

OUR REF: CAJ/OM/07/13/13/RS

22nd August, 2013

Hon. Dr. Willy Mutunga, D. Jur, SC, EGH

Chief Justice of the Republic of Kenya and
Chairperson of the Judicial Service Commission
Chief Justice Chambers
Supreme Court of Kenya
P. O. Box 30041 – 00100

NAIROBI

Dear

RE: DECISION BY THE JUDICIAL SERVICE COMMISSION TO SEND THE CHIEF REGISTRAR OF THE JUDICIARY ON COMPULSORY LEAVE PENDING INVESTIGATIONS

Kindly receive warmest compliments from the Commission on Administrative Justice.

The Commission on Administrative Justice (Office of the Ombudsman) is a Constitutional Commission established under Article 59 (4) and Chapter Fifteen of the Constitution, and the Commission on Administrative Justice Act, 2011.

The Commission has a mandate *inter-alia*, to investigate any conduct in state affairs or any act or omission in public administration in any sphere of Government, complaints of abuse of power, matters relating to administrative justice, unfair treatment, manifest injustice and unlawful, oppressive, or unresponsive official conduct.

The Commission's attention has been drawn to a paid advertisers' announcement and other media reports that the Judicial Service Commission has recently resolved to send the Chief Registrar of the Judiciary on compulsory leave pending investigations. The Commission notes:

- a) That on 17th and 19th August 2013, the Judicial Service Commission resolved to send the Chief Registrar, Mrs. Gladys Boss Shollei, on compulsory leave for a period of fifteen days to pave way for investigations on various allegations.
- b) That it appears the latter decision was reached following a meeting of the JSC whereby the Commissioners voted 5-4 in favour.
- c) That the JSC has since mandated two committees of the Judiciary to investigate the alleged accusations against the Chief Registrar and to report back to the full plenary.
- d) That the said Committees have since merged into one for these purposes, which has since invited comments and submissions from the public.
- e) That the ambit of investigations is stated as “touching on but not limited to the process of procurement, employment, administration, finance and corporate governance of the Judiciary.”

In the course of examining this issue, we have noted that issues have been raised about the legitimate reach of Article (172) (1) (c) in relation to the Chief Registrar; the legality of compulsory leave, and whether “officer” in S. 16 of Schedule Three of the Judicial Services Act would include the Chief Registrar, and the definition of Judicial Officer thereon; the statutory delegation of disciplinary processes to the Chief Justice under S. 15 of the Third Schedule and whether these can be recalled without amendments; the question of absence of S. 47 Regulations and its effects, among other issues. In our view, however, these are matters for later consideration by JSC.

Presently, what has detained our attention are issues of due process, natural justice and the constitutional requirement of fair administrative action. This is particularly so, noting that the origination of the allegations appear to be internal to JSC, and the total membership of the twin committees investigating form an overwhelming majority of the total membership of the JSC. A further point of note is that the JSC membership comprises representatives of all Superior Courts in

Kenya, including the Presidency of the Supreme Court, making judicial recourse cumbersome, even if available.

Thus, it is the considered view of this Commission that the process adopted makes the JSC the accuser, Investigator, Prosecutor and Judge in the same cause. In our humble view, the JSC, having preliminarily determined the need for investigations, should have invited the Ethics and Anti-Corruption Commission to investigate any issues of alleged corruption; the Auditor-General to investigate financial dealings; the Public Procurement Oversight Authority to investigate issues of procurement; and the Commission on Administrative Justice to investigate any issues of maladministration and mis-governance. In this event, each of these bodies would then present its findings to the JSC to make its determination on how to proceed. This, in our opinion, would provide a fair, unbiased and transparent process in keeping with the principles of Judicial authority under Article 159 of the Constitution. We humbly commend to you this course.

That said, our attention has further been drawn to an inquiry by the Parliamentary Legal Affairs Committee in which it has summoned the leadership of JSC to appear before it and explain circumstances surrounding the Chief Registrar's investigations. While it is to be conceded that Parliamentary Committees has panels of the High Court during an Inquiry, and may summon any person in accordance with Article 125 of the Constitution, it is our view that it is improper to invoke this power against an independent commission in respect of an act done in furtherance of its constitutional mandate, even if impugned, as this would directly offend the provisions of Article 249 (2) (b) which insulates such Commissions and Independent Offices from direction or control by any person or authority. In any event, the danger of such a body issuing a cross-summons to the Parliamentary Committee under Article 252 (3) (b) necessitates additional caution and circumspection. On this matter, we urge that you find it fit to engage with the constitutional head of the National Assembly to avert any constitutional stand-off by advising the Committee to suspend any inquiry until all and any constitutionally mandated processes are exhausted.

We thank you and assure you of our highest regards.

Yours Sincerely,

CMMR. OTIENDE AMOLLO, EBS
CHAIRPERSON OF THE COMMISSION

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