



REPUBLIC OF KENYA

IN THE EMPLOYMENT AND LABOUR RELATIONS COURT OF KENYA AT NAIROBI

PETITION NO. 205 OF 2019

IN THE MATTER OF ARTICLES 10, 19, 20, 22, 23, 47, 50, 162(2) (a) AND 168 OF THE CONSTITUTION OF KENYA, 2010

IN THE MATTER OF THE JUDICIAL SERVICE ACT, 2011 THE EMPLOYMENT AND LABOUR RELATIONS COURT ACT, 2011 AND THE JUDICIAL CODE OF CONDUCT AND ETHICS

IN THE MATTER OF THE TRIBUNAL APPOINTED ON 4TH JUNE 2019 TO INVESTIGATE THE CONDUCT OF THE HONOURABLE LADY JUSTICE LUCY NJOKI WAIHAKA

-BETWEEN-

JUSTICE LUCY NJOKI WAIHAKA.....PETITIONER

-VERSUS-

THE TRIBUNAL APPOINTED ON 4TH JUNE 2019 TO

INVESTIGATE THE CONDUCT OF THE HONOURABLE

LADY JUSTICE LUCY NJOKI WAIHAKA.....1ST RESPONDENT

JUDICIAL SERVICE COMMISSION.....2ND RESPONDENT

-AND-

KENYA MAGISTRATES AND JUDGES ASSOCIATION.....INTERSTED PARTY

(Before Hon. Justice Byram Ongaya on Wednesday, 11th December, 2019)

JUDGMENT

The petitioner is a Judge of the Environment and Land Court and was until her suspension on 04.06.2019 the Presiding Judge of the Environment and Land Court in Nyeri. The petitioner filed the petition on 04.11.2019 through Marende & Nyaudi Associates, Advocates. Dr. Ken Nyaudi Advocate and Mr. Tim Machage as lead by Mr. Paul Muite, SC acted for the petitioner. The petitioner prayed for:

- a) A declaration that the decision of the 2nd respondent embodied in the report dated 08.05.2019 titled, “**Report of the Committee of the Judicial Service Commission Appointed to consider a Petition by Philip Kipyegon Lelei against Hon. Lady Justice Lucy Waithaka in Kericho HCCC No. 64/2008 Jonathan Kimutai Mibei –Versus- Philip Kipyegon Lelei**” violates the petitioner’s rights under Articles 10, 19, 21, 47, 50, 160(5) of the Constitution of Kenya.
- b) An order do issue quashing the 2nd respondent’s report dated 08.05.2019 recommending for the appointment of a tribunal to further investigate the petitioner’s conduct.
- c) A declaration do issue that the institution of removal proceedings against the petitioner contemporaneously with an appeal against her judgment pronounced on 29.10.2014 in HCCC No. 64 of 2008 – Johnathan Kimutai Mibei –Versus- Philip Kipyegon Lelei is an abuse of the process contemplated by Article 75 (2) and 168 of the Constitution of Kenya.
- d) An order do issue quashing gazette Notice No. 4851 published in the Kenya Gazette volume CXX1 – No. 71 on 04.06.2019 limited to the appointment of a tribunal to inquire into the petitioner’s conduct.

e) Costs of the petition.

The petition is based on the annexed petitioner's supporting affidavit and exhibits. The petitioner also filed a supplementary affidavit on 18.11.2019.

The 1st respondent appointed the Attorney General to act in the matter and learned Senior State Counsel Ernest Kioko urged the 1st respondent's case. The 1st respondent filed on 12.11.2019 the replying affidavit of Peter Kariuki, the Joint Secretary to the 1st respondent. The 2nd respondent filed on 12.11.2019 the replying affidavit of Anne A. Amadi, the Chief Registrar of the Judiciary and the Secretary to the 2nd respondent, sworn on 12.11.2019 to oppose the petition. Mr. Isaac J.M Wamaasa Advocate acted for the 2nd respondent. The interested party despite service, did not enter appearance and did not participate in the proceedings.

The background and facts leading to the petition are as follows. On 31.07.2013 the petitioner commenced the hearing of a case identified as **Jonathan Kimutai Mibei –Versus- Phillip Kipyegon Lelei HCCC No. 64 of 2008 at Kericho** (hereafter referred to as "the case") whose hearing was concluded on 28.07.2014. The petitioner was, at the time of the hearing of the case, deployed to serve at the Nakuru Court Station and as a visiting Judge at the Kericho Court Station where the hearing of the case took place. The plaintiff in the case complied with Court's directions to file submissions by 25.09.2014 as directed by the Court and thereafter the Court directed that judgment would be delivered on 29.10.2014. The petitioner's case is that on 29.10.2014 the Court pronounced a typed judgment in open Court as required by the provisions of Order 21 Rule 1 and 3(1) of the Civil Procedure Rules. The typed and signed judgment that the Court delivered on 29.10.2014 in the case is exhibited on the supporting affidavit. The plaintiff's advocate, the plaintiff, the defendant in person (his advocate being absent) and the court clerk were present in Court on 29.10.2014 when the judgment was delivered. The petitioner's case is that the typed judgment had some typographical errors and the petitioner retired to her chambers with the case file and gave it to a secretary at the Kericho Law Courts to amend the errors in accordance with the provisions of section 99 of the Civil Procedure Act. Soon thereafter the petitioner was transferred to the Nyeri Law Courts as the Presiding Judge of the Environment and Land Court.

In June 2015 the petitioner received a letter dated 05.06.2015 from the Deputy Registrar of the High Court at Kericho enclosing, inter alia, a letter erroneously dated 05.09.2009 but received at the registry on 25.05.2015 from the defendant's advocate in the case in which the said advocate, on behalf of his client, complained that his client had been unable to access the Court file for the case and the judgment the petitioner had delivered since the judgment date and that his client had been served with an eviction notice on 20.05.2015 by the defendant which was very odd since, to his recollection, based on information conveyed by the defendant who attended the pronouncement of judgment, the plaintiff's suit had been dismissed. The Deputy Registrar also enclosed a copy of the judgment and case proceedings with a request for the petitioner to revert with comments especially regarding the allegation that the judgment delivered on 29.10.2014 had been altered subsequent thereto.

The petitioner replied the Deputy Registrar's letter by her letter dated 15.06.2015 and confirmed that she had indeed delivered a judgment in the case on 29.10.2014 in which she made the final orders as set out in the judgment delivered on 29.10.2014. Further, she had not carried the file with her to Nakuru after the Judgment was delivered. The petitioner says that thereafter she assumed the matter had rested as duly resolved. However, she received a copy of the letter dated 09.04.2016 from the Principal Judge of the High Court written by the defendant's advocates in the case and addressed to the Chief Justice who had in turn passed it to the Principal Judge of the High Court. The Principal Judge of the High Court had endorsed comments on the letter and sent it to the petitioner to make a formal written response within 14 days. The petitioner sent her response to the Principal Judge on 25.04.2016 in which she reiterated the facts set out in the response she had sent to the Deputy Registrar of the High Court in Kericho on 15.06.2015. The petitioner's case is that thereafter the Principal Judge of the High Court wrote to her the letter dated 25.05.2016 stating, **"Thank you for your response of 25th April, 2016. I have perused the documents you sent. On my part, I do not need any further elaboration from you as your response and documents are sufficient."**

The petitioner received no correspondence or word about the issue until when she received a letter dated 30.01.2018 from the 2nd respondent's secretary who wrote requiring the petitioner to appear on the same matter the petitioner says she considered closed and she had a legitimate expectation that the matter had closed. The letter dated 30.01.2018 referred to the complaint dated 10.10.2015 by the firm of O.M.Otieno & Company Advocates which had been tabled before the 2nd respondent on 24.01.2018 and upon consideration it was resolved that the petitioner and the complainant be invited to appear before the 2nd respondent for an oral hearing of the complaint. The letter stated that the date, time and venue of the hearing would be communicated later. The copy of the complaint was attached. The hearing took place on 20.03.2019 at Supreme Court Boardroom. At the hearing, the 2nd respondent's Committee with delegated powers to undertake the hearing read the charge against the petitioner as follows.

"That you Hon. Judge Waithaka, delivered your judgment on the 29th of October, 2014 in favour of the complainant defendant wherein the plaintiff's suit was dismissed with costs. However, later the judgment was altered in favour of the plaintiff who had initially lost. That, the complainant defendant was present in court and heard you, Judge Waithaka, read out the hand written judgement which was in his favour. That the Court file disappeared from the registry and upon enquiry he was informed that, you, Honourable Waithaka, had carried along the file and it had not been returned to the registry and that the file resurfaced only for them to discover that the judgment had been altered.

That unknown to them there were machinations to have the judgment of the court issued in favour of the defendant altered and that this became apparent when on the 19th of May, 2015 when the file was still missing in the registry, the defendant was served with a letter demanding that the defendant delivers vacant position within 10 days failure to which he would be evicted. That it is their position that you, Judge Waithaka, went with the court file immediately after the judgment and kept the same, only to resurface at the same time the plaintiff had changed stand and was now seeking for eviction, which contravenes the plaintiff's earlier position wherein he was aware he had lost the case and even voluntarily started processing title for the defendant.

That they sought clarification from you, Judge Waithaka and the Deputy Registrar on the contents of the typed judgement and both maintained that the typed judgment was the one read in court. That the conduct of the Deputy Registrar, Mr. Ndururi, has not been above board in the matter for the reason that despite their speed to extract protestation in the matter you proceeded with evictions decree order which the plaintiff is now using to threaten eviction on the defendant.

That is the end of the complaint, Chair....”

It is urged for the petitioner as follows:

1) The Court’s record in **Jonathan Kimutai Mibei –Versus- Phillip Kipyegon Lelei HCCC No. 64 of 2008 at Kericho** (the case) is clear. The judgement delivered by the petitioner in that case was by a court of record. The petitioner presided over the case as a Judge of the Environment and Land Court which is a superior court of record as provided under Article 162(1) as read with Article 162 (2) (b) of the Constitution of Kenya 2010. Black’s Law Dictionary 10th Edition at page 431 defines “**court of record**” as a court that is required to keep a record of its proceedings and the court records are presumed accurate and cannot be collaterally impeached. It was urged that the record of a court of record is incontrovertible. Thus, it was urged that under the doctrine of a court of record, the events of the date the judgment was delivered and thereafter were as per the court record in **Jonathan Kimutai Mibei –Versus- Phillip Kipyegon Lelei HCCC No. 64 of 2008 at Kericho**. Pertinent to the present case, it was urged for the petitioner that the two issues in the complaint before the 2nd respondent were first about the content of the judgment delivered in the case and then second whether after delivery of the judgment the petitioner took away the file. It is the petitioner’s position that the two issues were answered by the record of the court being that first that the petitioner delivered only one judgment and which was on record and secondly that the court record showed that after delivery of the judgment the file went back to the registry with no further movement so that the petitioner did not go away with the file after delivery of the judgment. It was urged for the petitioner that the complainant could not controvert the judgment on record on the basis of whatever the complainant says he heard the judgment to have been as pronounced by the petitioner and who in the hearing proceedings before the 2nd respondent admitted not to know the complexities of the law, the language of the courts and how a Judge undertook the business of the Court.

2) During the hearing before the Committee of the 2nd respondent, the Committee went into interrogating the petitioner about the judgment she had delivered in the case. It is urged for the petitioner that by so doing, the petitioner’s decisional independence was thereby violated or threatened especially that there was an appeal pending determination by the Court of Appeal as against the judgment in the case and the proper process to challenge the judgment was by way of an appeal or by way of an application for review because the 2nd respondent was not the appropriate forum for challenging the judgment. In that regard it was urged for the petitioner that the petitioner’s decisional independence had been undermined because the 2nd respondent had complained about the judgment delivered in the case by the petitioner contrary to provisions of Article 160(5) of the Constitution which provides thus, “**(5) A member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function.**” Further the impugned judgment of the petitioner in the case was also the subject matter of an appeal pending before the Court of Appeal and it was abusive of the due process for the complainant who was appealing to have concurrent proceedings before the respondents disputing the veracity of the impugned judgment.

3) It was further urged for the petitioner that the 2nd respondent under Article 168(4) of the Constitution is required to consider the petition and be satisfied that it disclosed a ground for removal of a Judge. Instead of satisfying itself accordingly, in the instant matter the 2nd respondent relied on a prima facie case which is a lower standard than the one contemplated in Article 168(4) which states, “**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.**” Thus it was urged that in the instant matter the 2nd respondent had failed to meet the threshold envisaged in Article 168(4) as read with Article 168(1) of the Constitution.

4) It was urged that the letter and spirit of Article 50 of the Constitution on due process had been violated. Article 50(1) was cited and it provides, “**Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body**”. It was urged that the respondents are such tribunal and body respectively and the 2nd respondent had required the petitioner to answer the complaint and allegations after the lapsing of over three years since the complaint was initially made and long after the Principal Judge of the High Court had written on 25.05.2016 assuring the petitioner that she had replied to the complaint sufficiently as the Principal Judge did not need any further elaboration from the petitioner so that the matter had rested in the petitioner’s legitimate expectation, accordingly. It was urged that the delay was not excusable and it made the proceedings before the respondents incurably defective because in the intervening lapse of time, the plaintiff in the case passed on and the plaintiff would have been the petitioner’s key witness in the matter. Further the judiciary’s laptop provided for the petitioner’s official work and on which the petitioner had typed the judgment in the case was no longer available to demonstrate the petitioner’s accuracy and truthfulness.

5) The judgment in the case as delivered by the petitioner was a sound judgment with all prescribed attributes of a good judgment by a court of law and a party being dissatisfied had a right to appeal. Thus, in a ruling by the Court of Appeal in **Philip Kipyegon Lelei –Versus- Jonathan Kimutai Mibei [2016]eKLR**, leave had been granted to file an appeal and an appeal had been filed based on the record as was now before the 1st respondent in the impugned removal proceedings.

6) Article 168(5) of the Constitution provides, “**The President shall, within 14 days after receiving the petition, suspend the judge from office and, acting in accordance with the recommendation of the Judicial Service Commission -(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.**” It was urged for the petitioner that in Gazette Notice No. 4851 of 04.06.2019 the President appointed Justice Alnashir Visram as Chairperson, and, Justice (Rtd) Festus Azangalala, Ambrose Weda, Andrew Bahati Mwamuye, Lucy Kambuni, Sylvia Wanjiku Muchiri, and Amina Abdalla to be members of a Tribunal to investigate the conduct of the petitioner about, “**...matters including but not limited to: The allegations contained in the petition of the Judicial Service Commission of Kenya dated the 8th day of May, 2019 and presented to myself on the 20th of May, 2019 regarding the conduct of Lucy Njoki Waithaka, Judge of the Environment and Land Court of Kenya.**” It was urged that use of the words “**...including but not...**” meant that the petitioner was subjected or would be subjected to an investigation by the 1st respondent beyond the allegations in the petition by the 2nd respondent and in contravention of Article 168(5) of the Constitution. It was submitted that in **Nancy Baraza –Versus- Judicial Service Commission & 9 Others [2012]KLR**, a bench of three Judges, (Warsame J, Omondi J, and Odunga J) held at paragraph 120 of the judgment that the use of the words “**...including but not ...**” in a similar Gazette Notice No. 664 of 26.01.2012 for a

tribunal to investigate the judge therein was to that extent *ultra vires* the powers conferred upon the President under Article 168(5). Thus it was urged for the petitioner that the 1st respondent cannot be allowed to frame its own or new charges against the petitioner. In that case the High Court held at paragraph 124 thus, **“...It is our view that where any provision is contrary to the Constitution, only the inconsistent portion is to be declared void...”**

7) The Court enjoys jurisdiction to hear and determine the petition as per Article 165 (2) (b) on jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened as read together with Articles 165 (5) (b) and 162 (2) (a) on the jurisdiction of the Court over employment and labour relations.

For the 1st respondent, it was urged that Article 168 (5) of the Constitution was invoked in appointing the 1st respondent by the President as per Gazette Notice No. 4851 dated 04.06.2019. It was urged for the 1st respondent that the 1st respondent would not reply to the merits of the petitioner’s case because that would be reserved for the 1st respondent’s consideration as duly appointed to do. It was further urged that the alleged violations against the 2nd respondent would be cured through the proceedings before the tribunal, the 1st respondent. Further the 1st respondent in its proceedings would be guided by the provisions of Article 160(1) which provides that in the exercise of judicial authority, the Judiciary, as constituted by Article 161, shall be subjected only to the Constitution and the law and shall not be subjected to the control or direction of any person or authority. Under Article 161 (1) the Judiciary consists of the judges of the superior courts, magistrates, and other judicial officers and staff. Under Article 159(1), the judicial authority is derived from the people and vests in and shall be exercised by, the courts and tribunals established by or under the Constitution. It was urged that the 1st respondent will act fairly in line with the cited constitutional provisions and it was ready to have the petitioner to clear her name. Further validity of the proceedings before the 1st respondent was not affected by the procedure adopted by the 2nd respondent. The 1st respondent then urged two issues that it considered crucial in the case as follows:

a) The 1st issue was whether the Court should interfere with the 1st respondent’s mandate to investigate the petitioner and render a report to the President. It was submitted that if there was another body to dispose of an issue, then the Court should let that other body determine the issue. In the instant case, the 1st respondent urged that it was the right forum for the claimant to clear her name. The Court should not entertain the petition because the 1st respondent was the constitutionally provided avenue for the petitioner to ventilate her concerns and seek justice in the matter. For the 1st respondent it was submitted that the Court should abide by the holding in **Secretary, County Public Service Board & Another –Versus- Hulbhai Gedi Abdille [2017]eKLR** where the Court of Appeal (Makhandia, Ouko, and M’Inoti JJ.A) held that where there exists other sufficient and adequate avenue or forum to resolve a dispute, a party ought to pursue that avenue or forum and not invoke the court process if the dispute could very well and effectively be dealt with in that other forum. And further, **“...In our view, the most suitable and appropriate recourse for the respondent was to invoke the appellate procedure under the Act...we discern no exceptional circumstance in this appeal that would have warranted the bypassing of the statutory appellate process by the respondent....”** Thus, it was urged for the 1st respondent that the forum in Article 168 of the Constitution applied to cases for removal from office of a judge. Further, the petitioner should subject herself to the tribunal’s jurisdiction as appointed under Article 168(5) (b) and if the petitioner will be aggrieved by the decision of the 1st respondent she will appeal to the Supreme Court as provided for in Article 168(8).

b) The 2nd issue urged for the 1st respondent is that there was no material before the Court to challenge the constitutionality of the 1st respondent as duly appointed by the President in Gazette Notice No. 4851 dated 04.06.2019. It was urged that the petitioner should not be afraid but should be confident that the 1st respondent will look at all her concerns in the matter and do so justly while adhering to the constitutional mandate and standards.

It was urged and submitted for the 1st respondent that the Court should interpret and determine the petition as per Article 159 (2) (e) which provides that in exercising judicial authority the Court shall be guided by the principle, *inter alia*, that the purpose and principles of the Constitution shall be promoted and protected.

For the 2nd interested party it was urged that it had performed its duty as per Article 168(1), (2), (3), and (4) of the Constitution. Further the 1st respondent was part of the Judiciary in terms of Article 161 (1) of the Constitution. Thus it was the correct forum for the petitioner to ventilate her concerns. As submitted for the 1st respondent, the 2nd respondent urged that the 1st respondent was an independent body and the petitioner should be confident to get justice from that forum. The petition was therefore an abuse of Court process. The 2nd respondent’s decision was made on 08.05.2019 and on 04.06.2019 the 1st respondent was appointed so that the petitioner had moved the Court belatedly on 04.11.2019 as a mere afterthought – as she did not move the Court promptly after the 2nd respondent concluded its work in the matter and if she was dissatisfied as currently alleged in the petition. It was further urged that the petitioner did not mention issue of prejudice before the 2nd respondent’s proceedings as regards the laptop that was taken from her or death of the plaintiff in the case whose judgment was impugned, or that she was informed by the letter by the Principal Judge of the High Court that she did not need to elaborate her response further and therefore acquired a legitimate expectation that the matter had rested. Thus the petitioner should not be allowed to raise issues she had not raised before the 2nd respondent towards faulting the 2nd respondent’s decision in the matter.

The 2nd respondent further stated that the 1st respondent had obtained witness statements for its process and which statements were exhibited on the petitioner’s supporting affidavit. Those were the 1st respondent’s processes and not the 2nd respondent’s work.

The 2nd respondent further urged that the issues forming the grounds for the 2nd respondent’s decision to forward the case to the President revolved around two issues namely whether the petitioner altered the judgment and, whether the petitioner left Kericho station with the case file in the case. The 2nd respondent denied that the case was about merits of the judgment the petitioner had delivered in the case. It was the 2nd respondent’s case that after judgment was delivered in the case, the file went missing, and the plaintiff in whose favour the judgment in the case was to be in his favour filed a notice of appeal. Further, the defendant in the case filed an application at the Court of Appeal to file an appeal out of time and it was allowed upon reasons given in paragraph 14 of the ruling by the Court of Appeal in **Philip Kipyegon Lelei – Versus- Jonathan Kimutai Mibei [2016]eKLR**, (Okwengu JA) that the applicant had established grounds for the delay in filing the appeal. Thus it is urged for the 2nd respondent that on merits of the case the 2nd respondent had some grounds on whether the petitioner was fit to hold office of a judge and that issue could not be determined by the Court of Appeal while considering merits of the pending appeal against the judgment in the case – so that merits of the judgment in the case was not before the 2nd respondent or its Committee’s hearing in the instant case. It was further urged that Article 160(5) removes liability of judges for **“...anything done or omitted in good faith in the**

lawful performance of a judicial function.” Further the proper forum to establish if that test is satisfied was the 1st respondent and which goes to accountability and not the decisional independence of the petitioner. The 2nd respondent urged that the petitioner be allowed to submit to the 1st respondent’s jurisdiction.

The Court has considered the pleadings, the affidavits, the exhibits and the submissions filed for the parties. The Court considers that there are two pertinent preliminary issues that fall to be determined prior to delving into the matters of merits of the petition. The preliminary issues are as follows:

- 1) Whether the proper forum is this Court or is the 1st respondent.
- 2) Whether there exist exceptional circumstances in the petition that warrant the bypassing of the 1st respondent to justify the exercise of the Court’s jurisdiction as envisaged in Article 165 (2) (b) on jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened as read together with Articles 165 (5) (b) and 162 (2) (a) on the jurisdiction of the Court over employment and labour relations; and as per Articles 22 and 258 of the Constitution of Kenya, 2010.

For the **1st issue**, it is submitted for the respondents that the provisions in Article 168 involving the 2nd respondent, the 1st respondent then an appeal to the Supreme Court in event of dissatisfaction is the complete and conclusive forum in the matters of removal of a judge from office. For the petitioner it is submitted that the 2nd respondent has not met the threshold of being satisfied that there exists a ground that may lead to such removal of the petitioner and further that if any ground exists, it offends the decisional independence of the petitioner by interrogating the judgment in the case and which judgment she had delivered in good faith and lawful exercise of her jurisdiction as a judge.

The Court considers that justiciability is the concept in law that concerns itself with whether the Court is the most appropriate organ of the state or government (government in the wider sense including the three arms of government and other public agencies or bodies) to deal with the dispute. **The Black’s Law Dictionary 10th Edition at page 996** defines “**justiciability**” as the quality, state, or condition of being appropriate or suitable for adjudication by a court. The case may not be suitable for adjudication by the court due to a number of reasons such as under mootness doctrine where the real dispute has ceased to exist. The dictionary lists elements of the doctrine of justiciability such as advisory opinions, feigned and collusive cases; standing, ripeness, political questions and administrative questions. The Court considers that the application of the doctrine of justiciability is highly modified by the provisions of the Constitution of Kenya 2010 and which provisions have tended to admit than deny the forum in courts of law more readily and often so than not. The Court considers that a sound development and application of the doctrine of justiciability should lead to rules related to availability of alternative and more convenient remedies, Thus as was held in **Secretary, County Public Service Board & Another –Versus- Hulbhai Gedi Abdille [2017]eKLR** by the Court of Appeal , an alternative and more convenient remedy in some other tribunal or forum should, in the Court’s opinion be a good ground for the Court to decline to act. The Court considers that a sound application of the doctrine of justiciability should be one of the better mechanisms for keeping courts within what actually is or is perceived to be their proper constitutional sphere of activity.

In the instant case it is urged for the respondents that there exist constitutionally prescribed avenue under Article 168 and in the circumstances of the case, the Court should decline its forum. The Court has considered the grounds in support of the petition as urged and submitted for the petitioner and as earlier listed in this judgment. The Court finds that the grounds (with exception of one and which the Court will return to later in this judgment), they are grounds which mix allegations of fact and law, rights, freedoms and enforcement of the constitutional provisions which constitute a blend of what the Court returns to be a cause of action for which the 1st respondent is properly established to investigate and render a report. The Court has further considered the ripeness and the suitability of its forum in the case and returns that looking at the grounds as urged for the petitioner, to properly, fairly and completely adjudicate on the matters of rights and fundamental freedoms and other constitutional provisions as may have been violated or threatened, the taking of evidence and consideration of the representations of other parties or persons involved in the matter but being not before the Court in the present petition would be necessary. The Court returns that such proper, fair and complete determination of the matters would therefore be properly undertaken in the proceedings before the 1st respondent. The Court further considers that the 1st respondent’s forum would be the conclusive forum to vindicate the petitioner as may be found by the 1st respondent rather than for this Court to make a finding on the grounds raised by the petitioner one way or the other in circumstances whereby the determination of some of the matters in issue would be rendered as aborted and which would not be the case in the forum before the 1st respondent. To answer the 1st preliminary issue in the case, the Court returns that the proper forum is the 1st respondent.

For the **2nd issue**, there was no dispute between the parties that the Court enjoys jurisdiction as envisaged in Article 165 (2) (b) on jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened as read together with Articles 165 (5) (b) and 162 (2) (a) on the jurisdiction of the Court over employment and labour relations disputes; and as per Articles 22 and 258 of the Constitution of Kenya, 2010. The preliminary issue is whether, despite the findings on forum in the 1st issue, the petitioner has nevertheless established an exceptional ground that would warrant the exercise of its jurisdiction in the petition. The Court returns to the exceptional ground in the petition and finds that the respondents have not contested the unconstitutionality of the Gazette Notice No.4851 of 04.06.2019 to the extent that it used the words “**...including but not...**” Thus the Court follows the holding in **Nancy Baraza –Versus- Judicial Service Commission & 9 Others [2012]KLR** and returns that the Gazette Notice in the present petition is unconstitutional to the extent that it contains the words, “**...including but not...**”and which are liable to being struck out from the Gazette Notice 4851 of 04.06.2019 appointing the 1st respondent.

To answer the **3rd issue** for determination, in view of the findings on the 1st and 2nd preliminary issues above, the Court will not delve into the other matters raised in the petition as they go to the merits of the case to be investigated and reported upon by the 1st respondent.

While making that finding the Court has considered the submission made for the petitioner that she should not be dragged through the substantive or full proceedings by the 1st respondent in circumstances whereby under the doctrine of the court of record and independence of the judiciary, there is only one judgment on record; the second judgment is fictitious and only in the mind of the complainant; her decisional independence is being undermined for a matter she handled in good faith and lawfully; and that the constitutional threshold was not met by the 2nd respondent prior to forwarding the case to the President. The Court returns that such are matters that the 1st respondent might, within its procedural rules, decide on preliminary basis or other convenient stage in the proceedings as the petitioner may wish to move the 1st

respondent appropriately. The Court further considers that depending on the outcomes or decision by the 1st respondent, such should be matters the petitioner may move to the Supreme Court by way of an appeal within the forum contemplated in Article 168(8) of the Constitution. The Court considers that the Courts always have jurisdiction to declare the law and even where statutory ouster provisions exist, the Court holds that such finality or ouster provisions have no effect to that fundamental and constitutional function of the courts of law. The Court finds that an appeal to the Supreme Court as contemplated in Article 168 of the Constitution is the forum for dealing with any jurisdictional error on the part of the 1st respondent and as was held by Lord Pearce in Anisminic Ltd –Versus- Foreign Compensation Commission and Another 1969 2 A.C 147 at 360, thus “**Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an inquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage while engaged on a proper inquiry the tribunal may depart from rules of natural justice; or may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its inquiry into something not directed by parliament and fail to make the inquiry which parliament did direct. Any of these things would cause its purported decision to be a nullity.**”

The Court considers that the 1st respondent as a tribunal may be guilty of such jurisdictional errors and should the petitioner consider that she is aggrieved in that regard, the constitutionally provided channel is to file an appeal at the Supreme Court as per Article 168 (8) of the Constitution. It could be that as was urged for the petitioner, the constitutional threshold for existence of the ground to justify the case being forwarded to the President by the 2nd respondent was not met. Such is a question of whether the 1st respondent had the entitlement to embark on the investigation and subsequent reporting, that is, jurisdiction *ab initio*. While undertaking the investigation and reporting, the 1st respondent might also engage in matters beyond what it was authorised to investigate and report on, that is, exceed jurisdiction such as in the sphere of the words the Court has found to have been unconstitutional in the Gazette Notice appointing the 1st respondent. The two would in the Court’s opinion amount to jurisdictional errors on the part of the 1st respondent. In both instances of jurisdictional error, the Court returns that the constitutional design under Article 168 is such that the petitioner is entitled to raise them before the 1st respondent and if aggrieved by the decision of the 1st respondent, by way of an appeal to the Supreme Court, the matter will be decided with finality.

The parties did not submit on the issue but Court doubts that in deciding the appeal, the matter would in some way be remitted back to this Court by the Supreme Court within the provisions of Article 165 (2) (b) on jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened as read together with Articles 165 (5) (b) and 162 (2) (a) on the jurisdiction of the Court over employment and labour relations disputes; and as per Articles 22 and 258 of the Constitution of Kenya, 2010 – because the design of Article 168 provides for a convenient and expeditious procedure for the proper, just and complete determination of the matter under the Article and with such finality by the Supreme Court. The Court considers that the issue is left for the Supreme Court’s decision in an appropriate future case on the point as the issue has not accrued in the present petition. In the instant petition, there was no decision of the 1st respondent about the offensive words in the Gazette Notice and thus this Court has exercised the jurisdiction and made a finding because an appeal to the Supreme Court had not accrued for want of the 1st respondent’s decision to be appealed against. However, had the 1st respondent made a decision about the challenged words in the Gazette Notice, then the proper channel would be to appeal to the Supreme Court. Thus, in an appropriate and exceptional case of proceedings under Article 168 of the Constitution, it appears that this Court would have jurisdiction for that exceptional matter (like the instant case the offensive words in the Gazette Notice which would impair the tribunal’s jurisdiction) provided the tribunal has not made a decision on the matter and therefore circumstances for appealing to the Supreme Court would not yet have accrued. What would amount to an exceptional matter, in the opinion of the Court, will vary from case to case based on the unique circumstances of the individual cases and may include such obvious violation or threatened violation of rights or fundamental freedoms in the Bill of Rights independent of (that is not subject to or requiring) the investigation and reporting by the tribunal; an impairment in the membership the tribunal; outright or manifest injustice or unreasonableness; or a matter that impairs the tribunal’s jurisdiction on the face of it such as the words that have been found to be offensive in the instant petition.

On the **4th issue** for determination, the Court has considered the respondent’s position that the Attorney General was a necessary party and returns that the omission of the Attorney General as a party did not impair the just and complete determination of the dispute between the parties actually before the Court. In any event the petitioner cannot be faulted for not naming the Attorney General as a party because the Attorney General is a member of the 2nd respondent and acted for the 1st respondent in the petition. In such circumstances, the Attorney General was aware of the proceedings and had a fair chance to make his opinion and case known about the petition.

The Court has considered the parties’ margins of success, the nature as well as the importance of the proceedings in growing jurisprudence and returns that there shall be no orders on the costs of the petition.

In conclusion the petition filed herein for the petitioner on 04.11.2019 is hereby determined with orders:

- a) The words“**...including but not...**” appearing in the Gazette Notice No. 4851 published on 04.06.2019 (by which the President appointed the 1st respondent) are found unconstitutional to the extent that they are ***ultra vires*** the powers conferred upon the President under Article 168(5) of the Constitution of Kenya, 2010 and the said words “**...including but not...**” be and are hereby struck out from the said Gazette Notice; and for avoidance of doubt the 1st respondent shall only consider and confine its investigation, decision and report to the petition or representations by the 2nd respondent against the petitioner.
- b) No orders on the costs of the petition.

Signed, dated and delivered in court at **Nairobi** this **Wednesday, 11th December, 2019.**

BYRAM ONGAYA

JUDGE