



**Shollei v Judicial Service Commission & another (Application 10 (E016) of 2022) [2023] KESC 8 (KLR) (Civ) (17 February 2023) (Ruling)**

Neutral citation: [2023] KESC 8 (KLR)

**REPUBLIC OF KENYA  
IN THE SUPREME COURT OF KENYA**

**CIVIL**

**APPLICATION 10 (E016) OF 2022**

**PM MWILU, DCJ & VP, SC WANJALA, N NDUNGU, I LENAOLA & W OUKO, SCJJ**

**FEBRUARY 17, 2023**

**BETWEEN**

**GLADYS BOSS SHOLLEI ..... PETITIONER**

**AND**

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

**COMMISSION ON ADMINISTRATIVE JUSTICE ..... 2<sup>ND</sup> RESPONDENT**

*(Being an application for enlargement of time to comply with the directions of this Honourable Court in the Judgment delivered on 17th February 2022)*

**Supreme Court lacks the jurisdiction to determine an application for enlargement of time to comply with the directions in a matter it had already determined.**

*The Supreme Court did not have the jurisdiction to extend time for parties to comply with orders of the court. Once the court was functus officio, it ceased having jurisdiction over the matter. Where the directions of the Supreme Court did not require the parties to update the Supreme Court on compliance with the court's orders, the court was deemed to have finalized the proceedings and it did not have jurisdiction to further determine any issues raised by the parties.*

Reported by John Wainaina

**Jurisdiction** – jurisdiction of the Supreme Court – functus officio – application to re-open a matter for directions where the court was functus officio - whether the Supreme Court having already made a determination on an issues before it, had the jurisdiction re-open deliberations on its directions.

**Brief facts**

The applicant sought for the Supreme Court to enlarge time for compliance with Supreme Court orders which the court had issued after having conclusively determined the instant matter.



## Issues

Whether the Supreme Court having made a determination on issues before it, had the jurisdiction re-open deliberations on its directions.

## Held

1. The Supreme Court was *functus officio* having rendered its judgment on February 17, 2022 which *inter alia*, directed the 1<sup>st</sup> respondent/applicant to publish and publicize procedures for all its disciplinary and investigative processes, and that such publication be undertaken and effected through the Kenya Gazette, within 90 days from the date of the Judgment. The Supreme Court having made a determination on the issues before it could not re-open deliberation on its directions.
2. A court was *functus* when it had performed all its duties in a particular case. The purpose of the doctrine was to provide finality. Once proceedings were finally concluded, the court could not review or alter its decision; any challenge to its ruling on adjudication had to be taken to a higher court if that right was available.
3. The court had finalised the proceedings in the instant matter and did not have jurisdiction to further determine issues raised by the parties. The scope of the directions given by the court was specific to a period of ninety days. Further, the directions did not require the parties to return to update the Supreme Court on whether there was any progress as regards compliance. The determination by the court on the instant matter brought the whole matter to a final close. The parties were bound by court orders which required strict compliance.
4. The draft manual attached to the 1<sup>st</sup> respondent/applicant's notice of motion application is the requisite legal instrument anticipated under section 47 of the which empowered the 1<sup>st</sup> respondent to make regulations for the better carrying out of its purpose. The 1<sup>st</sup> respondent would be well advised to stand guided by the structure and format of the already published regulations provided for and gazetted in the third schedule of the and comply accordingly in form and content.

*Application dismissed.*

## Orders

No order as to costs.

## Citations

### Cases

1. *Asanyo & 3 others v Attorney General* (Petition 21 of 2015; [2018] KESC 10 (KLR)) — Explained
2. *County Executive of Kisumu v County Government of Kisumu & 8 others* (Civil Application 3 of 2016; [2017] eKLR) — Explained
3. *Odinga & 2 others v Independent Electoral & Boundaries Commission & 3 others* (Petition 5, 4 & 3 of 2013; [2013] KESC 8 (KLR)) — Explained
4. *Salat, Nicholas Kiptoo Arap Korir v Independent Electoral and Boundaries Commission & 7 others* (Application 16 of 2014; [2014] KESC 12 (KLR)) — Explained
5. *Jersey Evening Post Limited v A. Thani* ([2002] JLR 542 at pg. 550) — Explained

### Statutes

1. Constitution of Kenya, 2010 — Article 50, 159 — Interpreted
2. Judicial Service Act, 2011 (No 1 of 2011) — Section 47; Schedule 3 — Interpreted
3. Supreme Court Rules, 2020 (No 7 of 2011 Sub Leg) — Rule 15(2), 31(6) — Interpreted

### Advocates

*Mr Kiragu Kimani* for Petitioner

*Mr Issa Mansur* for 1st Respondent



## RULING

1. Upon reading the amended notice of motion filed by the Judicial Service Commission the 1<sup>st</sup> respondent/applicant herein, which application is dated October 13, 2022 and filed on October 19, 2022 pursuant to article 50 and 159 of the *Constitution* and rules 15(2) & 31(6) of the *Supreme Court Rules* praying for an order that;

This honourable court to enlarge time within which the 1<sup>st</sup> respondent is to publish and publicize procedures for all its disciplinary and investigative processes through the Kenya Gazette by a further period of ninety (90) days from the date of the ruling on the application or consent by the parties.

2. Upon reading the supporting affidavit sworn on August 24, 2022 by the 1<sup>st</sup> respondent's secretary, Anne Amadi; and
3. Upon considering the 1<sup>st</sup> respondent's grounds in support of the application wherein it contends that; this court delivered its Judgment on February 17, 2022 where it directed the 1<sup>st</sup> respondent to publish and publicize procedures for all its disciplinary and investigative processes through the Kenya Gazette within ninety (90) days from the date of the Judgment; that the various stakeholders engaged by the 1<sup>st</sup> respondent to comment on the draft manual are yet to submit their responses; and that the application was filed without undue delay and that no prejudice will be occasioned by granting the orders prayed for; and
4. Noting this court's directions issued on October 27, 2022 where the parties were directed to file written submissions addressing the following questions; whether this court has jurisdiction to entertain this application, the legal provisions under which parties may enter a consent as sought and whether the draft manual attached to the application is the requisite legal instrument anticipated under section 47 of the *Judicial Service Act*; and
5. Upon considering the 1<sup>st</sup> respondent/applicant's submissions filed on November 15, 2022 where it submitted that this court has jurisdiction to enlarge time pursuant to rule 15(2) of the *Supreme Court Rules*; that the *Supreme Court Rules* are silent on the mode and manner of recording consent orders and that article 159(2) of the *Constitution* contemplates settling of disputes and any pending judicial proceedings by recording of consents as an alternative dispute resolution mechanism; and that the draft manual attached to assist in facilitating its constitutional disciplinary mandate and developed pursuant to section 47 of the *Judicial Service Act* which empowers it to make regulations; and
6. Upon considering the case law cited in support of the 1<sup>st</sup> respondent/applicant's submissions being *Nicholas Kiptoo Arap Korir Salat v Independent Electoral and Boundaries Commission & 7 others* [2014] eKLR and *County Executive of Kisumu v County Government of Kisumu & 8 others* [2017] eKLR and *Geoffrey M Asanyo & 3 others v Attorney General* [2018] eKLR; and
7. Upon considering the petitioner/respondent's written submissions filed on November 28, 2022 in support of the application where she submitted that rule 15(2) of the *Supreme Court Rules, 2020* vest this court with jurisdiction to enlarge time.
8. Having considered the 1<sup>st</sup> respondent's amended notice of motion application and submissions by the parties, We hold as follows:

On Jurisdiction to extend time:



9. This court is now *functus officio*, having rendered its judgment on February 17, 2022 which *inter alia*, directed the 1<sup>st</sup> respondent/applicant to ‘publish and publicize procedures for all its disciplinary and investigative processes, and that such publication be undertaken and effected through the Kenya Gazette, within 90 days from the date of this Judgment.’ This court having made a determination on the issues before it cannot re-open deliberation on its directions; and

10. Noting that in the case of *Raila Odinga vs IEBC & 3 others* [2013] eKLR this court referred to the case of *Jersey Evening Post Limited v A Thani* [2002] JLR 542 at pg 550 where it was stated that:

A court is functus when it has performed all its duties in a particular case. The doctrine does not prevent the court from correcting clerical errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded, and the court *functus*, when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded, the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.” [emphasis ours]

11. We determine that this court has finalised the proceedings in this matter and does not have jurisdiction to further determine issues raised by the parties. The scope of the directions given by this court was specific to a period of ninety (90) days. Further, the directions did not require the parties to return to update the court on whether there was any progress as regards compliance. The determination by this court on this instant case thus brought the whole matter to a final close. This is therefore to say that parties are bound by court orders which require strict compliance.

12. Consequently, we find that this court does not have jurisdiction to extend the timeline granted to the 1<sup>st</sup> respondent to publish and publicize procedures for all its disciplinary and investigative processes through the Kenya Gazette.

On clarity of this court’s orders relating to instruments under section 47 of the *Judicial Service Act*;

13. We find that the draft manual attached to the 1<sup>st</sup> respondent/applicant’s notice of motion application is the requisite legal instrument anticipated under section 47 of the *Judicial Service Act* which empowers the 1<sup>st</sup> respondent to make regulations for the better carrying out of its purpose, we can say no more than to state that the 1<sup>st</sup> respondent would be well advised to stand guided by the structure and format of the already published regulations provided for and gazetted in the third schedule of the *Judicial Service Act* and comply accordingly in form and content.

14. Consequently, we dismiss the 1<sup>st</sup> respondent’s application with no order as to costs.

15. It is so ordered.

**DATED AND DELIVERED AT NAIROBI THIS 17<sup>TH</sup> DAY OF FEBRUARY, 2023**

.....

**P.M MWILU**

**DEPUTY CHIEF JUSTICE & VICE PRESIDENT OF THE SUPREME COURT**

.....

**C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....



**NJOKI NDUNGU**  
**JUSTICE OF THE SUPREME COURT**

.....

**I. LENAOLA**  
**JUSTICE OF THE SUPREME COURT**

.....

**W. OUKO**  
**JUSTICE OF THE SUPREME COURT**

*I certify that this is a true copy of the original*

**REGISTRAR,**  
**SUPREME COURT OF KENYA**

