



Law Society of Kenya v Supreme Court of Kenya & another; Abdulahi SC & 19 others (Interested Parties) (Petition E026 of 2024) [2024] KEHC 7819 (KLR) (Constitutional and Human Rights) (28 June 2024) (Ruling)

Neutral citation: [2024] KEHC 7819 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS**

PETITION E026 OF 2024

EC MWITA, J

JUNE 28, 2024

BETWEEN

THE LAW SOCIETY OF KENYA PETITIONER

AND

THE SUPREME COURT OF KENYA 1ST RESPONDENT

THE REGISTRAR OF THE SUPREME COURT OF KENYA . 2ND RESPONDENT

AND

AHMEDNASSIR ABDULAHI SC INTERESTED PARTY

AHMEDNASIR ABDULLAHI ADVOCATES LLP INTERESTED PARTY

THE HON MARTHA KARAMBU KOOME INTERESTED PARTY

THE HON PHILOMENA MBETE MWILU INTERESTED PARTY

THE HON MOHAMMED KHADHAR IBRAHIM INTERESTED PARTY

THE HON SMOKIN CHARLES WANJALA INTERESTED PARTY

THE HON NJOKI SUSANNA NDUNGU INTERESTED PARTY

THE HON ISAAC LENAOLA INTERESTED PARTY

THE HON WILLIAM OUKO INTERESTED PARTY

THE HON L.M WACHIRA INTERESTED PARTY

ASLI OSMAN INTERESTED PARTY

PETER MUCHOKI INTERESTED PARTY

IRENE KOECH INTERESTED PARTY



ESTHER WANGA	INTERESTED PARTY
COHEN AMANYA	INTERESTED PARTY
KHADIJA SAID	INTERESTED PARTY
WANGUI ELIZABETH	INTERESTED PARTY
BENARD ONYINKWA	INTERESTED PARTY
TONY TOWETT	INTERESTED PARTY
MOHAMED BILLOW	INTERESTED PARTY

RULING

Background

1. On 18th January 2024, the Registrar of the Supreme Court of Kenya, Hon. L.M. Wachira wrote a letter (the communication) addressed to the 1st interested party, Mr. Ahmednasir Abdullahi SC, (Mr. Abdullahi), informing him that the seven Justices of the Supreme Court, (the Court), had made of a decision that he would not have audience before the Court, either by himself, through employees of his firm, or any other person holding brief for him, or acting pursuant to his instructions in the Court.
2. On 22nd January 2024, Asli Osman, (the 11th interested party), an associate in Mr. Abdullahi’s Law firm, the 2nd Interested party, appeared before Hon. Bernard Kasavuli, Deputy Registrar of the Court, in Supreme Court Petition No. E035 of 2023; Fatuma Athman Abud Faraj v Rose Faith Mwawasi & 2 others, but was denied audience on the basis of that communication.
3. On 23rd January 2024, when Supreme Court Petition No. E 021 of 2022; Zehrabanu Janmohamed & Another v Nathaniel K. Lagat & 3 others), in which Mr. Abdullahi’s Law firm was involved for one of the parties came for hearing before the Court, Six Justices of the Court, (the 3rd to 8th interested parties, (Hon. Mr. Justice Ouko, SCJ not sitting), issued an order reiterating the message in the communication, and recused themselves from hearing the matter as long as a counsel from Mr. Abdullahi’s Law firm was involved.
4. These series of events led the Law Society of Kenya, (the petitioner), to file of a petition dated 20th January 2024, challenging the decision in the communication and the recusal order issued on 23rd January 2024, as violating Mr. Abdullahi’s and 11th -20th interested parties’ fundamental rights and freedoms guaranteed in *the Constitution*.
5. On being served with the petition, the Court and the Registrar (the respondents) and the 3rd-10th interested parties, filed a motion application dated 16th February 2024, together with a notice of preliminary objection challenging the petition.

Motion application

6. In the motion application, the respondents and the 3rd-10th interested parties seek two orders; namely, that the names of the 3rd -10th interested parties be struck out from the petition and the petition be struck out. They also seek costs.
7. The motion application is predicted on the grounds that the 3rd -10th interested parties enjoy judicial immunity under article 160(5) of *the Constitution* as read with sections 6 of the *Judicature Act* and 45(1) of the *Judicial Service Act*, thus no proceedings can be instituted against them. Further, that



the petition is fatally defective for seeking orders against them and a court hierarchically higher to this court, contrary to article 163(7) of *the Constitution*. They again state that the challenge to the communication is premature as the 1st, 2nd and 11th -20th interested parties have not exhausted the statutory remedies in section 21A of the *Supreme Court Act*.

8. The section provides for circumstances when The Supreme Court may review its own decision, either on its own motion, or
upon application by a party. These are; -(a) where the judgement, ruling or order was obtained through fraud, deceit or misrepresentation of facts; (b) where the judgement, ruling or order is a nullity by virtue of being made by a court which was not competent; (c) where the court was misled into giving a judgement, ruling or order under the belief that the parties have consented; or (d) where the judgement, ruling or order was rendered on the basis of repealed law, or as a result of a deliberate concealment of a statutory provision.
9. It is the respondents and 3rd to 10th Interested parties' case, that by dint of article 165(5) and (6) of *the Constitution*, this court lacks jurisdiction to call for, review, examine or quash the communication and the recusal order. They also state that the petition does not disclose a reasonable cause of action, or any justiciable question.

Preliminary Objection

10. The preliminary objection also dated 16th February 2024, is predicated on similar grounds: That the petition offends the provisions of articles, 163(7) and 165(5),(6) of *the Constitution*; the principle set out by the Supreme Court in *Kenya Hotel Limited v Attorney General & 5 others (Petition 16 of 2020)* (2022) KESC 62 (KLR), and the provisions of article 160(5) of *the Constitution* as read with sections 6 of the *Judicature Act*, and 45(1) of the *Judicial Service Act*.

2nd and 11th -20th interested parties' response

11. The 2nd and 11th -20th interested parties oppose the motion application and preliminary objection, through grounds of opposition. They state that the motion application is defective and incompetent as it is not supported by an affidavit. They also contend that contrary to the argument that the petition challenges the recusal order issued on 23rd January 2023, the fact is that the petition challenges the administrative decision of the 3rd – 9th interested parties communicated by the 10th interested party on 18th January 2024 and later adopted and contained in the order issued on 23rd January 2024.
12. The 2nd and 11th -20th interested parties assert that there was no judicial process leading to a decision by the 3rd -9th interested parties communicated on 18th January 2024 for which judicial immunity would attach.
13. The 2nd and 11th -20th interested parties maintain that the decision of the Supreme Court in *Bellevue Development Company Limited v Francis Gikonyo & 3 others* [2020] eKLR is not applicable to the circumstances of this petition.
14. According to the 2nd and 11th -20th interested parties, the petition will not occasion an inevitable subversion of *the Constitution* and create an absurdity and embarrassment in the Judicial system in Kenya. On the contrary, the arbitrary decision to deny Mr. Abdulahi, the 2nd and 11th -20th interested parties audience and due process, creates an absurdity and embarrassment in the judicial system.
15. The 2nd and 11th -20th interested parties assert that impugned action is not a judicial decision of the Court made in the exercise of the Court's original, or appellate jurisdiction under *the Constitution* or *Supreme Court Act*. It neither constituted a ruling or a judgment of the Court.



16. It is their position that as an administrative decision of a constitutionally established organ, it is subject to judicial review under the jurisdiction of this court. The 2nd and 11th -20th interested parties urge this court to dismiss the motion application and preliminary objection with costs.

Respondents & 3rd -10th interested parties' submissions

17. The respondents and 3rd -10th interested parties submit that by dint of article 165 (6) of *the Constitution*, this court has no jurisdiction to hear and determine this petition. It is their case that the orders and proceedings complained of relate to exercise of the exclusive jurisdiction by the Court falling outside the jurisdiction of this court.
18. The respondents and 3rd -10th interested parties rely on the decisions in *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others (Civil Appeal 656 of 2022)* [2023] KECA 80 (KLR) (3 February 2023) (Judgment); *David Pkosing v National Super Alliance & 13 others* [2017] eKLR; *Okiya Omtata Okoiti & another v Attorney General & 2 others* [2015] eKLR; *Sonko v Supreme Court of Kenya (Petition E14 of 2022)* [2023] KEHC 17295 (KLR) (11 May 2023) (Ruling) and in the matter of Interim Independent Electoral Commission [2011] eKLR, in support of that argument.
19. The respondents and 3rd -10th interested parties argue that the question of how the Court conducts its proceedings cannot be interrogated by, or before this court. They rely on *National Social Security Fund Board of Trustees v Kenya Tea Growers Association & 14 others* (supra) and *Kenya Hotel Properties Limited v Attorney General & 5 others (Petition 16 of 2020)* [2022] KESC 62 (KLR) (Civ) (7 October 2022) (Judgment); *Kenya Hotel Properties Limited v Attorney General & 7 others* [2020] eKLR and *Bellevue Development Company Ltd v Francis Gikonyo & 7 others* [2018] eKLR.
20. The respondents and 3rd -10th interested parties further rely on the decision in *Richard Nyagaka Tongi v Chris Munga N Bichage & 2 others* [2015] eKLR to emphasize that the determination of the Court not to grant audience to Mr Abdulahi was a decision of the Court in accordance with the Supreme Court rules at the pretrial conference.
21. It is posited that pursuant to rule 29(1) of the Supreme Court Rules, the Court formalized its decision not to grant Mr. Abdulahi audience in the order issued of 23rd January 2023 in the pending proceedings. For that reason, the barring of Mr, Abdulahi from appearing before the Court on 18th January 2024 was final and not subject to review. That determination falls within the category of the decisions referred to in *Justice Jeanne W Gacheche & 5 others v Judges and Magistrates Vetting Board & 2 others* [2015] eKLR.
22. The respondents and 3rd - 10th Interested parties argue that they are judicial officers in terms of article 160(5) of *the Constitution* as read with sections 6 of the *Judicature Act* and 45(1) of the *Judicial Service Act*. They, thus enjoy absolute immunity from civil proceedings in relation to any action they undertake in the course of their duties.
23. In that respect, the 3rd to 9th interested parties made the order of 23rd January 2024 in the course of their duties as justices of the Court. The communication was also issued by the 10th interested party in her capacity as the Registrar of the Court pursuant to section 10(1) of the *Supreme Court Act*. These actions, they assert, are non-justiciable on account of the immunity they enjoy. They rely on the decisions in *Bellevue Development Company Ltd v Francis Gikonyo & 3 others* [2020] eKLR and *Moses Wamalwa Mukamari v John O. Makali & 3 others* [2012] eKLR.



24. The respondents and 3rd-10th interested parties take the view, that the questions raised are pure questions of law that require no ascertainment of any facts by this court, hence meet the threshold for a preliminary objection. In support of this argument, they rely on *Mukisa Biscuit Manufacturing Co. Ltd v West End Distributors* [1969] E.A 696; *Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others* [2014] eKLR and *Independent Electoral & Boundaries Commission v Jane Cheperenger & 2 others* [2015] eKLR.

Petitioner's submissions

25. The petitioner argues through written submissions, that there was no valid order that could have been issued on 23rd January 2024. The decision to deny audience to Mr. Abdulahi and the 2nd and 11th -20th interested parties had already been made through the communication on 18th January 2024.

26. According to the petitioner, by dint of article 165(3) (b) and (d) and 165(6) of *the Constitution*, this court is vested with the requisite jurisdiction to hear and determine the petition for reasons: that the petition challenges the constitutionality of the action by members of the Supreme Court and the communication by the Court's Registrar, the proceedings before the Deputy Registrar of the Court, and the Orders of the Court made on 18th, 22nd and 23rd January respectively. The petition also seeks various administrative law remedies on the premise that the basic principles of natural justice were violated.

27. The petitioner also argues that the impugned decision was not a judicial decision of the Court as contemplated by article 163(7) of *the Constitution*, but a decision of individual judges of that Court. By virtue of article 22 of *the Constitution* and sections 5(2) (b) (c) of the *Fair Administrative Action Act*, the aggrieved parties are rightly before this court.

28. The petitioner maintains that by dint of article 163(3) and (4) of *the Constitution*, the impugned proceedings were neither a dispute relating to the elections to the office of the President, nor an appeal. According to the petitioner, the acts, omissions and decisions taken against Mr. Abdulahi; the 2nd and 11th -20th interested parties by the respondents and 3rd -10th interested parties, amounted to administrative actions or quasi-judicial decisions within the meaning of section 2 of the *Fair Administrative Action Act*.

29. The petitioner asserts that the respondents and 3rd -10th interested parties have not specified the principle enunciated in *Kenya Hotel Properties Limited v attorney General & 5 others (Petition 16 of 2020)* [2022] KESC 62 (KLR). In any case, the petitioner argues, the final decisions of the Court of Appeal and the decisions that could not be re-opened or reviewed and which were being referred to the Supreme Court, were judicial decisions and not decisions such as the ones now the subject of this petition.

30. The petitioner further argues that in that case, the Court not only recognized that the High Court had jurisdiction under article 165 to redress violation of the Bill of Rights, but also recognized bias to amount to a breach of constitutional rights.

31. The petitioner contends that, that decision is also be distinguishable from the facts of this petition as it related to a judicial determination by the High Court regarding which an appeal was then taken before the Court of Appeal and ultimately to the Supreme Court. This petition, on the contrary, deals with an administrative decision, or quasi-judicial decision rather than a judicial decision.

32. As to whether the 3rd -10th interested parties have been wrongly impleaded, the petitioner submits that the reliefs sought are in the form of declarations on the constitutionality of the actions of the 3rd to



- 10th interested parties. Also sought are various administrative law remedies to prohibit or quash certain actions taken in violation of the principles of natural justice, and to compel the respondents to act in accordance with the constitutional principles of natural justice.
33. The individual judges and the Registrar of the Court are not respondents, but interested parties. No orders in personam have been sought against them. The petitioner postulates that liability under section 6 of the *Judicature Act*, or section 45 of the *Judicial Service Act* does not arise either. This is because sections 6 and 45 of the respective statutes deal with non liability of judges in respect of a civil suit. These are proceedings before a constitutional court, and are neither criminal nor civil, but sui generis.
34. According to the petitioner, the *Judicature Act* requires the person who seeks to escape liability to have been acting judicially. In the present case, it is doubtful whether the 3rd to 10th interested parties were acting judicially in respect of the actions taken against Mr. Abdulahi and the 2nd and 11th -20th interested parties.
35. In the view of the petitioner, the question of liability is pegged on the factual determination of whether there was good faith in making the impugned decision against Mr. Abdulahi, the 2nd and 11th -20th interested parties. This is an issue of fact which cannot be determined by way of a preliminary objection.
36. The petitioner maintains, that contrary to the respondents and 3rd -10th interested parties' argument relying on *Bellevue Development Co. Ltd v Francis Gikonyo & 3 others* [2020] eKLR, a judge remains unquestionably immune as long as he does not take actions that intentionally and plainly prevent litigants from enjoying Constitutional and Statutory rights.
37. The petitioner points out that in the *Chitembwe* case, (Supreme Court Petition No. E001 of 2023), the Supreme Court stated that the import of article 160(5) of *the Constitution* is that a member of the judiciary is accorded judicial immunity for anything done or omitted to be done in good faith and in the lawful performance of a judicial function. The petitioner asserts that the accusations of frivolity and the like should not be casually made where a matter involves the interpretation and application of *the Constitution*; the question whether the impugned acts were done under the authority of, or were inconsistent with *the Constitution*, is a matter of general public importance.

2nd and 11-20th intersected parties' submissions

38. The 2nd and 11th -20th interested parties reiterate that the petition invites this court to exercise its interpretive jurisdiction under article 165(3) (d) of *the Constitution*. They further reiterate that the decision contained in the impugned communication and the order issued on 23rd January 2024 was an administrative act in nature, thus subject to the jurisdiction of this court. They rely on *Mumo Matemu v Trusted Society of Human Rights Alliance & 5 others* [2013] eKLR and *Martin Nyaga Wambora & 3 others vs Speaker of the Senate & 6 others* [2014] eKLR to support their position.
39. According to the 2nd and 11th -20th interested parties, judicial immunity has been wrongly invoked in this petition since the decision was not as a result of a lawful performance of a judicial function as contemplated under *the Constitution*.
40. The 2nd and 11th -20th interested parties rely on Sadler, Robert J. "Judicial and Quasi-Judicial Immunities: A Remedy Denied" (1982) 13 (4) *Melbourne University Law Review* 508, (at pages 524-525) and *Halsbury's Laws of England* Vol. 1, 4th Edition, 2001 Reissue, to support the position that the most important justification underlying the doctrine of judicial immunity is that it is in the public interest.



41. The 2nd and 11th -20th interested parties further rely on the decisions in *Sirros v Moore & Others* [1974] 3 All ER 776; *Stump v Sparkman* 435 U.S 349 (1978); *McC v Mullan & Others* [1984] All ER 908 and *Royer v Mignault* (1988) Q. A.C on the extent of judicial immunity.
42. It is the 2nd and 11th -20th interested parties' position, that judicial immunity is not absolute. The parameters within which judicial officers enjoy immunity are, for anything done or omitted to be done in good faith; in the lawful performance of a judicial function and for acts done within their jurisdiction. They rely on [*Attorney- General & 2 others v Ndiu & 79 Others; Dixon & 7 others \(Amicus Curiae\) \(Petition 12, 11& 13 of 2021*](#) (Consolidated)) [2022] KESC 8 (KLR).
43. Regarding good faith, the 2nd and 11th -20th interested parties assert that the impugned decision was not made in good faith. Mr. Abdulahi and 11th -20th interested parties and their clients were not given an opportunity to be heard contrary to articles 10, 47 and 50 of [*the Constitution*](#).
44. The 2nd and 11th -20th interested parties submit that there was no judicial process leading to the impugned decision. The 3rd -9th interested parties were not, thus acting judicially, but administratively.
45. On whether they acted within their jurisdiction, the 2nd and 11th -20th interested parties reiterate that the case of *Bellevue Development Company Limited v Francis Gikonyo & 3 others* [2020] eKLR relied on is distinguishable and not applicable to the case before this Court. In the present petition, the impugned decision was administrative and a violation of the rights of the 2nd and 11th – 20th interested parties. The 3rd -9th interested parties acted outside their jurisdiction.
46. The impugned administrative decision is not a decision capable of appeal, having been rendered by the apex court. Neither can the said decision be subject of review under section 21A of the [*Supreme Court Act*](#) as the same is not a decision of the court in the manner envisage in law, having not arisen from a determination of the matter before court in a specific matter.
47. They maintain that in the Bellevue case, the petitioner was a litigant in the matter. In the instant case, however, neither the 1st interested party, nor the 2nd and 11th -20th interested parties are litigants in *Republic v Ahmad Abolfathi Mohammed & another* [2019] eKLR quoted in the impugned communication nor in *Zehrabanu Janmohamed & Another v Nathaniel K. Lagat & 3 others* (supra), in which the order of 23rd January 2024 was issued.
48. The 2nd and 11th -20th interested parties urge this court to consider the case of *Republic v R. O Mbogo & another; Alfred Ndemo Nyakundi (Interested Party) Ex Parte Diana Mutheu & Another* [2020] eKLR and dismiss the motion application and preliminary objection.

Determination

49. I have considered the motion application and preliminary objection, responses thereto, and arguments by parties. I have also considered the decisions relied on by both sides in support of their respective positions. Two issues arise for determination. First, whether the petition should be struck out, and second, whether the names of the 3rd to 10th interested parties should be truck out from this petition. In other words, was the joining of the 3rd to 10th interested parties in this petition improper?
50. As seen from the background, this petition was triggered by the communication from the 2nd respondent to Mr. Abdulahi, informing him that the Court had made a decision that he would not have audience before it by himself, his associates, or any advocate holding his brief. Other events followed giving effect to that communication.



51. The petitioner, the umbrella body representing lawyers in this country, has filed this petition challenging that action on grounds of unconstitutionality.
52. The motion application and preliminary objection seek not only to have the petition struck out but also the names of the 3rd -10th interested parties. The grounds that inform the motion application, are based on the argument by the 3rd -10th interested parties that they enjoy judicial immunity under article 160(5) of *the Constitution* as read with sections 6 of the *Judicature Act* and 45(1) of the *Judicial Service Act*.
53. They also argue, that the petition should fail for seeking orders against them and a court hierarchically higher to this court, contrary to article 165(6) of *the Constitution*. They further argue that the challenge to the communication is premature given that the 1st, 2nd and 11th -20th interested parties have not exhausted the statutory remedies available under section 21A of the *Supreme Court Act*. The preliminary objection is largely predicated on similar grounds.
54. The respondents and 3rd to 10th interested parties add, that the petition offends the provisions of articles, 163(7), 165(5) & (6) of *the Constitution* and the principle set in *Kenya Hotel Limited v Attorney General & 5 others (Petition 16 of 2020)* (2022) KESC 62 (KLR). Article 160(5) of *the Constitution* as read with sections 6 of the *Judicature Act*, and 45(1) of the *Judicial Service Act* have also been relied on.
55. The petitioner and the 2nd, 11th-20th interested parties argue that the petition is properly before this court as it challenges actions that violate *the Constitution* and the Bill of Rights. According to them, the petition impugns the decision in the communication, arguing that it was an administrative act, thus liable to challenge before this court under its judicial review jurisdiction.

Whether the petition should be struck out

56. The first issue is whether the petition violates *the Constitution* and statute and should, therefore, be struck out. My understanding of the objections raised in the motion application and the preliminary objection, is that this court has no jurisdiction to hear and determine the petition. This is clear from the submissions by counsel for the respondents and 3rd to 10th interested parties who have cited articles 163(7) and 165(6) as the bar. The grounds of the face of the motion application and the notice of preliminary objection simply elaborate the arguments on jurisdiction.
57. Jurisdiction is the power or authority given to a court to hear and determine a dispute presented before it. The challenge to jurisdiction of the Court to hear a matter being a threshold question, the court has to weigh the objection carefully and determine the fundamental question, namely; whether it does have jurisdiction over the matter. If the court determines that it has no jurisdiction to hear a matter, it is the end of that matter and the court should not take any further step, but down its tools. (See Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited [1989] eKLR).
58. In Samuel Kamau Macharia v Kenya Commercial Bank Ltd & 2 others [2012] eKLR, the Supreme Court stated on jurisdiction:
 - (68) A Court’s jurisdiction flows from either *the Constitution* or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by *the constitution* or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law... without jurisdiction, the Court cannot entertain any proceedings...Where *the Constitution* exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.



59. In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011 [2011] eKLR, after referring to Owners of Motor Vessel “Lillian S” v Caltex Oil (Kenya) Limited (supra), the Supreme Court again stated:

[30] The Lillian ‘S’ case establishes that jurisdiction flows from the law, and the recipient-Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavours to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by *the Constitution*.

60. The jurisdiction of this Court is provided for in article 165(3) of *the Constitution*. This Court has the jurisdiction to, among others, (b) determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened; (d) hear any question respecting the interpretation of *the Constitution*, including the determination of—(ii)the question whether anything said to be done under the authority of *the Constitution* or of any law is inconsistent with, or in contravention of, *the Constitution*.
61. The import of article 165(3) is to authorise the High Court to decide all matters other than those reserved for other courts as contemplated in article 162 (2) and as restricted by article 165(6). The sweep of the constitutional authorisation given to the High Court cannot not be lightly taken, or given up on request or application. That is; this Court has wide jurisdiction to hear and determine various matters that may be brought before it. Whether or not this Court has jurisdiction to hear and determine this petition must, therefore, be viewed through the prism of article 165(3)(b) and (d) (ii).
62. This petition challenges the constitutionality of the communication dated 18th January, 2024 informing Mr. Abdulahi that a decision had been made that he, his associates and any counsel holding brief on his instructions or those of his firm, would not have audience before the Court, and the actions that followed subsequent to that communication.
63. The petitioner, 2nd and 11th -20th interested parties maintain that the petition challenges an administrative decision of the 3rd – 9th interested parties communicated by the 10th interested party in the impugned communication of 18th January 2024 and later adopted and contained in the order issued on 23rd January 2024. They maintain that these were administrative actions and not judicial decisions.
64. Looking at the totality of the issues raised in this petition, it is clear to me, that they centre on whether the impugned communication was an administrative action subject to the review jurisdiction of this court, or not. There is also the underlying question of whether rights or fundamental freedoms in the Bill of Rights have been denied, violated, infringed or threatened through the impugned action; or whether the action is inconsistent with, or in contravention of, *the Constitution* and the law.
65. As this Court pointed out in *Cami Graphics Limited v Chief Registrar of the Judiciary & 2 others; Commissioner of Lands & 4 others (Interested Parties) (Constitutional Petition 543 of 2022)* [2024] KEHC 2999 (KLR) (Constitutional and Human Rights) (15 March 2024) (Ruling):
- (22) Where a party moves this Court under Article 22 of *the Constitution*, the Court has jurisdiction in terms of Article 23(1) as read with Article 165(3)(d) to determine the petition. However, the claim must be that the action complained of violates or threatens a right or fundamental freedoms and the relief sought must be aimed at redressing that violation.
66. There can be no denial that what is before this court is a constitutional petition brought under article 22 as read with articles 23(1) and 165(3) of *the Constitution*, challenging what the petitioner perceives



- to be constitutional infractions on various articles of *the Constitution*. The petitioner wants this court to exercise its mandate under article 165(3) (b) and (d)(ii) to investigate and determine the veracity, or otherwise of the alleged infringements and redress the violations, if any.
67. The respondents and 3rd -10th interested parties argue, that this court is barred by, among others, articles 163(7) and 165(6) of *the Constitution* from granting the reliefs and orders sought. They rely on the decision in *Kenya Hotel Properties Limited v attorney General & 5 others* (supra), among other decisions, that this court cannot review or reconsider a decision of a superior court.
68. It is worth noting, that one of the issues this court is called upon to determine, is whether the communication of 18th January 2024 was an administrative action or a judicial decision. This is a question of fact that can only be determined upon hearing parties. The issues raised in the petition cannot, in my respectful view, be determined through interlocutory proceedings, namely; the motion application and preliminary objection, when a claim of infringement of fundamental rights and freedoms in the Bill of Rights has been raised.
69. I must also point out that it is not a must that a petition challenging violations or infringements of constitutional rights and fundamental freedoms in the Bill of Rights has to succeed. Rather, it is a cardinal principle in our constitutional architecture and philosophy, that a petitioner who has come to this court on the basis that rights and fundamental freedoms in the Bill of Rights have been violated or infringed, should be accorded an opportunity to be heard so that the court can make an informed decision on the issue, rather than shut out such a petitioner from the seat of justice at the preliminary stage, unless his is an open and shut case.
70. In that respect, my review of the petition is that the issues raised therein are not idle. They fall within the ambit of article 23(1) as read with article 165(3)(b)(d)(ii) and, therefore, under the jurisdiction of this Court. The court has to determine whether indeed, rights and fundamental freedoms in the Bill of Rights have been denied, violated, infringed or are threatened through the impugned action. The court has also to decide whether both the actions complained in this petition and those issues raised by the respondents and 3rd -10th interested parties against the petition, are inconsistent with, or in contravention of, *the Constitution*. This is because as was stated in *Mackeigan v Hickman* [1989] SCR 796, courts are the protectors of *the Constitution* and the fundamental values embedded in it, that is; the rule of law, fundamental justice and preservation of the democratic process.

Striking out names of 3rd -10th interested parties

71. There other issue is whether to strike out the names of the 3rd to 10th Interested parties from these proceedings. It has been argued that as Justices of the Court and a Deputy Registrar, the 3rd -10 interested parties, are immune from civil proceedings by virtue of article 160(5) of *the Constitution* as read with sections 6 and 45 of the *Judicature Act* and the *Judicial Service Act*, respectively.
72. I have carefully gone through the petition and the reliefs sought. The 7 prayers sought in the petition are declarations of unconstitutionality and orders mandamus and certiorari. The petition also seeks any other relief the court may deem fit and just to grant. No positive and or substantive orders have been sought against the 3rd to 10th interested parties either in their official or personal capacities.
73. In the circumstances, whether the 3rd -10th interested parties have been wrongly joined into these proceedings is an issue that should also be determined if, on the basis of the prayers sought in the petition, their being joining as interested parties offends any of the provisions of *the Constitution*, or statute.



Conclusion

74. Flowing from what I have stated above, the conclusion I come to, is that this court has jurisdiction to hear and determine the issues raised in the petition. Further, some of the issues are factual and can only be determined after hearing the parties. Again, as no positive orders have been sought against the 3rd to 10th interested parties that would call for striking their names from the petition, there is need to hear the petition and determine it on merit.

Disposal

75. In the end, the motion application is dismissed. The same fate befalls the preliminary objection: It is also dismissed. I make no order as to costs.

DATED SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF JUNE 2024

E C MWITA

JUDGE

