



**Koome, EGH, Chief Justice & President of the Supreme Court of Kenya & 4 others v Judicial Service Commission & another; Havi & 22 others (Interested Parties) (Petition E083, E079, E087, E090 & E098 of 2025 (Consolidated)) [2025] KEHC 5666 (KLR) (Constitutional and Human Rights) (25 April 2025) (Ruling)**

Neutral citation: [2025] KEHC 5666 (KLR)

**REPUBLIC OF KENYA  
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)  
CONSTITUTIONAL AND HUMAN RIGHTS  
PETITION E083, E079, E087, E090 & E098 OF 2025 (CONSOLIDATED)**

**LN MUGAMBI, J**

**APRIL 25, 2025**

**BETWEEN**

**HON LADY JUSTICE MRTHA K KOOME, EGH, CHIEF JUSTICE & PRESIDENT OF THE SUPREME COURT OF KENYA ..... 1<sup>ST</sup> PETITIONER  
HON LADY JUSTICE NJOKI S. NDUNGU ..... 2<sup>ND</sup> PETITIONER  
HON JUSTICE ISAAC LENAOLA ..... 3<sup>RD</sup> PETITIONER  
HON JUSTICE WILLIAM OUKO ..... 4<sup>TH</sup> PETITIONER  
HON JUSTICE (DR) SMOKIN C WANJALA ..... 5<sup>TH</sup> PETITIONER**

**AND**

**JUDICIAL SERVICE COMMISSION ..... 1<sup>ST</sup> RESPONDENT  
ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**AND**

**NELSON HAVI ..... INTERESTED PARTY  
CHRISTOPHER ROSANA ..... INTERESTED PARTY  
ASLI OSMAN MAHAMUD ..... INTERESTED PARTY  
PETER MUCHOKI GICHURU ..... INTERESTED PARTY  
IRENE JELEGAT KOECH ..... INTERESTED PARTY  
ESTHER AMBOKO WANGA ..... INTERESTED PARTY  
COHEN KYAMPENE AMANYA ..... INTERESTED PARTY**



<b>KHADIJAH SAID ALI .....</b>	<b>INTERESTED PARTY</b>
<b>ELIZABETH WANGUI MUNGAI .....</b>	<b>INTERESTED PARTY</b>
<b>TONY KIPROTICH TOWETT .....</b>	<b>INTERESTED PARTY</b>
<b>MOHAMED BILLOW ABDI .....</b>	<b>INTERESTED PARTY</b>
<b>JERIOETH MUTHONI GATERE .....</b>	<b>INTERESTED PARTY</b>
<b>OMAR ATHMAN MWARORA .....</b>	<b>INTERESTED PARTY</b>
<b>HILDA MULWA NDULU .....</b>	<b>INTERESTED PARTY</b>
<b>JEMIMAH AILEEN MASUDI .....</b>	<b>INTERESTED PARTY</b>
<b>DARI LIMITED .....</b>	<b>INTERESTED PARTY</b>
<b>S.A.M COMPANY LIMITED .....</b>	<b>INTERESTED PARTY</b>
<b>RAPHAEL TUJU .....</b>	<b>INTERESTED PARTY</b>
<b>MANO TUJU .....</b>	<b>INTERESTED PARTY</b>
<b>ALMA TUJU .....</b>	<b>INTERESTED PARTY</b>
<b>YMA TUJU .....</b>	<b>INTERESTED PARTY</b>
<b>KENYA MAGISTRATES AND JUDGES ASSOCIATION ...</b>	<b>INTERESTED PARTY</b>
<b>KATIBA INSTITUTE .....</b>	<b>INTERESTED PARTY</b>

## **RULING**

### **Introduction**

1. By a Notice of Motion Application dated 21<sup>st</sup> February 2025, the 3<sup>rd</sup> petitioner inter alia seeks empanelment of a bench under Prayer IV on grounds that the Petition (now consolidated) raises substantial questions of law.
2. The application is supported by the 3<sup>rd</sup> petitioner's supporting affidavit of even date and the grounds on the face of the application.
3. In the directions issued by this Court on the 5<sup>th</sup> of March, 2025; the Court directed that it will give priority to the application for empanelment of the bench and held in abeyance all other pending applications.
4. The 3<sup>rd</sup> petitioner states that in the recent past Judges have been a target of persistent inflammatory and prejudicial campaigns on the mainstream and social media platforms during the pendency of Petitions for their removal to the extent that a senior member of bar has gone ahead and issued a threat that any Judge who would issue a conservatory order in favour of Supreme Court Judges to stop the process of the Supreme Court Judges removal will equally be guilty of gross misconduct and will also be removed (per annex IL 5).
5. He regrets that the 1<sup>st</sup> respondent has failed to protect judicial officers against these persistent vilifying speeches and commentaries which are disguised as exercise of the freedom of expression.
6. That in addition, the Petitions against the Supreme Court Justices are founded on the challenge to the merits of the Court's decision. The 3<sup>rd</sup> petitioner is questioning the constitutional competence of the 1<sup>st</sup>



respondent which is not a Court of law established by the Constitution sitting to entertain merit review of the Court decisions as though it was an appellate Court in the guise of considering Petitions for the removal of the Judges. He asserted that the 1<sup>st</sup> Respondent has authority to require any Judge or judicial officer to respond to such a complaint as thus amounts to interference with judicial independence.

7. The 3<sup>rd</sup> Petitioner observes that these incidents are a serious attack on the independence of the judiciary and integrity of the judicial process.
8. The 3<sup>rd</sup> Petitioner also wants this Court to determine the constitutionality of process that permits filing of petitions with the 1<sup>st</sup> Respondent whose end result is likely to lead to unconstitutional abolishment of the Supreme Court under the guise of complaints filed against all the seven Justices of the Supreme Court.
9. The 3<sup>rd</sup> petitioner further points out that there are various pending suits before the High Court relating to the matters that constitute the subject matter of these petitions that have been brought against the Judges before the 1<sup>st</sup> respondent which in thus offending the doctrine of *sub judice*. He maintained the existence of these live cases strip the judicial service commission the jurisdiction to deal with any complaint arising therefrom. He in particular cited the complaint relating to the letter of 18<sup>th</sup> January, 2024 which he claimed is the subject matter of proceedings in *Law Society of Kenya v Supreme Court of Kenya & another; Abdulahi SC & 19 others (Interested Parties) (Petition E026 of 2024)*. Other Petitions against the said letter are *Petition E033 of 2024-Dr. Felix Otieno Odhiambo v Chief Registrar of the Judiciary & Ahmednassir Abdullahi Maalim & 2 others*; and, *Petition E048 of 2024-Ahmednassir Abdullahi Advocates LLP v Lady Justice Martha Karambu Koome* which are all pending before the Court.
10. In addition, the petition seeks a determination on whether the Supreme Court Justices are entitled to approach the High Court seeking for redress since a Judge aggrieved by a removal decision is entitled to approach the Supreme Court as in these cases, in the event of removal, the seven judges would be appealing to themselves which is an absurdity.
11. In view of the foregoing issues, the 3<sup>rd</sup> petitioner prays that the empanelment of a bench on the basis that the Petitions raise substantial questions of law.

### **Parties Submissions**

12. Parties did not file responses to the instant Notice of motion; instead, being a matter of law, they written submissions and subsequently highlighted the same in open court.

### **3<sup>rd</sup> Petitioner's Submissions**

13. The 3<sup>rd</sup> petitioner in support of his application filed submissions dated 21<sup>st</sup> March 2025 through Marende and Nyaundi Associates Advocates. Counsel underscored the issues for determination as: whether the issues in the petition significantly affect the public interest or impact Kenya's constitutional democracy; whether there exists a state of uncertainty in the law; whether the petitions fall under Article 165 (3)(c) or (d) of the Constitution, whether the seven petitions require substantial time to dispose of, and whether the Chief Justice can empanel the bench under the circumstances.
14. To commence with, Counsel highlighted that the constitutional questions that warrant the empanelment of a bench are:
  - a. The constitutional propriety of the 1<sup>st</sup> respondent's failure to filter and or sieve, and to dismiss at the threshold, complaints not just about the merits of a judicial decision, but the merits of a judge's decision to recuse from a case on personal and conscientious grounds.



- b. Whether the 1<sup>st</sup> respondent may require a judge to respond to a complaint, over a matter, where the judge did not sit and where the complainant has admitted mistakenly including a judge's name in the complaint.
- c. Whether a petition may be filed against a Court in its entirety, in a manner as would abolish or dissolve such a court.
15. Reliance was placed in *Esther Awuor Adero v Cabinet Secretary (Education) & others* [2021] eKLR where it was held that:
- “a) The matter to be certified must fall within the terms of Article 165(3)(b) or (d) of the *Constitution*.
- b) The matter must raise substantial question(s) of law.
- c) The applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest.
- d) The applicant must show that there is a state of uncertainty in the law.
- e) The applicant must identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.
- f) The matter is of immense public importance and has unique significance in our constitutional democracy.
- g) Whether the matter is complex.
- h) Whether the matter raises novel points of law.
- i) Whether the matter by itself requires a substantial amount of time to be disposed of.
- j) The effect of the prayers sought in the Petition.”
16. Like dependence was placed in *Hermanus Phillipus v Giovanni Gneccchi-Ruscone* [2013] eKLR and *Okiya Omtatah Okoiti & another v Anne Waiguru – Cabinet Secretary, Devolution and Planning & 3 others* [2017] eKLR.
17. On the first issue, Counsel submitted that the underscored issues affect public interest as raise substantial questions concerning the interpretation of Article 168 of the *Constitution* and the purported removal of an entire bench and the 1<sup>st</sup> respondent's jurisdiction on review of the merits of a case and a judge's decision to recuse themselves. These are argued to be significant issues that touch on public interest.
18. Reliance was placed in *Chunilal v Mehta v Century Spinning and Manufacturing Co* AIR 1962 SC 1314 where it was held that:
- “a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views. If the question is settled by the



Highest Court or the general principles to be applied in determining the questions are well settled and there is a mere question of applying those principles or that the plea raised is palpably absurd, the question would not be a substantial.”

19. Equal dependence was placed in *Kenya Anti-Corruption Commission v Deepak Chamanlal Kamni and 4 others* [2014] eKLR and *Philomena Mbeti Mwilu v Director of Public Prosecution & 4 others* [2018] eKLR.
20. On the second issue, Counsel submitted that there is also uncertainty in law concerning the issues raised in the petition. In particular, Counsel submitted that in this matter there is some doubt and difference of opinion concerning the issues raised as appreciated in *National Super Alliance (NASA) Kenya v Independent Electoral and Boundaries Commission* [2017] eKLR. Moreover, the issues raised have never been resolved before in any Court.
21. Counsel was certain thus in the third issue that this petition falls within this Court’s jurisdiction under Article 165 (3) (b) and (d) of the *Constitution*. This is because the 3<sup>rd</sup> petitioner is aggrieved by a decision under Article 168 of the *Constitution* and thus has the right to an appropriate remedy. As such, the 3<sup>rd</sup> petitioner may where appropriate approach the High Court under Article 165(3) of the *Constitution* if the reliefs under Article 168(8) are untenable.
22. Furthermore, concerning the nature of the petitions and the number of advocates, Counsel submitted in the fourth issue that the petitions will require substantial time to dispose of. Considering this, Counsel stressed that hearing of the petition by a single judge will be tedious.
23. In the final issue, Counsel submitted that the concern was not valid as the 1<sup>st</sup> petitioner’s mandate can certainly be delegated to another judge being the deputy Chief Justice. This reasoning was premised on the finding in *Leina Konchellah & others v Chief Justice and President of Supreme Court of Kenya & others; Speaker of National Assembly & others (Interested Parties)* [2021] eKLR where it was held that:

“Where a Judge is a party to a case in which the Judge’s act or decision is being impugned, as the Chief Justice is in the instant consolidated petitions, both actual and an apprehension of bias would arise, as the Judge would be sitting in his own cause. The Chief Justice’s empanelment of a bench under Article 165(4) in those circumstances would, even though he is not determining the matter, give rise to a likelihood or reasonable apprehension of bias. A right-minded person seized of the circumstances of these petitions will go away thinking that it is more likely than not: that: the Chief Justice would not decide fairly and would be biased in his selection of the bench. This is because the rule against: bias must be considered within the particular context of the decision-making process which is being challenged. In the circumstances of the instant: petitions, it is evident that the Chief Justice could not, in the interest of justice, rule of law, good governance, integrity, transparency and accountability assign judges to hear and determine the cases challenging The Advice he had personally given to the President:.. To avoid any perception of bias, it was prudent that another person performs that function. Our finding is that under the *Constitution*, the Deputy Chief Justice is the person who has authority to undertake the functions of the Chief Justice in his absence, or when necessary, or when for good reason the Chief Justice is unable to act. Therefore, the action of the Deputy Chief Justice in assigning the present bench was proper, legal and constitutional.”
24. Counsel furthermore argued that this decision is also supported by the doctrine of necessity. Consequently, Counsel submitted that the 1<sup>st</sup> petitioner acting under the principle of ‘a duty to act’ is the only person prescribed under the *Constitution* to empanel a bench to hear and dispose of this



matter. Therefore, in the circumstances, if the 1<sup>st</sup> petitioner is not permitted to do so, an instance of judicial impasse would occur. Reliance was placed in *Dr. Virendra Kumar Sharma v State of U.P. through Principal Medical and Health, LAWS* [ALL]-2006-5-234.

25. Like dependence was placed in *Rai & 3 others v Rai & 4 others* (2013] KESC 20 (KLR), *Shollei & another v Judicial Service Commission & another* [2018] KESC 42 (KLR) and *Badri Nath v Government Of Tamil Nadu and 01's* on 29 September, 2000.

### 1<sup>st</sup> Petitioner's Submissions

26. On 27<sup>th</sup> March 2025, Oraro and Company Advocates on behalf of the 1<sup>st</sup> petitioner filed submissions in support of the 3<sup>rd</sup> petitioner's case.
27. Counsel relying in Article 165 (3) of the *Constitution* submitted that given the nature of the claims in the consolidated petitions and the lack of legal precedent for these claims, this Court ought to find that the threshold for empanelment has been met.
28. Reliance was placed in *Santosh Hazari v Purushottam Tiwari* [2001] 3 SCC 179 where it was held as follows:

“A point of law which admits of no two opinions may be a proposition of law but cannot be a substantial question of law. To be substantial, a question of law must be debatable, not previously settled by law of the land or a binding precedent and must have a material bearing on the decision of the case, if answered either way; in so far as the rights of the parties before it are concerned. To be a question of law involving in the case there must be first a foundation for it laid in the pleadings and the question should emerge from the sustainable findings of fact arrived at by court of facts and it must be necessary to decide that question of law for a just and proper decision of the case. An entirely new point raised for the first time before the High Court is not a question involved in the case unless it goes to the root of the matter. It will, therefore, depend on the facts and circumstance of each case whether a question of law is a substantial one and involved in the case, or not; the paramount overall consideration being the need for striking a judicious balance between the indispensable obligation to do justice at all stages and impelling necessity of avoiding prolongation in the life of any case.”

29. Similar dependence was placed in *Okiya Omtatah Okoiti* (*supra*) and *Sir Chunilal Mehta* (*supra*).
30. Counsel submitted that the justification of allowance of this application is anchored on a number of issues that cut across the consolidated petitions. These are:
- a. Whether a complaint or petition before the 1<sup>st</sup> respondent is immune from the provisions of Article 22 and 23 of the *Constitution* granting this Court jurisdiction to hear and determine petitions and/or applications for redress of, denial, violations and or infringement of fundamental freedoms in the Bill of Rights.
  - b. Whether the 1<sup>st</sup> respondent is by virtue of Article 168 entitled to disregard judicial independence as guaranteed by Article 160 and inquire into decisions by Judges.
  - c. Whether the 1<sup>st</sup> respondent has violated the petitioners fundamental rights guaranteed under Articles 25, 47 and 50 of the *Constitution*.
  - d. Whether the 1<sup>st</sup> respondent can entertain complaints or petitions in respect of cases currently under review by the Courts on the same subject matter, thereby resulting in concurrent hearings by both the Judicial Service Commission and the Courts.



31. In view of the foregoing, Counsel submitted that the consolidated petitions do indeed qualify for empanelment as envisaged under Article 165(4) of the Constitution. This is anchored on the fact that the petitions raise substantial questions of law, seeks clarification on the uncertainty in law over the matter and the matters fall under Article 165 (3)(b) or (d) of the Constitution.

#### **4<sup>th</sup> Petitioner's Submissions**

32. On 26th March 2025, Triple OK law LLP filed submissions for the 4th petitioner in support of the instant application. Counsel noted that the 4th petitioner had also in his petition (Petition No E090 of 2025) emphasized that the issues underscored raise substantial questions of law that transcend personal interest. The issues are said to directly impact the administration of justice, judicial independence, and public confidence in the Judiciary hence a matter of general public importance.
33. Counsel submitted that mainly, the 4<sup>th</sup> petitioner under Part H in his petition had accentuated the issues as:
- a. Whether the Judicial Service Commission has jurisdiction under Articles 168 and 172 of the Constitution to review, reconsider, or question judicial decisions of the Supreme Court.
  - b. Whether the Judicial Service Commission exceeded its constitutional mandate by entertaining petitions that challenge the collective decisions of the Supreme Court as court, rather than addressing allegations of misconduct, incapacity, or breach of judicial conduct against individual judges under Article 168(1) of the Constitution.
  - c. Whether the Judicial Service Commission's actions in requiring the Petitioner to respond to Petitions that challenge the Supreme Court's performance as an institution, rather than judicial misconduct, amount to unconstitutional interference with judicial functions of the Supreme Court under Article 163 of the Constitution.
  - d. Whether the Judicial Service Commission is required under Article 168 (2) and (4) to conduct a preliminary assessment of petitions to determine if they disclose valid grounds for the removal of a judge before forwarding them to the judge concerned for response, and whether its failure to do so in this case violated the Constitution of Kenya.
  - e. Whether the Judicial Service Commission's actions in processing petitions that challenge the rationale of judicial decisions without any evidence of corruption, misconduct, or bad faith undermine judicial independence and violate Articles 160(5), 168(2), and 172 of the Constitution.
  - f. Whether the Judicial Service Commission's failure to filter out frivolous and vexatious petitions before requiring a judge's response constitutes a violation of judicial independence, natural justice, and the rule of law under the Constitution.
  - g. Whether the Judicial Service Commission's actions in processing the Petitions without a clear legal framework for handling complaints for removal of a judge from the moment inception / receipt of the complaint violate the Petitioner's right to fair administrative action under Article 47 of the Constitution and the Fair Administrative Action Act, 2015.
  - h. Whether the Judicial Service Commission's handling of the petitions creates a chilling effect on judicial independence, pressuring judges to align decisions with external influences rather than legal principles, in violation of Articles 159(1), 160(1) and (5), and 172 of the Constitution.



- i. Whether JSC Petition No 35 of 2024 and JSC Petition No 3 of 2025 are frivolous, vexatious, and a threat to judicial independence, warranting their dismissal under Articles 159(1), 160(1) and (5), and 172 of the Constitution.
  - j. Whether the Judicial Service Commission’s processing of petitions that are constitutionally and legally defective, without first assessing their validity, violates the principles of constitutionalism, rule of law, and good governance under Articles 10, 47, and 232 of the Constitution as well as the doctrines of natural justice and legitimate expectations.
  - k. Whether the Judicial Service Commission forwarding of the petitions to the Petitioner without first satisfying itself that they disclose valid grounds for removal under Article 168(1) constitutes a violation of the Petitioner’s constitutional rights to fair administrative action under Article 47 and the principles of natural justice.
  - l. Whether the Judicial Service Commission’s practice of forwarding any and all manner of complaints against judges without first determining their validity imposes an undue emotional and psychological toll on judges, thereby interfering with their ability to perform their judicial functions impartially and efficiently.
  - m. Whether the Judicial Service Commission’s unprecedented decision to announce the petition against the Supreme Court and the Petitioner through a press conference—despite never having made similar announcements for any other petition since its establishment—amounts to bias, unequal treatment, and a violation of Article 27 of the Constitution, which guarantees equality, fairness, and freedom from discrimination. Further, whether this selective disclosure eroded public confidence in the judiciary, undermined judicial independence, and subjected the Supreme Court Petitioner to unwarranted elevated public scrutiny in violation of constitutional principles.
  - n. Whether the Judicial Service Commission’s failure to establish clear procedural guidelines for handling judicial petitions violates the principles of transparency, accountability, and due process under Articles 10, 47, and 232 of the Constitution.
  - o. Whether the JSC’s actions in processing the petition without first determining its validity amount to an unconstitutional encroachment on judicial authority and a violation of the separation of powers under Article 1(3) of the Constitution.
34. Counsel submitted that to qualify as such, a petition must meet the requirement set out under Gachagua v Speaker of the National Assembly of Kenya & 3 others [2024] KEHC 12075 (KLR) as follows:
- i. The issue must involve more than mere novelty or complexity; it should present unique facts not covered by precedents. (Complexity alone is insufficient).
  - ii. The issue must affect the rights of the parties and have a broader public interest impact.(Impact on rights).
  - iii. There must be legal uncertainty or a divergence of opinion on the issue, suggesting it can generate different interpretations. (Uncertainty in law).
  - iv. The issue must fall within Article 165(3)(b) or (d) involving questions of constitutional rights or interpretation. (Constitutional interpretation or violation of rights).



- v. The matter should have significance beyond the case, affecting public interest or the legal system. (Public interest); and
  - vi. The Applicant must clearly identify the specific substantial questions of law being raised. (Clear Articulation).”
35. Counsel submitted that the issues raised in these petitions are significant warranting the empanelment of a bench. The issues concern the interpretation and application of constitutional provisions regarding judicial independence, the powers of the 1<sup>st</sup> respondent and the role of judicial review in Kenya, among others.
36. On whether the 1<sup>st</sup> petitioner’s empanelment of a bench would violate the rules of natural justice as argued, Counsel submitted that the argument was unfounded and misplaced. This is because the duty to empanel a bench under Article 165(4) of the *Constitution* is purely an administrative function, and it ends with the assignment of an uneven number of judges to hear the case. Counsel similarly relied in *Leina Konchellah* (*supra*) and *Gachagua & 7 others* (*supra*) to buttress this point.
37. Counsel further argued that the *Constitution* grants judges decisional independence, which is protected by their security of tenure. As such, it was argued that the mere act of the 1<sup>st</sup> petitioner appointing a bench has no bearing on the outcome of the case at all.

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

38. Counsel for the JSC, Mr. Issa Mansur submitted that JSC has since inception handled over 900 petitions against removal of Judges with only 12 being successful. He argued that although the present Petitions raise issues, they do not raise anything more significant than JSC has handled before and the 1<sup>st</sup> Respondent has complete answers for all the issues raised in the Petition.
39. Mr. Issa was of the view that should this Court be satisfied that the issues raise substantial questions of law, JSC did not have any issue with the Chief Justice constituting a bench. Citing the vetting cases that Judges sat and decided independently notwithstanding they had to undergo vetting, Mr. Issa submitted that JSC was ready to deal the issues before any bench that may be constituted the Chief Justice; He stated:

“... At first, she is the Chair of JSC, on our part, there will be no issue if you find the matter raises a substantial question of law. We will be able to deal with issues before any bench...”

### **2<sup>nd</sup> Respondent Submissions**

40. Mr. Emmanuel Bitu only made a succinct comment during the oral highlighting as follows:

“...As for the 2<sup>nd</sup> Respondent, we do not oppose the motion for certification and we leave it entirely to the Court to determine...”

### **3<sup>rd</sup>, 4<sup>th</sup>, 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Interested Parties Submissions**

41. These parties through MMA Advocates LLP filed submissions dated 26<sup>th</sup> March 2025 in opposition to the instant application.
42. Counsel opposing the prayer for empanelment submitted that the petition does not raise substantial questions of law to warrant empanelment of a bench and that the same can competently be determined by a single judge. It was argued that this is not the first time that this Court has been called upon to



- determine questions relating to the constitutional mandate of the 1<sup>st</sup> respondent in relation to removal of judges under Article 168 (2) and (4) of the *Constitution*. To buttress this point Counsel pointed out the cases of *Hon. Lady Justice Nancy Makokha Barasa v Judicial Service Commission & 9 others* [HCCRPET. No 23 of 2012] and *Hon. Justice Joseph Mbalu Mutava v Attorney General & another* [2014] KEHC 7535 (KLR).
43. Reliance was placed in *J. Harrison Kinyanjui v Attorney General & another* [2012] eKLR, where it was noted that:
- “the *Constitution* does not define, “substantial question of law.” It is left to each High Court judge to satisfy himself or herself that the matter is substantial to the extent that it warrants reference to the Chief Justice to appoint an uneven number of judges not being less than three to determine a matter.”
44. Like dependence was placed in *County Government of Meru v Ethics and Anti-Corruption Commission* [2014] eKLR, *Sir Chunilal (supra)* and *Martin Nyaga & others v Speaker County Assembly of Embu & 4 others & Amicus Curiae* [2014] KEHC 7962 (KLR).
45. Furthermore, Counsel submitted that these parties opposition is based on the fact that certification under Article 165(4) of the *Constitution* is discretionary not mandatory. Reliance was placed in *Okiya Omtatah (supra)* where it was held that:
- “The different approaches taken by the High Court as shown above would make it clear that whether a substantive question of law arises under 165(4) is dependent on the circumstances of a particular case. Furthermore, that the list of relevant factors is not exhaustive and that the presence or absence of one is not necessarily decisive in a particular case. Ultimately, the presiding judge has to exercise his or her discretion on whether, on his or her appraisal of the factual and legal matrix, a substantial question of law arises.”
46. Secondly, Counsel submitted that the principle of judicial economy calls upon the judge to dispose of the consolidated petitions so as to save time and costs. To buttress this point reliance was placed in *Selecta Kenya Gmbh & Co. KG v Chase Bank Kenya Limited & 2 others* [2018] eKLR where it was held that:
- “It is therefore clear that the purpose of consolidation of suits is to save costs, time, speed up trial, eliminate duplicative trials involving the same parties, issues and evidence, for efficient and proper administration of justice, and expeditious disposal of matter consequently promote judicial economy, so long as it is not to prejudice any of the parties.”
47. Counsel further argued in the third issue that the circumstances of this case make it impractical for the 1<sup>st</sup> petitioner to exercise her constitutional mandate under Article 165(4) of the *Constitution*. Counsel relied in *Kenya Medical Research Institute v Attorney General & 3 others* [2014] eKLR where it was held that the role of the Chief Justice under Article 165(4) of the *Constitution* is constitutional as opposed to a merely administrative function.
48. Counsel added that contrary to the holding in *Leina Konchellah (supra)* no judge is able to constitutionally exercise this mandate as both the Chief Justice and the Deputy Chief Justice are parties in the matter before this Court. As such, Counsel argued that this application ought not to be allowed.
49. Likewise, Counsel submitted that public interest tilts towards a quick disposal of this matter thus the instant application is adjudged as an invitation to delay the disposal of the consolidated petitions.



## 16<sup>th</sup> and 18<sup>th</sup> Interested Parties Submissions

50. Okatch and Partner Advocates on behalf of these parties filed submissions dated 27<sup>th</sup> March 2025.
51. On a preliminary note, Counsel relying in Article 168 of the Constitution on the removal of a judge, submitted that this Court does not have jurisdiction to entertain these petitions as this power is vested in the 1<sup>st</sup> respondent. Reliance was placed in Owners of the Motor Vessel "Lilian S" v Caltex Oil (Kenya) Limited (1989) KLR 1 where it was held that:
- “Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court of law downs its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
52. Similar dependence was placed in Samuel Kamau Macharia v Kenya Commercial Bank Limited and 2 others [2012] eKLR, In the Matter of the Interim Independent Electoral Commission (Applicant) [2011] KESC 1 (KLR), Communications Commission of Kenya and 5 others v Royal Media Services Limited and 5 others [2014] eKLR and Benard Murage v Fineserve Africa Limited and 3 others [2015] eKLR.
53. That said, Counsel on empanelment of a bench submitted that should this Court determine that it has jurisdiction to proceed, these parties support the empanelment of a bench. This is since as guided by the Court of Appeal in Okiya Omtatah (supra) for a case to be certified as one involving a substantial point of law, there is must be a state of uncertainty in the law and that the matter falls under Article 165(3)(b) of the Constitution.
54. In Counsel’s view, the instant petition is indeed one that raises substantive novel issues of law that merit constitution of a bench. Additionally, the issues are deemed to invoke great public interest.
55. On whether the 1<sup>st</sup> petitioner can empanel a bench, Counsel submitted that the constitutional mandate to do so is vested in the office not the office holder. Thus the two are separate entities. In view of this, Counsel submitted that the 1<sup>st</sup> petitioner ought to exercise her mandate in an impartial manner as mandated by the office. Reliance was placed in Rai and 3 others (supra) where it was held that:
- “In the circumstances in which all the members of the only tribunal competent to determine a matter are subject to disqualification, they may be allowed to sit and determine the matter under the doctrine of necessity to avoid a miscarriage of justice. This common law principle will however, only apply in very exceptional circumstances which are required to be very clear.”

## 22<sup>nd</sup> Interested Party’s Submissions

56. Kiragu Wathuta and Company Advocates for the 22<sup>nd</sup> interested party filed submissions dated 21<sup>st</sup> March 2025 and highlighted the issue for discussion as whether a bench of uneven number of judges should be empaneled to hear and determine the Petition.
57. Counsel equally relying in the Chunilal case (supra) submitted that a substantial question of law is one which is of general public importance or which directly and substantially affects the rights of the parties and which have not been finally settled by the Supreme Court, the Privy Council or the Federal Court or which is not free from difficulty or which calls for discussion of alternative views.
58. Like reliance was placed in Rawal v Judicial Service Commission & another; International Commission of Jurist (Kenya Chapter) & another [2015] KEHC 6961 (KLR) and Chepkorir Rebema (Suing through



*father and next friend) & 130 others v Kenya National Examinations Council* [2017] KEHC 8781 (KLR).

59. Counsel submitted that the circumstances of the petition are unique and have not been previously determined in our jurisdictional realm. It was noted further that the petitions key issue is the removal of entire Supreme Court bench which is a matter that requires interpretation in light of Article 168(1) (2) (3) (4) of the *Constitution* and the independence of the Judiciary pursuant to Article 160 of the *Constitution*. In addition, the petitions seek an answer on whether the 1<sup>st</sup> respondent has jurisdiction to conduct a merit review of decisions from the Supreme Court. According to Counsel, these questions undoubtedly raise issues of great public importance thus the need of empanelment of a bench.
60. Additionally, Counsel submitted that the 1<sup>st</sup> petitioner's mandate to empanel a bench is conducted in an administrative capacity thus does not affect the determination of the issues raised herein. Reliance was placed in *Oraro v Speaker of the National Assembly and 11 others* [2005] 2 KLR 538 where it was held that:

“While the Chief Justice in his administrative functions and duties may empanel benches of more than one judge to hear certain cases e.g constitutional cases which may require such empanelment and while he can direct at which station a judge will be based from time to time his roles stop there and he cannot direct any judge of the High Court or Court of Appeal as to how to decide cases being heard by the said judge or in respect of any other matters where the judge is carrying out his judicial functions.”

### 23<sup>rd</sup> Interested Party's Submissions

61. In support of the instant application, the 23<sup>rd</sup> interested party filed submissions dated 26<sup>th</sup> March 2025 through its Counsel, Joshua Malidzo Nyawa. Counsel highlighted the single issue for determination as: whether the 3<sup>rd</sup> petitioner has met the test for certification under Article 165(4) of the *Constitution*.
62. Counsel submitted that to answer this question, the Court has to ascertain whether the matter falls under Articles 165(3)(b) or (d) of the *Constitution* and whether the matter raises a substantial question of law. According to Counsel the petition calls upon this Court to interpret various provisions of the *Constitution* relating to the powers of the 1<sup>st</sup> respondent as well as the independence of the Judiciary so falls squarely under Article 165(3)(d) of the *Constitution*. Equally, Counsel submitted that a substantial question of law was discussed by the Court of Appeal in *Okiya Omtatah* (*supra*) as follows:

- “(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
- (ii) The applicant must show that there is a state of uncertainty in the law;
- (iii) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the *Constitution*;
- (vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”



63. It was argued hence that the petition herein does indeed raise substantial questions of the law. In particular Counsel highlighted the issues as: whether complaints for the removal of judges should be made on an individual basis and not against the entire bench; whether the Judicial Service Commission (JSC) has jurisdiction to conduct a meritorious review of decisions; whether allowing JSC to conduct a meritorious review of decisions is a violation of the decisional independence of judges; whether the JSC must determine whether a complaint meets the constitutional threshold before asking judges to respond to it; whether a Judge can be punished for recusing themselves in a case; whether JSC is mandated to protect judges from persistently vilifying speech online and online conversations intended to scandalise the Court and whether the JSC should not consider a complaint without first enacting the rules of procedure to govern disciplinary proceedings.
64. In light of the foregoing, it was argued that the petition touches on public interest as seeks an interpretation of the Constitution that seeks protection from any violations, infringements or threats as stressed in Katiba Institute v Judicial Service Commission & 2 others; Kenya Magistrates and Judges Association & 2 others (Interested Parties) [2022] KEHC 438 (KLR). Counsel noted that in this matter the threat is with reference to judicial independence.
65. In like manner, Counsel submitted that the issues raised make manifest that there is uncertainty in law as the issues have never been dealt with before and yet to be settled in law.
66. On whether the 1<sup>st</sup> petitioner can empanel a bench in the circumstances of this case, Counsel submitted that the Constitution is silent as to what is to occur when the 1<sup>st</sup> petitioner is unable to perform this duty. In this regard, Counsel relied in Re the Speaker of the Senate & another v Attorney-General & 4 others (2013)eKLR where it was held that:
- “The Court must also remain conscious of the fact that constitution-making requires compromise, which can occasionally lead to contradictions; and that the political and social demands of compromise that mark constitutional moments, fertilize vagueness in phraseology and draftsmanship. It is to the Courts that the country turns, in order to resolve these contradictions; clarify draftsmanship gaps; and settle constitutional disputes. In other words, constitution making does not end with its promulgation; it continues with its interpretation. It is the duty of the Court to illuminate legal penumbras that Constitutions borne out of long drawn compromises, such as ours, tend to create. The Constitutional text and letter may not properly express the minds of the framers, and the minds and hands of the framers may also fail to properly mine the aspirations of the people. It is in this context that the spirit of the Constitution has to be invoked by the Court as the searchlight for the illumination and elimination of these legal penumbras.”
67. Comparable dependence was placed in Attorney-General & 2 others v Ndi & 79 others; Prof. Rosalind Dixon & 7 others (2022) eKLR.
68. In light of this, Counsel submitted that Article 259 of the Constitution guides that an interpretation must sustain, protect and enforce both the text and spirit of the Constitution in that, the Constitution is always speaking even when it is silent. As such, an interpretation that will lead to non-enforcement or implementation of the Constitution is a violation of the Constitution.
69. Equally Counsel stressed that all judges are obligated to uphold their oath of office and so required to be impartial and protect the Constitution. Accordingly, it was argued that just because the 1<sup>st</sup> petitioner may empanel a bench does not mean the judges will fail to abide by their oath of office.



## Analysis and Determination

70. The only issue for determination is:

Whether the 3<sup>rd</sup> petitioner's application dated 21<sup>st</sup> February 2025 has demonstrated that this Petition raises substantial issues of law to have it certified to the Chief Justice for empanelment of an uneven number of Judges to hear and determine the matter.

71. Article 165 (4) of the Constitution provides as follows:

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

72. It is important to underscore that once a matter that is certified as raising a substantial question of law and is shown to fall under Article 165 (3) (b) or (d); what follows is a prescription of the consequence or effect of that finding which the Constitution describes by use of the mandatory word 'shall' ; thus stating: 'shall be heard by an uneven number of judges being not less than three, assigned by the Chief Justice'

73. Article 165 (3) (b) (d) provide that—

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of--

i. the question whether any law is inconsistent with or in contravention of this Constitution;

ii. the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

iii. any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

iv. a question relating to conflict of laws under Article 191.

74. This petition challenges the manner the 1<sup>st</sup> Respondent has exercised its constitutional and legal mandate in processing the Petitions against the removal of the Petitioners as Judges of the Supreme Court and also raises the issue of violation of their rights and fundamental freedoms. It is thus manifest that the issues raised fall within the scope of Article 165 (3) (b) and (d) (ii).

75. the Constitution does not define the phrase 'substantial question of law' but this has been considered by Courts in various judicial decisions.

76. In the case of Philomena Mbete Mwilu (*supra*) the Court observed:

“24. ....a question of law would be a substantial question of law if it directly or indirectly affects the rights of parties; there is some doubt or difference of opinion on the issues raised and that the issue is capable of generating different



interpretations. If however the question has been well settled by the highest court or the general principles to be applied in determining the question before court have been well-settled, the mere application of those principles to a new set of facts presented in a case before the court would not on their own constitute a substantial question of law. There must be the possibility of the matter attracting different interpretations or opinion in its interpretation or application of the principles espoused in the matter to make it a substantial question of law. All this notwithstanding, it is up to the individual judge to decide whether the matter raises a substantial question of law for purposes of reference.”

77. The Court of Appeal in *Okiya Omtatah*(*supra*) laid down the guiding principles that may be considered by the Court in an application of this nature. The Superior Court opined as follows:

“ 42. There are, in our view, parallels to be drawn between certification for purposes Article 163(4)(b) of the *Constitution* and certification for purposes of Article 165(4) notwithstanding that the drafters of the *Constitution*, in providing for certification of matters for purposes of appeal to the Supreme Court under Article 163(4)(b) stipulated that a matter should be of “general public importance”, The word, “substantial” in its ordinary meaning, means “of considerable importance”. There is therefore wisdom to be gained from the pronouncements of the Supreme Court of Kenya respecting interpretation of Article 163(4)(b). In *Hermanus Phillipus Steyn v Giovanni Gnechi-Ruscone* [2013] eKLR the Supreme Court of Kenya pronounced governing principles for purposes of certification under Article 163(4)(b) some of which are relevant in the context of certification under Article 165(4). Drawing therefrom, we adopt, with modification, the following principles:

- “(i) For a case to be certified as one involving a substantial point of law, the intending applicant must satisfy the Court that the issue to be canvassed is one the determination of which affects the parties and transcends the circumstances of the particular case and has a significant bearing on the public interest;
- (ii) The applicant must show that there is a state of uncertainty in the law;
- (iii) The matter to be certified must fall within the terms of Article 165 (3)(b) or (d) of the *Constitution*;
- (vi) The applicant has an obligation to identify and concisely set out the specific substantial question or questions of law which he or she attributes to the matter for which the certification is sought.”

43. It is our judgment therefore, that whether a matter raises a substantial point of law for purposes of Article 165(4) of the *Constitution* is a matter for determination on a case-by-case basis. The categories of factors that should be taken into account in arriving at that decision cannot be closed.”

78. Guided by the above case law, I must now proceed to answer the question of whether this Petition raises substantial questions of law.



79. After a careful perusal of the written submissions of all the parties and upon listening to their brief oral highlights in Court, I was able to pick out a number of issues that the petitions present.
80. Upon thorough review of the submissions, I was able to capture and summarize what I consider to be weighty constitution questions that as follows:
- i. Whether the 1<sup>st</sup> Respondent acting under Article 168 (2) and (4) of the Constitution has a duty to undertake preliminary appraisal of the petitions seeking the removal of Judges to ascertain if the grounds cited meet the threshold for the removal of a Judge before requiring the Judge to respond in order to weed out frivolous and vexatious complaints and protect the judges against intimidation, distortion and pressure in the performance of their judicial duties to safeguard judicial independence.
  - ii. Whether the 1<sup>st</sup> respondent can entertain complaints for removal of a judge where such complaints are also the subject matter of active suits/litigation pending before the Courts resulting into concurrent proceedings on similar facts before the 1<sup>st</sup> Respondent and in the Courts.
  - iii. Whether the processing of petitions by the 1<sup>st</sup> Respondent that challenge the merit of judicial decisions made by the Petitioners undermines the principle of judicial independence hence a violation of Articles 160(5), 168(2), and 172 of the Constitution.
  - v) The constitutionality of a collective/composite petition that seeks the removal of all Judges constituting a Court established by the Constitution; whether it amounts to a real threat to unconstitutionally abolish the Court.
  - vi) Whether the 1<sup>st</sup> Respondent has neglected its constitutional mandate under Article 172 (1) of promoting and facilitating the independence of the judiciary
81. The independence of Courts which is an essential element in ensuring observance of the rule of law in a constitutional democracy. The issues raised in the consolidated petition thus go beyond the interest of the individual petitioners as they relate to a very critical component in the administration of justice. The resolution of the issues will not only provide clarity in the law that ensures judges are accountable for their actions but will also clarify the manner that process may be undertaken without compromising the principles of judicial independence.
82. I now turn to the issue of whether the Chief Justice can empanel the bench in view of very strong opposition expressed during hearing of the empanelment application. It was contended that the Chief Justice is the lead Petitioner in the consolidated petition hence cannot constitute the bench as she an interest in the outcome of the petition.
83. Mr. Ahmednasir S.C comment on this issue during his oral highlight was striking; Counsel remarked:  
“...If you certify the petition to her, it will be an epic scandal, it will be taught in law schools...”
84. One thing is unmistakably clear to me though. Once the Court certifies that the matter raises a substantial question of law under Article 165 (4) of the Constitution, the consequence of that finding is coached in mandatory terms. the Constitution directs what shall follow by use of the mandatory word ‘shall’ by stating thus: ‘shall be heard by an uneven number of judges being not less than three, assigned by the Chief Justice’
85. The only person who can empanel an uneven bench of Judges to hear and determine the matter is the Chief Justice. One of the tenets of Constitutional interpretation is that it should be interpreted



in a manner that gives effect its provisions as opposed to an interpretation that makes its provisions inoperable so as to ensure that constitutional provisions remain binding as the Supreme law. There being no substitute as to who else may perform this mandatory constitutional function, the Court is compelled to resort to the doctrine of necessity. the Constitution empowers only the Chief Justice to empanel an uneven number of Judges under Article 165 (4) hence is the only person who can do so.

86. The principle of necessity applies in unavoidable situations such this one. In Election Commission of India v Dr. Subramaniam Swamy reported in (1996) 4 SCC 104 (AIR 1996 SC 1810) cited with approval in the case of Dr. Virendra Kumar Sharma & Anr v State of U.P. through Principal Medical & Health, LAWS [ALL] 2006-5-234 the Court explained the doctrine of necessity as follows:

“ 16. We must have a clear conception of the doctrine. It is well settled that the law permits certain things to be done as a matter of necessity which it would otherwise not countenance on the touchstone of judicial propriety. Stated differently, the doctrine of necessity makes it imperative for the authority to decide and considerations of judicial propriety must yield. It is often invoked in cases of bias where there is no other authority or Judge to decide the issue. If the doctrine of necessity is not allowed full play in certain unavoidable situations, it would impede the course of justice itself and the defaulting party would benefit therefrom. Take the case of a certain taxing statute which taxes certain perquisites allowed to Judges. If the validity of such a provision is challenged who but the members of the judiciary must decide it. If all the Judges are disqualified on the plea that striking down of such a legislation would benefit them, a stalemate situation may develop. In such cases the doctrine of necessity comes into play. If the choke is between allowing a biased person to act or to stifle the action altogether, the choke must fall in favour of the former as it is the only way to promote decision-making...”

87. Over and above the need to invoke the doctrine of necessity, this Court would like to reiterate the fact that the Chief Justice will assign Judges is not to say that the Judges will be at her beck and call.
88. Judges have the constitutional and moral obligation to uphold their oath of office of discharging justice based on the assessment of facts and conscientious understanding of the law without fear, favour, affection or ill will. Their solemn duty is the fidelity to the law, a basic tenet that every Judge understands. It is therefore untenable to imagine that a Judges assigned to hear the matter by the Chief Justice are subject to her control and that the Chief Justice will direct the outcome of the Petition.
89. An observation in the book, Commentary on Bangalore Principles of Judicial Conduct by United Nations Office on Drugs and Crime September, 2017 at pg. 50 should serve to advise against this line of thought as Judges are not beholden to any other authority other than the law in discharge of their judicial duties. The author observes:

“ ... The hierarchical organization of the judiciary is irrelevant. In the performance of his or her functions, a judge is no one’s employee. He or she is a servant of, and answerable only to, the law and to his or her conscience which the judge is obliged to constantly examine. It is axiomatic that, apart from any system of appeal, a judge deciding a case does not act on any order or instruction of a third party inside or outside the judiciary. Any hierarchical organization of the judiciary and any difference in grade or rank shall, in no way, interfere with the right of a judge to pronounce the judgment freely, uninfluenced by extrinsic considerations or influences...”



90. I believe I have said enough of this issue. I must now perform my singular duty of transmitting this consolidated Petition to the Chief Justice for empanelment of uneven number of Judges to hear and determine.

91. The parties are directed to appear before the Deputy Registrar of this Court on 6<sup>th</sup> of May, 2025 to confirm if the Chief Justice has empaneled a bench.

**DATED, SIGNED AND DELIVERED IN OPEN COURT AT NAIROBI THIS 25<sup>TH</sup> DAY OF APRIL, 2025.**

.....

**L N MUGAMBI**

**JUDGE**

