the Petition for a necessary party as the Tribunal is part of the system being challenged.

In conclusion, he submitted that the process of the Respondent in making recommendations is what is in question and no ruling has been made that the petition does not disclose any cause of action.

**Determination**

I have considered the Application, the Supporting Affidavit and the

authorities filed by the Petitioner, the Grounds of Opposition filed by the Respondent and the Replying Affidavit filed by the Tribunal. Ms. Mbilo for the Tribunal alluded to grounds of opposition dated 17th June, 2019 which are not in the Court file. I have also considered the submissions made by the respective parties with the exception of the Proposed Interested Party which has never entered appearance. In my view, the issues for determination arising are:-

1. Whether the Application filed by the Petitioner is *res judicata*

2. Whether the prayer for joinder of the Proposed 2nd Respondent and the Proposed Interested Party is merited

3. Whether the Petitioner has established a prima facie case

4. Whether the Petitioner is entitled to the orders sought

The Respondent and the Proposed 2nd Respondent have both contended that the Application is *res judicata* on the grounds that the prayers sought for stay of the proceedings of the Proposed 2nd Respondent had already been determined by this Court in its Ruling delivered on 12th June, 2019. Counsel for the Petitioner on the other hand submitted that the principle of res judicata only applies to suits and not applications and that making of interim applications within a suit can never be *res judicata* as they can be made at any time and as many times dependent on the prevailing circumstances.

**Black's Law Dictionary, 10th Edition** at page 1504 provides a translation of res judicata as "a thing already adjudicated" it goes ahead to define the term in the legal context as:-

> "*An issue that has been definitively settled by judicial decision"*

The doctrine originates from the policy "*that parties to a judicial decision should not afterwards be allowed to re-litigate the same question*" [see ***Crown Estate Commissioners v Dorset County Council [1990]1 ALL ER 23*** ]. It acts as a bar to foreclose matters already litigated upon and determined from being revived and re-litigated.

**Section 7** of the Civil Procedure Act, 2010 provides a statutory underpinning of the doctrine providing that:-

> "*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 any 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 of 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.*
>
> *Explanation (4) – Any matter which might and ought to have been made ground of defence of attack in such a former suit shall be deemed to have been a matter directly and substantially in issue in such suit."*

While I would appreciate Counsel for the Petitioner's contention that *res judicata* only applies to suits and not applications, the provision also envisions any "*issue*". In my view, an application would be deemed to fall under "*issue*" so that applications in a suit may be barred once they have been litigated upon. I find credence in this view from the holding in ***UHURU HIGHWAY DEVELOPMENT LTD. v CENTRAL BANK OF KENYA & OTHERS 1996 eKLR*** where the Court of Appeal was met with the question of whether *res judicata* applied to applications heard and determined in the same suit. Therein it was held:-

> "*There must be an end to applications of similar nature, that is to say further, widen principles of res – judicata apply to applications within the suit. If that was not the intention, we can imagine that the Courts could and would be inundated by new applications filed after the original one was dismissed. There must be an end to interlocutory applications as much as there ought to be an end to litigation. It is this precise problem that Section 89 of our Civil Procedure Act caters for."*

Ringera J. (as he then was) similarly addressed the issue in the case of ***KANORERO RIVER FARM LTD & OTHERS V. NATIONAL BANK OF KENYA LTD H.C.C.C NO 699 OF 2001 (NBI)*** where he held that:

> "*As I understand the law, the doctrine of res – judicata applies to both suits and applications, whether they be final or interlocutory. Indeed Section 2 of the Civil Procedure Act defines a suit to mean any civil proceeding commenced in any manner prescribed. And prescribed is defined by rules. Applications for temporary injunction are prescribed for by Order 39 of the Civil Procedure Rules. It follows that the determination of such an application by a Court of competent jurisdiction would in appropriate circumstances operate as a plea in bar called res – judicata."*

While the decisions cited above were made in reference to provisions of the Civil Procedure Act prior to its review in 2010, the principle still

remains applicable and has been applied in various Courts. In a more recent decision my brother **Olao. J**, placed reliance on the findings of the Court of Appeal and **Ringera J**. in the case of ***Michael Wafula Khaemba v Patrick Chepkondoli Mustuni; Ex parte Nicholas Wanyonyi Wafula [2020] eKLR*** where he held that:-

> "*That decision has been followed by superior Courts in this country and whereas **RINGERA J** (as he then was) was dealing with an application for injunction, there is no doubt that the arguments advanced apply with equal force to any other applications which are equally barred by the principle of res – judicata. It is clear therefore that the application seeking to substitute the deceased with the Applicant, having been previously heard and determined by this Court, cannot again be canvassed."*

As it is determined that an application may be found to be res judicata, I will now to proceed to consider whether the instant Application is indeed *res judicata*.

The Petitioner filed a notice of motion application on 23rd May 2019 seeking orders that:-

> *1. The application be certified urgent and heard ex-parte in the first instance.*
>
> *2. That this Court be pleased to issue an injunction directing the Chairman, the Secretary or any other person acting on behalf of the Judicial Service Commission or otherwise howsoever from petitioning His Excellency the President of the Republic of Kenya pursuant to Article 168(5) of the Constitution recommending the setting up of a Tribunal to investigate the Petitioner of the Constitution pending the hearing and final determination of this Application and the Petition or until timber orders of this Court;*
>
> *3. This Court be further pleased to prohibit a Tribunal established to investigate the Hon Mr. Justice D.K. Njagi Marete, if already established, from proceeding with such investigation pending the hearing and final determination of this Application and the Petition or until further orders of this Court.*

In a Ruling delivered on 12th June, 2020 this Court dismissed the said application. Therein, this Court found that Article 168 of the Constitution ousts the jurisdiction of the High Court and by extension this Court, from determining the merits of the removal of a Judge and that the Court may only intervene where there is violation of the fundamental rights and freedoms of the Judge in the process of considering a petition. Further, the Petitioner in the said application did not complain of any breach of his rights and fundamental freedoms under the Bill of Rights. This Court also found that under Article 168 of the Constitution, the Respondent is not required to make any decision other than satisfying itself that the petition against the Judge does not disclose a ground for removal. This Court found that the Judicial Service Act only contains the procedure for the tribunal appointed to investigate the conduct of a Judge but does not contain any prescription for the procedure applicable before the tribunal is appointed. That having finalised its mandate under Article 168, the Respondent is *functus officio*. It has no further role in the matter. What remains is for the President to appoint a tribunal. In conclusion, this Court found the Petitioner's second prayer can only be made against either the tribunal or the Attorney General as the Respondent has no control over the same. Consequently, the court dismissed the application as the Petitioner had failed to establish a prima facie case.

In the present Application, (the prayers have been set out hereinabove) the Petitioner seeks joinder of the Tribunal as a 2 nd Respondent and the Kenya Judges & Magistrates Association as an Interested party. It also seeks stay of the proceedings of the Tribunal pending interparties hearing of the present Application and stay of proceedings of the Tribunal pending hearing and determination of the Petition.

The present application is premised heavily on the contention that the Respondent intends to rely on a draft complaint manual whose copy was never availed to the Petitioner and the failure of the Judicial Service Commission to enact regulations pursuant to **Section 47(2) (c)** of the Judicial Service Act. Both issues were addressed by the Tribunal as currently constituted in their findings titled – **REPORT AND RECOMMENDATION OF THE INVESTIGATION INTO THE CONDUCT OF HON. MR. JUSTICE PROF. JACKTON B. OJWANG**, **JUDGE OF THE SUPREME COURT OF KENYA.** The Tribunal recommended to the Respondent to enact the Regulations which the Respondent has not. It is the Petitioner's contention that failure of the Respondent to enact these regulations not only offends the principals of procedural fairness but also impedes the Applicant's ability to carry out his judicial functions during the pendency of the Tribunal's investigations and has compromised his judicial independence.

From a cursory reading of prayer 3 of the Application filed on 23rd May, 2019 (the "**First Application**") it is clear that prayer 2 and 3 of the instant Application are similar in nature, the only difference being that at the time of the filing of the First Application, the Tribunal had not been constituted. While the grounds of the two applications are apparently different, the prayers for stay of the proceedings in both applications have the net effect of staying the proceedings of the Tribunal. This in my view renders the application in terms of prayer 3 barred by *res judicata* and thus fails.

In light of this finding, I will now proceed to determine whether the Application for joinder of the Tribunal and the Proposed Interested Party to the suit is merited as this is a prayer not previously determined by this Court.

The principles applied by Courts in the determination of applications for joinder of parties, are set out both by statute and case law. **Order 1 Rule 10 (2)** of the Civil Procedure Rules provides for a party to be enjoined in a suit as a necessary party as follows:

> "*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 to the court to be just, order that the name of any party improperly joined, whether as plaintiff or defendant, be struck out, and that the name of any person who ought to have been joined, whether as plaintiff or defendant, or whose presence before the court may be necessary in order to enable the court effectually and completely to adjudicate upon and settle all questions involved in the suit, be added."*

The principles objectives for joinder are enunciated in the case of **Joseph Njau Kingori versus Robert Maina Chege & 3 others [2002]**

**eKLR** contained in the Petitioner's List of Authorities that;

> *"… that the guiding principles when an intending party is to be joined are as follows:*
>
> *(1) He must be a necessary party;*
>
> *(2) He must be a proper party;*
>
> *(3) In the case of the Defendant there must be a relief flowing from that Defendant to the Plaintiff;*
>
> *(4) The ultimate order or decree cannot be enforced without his presence in the matter;*
>
> *(5) His presence is necessary to enable the Court to effectively and completely to adjudicate upon and settle all questions involved in the suit.'"*

The joinder of parties to a suit is not as of right. The party seeking to enjoin a new party to the suit is required to lay a basis for the joinder. It is the burden of the Petitioner herein to lay a basis to warrant the joinder of the proposed parties. The threshold set by the case of **Joseph Njau Kingori versus Robert Maina Chege & 3 others** (supra) qualifies the need for the parties to be enjoined to be necessary for the effective and complete adjudication of all the matters arising in the suit.

The Petition in this case is premised on the claim of a process commenced by the Respondent that the Petitioner alleges to have violated and infringed his constitutional rights as set out in the Petition. There are no orders sought as against the Tribunal. Further the Petitioner has not laid a basis to establish the necessity of the Tribunal in the suit for the effective and complete adjudication of the matters in dispute. The prayers sought by the Petitioner are not anchored on the Petition or indeed the Proposed Interested Party - the Kenya Judges and Magistrates Association.

The above findings would be sufficient reason to dismiss the Application. However, I will proceed to consider whether the Petitioner has established a prima facie case to warrant exercise of this Court's discretion in his favour. The Petitioner has contended that the Respondent's failure to enact regulations under Section 47(2)(c) impedes his ability to carry out his judicial functions during the pendency of these investigations. This, the Petitioner contends, has ultimately compromised his judicial independence and is unfair on account of his suspension and payment of half salary. The Petitioner relied on the recommendations of the Tribunal as currently constituted in the Investigation of Honourable Mr. Justice (Prof.) Jackton B. Ojwang, SCJ, where it recommended the enacting of the regulations and provision of the complaints manual used by the 1st Respondent in that case. These are matters that are not anchored on the Petition by pleading. They appear to have been raised following the delivery of the report in the said Tribunal decision. In any event with due respect to the Petitioner's contentions, the Tribunal in the said investigation raised the matter on the enactment of regulations by the JSC to address the delay in the processing of the petition for removal of the Honourable Judge that took three years, which was not the case with the Petitioner herein.

I find this contention to be flawed based on the provisions of Article 168(5) and (6) as read with Article 160(4) of the Constitution. Article 168(5) directs the President after receiving the petition for removal to within 14 days suspend the Judge from office. Article 168(6) directs the adjustment of the salary to half salary during the pendency of the suspension. Further, Article 160(4) creates an exception to judicial independence in respect of remuneration of a Judge as would be affected by under Article 168(6).

Further there appears to be a presumption by the Petitioner in its Application that the enactment of the regulations would allow him to proceed in the performance of his judicial functions. This, however, would be in direct contravention of the provisions of Article 168(5) of the Constitution.

As rightly stated by the Petitioner, the determination on the rules applicable to the respondent's proceedings under Article 168(4) is fairly novel on the case law as it stands. Githinji JA, noted in the case of ***Judicial Service Commission v Mbalu Mutava & another [2015] eKLR*** as follows:-

> *The jurisdiction conferred upon JSC is to itself initiate the process of removal or consider an initiating petition by a person and in case of an initiating petition by a person, to consider the petition and if satisfied that it discloses a ground for removal, to send it to the President with appropriate recommendations. Before initiating the process of removal on its own motion, JSC by necessary implication should consider if the facts it is relying on from its source disclose a ground for removal, and if so satisfied, formulate a petition to the President with necessary recommendations. In either case, neither the Constitution nor the JS Act stipulates the procedure to be followed. 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.*
>
> *The objective of the process is to ascertain, by evaluation, whether a ground of removal has been disclosed and, if so satisfied to recommend to the President for appointment of a tribunal to make a full inquiry of the allegations. The constitutional order is that JSC has no power to inquire into the allegations and make a finding of facts or make recommendations for the removal of the judge. That is the exclusive duty of the tribunal.*
>
> *It has been contended, and correctly so, that JSC at this stage is making a preliminary decision and its duty is to find out if there is a prima facie case. It has been held that there is no difference in principle so far as observance of rules of natural justice is concerned between decisions which are final and which are not (**Wiseman v Borneman; Evans Rees – Supra**), that there is no*

*absolute rule and that it all depends on the circumstances of the case. Further, I have already observed that the principle of fair administrative action applies to the proceedings in question.*

By my reading, in the absence of the regulations, the Respondent is required to adopt a procedure that ensures fair administrative action which has its statutory underpinning in the Fair Administrative Actions Act. In any event, Section 47(1) provides that the Respondent "**may**" make regulations for the better carrying of the purposes of the Judicial Service Act and specifically at 47(2)(c) which the Petitioner relies on; regulations for preliminary procedures for making any recommendations required to be made under the Constitution. A reading of the Section confirms that it is not framed in mandatory terms and the Respondent is thus not bound to enact the regulations as contended by the Petitioner, although this would be the ideal situation.

The Petitioner seems to invite this Court to exercise supervisory jurisdiction over the Tribunal and has pleaded interalia that the Respondent intends to rely on a draft complaint manual which copy has not been availed to him or been adopted by the requisite procedure under the Statutory Instruments Act.

The case of **The Anisminic Ltd v The Foreign Compensation Commission & Another [1969] 2 A.C 147, (1969)2 W.L.R. 163, (1969) I ALL E.R. 208 (House of Lords)** is instructive on when the supervisory jurisdiction of the Court ought to be invoked wherein it was held:-

> *"…For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the courts have intervened to correct the error. The courts have, however, always been careful to distinguish their intervention whether on excess of jurisdiction or error of law from an appellate function. Their jurisdiction over inferior tribunals is supervision, not review. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise… If the tribunal is intended, on a true construction of the Act, to enquire into and finally decide questions within a certain area, the courts' supervisory duty is to see that it makes the authorised enquiry according to natural justice and arrives at a decision whether right or wrong. They will intervene if the tribunal asks itself the wrong questions (that is questions other than those which Parliament directed it to ask itself). But if it directs itself to the right enquiry, asking the right questions, they will not intervene merely because it has or may have come to the wrong answer, provided that this is an answer that lies within its jurisdiction."*

The Tribunal is in the process of exercising its statutory mandate and this Court is unable to heed the call to exercise supervisory jurisdiction in the absence of any basis for the supervision for reasons of procedural impropriety, denial of a right to fair administrative action or access to justice as is the jurisdiction of this Court. All the matters raised with respect to the enactment of the regulations by the Respondent are matters already in the knowledge of the Tribunal as demonstrated by the report that the Petitioner has heavily relied upon. These are matters that can be properly addressed by the Tribunal without the interference of this Court.

It is also not clear why it took the Petitioner a year to file this application. The Tribunal was established by Gazette Notice published on 4th June 2019. No explanation has been given for the delay in bringing this application. In the Replying Affidavit of Josiah Musili, he has deponed that the Tribunal adjourned the petitioner's hearing four (4) times on 21st January 2020, 12th February 2020, 17th February 2020 and 16th March 2020. This was after pre-trial conference on 26th November 2019 where it was agreed that the hearing would be in February 2020. All these dates were after this court's ruling of 12th June 2019. In the intervening period, the Petitioner also did not take any action to fix the petition for hearing. Going by the speed with which the court heard the petitioner's applications and delivered rulings, had the petition been fixed for hearing, it would long have been heard and disposed of. I would therefore agree with the Respondent and the Tribunal that the Petitioner is guilty of latches. I would further agree with them that the intention of the instant application was to scuttle or delay the proceedings of the Tribunal.

Finally, I would have expected the applicant to seek leave to amend the petition in order to enjoin both the Intended 2nd Respondent and Interested Party to the petition by demonstrating in the amended pleadings the necessity to bring them on board. Making the application for joinder when the pleadings do not demonstrate necessity thereof was bound to be an uphill task.

In conclusion, I find that the Application is not merited and **is dismissed with no order as to costs.**

**It is so ordered.**

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 3RD DAY OF JULY 2020**

**MAUREEN ONYANGO**

**JUDGE**

**ORDER**

In view of the declaration of measures restricting court operations due to the COVID-19 pandemic and in light of the directions issued by His Lordship, the Chief Justice on 15th March 2020 and subsequent directions of 21st April 2020, that judgments and rulings shall be delivered through video conferencing or via email. They have waived compliance with **Order 21 Rule 1** of **the Civil Procedure Rules** which requires that all judgments and rulings be pronounced in open court. In permitting this course, the court has been guided by Article 159(2)(d) of the Constitution which requires the court to eschew undue technicalities in delivering justice, the right of access to justice guaranteed to every person under Article 48 of the Constitution and the provisions of **Section 1B** of the **Civil Procedure Act (Chapter 21 of the Laws of Kenya)** which impose on the court the duty of the court, inter alia, to use suitable technology to enhance the overriding objective which is to facilitate just, expeditious, proportionate and affordable resolution of civil disputes.

**MAUREEN ONYANGO**

**JUDGE**