



**REPUBLIC OF KENYA**

**IN THE EMPLOYMENT AND LABOUR RELATIONS COURT**

**AT NAIROBI**

**PETITION NO. 154 OF 2019**

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

**IN THE MATTER OF ENFORCEMENT OF FUNDAMENTAL RIGHTS UNDER ARTICLE 22 OF THE CONSTITUTION OF KENYA, 2010**

**-AND-**

**IN THE MATTER OF THE REPORT OF THE COMMITTEE OF THE JUDICIAL**

**SERVICE COMMISSION APPOINTED TO CONSIDER A PETITION LODGED BY ONYINKWA**

**AND COMPANY ADVOCATES AGAINST HONOURABLE MR. JUSTICE MARTIN MATI MUYA – JUDGE OF THE HIGH COURT OF KENYA**

**-AND-**

**IN THE MATTER OF ARTICLES 2, 3, 19, 20, 21, 22, 25 (c), 47, 50(2)(c) AND (e) AND 165(3)(a), (b), (c) AND (d) OF THE CONSTITUTION OF KENYA, 2010**

**-AND-**

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

**PRESIDENT OF THE REPUBLIC OF KENYA UNDER ARTICLE 168(2), (3) AND (4) OF THE CONSTITUTION OF KENYA, 2010**

**-BETWEEN-**

**HON. MR. JUSTICE MARTIN MATI MUYA.....PETITIONER**

**VERSUS**

**JUDICIAL SERVICE COMMISSION.....1<sup>ST</sup> RESPONDENT**

**THE ATTORNEY GENERAL.....2<sup>ND</sup> RESPONDENT**

**JUDGMENT**

The petitioner was until 4<sup>th</sup> June, 2019 a Judge of the High Court of Kenya stationed at Bomet Law Courts within Bomet County. Following the decision by the 1<sup>st</sup> Respondent to Petition His Excellency, The President of Kenya for the appointment of a Tribunal to investigate into the conduct of the petitioner, a Tribunal was appointed on 4<sup>th</sup> June, 2019 via Gazette Notice No. 4851, Vol CXX1- No. 71 of 4<sup>th</sup> June 2019.

The Petitioner was aggrieved by the above decision. It is his position that the appointment of this Tribunal was irregular, invalid, unconstitutional null and void *ab initio*. He argues that the same ought to be disbanded. He filed the instant petition which was amended on 24<sup>th</sup> June, 2019 in which he seeks:-

1) A declaration be and is hereby issued that the entire proceedings

based on the complaint dated 17<sup>th</sup> August 2017 lodged with the 1<sup>st</sup> Respondent against the Petitioner and subsequent Report of 8<sup>th</sup> May, 2019 and the findings and recommendations thereto were flawed, biased, malicious and violated the Petitioner's fundamental constitutional rights, inter-alia his right to fair hearing and fair administrative action and are therefore null and void *ab initio* and are hereby set aside forthwith.

2) A declaration that the Report dated 8<sup>th</sup> May, 2019 and the findings and recommendations thereof by the 1<sup>st</sup> Respondent pursuant to its investigations proceedings against the Petitioner on the complaints dated 17<sup>th</sup> August, 2017 and 18<sup>th</sup> December, 2017 by Onyinkwa and Company Advocates against the Petitioner does not meet the threshold of Article 168(1) of the Constitution of Kenya and the Judicial Service Code of Conduct and Ethics and is therefore invalid, null and void *ab initio* and is hereby set aside.

3) A declaration that the recommendation by the 1<sup>st</sup> Respondent contained in its Report of 8<sup>th</sup> May, 2019 to forward a petition to the President of the Republic of Kenya pursuant to Article 168 (1) of the Constitution of Kenya to form a tribunal to investigate into the conduct of the Petitioner on alleged gross misconduct, misbehaviour, breach of the Constitution and the Judicial Code of Conduct and Ethics was premature, unlawful, biased, irregular, invalid, null and void and the same is hereby set aside forthwith.

4) A declaration be and is hereby issue that the Tribunal appointed by His Excellency the President of the Republic of Kenya and gazetted vide Gazette Notice No. 4851 Vol. CXX1- No. 71 on 4<sup>th</sup> June 2019 is irregular, invalid, unconstitutional null and void *ab initio* and the same be and is hereby disbanded.

5) A declaration be and is hereby issued that the Gazette Notice No 4851 dated 4<sup>th</sup> June 2019 is irregular, invalid, unconstitutional and is thereby quashed, annulled and/or set aside forthwith.

6) A declaration be and is hereby issued that the decision of 4<sup>th</sup> June, 2019 by the president of Kenya suspending the Petitioner from discharging his duties as a Judge of the High Court of Kenya is annulled and set aside and the Petitioner be and is hereby ordered to resume duties as a Judge of the High Court of Kenya forthwith.

7) A declaration be and is hereby issued that any adjustment of the Petitioner's remuneration and benefits pursuant to the suspension of the Petitioner by the President of the Republic of Kenya be and is hereby reversed, the Petitioner's full remuneration and benefits be reinstated and any deductions already effected be and are hereby refunded to the Petitioner.

8) The Respondents to pay the Petitioner costs of these proceedings in any event.

It is the Petitioner's averment that the 1<sup>st</sup> Respondent received a complaint against him on 17<sup>th</sup> August, 2017 from the Firm of Messrs. Onyinkwa and Company Advocates on behalf of their Client NIC Bank Limited with respect to the Petitioner's conduct in the matter ***Bomet HCCC No. 4 of 2016; Alfred Kipkorir Mutai & Kipsigis Stores Limited Vs NIC Bank Limited*** which he presided over.

The Petitioner further avers that the 1<sup>st</sup> Respondent received yet another complaint from the Firm of Messrs. Mukite Musangi Advocate on behalf of their client KCB Bank Limited with regards to the matter of ***Bomet HCCC No. 2 of 2016; Alfred Kipkorir Mutai & Another Vs KCB Bank Limited*** which was similarly presided over by the Petitioner herein.

In both complaints the Petitioner is accused of inordinate delay of five (5) months in delivering his reasoning for his Rulings having delivered the shortened Ruling in both matters.

The Petitioner contends that upon receipt of the above complaints against him the 1<sup>st</sup> Respondent on 11<sup>th</sup> January, 2019, pursuant to Section 13(3) Part III of the Judicial Service Act, resolved to set up a four (4) Member committee to consider the petitions against the petitioner herein.

The Petitioner further contends that the committee as formulated proceeded to hear oral evidence from the various complainants, received written responses from the Petitioner as well as written submissions on the matters as presented and prepared its Report dated 8<sup>th</sup> May 2019.

The petitioner averred that the delay in delivering his reasons for the Rulings was occasioned by the huge workload at the station being a single Judge station and serving both Bomet and Kericho High Courts. That this was compounded by the lack of basic amenities in Bomet High Court. He posits that the delay was beyond his control.

The 1<sup>st</sup> Respondent in the aforementioned Report after hearing representations by all involved parties found that there was inordinate delay on the part of the Petitioner herein in delivering the reasons for the Ruling in Bomet HCC No. 4 of 2016; Alfred Kipkorir Mutai & Another Vs KCB Bank Limited contrary to the provisions of Order 21 Rule 1 of the Civil Procedure Act, Cap. 21 Laws of Kenya.

The 1<sup>st</sup> Respondent further in its Report found that the complaint in the Petition against the petitioner disclosed a Prima Facie case of incompetence, gross misconduct, lack of integrity and professionalism, inordinate delay and bias on the part of the Petitioner and proceeded to recommend that the Petition against the Petitioner be submitted to His Excellency the President for appointment of a Tribunal to further investigate the conduct of the Petitioner herein.

The Petitioner contends that the decision by the committee and the recommendation thereof were highly biased, suspicious and questionable since his constitutional right to fair hearing and fair administrative action were breached at the time of the alleged hearing. The petitioner

further contends that the said committee acted ultra vires when considering the complaints against him and blatantly overstepped its assigned mandate in law by delving into the merits of the Rulings subject of the complaints.

The petitioner avers that the 1<sup>st</sup> Respondent's Report dated 8<sup>th</sup> May, 2019 is largely incompetent as it has been prepared in a haphazard manner not befitting of its seriousness as it refers to another complaint received on 30<sup>th</sup> October 2017 from the Firm of Kaplan and Stratton Advocates on behalf of Kenya Tea Growers Association and 5 Others against the Hon. Justice D. K Njagi Marete, which complaint had nothing to do with the Petitioner. On this basis the Petitioner challenged the Report together with the findings therefore as being irregular, erroneous, inaccurate, invalid and therefore null and void.

The Petitioner posits that his rights as provided under the Constitution of Kenya, 2010 with regard to fair hearing and fair administrative action have been violated as he did not have the benefit of the Court file and proceedings in **Bomet HCCC No. 4 of 2016; Alfred Kipkorir Mutai and Kipsigis Stores Limited -V- NIC Bank**, a fact that was brought to the attention of the 1<sup>st</sup> Respondent through the petitioner's letter dated 20<sup>th</sup> February, 2018 and was highlighted in the proceedings of 18<sup>th</sup> March, 2018. He further avers that Articles 2(1) and (4), 3(1), 10, 20, 22, 23, 47, 50, 168(1), 168(4) and 259 have been violated by the 1<sup>st</sup> Respondent. He urges the Court to allow his Petition as drawn.

In response to the Petition, the 1<sup>st</sup> Respondent filed a Replying Affidavit sworn by ANNE ATIENO AMADI, the Chief Registrar of the Judiciary and the Secretary to the Judicial Service Commission, in which she confirmed receipt of the two complaints filed by the firms of Messrs Onyinkwa and Company Advocates and Mukite Musangi and Company Advocates against the Petitioner herein.

She further confirms having written to the Petitioner requesting him to respond to the two complaints against him vide her letter dated 30<sup>th</sup> January 2018 and requested for the Petitioner's response to the same within 21 days which response was received by the 1<sup>st</sup> Respondent on 20<sup>th</sup> February 2018.

The 1<sup>st</sup> Respondent avers that the Petitioner in the aforementioned response did admit having delayed in delivering his reasons for the Rulings in both matters thus denying the complainants the opportunity to pursue their respective appeals.

The 1<sup>st</sup> Respondent contends that the commission did constitute a committee that heard the two complaints against the Petitioner on 18<sup>th</sup> March, 2019 and 8<sup>th</sup> April 2019. It is further the 1<sup>st</sup> Respondent's contention that the Petitioner was well aware the Court files with respect to both matters were not present and still proceeded with the proceedings, the 1<sup>st</sup> Respondent therefore argued that the Petitioner's averment that he was denied a fair hearing due to the unavailability of the Court file is therefore an afterthought.

She admits that the report dated 8<sup>th</sup> May 2019 made reference to a different complaint and a different Judicial Officer. She attributed the mix up to the pressure of work. She however contended that the said omission did not occasion any prejudice to the Petitioner as the Petitioner had been responding to the complaints in writing from the onset and reference was made to the correct matter.

The 1<sup>st</sup> Respondent contends that it did submit the petition to His Excellency the President on 20<sup>th</sup> May 2019 a petition as provided under Article 168(4) of the Constitution of Kenya and is therefore *functus officio* in the matter having acted within its mandate as provided under the Constitution of Kenya. The 1<sup>st</sup> Respondent urged the Court to dismiss the instant Petition with costs to the 1<sup>st</sup> Respondent.

The 2<sup>nd</sup> Respondent on its part despite service of the Amended Petition failed to enter appearance and file its Replying Affidavit to the Petition.

The Parties agreed to proceed by way of written submissions.

### **Submissions by the Parties.**

It is submitted by the Petitioner that he was not accorded a fair hearing by the 1<sup>st</sup> Respondent as envisaged in Article 50(1) and (2) of the Constitution of Kenya and that his right to Fair Administrative Action under Article 47(1) of the Constitution of Kenya was infringed. He further argued that the Report prepared by the 1<sup>st</sup> Respondent is fundamentally flawed, full of errors. He further submitted that the manner in which the decision to Petition the President was arrived at by the 1<sup>st</sup> Respondent was not procedurally fair. The Petitioner cited the case of **Onyango Oloo Vs Attorney General (1986-1989) EA**.

The Petitioner further submitted that the complaint filed by the Firm of Messrs Onyinkwa and Company Advocates was addressed to the Office of the Chief Justice at the Supreme Court building and not the 1<sup>st</sup> Respondent herein therefore the 1<sup>st</sup> Respondent acted without jurisdiction in considering the said complaint having not been filed before it in accordance with Article 168 of the Constitution of Kenya.

The Petitioner contends that consequently the proceedings of 18<sup>th</sup> March 2019 and 8<sup>th</sup> April, 2019 and the report, findings and recommendations of 18<sup>th</sup> May 2019 by the 1<sup>st</sup> Respondent are unconstitutional, tainted with illegality, invalid, null and void *ab initio*. The Petitioner urged the Court to issue a declaration in his favour on this basis.

The Petitioner further submitted that the 1<sup>st</sup> Respondent failed to consider all mitigation given by the Petitioner and that the fact that there is no law and/or directive that prohibited the Petitioner from delivering his reasons at a later date only meant that the 1<sup>st</sup> Respondent's acts were ultra vires, irrational and unreasonable as it exceeded its jurisdiction in the matter. To fortify this argument the Petitioner cited and relied on the Court of Appeal decision in **Judicial Service Commission Vs Mbalu Mutava & Another (2015)** which also cited the findings in **Nancy Makoha Baraza Vs Judicial Service Commission & 9 Others (2012) eKLR** where it was held:

*“The High Court held, inter alia, that the JSC’s role is not that of a conveyor belt or messenger but plays the role of a sieve, that before sending the Petition to the President, either from any person or after its own investigations, it must evaluate the veracity of the allegations made against a Judge to satisfy itself prima facie that it discloses grounds for removal of a Judge and that the complaint merited forwarding to the next stage; that the JSC is not required to make definitive findings whether the allegations against the Judge have been proved.”*

The Petitioner further submitted that the complaints against him did not meet the threshold for removal of a Judge as set out in Article 168(1) of the Constitution of Kenya, 2010. He further submitted that the 1<sup>st</sup> Respondent failed to comply with the provision of Section 168 (4) of the Constitution which dictates that the 1<sup>st</sup> Respondent must be satisfied that any Petition or complaint before it against a sitting Judge must disclose a ground for removal of a judge from office under Article 168 (1) of the Constitution of Kenya before the Petition can be sent to the President to constitute a Tribunal. To fortify this argument the Petitioner cited the Court of Appeal decision of **Judicial Service Commission Vs Mbalu Mutava & Another (2015) eKLR** which cited the findings of the Privy Council in **Rees Vs Crane (1994) ALL ER 833** where it was held:

*“...the commission is not intended to simply be a conduit pipe by which complaints are passed on by way of representation...The Commission before it represents must, thus, be satisfied that the complaint has prima facie sufficient basis in fact and must be sufficiently serious to warrant representation to the President, effectively, the equivalent of impeachment proceedings. Both in deciding what material it needs in order to make such decision and in deciding whether to represent to the President, the commission must act fairly.”*

The petitioner urged this Court to allow his Amended Petition as drawn.

### **1<sup>st</sup> Respondent’s Submissions**

The 1<sup>st</sup> Respondent on the other hand has submitted that the petition lacks merit, is bad in law and an abuse of the Court process. The 1<sup>st</sup> Respondent urges this Court to dismiss the same with costs.

It is further submitted that it did accord the Petitioner a fair hearing and fair administrative action as envisaged under Articles 50 and 47 of the Constitution of Kenya, 2010 respectively. It is further submitted that the Petitioner was given adequate time to prepare for the hearing before the committee. Further that he consciously agreed to proceed with the hearing in the absence of the Court file in **Bomet HCCC No. 4 of 2016**.

The 1<sup>st</sup> Respondent contended that it did carry out its functions as provided under Article 168 of the Constitution of Kenya by considering the complaints against the Petitioner herein, investigated the same and it was satisfied that the same disclosed grounds for the petitioner’s removal as set out in Article 168 (4) of the Constitution of Kenya.

The 1<sup>st</sup> Respondent further contended that having submitted the Petition to the President as provided under Article 168 (4) of the Constitution, it became **functus officio** and that the Orders being sought against it herein cannot issue. Further that the decision of whether or not the Petitioner may be removed from office pursuant to Article 168 (1) of the Constitution lies with the Tribunal appointed by the President and not it.

The 1<sup>st</sup> Respondent avers that its duty was not to establish whether the complaint against the petitioner satisfied the threshold set out in Article 168(1) of the Constitution but rather it was to consider the Petition and be satisfied that the same discloses a ground for removal under Clause 1.

In conclusion, the 1<sup>st</sup> Respondent submitted that due to the fact that the Petitioner admitted to the delay in delivering his reasons for the Ruling (the averments in the two complaints) he is not entitled to the reliefs as sought in the Amended Petition. The 1<sup>st</sup> Respondent therefore urged the court to dismiss the petition with costs to the 1<sup>st</sup> Respondent. The 1<sup>st</sup> Respondent cited and relied on the Court findings in the matter of **Judicial Service Commission Vs Mbalu Mutava & Another (2015) eKLR** where it was held:

*“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 allegations and make a finding of fact or make recommendations for the removal of the Judge. That is the exclusive duty of the tribunal.”*

### **Analysis and Determination**

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 1<sup>st</sup> Respondent’s acts were *ultra vires*
2. Whether the 1<sup>st</sup> respondent violated the rights and fundamental freedoms of the petitioner.
3. Whether the Proceedings of 18<sup>th</sup> March 2019 and 8<sup>th</sup> April, 2019 and the Report, findings and recommendation of 18<sup>th</sup> May, 2019

by the 1<sup>st</sup> Respondent are unconstitutional

4. Whether the 1<sup>st</sup> respondent is *functus officio*.

5. Whether the petitioner is entitled to the orders sought.

The Petitioner in his Amended Petition and written submissions contended that the 1<sup>st</sup> Respondent acted in excess of its powers as it acted on complaints addressed to the Chief Justice and not the 1<sup>st</sup> Respondent. The Petitioner further contended that the mandate of the 1<sup>st</sup> Respondent as provided under the Constitution is only to determine whether grounds for the removal of a Judge had been disclosed under Article 168(1) of the Constitution and not sit on appeal against the Petitioner's ruling as the 1<sup>st</sup> Respondent did.

The 1<sup>st</sup> Respondent on the other hand submitted that its acts were within the mandate as provided by the Constitution of Kenya and that it did recommend that the complaints raised against the Petitioner herein raised a prima facie case to warrant the President to appoint a tribunal to further investigate his conduct. The 1<sup>st</sup> Respondent relied on the Authority of *Judicial Service Commission Vs Mbalu Mutava & Another (2015)* where the Court held:

*“In considering the Petition, the commission conducts a preliminary inquiry to satisfy itself that the complaint is not frivolous, lacking in substance, unfounded or hypothetical. That it has at least some probative value. The inquiry is not intended to lead to a final decision but is designed only for receiving information for the purpose of a recommendation on which a subsequent and final decision may be founded. While so engaged, the commission does not conduct a formal hearing at which witnesses are called and examined. The process merely seeks to determine if the Petition discloses a prima facie ground or grounds to warrant the presentation of the Petition to the president. It is my considered view that mere presentation of the petition to the President cannot in itself adversely affect the 1<sup>st</sup> Respondent. The commission must however, be guided by Article 47 of the Constitution that enjoins it to act fairly and in good faith – and to ensure expeditious, efficient and reasonable determination.”*

#### **What then is the function of the Judicial Service Commission in relation to the removal of a Judge?**

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.

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.

From the above provisions of Article 168, the role of the 1<sup>st</sup> Respondent is limited to initiating the removal of a Judge either on its own or acting on a petition by any person. The 1<sup>st</sup> Respondent is then required to consider the petition, and if satisfied that it discloses a ground for removal, send the petition to the President.

My understanding of the Petitioner's reason for alleging that the 1<sup>st</sup> Respondent's actions were ultra vires is because the complaints by Mukite Musangi & Company Advocates (the first complaint) and Onyinkwa & Company Advocates (the second complaint) are addressed to the Chief Justice and not the Commission and therefore do not constitute a petition under Article 168(2) which provides that-

**“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.”**

Further, that the complainant only requested the Chief Justice to take administrative action against the Petitioner and did not contemplate the removal of the Petitioner from office.

I have looked at the complaints. The first complaint opens with the sentence –

*“We write to ventilate our well founded concerns on how the above file has been handled by the Honourable Justice M. Muya sitting at the High Court of Kenya at Bomet.*

.....

*Our client certainly feels that this is a matter that may well lend itself to a formal complaint to the JSC as they now feel the conduct of the Judge when cumulatively reviewed, seems to lean in favour of the applicant in an openly biased manner.*

*Your Lordship, we humbly call upon your intervention in addressing this matter. We could request you to call for the file review it and give appropriate administrative directions.”*

The opening paragraph in the second complaint reads-

*“We are duly instructed ... to lodge a complaint ... on how this file has been handled ...”*

The last paragraph reads –

*“All in all, it is our client’s humble request that we call for intervention from your good office in addressing this matter. We request that you call for this file, review the same and take the requisite administrative action to remedy the situation herein.”*

The Complainant in my understanding asked that requisite administrative action be taken to remedy the situation.

The Chief Justice took administrative action by writing to the petitioner to respond to the two complaints before he tables them before the 1<sup>st</sup> Respondent.

The issue therefore is whether these two complaints meet the threshold of Article 168(2).

The Chief Justice is the Chairman of the Judicial Commission. Under the article the Commission may act either on its own initiative or on a petition by any person. In my view the action taken would fall within the purview of the JSC acting on its initiative following the complaints made to the Chief Justice and the Responses from the petitioner.

From the forgoing I find that the 1<sup>st</sup> Respondent’s actions were not ultra vires and that it was performing its functions as provided under the Constitution of Kenya, 2010.

The petitioner also raised an issue on the jurisdiction in respect of the Report, Findings and Recommendations of the 1<sup>st</sup> Respondent. He submitted that some of the grounds set out in the report are not stipulated under Article 168(1) and were never raised in the complaints, that the decision of the Committee of the 1<sup>st</sup> Respondent was solely based on its interpretation of Order 21 Rule 1 of the Civil Procedure Rules, 2010 and thus dwelled on interpretation of statute and are subjective. That the 1<sup>st</sup> Respondent made a decision it was not qualified and/or mandated to make. That the decision was thus ultra vires.

I have perused the report and in my opinion the 1<sup>st</sup> Respondent dealt with all the issues that arose during the hearing of the complaint. I do not think that a reference to a matter which did not appear in the complaint as submitted by the complainants occasioned any prejudice to the Petitioner.

In *Nancy Makoha Baraza Vs Judicial Service Commission & 9 Others (2012) eKLR* it was held:

*“The High Court held, inter alia, that the JSC’s role is not that of a conveyor belt or messenger but plays the role of a sieve, that before sending the Petition to the President, either from any person or after its own investigations, it must evaluate the veracity of the allegations made against a Judge to satisfy itself prima facie that it discloses grounds for removal of a Judge and that the complaint merited forwarding to the next stage; that the JSC is not required to make definitive findings whether the allegations against the Judge have been proved.”*

In my opinion it was not wrong for the 1<sup>st</sup> Respondent to deal with all the issues that arose during the hearing of the complaint. I also refer to the case of *Judicial Service Commission Vs Mbalu Mutava and Another (2015) eKLR* supra.

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 discloses 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.

#### **Whether the 1<sup>st</sup> Respondent violated the rights and fundamental freedoms of the Petitioner**

The Petitioner contends that his right to fair hearing and fair administrative action has been violated by the 1<sup>st</sup> Respondent as the hearing conducted by the Committee of the 1<sup>st</sup> Respondent was not fair. He stated that he did not have the benefit of the Court file in Bomet HCCC No. 4 of 2016 while responding to the complaints.

The 1<sup>st</sup> respondent on the other hand confirms that the Petitioner had the benefit of the file while responding to the letter from the Chief Justice and Chairperson to the Judicial Service Commission with his letter dated 13<sup>th</sup> November, 2017 and that at the hearing he chose to proceed with the same without the court file.

I have looked at the record of the proceedings and confirmed that indeed this issue came up during the hearing of the petition. I have perused the pleadings and document attached thereto and find that the Petitioner’s right to fair hearing and fair administrative action was not violated as the Petitioner was given adequate time to respond to the complaints and that he is the one who chose to proceed with the hearing despite the fact that he did not have the benefit of the Court file. When asked to confirm whether or not he wished to proceed without the file the petitioner responded that he was ready to proceed. This is in pages 9 and 10 of the proceedings.

I therefore do not find proof of denial of a fair hearing.

**Whether the Proceedings of 18<sup>th</sup> March 2019 and 8<sup>th</sup> April 2019 and the Report, findings and recommendation of 18<sup>th</sup> May 2019 by the 1<sup>st</sup> Respondent are unconstitutional**

It is submitted by the Petitioner that proceedings of March 2019 and 8<sup>th</sup> April 2019 and the report and recommendations of 18<sup>th</sup> May 2019 are unconstitutional as the same were prepared in a haphazard manner and contained errors as to the complaint and the Judicial Officer against whom the complaint was made. It is further the Petitioner's contention that these errors go to the root of the report thus questioning its credibility.

The 1<sup>st</sup> Respondent admitted that the report contained an error, attributing the same to pressure of work. It however contended that the error did not affect the credibility of the report.

I agree with the Respondent as it is clear from the proceedings of the hearing that the Petitioner was referred to complaints against him and not those against Hon. Justice D. K. Njagi Marete. Further all communication between the Petitioner and the 1<sup>st</sup> Respondent were in relation to the two complaints filed against the Petitioner herein.

The petitioner has not demonstrated how the errors per se or the manner in which the report was prepared or the quality thereof affected the credibility of the report or how these made the Report, findings and recommendation of 18<sup>th</sup> May 2019 by the 1<sup>st</sup> Respondent are unconstitutional. The constitution does not prescribe the manner in which the report should be written. Neither does the Judicial Service Act. All that is required of the 1<sup>st</sup> Respondent is to "...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..." . Of course as was held in the case of *Nancy Makoha Baraza Vs Judicial Service Commission & 9 Others (2012) eKLR* and approved by the Court of Appeal in *Judicial Service Commission Vs Mbalu Mutava & Another (2015)*

*"JSC's role is not that of a conveyor belt or messenger but plays the role of a sieve, that before sending the Petition to the President, either from any person or after its own investigations, it must evaluate the veracity of the allegations made against a Judge to satisfy itself prima facie that it discloses grounds for removal of a Judge and that the complaint merited forwarding to the next stage.*

I thus find no merit in the contention.

The Gazette Notice Number 4851 of 4<sup>th</sup> June 2019 appointing the Tribunal is contested on these same grounds. Having found that the proceedings leading to the gazetting of the Tribunal were not unconstitutional, the prayers in respect of the validity thereof must also fail.

**Whether the 1<sup>st</sup> Respondent is functus Officio**

It is not contested that the 1<sup>st</sup> Respondent submitted a petition to the President in compliance with Article 168(4) of the Constitution and that a Tribunal has since been appointed by the President. Having already finalised its mandate under Article 168, I agree with the 1<sup>st</sup> Respondent that it is *functus officio*. It has no further role in this matter which is now in the hands of the Tribunal.

**Whether the Petitioner is entitled to the reliefs sought**

I have found hereinabove that the 1<sup>st</sup> Respondent's actions in respect of the complaint against the Petitioner were not ultra vires. I have further found that there was no proof of violation of the Petitioner's right to fair hearing and that the report of the 1<sup>st</sup> Respondent was not unconstitutional. For these reasons the Petitioner is not entitled to the reliefs sought.

It is further my finding that in view of the fact that the 1<sup>st</sup> Respondent has concluded its mandate as provided under Article 168(4) of the Constitution of Kenya by forwarding the Petition to His Excellency the President for the formation of a Tribunal to further investigate the Petitioner and a Tribunal having been constituted by His Excellency, The President, this Court should allow the Tribunal to carry out its constitutional mandate and handle the matter to its conclusion. Should the Petitioner not be satisfied with the recommendation of the Tribunal, the petitioner has a right of Appeal to the Supreme Court by virtue of Article 168 (8) of the Constitution of Kenya, 2010.

The consequence of the foregoing is that the petition is dismissed. Each party shall bear its costs.

**DATED, SIGNED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2019**

**MAUREEN ONYANGO**

**JUDGE**