



**REPUBLIC OF KENYA**

**IN THE SUPREME COURT OF KENYA**

*(Coram: Koome; CJ & P, S. Wanjala, N. Ndungu, I. Lenaola & W. Ouko SCJJ)*

**ADVISORY OPINION NO. E 001 OF 2025**

**IN THE MATTER OF: APPLICATION BY THE COMMISSION ON ADMINISTRATIVE JUSTICE FOR ADVISORY OPINION UNDER ARTICLE 163 (6) OF THE CONSTITUTION**

**-AND-**

**IN THE MATTER OF: ARTICLES 10, 21(3), 47, 50, 59, 163(6), 248, 249 & 252 OF THE CONSTITUTION**

**-AND-**

**IN THE MATTER OF: THE COMMISSION ON ADMINISTRATIVE OF JUSTICE, CAP 71 & THE ACCESS TO INFORMATION ACT, 2016**

**-AND-**

**IN THE MATTER OF: THE MANDATE, FUNCTIONS & POWERS OF THE COMMISSION ON ADMINISTRATIVE JUSTICE**

**-AND-**

**COMMISSION ON ADMINISTRATIVE JUSTICE..... APPLICANT**

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Representation:

Mr. Ochiel J. Dudley, Advocate for the Applicant.

# **ADVISORY OPINION**

## **A. INTRODUCTION**

[1] The Reference before the Court is dated 12<sup>th</sup> March, 2025, and was filed on 17<sup>th</sup> March, 2025, at the instance of the Commission on Administrative Justice (CAJ). It is anchored on Article 163(6) of the Constitution, Section 13 of the Supreme Court Act, and Rule 50 of the Supreme Court Rules. The Applicant seeks this Court's advisory opinion on the following issues:

- i. What is the extent of CAJ's mandate, functions and powers under Article 59(2) and 252 of the Constitution concerning county governments officers, state officers or constitutional commissioners;*
- ii. In the Vision 2030 Delivery Board Case, was the Supreme Court asked to, or did it consider or interpret the extent of CAJ's mandate, functions, and powers under Article 59(2) of the Constitution? In that case, was Vision 2030 Delivery Board Case per incuriam? Could a narrow reading of the Vision 2030 Delivery Board Case affect CAJ's ability to give binding directives that remediate complaints against county government officers, state officers or constitutional commissioners?*
- iii. What are the limits under Article 252(3)(a) of the Constitution and, Sections 26, 27, and 29 of the Commission on Administrative Justice Act, on CAJ's power to issue summons to a witness from the County Government officers, state officers or constitutional commissioners?*
- iv. What are the limits under Section 23(1)(a) of the Access to Information Act on CAJ's power to issue summons or other orders requiring the attendance of any person before the Commission and the production of any documents or record relevant to any investigation by the Commission over county government officers, state officers, or constitutional commissioners? and*

*v. Exercising the powers in (iii) and (iv), can CAJ summon county government officers, state officers, or constitutional commissioners?*

## **B. BACKGROUND**

**[2]** In laying a basis for the Reference, the Applicant averred that it is a constitutional commission under Article 59(1) and (2) of the Constitution which established the Kenya National Human Rights and Equality Commission (KNHREC). It further urges that under Article 59(4) of the Constitution, Parliament restructured KNHREC into the Commission on Administrative Justice (CAJ), the Kenya National Commission on Human Rights (KNCHR) and the National Gender and Equality Commission (NGEC) through the CAJ Act, the Kenya National Commission on Human Rights Act and the National Gender and Equality Commission Act, respectively.

**[3]** The applicant states that, as a successor to the KNHREC, it is a Constitutional Commission, with the objects set out in Article 249 of the Constitution. It is independent, subject only to the Constitution and the law, and has its general powers provided for under Article 252(1) particularly, to conduct investigations on its own initiative or a complaint made by a member of the public, for conciliation, mediation, negotiations, and to perform any functions and exercise any powers prescribed by legislation in addition to those conferred by the Constitution. The applicant also highlights its powers to issue summons to a witness under Article 252(3)(a) and its powers and obligations to submit reports to the President and Parliament.

**[4]** On its statutory powers, the applicant highlights the CAJ Act, particularly: Section 4 to the effect that CAJ is a Commission within the meaning of Chapter Fifteen of the Constitution; Section 8 which sets out the powers of CAJ; Section 26 which outlines further general powers of the applicant; Section 27 which gives the applicant the powers of a court (to issue sermons, interrogate any person and requiring disclosure of information relevant to the applicant's investigation) when performing its functions; Section 29 which gives the applicant the powers to investigate a complaint on its own initiative or by a complainant, recommend to the

complainant a course of judicial redress or to the relevant government agency or other body concerned the appropriate method of settling the complaint and to issue summons it deems necessary for the fulfilment of its mandate.

[5] Additionally, it highlights provisions of the Access to Information Act 2016. Section 21 which gives the applicant the oversight and enforcement mandate over the right of access to information under Article 35 of the Constitution, including to investigate on its own initiative or upon a complaint on violations of the provisions of the Access to Information Act, request and receive reports from public entities with respect to the implementation of the Act, to hear and determine complaints and review decisions arising from violations of the right to access to information, among others; and Section 23(1) which gives the applicant the power to issue summons or orders requiring the attendance of any person before it, to interrogate and question any person in respect of any subject before it; and requiring disclosure of information within such person's knowledge relevant to any investigations before it.

[6] With the above background, the applicant contends the decision of this Court in **Vision 2030 Delivery Board Vs Commission on Administrative Justice & 2 others** [2021] KESC 35 (KLR) delivered on 24<sup>th</sup> March, 2021. First, the applicant states that the finding of this Court that its (CAJ) recommendations are not binding but discretionary, negatively impacts the policies on its mandate as vested by the Constitution and the law. Secondly, it takes issue with the Court's over-emphasis of the CAJ's reporting requirements to Parliament under Section 42(4) of the Commission on Administrative Justice Act (CAJ Act), as the only means for enforcing its recommendations and directives. Finally, the applicant avers that, the Court was not asked and did not consider, interpret or decide on its mandate under Article 59(2) of the Constitution, and urges that had the Court interpreted the said provisions, it would have made a different finding. For these reasons, the applicant argues that **Vision 2030 Delivery Board Case** was made *per incuriam*, necessitating the request for the Court's interpretation of Article 59 of the Constitution.

[7] To demonstrate its predicament, the applicant produced the summons to the Judicial Service Commission (JSC) which it issued to the JSC; to all the JSC Commissioners on 28<sup>th</sup> February 2025 over alleged failure to publish and publicise all complaints against judicial officers received by JSC and the Judiciary Ombudsperson. Citing Articles 59(2) and 252(3) of the Constitution and Sections 26,27, and 29 of the CAJ Act, the Applicant states that the Commissioners ignored the summons on grounds that they were unlawful, unwarranted and unconstitutional.

[8] The applicant also alleges that there are unresolved complaints against various county governments. With regards to Mombasa County, it claims of a complaint over unpaid work injury benefits, and the delayed settlement of hospital bills to the Aga Khan Hospital (the county had committed to settle the bill). For Kisumu County, it claims of complaints on the delayed settlement of dues to various parties, and complaints of noise pollution by the residents of Kimute Housing Society. The applicant argues that it cannot resolve these complaints because its intervention and enforcements mechanisms were limited in **Vision 2030 Delivery Board Case**.

[9] On the advice by the Attorney General, the applicant in its supplementary affidavit filed on 21<sup>st</sup> October, 2025, states that it disagrees with the advice that, the CAJ has the powers to investigate administrative actions but does not have judicial review powers, and it cannot nullify or overturn an administrative action as a court of law would; that this Court's decision in **Vision 2030 Delivery Board Case** was not *per incuriam* as the Court limited itself to the issues raised before it; and that there is a limitation imposed by Section 30 of the CAJ Act, in matters in respect of which there is a right of appeal or other legal remedy or matters under investigations by other person or a Commission established by the Constitution. The applicant asserts that without a binding adjudicative authority, it is unable to exercise its powers.

## **C. SUBMISSIONS**

### ***i. The Applicant***

**[10]** The applicant, CAJ, urges that it has met the threshold to warrant the invocation of this Court's jurisdiction under Article 163(6) of the Constitution. It submits that it is a state organ, and the reference raises legal questions concerning county governments and other entities in their interactions with the applicant. It also urges that the questions raised are unfit for ordinary adversarial litigation and that, the public interest warrants the Court's intervention.

**[11]** On the extent of its mandate and powers under Articles 59(2) and 252 of the Constitution, as read with the statute law, the applicant submits on two broad categories of powers and functions under Article 59 of the Constitution: to make recommendations, and to take remedial action. It argues that Article 59(2)(f) empowers it to make recommendations to improve the function of state organs, although such recommendations are not necessarily binding, unless there is a gross abuse of discretion, manifest injustice or palpable excess of authority, and there is no other plain, speedy and accurate remedy. It opines therefore, that a state organ cannot ignore or casually deal with the recommendations from the CAJ.

**[12]** On its powers to take remedial action, the applicant submits that, from a plain reading of Article 59(2)(e) and (j) of the Constitution, and Section 8(c) of the CAJ Act, it can take remedial action, which is geared towards sustaining the protection of fundamental rights and freedoms under Articles 21(1) and 23(3). For these reasons, the applicant contends that when it finds violations of Articles 35 and 47 of the Constitution, it must redress the violation effectively, and the law should treat that remedial action as binding, unless a court stays or sets aside the action.

**[13]** On the limits of the power to issue summons, the applicant submits that according to Article 252(3)(a), Sections 26, 27 and 29 of the CAJ Act and, 23(1)(a) of the Access to Information Act, it has the powers to compel attendance, question

witnesses and require the production of documents from state organs, county governments or their officers on matters before it. Citing this Court in **Independent Electoral and Boundaries Commission Vs Chege** [2023] KESC 74 (KLR), it contends that Constitutional Commissions have the power to issue summons.

[14] Finally, the applicant submits that it is dissatisfied with the Attorney General's advice that it lacks jurisdiction over matters within the mandate of Commissions or persons created under the Constitution. Further, that even if limits exist to its power to issue summons, these can only be jurisdictional and procedural, as opposed to institutional.

#### **D. ISSUES FOR DETERMINATION**

[15] From the reference and the submissions, the following issues have crystallized for our determination:

- i. *Whether this Court has jurisdiction to render the advisory opinion sought and if so;*
- ii. *Whether the Court should exercise its discretion to give an advisory opinion in the terms set out in this matter*

#### **E. ANALYSIS AND DETERMINATION**

##### ***(i) Whether this Court has jurisdiction to render an advisory opinion sought***

[16] At the outset, we have to determine whether the jurisdiction of this Court to render an advisory Opinion has been properly invoked. In that regard, we note that this Court's jurisdiction to issue advisory opinions is anchored in the Constitution as Article 163(6), stipulates that:

***“The Supreme Court may issue an advisory opinion at the request of the national government, any state organ, or any county government with respect to any matter concerning county government.”***

[17] This Court has in several decisions interrogated the question of its jurisdiction under Article 163 (6) of the Constitution. **In the Matter of the Interim Independent Electoral Commission**, [2011] KESC 1 (KLR), we laid down the principles to guide the Court on the exercise of its jurisdiction under Article 163 (6) of the Constitution. At paragraph 83 of that judgment, this Court stated:

***“[83] With the benefit of the submissions of learned counsel, and of the comparative assessments recorded herein, we are in a position to set out certain broad guidelines for the exercise of the Supreme Court’s Advisory-Opinion jurisdiction.*”**

- i. For a reference to qualify for the Supreme Court’s Advisory Opinion discretion, it must fall within the four corners of Article 163(6): it must be “a matter concerning county government.” The question as to whether a matter is one “concerning county government “will be determined by the Court on a case-by-case basis.***
- ii. The only parties that can make a request for an Advisory Opinion are the national government, a State organ, or county government. Any other person or institution may only be enjoined in the proceedings with leave of the Court, either as an intervener (interested party) or as amicus curiae.***
- iii. The Court will be hesitant to exercise its discretion to render an Advisory Opinion where the matter in respect of which the reference has been made is a subject of proceedings in a lower Court. However, where the court proceedings in question have been instituted after a request has been made to this Court for an Advisory Opinion, the Court may if satisfied that it is in the public interest to do so, proceed and render an Advisory Opinion.***
- iv. Where a reference has been made to the Court the subject matter of which is also pending in a lower Court, the Court***

***may nonetheless render an Advisory Opinion if the applicant can demonstrate that the issue is of great public importance and requiring urgent resolution through an Advisory Opinion. In addition, the applicant may be required to demonstrate that the matter in question would not be amenable to expeditious resolution through adversarial Court process”.***

[18] Flowing from the above, we have to answer the question as to whether the Reference herein meets the above criteria to enable the Court to exercise its advisory opinion jurisdiction. The first limb of the jurisdictional inquiry concerns whether the party seeking to move it, falls within the categories of parties decreed by the Constitution.

[19] **In Matter of the National Gender and Equality Commission**, Reference No. 1 of 2013 [2014] eKLR, we observed as follows:

***“However, there are certain key considerations in applying these essentials. The starting point will always be that the party must have locus standi. The Court will always consider whether the party seeking to move it, falls within the categories of parties decreed by the Constitution. The Court will then proceed to consider the subject-matter: whether it is one involving County Government. Once it rules in the affirmative, the other considerations come into play.”***

[20] The only parties who may apply for an advisory opinion are, the National Government; a State organ; or any County Government with respect to any matter concerning county government. We are in agreement with the applicant that it is a State Organ, by dint of the provisions of Article 260 of the Constitution, and therefore has the locus standi to request an advisory opinion. Article 260 of the Constitution defines what a State organ as follows:

*“A State organ is defined as “a commission, office, agency or other body established under the Constitution.”*

[21] The second limb concerns whether the subject matter of the reference before us is one concerning county government. Can it be said that the applicant, a State organ, is seeking an advisory opinion from this Court on a matter concerning county government? This Court has expressed itself on what matters can be regarded as being ‘one of county government’. **In the Matter of the Speaker of the Senate & another**, SC Reference No. 2 of 2013 [2013] eKLR this Court observed thus:

*“It emerges that a matter qualifies to be regarded as one of county government only where: that is the case in the terms of the Constitution; it is the case in the terms of statute law; it is the case in the perception of the Court, in view of the function involved or the relation created as between the national government and its processes, on the one hand, and the county governments and their operations, on the other.”*

[22] From the Reference before us, the applicant seeks an advisory opinion regarding the extent of its mandate, functions and powers under Article 59(2) and 252 of the Constitution concerning county governments officers, state officers or constitutional commissioners. A further perusal of the reference indicates that the applicant, has taken issue with this Court’s decision in **Vision 2030 Delivery Board case** in that the said decision, affects CAJ’s ability to give binding directives that remediate complaints against county government officers, state officers or constitutional commissioners, and its power to issue summons to a witness from the County Government officers, state officers or constitutional commissioners. From the foregoing issues, there is no doubt that this Reference concerns matters relating to County Government. We therefore affirm our jurisdiction to render an advisory opinion in this matter.

***(ii) Whether this Court should exercise and render an advisory opinion in the terms set out in this matter***

[23] Our task now is to decide whether, in the circumstances demonstrated in the reference, if we should proceed to render an advisory opinion. In the **Re the Matter of the Principle of Gender Representation in the National Assembly and the Senate**, SC. Advisory Opinion No. 2 of 2012; [2012] eKLR, at paragraph [17] and [18], we emphasized that the exercise of this Court’s jurisdiction under Article 163(6) of the Constitution is discretionary and only deserving matters will justify the exercise of such jurisdiction.

[24] It is also a tradition of this Court to ensure that before it proceeds to exercise its discretion to render an advisory opinion, it must consider whether the opinion of the Attorney General was sought. We emphasized this position in the **Matter of the National Gender and Equality Commission**, Reference No. 1 of 2013; [2014] eKLR, where we directed that, even though the locus standi of the party, and the nature of the subject matter, are two paramount considerations, there are other factors which though essential, will be weighted on a case-by-case basis. The issue whether the opinion of the Attorney-General has been sought is one such factor. In that matter, we concluded that;

***“Though there is no mandatory requirement to first seek the Attorney-General’s opinion, this Court has held that, as a matter of good practice, such opinion should be sought...***

***... Consequently, as a matter of due process, we would restate that the applicant, same as other government institutions and agents, should adopt the practice of resorting to the office of the Attorney-General first”***

[25] We are further guided by our decision in **Re the Matter of the Interim Independent Electoral Commission**, SC Application No. 2 of 2011; [2011] eKLR [Re IIEC] where the Court considered the question whether seeking advice from the

Attorney-General, or the requirement for seeking such advice before moving the Court for an Advisory Opinion, would be tantamount to interference with the independence of the Interim Independent Electoral Commission. The Court pronounced itself as follows:

***“In the instant matter, it is our opinion that, seeking the advice of the Attorney-General, or being required to do so by a rule of procedure, does not compromise the independence of a State organ in any way, nor does it vest a veto power in that office. While the applicant after obtaining advice from the office of the Attorney-General is not necessarily bound by the same, for the purpose of this Court, the fact that such advice was sought in the first place, will demonstrate the applicant’s commitment, as well as fidelity to due process”.***

[26] Examining the record, the reference and the applicant’s submissions, we take cognizance of the fact that the applicant sought the advice of the Attorney General vide a letter dated 7<sup>th</sup> March, 2025, on its mandate, functions and powers concerning county government, state officers and constitutional offices. Subsequently, the Attorney General, in a well-reasoned and comprehensive letter dated 24<sup>th</sup> March, 2025, responded to the substantive questions raised by the applicant, which we note are all the questions outlined in the reference now before us.

[27] Although we indicated that while an applicant after obtaining advice from the office of the Attorney-General is not necessarily bound by the same, for the purpose of this Court, we must emphasize that seeking the opinion of the Attorney General is not a mere formality for the purposes of fulfillment of this Court’s dictates. As the principal government legal advisor, the Attorney General has the capacity, and duty to advise the government or any State Organ without seeking an advisory opinion from the Court.

[28] Article 156 (1) (c) of the Constitution provides that, ‘the Attorney General is the principal adviser of the Government’. This mandate was appreciated by this Court in

**Re the Matter of the Interim Independent Electoral Commission (*supra*)**

where it was pointed out that;

***“...By Article 156(4) ... of the Constitution, the Attorney General is designated the principal [legal] advisor of the Government .... It can be said that the Attorney- General bears the mantle of the “chief lawperson” of Government in its diverse dimensions. The various departments [and levels] of the Government have the liberty to seek the Attorney-General’s opinion on any legal question of relevance to their day-to-day operations.”***

[29] We have had the benefit of reading through the opinion of the Attorney General of 24<sup>th</sup> March, 2025, as was given to the applicant. We note that the opinion responded to all the questions that the applicant requested advice on, which curiously are the same questions raised in this Reference. The Attorney General advised the applicant that:

- i. *The Commission on Administrative Justice plays a crucial role in addressing maladministration and ensuring adherence to the law relating to Access to information by both the National and County Government. While the CAJ has the power to summon public officers, conduct investigations and issue recommendations, it does not possess binding adjudicative authority.*
- ii. *In cases where public entities, including county governments and other constitutional commissions, fail to comply with its recommendations, the CAJ is required to escalate the matter to the National Assembly or other relevant oversight bodies as stipulated under Section 42 (4) of the CAJA as read together with Article 254 of the Constitution.*
- iii. *The decision of the Supreme Court in the Vision 2030 Delivery Board (Abeka’s) Case was not per incuriam as the Court limited its decision to the issue raised before it and that CAJ’s functions and powers were not in dispute in that case.*

- iv. The Commission may consider proposing legislative amendments in order to specify the categories of offices subject to summons and the consequences of non-compliance.*
- v. Finally, that CAJ was at liberty to seek an advisory opinion of the Supreme Court in line with Article 163 (6)*

**[30]** This then brings us to our next question, which is, how and why the applicant is aggrieved by the opinion of the Attorney General, to necessitate its request for an advisory opinion from this Court. As we have mentioned elsewhere in this judgment, the advice and/or opinion of the Attorney General is not a formality to be undertaken as a matter of course just to ‘fulfill’ a jurisdictional requirement. When the Attorney General gives his advice/opinion, he does so to uphold the constitutional mandate granted to that office, as a principal legal advisor. The advice is not given in vain. Once a party gets the advice from the Attorney General, they can move this Court for an advisory opinion, only if and when they are dissatisfied by that advice. We must hasten to add that, a party moving this Court for an advisory opinion, must demonstrate how they are aggrieved by the advice from the Attorney General, and why this Court must exercise its discretion to render an advisory opinion.

**[31]** From our perusal of the reference and the submissions by the applicant, we do not see why and how the applicant is aggrieved and/or dissatisfied by the advice from the Attorney General. The applicant in its submissions acknowledges that while agreeing with the Attorney General’s advisory on some points, for instance, that the Attorney General correctly observed that the Supreme Court’s ratio decidendi in the **Vision 2030 Delivery Board** Case was properly applied to the core issue brought before the Supreme Court, CAJ departs on other points, but has however, failed to demonstrate why.

**[32]** We restate our finding in **Re Speaker, County Assembly of Siaya County**, (Reference 4 of 2017) [2020] KESC 40 (KLR) that:

*... We would, in the circumstances, like to make it clear that the Supreme Court is not a legal adviser of State organs.*

***Further, the scope of an Advisory Opinion under Article 163(6) of the Constitution does not extend to offering legal advice. As the provision states, the jurisdiction the Article vests in the Supreme Court is to offer Advisory Opinion, and even then, that jurisdiction is circumscribed.***

[33] The applicant is, in this Reference asking this Court to expand its mandate, powers and functions beyond what is laid down in the Constitution and Statutes. This we must say, does not fall within the mandate of this Court. We have in numerous cases, emphasized that law making, is a preserve of the legislative arm of the government. In any event, the Attorney General advised the applicant to consider proposing legislative amendments in order to expand its mandate, powers and functions.

[34] Although we acknowledge, the criteria for rendering an advisory opinion are more generous than for ordinary suits, even then, advisory opinions are not rendered in the abstract. The time of this Court is too valuable to be frittered away on hypothetical fears or contingent future events, that may not occur as anticipated, or indeed, may not occur at all. We restate our position **In Re Matter of the Interim Independent Electoral Commission**, SC Application No. 2 of 2011; [2011] eKLR [Re IIEC], this Court at paragraph [84] emphasized that:

***“...given the practical and legal constraints attendant on Advisory Opinions, this Court will, in principle, exercise that jurisdiction with appropriate restraint. We shall not, therefore, exercise our jurisdiction in hypothetical situations.”***

[35] This Court has had an opportunity in the past to pronounce itself on its jurisdictional contours including **In the Matter of the Principle of Gender Representation in the National Assembly and the Senate**, SC Advisory Opinion No. 2 of 2012; [2012] eKLR where the Court stated that an advisory opinion as contemplated by Article 163(6) of the Constitution, must seek to unravel a legal

uncertainty in such a manner as to promote the rule of law and public interest. Section 13 (3) of the Supreme Court Act clearly provides that:

*3. The nature of opinion sought shall not be adversarial, abstract, or hypothetical.*

[36] We have considered all the questions raised in the Reference before us. We note that the applicant is asking this Court to render an advisory opinion, but has not demonstrated how it is unable to exercise its authority to resolve major governance issues, such as summoning the officers of the various organs established under the Constitution. There is also no indication of any challenges or any disputes arising from the applicant exercise of its powers or functions, neither has the applicant demonstrated the difficulties in requiring the production of any documents or record relevant to any investigation by the Commission over county government officers, state officers, or constitutional commissioners. From our perusal of the reference, the applicant has only indicated that it has received complaints against the counties of Mombasa and Kisumu, but has failed to establish what actions in exercise of its mandate, has been taken, and the consequences thereof. On the summons to the JSC, the applicant has not demonstrated whether it took further action as is provided for under the Constitution and the CAJ Act, with regard to non-compliance.

[37] We recall that in the case of [Attorney-General & 2 others Vs Ndi & 79 others; Dixon & 7 others \(Amicus Curiae\)](#) (Petition 12, 11 & 13 of 2021 (Consolidated)) [2022] KESC 8 (KLR), this Court was called upon to interpret Article 257(10) of the [Constitution](#), specifically, whether it requires that each proposed constitutional amendment be submitted as a separate and distinct question during a referendum. The Court in its Judgment, by a majority, was of the view that IEBC was yet to be invited to make a determination on the manner and form of the referendum question(s). Therefore, IEBC had not had an opportunity to address its mind and make a determination on the issue. Taking into consideration that IEBC's obligation under Article 257(10) of the [Constitution](#) had not yet arisen, the Court therefore arrived at a decision not to accede to the invitation by the respondents to consider an

issue that was not ripe and was therefore not justiciable. The Court reasoned that rendering a decision at that stage would amount to engaging in an abstract exercise, effectively directing an independent constitutional commission on how to execute its constitutional mandate, an outcome this Court is constitutionally enjoined to avoid.

[38] In these circumstances, and by parity of reasoning, we are similarly constrained to find that, prior to the issuance of any summons to any of the officers as claimed by the applicant in this reference, or any request for the information from the State, and the request has been denied or not provided, and without the Commission first considering and applying its mind to all its powers as provided for in the attendant constitutional and statutory provisions, this Court lacks any basis upon which to assess or evaluate the extent and the limits of the applicant's mandate and powers. As we have repeatedly stated, this Court does not engage in hypothetical determinations.

[39] We agree with the High Court in **Kahindi Lekalhaile & 4 others Vs Inspector General National Police Service & 3 others**, Petition No. 25 of 2013 [2013] eKLR, where the court stated as follows:

*“However, in order for this right to be justiciable, it must be established that the person seeking the information has sought the information, and access to such information has been denied. ... In the instant case, no request for information has been made to the respondents. The enforcement of the right cannot therefore be said to have crystallized.”*

[40] On the extent of its mandate and powers under Articles 59(2) and 252 of the Constitution, as read with the statute law, it is our finding that this question can be dealt with through the advice of the Attorney General or by the courts below to reach us through the normal appellate mechanism.

[41] On whether in the Vision 2030 Delivery Board Case, the Supreme Court was asked to, or did it consider or interpret the extent of CAJ's mandate, functions, and

powers under Article 59(2) of the Constitution? In that case, was Vision 2030 Delivery Board Case per incuriam? Could a narrow reading of the Vision 2030 Delivery Board Case affect CAJ's ability to give binding directives that remediate complaints against county government officers, state officers or constitutional commissioners?

**[42]** Is the applicant really seeking an Advisory Opinion on this issue? In our view, the applicant is not seeking an Advisory Opinion within the meaning of Article 163 (6) of the Constitution. On the face of it, it is clear to us that, what the applicant seeks is not an Advisory Opinion, but this Court's departure from its previous decision in the **Vision 2023 Delivery Board Case**. The main objective of the applicant is to elicit a different conclusion from what this Court previously concluded.

**[43]** If we apply the arguments in **Rai & 3 others Vs Rai & 5 others**, (Petition 4 of 2012) [2013] KESC 21 (KLR), the suggestion is that the earlier decisions by this Court were reached through ignorance or mistake, or that the Court was ill informed about the applicable law; and that had the Court reviewed the facts, it could have reached a different outcome. While the Court may depart from its previous decision if it is shown that such decision was given *per incuriam*, it is a serious suggestion that the apex court made a decision through ignorance or was ill informed about the applicable law. This is how the Court explained the context of departure in the case of **Jasbir Singh Rai (supra)**;

***“[51] Comparative judicial experience shows that the decision of a superior Court is not to be perceived as having been arrived at per incuriam, merely because it is thought to be contrary to some broad principle, or to be out of step with some broad trend in the judicial process; the test of per incuriam is a strict one – the relevant decision having not taken into account some specific applicable instrument, rule or authority. A decision per incuriam is one rendered in ignorance of a constitutional or statutory prescription, or of***

***a binding precedent: but if a decision be such, this, by and of itself, does not, perforce, render it “inappropriate”, or “mistaken”, or “wrong” – for the decision could still rest upon its own special merits, and be in every respect sustainable as a matter of principle”.***

[44] While it is not in doubt that the Supreme Court may depart from its previous decisions as per article 163 (7) of Constitution, such departure must be premised upon a clear and well-reasoned justification. A litigant cannot urge the Court to depart from its previous decision simply because he disagrees with it, or that the decision, militates against his case. We restate our position **In the Matter of Council of Governors & 47 others**, (Reference 3 of 2019) [2020] KESC 65 (KLR) where we held that, any party intending to steer the Court in that direction, ought to ideally make a formal application in which he states the reasons in justification of such a motion.

[45] In the instant matter, we are being asked to depart from a previous decision, not in the manner signaled above, but in the course of a Reference. The perfunctory manner in which the Court is being moved to depart from a previous decision does not commend itself to us. We recall our decision in **The Senate & another Vs Council of County Governors and others** SC Petition No. 25 of 2019, where held that:

***“Though not bound by its decisions, the Supreme Court, being the apex court, will not lightly depart from or review its previous decisions, save to the extent explained in the highlighted passage above. Just as it is a serious matter to suggest that the decision of this Court was made per incuriam, it is equally not a simple matter for the Court to depart from its decisions that have been, over time applied as ratio decidendi, binding the courts below.***

[46] Although the Court did not expressly direct what the phrase, ‘when properly moved’ entails, it left no doubt that for the Court to depart from its previous decision, or for it to review its decision, it can only be moved by a formal application. This view was expressed in **Fredrick Otieno Outa Vs Jared Odoyo Okello & 3 others** [2017] eKLR. Consequently, we are unable to consider the merits of that argument.

**F. DISPOSITION**

[47] Ultimately, based on our findings above, we decline to exercise our discretion in rendering an opinion in this matter.

[48] We shall make no Order as to costs.

DATED and DELIVERED at NAIROBI this **20<sup>th</sup>** Day of **February**, 2025

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**M. K. KOOME**

**CHIEF JUSTICE & PRESIDENT OF  
THE SUPREME COURT**

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**S. C. WANJALA**

**JUSTICE OF THE SUPREME COURT**

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**NJOKI NDUNGU**

**JUSTICE OF THE SUPREME COURT**

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**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

