

**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Ibrahim, Wanjala, Njoki, Lenaola & Ouko, SCJJ)*

**PETITION (APPLICATION) NO. 17 (E017) OF 2020**

**BETWEEN**

**KATIBA INSTITUTE .....PETITIONER**

**VERSUS**

**ATTORNEY GENERAL.....1<sup>ST</sup> RESPONDENT**

**PUBLIC SERVICE COMMISSION.....2<sup>ND</sup> RESPONDENT**

**NATIONAL ASSEMBLY OF KENYA.....3<sup>RD</sup> RESPONDENT**

**JUDICIAL SERVICE COMMISSION.....4<sup>TH</sup> RESPONDENT**

**PATRICK GICHOHI.....5<sup>TH</sup> RESPONDENT**

**OLIVE MUGENDA.....6<sup>TH</sup> RESPONDENT**

**FELIX KOSKEI.....7<sup>TH</sup> RESPONDENT**

**DR. GEORGE LUKOYE.....8<sup>TH</sup> RESPONDENT**

**KENYA NATIONAL COMMISSION ON  
HUMAN RIGHTS.....9<sup>TH</sup> RESPONDENT**

**AFRICAN CENTER FOR OPEN GOVERNANCE.....10<sup>TH</sup> RESPONDENT**

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*(Being an Application for extension of time to file further pleadings in the form  
of Replying Affidavits in response to Petition No. 17 of 2020)*

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**RULING OF THE COURT**

**A. INTRODUCTION**

**[1]** The subject matter of this ruling is the Notice of Motion dated 7<sup>th</sup> June 2021 and filed on 29<sup>th</sup> June 2021 by the 1<sup>st</sup>, 2<sup>nd</sup> and 5<sup>th</sup> Respondents (hereinafter the

‘Applicants’) in this instance and supported by the grounds set out on its body and the facts stated in the supporting affidavits of **Simon K. Rotich**, the Chief Executive Officer of Public Service Commission and **Patrick Gichohi**, sworn on 7<sup>th</sup> June 2021. The Application is brought pursuant to Articles 48, 50(1), 156(4), 159(2)(d), 163(4) of the Constitution; Sections 3(e) and 24 of the Supreme Court Act; Rules 3, 15(2), 17, 31 and 42 of the Supreme Court Rules, 2020 and all other enabling provisions of the law.

**[2]** In the aforesaid Motion, the Applicants seek orders that:

- i. This Honourable Court do grant leave to the Hon. Attorney General, Public Service Commission and Patrick Gichohi to file Replying Affidavits in response to the present Petition.***
- ii. This Honourable Court do make such further order(s) and/or directions as it may deem necessary in the circumstances.***
- iii. The cost of this Application be in cause.***

## **B. BACKGROUND**

**[3]** The Application emanates from the following factual background, to wit: on 13th February 2018, the President nominated Patrick Gichohi, Olive Mugenda and Felix Koskei, the 5th, 6th and 7th Respondents, as commissioners to the Judicial Service Commission (hereinafter the ‘JSC’). The 5th Respondent was nominated in accordance with Article 171(2) (g) of the Constitution to represent the Public Service Commission while the 6th and 7th Respondents were nominated in conformity with Article 171(2) (h) to represent the public.

**[4]** The aforementioned names were then forwarded to the National Assembly, the 3rd Respondent herein, for approval before the formal appointment ensued.

On 28<sup>th</sup> February 2018, the 3<sup>rd</sup> Respondent approved the nominees and were subsequently appointed as commissioners to the Judicial Service Commission.

[5] The Petitioner was aggrieved by the said nominations as it perceived a violation of various Constitutional provisions. According to the Petitioner, the nominations of the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents as members of JSC was *ultra vires* Article 171(2) (g) and (h) of the Constitution on the grounds that the same lacked fair competition and/or merit contrary to Article 232(1)(g) and 234(2) (c) of the Constitution and Section 46 of the Public Service Commission Act 2017 (**PSC Act**) which underpin among others, the constitutional requirement of fair competition and merit as the basis of appointment, in all cases where the commission is required by the Constitution or legislation to nominate or recommend a person for appointment, hence the action was invalid and of no legal effect.

[6] It was the Petitioner's view that the identification and nomination of the 5<sup>th</sup>, 6<sup>th</sup> and 7<sup>th</sup> Respondents was not preceded by public participation and therefore, the same was null and void. It was further claimed that the 3<sup>rd</sup> Respondent failed to interrogate the mandatory considerations under Section 7 of the Public Appointments (Parliamentary Approval) Act, 2011. That the 6<sup>th</sup> Respondent's vetting did not meet the standard of strict scrutiny set out by case law. It was contended that the 3<sup>rd</sup> Respondent also failed to consider that the 5<sup>th</sup> Respondent had already retired from public service thus his appointment denied other citizens an equal opportunity for appointment, training and advancement in the public service.

[7] The Petitioner also queried the constitutional validity of Section 15(2) of the Judicial Service Act, 2011 for failing to provide for the manner of identification and qualifications for appointment of the persons contemplated under Article 171(2)(g) and (h) of the Constitution.

[8] Consequently, the Petitioner instituted a Petition to the High Court *vide* **Petition No. 84 of 2018** challenging the nomination of the said commissioners, which dispute has now risen to the Apex Court.

### C. APPLICATION BEFORE THE COURT

[9] The Application is premised on the following grounds, inter alia, that: *the Petition raises issues of great public interest regarding the composition of a constitutional commission being the Judicial Service Commission; the said Replying Affidavits will aid this Court in arriving at a just and fair hearing of the instant Petition; that none of the Respondents will be prejudiced should the orders sought be granted.*

[10] Further grounds are amplified in the Applicants' written submissions dated 27th June 2021. The Applicants contend that granting leave sought herein will enable this Court improve access to justice in accordance with Section 3 (e) of the Supreme Court Act. It is their further contention that under Section 24 of the Act, this Court has powers to make such interlocutory orders to meet the ends of justice. Moreover, that Rule 3 of the Supreme Court Rules, empowers this Court to promote the overriding objectives of its rules which is to ensure that the court is accessible, fair and efficient.

[11] Citing Rule 15(2) of this Court's rules, the Applicants reiterate that this Court has the power to extend the time limited by the said rules or any decision of the court. Reliance is placed on this Court's decision in **Bernard Kibor Kitur v Alfred Kiptoo Keter & Another [2018] eKLR** for this proposition. Additionally, that under Rule 17 of the Supreme Court Rules, a party may file further pleadings only with leave of the court. To buttress this position, they cite the persuasive decision of the Court of Appeal in the case of **Miruru Waweru vs David Ndi & 81 others; Nairobi Civil Application No. E187 of 2021**. They urge that the instant Application be allowed.

[12] It is noteworthy that on 9<sup>th</sup> July 2021, the Deputy Registrar directed that any party wishing to oppose the Application to file their submissions. Having granted them sufficient time to do so, none of the parties opposed the Application. On 9<sup>th</sup> August 2021, the Application was therefore placed before the Court for determination, unopposed.

#### **D. ANALYSIS AND DETERMINATION**

[13] The main issue for determination in this Application is *whether this Court should extend time for the Applicants to file their Replying Affidavits in response to the Petition.*

[14] Rule 15(2) of the Supreme Court Rules, 2020 grants this Court the discretion to extend time. It provides thus:

***“The Court may extend the time limited by these Rules or by any decision of the Court.”***

[15] The Applicants submit that they are desirous of filing further pleadings in the form of Replying Affidavits to further buttress their arguments, having initially filed their grounds of objection by dint of Rule 42 of this Court’s rules.

[16] **UPON** considering the Application and the submissions filed by the Applicants, this Court finds that it may, in its discretion, extend time for any action under the Rules. This Court already set out the guiding principles for extension of time in the case of ***Nicholas Kiptoo Arap Korir Salat v. Independent Electoral and Boundaries Commission & 7 others [2014] eKLR***, as follows:

**“(1) Extension of time is not a right of a party. It is an equitable remedy that is only available to a deserving party at the discretion of the court.**

**(2) A party who seeks for extension of time has the burden of laying a basis to the satisfaction of the court.**

**(3) Whether the Court should exercise the discretion to extend time, is a consideration to be made on a case to case basis.**

**(4) Whether there is reasonable reason for the delay. The delay should be explained to the satisfaction of the court.**

**(5) Whether there will be any prejudice suffered by the respondent of the extension is granted.**

**(6) Whether the application has been brought without undue delay; and**

**(7) Whether uncertain cases, like election petition, public interests should be a consideration for extending time.”**

**[17] UPON FURTHER** considering the above principles and the Applicants’ submissions that no prejudice would be occasioned to the Respondents if leave is granted as prayed; further that the purpose of the Replying Affidavits is to reinforce the grounds of objections already filed and finally that the Application stands unopposed; and

**[18] UPON NOTING** this Court’s pronouncement in the decision of *Gideon Konchellah v Julius Lekakeny Ole Sunkuli & 2 others [2018] eKLR* where the Court expressed that:

**“[9] A Replying Affidavit is the principal document wherein a respondent’s reply is set and the basis of any submissions and/or List of Authorities that may be subsequently filed. Absence this foundational pleading, the Replying Affidavit, it follows that even the Written Submissions purportedly filed by the 1<sup>st</sup> Respondent on 17<sup>th</sup> August, 2018 are of no effect...**

**[10] Be that as it may, as a court of Law, we have a duty in principle to look at what the application is about and what it seeks. It is not automatic that for any unopposed application, the Court will as a matter of course grant the sought orders. It behooves the Court to be satisfied that prima facie, with no objection, the application is meritorious and the prayers may be granted. The Court is under a duty to look at the application and without making any inferences on facts point out any points of law, such as any jurisdictional impediment, which might render the application a non-starter.”**

**[19]** Accordingly, we are persuaded that in the circumstances, it is in the interest of justice that the instant Application be allowed and hereby make the following orders:

- a. *The Application dated 7th June 2021 and filed on 29th June 2021 is hereby allowed.***
- b. *Leave be and is hereby granted to the Applicants to file and serve further pleadings in the form of Replying Affidavits within fourteen (14) days from the date hereof.***
- c. *The Respondents to file their responses (if any) within 7 days (7) days from the date of service.***
- d. *Costs of the Application to abide the outcome of the Petition.***

**DATED and DELIVERED at NAIROBI this 3<sup>rd</sup> Day of December 2021.**

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**M. K. IBRAHIM**

**JUSTICE OF THE SUPREME COURT**

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**S.C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

.....  
N. NDUNGU

**JUSTICE OF THE SUPREME COURT**

.....  
I. LENAOLA

**JUSTICE OF THE SUPREME COURT**

.....

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

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

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

