



**Marete v Judicial Service Commission (Petition 88 of 2019)
[2019] KEELRC 1432 (KLR) (12 June 2019) (Ruling)**

D K Njagi Marete v Judicial Service Commission [2019] eKLR

Neutral citation: [2019] KEELRC 1432 (KLR)

**REPUBLIC OF KENYA
IN THE EMPLOYMENT AND LABOUR RELATIONS COURT AT NAIROBI
PETITION 88 OF 2019
MA ONYANGO, J
JUNE 12, 2019**

BETWEEN

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

AND

JUDICIAL SERVICE COMMISSION RESPONDENT

RULING

- 1 By his application dated 23rd May 2019 and filed on 24th May 2019 under certificate of urgency, the petitioner seeks the following orders–
 1. spent
 2. The court be pleased to issue an injunction directing the Chairman, the Secretary of 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 pending the hearing and final determination of this application and the petition or until further order of the court;
 3. The 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 the court.
- 2 The grounds upon which the applicant relies as set out on the face of the application and in the affidavit of the petitioner/applicant sworn on 23rd May 2019, are that the petitioner is a Judge of the Employment and Labour Relations Court, having taken the oath of office on 13th July 2012. That



- the respondent is a constitutional commission charged with, inter alia, the responsibility to promote and facilitate the independence and accountability of the judiciary and the efficient and transparent administration of justice. That at the time material to this suit the petitioner was stationed at the Employment and Labour Relations Court at Kericho.
- 3 The petitioner deposes that a complaint was filed against him in Kericho ELRC Misc. Application No. 6 of 2017 and Kericho ELRC Misc. Application No. 7 of 2017 by the law firm of Kaplan and Stratton, Advocates on behalf of their clients to the effect that during the pendency of injunctive orders issued by other courts, he granted ex parte orders which had the effect of setting aside the orders made by the other courts, which had been brought to his attention.
 - 4 It is deposed that the petitioner responded to the complaint on 16th August 2018 pointing out that the orders by the other Judge(s) were in respect of a different dispute, and that in any event, an aggrieved party had all the avenues in law and process to confront the court on service of the interim orders and was not tied to the inter partes hearing date given by the court.
 - 5 The petitioner further deposes that in making the impugned orders he exercised his unfettered judicial authority and discretion in so doing, he is not subject to the control or direction of any person or authority that the purported investigation of the decision in the manner contained in the complaint gravely offends the provisions of Article 160(1) of the Constitution as it purports to direct him on what judicial findings he should have made. He further deposes that the respondent has no authority or jurisdiction to determine or even contemplate making a determination of issues relating to decisional independence of a Judge. He deposes that in making determination that the petitioner had committed gross misconduct, bias impartiality (sic) and breach of the Constitution and Judicial Service Code, the respondent was exercising pretended appellate and/or supervisory jurisdiction over the petitioner. He deposes that the respondent made a finding in excess of, or without, jurisdiction and thereby contravened the mandatory provisions of Article 160(1) of the Constitution.
 - 6 He deposes that on 13th May 2019, he was upon inquiry, informed by the Secretary of the respondent that there was no formal or written decision on the matter. That he has not been served with any decision of the respondent, that therefore the press statement issued by the respondent dated 9th Mays 219 was for extraneous and self-serving reasons in the face of a public outcry over attempts by the respondent to protect and cover itself.
 - 7 The petitioner states that the respondent has not served him with its decision/determination after conducting investigations against him in spite of his requests for the same both verbally and in writing, that he believes there was no such decision at the time the respondent made a press release to announce the decision and that a press release cannot form the basis of a decision. He prays that the court grants orders as prayed.
 - 8 On 31st May 2019, the respondent filed grounds of opposition as follows –
 - a) The motion is totally defective bad in law and an abuse of the process of the court.
 - b) The motion lacks merit.
 - c) The applicant has failed to satisfy the conditions for the granting of orders of injunction.
 - d) The application has been overtaken by events and that the respondent having complied with Article 168(4) of the Constitution on 20th May, 2019 is functus officio.
 - 9 The application was argued on 3rd June 2019. Mr. Gitobu Imanyara appeared with Ms. Ngania for the petitioner while Mr. Isaac Wamaasa appeared for the respondent.



Submissions by the Petitioner

- 10 Learned counsel for the petitioner, Mr. Gitobu Imanyara submitted that the claim by the respondent that the application has been overtaken by events is not supported by evidence as no response or affidavit has been filed by the respondent. He submitted that the only evidence that the respondent has is a press release, which is not enough to recommend to His Excellency the President to constitute a tribunal.
- 11 Counsel submitted further that all that the Judge did was exercise judicial authority and discretion and the only way to challenge the same is an appellate jurisdiction through the Court of Appeal. That this is an important point of law warranting full hearing and the grant of the orders sought.
- 12 He submitted that even if the court is persuaded by the respondent without evidence that prayer 1 has been overtaken by events, the petitioner would still be entitled to grant of prayer 2. That the balance of convenience tilts in favour of the petitioner. He submitted that no prejudice will be suffered by the respondent in the event that stay is granted.
- 13 Ms. Ngania who appeared together with Mr. Imanyara submitted that it is trite law that he who alleges must prove, relying on Sections 105 and 107 of the Evidence Act. That the respondent has not discharged the burden of proof, as it has not submitted any proof that it has complied with the constitution and forwarded its recommendation to the President.
- 14 Ms. Ngania further submitted that the petitioner is challenging the decision of the respondent. That this court has jurisdiction under Article 165(6) of the Constitution to determine the legality and process of the Judicial Service Commission, being a body established under Article 171 of the Constitution. She submitted that the petitioner is not invoking the jurisdiction of the court to supervise the tribunal as no tribunal has been formed.
- 15 Ms Ngania referred the court to the decision of the Supreme Court in Judges and Magistrates Vetting Board & 2 Others –V- Centre for Human Rights and Democracy and 11 Others (2014) eKLR where the court distinguished the jurisdiction of the High Court and that of the Tribunal. That in that decision the Supreme Court stated what jurisdiction fell within the provisions of the constitution.
- 16 Ms. Ngania submitted that what the petitioner is challenging is the quasi-judicial function of the Judicial Service Commission in making a decision.
- 17 With respect to the authorities in the respondent’s list and bundle of authorities, Ms Ngania submitted that the court declined to grant the orders sought in Augustine Michael Murandi and 2 Others –V- Nolturesh Loitoktok Water and Sanitation Company Limited (Successor in Title of National Water Conservation and Pipeline Conservation), Kajiado High Court Petition No. 8 of 2017 because it emanated from a contractual arrangement. That the jurisdiction of the High Court in the matter was appellate as it was a matter touching on water. That this is not the case in the instant application.
- 18 Ms. Ngania further submitted that in the case of Kenya Hotel Properties Limited –V- Willesden Investments Limited and Another (2018) eKLR, the Court of Appeal declined to grant the orders sought because the appellant had abused the process of the court, which is also different from the issue in the instant petition.
- 19 In concluding Mr. Imanyara added that the attorney General is a member of the Judicial Service Commission and if he is aware that a decision has been made it would be upon him to advise the President so as to preserve the integrity of administration of justice.



Respondent's Submissions

- 20 Mr. Isaac Wamaasa, Counsel for the respondent opposed the application relying on the grounds of opposition filed by the respondent and his list and bundle of authorities.
- 21 He submitted that it is the position of the respondent that the application is an abuse of the powers of this court, that the respondent has already complied and is therefore functus officio and that the orders sought cannot be granted against it. He submitted that the fact that the respondent has not filed an affidavit does not mean that the court can or should ignore the grounds. That the risk of ignoring the contention is that the court is going to deliver a ruling in vain, because by then the President may have set up a Tribunal. That the respondent will not be able to comply with the orders of this court as it has already submitted the petition to the President, pointing out that the 14 days had not yet lapsed.
- 22 Mr. Wamaasa submitted that the grounds of opposition raise serious constitutional issues.
- 23 Mr. Wamaasa further submitted that the petitioner seeks orders to injunct constitutional timeline. That there are conditions that an applicant must satisfy before such orders are granted. That he must prove a prima facie case which in counsel's opinion has not been proved.
- 24 That the petitioner must further prove irreparable loss or damage but no attempt has been made by the petitioner to do so.
- 25 That further, the petitioner must prove that the balance of convenience is in his favour. Counsel submits that the balance of convenience tilts in favour of compliance with constitutional timelines and therefore in favour of the respondent. He submitted that the petitioner has an opportunity to clear himself before the tribunal.
- 26 Counsel further submitted that the petitioner would have to file a case against the Tribunal and the Attorney General once the Tribunal is constituted as the respondent has no powers to stop the appointment of the Tribunal. Counsel relied on the two authorities he filed being –
1. Kajiado High Court Petition No. 8 of 2017: Augustine Michael Murandi and 2 Others -V- Nolturesh Loitoktok Water and Sanitation Company Limited
 2. Kenya Hotel Properties Limited –V- Willesden Investments Limited and Another (2018) eKLR.
- 27 He submitted that the petition is an abuse of court process and prays that the application be dismissed.
- 28 In a brief rejoinder, Mr. Imanyara restated that the application before the court is not defended as there was no affidavit filed in opposition thereto. Further, that the 14 days provided for in the constitution for appointment of a tribunal have not lapsed and that the court does not have to wait until a violation has occurred before acting as the Constitution provides for protection before violation.
- 29 He urged the court to grant the orders.

Determination

- 30 I have considered the pleadings and submissions made by the parties. The issues arising for determination of this court are the following –
1. Whether the respondent violated the rights and fundamental freedoms of the petitioner.
 2. Whether the petitioner has established a prima facie case.



3. Whether the respondent is functus officio.
4. Whether the petitioner is entitled to the orders sought.

31 The petitioner has pleaded that the respondent failed to serve him with its decision after conducting investigations pursuant to Article 168(1) of the Constitution, that it publicly announced its decision to refer the petition against petitioner to His Excellency the President to appoint a Tribunal to investigate him with a view of his removal. In the affidavit, he states that the respondent has no basis or jurisdiction to determine issues arising from exercise of judicial independence or discretion, which is the basis for the recommendation of the establishment of a Tribunal by the respondent.

32 The Judicial Service Commission is established under Article 171 of the Constitution. Its functions are set out at Article 172 of the Constitution as the promotion and facilitation of the independence and accountability of the judiciary and the efficient, effective and transparent administration of justice.

33 Article 168 sets out the role of the Judicial Service Commission in the process of removal of a Judge as follows –

168. Removal from office.

- (1) A judge of a superior court may be removed from office only on the grounds of—
 - (a) inability to perform the functions of office arising from mental or physical incapacity;
 - (b) a breach of a code of conduct prescribed for judges of the superior courts by an Act of Parliament;
 - (c) bankruptcy;
 - (d) incompetence; or
 - (e) gross misconduct or misbehaviour.
- (2) The removal of a judge may be initiated only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission.
- (3) A petition by a person to the Judicial Service Commission under clause (2) shall be in writing, setting out the alleged facts constituting the grounds for the judges removal.
- (4) The Judicial Service Commission shall consider the petition and, if it is satisfied that the petition discloses a ground for removal under clause (1), send the petition to the President.
- (5) The President shall, within fourteen days after receiving the petition, suspend the judge from office and, acting in accordance with the recommendation of the Judicial Service Commission—
 - (a) in the case of the Chief Justice, appoint a tribunal consisting of—
 - (i) the Speaker of the National Assembly, as chairperson;
 - (ii) three superior court judges from common-law jurisdictions;
 - (iii) one advocate of fifteen years standing; and



- (iv) two other persons with experience in public affairs; or
- (b) in the case of a judge other than the Chief Justice, appoint a tribunal consisting of—
 - (i) a chairperson and three other members from among persons who hold or have held office as a judge of a superior court, or who are qualified to be appointed as such but who, in either case, have not been members of the Judicial Service Commission at any time within the immediately preceding three years;
 - (ii) one advocate of fifteen years standing; and
 - (iii) two other persons with experience in public affairs.
- (6) Despite Article 160 (4), the remuneration and benefits payable to a judge who is suspended from office under clause (5) shall be adjusted to one half until such time as the judge is removed from, or reinstated in, office.
- (7) A tribunal appointed under clause (5) shall—
 - (a) be responsible for the regulation of its proceedings, subject to any legislation contemplated in clause (10); and
 - (b) inquire into the matter expeditiously and report on the facts and make binding recommendations to the President.
- (8) A judge who is aggrieved by a decision of the tribunal under this Article may appeal against the decision to the Supreme Court, within ten days after the tribunal makes its recommendations.
- (9) The President shall act in accordance with the recommendations made by the tribunal on the later of—
 - (a) the expiry of the time allowed for an appeal under clause (8), if no such appeal is taken; or
 - (b) the completion of all rights of appeal in any proceedings allowed for under clause (8), if such an appeal is taken and the final order in the matter affirms the tribunal's recommendations.
- (10) Parliament shall enact legislation providing for the procedure of a tribunal appointed under this Article.

[Emphasis added]

34 From the provisions of Article 168, the role of the respondent is limited to initiating the removal of a Judge either on its own or acting on a petition by any person. The respondent is then required to consider the petition, and if satisfied that it discloses a ground for removal, send the petition to the President.

35 I have perused the Judicial Service Act and it does not make any provision on the procedure through which the petition is to be considered by the respondent. Neither have the parties referred to any

36 In the case of Judges and Magistrates Vetting Board and 2 Others –V- Centre for Human Rights and Democracy and 11 Others (supra) which is the only authority filed by the petitioner, the Supreme



Court, while considering the powers of the High Court to intervene in the removal of a judge was of the opinion that the High Court may only determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Per Rawal, DCJ and Vice President (as she then was) at paragraph 223 –

Besides ousting the jurisdiction of the High Court, or any other Court for that matter, in reviewing either the removal or the process leading to the removal, of a Judge from office, the Constitution in my view, also excluded the powers of the High Court to exercise original jurisdiction in claims brought before it as a consequence of the mandate of the Vetting Board. The application of the phraseology, “shall not be subject to question in,” in my view, represents an immunity for the Vetting Boards decision. The intended finality of the decisions of the Vetting Board is further reinforced. Black’s Law Dictionary (9th Edition), at page 1366 defines “question” as “2. An issue in controversy; a matter to be determined.” The Constitution specifies the causes of action open to the remit of the High Court. Article 165(3)(b) gives the High Court jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. Article 165(3)(d) further empowers the High Court to hear any question regarding the interpretation of the Constitution. This jurisdiction, is distinguished from the High Court’s appellate jurisdiction [Article 165(3)(c)], and its supervisory jurisdiction [Article 165(6)].”

- 37 Applying the above principle to this case, it is my view that Article 168 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 rights and fundamental freedoms of the Judge during the process of “considering” a petition for purposes of satisfying that it discloses a ground for removal and ought to be sent to the President to appoint a tribunal.
- 38 The court considered the issue of ouster of jurisdiction in the case of John Fitzgerald Kennedy Omanga vs. The Postmaster General Postal Corporation of Kenya & 2 Others Nairobi HCMA No. 997 of 2003 Ochieng, J stated –

For the Court to require the alternative procedure to be exhausted prior to resorting to judicial review is in accord with judicial review being very properly regarded as a remedy of last resort though the applicant will not be required to resort to some other procedure if that other procedure is less convenient or otherwise less appropriate. Therefore, unless due to the inherent nature of the remedy provided under the statute to resort thereto would be less convenient or otherwise less appropriate, parties ought to follow the procedure provided for under the statute. This position was re-affirmed by the Court of Appeal in Speaker of The National Assembly vs. Karume Civil Application No. Nairobi. 92 of 1992, where it was held that there is considerable merit in the submission that where there is a clear procedure for redress of any particular grievance prescribed by the Constitution or an Act of Parliament, that procedure should be strictly followed. Accordingly, the special procedure provided by any law must be strictly adhered to since there are good reasons for such special procedures.”

- 39 In both the petition and the application, the petitioner does not complain of any breach of his rights and fundamental freedoms under the Bill of Rights. His complaint is that the matters giving rise to the complaint against him is the exercise of the judicial authority and discretion which can only be questioned by an appeal, and that the respondent was wrong in finding that the facts before it constituted grounds for his removal. Further, that the respondent failed to serve him with its decision, if at all the decision exists which he doubted.



- 40 From my reading of Article 168, the respondent is not required to make any decision other than satisfying itself that the petition against a Judge disclose a ground for removal. Once it is satisfied, it sends the petition as received, to the President with its recommendation to the President to appoint a tribunal. It is the Tribunal to decide whether the complaint is valid and if the Judge ought to be removed from office. Appeal against the decision of the Tribunal lies with the Supreme Court.
- 41 The petitioner has confirmed that he learned about the recommendation to the President through a press statement. According to Article 168(5) it is the President to communicate to the Judge by suspending him and appointing the Tribunal.
- 42 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 before the Tribunal is appointed. There is therefore no basis for faulting the manner in which the respondent handled the transmission of the information.
- 43 Having already finalised its mandate under Article 168, I agree with the respondent that it is functus officio. It has no further role in the matter. What remains is for the President to appoint a tribunal.
44. The orders sought under prayer one is overtaken by events as the respondent has already complied with its mandate under the constitution and forwarded the petition for removal of the petitioner to the President.
- 45 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.
- 46 For these reason I find that the applicant has not established a prima facie case for grant of the orders sought.

DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 12TH DAY OF JUNE 2019

MAUREEN ONYANGO

JUDGE

