



THE SUPREME COURT OF KENYA

**HON. LADY JUSTICE MARY MUTHONI GITUMBI VS. THE TRIBUNAL
APPOINTED TO INVESTIGATE THE CONDUCT OF HON. LADY JUSTICE
MARYMUTHONI GITUMBI, JUDGE OF THE ENVIRONMENT AND LANDS
COURT OF KENYA**

S.C. PETITION NO 10 (E013) OF 2022

DATE OF JUDGMENT: 12TH SEPTEMBER 2023

MEDIA SUMMARY

The following explanatory note is provided to assist the media in reporting this case and is not binding on the Supreme Court or any member of the Court.

Order: The Petition of Appeal dated 19th May, 2022 is dismissed with no order as to costs.

Background

The Petitioner, pursuant to Article 168(8) of the Constitution filed an appeal challenging the Report and Recommendation of the Tribunal Appointed under Article 168(5)(b) of the Constitution of Kenya to Inquire into the Inability of Hon. Lady Justice Mary Muthoni Gitumbi, Judge of the Environment and Land Court of Kenya, to perform the functions of her Office due to Mental Incapacity dated 13th April, 2022. The Tribunal in its report had reached a determination that the statement in the list of allegations that the Judge has mental incapacity and was therefore not able to perform the functions of the office of Judge of the Environment and Land Court, was established to the required standard of proof. The Tribunal unanimously recommended the Petitioner be removed from office of Judge of the Environment and Land Court.

In the appeal before the Supreme Court, the Court framed the following issues for determination:

- i) Whether the Tribunal acted within its jurisdiction to make the findings contained in its report;*
- ii) Whether the Petitioner's mental incapacity was established; and*
- iii) Whether mental incapacity rendered the Petitioner unable to perform the functions of the office of a judge of the ELC.*

Upon consideration, the Supreme Court has dismissed the appeal for the following reasons:

- 1. Issue 1:** The Court finds that a thorough reading of the Tribunal's Report reveals an in-depth inquiry as to whether the Petitioner was unable to perform her judicial functions due to mental incapacity, and in doing so, found it evident that the Tribunal was exercising its mandate pursuant to Article 168 (1) (a) of the Constitution. The Tribunal confined itself to the matters contained in the petition submitted to the President by the JSC and did not consider issues extraneous to its jurisdiction.

- 2. Issue 2:** The Court finds that on the basis of the medical evidence on record and the Petitioner's own admission, the Tribunal established beyond reasonable doubt that the Petitioner had a mental illness, schizophrenia, with a severity that it terms as chronic and deteriorates with every relapse. Further, at no point did the Tribunal equate mental illness to mental incapacity. It is the Court's considered analysis that based on the nature of the disease, symptoms, result of relapses, and mental impairment caused by the disease and upon the Court's evaluation of the evidence before the Tribunal, the Tribunal's finding that the Petitioner's mental illness caused mental incapacity was arrived at correctly.

The Court, guided by prevailing social needs as well as relevant case law as developed in comparative jurisdictions, is well aware of the necessity to strike a balance, on the one hand, of the rights of an individual in a free society and, on the other hand, the need to protect the individual, employment environment, and society at large, from the adverse effects of mental illnesses and disorders. Therefore, in determining cases of mental incapacity, and keeping in mind that findings cannot be generalised from one case to another, the Court establishes the following guidelines for courts to follow in matters which involve an assessment of mental incapacity:

1. *Mental incapacity includes but is not limited to a person's inability to make a decision, understand information about a decision, remember information, use the information to make a decision, or communicate a decision.*
 2. *Mental incapacity can result from mental illness but it does not necessarily follow that mental illness equals mental incapacity.*
 3. *Mental incapacity must be diagnosed by a qualified professional.*
 4. *A court is bound to consider whether an employer caused the establishment of an independent medical board of duly qualified members to determine whether the employee is, by reason of an infirmity of mind, incapable of discharging the functions of the relevant office.*
 5. *If an employee's mental illness is adversely affecting their ability to perform their duties, in some instances, the employer, following due process, may terminate the employee's contract of employment or recommend the employee's removal from office.*
 6. *A court must consider the diagnosis by a qualified professional, and medical expert evidence and assess whether, on a balance of probabilities, the employee's mental illness affects their work duties.*
 7. *Where a person is deemed to lack mental capacity, any interference with his or her fundamental rights and freedoms must be the least restrictive possible.*
- 3. Issue 3:** The Court establishes a two-stage test that will guide courts when they are faced with the issue of establishing whether mental incapacity affects the performance of a person in their work duties. Firstly, there must be proof that a person has an illness or injury that affects the manner in which the brain or mind works. Secondly, that the illness or injury affects the person to the extent that they are unable to perform their duties to the requisite standard.

Based on this two-stage test together with the evidence adduced before the Tribunal, the Court finds that the Tribunal properly arrived at the conclusion that the Petitioner's mental incapacity rendered the Petitioner unable to perform the functions of the office of a judge of the ELC.

- 4. Issue 4:** No order as to costs.

Accordingly, the Court grants the following orders:

- a) ***The Petition of Appeal dated 19th May 2022 is hereby dismissed.***
 - b) ***The Tribunal's finding that the Petitioner was unable to perform the functions of her office due to mental incapacity is affirmed.***
 - c) ***The Tribunal's recommendation to the President for the Petitioner's removal from office under Article 168(1)(a) of the Constitution is affirmed.***
 - d) ***No orders as to costs.***
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