



**Lubengu v Judicial Service Commission & another; Aldrin Ojiambo t/  
a Acorn Law Advocates-LLP (Interested Party) (Petition E110 of 2025)  
[2025] KEHC 7926 (KLR) (Constitutional and Human Rights) (30 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 7926 (KLR)

**REPUBLIC OF KENYA**  
**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**  
**CONSTITUTIONAL AND HUMAN RIGHTS**  
**PETITION E110 OF 2025**  
**AB MWAMUYE, J**  
**APRIL 30, 2025**  
**IN THE MATTER OF ARTICLES 2,10,22,47,50,73,159,160,165,168,171,172 AND 259**  
**OF THE CONSTITUTION OF KENYA 2010.**  
**AND**  
**THE JUDICIAL SERVICE ACT NUMBER 1 OF 2011**  
**AND**  
**THE FAIR ADMINISTRATIVE ACTIONS ACT**  
**AND**  
**THE JUDICIAL CODE OF CONDUCT**  
**AND**  
**THE PRINCIPLES OF JUDICIAL IMPARTIALITY AND JUDICIAL INDEPENDENCE**  
**AND**  
**ALL OTHER ENABLING PROVISIONS OF LAW**  
**AND**  
**JSC PETITION NO 29 OF 2023**

**BETWEEN**  
**KENNEDY ECHESA LUBENGU ..... PETITIONER**  
**AND**  
**THE JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT**  
**ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**



AND

ALDRIN OJIAMBO T/A ACORN LAW ADVOCATES-  
LLP ..... INTERESTED PARTY

RULING

**Introduction**

1. The Petitioner/Applicant is aggrieved by ongoing proceedings before the Judicial Service Commission (JSC) in JSC Petition No. 29 of 2023: Acorn Law Advocates LLP v. Hon. Lady Justice Dorah Chepkwony. In that petition, Acorn Law Advocates LLP (the Complainant) has lodged a complaint against the Applicant, prompting the JSC to initiate the process of the possible removal of the Hon. Lady Justice Dorah Chepkwony ( herein after “ the Subject Judge”) under Article 168(2) of the Constitution. The Petitioner/Applicant contends that the JSC proceedings have been conducted in a manner that violates the Subject Judge’s constitutional rights and the law, particularly the right to fair administrative action under Article 47 of the Constitution and the applicable statutory procedures. The Petitioner/Applicant asserts that unless the High Court intervenes, the JSC’s actions could lead to the Subject Judge’s suspension and eventual removal without proper due process and in breach of her fundamental rights.
2. Consequently, the Petitioner/Applicant has filed the present Constitutional Petition together with a Notice of Motion Application seeking conservatory orders to stay and/or suspend the JSC proceedings pending the hearing and determination of the Petition. The Application is expressed to be brought under Articles 22, 23(3)(c) and (d), and 165(3)(b) & (d) of the Constitution, Section 4 of the Fair Administrative Action Act 2015, Sections 3 and 3A of the Civil Procedure Act. The Petitioner/Applicant also invokes Article 165(4) of the Constitution, seeking certification that the Petition herein raises substantial questions of law warranting certification and referral to the Hon. Chief Justice to empanel a bench of at least three judges to hear and determine the matter.
3. The Applicant avers, inter alia, that the JSC failed to accord the Subject Judge her constitutional recognized and protected fundamental procedural rights; specifically that she was not supplied in advance with crucial evidence or witness statements, and was denied a fair opportunity to challenge or cross-examine the Complainant’s allegations – thus contravening Article 47 of the Constitution and the Fair Administrative Action Act. The Applicant maintains that the impugned proceedings are tainted with bias and unfairness, and that allowing them to continue would occasion the Subject Judge irreparable harm and undermine judicial independence.
4. In response, the 1<sup>st</sup> Respondent and the Complainant Law Firm (the Interested Party) oppose the Application. They argue that the JSC is carrying out its constitutional mandate under Article 168 in good faith; and that the Subject Judge has been afforded due process as per the Judicial Service Act and JSC Regulations. Consequently, they urge that this Court should refrain from intervening in an ongoing disciplinary process.
5. The 1<sup>st</sup> Respondent and the Interested Party further contend that the Applicant has not met the legal threshold for the grant of a conservatory order, insisting that the Subject Judge will have the opportunity to defend herself fully before the JSC and, if it comes to that, before the Tribunal inquiring into the matter. They further assert that the issues raised do not merit certification for a three-judge bench, characterizing the Petition as a straightforward dispute that a single judge can determine.



6. The Application was argued inter partes before this Court. The Parties filed detailed submissions and bundles of authorities. The Court has carefully considered the pleadings, the affidavits on record, the submissions by learned counsel for the parties, and the authorities cited.
7. From the material presented, the Court distils the following two issues for determination:
  - a. Whether the Applicant has met the requisite threshold for grant of a conservatory order to stay and/or suspend the proceedings before the JSC in Petition No. 29 of 2023; and
  - b. Whether the issues raised in the petition amount to substantial questions of law under the meaning of Article 165(4) of the Constitution, so as to warrant certification and referral of the matter to the Chief Justice for the Constitution of a bench of at least three judges to hear and determine the petition.

## Analysis

### a. Threshold for Grant of Conservatory Orders

8. In an Application for conservatory orders in a constitutional petition, the first consideration is whether the Applicant has established a prima facie case that is neither frivolous nor devoid of merit. At this stage, the Court is not required to make definitive findings of fact or law; it suffices that the Applicant's case is arguable and has a real chance of success upon full hearing. The Applicant submits that his Petition discloses a credible case of alleged constitutional violations by the JSC. He argues that the JSC's handling of the complaint has breached the Subject Judge's right to fair administrative action under Article 47 of the Constitution and statutory law.
9. In particular, the Applicant avers that the Subject Judge was not given adequate notice of specific allegations and evidence against her, that she was denied access to critical witness statements and documents, and that she was not afforded a reasonable opportunity to rebut the claims. These failures, the Applicant contends, amount to a violation of the constitutional guarantee of procedural fairness.
10. The Applicant relies on the Court of Appeal's decision in *Judicial Service Commission v. Mbalu Mutava* [2015] eKLR, which affirmed that when the JSC exercises its disciplinary mandate under Article 168(2) of the Constitution, its proceedings "involve a decision-making process that affects the rights" of a judge and are subject to Article 47's requirements of procedural fairness.
11. The Applicant argues that, similarly, in the impugned case the JSC has fallen short of these standards – for example, by failing to provide the Subject Judge with the "information, materials and evidence" to be relied upon as required under Section 4(3)(g) of the Fair Administrative Action Act and by effectively denying her the right to cross-examine adverse witnesses contrary to Section 4(4)(c) of the same Act. These alleged procedural technicalities coupled with claims of bias, form the crux of the Applicant's argument that there exists a prima facie case that the ongoing proceedings are unconstitutional and unlawful.
12. On the other hand, the Respondents and the Interested Party assert that no rights have been violated and that the Applicant has been treated fairly. They contend that the JSC has adhered to its internal procedures as set out in the Judicial Service Act and Regulations, including notifying the Applicant of the complaint and affording her an opportunity to respond in writing. They submit that Article 47 is being respected and that the Applicant will still have the opportunity to be heard at all stages, including if a Tribunal is eventually appointed.



13. In their view, the petition before this Court is premature and it is an attempt by the Applicant to pre-empt the JSC process, whereas any grievance about the outcome of that process can be addressed through the mechanisms provided; noting that Article 168(8) allows a judge to challenge a Tribunal's recommendation of removal in the Supreme Court. The Parties Opposed to the Application rely on the principle of institutional comity and they have cited cases emphasizing that Courts should be cautious not to unduly interfere with independent constitutional bodies unless a clear transgression of the law is shown.
14. Having considered these arguments, this Court is persuaded that the Applicant has demonstrated a prima facie case that warrants further inquiry at the full hearing of the petition. The Court notes that the JSC's role in processing a petition for a judge's removal is a preliminary administrative step, but one that can have serious consequences including suspension of the judge under Article 168(5) and reputational damage. Without delving into the merits conclusively, the Court finds that the petition discloses issues worthy of adjudication, and is not merely a shield against accountability. The prima facie merit of the Applicant's case is therefore established for purposes of the present application.
15. The second limb is whether the Applicant has shown that the Subject Judge stands to suffer irreparable harm that cannot be adequately remedied by an award of damages or cured at a later stage – if the conservatory order is denied. The Applicant submits that unless the JSC proceedings are halted, there is a real and imminent danger of suffering serious prejudice. The Applicant underscores the unique position of a judge: once a removal process is triggered and proceeds without due process, the damage to the judge's reputation, dignity, and professional standing is incalculable and irreversible, according to the Applicant. The Applicant argues that even if the Subject Judge were to eventually be exonerated, the intervening suspension and the stigma of being subjected to a removal hearing would have caused harm that cannot be undone. Moreover, continuing with the impugned process would violate her constitutional rights in the meantime – a harm which the Applicant argues by its very nature is not adequately compensable by monetary damages. He cites the principle that where a constitutional right or values are threatened with violation, the prejudice caused is presumed irreparable in the absence of intervention.
16. The Applicant also argues that without the grant of conservatory orders pending the hearing and determination of the Petition herein, this Petition will be rendered nugatory and academic if adverse findings are made by the JSC and an adverse recommendation made to the Head of State and Government.
17. The Respondents and the Interested Party, in contrast, argue that the Applicant's fears are speculative. In their view, allowing the JSC to conclude its inquiry does not irreparably prejudice the Subject Judge because if the complaint is unmerited, the JSC will dismiss it; it is not fait accompli that the complaint will be progressed to the Tribunal stage. They also argue that even if the JSC were to recommend removal, the Applicant would still have an opportunity to defend herself robustly before the Tribunal and even challenge any adverse outcome as provided by law in our nation's apex court.
18. They contend that the existence of further remedial avenues, including potential appeals or reviews, means the harm, which they nevertheless insist does not exist, is not irredeemable. Additionally, they assert that halting the JSC process might itself cause harm by delaying the resolution of the complaint, which might undermine public confidence in the accountability of the judiciary.
19. Upon evaluation, the Court is satisfied that the Applicant has demonstrated a real risk of irreparable harm if the conservatory orders sought are not granted, and without halting the ongoing process the Petition would likely be rendered nugatory.



20. The final consideration is the balance of convenience and, in constitutional cases, the overarching public interest. The Court must weigh which course – granting or denying the conservatory relief – carries the lower risk of injustice and better serves the public interest in the circumstances. The Applicant urges that the balance tilts in favour of the grant of the orders sought. He submits that granting a conservatory order would merely preserve the status quo ante until the legality of that process is determined, whereas declining relief would allow a potentially unconstitutional process to continue, thereby imperilling not only the Subject Judge’s rights but also the constitutional provisions and edicts allegedly being violated by the 1<sup>st</sup> Respondent.
21. The Applicant emphasizes that it is in the public interest that the process for removing a judge – a matter touching on the independence of the judiciary – is above reproach and strictly in accord with the law. He argues that no prejudice will be suffered by the JSC or the Complainant if they are required to pause briefly, since the complaint can be heard to completion if this Court finds that the JSC is acting constitutionally. By contrast, if the process proceeds and results in an unlawful removal or suspension, the Applicant contends that both the Subject Judge’s as well as the public’s interest in fair and accountable governance would be harmed. In support of his stance, the Applicant cites the Supreme Court’s observations in *Gatirau Peter Munya v. Dickson Mwenda Kithinji* [2014] eKLR that conservatory orders in constitutional petitions bear a public law connotation and are issued “in the public interest to maintain the constitutional status quo” pending resolution of a dispute.
22. Thus, in the Applicant’s eyes, the balance of convenience and the public interest tilt strongly in favour of the grant of the conservatory orders sought.
23. The Respondents and the Interested Party, on their part, contend that the public interest lies in accountability and justice being done without delay. They argue that complaints against judges must be dealt with expeditiously by the JSC to uphold public confidence in the judiciary’s integrity. They cite the fundamental principle that no one is above the law, and submit that were this Court to grant the conservatory orders sought the public’s confidence in the judiciary would be eroded as the judiciary would be seen to be shielding one of its own from transparency, accountability, and disciplinary actions.
24. The 1<sup>st</sup> Respondent in particular argues that granting the conservatory orders sought might encourage impunity and could open floodgates for judicial officers to rush to court in every instance where the JSC is processing a complaint against them; thereby hampering the JSC’s constitutional mandate. They maintain that the JSC is an independent body and its proceedings enjoy a presumption of regularity and legality; thus the Court should not interfere with them at the interlocutory stage. In sum, the Parties Opposed assert that the balance of convenience favours allowing the JSC to continue its work, and that any issues can be addressed in the forums that follow, if it comes to that.
25. Having weighed these positions, the Court finds that the balance of convenience leans in favour of granting the conservatory relief, and that the public interest will be best served by preserving the status quo in this case for the short time that it would take to hear and determine this Petition on its merits.
26. Judges have no more nor no less rights than any other person under the *Constitution*. An action against a Subject Judge that is alleged to be unconstitutional cannot escape the constitutional required interlocutory interventions simply because the person against whom that alleged unconstitutional action is being taken is a judicial officer. A Court, in granting such an order, is not doing any more or any less than it would in respect to any other person whose circumstances are deserving of the grant of interlocutory conservatory orders pending full hearing and determination of the Petition.



27. Consequently, and for the foregoing reasons as analysed above, it follows that the Application has merit and ought to succeed; with the conservatory orders sought being deserving of issuance pending the full hearing and determination of the Petition herein.

#### **b. Substantial Question of Law (Empanelment under Article 165(4))**

28. The second issue is whether this matter raises a “substantial question of law” under Article 165(4) of the *Constitution*, thereby justifying referral to the Chief Justice to constitute a bench of an uneven number of judges (being not less than three) to hear and determine the petition. Article 165(4) is triggered at the discretion of the court upon certifying that the case involves a substantial question of law under Article 165(3)(b) or (d) – in other words, a significant issue regarding the enforcement of fundamental rights or the interpretation of the *Constitution*.

29. The question must be one that is truly weighty, novel, or complex, requiring enhanced judicial consideration. Several non-exhaustive factors have been considered relevant, including: whether the issue directly or indirectly affects substantial rights of the parties; whether it is of general public importance; whether it is an open question in the sense that it has not been settled by precedent; whether the matter is complex or raises difficulty; and whether the outcome of the case could have broad implications, calling for an authoritative determination by a bench.

30. Additionally, courts have looked at practical aspects such as the volume of evidence and time required for the hearing, and whether differing interpretations of the law might be reconciled by a bench hearing. Ultimately, the goal of empanelling a bench is to draw upon collective wisdom for cases of special importance or difficulty, while balancing against the need to dispense justice without undue delay.

31. With these principles in mind, the Court turns to the circumstances of this case. The Applicant strongly urges that this Petition raises substantial questions of law of great public importance. He points to the constitutional questions surrounding the intersection of Article 47 (fair administrative action) with Article 168 (removal of a judge) – essentially, how to ensure fairness and due process in the unique context of disciplining court judges. This issue, he notes, was at the heart of the Mbalu Mutava case and remains a live and evolving question. The Applicant also highlights that this Petition raises questions about the independence of the judiciary, since it involves oversight of a judge by the JSC. Striking the correct balance between judicial independence and accountability, in line with Articles 160 and 172 of the *Constitution*, is a matter of considerable public interest and one which raises substantial questions of law.

32. Moreover, the Applicant argues that the present Petition invites interpretation of the scope and application of the *Fair Administrative Action Act* vis-à-vis proceedings of the JSC – effectively testing how far statutory fair hearing guarantees apply in a constitutional removal process. The Applicant submits that these issues transcend the Subject Judge’s individual interest; their resolution will impact the wider judicial service and constitutional governance. Given the potential implications, he argues that it would be prudent to have a bench of at least three judges address the matter, lending greater jurisprudential weight to the eventual outcome.

33. The Respondents and the Interested Party oppose the request for empanelment. They contend that the legal and factual issues in the petition, while important, are not so novel or complex as to require multiple judges. They point out that the High Court has handled numerous JSC-related or disciplinary process cases before with single judges, and this matter is no different. They also submit that the principles concerning fair administrative action and judicial disciplinary processes have already been largely settled by the Court of Appeal in *JSC v. Mbalu Mutava* (supra) and subsequent cases; and thus this Court is only being invited to apply established law to the facts of this case. They rested their



opposition by pointing out that a three or more judge bench's decision carries the same jurisprudential and legal weight as that of a single Judge, as ultimately a single judge sits as the High Court same as a multi-judge bench.

34. Having reflected on the parties' positions and the nature of the petition, the Court is inclined to agree with the Applicant that this matter does indeed raise substantial questions of law under Article 165(4). Several considerations inform this conclusion. First, the petition touches on the fundamental rights of a judge facing potential removal – specifically the right to fair administrative action (Article 47) and the right to a fair hearing (Article 50) in an administrative or quasi-judicial setting. The proper delineation of these rights in the context of JSC proceedings is a weighty constitutional question. While the Court of Appeal in *Mbalu Mutava* provided guidance, the present case may require further interpretation or even reconciliation of Article 47 rights with the unique framework of Article 168. Notably, the Court of Appeal in *Mbalu Mutava* held that Article 47 applies to JSC proceedings, but left room as to what procedural safeguards are sufficient at the JSC stage vis-à-vis the tribunal stage. The instant petition squarely raises whether the JSC complied with Article 47 and the *Fair Administrative Action Act* – an issue of constitutional and statutory interpretation that is of general importance to all judges and indeed all state organs exercising disciplinary authority.
35. Second, the case implicates the doctrine of judicial independence. Allegations that the JSC process is being conducted in a manner that could undermine the independence and security of tenure of a judge elevate the matter to one of great public interest and substantial questions of law. The public has a stake in how judges are disciplined: it must be done in a manner that secures both accountability and the independence of the Judiciary, a critical institution. This delicate balance is a constitutional matter that arguably merits consideration by more than one judge. The outcome of this case could set a precedent for how similar complaints are handled in future, affecting not just the parties at hand but the administration of justice at large.
36. For the reasons outlined above, the Applicant's Notice of Motion is allowed. In consequence, the Court makes the following orders:
- I. A conservatory order be and is hereby issued staying and suspending the proceedings, including any further hearing or action, before the Judicial Service Commission in JSC Petition No. 29 of 2023, *Acorn Law Advocates LLP v. Hon. Lady Justice Dorah Chepkwony*, pending the hearing and determination of the constitutional petition herein, or until further orders of this Court. For the avoidance of doubt, the JSC, whether by itself, its committees or agents, is restrained from taking any further steps in or in respect of the said JSC Petition No. 29 of 2023 during the pendency of this order.
  - II. It is hereby certified that this Petition raises substantial questions of law under Article 165(3) (b) and (d) of the *Constitution*. Pursuant to Article 165(4) of the *Constitution*, the matter and file is hereby referred to the Hon. Chief Justice to empanel a bench of an uneven number of judges, being not less than three, to hear and determine this petition.
  - III. The costs of the Applicant's Notice of Motion shall be in the cause.

37. It is so ordered.

**DATED, SIGNED AND DELIVERED VIRTUALLY THIS 30<sup>th</sup> DAY OF APRIL 2025**

**BAHATI MWAMUYE**

**JUDGE**

