

# **SPECIAL ISSUE**



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## **THE JUDICIAL SERVICE ACT**

(No. 1 of 2011)

THE JUDICIAL SERVICE (TRIBUNAL APPOINTED UNDER ARTICLE 168 (5) (B) OF THE CONSTITUTION TO INQUIRE INTO THE CONDUCT OF HON. JUSTICE SAID JUMA CHITEMBWE, JUDGE OF THE HIGH COURT OF KENYA, ON THE GROUNDS FOR REMOVAL OF A JUDGE UNDER ARTICLES 168 (1) (B) AND 168 (1) (E) OF THE CONSTITUTION) RULES OF PROCEDURE, 2022

IN EXERCISE of powers conferred under section 31 (5) of the Judicial Service Act, 2011, the Tribunal appointed to inquire into the conduct of the Hon. Justice Said Juma Chitembwe, Judge of the High Court of Kenya, from office on the grounds for removal of a judge under Articles 168 (1) (b) and 168 (1) (e) of the Constitution, *vide* Gazette Notice No. 5540 of 2022, makes the following rules—

### *Citation*

1. These Rules may be cited as the Judicial Service (Tribunal to Inquire into the Conduct of Justice Said Juma Chitembwe) Rules of Procedure, 2022.

### *Interpretation*

2. In these Rules, unless the context otherwise requires—

No. 1 of 2011

“Act” means the Judicial Service Act, 2011;

“Assisting counsel” means counsel appointed by the President of the Republic pursuant to section 31 (4) of the Act;

“Chairperson” means the Chairperson of the Tribunal;

“Hearing” means a sitting of the Tribunal for the purpose of receiving evidence, hearing submissions from a party, delivering a decision, or doing anything lawfully required to enable the Tribunal to reach a decision, on any complaint before it;

“Judge” means Hon. Justice Said Juma Chitembwe who is the subject of the investigations of the Tribunal;

“Member” means a member of the Tribunal;

“Register” means the register in which pleadings and supporting documents and all orders and decisions of the Tribunal are kept in accordance with these Rules;

“Registry” means the registry of the Tribunal;

“Secretary” means the person appointed by the President to carry out the functions set out in rule 4;

“Tribunal” means the tribunal appointed to inquire into the conduct of Justice Said Juma Chitembwe, Judge of the High Court of Kenya; and

“Vice-Chairperson” means the person elected pursuant to section 31 (2) of the Judicial Service Commission Act, 2011.

### *Chairperson*

3. The Chairperson shall co-ordinate the work of the Tribunal and be responsible for—

- (a) constituting such panel or panels of the Tribunal as may be necessary for the fair and expeditious disposal of the business of the Tribunal;
- (b) assigning the business of the Tribunal to the members;
- (c) supervising the activities of the Secretary and Registry; and
- (d) exercising all other functions contemplated by Article 168 of the Constitution or conferred by the Act and these Rules.

### *Secretary*

4. (1) In relation to the proceedings before the Tribunal, the Secretary shall act in accordance with the instructions of the Chairperson and, in particular, be responsible for—

- (a) the establishment and maintenance of the Register and Registry;
- (b) the acceptance, transmission, service and custody of documents in accordance with these Rules;
- (c) the enforcement of decisions of the Tribunal;
- (d) certifying the orders, directions or decisions of the Tribunal;
- (e) causing records of the proceedings and minutes of the meetings of the Tribunal and such other records as the Tribunal may direct, to be kept;
- (f) performing any other duties assigned by the Tribunal for the purposes of the Tribunal;
- (g) summoning of witnesses;

- (h) the recruitment and supervision of staff of the Tribunal; and
- (i) the management and co-ordination of the operations, staff, finances and physical facilities in support of the Tribunal.

(2) The Secretary may, with the approval of the Chairperson, consider and dispose of procedural or administrative matters in accordance with these Rules.

(3) A party may, within seven days of any action taken by the Secretary, request in writing that the Secretary's action be reviewed by the Tribunal.

(4) Any administrative function of the Secretary may, in the Secretary's absence, be performed by any member of staff of the Tribunal whom the Chairperson may authorize for that purpose.

(5) The Secretary shall have such other powers similar to those of a Registrar as set out under Order 49 of the Civil Procedure Rules, 2010, with such modifications as may be necessary.

#### *Quorum for Hearings and other Business of the Tribunal*

5. (1) The quorum necessary for the conduct of the hearings of the Tribunal shall be the Chairperson and four other members.

(2) In the absence of the Chairperson, the quorum necessary for the conduct of the hearings of the Tribunal shall be the Vice-Chairperson and four other members.

(3) The quorum necessary for the conduct of any other business of the Tribunal shall be the Chairperson and three other members.

(4) In the absence of the Chairperson, the business of the Tribunal may be carried on by the Vice-Chairperson and three other members.

#### *Tribunal to uphold Principle of Substantial Justice*

6. (1) The Tribunal shall interpret the provisions of these Rules in a manner that promotes the principle of substantial justice.

(2) Any irregularity resulting from failure to comply with any provision of these Rules shall not in itself render the proceedings void or invalid if the irregularity does not occasion a miscarriage of justice.

(3) Where any such irregularity comes to the attention of the Tribunal, the Tribunal may, where it determines that any person may have been prejudiced by the irregularity, give such directions as may be just, to cure the irregularity.

(4) Clerical mistakes in any document recording a direction, order or decision of the Tribunal, or errors arising in such a document from an accidental slip or omission, may be corrected by the Chairperson, by certificate under the Chairperson's hand.

#### *Powers of Tribunal not affected or limited*

7. Nothing in these Rules shall be deemed to limit or otherwise affect any of the powers of the Tribunal necessary for the proper execution of its mandate.

#### *Service of Notice*

8. (1) The Tribunal shall serve on the Judge a hearing notice at least fourteen days before the date of the first hearing and for subsequent hearings, at least seven days, unless the date of the subsequent hearing is otherwise mutually agreed upon by all the parties.

(2) Assisting counsel shall draw up a list of the allegations against the Judge together with a summary of the evidence in support of the allegations and shall serve the document containing the allegations and the summary of the evidence on the Judge at least fourteen days before the first date of hearing.

(3) Service upon the Judge shall be effected through his appointed legal counsel (if any) or personal service or if unable to serve the Judge through his appointed counsel or in person, through a duly appointed court process server.

#### *Hearings*

9. (1) The hearings of the Tribunal shall be held in camera except where the Judge opts to have the hearings in public.

(2) The Tribunal may exclude any person or class of persons from all or any part of the hearing if satisfied that it is desirable so to do for—

- (a) the preservation of order; or
- (b) the due conduct of the investigation; or
- (c) the protection of any witness in the investigation or any person referred to in the course of the investigation or the property or reputation of such witness or person.

(3) The Tribunal may, for the reasons specified in sub rule (2), order that no person shall publish the name, address or photograph of any witness or person or any evidence or information whereby he or she would or may be identified.

#### *Right to be present at hearings and representation*

10. The Judge shall have the right to be present during all of the proceedings that relate to him and shall be entitled to legal representation by counsel.

#### *Assisting Counsel to present Evidence*

11. Assisting counsel shall present evidence and any matter relevant to the investigation.

#### *Summoning of Witnesses*

12. (1) The Tribunal may summon any person or persons to testify before it on oath or to produce such documents as the Tribunal may require, and the person so summoned shall be obliged to attend and to testify or produce the required documents and the provisions applying to witnesses summoned by ordinary courts of law shall apply to such person.

(2) Any request by assisting counsel or the Judge for the Tribunal to exercise its discretion under subparagraph (1) shall be in writing and shall be addressed to the Secretary.

(3) Subject to subparagraph (1), the Tribunal may issue a warrant in accordance with section 46 of the Judicial Service Act to apprehend any witness or witnesses who fail to honour the summons issued.

#### *Tribunal not bound by strict rules of evidence*

13. The Tribunal shall not be bound by the strict rules of evidence but shall be guided by the rules of natural justice.

#### *Right to Cross-Examine Witnesses*

14. The Judge shall have the right to cross-examine any witness during the hearings.

#### *Right to Call Evidence and Personal Appearance*

15. (1) The Judge shall be entitled to testify or call evidence to rebut allegations made against him.

(2) The Judge duly served may elect not to attend in person or by counsel or at all, in which case the Tribunal shall be entitled to consider the evidence available and make a report and appropriate recommendations.

#### *Cross Examination of Witnesses*

16. (1) The Tribunal and assisting counsel shall be entitled to examine the subject and any witnesses appearing before the Tribunal.

(2) The Tribunal may recall any witness that shall have appeared before the Tribunal.

#### *Form of Evidence*

17. (1) Evidence before the Tribunal may be presented orally or in the form of a memorandum, affidavit, document and in any other electronic or digital format the Tribunal shall be entitled to receive such documents and to use the contents thereof in forming its opinion.

(2) The Judge shall be furnished with copies of any documentary, electronic, digital or oral evidence and shall be entitled to cross-examine the deponent or maker of any such affidavit or document tendered as evidence.

(3) Where documentary evidence against the Judge is provided to the Tribunal, the evidence shall be served on the Judge at least seven days or such period as the Tribunal may determine appropriate before the hearing at which the evidence shall be considered.

(4) In estimating the weight, if any, to be attached to electronic and digital evidence, the Tribunal shall have regard to—

- (a) the reliability of the manner in which the electronic and digital evidence was generated, stored or communicated;
- (b) the reliability of the manner in which the integrity of the electronic and digital evidence was maintained;
- (c) the manner in which the originator of the electronic and digital evidence was maintained; and
- (d) any other relevant factor.

(5) The Tribunal may admit such persons specially skilled on a subject or fact relevant to the proceedings to give an opinion on such subject or fact.

#### *Submissions*

18. At the close of the hearing of all evidence before the tribunal, Counsel assisting the Tribunal and the Judge or his counsel shall be entitled to make oral or written submissions.

#### *Delivery of Decisions*

19. (1) All decisions of the Tribunal shall be in writing and shall contain a concise statement of the investigation, the points for determination, the decision thereon, and the reasons for such decision upon each separate issue.

The decisions of the Tribunal shall be carried by a simple majority of members present.

(2) The final decision of the Tribunal shall be submitted to the President and thereafter made in public on a date affixed for that purpose but not later than fourteen (14) days after conclusion of the proceedings.

(3) Where a member, for reasons either beyond his or her control or the control of the Tribunal, is unable to sign the decision of the Tribunal, the reason shall be recorded, and the decisions signed by the other members.

(4) The Secretary shall on delivery of the decision under subparagraph (2) cause the decision of the Tribunal to be published in the *Gazette* and posted on the Tribunal's website.

#### *Sittings of the Tribunal*

20. The Tribunal shall sit on such days, and at such times and venues as it may determine.

#### *Registry Hours*

21. The Registry shall be open for business from Monday to Friday from 8:30 am to 4:30 pm but may be open at other times for urgent business at the direction of the Chairperson.

#### *Summonses to be signed by Secretary*

22. Summonses issued by the Tribunal shall be endorsed by and bear the signature of the Secretary.

#### *Recording of Proceedings*

23. The Chairperson shall cause to be taken notes of all proceedings before the Tribunal or may direct that the record of any proceedings before the Tribunal be taken by shorthand notes or tape recorded or, at the discretion of the Tribunal, electronically recorded.

#### *Practice Directions*

24. The Chairperson may issue Practice Directions for the just, efficient and economical determination of proceedings under these Rules, and the Practice Directions so issued shall be special rules of practice and procedure of the Tribunal.

#### *Extension of Time*

25. The Tribunal may, for sufficient cause shown, extend the time prescribed by these Rules for doing any act or taking any proceedings upon such terms and conditions, if any, as may appear just and expedient.

#### *Amendment of Rules*

26. The Tribunal may, from time to time, by notice in the *Gazette*, amend the provisions of these Rules.

#### *General Powers of Tribunal*

27. (1) Subject to the provisions of these Rules, the Tribunal may regulate its own procedure.

(2) The Chairperson may issue practice directions in relation to the procedures provided for by these Rules.

(3) Nothing in these Rules shall limit or otherwise affect the inherent power of the Tribunal conferred by Article 168 of the Constitution either on its own motion or on the application of a party to make such orders as may be necessary for the ends of justice or to prevent abuse of the process of the Tribunal.

Dated the 8th June, 2022.

MUMBI NGUGI,  
*Chairperson.*