



REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA AT NAIROBI
MILIMANI LAW COURTS
CONSTITUTIONAL AND HUMAN RIGHTS DIVISION
PETITION NO. 204 OF 2016

APOLLO MBOYA
PETITIONER

Versus

THE JUDICIAL SERVICE COMMISSION **1ST RESPONDENT**

THE HON. ATTORNEY GENERAL **2ND RESPONDENT**

And

JUSTICE KALPANA RAWAL **1ST INTERESTED PARTY**

JUSTICE PHILIP TUNOI **2ND INTERESTED PARTY**

JUSTICE MOHAMMED IBRAHIM **3RD INTERESTED PARTY**

JUSTICE JACKTON B OJWANG **4TH INTERESTED PARTY**

JUSTICE NJOKI SUSANNA NDUNG'U **5TH INTERESTED PARTY**

CONSOLIDATED WITH PETITION NO. 218 OF 2016

HON. LADY JUSTICE NJOKI S. NDUNG'U **PETITIONER**

Versus

THE JUDICIAL SERVICE COMMISSION
RESPONDENT

And

APOLLO MBOYA INTERESTED
PARTY

**PETITIONER/5TH INTERESTED PARTY'S FURTHER REPLYING AFFIDAVIT IN
RESPONSE TO THE JUDICIAL SERVICE COMMISSION**

I, HON. LADY JUSTICE NJOKI S. NDUNGU of P.O. Box Number 30041 - 00100, Nairobi in the Republic of Kenya, do hereby make oath and state as follows: -

1. **THAT** I am a female adult of sound mind and competent to swear this Further Replying Affidavit.
2. **THAT** I have read the Judicial Service Commission's Further Replying Affidavit sworn by Dr. Willy Mutunga and I swear this Affidavit in response thereto.
3. **THAT** the Constitutional role of the Judicial Service Commission (hereinafter referred to as the "JSC") has been succinctly spelt out Section 3 of the Judicial Service Act as guided by and read together with Article 168 and 172 of the Constitution. These are the governing provisions on the mandate of the JSC and all other provisions of the law that are complementary as listed by Dr. Mutunga must be read together with and applied within the parameters of the aforementioned provisions.

4. **THAT** the Judicial Service Act under Section 3 (g) has been specifically mandated promote and sustain fair procedures in its functioning and be guided by the rules of natural justice. By virtue of this provision the JSC is bound by the rules of natural justice and the general provisions on commissions and independent offices as quoted in the Affidavit sworn by Dr. Mutunga have no substantive bearing on my Petition.
5. **THAT** in response to the matters addressed in paragraphs 5, 6 and 7 of the Further Replying Affidavit sworn by Dr. Mutunga I wish to state: -
 - a. That these are the very issues of fact that should have been tabled before the JSC and on which I pleaded to be heard but was never granted a hearing at all.
 - b. That had the JSC led by Dr. Mutunga given me a fair hearing I would have asked that Dr. Mutunga recuse himself given the partisan position he had (and continues to) taken.
 - c. **THAT** Dr. Mutunga should have stepped down as the Chair of the JSC and sought to testify as a witness before the JSC as he has done in this Petition. The JSC Chair could not and should not have sought to act as both a witness against me as well as a Judge in my cause. This is clear admission of a grossly unfair process.
 - d. It is also clearly admitted now that the JSC proceeded to admonish me without granting me the right to be heard as mandated by law and without any regard to the question of whether they had any jurisdiction to admonish me in the first instance. Had I been accorded any sort of rudimentary hearing, the question of jurisdiction would have been foremost for determination.
6. **THAT** it is quite clear now from the factual assertions in the JSC affidavit, which are false, that the JSC was at all times acting in concert with the Petitioner Apollo Mboya

to orchestrate these proceedings against me and my fellow Judges with the ultimate aim of condemning the Judges of the Supreme Court unheard.

7. **THAT** the JSC did not even find it necessary or just for Apollo Mboya to provide me with the particulars sought by myself at the time his JSC Petition was served upon me because evidently, the JSC was comfortable proceeding to determine my case entirely in my absence and with their own supplementary perception of the allegations against me being provided by testimony from the Chair of the JSC.
8. **THAT** I have only recently seen this testimony from Dr. Mutunga for the first time in this Court and it is notable that, with this pre-conceived mind-set, the former Chief Justice did not consider his own voluntary recusal, but instead sat both as a material witness of fact and as a Judge in my matter which proceeded *ex parte* before the JSC.
9. **THAT** entire thrust and basis of my Petition herein is that I should have been accorded a chance to respond to the allegations raised by Apollo Mboya (or anyone else) against me before the JSC made any decision adverse to me, whether or not the JSC was to reach a determination that upon review, my alleged conduct disclosed a "*lower level of judicial misconduct.*" I reiterate that the JSC has no jurisdiction to mete out any disciplinary action against a Judge in any event.
10. **THAT** the JSC has sought to divert the attention of this Court to validity, accuracy or veracity of the minutes I took. In pursuit of this mischievous diversion, the JSC has filed a Notice to Cross Examine me on the alleged discussions by the Supreme Court Judges during the conferencing on 22nd September 2015, the letter of 24th September 2015 and the minutes of the meeting of the Supreme Court Judges held on 6th October 2015.
11. **THAT** while I stand by my records, this factual dispute should not be and is not the core subject of these proceedings before the High Court. My Petition is based on the

irregular and unfair *process* adopted by the JSC and is *not an appeal on merit or facts* from the JSC decision. The JSC has completely ignored the fact that my substantive cause of action arose way after the said meetings when I was denied a hearing before the JSC.

12. **THAT** the JSC having failed to accord me a fair hearing, is now seeking to cross examine me in this Court on factual matters that ought to have been ventilated fully before an impartial JSC panel at my expected hearing. This is not only ironic but self-defeating because it admits the fact that I was never heard at all despite a written promise by the JSC that I would be accorded a proper hearing. I verily believe the Notice is misplaced and ought to be denied as it amounts to no more than enhancing sideshows at the expense of the substantive Petitions.

13. **THAT** I verily believe that this Court, in dealing with the consolidated Petitions, ought to confine itself to the issues of Constitutional interpretation the Petitioners have placed before it and should not succumb to diversionary tactics by the JSC to draw the Court to focus on extraneous or peripheral matters which ought to have been dealt with at the level of the conspicuously (and admittedly) absent JSC hearing.

14. **THAT** the crux of my Petition filed before the Court is that this failure by the JSC to afford me treatment in accordance with the most fundamental rules of natural justice is the primary matter for determination.

15. **THAT** I have in similar vein, sought orders that the JSC be ordered to formulate its cogent rules of procedure to ensure predictability and consistency of process to protect and assure fairness for all persons that may fall under its jurisdiction in future in similar proceedings.

16. **THAT** what is deponed to above is true to the best of my knowledge information and belief.


SWORN at **NAIROBI**)

HON. LADY JUSTICE NJOKI S. NDUNGU)

This 27th day of September 2017)

By the said)

BEFORE ME)

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DEPONENT



COMMISSIONER FOR OATHS)

<p><u>Drawn and Filed</u> <u>by:</u> LJA Associates 3rd Floor, Cavendish Block, 14 Riverside, Riverside Drive P O Box 49594 – 00100 <u>NAIROBI</u></p>	<p><u>To Be Served Upon:</u> Apollo & Co. Advocates Kindaruma Court, Suite B2 Kindaruma Road, Kilimani P.O. Box 2073 – 00100 <u>NAIROBI</u></p>	<p><u>To Be Served Upon:</u> The Attorney General's office Sheria House <u>NAIROBI</u></p>	<p><u>To Be Served Upon:</u> Muma and Kanjama Advocates 4th floor I & M House 2nd Ngong Avenue <u>NAIROBI</u></p>
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