



REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT
AT NAIROBI

PETITION NO. 150 OF 2019

(Formerly Nairobi HC Petition No. 150 of 2019)

Before Hon. Lady Justice Maureen Onyango

IN THE MATTER OF: ARTICLE 2, 19, 20, 22, 23, 25, 27, 47, 50, 165, 171,
172, 172, 258, 259 AND 260 OF THE CONSTITUTION OF KENYA

AND

IN THE MATTER OF: MATTER OF THE JUDICIAL SERVICE ACT, NO. 1 OF 2011

AND

IN THE MATTER OF: INCONSISTENCY BETWEEN SECTION 14, 20, 32 AND PARAGRAPHS
15, 16, 17, 20 AND 25 OF THE THIRD SCHEDULE OF THE JUDICIAL SERVICE ACT

BETWEEN

KENYA MAGISTRATES AND JUDGES ASSOCIATION.....PETITIONER

VERSUS

JUDICIAL SERVICE COMMISSION.....1ST RESPONDENT

ATTORNEY GENERAL.....2ND RESPONDENT

CHIEF JUSTICE.....3RD RESPONDENT

JUDGMENT

The Petitioner, **the Kenya Magistrates and Judges Association**, (hereinafter referred to as “the KMJA” or “the Association”) is an Association of Magistrates and Judges registered under section 10 of the **Societies Act**, Cap. 108 of the Laws of Kenya.

The 1st Respondent, the **Judicial Service Commission** (hereinafter referred to as “the Commission”), is a constitutional Commission established under Article 171 of the Constitution of Kenya and whose functions as set out under Article 171 (1) (b) of The Constitution of Kenya and include *inter alia* the review and making of recommendations on the conditions of service of Judges, judicial officers and staff of the Judiciary.

The 2nd Respondent is the Government’s chief legal advisor and the legal representative of the government in Court proceedings as appointed under Article 156 of the Constitution of Kenya, 2010.

The 3rd Respondent, the **Honourable Chief Justice** and President of the Supreme Court of Kenya, is the Head of the Judiciary and the Chairman of the Judicial Service Commission appointed under Article 166 (1) (a) of the Constitution of Kenya.

The Petition

On 23rd July, 2019 the Petitioner filed the instant Petition seeking the following reliefs:

- a. A declaration that pursuant to Article 172(c) of the Constitution, the Judicial Service Commission through its secretariat or a subcommittee is the only body obligated by law to appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary.
- b. A declaration do issue directing that the delegation of powers to the 3rd Respondent to interdict, suspend and reprimand pursuant to paragraph 15, 16, 17, 20 and 25 of the Third Schedule of the Judicial Service Act, 2011 is inconsistent with Article 172 of the Constitution as read together with Section 14, 20 and 32 of the Judicial Service Act, 2011.
- c. A declaration do hereby issue that the unilateral issuance of letters of interdiction, suspension or reprimand by the 3rd respondent in the absence of the participation of the Commission offends Article 172 of the Constitution and threatens the rights of the members of the Petitioner's Association, to wit article 27(1) of the Constitution, to equal protection and equal benefit of the law.
- d. A declaration that paragraph 16 and 17 of the Third Schedule of the Judicial Service Act, 2011 is unconstitutional and inconsistent with Article 47 and 50(2)(e) for being vague and threatening members of the Petitioner's rights to a speedy disciplinary proceedings with time specifications.
- e. Without prejudice to the orders sought above, a declaration is hereby made that the suspension of the members of the Petitioner as per paragraph 16 of the Third Schedule on a nil salary is inhumane, indignifying and is hostile and in contravention to article 25(c), 28 and 50 of the Constitution thus null and void.
- f. A declaration that the indefinite and unrestricted periods of interdiction and/or suspensions as per paragraph 15 and 16 of the Third Schedule of the Judicial Service Act, 2011 is in flagrant violation to article 25(c), 28 and 50 of the Constitution thus null and void.
- g. Costs of this Petition be provided for.
- h. Any other order that this Court deems just and fit in the circumstances.

The Association relied on the provisions of Articles 2, 3, 10, 19 (2), 20, 22, 23, 25, 27, 28, 50, 171 and 172 of the Constitution of Kenya, 2010 as the legal basis for its Petition.

The Petitioner further relied on the provisions of Sections 14, 20 and 32 of the Judicial Service Act and Paragraphs 15, 16, 17, 20, and 25 of the Third Schedule of the Judicial Service Act No. 1 of 2011.

The Petitioner seeks to have the provisions of Paragraph 15, 16 and 17 of the Third Schedule declared unconstitutional on the grounds of vagueness.

It specifically pleads that the said rules fail to set out the limited circumstances under which the Honourable Chief Justice can exercise his delegated power and therefore constitutes an open cheque for the Chief Justice to exercise this role to the detriment of the Petitioner's members, in complete violation of their rights and fundamental freedoms.

The Petitioner further contends that the provisions fail to set out the circumstances under which interdiction or suspension may be exercised and the validity period for interdiction for affected judicial officers.

The Petitioner states that the aforesaid provisions further fail to prescribe what conduct or misbehaviour qualify for interdiction or suspension or remuneration upon interdiction or suspension. It is on this basis that the Petitioner maintains that given that the system is not predictable its members are susceptible to unfair and unjust treatment from the 3rd Respondent.

It is further the Petitioner's position that Paragraphs 15, 16 and 17 of the Third Schedule of the Judicial Service Act are unconstitutional on the grounds of conflict of interest by dint of Articles 10, 47, 50, 171(2)(a) and 236 of the Constitution of Kenya, 2010 in that the powers to interdict and suspend a Judicial officer ought to lie with the Commission and any delegation of such powers ought to vest in an independent commission and not to the office of the 3rd Respondent.

The Petitioner contends that the impugned provisions of the schedule are inconsistent with the substantive Act in particular Sections 14, 20 and 32 of the Judicial Service Act.

In conclusion the Petitioner urged this Court to find that the impugned provisions are indeed null and void to the extent of their inconsistency.

The Petitioner urged this Court to allow its Petition in terms of the reliefs sought therein.

In response to the Petition the 1st and 3rd Respondent filed a Replying Affidavit sworn by **ANNE ATIENO AMADI**, the Chief Registrar of the Judiciary and the Secretary of the Judicial Service Commission, in which she affirms that the 3rd Respondent enjoys delegated powers from the 1st respondent to initiate disciplinary proceedings against errant Judicial officers under Paragraph 15 of the Third Schedule to the

Judicial Service Act. She however maintained that the delegation is not made at the instance of the 1st Respondent but one by Parliament.

She deposes that the allegation that the said powers are unlimited and open to abuse by the Honourable Chief Justice are not true as the wording of Paragraph 15 are clear on the powers delegated and provide for the same to be exercised in accordance with the Schedule and any other appropriate legislation. She further maintains that the Honourable Chief Justice in exercise of these delegated powers remains accountable to the Commission.

The affiant further states that the parameters guiding the Honourable Chief Justice to perform his delegated functions are clearly highlighted in Paragraph 16 of the said Third Schedule to the Act.

She posits that besides what is contained in the Judicial Service Act, the 3rd Respondent in carrying out his mandate is guided by legislation and any other regulations in force, more specifically the Judiciary's Human Resources Policies and Procedures and Procedure (hereunder referred to as Manual).

Ms. Amadi states that part D.7.1 and D.7.2 specifically prescribes what conduct amounts to gross misconduct which in turn would act as a point of reference for the 3rd Respondent in performing his functions.

She further states that Paragraph 25 (3) provides a further safeguard against any presumed abuse of delegated power by the 3rd Respondent where the 1st Respondent is expected to make a decision whether disciplinary proceedings are to continue and if so form a panel or a committee and that the Honourable Chief Justice shall not be a member of the Committee or Panel given that he/she has already made an opinion in the matter.

She contends that the allegation of abuse of the delegated power ought to be dismissed by this Court for want of proof. The 1st and 3rd Respondent maintained that the Petitioner has not laid a basis for the alleged abuse if at all. Be that as it may it is contended that such an abuse is not a ground to declare a statute or sections therein unconstitutional as the Petitioner now seeks.

She avers that interdiction and suspension are not final in nature but are interlocutory safeguards to the disciplinary process from interference by the said officer to ensure sanctity of the process.

The 1st and 3rd Respondent avers that the Petition as filed fails meet the threshold as set out in the case of **Anarita Karimi Njeru v Attorney General (1979) KLR 154** in that it has failed to plead with particularity that of which is complained of, the provision said to have been infringed and the manner in which the particular right is violated.

She maintains that the disciplinary process under the Judicial Service Act meets the threshold of a fair administrative action and a fair hearing as envisaged under Article 47 of the Constitution of Kenya, 2010 and Section 4(3) of the Fair Administrative Actions Act.

She further maintains that the Petition as filed is speculative as the Petitioner has failed to point out specific instances/cases where the 3rd Respondent has abused his delegated power to suspend or interdict. She nonetheless confirms that in instances where officers feel aggrieved with the exercise of such powers by the 3rd Respondent they have a right of appeal, review and to approach courts, which right has always been exercised.

She avers that on suspension officers don't earn a salary but an Alimentary allowance.

She further avers that the instant Petition is not ripe, justiciable, is an abuse of the Court process and is devoid of merit. She urges this Court to dismiss it with costs to the 1st and 3rd Respondents.

The 2nd Respondent did not file a response to the Petition. It however indicated on 20th November 2019 through its Counsel Ms. Wangechi that it would rely on the Replying Affidavit filed on behalf of the 1st and 3rd Respondent together with the annexures thereto.

Parties agreed to dispose of the Petition by way of written submissions.

Submissions by the Parties

The Petitioner submitted that the Judicial Service Commission through its secretariat or subcommittee is the only body obligated by law pursuant to the provisions of Article 172(c) of the Constitution of Kenya, 2010 to appoint, receive complaints against, investigate and/or remove from office or otherwise discipline Judicial officers and staff.

The Petitioner further contends that this position is affirmed by the provisions of Section 32 of the Judicial Service Act. The Petitioner relied on the case of **Judicial Service Commission v Speaker of the National Assembly & 8 Others (2014) eKLR**.

The Petitioner further submitted that the provisions of Paragraph 15 of the Third Schedule and Paragraph D.7.5.2 of the Judiciary Human Resource policies and Procedures Manual unconstitutionally delegates disciplinary powers to the 3rd Respondent who is not a party to the Contract of Employment contrary to the provisions of Articles 41 and 172 of the Constitution of Kenya, 2010.

It is further contended that a constitutional function cannot be delegated by either statute or any internal document as contended by the Respondents. It is on this basis that the Petitioner urged this Court to find that the impugned provisions are indeed unconstitutional and that

the provisions of Sections 14 and 32 of the Judicial Service Commission (JSC) Act must prevail over the provisions of Paragraphs 15 and 17 of the Third Schedule of the Act. The Petitioner relied on the cases of **Timothy Njoya & 17 Others v Attorney General & 4 Others (2013) eKLR** and **Alice Waithera Mwaura & 12 Others v Committee of Experts & 2 Others (2010) eKLR** where the Courts held that in the event of conflict between a schedule and the main body of the law, the main body of the law must prevail.

The Petitioner maintains that the power to appoint, receive complaints against, investigate judicial officers and staff has been delegated to the 1st Respondent and cannot be delegated further to the 3rd Respondent. The Petitioner relied on the case of **Kasozi Robinson v Attorney General, Uganda Constitutional Court, Const. Pet. No. 37 of 2010** where the Court held that in Constitutional and Administrative law the general rule of interpretation provides that one cannot delegate a duty that was cast upon one to perform.

The petitioner maintained that Paragraphs 16 and 17 of the Third Schedule of the Judicial Service Act, 2011 is unconstitutional and inconsistent with the provisions of Articles 47 and 50 of the Constitution as the same are vague and threaten the rights of members of the Petitioner to speedy disciplinary proceedings with no definite timelines.

The Petitioner further maintains that condemning a Judicial Officer or Staff with no pay and/or alimentary allowance is contrary to the provisions of Article 41 of the Constitution of Kenya and Section 17 of the Employment Act, 2007 that guarantees employees to remuneration for services rendered. The Petitioner relied on the case of **Attorney General v Kituo Cha Sheria & 7 Others (2017) eKLR**.

It is further submitted that denying salaries to suspended members of the Petitioner as provided under Paragraph 16 of the Third Schedule is tantamount to inhumane treatment and is in complete contravention to the provisions of Articles 25(c), 28 and 50 of the Constitution of Kenya, 2010.

It is further submitted that there is no provision in law that provides for an employees pay to be withheld by an employer in the event of suspension. The Petitioner cited the case of **Peterson Ndung'u & 5 Others v Kenya Power and Lighting Company Limited (2014) eKLR**, where the Court held that the practice of withholding salaries during suspension has no foundation in the Employment Act and therefore lacks legal validity.

The Petitioner further submitted that Paragraphs 15, 16 and 17 of the Third Schedule to the JSC Act violate the guarantee to fair trial as entitled under the provisions of Articles 10, 25(c), 50 and 236 of the Constitution.

In conclusion the Petitioner urged this Court to allow the Petition in terms of the reliefs sought therein.

1st and 3rd Respondents Submissions

The 1st Respondent filed its submissions on 31st January, 2020 in which it raised similar submissions to those filed the 2nd Respondent herein.

The 1st Respondent opposed the petition as filed herein on the grounds that petitioner is estopped from raising similar issues as had been raised in the case of **Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya & Another (2019) eKLR**, which matter has been decided by this Court. It is further the Respondents' submission that the Petition is in fact a veiled attempt to re-litigate issues raised in the **Bryan Mandila Khaemba case (Supra)** and that this Court ought not to entertain the same by virtue of the doctrine of estoppel.

The Respondents relied on the case of **George Kamau Kimani & 4 Others v The County Government of Trans- Nzoia & Another (2016) eKLR** and **Communications Commission of Kenya & 5 Others (2014) eKLR**.

The Respondents maintain that the power to initiate the charge, suspend, interdict or reprimand by the 3rd Respondent is vested by statute and that in carrying out this authority the 3rd Respondent is guided by the Constitution, the JSC Act and the Judiciary Human Resources Policies and Procedures Manual.

The Respondents further submitted the Petitioner has failed to prove the unconstitutionality of the provisions of Paragraph 15, 16, 17, 20 and 25 of the Third Schedule to the JSC Act. The Respondents maintain that in the absence of any evidence the Petition fails to attain the threshold as to displace the presumption of constitutionality.

The Respondents further submitted that this Court has a duty while addressing the issue of unconstitutionality or otherwise of a statute consider the purpose or effect of the impugned provisions, if the same infringes a provision in the Constitution it is so declared unconstitutional. the Respondents relied on the case of **Olum and Another v Attorney General (2002) EA 120**.

2nd Respondent's Submissions

The 2nd Respondent on the other hand submitted that the delegation of powers to the 3rd Respondent under the Third Schedule of the JSC Act is an administrative role and that the 3rd Respondent at all times in exercising this power remains accountable to the Commission as required under the provisions of Paragraph 15 of the Third Schedule of the JSC Act. The 2nd Respondent relied on the case of **Davis Gitonga v Judicial Service Commission (2019) eKLR**.

The 2nd Respondent further contends that in exercise of the delegated powers the 3rd Respondent is further guided by the Judiciary Human Resource Policies and Procedure Manual and therefore the exercise of those powers cannot be subject to abuse by the 3rd Respondent.

It is further the 2nd Respondent's submission that the said delegated powers of the 3rd Respondent is not inconsistent with the provisions of Article 172 of the Constitution and can therefore not be termed as unconstitutional as the Petitioner has failed to identify a constitutional provision that limited parliament from enacting the Act as prepared. The 2nd Respondent relied on the case of **Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court & Another (2019) eKLR** where the Court held that in absence of evidence to prove that statutory provisions violate or are inconsistent with a Constitutional provision the Court must find that parliament properly enacted the law and is therefore binding to all parties.

The 2nd Respondent further submitted that the issue of whether the provisions of Paragraph 16 and 17 of the Third Schedule are unconstitutional and inconsistent with Articles 47 and 50 (2) (e) for being vague and threatening members of the Petitioner's right to a speedy disciplinary proceedings has been determined by this Court in the case of **Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya & Another (Supra)** and therefore urged this Court to be guided by the said judgment.

The 2nd Respondent further relied on the case of **JRN v Judicial Service Commission (2019) eKLR** where the Court was invited to determine the issue of time taken in disciplinary proceedings and held that a period of 19 months was not inordinate or an assault to the right to fair administrative action or a violation of the right to fair labour practices.

The 2nd Respondent maintained that the assertion made by the Petitioner that its suspended members receive no remuneration is not true as under the provisions the Paragraph 16 of the Third Schedule of the JSC Act there is provision for payment of salaries during the period of interdiction.

It is further the 2nd Respondent's submission that Paragraph 17 of the Third Schedule further provides for payment of an alimentary allowance in the event of suspension.

In conclusion the 2nd Respondent urged this Court to find the instant Petition devoid of merit and accordingly dismiss the same with costs to the Respondents.

Analysis and Determination

Having considered the Petition, the affidavits, submissions and authorities cited by parties, the issues for determination are:

1. Whether the delegated powers of the 3rd Respondent to interdict, suspend and reprimand pursuant to paragraphs 15, 16, 17, 20 and 25 of the Third Schedule of the JSC Act, 2011 is inconsistent with Article 172 of the Constitution of Kenya, 2010 as read together with Sections 14 and 32 of the Judicial Service Act, 2011.
2. Whether the 1st Respondent can delegate its power to interdict, suspend and reprimand to the 3rd Respondent
3. Whether the delegated powers are open to abuse by the 3rd Respondent
4. Whether the provision for suspension of members of the Petitioner on nil salary under Paragraph 16 of the Third Schedule to the JSC Act is unconstitutional.
5. Whether the Petitioner is entitled to the reliefs sought in the Petition.

Article 172(1)(c) of the Constitution empowers the JSC to appoint, receive complaints against, investigate and remove from office or otherwise discipline Registrars, Magistrates, other judicial officers and other staff of the Judiciary, **in a manner prescribed by an Act of Parliament.** [Emphasis added].

The Judicial Service Act is the Act of Parliament envisioned in Article 172(1)(c).

It is the petitioner's argument that the delegation of the powers of discipline under Article 172(1)(c) unconstitutional. They rely on Section 24(2) of the Statutory Instrument Act. The Section provides as follows –

(2) A statutory instrument shall not be inconsistent with the provisions of the enabling legislation, or of any Act, and the statutory instrument shall be void to the extent of the inconsistency.

Statutory instrument is defined at Section 2 of the Statutory Instrument Act to mean

"statutory instrument" means any rule, order, regulation, direction, form, tariff of costs or fees, letters patent, commission, warrant, proclamation, by-law, resolution, guideline or other statutory instrument issued, made or established in the execution of a power conferred by or under an Act of Parliament under which that statutory instrument or subsidiary legislation is expressly authorized to be issued.

Regulations made under the Judicial Service Act are therefore a statutory instrument under the Act.

Section 14 of the Judicial Service Act provides that –

14. Delegation by the Commission

Subject to the provisions of the Constitution or any other law, the Commission may hire such experts or consultants, or delegate such of its functions as are necessary for the day-to-day management of the judicial service to subcommittees or to the secretariat.

Section 32 of the Judicial Service Act provides that –

32. Appointment, discipline and removal of judicial officers and staff

1. For the purposes of appointment, discipline and removal of judicial officers and staff, the Commission shall constitute a Committee or Panel which shall be gender representative.

2. Notwithstanding the generality of subsection (1), a person shall not be qualified to be appointed as a magistrate by the Commission unless the person —

- a. is an advocate of the High Court of Kenya;**
- b. has high moral character, integrity and impartiality;**
- c. has demonstrable management skills;**
- d. has proficiency in computer applications; and**
- e. has no pending complaints from the Advocates Complaints Commission or the Disciplinary Committee.**

3. The procedure governing the conduct of a Committee or Panel constituted under this section shall be as set out in the Third Schedule.

4. Members of the Committee shall elect a Chairperson from amongst their number.

5. Subject to the provisions of the Third Schedule, the Committee or Panel may determine its own procedure.

It is the petitioner's position that Sections 14 and 32 of JSC Act do not provide for an individual to take disciplinary action against an officer. That it was the intention of Parliament that disciplinary function be undertaken by a collective decision of a committee.

My understanding of Section 14 of the JSC Act is that it refers to delegation of day to administrative management of judicial activities. There is a difference between the functions of the Office of the Chief Justice and the Judicial Service Commission. The Constitution sets out the duties of the JSC but does not define the duties of the Chief Justice. These are defined in Section 5 of the JSC Act as follows –

5. Functions of the Chief Justice and the Deputy Chief Justice

1. The Chief Justice shall be the head of the Judiciary and the President of the Supreme Court and shall be the link between the Judiciary and the other arms of Government.

2. Despite the generality of subsection (1), the Chief Justice shall —

- a. assign duties to the Deputy Chief Justice, the President of the Court of Appeal, the Principal Judge of the High Court and the Chief Registrar of the Judiciary;**
- b. give an annual report to the nation on the state of the Judiciary and the administration of justice; and cause the report to be published in the Gazette, and a copy thereof sent, under the hand of the Chief Justice, to each of the two Clerks of the two Houses of Parliament for it to be placed before the respective Houses for debate and adoption;**
- c. exercise general direction and control over the Judiciary.**

This in essence means that the Chief Justice is the Chief Executive Officer of the Judiciary and therefore supervises the Judges, judicial officers and staff of the Judiciary through the titular heads being the president of the Court of Appeal, the Principal Judges of the High Court and Courts of equal status and the Chief Registrar of the Judiciary. As provided under subsection 2(c), he exercises general direction and control over the judiciary.

On the other hand, the functions of the Judicial Service Commission are set out under Section 13 as follows –

13. Powers and functions of the Commission

1. In addition to the powers of the Commission under Article 253 of the Constitution, the Commission shall have the power to—

- a. purchase or otherwise acquire, hold, charge and dispose of movable or immovable property;**
- b. borrow and lend money;**
- c. enter into contracts;**
- d. do or perform all such other things or acts necessary for the proper performance of its functions under the Constitution and this Act which may be lawfully done or performed by a body corporate.**

2. Members of the Commission shall be guided in the discharge of their responsibilities by the principles contained in the Constitution and in this Act.

3. The Commission shall have all the necessary powers for the execution of its functions under the Constitution and this Act.

The issue therefore is whether the functions under paragraph 15, 16, 17 and 25 constitute the discipline and removal of a judicial officer under Section 32 and if the said regulations are in conflict with Section 32, and whether the delegation referred to under paragraph 15 is in conflict with Section 14 of JSC Act.

In my opinion, the regulations are clear that the role of the Chief Justice is to establish if there is a prima facie case to warrant the reference of a disciplinary case involving an officer to the JSC. The role of the Chief Justice thereafter is to interdict or suspend an officer and then refer the matter to JSC for hearing. It is clear under paragraph 16(4) and paragraph 19 that interdiction and suspension are not punishments. In the sense in which they are applied in paragraphs 16 and 17, they are administrative functions intended to remove the employee from the workplace while proceedings that may lead to the dismissal of the officer are being taken. Since the assignment of duties is an administrative function of the Chief Justice, the removal of a judicial officer from performing those duties is also a function of the Chief Justice as part of the administrative duties.

Interdiction and suspension give the employer an opportunity to carry out investigations into possible misconduct. In the case of **Mary Chemweno Kiptul v Kenya Pipeline Company Limited [2014] eKLR**, the court held that: -

“A suspension therefore is ultimately a right due to an employer who on reasonable grounds suspects an employee to have been involved in misconduct, or poor performance or physical incapacity and wishes to remove such an employee from the work place to enable further investigation without subjecting the employee to further commission of more acts of misconduct, under performance or the conditions leading to incapacity.”

In **Donald C. Avude v Kenya Forest Service [2015] eKLR**, the court quoted from the case of **Cabiakman v Industrial Alliance Life Insurance Co. [2004] 3 S.C.R. 195, 2004** see 55 where it was held that: -

“...administrative suspension is “a preventive measure which can be taken when the interest of the employer's business requires it, even in the absence of an act made by the employee while working.”

In **Paul Ngeno v Pyrethrum Board of Kenya Ltd [2013] eKLR** the court held that: -

“... Thus, the court holds that whether an employee will be paid during the period of interdiction or suspension will depend upon the outcome of the disciplinary proceedings. It would be unfair labour practice to deny an employee payment during the period of interdiction or suspension if at the end of the disciplinary process the employee is found innocent. Similarly, it would be unfair labour practice for the employer to be required to pay an employee, during the suspension or interdiction period if at the end of the disciplinary process the employee is found culpable.”

Regulations 15, 16, 17 and 20 provided as follows –

15. Delegation of powers

1. The following disciplinary powers vested in the Commission are delegated to the Chief Justice—

- a. the power to interdict an officer under paragraph 17;**
- b. the power to suspend an officer under paragraph 18;**
- c. the power to administer a severe reprimand or a reprimand to an officer.**

2. The Chief Justice, when exercising the powers delegated by this Schedule, shall act in accordance with the provisions of this Schedule and in accordance with any other appropriate regulation which may be in force.

16. Interdiction

1. If in any case the Chief Justice is satisfied that the public interest requires that an officer should cease forthwith to

exercise the powers and functions of their office, the Chief Justice may interdict the officer from the exercise of those powers and functions, provided proceedings which may lead to their dismissal are being taken or are about to be taken or that criminal proceedings are being instituted against them.

2. An officer who is interdicted shall receive such salary, not being less than half their salary, as the Commission may by regulations prescribe.

3. Where disciplinary or criminal proceedings have been taken or instituted against an officer under interdiction and such officer is neither dismissed nor otherwise punished under this Schedule, the whole of any salary withheld under subparagraph (2) shall be restored to them upon the termination of such proceedings.

4. If any punishment other than dismissal is inflicted, the officer may be refunded such proportion of the salary withheld as a result of their interdiction as the Commission shall decide.

5. An officer who is under interdiction shall be required to comply with such conditions as may by regulations be prescribed.

6. For the purposes of this paragraph and paragraph 18 of this Schedule “salary” means basic salary and, where applicable, includes inducements or overseas allowances.

17. Suspension

1. Where an officer has been convicted of a serious criminal offence, other than such as are referred to in paragraph 28(2), the Chief Justice may suspend the officer from the exercise of the functions of their office pending consideration of their case under this Schedule.

2. The Chief Justice may suspend from the exercise of the functions of their officer against whom proceedings for dismissal have been taken if, as a result of those proceedings, he considers that the officer ought to be dismissed.

3. While an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine.

4. An officer who is suspended shall be required to comply with such conditions as may, by regulations, be prescribed.

20. Reprimand by Chief Justice

1. Notwithstanding any other provisions of this Schedule, the Chief Justice may, without reference to the Commission, after investigation and after giving the officer concerned an opportunity for making their defence (which shall be recorded), administer to an officer a severe reprimand or reprimand.

2. The Chief Justice shall, when exercising the powers referred to in this paragraph, act in accordance with this Schedule.

Paragraphs 16(1), 17(1) and (2) are clear that the only role the Chief Justice performs under those paragraphs is to remove the officer from exercising the powers of the office where proceedings have been commenced that may lead to the removal of the officer. There is separation of roles between the Chief Justice and JSC, the former being to remove from performing the functions of the office and the latter being to hear and determine the disciplinary case. It is evident that there is no disciplinary role in those sections. The Chief Justice does not hear the disciplinary case. He does not remove a judicial officer from office. His role is limited to receiving a complaint, considering the complaint and if it does not in his opinion as Head of Judiciary, constitute misconduct, he rejects the complaint. However, if it constitutes a misconduct, he only removes the officer from performing the duties of the office then refers the charges against the officer to JSC for hearing.

It is paragraphs 25 and 26 of the Regulations that provide for the procedure for the disciplinary hearing which is carried out by the JSC, not the Chief Justice. I thus find that Regulations, 15, 16 and 17 only delegate the administrative functions of framing charges and removal of an officer from performing his duties to the Chief Justice while the substantive investigations are covered under paragraphs 25 and 26 and are carried out by the JSC. I find that Regulations 16 and 17 do not delegate any functions of JSC to the Chief Justice and that Regulation 20 does not provide for roles of the JSC but of the Chief Justice as the Supervisor of judicial officers.

The Petitioner has submitted that indefinite suspension or interdiction is a violation of Articles 25(c), 28 and 50 of the Constitution. The respondents did not submit on this aspect.

In **Donald C. Avuda v Kenya Forest Service (2015) eKLR**, the court held that: -

“...suspension should be for a determinate period where such suspension is without pay. Otherwise it would constitute inhuman treatment...”

In **Joseph Ndung’u v Mastermind Tobacco (K) Ltd [2014] eKLR** the court held that: -

“An employee cannot be kept on suspension indefinitely and I agree with the Claimant that his continued suspension amounts to constructive dismissal amounting to unfair termination of employment.”

Article 25 provides for rights and freedoms that may not be limited, among them freedom from torture, cruel, inhuman or degrading treatment, and the right to fair trial.

Article 28 provides for protection of the inherent dignity of persons and the right to have that dignity respected and protected. Since during interdiction and suspension an employee is not remunerated as is in limbo over whether or not they have a job, it would amount to inhuman treatment to subject them to the situation indefinitely.

Where an officer is placed on interdiction or suspension, the officer is prejudiced by reduction of income and removal from performing the functions of the office and in a way, constitutes punishment. It is therefore necessary to be specific on the duration of the suspension to create certainty so that there is accountability, and that interdiction or suspension are not imposed in a manner that inflicts punishment on the officer.

With respect to the Petitioner’s averment that interdiction and suspensions are without pay and therefore inhuman, it is clear from paragraphs 16 and 17 of the Third Schedule to the JSC Act that on interdiction an officer is entitled to half of basic pay and all allowances while on suspension an officer is entitled to alimentary allowance. Further, that should an officer be absolved of the charges against him or her, the withheld salary is released to them.

On the allegation that the Chief Justice acts unilaterally, paragraph 15 gives guidelines under sub paragraph 2 for the exercise of the delegated authority. The law cannot be over prescriptive as doing so would remove discretion and may make the law too voluminous. It would further be impossible for the law to anticipate every situation and provide for it hence the grant of discretion with limits or guidelines on the exercise thereof.

Both respondents have submitted that the issues raised in the instant petition were substantially dealt with in **Bryan Mandila Khaemba v Chief Justice and President of the Supreme Court of Kenya and Another (2019) eKLR** and the same is therefore an attempt to relitigate the issues raised in the said petition.

The doctrine of issue estoppel was defined by the Court of Appeal in the case of **George Kamau Kimani and 4 Others v County Government of Trans Nzoia and Another (2016) eKLR** as follows –

“In **Trade Bank Limited v Engineering Construction Limited [2001] E.A.266**, this Court, adopting the definition of issue estoppel in Halsbury's Laws of England (4th edition) at page 861 stated:

"An estoppel which has come to be known as Issue Estoppel may arise where a plea of res judicata could not be established because the causes of action are not the same. A party is precluded from contending the contrary of any precise point which having once already been distinctly put in issue, has been solemnly and with certainty determined against him. Even if the objects of the first and second actions are different, the finding on a matter which came directly (not collaterally or incidentally) in issue on the first action, provided it is embodied in a judicial decision is final, is conclusive in a second action between the same parties and their privies. The principle applies whether the point involved in the earlier decision, and as to which the parties are estopped, is one of fact or one of law, or one of mixed fact and law.”

The Supreme Court of Kenya in its landmark decision in the case of **Communications Commission of Kenya & 5 others v Royal Media Services Limited & 5 others [2014] eKLR** observed as follows on the doctrine of issue estoppel:

“A more broadly-based approach, founded on lines of principle, is reflected in the English case, *North West Water Authority v. Binnie & Partners*, [1990] 3 All ER 547, in which Drake J thus stated (at page 561):

"In my judgment, this broader approach to a plea of issue estoppel is to be preferred. I find it unreal to hold that the issues raised in two actions arising from identical facts are different solely because the parties are different ... I think great caution must be exercised before shutting out a party from putting forward his case on the grounds of issue estoppel or abuse of process. Before doing so the court should be quite satisfied that there is a real or practical difference between the issues to be litigated in the new action and that already decided and the evidence may properly be called on the issues in the new action."

Of the differing approaches to the application of "issue estoppel", we find more merit with the broader one, for its unconstrained scheme of principle; and on this basis we find no practical difference between the issues lodged before the Tribunal and before the High Court. We thus conclude that issue estoppel is applicable to this case, with regard to the question as to whether the 1st, 2nd and 3rd respondents should have been issued with a BSD licence.”

I have perused the decision in **Bryan Mandila Khaemba** and I agree with the respondents. In the said judgment, the court stated as follows in relation to the issues raised by the Petitioner: -

a. The Third Schedule to the Judicial Service Act is considered part of the Act. The Court held “The provisions of the Third Schedule properly constitute a parliamentary enactment just like the other provisions in the body of the Act.”

b. The entire Judicial Service Act is Constitutional and properly enacted. The Court holding that “thus the Court returns that the Judicial Service Act was enacted by the Parliament in line with the cited constitutional provisions and unless it is shown.”

c. Parliament had properly delegated to the Chief Justice the powers to initiate, suspend, formulate a charge and escalate or reprimand a judicial officer. The Court clearly holding that “the petitioner has not identified a constitutional provision that limited Parliament from enacting the delegation of the 2nd respondent's power to suspend an officer to the 1st respondent. Further, section 32 (2) of the Judicial Service Act by itself provides that the procedure governing the conduct of a Committee or Panel constituted under the section shall be as set out in the Third Schedule.”

d. There is no irrationality or unreasonableness in the act of Parliament delegating the power to suspend, formulate a charge and escalate or reprimand a judicial officer with the judge observing that, “the Court returns that it has not been shown that the Parliament may have acted irrationally or unreasonably or unconstitutionally in imposing the delegation upon the 1st respondent.”

e. The Chief Justice power to suspend, formulate a charge and escalate or reprimand a judicial office are administrative powers exercised by the Chief Justice as an individual executive in line with his Constitutional mandate. The Court observed “within the safeguards in paragraphs 15 and 17 of the Third Schedule, the 1st respondent is vested with the delegated power to perform an administrative role, namely, to impose a suspension within the stipulated safeguards. To that extent, the Court returns that the imposed delegation is an administrative role that is efficiently and effectively performed by an individual executive and which in the opinion of the Court, is properly vested in the Chief Justice as the Head of the Judiciary as per Article 161(2)(a) of the Constitution.”

f. There is no conflict between paragraphs 15 and 17 of the Third Schedule to the Judicial Service Act and sections 14 and 32 of the Act. The Court observing that “... the power to suspend is conveniently exercised, within the safeguards in a manner that is responsive to the needs of the Judicial service. Accordingly the Court returns that there is no conflict between paragraphs 15 and 17 of the Third Schedule to the Act and sections 14 and 32 of the Act or the definition of "Committee" under the Act.”

From the foregoing, it is clear that the issues of delegation of powers under paragraphs 15, 16 and 17 to the Chief Justice were discussed and a final determination reached by the court in the case of **Bryan Mandila Khaemba**. I agree with the respondents that the issues in this petition were conclusively dealt with in the case of **Bryan Mandila Khaemba**. Indeed, it appears that the submissions filed by the petitioner herein at paragraph 19 thereof is a reproduction of the submissions in Khaemba’s petition where it is submitted that:

“It is submitted that paragraph 17(3) of the Third Schedule and paragraph D.7.5.2 (iii) of the Manual provide that while an officer is suspended from the exercise of the functions of their office they shall be granted an alimentary allowance in such amount and on such terms as the Commission may by regulations determine. It is submitted that the petitioner was suspended without pay and though the provision prescribes for an alimentary allowance, the same was not awarded and the same lacked basis in Employment Act, 2007. It is of interest to note that the petitioner was entitled to payment of contractual remuneration under Article 41 of the Constitution as amplified in section 17 of the Employment Act, 2007 which requires the employer to pay an entire amount of the wages earned by or payable to an employee in respect of work done by the employee in pursuance of a contract of service. It was submitted that the right to be paid under Article 19(3) (a) of the Constitution attached to the petitioner as a human being and could not be abrogated or limited unless as contemplated in the Constitution. The petitioner cited **Attorney General v Kituo Cha Sheria and 7 Others [2017] eKLR**, thus,

“The clear message flowing from the constitutional text is not that rights have inherent value and utility and their recognition, protection, and preservation is not an emanation of state largesse because they are not granted, nor are they grantable by the state. They attach to persons, all persons, by virtue of their being human and respecting rights is not a favour done by the state or those in authority. They merely fall a constitutional command to obey.”

It is obvious that the Petitioner herein was not suspended and the submissions above could not have been originated in respect of the instant petition.

Conclusion

Having reached the conclusions above, I now have to determine the specific prayers in the petition.

Prayer (a) is that “A declaration that pursuant to Article 172(c) of the Constitution, the Judicial Service Commission through its secretariat or a subcommittee is the only body obligated by law to appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the judiciary.” I do agree with the Petitioner that JSC is the only body anticipated under Article 172(c) to deal with the matters set out therein and I declare accordingly.

Prayer (b) seeks – “A declaration do issue directing that the delegation of powers to the 3rd Respondent to interdict, suspend and reprimand pursuant to paragraph 15, 16, 17, 20 and 25 of the Third Schedule of the Judicial Service Act, 2011 is inconsistent with Article 172 of the Constitution as read together with Section 14, 20 and 32 of the Judicial Service Act, 2011.” As determined above, I find no inconsistency between Article 172 of the Constitution, Sections 14, 20 and 32 of the Judicial Service Act and paragraphs 15, 16, 17, 20 and 25 of the Third Schedule to the Judicial Service Act.

Prayer (c) – “A declaration do hereby issue that the unilateral issuance of letters of interdiction, suspension or reprimand by the 3rd respondent in the absence of the participation of the Commission offends Article 172 of the Constitution and threatens the rights of the members of the Petitioner's Association, to wit article 27(1) of the Constitution, to equal protection and equal benefit of the law.” The Petitioner did not prove that letters of interdiction, suspension or reprimand by the 3rd Respondent were issued unilaterally or that, if any was issued, which has not been brought to the attention of the Court, that the same offends Articles 27(1) and 172. No evidence was adduced of any letters of interdiction, suspension or reprimand issued unilaterally. The prayer therefore fails for want of proof.

Prayers (d) seeks orders that – “A declaration that paragraph 16 and 17 of the Third Schedule of the Judicial Service Act, 2011 is

unconstitutional and inconsistent with Article 47 and 50(2)(e) for being vague and threatening members of the Petitioner's rights to a speedy disciplinary proceedings with time specifications." The petitioner has not proved that paragraphs 16 and 17 of the Third Schedule are inconsistent with Articles 47 and 50(2).

On prayer (e) it is this court's finding that suspension per se does not violate Articles 25(c), 28 and 50 of the Constitution.

With respect to prayer (f) that – "A declaration that the indefinite and unrestricted periods of interdiction and/or suspensions as per paragraph 15 and 16 of the Third Schedule of the Judicial Service Act, 2011 is in flagrant violation to article 25(c), 28 and 50 of the Constitution thus null and void." I agree with the Petitioner that indefinite suspension or interdiction amounts to a violation of Article 25(a) and (c), Article 28 and Article 50. It is recommended that this is addressed administratively by the respondent by providing for the duration of any suspension or interdiction, and for extension thereof with reasons on a case by case basis.

Other than prayer (f), the petition is without merit and dismissed. There shall be no orders for costs.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF AUGUST 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, this 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 this 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