

## MEMORANDUM

**TO:** THE CHIEF REGISTRAR OF THE JUDICIARY / SECRETARY, JUDICIAL SERVICE COMMISSION

**FROM:** CAROLINE A. ODUOR, ADVOCATE

**DATE:** 11TH APRIL 2026

**RE:** FORMAL SUBMISSIONS ON THE PROPOSED JUDICIAL SERVICE (PETITION FOR REMOVAL OF A JUDGE) (PROCEDURE) REGULATIONS, 2026

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### I. INTRODUCTION

**A.** These submissions are made in response to the invitation by the Judicial Service Commission (the Commission) for public participation regarding the draft **Judicial Service (Petition for Removal of a Judge) (Procedure) Regulations, 2026**. I commend the Commission for recognizing that a procedure of this magnitude requires the input of stakeholders who deal with the practicalities of the law daily.

**B.** My engagement with this process is rooted in my 19-year tenure as an Advocate of the High Court, specifically my work in Constitutional Law and Judicial Review. Furthermore, I draw upon my professional background as a Certified Governance Auditor and my experience in legal education as an Adjunct Lecturer at the Kenya School of Law. My objective is to ensure these Regulations promote accountability while rigorously defending the constitutional independence of the Judiciary.

**C.** The integrity of the Judiciary is maintained not only by the quality of its judgments but by the fairness of the processes used to hold its members to account. It is imperative that these Regulations do not become a tool for the erosion of judicial security of tenure through procedural overreach.

### II. THE CONSTITUTIONAL IMPERATIVE: DISTINGUISHING MANDATE FROM PROCEDURE

**A.** The overarching concern throughout these draft Regulations is a perceived departure from the clear bifurcated process established under **Article 168** of the Constitution of Kenya.

**B.** The Constitution assigns the **Commission** a "Screening and Consideration" role under **Article 168(4)**, which is triggered to determine if a petition discloses a valid ground for removal. Once satisfied, the matter is transmitted to the President.

**C.** In contrast, the **Tribunal** is assigned the "Inquiry" role under **Article 168(5) and (7)**. The Tribunal is the body constitutionally mandated to conduct a full factual inquiry, hear witnesses, and make binding recommendations.

**D.** My submission is that these Regulations, by introducing trial-like adversarial hearings (including witness examination and pre-hearing conferences) at the Commission stage, effectively transpose the Tribunal's mandate onto the Commission. This creates a "double trial" scenario that is constitutionally suspect and procedurally inefficient.

### III. CRITICAL ANALYSIS OF PROCEDURAL SHIFTS

**1. The Transformation of "Consideration" into "Adjudication":** The draft Regulations appear to move the Commission away from a summary evaluation of petitions toward a full adversarial hearing model. While the Commission must act fairly, it must not replicate the functions of a Tribunal. Subjecting a judge to a full-blown trial at the Commission level—before a Tribunal is even appointed—is a redundant layer of litigation that can be weaponized against judicial officers.

**2. The "Satisfaction" Threshold as a Prima Facie Test:** The Commission's mandate is to reach a state of "satisfaction" that a ground for removal is disclosed. This must be interpreted as a *prima facie* standard. If the Commission moves into resolving contested facts via witness testimony, it has exceeded its constitutional lane and entered the domain of the Tribunal.

### IV. SPECIFIC SUBMISSIONS ON PARTS II, III, AND IV

**A. Governance Integrity of the Panel (Part II, Regulations 6-10):** While I recognize the practical utility of a Panel to manage the Commission's workload, the Regulations must explicitly state that the Panel's findings are recommendatory only. To ensure governance compliance, the ultimate decision on whether a petition moves to the President must be a collective act of the full Commission to avoid *ultra vires* challenges.

**B. Thresholds for Commission-Initiated Removals (Part III, Regulations 11-14):** The power to initiate removal on the Commission's own motion is an extraordinary power that requires stringent safeguards. I recommend that such initiation be strictly based on "credible, corroborated, and specific information" to prevent any perception of institutional bias or arbitrary investigation.

**C. The Problem of Adversarial Procedures (Part III, Regulations 15-20):** I note with concern the inclusion of pre-hearing conferences and witness cross-examinations. As a legal educator, I emphasize that the "consideration" phase should be a summary review of the petition and supporting evidence. A full merit hearing at this stage is a procedural duplication that delays justice and burdens the judge.

**D. Safeguarding Against Anonymous Petitions (Regulation 22):** From a Governance Audit perspective, allowing anonymous petitions without strict safeguards is a risk to judicial independence. While whistleblowing is necessary, the right to a fair administrative process requires that a judge eventually confronts their accuser. I suggest anonymity be maintained during the investigation stage only, and that a verifiable source be disclosed before any formal determination is reached.

**E. Petition Standards and Verification (Regulations 24-28):** To deter frivolous or malicious petitions, the Regulations must require a high standard of filing. I propose a "Mandatory Verification" clause, requiring all petitions to be accompanied by a sworn affidavit or declaration so the petitioner is held accountable for the veracity of the claims.

### V. EXHAUSTIVE RECOMMENDATIONS FOR AMENDMENT

Based on the full depth of the draft, I propose the following ten specific modifications:

- (a) Ensure the entire regulatory framework is recalibrated to honor the "satisfaction" test in Article 168(4), maintaining the distinction from the Tribunal's "inquiry" mandate.

- (b) Scale back the use of adversarial hearings, specifically removing the requirement for witness cross-examination at the Commission level.
- (c) Define the "Panel" as a purely advisory body whose recommendations must be ratified by the full Commission.
- (d) Codify the standard of "satisfaction" as a *prima facie* standard rather than a final determination on the balance of probabilities.
- (e) Explicitly provide for a right of appeal from the Commission's decisions to the High Court, ensuring judicial oversight of the Commission's administrative actions.
- (f) Limit the use of anonymous petitions to the investigative phase, requiring a named complainant before a petition is transmitted to the President.
- (g) Require that all Commission-initiated removals are triggered only by corroborated and credible evidence of a specific nature.
- (h) Align the definitions of "incompetence" and "gross misconduct" with established standards of judicial and professional ethics to avoid ambiguity.
- (i) Close the governance gap regarding the constitution and decision-making powers of the Panel to ensure constitutional compliance.
- (j) Introduce a comprehensive confidentiality framework for all proceedings occurring before a final determination is made to protect the reputation of the Judiciary.

## **VI. FINAL SUBMISSIONS**

**A.** The goal of these Regulations must be to create a process that is as fair as it is firm. As a Practitioner and Educator, I believe that by staying within its constitutional lane, the Commission can ensure a process that the Bar, the Bench, and the Public can respect.

**B.** I remain available to provide more detailed oral submissions or to participate in technical stakeholder sessions as the Commission finalizes this vital instrument.

**Respectfully submitted,**

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