REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

MILINMANI LAW COURTS

PETITION NO. 154 OF 2016

In the matter of enforcement of Fundamental Rights and Freedoms and Freedom of the Individual under Articles 19, 20, 22, 23, 27, 47 and 50 of the Constitution of Kenya, 2010

and

In the matter of an application and Interpretation of the Constitution Under Articles 2, 3, 10, 165 (3) and 258 of the Constitution and Section 23 of the sixth Schedule of the Constitution of Kenya, 2010

BETWEEN

Wilson Kaberia Nkunja..... Petitioner

versus

The Magistrates and Judges Vetting Board ..... 1st Respondent

The Judicial Service Commission ..... 2nd Respondent

JUDGMENT

Introduction.

1. The crux of this Petition is the question whether or not Section **23 (2)** of the Sixth Schedule to the Constitution ousts the jurisdiction of this Court to review a decision rendered by The Magistrates and Judges Vetting Board declaring a Magistrate unsuitable to continue serving. The contestation is that the word "Magistrate" does not appear in Section **23 (2)** of the Sixth Schedule to the Constitution, hence, a literal and natural construction of the said provision is that the provision excludes decisions rendered by the Board relating to Magistrates from the jurisdiction of this court.

2. The Petition provides an opportunity for this court to re-state in a subtle manner the applicable guiding principles of Constitutional and Statutory interpretation, especially, viewed from the lens and perspective of the Constitution of Kenya, 2010, a charter that has been correctly described as fiercely progressive and transformative which ushered in a new set of national values, a new Bill of rights and a new system of government and reset the relationship between the citizen and the state and reconfigured both the ethos and the architecture of governance.[1]

3. The Constitution gives prominence to national values and principles of governance which include human dignity, equity, social justice, inclusiveness, equality, human rights and Rule of law,[2] Leadership and Integrity,[3] Values and Principles of Public Service,[4] entrenchment of exercise of Judicial authority in the Constitution[5] and Independence of the Judiciary[6] and confers sovereignty to the people of Kenya to be exercised on their behalf by State Organs to perform their functions in accordance with the Constitution[7]

4. The philosophy, values and the structures of the previous Constitution had to give way to those of the new constitutional order which included enactment of new legislations, the realignment of the bureaucracy and management of institutions and the rallying of the national consciousness to the new dawn.[8] Judges and Magistrates are accountable to the Constitution and the law which they must apply honestly, independently and with integrity.

5. The Bangalore Principles of Judicial Conduct identified six core values of the judiciary, namely; Independence, Impartiality, Integrity, Propriety, Equality, Competence and Diligence all of which are intended to establish standards of ethical conduct of Judges and Magistrates. These values were viewed as having been disregarded in the old order, hence, the 2010 Constitution sought to re-introduce the values as part of transforming the judiciary.

6. Pursuant to Section **23 (1)** of the sixth Schedule of the Constitution, Parliament enacted the Vetting of Judges and Magistrates Act[9] (herein after referred to as the Act) which established **The Magistrates and Judges Vetting Board,**(hereinafter referred to as the Board), the first Respondent in this Petition.

7. The second Respondent is the Judicial Service Commission (hereinafter referred to at the JSC), a constitutional Commission established under Chapter **15** of the Constitution. It is sued as the Body mandated to implement the decisions rendered by the Board.

Petitioners' case.

8. It is common ground that the Petitioner was a serving Magistrate as at the **27th** August 2010, the effective date when the Constitution of Kenya 2010 came into force. The Petitioner submitted himself to the jurisdiction of the Board, and upon being vetted, the Board found him unsuitable to continue serving as a Magistrate. His application for Review was unsuccessful.

9. He challenges both the original determination and the Review decision stating that the determination was based on material that were outside the jurisdiction of the Board. Examples are complaint by a one **Jackson Mulei Mbula** whose complaints related to adjournments granted after the effective date, a matter which had also been dealt with by the J.S.C. He also states that a complaint by a one **Rashid Oloo** related to a business opened in 2012; while complaints by a one **Fatuma Osman** had no date. Also, he states that the original complaint by a one **Catherine Njeri Njenga** did not include the allegation that the Petitioner took her plot, and in any event, he avers that her complaint is post 2010.

10. The Petitioner further avers that the business operated by his wife was opened in 2012 while all the judgments and rulings the basis upon which he was found to have average writing and research skills were post August 2010. He also states that the determination was premised on fundamental errors of fact in that it differed with a J.S.C. report, that the record in SRM CR Case No. **84** of 2009 was clear the petitioner did not order the release of a fridge, and that **Catherine Njeri's** evidence on record was that the Petitioner did not take her plot, and, further, that the Petitioner had records to support how he acquired two plots at Kajiado.

11. The Petitioner avers that the determination was premised on partisan analysis of facts and evidence, and that the determination failed to uphold the principles of natural justice, in particular the rule against bias. Also, the Petitioner avers that he was never served with a summary of complaints against him by a one **Rashid Oloo** who alleged that he asked for a bribe of **Ksh. 200,000/=.** He also states that part of his response was struck off contrary to Article **159 (2) (d)** which requires justice to be done without undue regard to technicalities.

First Respondents Response.

12. **Reuben Chirchir**, the Boards Secretary and Chief Executive Officer in his replying affidavit dated **25th** April 2016 averred *inter alia* that under Section **5** of the Act, the Board is required to be guided by the principles and standards of judicial independence, natural justice and international best practices and to consider among others professional competence, diligence, integrity, fairness, temperament, good judgment, legal and life experience of the Judge or Magistrate. Further, he averred that the Petitioner submitted himself to the jurisdiction of the Board and stated that he had no objection to the presence of any members of the Board at the sittings.

13. He averred that the Petitioner was served with a summary of the main complaints against him, and that he was afforded an opportunity to file a response. He further averred that the Petitioner was heard in person and was granted the right to be represented by an advocate of his choice and an opportunity to question any of the complainant's witnesses and at every stage the Petitioner was asked whether he was ready to proceed. Further, he averred that the Petitioner was asked to state whether he had any objection on jurisdiction, or any member of the Board and he stated he had none.

14. **Mr. Chirchir** also averred that the Board dealt with specific complaints, it called witnesses who were cross-examined by the Petitioner's Advocate and that the two main witnesses were consistent that the Petitioner was corrupt and had used his position in the judiciary to enrich himself through unethical conduct and that the Board believed the said witnesses as it was entitled to. He also averred that the evidence against the Petitioner was weighed against other evidence and circumstances. He averred that the Board found the witnesses to be credible.

15. He reiterated that the Petitioner's responses were fully considered in the determination and that the Board arrived at an independent decision and that the Petitioner based this Petition on the mistaken assumption that complaints against a Judge or a Magistrate is the only factor to be considered, yet, the Board is permitted to consider relevant information including requisition of reports, records, documents or any information from any source including governmental authorities.[10]

16. He also averred that the Board is permitted to inform itself in such manner as it thinks fit,[11]and that it's not bound by the rules of evidence,[12] nor is it subject to direction or control of any person[13]and that it is required to consider competence, diligence, organizational and administrative skills, ability to work well with a variety of people, demonstrate consistent history of honesty and high moral character in professional life and personal life, ability to understand the need to maintain propriety and appearance of propriety, temperament, legal and life experience among other factors.[14]

17. He stated that the Board found that the Review had no merits, and that the Petitioner was found to be lacking candor, wanting in competence and had poor management of cases and that lack of candor or temperament cannot be restricted to the effective date and that the Supreme Court ruled that the Board's Decision is not subject to question or review by any court.[15] Further, he averred that the High Court had also ruled that no high court proceedings could be allowed to present a contest to the decision of the Board.[16]

Second Respondents' Replying affidavit.

18. **Anne Amadi**, the Chief Registrar of the Judiciary and the Secretary to the J.S.C. swore the Replying Affidavit filed on **7th** October 2016. She averred that the J.S.C. as mandated by law removed the Petitioner from the Payroll **30** days after the determination. She also averred that Section **22 (4)** of the Act ousts the jurisdiction of this court while section **22 (5)** of the Act provides that the decision of the Board shall be final, a matter that has been determined by the Supreme Court.

Issues for determination.

19. Upon analyzing the above facts and submissions rendered by the counsels, we find that the following issues distil themselves for determination:-

*a) Whether Section **23 (2)** of the Sixth Schedule to the Constitution ousts this Courts' jurisdiction to review the Board's decisions declaring a Magistrate unsuitable to continue serving.*

b) Whether the question of this Courts' jurisdiction to review decisions rendered by the Board was conclusively been determined by the Supreme Court of Kenya.

c) Whether or not this Court can examine the merits of this Petition.

d) What are the appropriate orders for Costs?.

20. Before addressing the above issues, we propose to briefly re-state the guiding principles of constitutional and statutory interpretation.

Principles governing Constitutional and Statutory Interpretation.

21. Determining the question whether or not Section **23 (2)** of the Sixth Schedule to the Constitution ousts this Court's jurisdiction to review the Boards' decisions affecting Magistrates involves interpreting the relevant provisions of the Constitution and the relevant Statutory provisions. It is imperative that we outline the governing principles.

22. This Court had the opportunity of discussing the applicable principles governing in Petition No. **230** of 2016 (Consolidated with **6** Others), in which similar issues as raised in this case arose. At the risk of repeating what we stated in the said case, we find it inevitable to re-state it here:-

"Interpretation is the process of attributing meaning to the words used in a document, be it legislation, statutory instrument, or contract having regard to the context provided by reading the particular provision or provisions in light of the document as a whole and the circumstances attendant upon its coming into existence. The 'inevitable point of departure is the language of the provision itself,' read in context and having regard to the purpose of the provision and the background to the preparation and production of the document.[17]

*Article **259** of the Constitution introduced a new approach to the interpretation of the Constitution. The Article obliges courts to promote 'the spirit, purport, values and principles of the Constitution, advance the rule of Law, Human Rights and fundamental freedoms in the Bill of Rights and contribute to good governance. This approach has been described as 'a mandatory constitutional canon of statutory and Constitutional interpretation'. The duty to adopt an interpretation that conforms to Article **259** is mandatory.*

Constitutional provisions must be construed purposively and in a contextual manner and that courts are simultaneously constrained by the language used. Courts may not impose a meaning that the text is not reasonably capable of bearing. In other words, the interpretation should not be "unduly strained"[18] but should avoid "excessive peering at the language to be interpreted without sufficient attention to the historical contextual scene," which includes the political and constitutional history leading up to the enactment of a particular provision.[19]

*It is by now trite that the Vetting of Judges and Magistrates Act [20] having been enacted pursuant to Section **23 (1)** of the Sixth Schedule to Constitution must be understood purposively because it is umbilically linked to the Constitution. As we do so, we must seek to promote the spirit, purport and objects of the Constitution. We must prefer a generous construction over a merely textual or legalistic one in order to afford the fullest possible constitutional guarantees.*

In searching for the purpose, it is legitimate to seek to identify the mischief sought to be remedied. In part, that is why it is helpful, where appropriate, to pay due attention to the social and historical background of the legislation. We must understand the provision within the context of the grid, if any, of related provisions and of the Constitution as a whole, including its underlying values. Although the text is often the starting point of any statutory construction, the meaning it bears must pay due regard to context. This is so even when the ordinary meaning of the provision to be construed is clear and unambiguous.

*Therefore, in construing the provision ousting the jurisdiction of this Court, we are obliged not only to avoid an interpretation that clashes with the Constitutional values, purposes and principles but also to seek a meaning of the provisions that promotes constitutional purposes, values, principles, and which advances rule of law, human rights and fundamental freedoms in the Bill of Rights and also an interpretation that permits development of the law and contributes to good governance. We are also obliged to be guided by the provisions of Article **159 (e)** which requires us to promote and protect the purposes and principles of the Constitution.*

It is an elementary rule of constitutional construction that no one provision of the constitution is to be segregated from the others and to be considered alone, but that all the provisions bearing upon a particular subject are to be brought into view and be

interpreted as to effectuate the greater purpose of the instrument.[21]

It is thus clear that it is the duty of a court in construing statutes to seek an interpretation that promotes the objects of the principles and values of the Constitution and to avoid an interpretation that clashes therewith. If any statutory provision, read in its context, can reasonably be construed to have more than one meaning, the court must prefer the meaning that best promotes the spirit and purposes of the Constitution and the values stipulated in Article ***259****.*

Courts have on numerous occasions been called upon to bridge the gap between what the law is and what it is intended to be. The courts cannot in such circumstances shirk from their duty and refuse to fill the gap. In performing this duty they do not foist upon the society their value judgments. They respect and accept the prevailing values, and do what is expected of them. The courts will, on the other hand, fail in their duty if they do not rise to the occasion but approve helplessly of an interpretation of a statute, a document or an action of an individual which is certain to subvert the societal goals and endanger the public good.

Words spoken or written are the means of communication. Where they are possible of giving one and only one meaning there is no problem. But where there is a possibility of two meanings, a problem arises and the real intention is to be sorted out. The Legislature, after enacting statutes becomes functus officio so far as those statutes are concerned. It is not their function to interpret the statutes. Legislature enacts and the Judges interpret. The difficulty with Judges is that they cannot say that they do not understand a particular provision of an enactment. They have to interpret in one way or another. They cannot remand or refer back the matter to the Legislature for interpretation. That situation led to the birth of principles of interpretation to find out the real intent of the Legislature. Consequently, the Superior Courts had to give the rules of interpretation to ease ambiguities, inconsistencies, contradictions or lacunas. The rules of interpretation come into play only where clarity or precision in the provisions of the statute are found missing.

Therefore, a court must try to determine how a statute should be enforced. There are numerous rules of interpreting a statute, but in our view and without demeaning the others, the most important rule is the rule dealing with the statutes plain language. The starting point of interpreting a statute is the language itself. In the absence of an expressed legislative intention to the contrary, the language must ordinarily be taken as conclusive.

It is not the duty of the Court either to enlarge the scope of the legislation or the intention of the legislature when the language of the provision is plain and unambiguous. The Court cannot rewrite, recast or reframe the legislation for the very good reason that it has no power to legislate. The power to legislate has not been conferred on the courts. The Court cannot add words to a statute or read words into it which are not there. Assuming there is a defect or an omission in the words used by the legislature the court cannot not go to its aid to correct or make up the deficiency. Courts decide what the law is and not what it should be. The Court of course adopts a construction which will carry out the obvious intention of the legislature but cannot not legislate itself.

In construing a statutory provision the first and the foremost rule of construction is that of literal construction. All that the Court has to see at the very outset is, what does the provision say? If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of statutes need not be called into aid. They are called into aid only when the legislative intention is not clear. But the courts would not be justified in so straining the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words employed by the Legislature.

It is trite law that in interpreting the provisions of a statute the Court should apply the golden rule of construction. The plain meaning of the language in a statute is the safest guide to follow in construing the statute. According to the golden or general rule of construction the words of a statute must be given their ordinary, literal and grammatical meaning and if by so doing it is ascertained that the words are clear and unambiguous, then effect should be given to their ordinary meaning unless it is apparent that such a literal construction falls within one of those exceptional cases in which it would be permissible for a court of law to depart from such a literal construction, e.g. where it leads to a manifest absurdity, inconsistency, hardship or a result contrary to the legislative intent.[22]

The Supreme court of India in Reserve Bank of India vs. Peerless General Finance and Investment Co. Ltd. and others[23] *observed that:-*

"Interpretation must depend on the text and the context. They are the bases of interpretation. One may well say if the text is the texture, context is what gives the colour. Neither can be ignored. Both are important. That interpretation is best which makes the textual interpretation match the contextual."

The touchstone of interpretation is the intention of the legislature. The legislature may reveal its intentions directly, for example by explaining them in a preamble or a purpose statement. The language of the text of the statute should serve as the starting point for any inquiry into its meaning.[24]*To properly understand and interpret a statute, one must read the text closely, keeping in mind that the initial understanding of the text may not be the only plausible interpretation of the statute or even the correct one.*[25] *Courts generally assume that the words of a statute mean what an "ordinary" or "reasonable" person would understand them to mean.*[26] *If the words of a statute are clear and unambiguous, the court need not inquire any further into the meaning of the statute.*

One can confidently assume that Parliament intends its legislation to be interpreted in a meaningful and purposive way giving effect to the basic objectives of the legislation."

a) Whether Section 23 (2) of the Sixth Schedule to the Constitution ousts this Courts' jurisdiction to review the Board's decisions declaring a Magistrate unsuitable to continue serving.

23. **Mr. Ongoya** for the Petitioner submitted that Section **23 (2)** of the Act does not oust the jurisdiction of this Court to question or review the removal or the process leading to the removal of a Magistrate from office and that a statute that purports to take away the jurisdiction of a court must be given the most restrictive interpretation.[27] He argued that the term Judge and Magistrates have been used separately in Section **23** of the sixth schedule and that the limitation of the jurisdiction having been expressed only in reference to a Judge, the same should not be extended to a Magistrate.

24. He submitted that the Supreme Court in *Judges and Magistrates Vetting Board vs Kenya Magistrates and Judges Association & Another*[28] appreciated that the interventions by the Court could be permitted in certain circumstances. And that ousting this court's jurisdiction would have an impact on other rights such as right to access justice, fair hearing, equal protection and equal benefit of the law and that the provisions of Section **23 (4)** of the Act must meet the permissible limitations under Article **24** of the Constitution, hence to the extent it purports to oust the jurisdiction of this court, the same is unconstitutional.

25. **Miss Mwassao** for the first Respondent submitted that the Board's decision was within the law, and argued that this court lacks jurisdiction.[29]She argued that section 22 (4) of the Act excludes the jurisdiction of this court and that the ouster clause is not inconsistent with the constitution.

26. **Mr. Ogallo** for the J.S.C. urged the court to find that it has no jurisdiction to entertain this case. He cited the Supreme Court decision in *Judges & Magistrates Vetting Board & 2 others vs Centre for Human Rights & Democracy & 11 others*[30] referred to later in this judgment.

27. The law is that where the court lacks jurisdiction to entertain a cause or matter, the entire process, no matter how well conducted, is an exercise in futility, for the proceedings are a nullity *ab initio.* Jurisdiction is so fundamental that once the court's jurisdiction to hear a matter is challenged, it must be dealt with and resolved first before any other step in the proceedings. Jurisdiction is the lifeblood of any adjudication and where it is lacking it would render any proceedings, no matter how well conducted, liable to be set aside for being a nullity.

28. The *locus classicus* decision in Kenya on jurisdiction is the celebrated case of *Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd*[31] where the late **Justice Nyarangi** of the Court of Appeal held as follows:-

> *"I think it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction."*

29. A Court's jurisdiction flows from either the Constitution or legislation or both. In the words of the Supreme Court of Kenya, assumption of jurisdiction by courts in Kenya is a subject regulated by the constitution; by statute law, and by principles laid out in judicial precedents. [32] Thus, a Court of law can only exercise jurisdiction as conferred by the Constitution or other written laws.[33]

30. In the often quoted words of Chief Justice Marshall of the U.S.A, in *Cohens vs. Virginia*:-[34]

> *"It is most true that this Court will not take jurisdiction if it should not; but it is equally true that it must take jurisdiction if it should. The judiciary cannot, as the legislature may, avoid a measure because it approaches the confines of the Constitution. We cannot pass it by because it is doubtful. With whatever doubts, with whatever difficulties, a case may be attended, we must decide it if it be brought before us. We have no more right to decline the exercise of jurisdiction which is given than to usurp that which is not given. The one or the other would be treason to the Constitution. Questions may occur which we would gladly avoid, but we cannot avoid them. All we can do is exercise our best judgment, and conscientiously perform our duty."*

31. Section **23 (2)** of the Sixth Schedule to the Constitution provides that :- *"A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or by, any court."*

32. The basis of **Mr. Ongoya's** argument is that the word **"Magistrate"** does not appear in the above provision. To him, it was wrong for Parliament to include **"Magistrates"** in Section **22 (4)** of the Act which provides that "a removal or a process leading to the removal of a **Magistrate** under this Act shall not be subject to question in, or review by, any court."

33. **Mr. Ongoya's** submission calls for a close examination of the wording of the contested provision to determine and appreciate its natural and ordinary meaning bearing in mind the intention of the Constitution and the legislature and of course guided by the principles of constitutional and statutory interpretation. The opening words of Section **23 (2)** of the Sixth Schedule to the Constitution are *"a removal,"* followed by the word "**or**" "*a processes leading to the removal, of a judge…"*

34. The key word here is **"or".** To appreciate the meaning of the word **"or"** it is necessary to consult dictionary meaning. Dictionaries have an aura of authority about them—words mean what the dictionary says they mean. It therefore seems only sensible that courts seeking the plain meaning of language would look to dictionaries to find it.[35]Dictionary usage is particularly important in textualist analysis, which seeks to find "a sort of 'objectified' intent—the intent that a reasonable person would gather from the text of the law"[36] and places foremost priority on the text itself, as opposed to utilizing external sources of understanding. Courts have long used dictionaries to aid their interpretive endeavors. Dictionaries are, after all, reference books that help readers comprehend the meanings and boundaries of words, which is precisely the function judges must often perform. The process of divining statutory meaning necessarily implicates linguistic concepts, and the value of dictionaries to interpretation must be judged in part on their ability to reflect the complexities of language.

35. Lord Wilberforce said as much as late as 1975:-[37]

> "*It is the function of the courts to say what the application of the words used to particular cases or individuals is to be. This power which has been devolved upon the judges from the earliest of times is an essential part of the constitutional process by which subjects are brought under the rule of law – as distinct from the rule of the King or the rule of Parliament; and it would be a degradation of that process if the courts were to be merely a reflecting mirror of what some other interpretation agency might say."*

36. The word "or" is defined in *dictionary.com*[38] *as a word used to connect words, phrases, clauses representing alternatives, it's used in correlation such as* ***either, or.*** The *Longman Dictionary of Contemporary English*[39] defines *"or"* as:- *"Conjunction used between two things or before the last in a list of possibilities, things that people can choose from, either… or…..,*

37. The *New Choice English Dictionary*[40] defines **"or"** as follows:- *'Conjunction denoting an alternative, the last in a series of choices' Conjunction* is defined in the same dictionary as *"a word connecting words, clauses or sentences…"* The *Oxford Advanced Learner's Dictionary of Current English*[41] defines ***'or'*** as a word *"used to introduce another possibility".*

38. The *Concise Oxford English Dictionary defines*[42] **"or"** as a *'conjunction used to link alternatives.'* The same dictionary defines the word *'conjunction'* as *a word used to connect clauses or sentences or to coordinate words in the same clause.*

39. The use of the word **"or"** in a statutory provision has also received judicial construction by the Supreme Court of India in *Fakir Mohd vs Sitam*[43] which stated:-

> *"The word 'or' is normally disjunctive and the word 'and' is normally conjunctive. But at times they are read as vice-versa to give effect to the manifest intent of the legislature as disclosed from the context. It is permissible to read 'or' as 'and' and vice-versa if some other part of the same statute, or the legislative intent clearly spelled out, require that to be done."*[44]

40. The apex Court of India also construed the word **"or"** in *Natarajan K.R. vs Personnel Manager, Syndicate Bank, Industrial Relation Division*[45] in which it stated:-

> *"In ordinary use the word 'or' is a disjunctive that makes an alternative which generally correspondents to the word 'either'. In face of this meaning, however, the word 'or' and the word 'and' are often used interchangeably. As a result of this common and careless use of the two words in legislation, there are occasions when the Court, through construction, may change one to the other. This cannot be done if the statute's meaning is clear, or if, the alteration operates to change the meaning of the law....."*

41. Also, the Supreme Court of *India in J. Jayalalitha vs Union of India*[46] held that the term "or" which is a conjunction, is normally used for the purpose of joining alternatives and also to join rephrasing of the same thing but at times to mean "and" also. It stated:-

> *"The dictionary meaning of the word `or' is : "a particle used to connect words, phrases, or classes representing alternatives". The word `or', which is a conjunction, is normally used for the purpose of joining alternatives and also to join rephrasing of the same thing but at times to mean `and' also. Alternatives need not always be mutually exclusive. Moreover, the word "or' does not stand in isolation and, therefore, it will not be proper to ascribe to it the meaning which is not consistent with the context.... It is a matter of common knowledge that the word `or' is at times used to join terms when either one or the other or both are indicated…. In our opinion, the word `or' as used… would mean that the … the power to do either or both the things…"*

42. The same principle is enunciated in *Crawford on Statutory Construction*[47] where it is stated at page 322 that :-

> *"In ordinary use the word 'or' is a disjunctive that marks and alternative which generally corresponds to the word 'either.' In face of this meaning however, the word 'or' and the word 'and' are often used interchangeably…"*

43. Without re-inventing the wheel, we find and hold that the above definitions are unanimous that the word ***''or''*** is used to *introduce another possibility or alternative*, that is *either or*. It can also be used in interchangeably with the word *"and."* The dictionary definitions and judicial construction leave us persuaded beyond doubt that the use of the word *"or"* in Section **23 (2)** immediately after the word *"removal,"* introduces another possibility, the first possibility being a *removal*. The second possibility is " *a process leading to the removal, of a judge.* In our view, the declaration by the Board that a Magistrate is unsuitable to continue serving amounts to *a removal* within the said provision.

44. To buttress our above conclusion, we also point out that it is a settled principle of Constitutional construction that provisions of the Constitution touching on the same subject are to be construed together without one provision destroying the other but each provision sustaining the other. Section **23 (1)** of the Sixth Schedule expressly provides that "*Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article* ***160, 167*** *and* ***168,*** *establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all Judges and Magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles* ***10*** *and* ***159.***"Section **23 (2)** cannot be read in isolation if the intention of the drafter is to be effected. We find and hold that the introduction of the word Magistrate in Section **22 (4)** of the Act is conformity with the provisions Section **23 (1) & (2)** of the sixth Schedule.

45. The court as an independent arbiter of the Constitution has fidelity to the Constitution and has to be guided by the letter and spirit of the Constitution. In interpreting a statute, the court should give life to the intention of the lawmaker instead of stifling it.

46. Further, our above finding is also fortified by the acceptable and established principle of statutory interpretation that the intention of the drafter of the Constitution or legislation can be gathered from the history leading to the enactment. This position was also appreciated by the Supreme Court of Kenya in *Judges & Magistrates Vetting Board & 2 others vs. Centre for Human Rights & Democracy & 11 others.*[48]

47. The background and rationale of the vetting of judges and magistrates was succinctly summarized by the ***Committee of Experts***, the body that was charged with the responsibility of finalizing the draft Constitution of Kenya before it was submitted to a national referendum. The Committee stated as follows in its ***Final Report***:-

> *"Submissions to the Committee of Experts on the Judiciary were virtually unanimous on one point: the judiciary must be reformed. The Committee of Experts received a number of submissions on how this should be done. These submissions can be classified into two groups: those that proposed that the entire judiciary should be reappointed (with all judicial officers or at least all judges being treated as having lost their jobs but permitted to reapply); and those that proposed a more gentle approach that judicial officers remain in office but are required to take a new oath and undergo a 'vetting process.…*
>
> *Informed by submissions, the weight of opinion at a technical consultation on the issue, the concerns of many of those directly involved in the justice system and its own understanding of the issue, the CoE decided that to retain the status quo and simply allow members of the judiciary to continue in office was not appropriate. In addition, on careful consideration of the options suggested in submissions, the CoE decided that wholesale reappointment of the judiciary was not appropriate. Instead, it decided that some form of vetting of the current judges should take place as was done in Bosnia Herzegovina, East Germany, the Czech Republic and elsewhere in Eastern Europe and as proposed by the CKRC and Bomas Drafts. This approach is also similar to that proposed by the August 2009 report of the Task Force on Judicial Reforms."* ***[49]***

48. It will be noted that the Committee of Experts' recommendation on vetting was restricted to Judges only and did not include Magistrates. However, before the draft Constitution was submitted to and approved in the national referendum, the vetting process was extended to cover both Judges and Magistrates who were in office on the effective day.[50]

49. Guided by the above historical background, we find that it is clear the intention of the drafters of the Constitution was that Judges and Magistrates who were serving as at the commencement date of the 2010 Constitution were to be subjected to vetting.

50. It is axiomatic that the vetting of Judges and Magistrates who were in office on the effective date was imperative, as a clear Constitutional principle, value and object which by dint of Article **259(1)** of the Constitution, must be given full effect. Vetting of Judges and Magistrates was part and parcel of the innovative provisions that on the whole have earned the Constitution of Kenya, 2010, the description of a transformative document that seeks to effect fundamental and large scale transformation of our political and social institutions through a democratic and legal process.[51]

51. In the *Speaker of the Senate & Another vs The Attorney General & Others*,[52] the supreme court recognized the principles embedded in the constitution as incorporating the transformative ideals of the Constitution of Kenya, 2010.

52. It is also an established principle of constitutional and statutory construction that the intention of the legislature can be gathered from the preamble to the Act or the short title to a provision. The preamble to the Act reads "*An Act of Parliament to provide for the vetting of Judges and Magistrates pursuant to Section **23** of the Sixth Schedule to the Constitution*."

53. The word Magistrate appears at the preamble clearly indicating the clear intention of the legislature which is to give effect to Section **23** of the Sixth Schedule. We find no inconsistency between the provisions of the Act and the Constitution.

54. Accordingly, we conclude and find that it was the intention of the drafters of the Constitution and the Act that all the serving Judges and Magistrates as at the effective date were to be vetted and their suitability to continue serving be determined in accordance with the Act. In view of our aforesaid conclusion, we find and hold that Section **23 (2)** of the Sixth Schedule expressly applies to a removal of a Magistrate, or, a process leading to the removal of a Judge.

b) Whether the question of this Courts' jurisdiction to review decisions rendered by the first Respondent has conclusively been determined by the Supreme Court of Kenya.

55. As correctly pointed out by counsels for the Respondents, the High court's jurisdiction in determinations made by the Board has been the subject of determination by the Apex Court in Kenya. In particular, in the earlier referred to case of *Judges & Magistrates Vetting Board & 2 others vs Centre for Human Rights & Democracy & 11 others* ***[53]*** the Supreme Court held that the High Court lacks jurisdiction to adjudicate upon the *suitability* of a *Judge* or a *Magistrate* to continue in service; and the responsibility for such a determination, during the period of transition, was constitutionally vested in the Judges and Magistrates Vetting Board. The Supreme Court went into great length to interpret Section **23 (2)** of the Sixth Schedule to the Constitution as follows:-

> ***[202]*** *For the avoidance of doubt, and in the terms of Section 23(2) of the Sixth Schedule to the Constitution, it is our finding that **none** of the Superior Courts has the jurisdiction to review the process or outcome attendant upon the operation of the **Judges** and **Magistrates** Vetting Board by virtue of the Constitution, and the Vetting of Judges and Magistrates Act. (Emphasis added)*
>
> ***[228]*** *In conclusion, the people of Kenya ordained legislation on mechanisms and procedures for vetting, to be conducted within a specified time-frame, to determine the suitability of Judges and Magistrates. The majority Judgment (at paragraph 159) cites paragraphs from the decision of the Court of Appeal which are relevant to the issue of the constitutionality of Section 19(3) of the VJM Act. In concurrence, I would reiterate the content of paragraph 189 in the majority Judgement, to the effect that the High Court lacks jurisdiction to adjudicate upon the* suitability *of a Judge or Magistrate to continue in service; and the responsibility for such a determination, during the period of transition, was constitutionally vested in the Judges and Magistrates Vetting Board. (Emphasis added)*

56. Article **163 (7)** of the Constitution explicitly provides that all courts, other than the Supreme court, are bound by the decisions of the

Supreme Court. Clearly, the interpretation of Section **23 (1) (2)** of the Sixth Schedule in the above case by the Supreme Court is binding on this court by dint of Article **163 (7)** of the Constitution.[54] The binding nature of the Supreme Court decisions under Article **167 (7)** of the Constitution is absolute. Article **163 (7)** is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court[55] and that where the issues before the court were determined by the Supreme Court, it is not open to this court to examine the same with a view to arriving at a different decision.[56]

57. Clearly, by dint of the above clear provisions of the Constitution, the Supreme Court decision cited above and by virtue of Article **163 (7),** the conclusion becomes irresistible that this Court lacks jurisdiction to entertain these Petitions. On this ground alone, we find and hold that these consolidated Petitions must fail.

58. Clearly, by dint of the above clear provisions of the Constitution, the Supreme Court decision cited above and by virtue of Article **163 (7)** we are persuaded that the conclusion becomes irresistible that this Court lacks jurisdiction to entertain this Petition.

c) Whether or not this Court can examine the merits of the Petition.

59. To fully explore the above issue, we opine that two Supreme Court determinations are worth considering. These are the Supreme Court decision in *Judges and Magistrates Vetting Board and 2 Others vs. Centre for Human Rights and Democracy and 11 Others*[57] whereby the Apex Court settled the legal point with regard to the process of vetting or the outcome of vetting process by the Vetting Board, that the courts have no jurisdiction to review the process or the outcome. It is axiomatic that by dint of Article **163 (7)** of the Constitution, the Supreme Court decision is binding to all the Courts in Kenya except the Supreme Court itself.

60. The second Supreme Court decision is the *Judges and Magistrates Vetting Board vs Kenya Magistrates & Judges Association & Another*[58]whereby the Apex Court held that:-

> ***[63]*** *We find and hold that the Judges and Magistrates Vetting Board, in execution of its mandate as stipulated in Section 23 of the Sixth Schedule to the Constitution of 2010, can only investigate the conduct of Judges and Magistrates who were in office on the effective date on the basis of alleged acts and omissions arising before the effective date, and not after the effective date. To hold otherwise would not only defeat the transitional nature of the vetting process, but would transform the Board into something akin to what Lord Mersey once called* "an unruly dog which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be" (Lord Mersey *in* **G & C Kreglinger v. New Patagonia Meat & Cold Storage Co. Ltd (1913).** *Lord Mersey used the analogy of* "a dog" *to refer to the* "Equity of Redemption" *in the law of mortgages. Here, we use it to refer to* "a jurisdictional mandate" *within our constitutional set-up; and not, the Board* per se.

61. To understand the two Supreme Court decisions, namely *Judges and Magistrates Vetting Board and 2 Others vs The Centre for Human Rights and Democracy & 11 Others*[59] (hereinafter referred to **JMVB"1"**) and *Judges and Magistrates Vetting Board vs Kenya Magistrates & Judges Association*[60](herein after referred to **JMVB"2"),** it is important to appreciate the issues under consideration in the two cases. It is beyond argument that a case is only an authority for what it decides, a proposition that was correctly stated in *State of Orissa vs. Sudhansu Sekhar Misra* where it was held:-[61]

> *"A decision is only an authority for what it actually decides. What is of the essence in a decision is its ratio and not every observation found therein nor what logically follows from the various observations made in it. On this topic this is what Earl of Halsbury, LC said in Quinn vs. Leathem,*[62]*that "Now before discussing the case of Allen vs. Flood*[63] *and what was decided therein, there are two observations of a general character which I wish to make, and one is to repeat what I have very often said before, that every judgment must be read as applicable to the particular facts proved, or assumed to be proved, since the generality of the expressions which may be found there are not intended to be expositions of the whole law, but governed and qualified by the particular facts of the case in which such expressions are to be found. The other is that a case is only an authority for what it actually decides..." (Emphasis added)*

62. It is also beyond argument that the ratio of any decision must be understood in the background of the facts of the particular case.[64] A case is only an authority for what it actually decides, and not what logically follows from it; [65] a little difference in facts or additional facts may make a lot of difference in the precedential value of a decision.[66] Each case depends on its own facts and a close similarity between one case and another is not enough because even a single significant detail may alter the entire aspect.[67] In deciding such cases, one should avoid the temptation to decide cases by matching the colour of one case against the colour of another.[68] To decide therefore, on which side of the line a case falls, the broad resemblance to another case is not at all decisive. Precedent should be followed only so far as it marks the path of justice, but one must cut the dead wood and trim off the side branches else you will find yourself lost in thickets and branches.[69]

63. In our considered opinion, the difference between the two Supreme Court decisions was ably captured by the Supreme Court in **JMVB "2"** hen it addressed the question *"what was the main question before the court in JMVB"1"* in the following words:-

> ***[36]*** *It was argued before this Court that the ruling in* ***Judges and Magistrates Vetting Board & Others v. The Centre For Human Rights And Democracy,*** *Petition No 13A of 2013 consolidated with Petition No 14 of 2013 and Petition 15 of 2013 (JMVB (I)) precludes this Court from answering the question before it – whether the Board can investigate allegations of impropriety on the part of judges and magistrates who were in service on the effective date, arising from acts or omissions by the said judicial officers after the effective date. The contention by Counsel was that the decision in JMVB (I)means this Court does not have jurisdiction to entertain this appeal.*
>
> ***[37]*** *On the foregoing point, two basic questions arise, namely:*

i. what was the main question before this Court in JMVB (1)? And

ii. what was the answer to (1) above, and what was the consequential decision by this Court?

[38] *The main question before this Court in JMVB(1) was whether Section 23(2) of the Sixth Schedule to the Constitution, as read with Section 22(4) of the Vetting of Judges and Magistrates Act, ousts the jurisdiction of the High Court to review the decision of the Judges and Magistrates Vetting Board.*
[39] *Having extensively considered the frontiers of Section 23(2) of the Sixth Schedule to the Constitution, this Court (at paragraph 202) stated categorically as follows:*

"For the avoidance of doubt, and in the terms of Section 23(2) of the Sixth Schedule to the Constitution, it is our finding that none of the Superior Courts has the jurisdiction to review the process or outcome attendant upon the operation of the Judges and Magistrates Vetting Board by virtue of the Constitution, and the Vetting of Judges and Magistrates Act."

[40] *In other words, this Court consciously articulated the state of the law, in accordance with the Constitution: the removal of a Judge or Magistrate, or a process leading to such removal by virtue of the operation of the Judges and Magistrates Vetting Act by the Vetting Board, cannot be questioned in any court of law. That remains the valid position, under the law.*

[41] *Today this Court, is faced with a different question: whether the Judges and Magistrates Vetting Board, in execution of its mandate as stipulated in Section 23 of the Sixth Schedule to the Constitution of 2010, can investigate the conduct of Judges and Magistrates who were in office on the effective date, on the basis of alleged acts and omissions arising after the effective date.*

[42] *In answering this question, the two superior Courts had to interpret Section 23 of the Sixth Schedule to the Constitution, as read with Section 18 of the Judges and Magistrates Vetting Act. It is their interpretation that has led to this appeal before us. This appeal, was filed as of right, pursuant to Article 163 (4) (a) of the Constitution, because it involves the interpretation or application of the Constitution.*

[43] *We do not see how our decision in JMVB (1), which was responding to a different question, can deprive this Court of its jurisdiction to interpret and apply the Constitution, in conformity with Article 163 (4) (a) thereof.*

[44] *Learned counsel, Mr. Rao was well aware of the jurisdictional position when he submitted thus:*

"Today's case is different; it is not about individual vetting decisions. It is about a mandate itself. What is at stake in this case is fidelity in the interpretation of that mandate and giving true and accurate effect to the Constitutional and Legislative provisions that define it."

[45] *We have no hesitation in finding that this appeal is properly before us, and that this Court has jurisdiction in every respect, to determine the issue. In this regard, we are unconvinced by the submissions of learned counsel, Mr Kanjama to the contrary. To decline to determine the question as framed, on the basis of an unsubstantiated claim of lack of jurisdiction, would defeat the vetting process, notwithstanding the clear terms of the Constitution.*

64. Conscious of the binding nature of the ouster clause in the Constitution and the application of Article **163 (7)** of the Constitution by dint of the Supreme Court decision in **JMVB"1",** as the Supreme Court held in **JMVB 2**, we find no difficulty in holding that where the Board exceeds its constitutional and statutory mandate, then, this Court can intervene. The Supreme Court in **JMVB "2"** held that the Board could only *investigate the conduct of Judges and Magistrates who were in office on the effective date on the basis of alleged acts and omissions arising before the effective date, and not after the effective date.* Our understanding of the Supreme Court decision in **JMVB "2"** is that where there is proof that the Board considered matters outside the period provided under the law, then, the Court could intervene.

65. We have no doubt that the Constitution and the Act established a comprehensive and objective system of factors that were to guide the vetting process. The Constitution required the Board to vet the suitability of the Judges and Magistrates in accordance with the values and principles set out in Articles **10** and **159.** Article **10** includes amongst others binding national values and principles: the rule of law, democracy and participation of the people, human dignity, equity, social justice, inclusiveness, equality, human rights, non-discrimination and protection of the marginalized, good governance, integrity, transparency and accountability. Article **159** goes on to enunciate three guiding principles of justice: it should be done to all irrespective of status, that it should not be delayed and that it should be administered without undue regard to procedural technicalities.

66. **Mr. Ongoya** submitted the determination was premised on material that were outside the jurisdiction of the Board, that the determination was premised on partisan analysis of facts and evidence avoiding exculpatory evidence and that the determination failed to uphold principles of natural justice.

67. Counsel for the first Petitioner submitted that the Board was guided by sections **14** and **18** of the Act and that the decision was arrived at in conformity with the law. On his part, counsel for the second Petitioner argued that the JSC acted within its mandate and implemented the Board's decision.

68. **Mr. Chirchir's** in his affidavit avers that the Petitioner assumed that complaints against a Judge or Magistrate is the only factor that determines the suitability and cited the provisions of section **14 (1) (a)** of the Act. This Section was the subject of consideration by the Supreme Court in the above cited case in which the Apex Court had this to say:-

[95] *Section* ***14(1)*** *of the Vetting of Judges and Magistrates Act provides that the Vetting Board has the power to –* ***"(a)*** *gather relevant information, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary;* ***(b)*** *interview any individual, group or members of organizations or institutions and, at the Board's discretion, to conduct such interviews; and* ***(c)*** *hold inquiries for the purposes of performing its functions under this Act."*

[96] *Indeed, the vetting process as described in the Vetting of Judges and Magistrates Act is* sui generis, *or of its own kind, as the Vetting Board does not act as a Court of law which is exclusively an arbiter;* it can conduct an investigation, and can act as an adjudicator. *The Judges and Magistrates Vetting Board?s* Interim Report *(September 2011- February 2013) recognizes this (at pages 37-38), when it states that the Vetting Board is* sui generis, *because it is not similar to a civil or criminal trial, or to any scheme of job interview.*

69. Section **14** is couched in the following words:-

14. Powers of the Board

1) Subject to section 18, the Board shall have all the powers necessary for the execution of its functions under the Constitution and this Act, and without prejudice to the generality of the foregoing, the Board shall have the power to—

a) gather relevant information, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary;

b) interview any individual, group or members of organizations or institutions and, at the Board's discretion, to conduct such interviews; and

c) hold inquiries for the purposes of performing its functions under this Act.

2) In the performance of its function, the Board—

a) may inform itself in such manner as it thinks fit;

b) may receive on oath, written or oral statement

c) shall not be bound by strict rules of evidence; and

d) shall not be subject to the direction or control of any person or authority.

70. Also relevant is Section **18** of the Act which sets out the relevant considerations which the Board takes into account. These include *(a) whether the judge or magistrate meets the constitutional criteria for appointment as a judge of the superior courts or as a magistrate; (b) the past work record of the judge or magistrate, including prior judicial pronouncements, competence and diligence; (c) any pending or concluded criminal cases before a court of law against the Judge or Magistrate; (d) any recommendations for prosecution of the Judge or Magistrate by the Attorney-General or the Kenya Anti-Corruption Commission; and* (e) pending complaints or other relevant information received from any person or body, including the- *Law Society of Kenya; Ethics and Anti-Corruption Commission, Advocates Disciplinary Tribunal; Advocates Complaints Commission; Attorney-General; Commission on Administration of Justice; Kenya National Human Rights and Equality Commission; National Intelligence Service; National Police Service Commission; or Judicial Service Commission.*

71. Section **18 (2)** provides that in considering the matters set out in sub-section **(1) (a)** and **(b),** the Board shall take into account professional competence, the elements of which include intellectual capacity, legal judgment, diligence, substantive and procedural knowledge of the law, organizational and administrative skills, and the ability to work well with a variety of people, **(b)** written and oral communication skills the elements of which include the ability to communicate orally and in writing; the ability to discuss factual and legal issues in clear, logical and accurate legal writing; and the ability to discuss factual and legal issues in clear, logical and accurate legal writing; and effectiveness in communicating orally in away that will readily be understood and respected by people from all walks of life; **(c)** integrity, the elements of which shall include- (i) a demonstrable consistent history of honesty and high moral character I professional and personal life; (ii) respect for professional duties, arising under the codes of professional and judicial conduct; and (iii) ability to understand the need to maintain propriety and appearance of propriety.

72. Other considerations include (d) fairness, the elements of which shall include- (i) a demonstrable ability to be impartial to all persons and commitment to equal justice under the law; and (ii) open-mindedness and capacity to decide issues according to the law, even when the law conflicts with personal views; (e)temperament, the elements of which shall include- (i) demonstrable possession of compassion and humility; (ii)history of courtesy and civility in dealing with others (iii) ability to maintain composure under stress; and (iv) ability to control anger and maintain calmness and order.

73. Other considerations enumerated in the above provision include good judgment, including common sense, elements of which shall include a sound balance between abstract knowledge and practical reality and in particular, demonstrable ability to make prompt decisions that resolve difficult problems in a way that makes practical sense within the constraints of any applicable rules or governing principles; and legal and life experience, the elements of which include— (i) the amount and breadth of legal experience and the suitability of that experience for the position, including trial and other courtroom experience and administrative skills; and (ii) broader qualities reflected in life experiences, such as the diversity of personal and educational history, exposure to persons of different ethnic and cultural backgrounds, and demonstrable interests in areas outside the legal field; and (h) demonstrable commitment to public and community service, the elements of

which shall include the extent to which a judge or magistrate has demonstrated a commitment to the community generally and to improving access to the justice system in particular.

74. Upon analyzing the facts presented by the parties and the provisions governing the vetting process, and upon carefully analyzing the complaints against the Petitioner, we find some are dated as early as 2009, (for example see complaint by a one Rashid Oloo). A distinction should be drawn between the act or omission complained about arose and the date the matter was reported to the Board as a complaint. We also note that the Petitioner's main complaint in the Review application was alleged "apparent bias." We find that the vetting was conducted in conformity with the relevant provisions of the Act, particularity Sections **14** and **18** discussed above. In any event, we cannot delve into the merits of the decision or the manner in which the process was conducted. Regarding the alleged violation of the principles of natural justice, we reiterate that we cannot delve in to the process.

d) What is the appropriate order on costs?

75. It is common knowledge that courts have been reluctant to award costs in constitutional Petitions seeking to enforce constitutional rights. Such an order, in our view must be viewed from the lens of our constitution which guarantees access to justice. The Court must exercise caution and ensure that costs do not become a barrier to access to Courts. Discussing costs as a barrier to access to Courts, we are reminded of the phrase *"Justice is open to all, like the Ritz Hotel"*[70]attributed to a 19th Century jurist. Costs have been identified as the single biggest barrier to litigation in many countries.[71] Not only does the applicant incur their own legal fees; they run the risk of incurring the other side's.

76. For all potential litigants, the risk of exposure to an adverse costs order is a critical consideration in deciding whether to proceed with litigation. There is little point opening the doors of the Courts if litigants cannot afford to come in, in the fear, if unsuccessful, they will be compelled to pay the costs of the other side, with devastating consequences to the individual or group bringing the action, which will inhibit the taking of cases to court.[72]

77. The rationale for refusing to award costs against litigants in constitutional litigation was appreciated by the South African constitutional court which observed that "an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights."[73] The court was quick to add that this is not an inflexible rule[74] and that in accordance with its wide remedial powers, the Court has repeatedly deviated from the conventional principle that costs follow the result.[75] The rationale for the deviation was articulated by the South African constitutional Court in *Affordable Medicines Trust vs Minister of Health* where **Ngcobo J** remarked:-

> *"There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case."*[76]

78. **Sachs J**, set out **three reasons** for the departure from the traditional principle:-

> *"In the first place it diminishes the chilling effect that adverse costs orders would have on parties seeking to assert constitutional rights. Constitutional litigation frequently goes through many courts and the costs involved can be high. Meritorious claims might not be proceeded with because of a fear that failure could lead to financially ruinous consequences. Similarly, people might be deterred from pursuing constitutional claims because of a concern that even if they succeed they will be deprived of their costs because of some inadvertent procedural or technical lapse.*
>
> *Secondly, constitutional litigation, whatever the outcome, might ordinarily bear not only on the interests of the particular litigants involved, but on the rights of all those in similar situations. Indeed, each constitutional case that is heard enriches the general body of constitutional jurisprudence and adds texture to what it means to be living in a constitutional democracy.*
>
> *Thirdly, it is the state that bears primary responsibility for ensuring that both the law and state conduct are consistent with the Constitution. If there should be a genuine, non-frivolous challenge to the constitutionality of a law or of state conduct, it is appropriate that the state should bear the costs if the challenge is good, but if it is not, then the losing non-state litigant should be shielded from the costs consequences of failure. In this way responsibility for ensuring that the law and state conduct is constitutional is placed at the correct door."*[77]

79. Discussing the same point, the Supreme Court of Kenya in the case of *Jasbir Singh Rai & Others vs Tarlochan Rai & Others*[78] observed that:-

> *"in the classic common law style, the courts have to proceed on a case by case basis, to identify "good reasons" for such a departure. An examination of evolving practices on this question shows that, as an example, matters in the domain of public interest litigation tend to be exempted from award of costs……"*

80. The primary consideration in constitutional litigation must be the way in which a costs order would hinder or promote the advancement of constitutional justice.[79]The "nature of the issues" rather than the "characterization of the parties" is the starting point.[80]Costs should not be determined on whether the parties are financially well-endowed or indigent.[81]One exceptions which can justify a departure from the general rule, is where the litigation is frivolous or vexatious.[82] That has not been demonstrated in this case nor was it alleged. There is nothing before us to suggestion that this Petition is frivolous or vexatious. We find no reason to depart from the generally accepted jurisprudence discussed above and award an order of costs against the Petitioner.

Comments on the Vetting of Judges and Magistrates Act.

81. We find it appropriate to make some general observations on the Vetting of Judges and Magistrates Act. It is true that the Constitution and the Act established a comprehensive and objective system of factors that were to guide the vetting process. These were captured by the Supreme Court in **JMVB "1"** as follows:-

> ***[95]*** *Section **14(1)** of the Vetting of Judges and Magistrates Act provides that the Vetting Board has the power to – **"(a)** gather relevant information, including requisition of reports, records, documents or any information from any source, including governmental authorities, and to compel the production of such information as and when necessary; **(b)** interview any individual, group or members of organizations or institutions and, at the Board's discretion, to conduct such interviews; and **(c)** hold inquiries for the purposes of performing its functions under this Act."*
>
> ***[96]*** *Indeed, the vetting process as described in the Vetting of Judges and Magistrates Act is* sui generis, *or of its own kind, as the Vetting Board does not act as a Court of law which is exclusively an arbiter**; it can conduct an investigation, and can act as an adjudicator**. The Judges and Magistrates Vetting Board's* Interim Report *(September 2011- February 2013) recognizes this (at pages 37-38), when it states that the Vetting Board is* sui generis, *because it is not similar to a civil or criminal trial, or to any scheme of job interview.*

82. The statute created a body with powers to ***conduct an investigation, and act as an adjudicator***. The Act mandated the Board to hear applications for Review. Considering the implications of the ouster Clause, we are of the considered opinion that Parliament ought to have included in the Act provisions establishing an appellate mechanism to be undertaken by a totally different body as opposed to the same Board. A look at the amendments made to the Act through a bill passed on **5th** December 2013 and assented to by the President on **24th** December 2013 which amended the provisions of Section **22 (1)** of the Vetting Act by deleting the word "*same panel*" substituting it with the words "*a new panel to be constituted by the chairperson of the board*", supports our view herein.

83. It is our view that an independent appellate body as opposed to a new panel could have insulated the process from perceptions of bias. The rule against bias is one of the twin pillars of natural justice. The first pillar is the hearing rule. The bias rule is the second pillar of natural justice and requires that a decision-maker must approach a matter with an open mind that is free of prejudgment and prejudice. The principle upon which the bias rule has been founded in modern times can be traced to Lord Hewart's famous statement that *"justice should not only be done, but be seen to be done."*[83] On this view, appearances are important. Justice should not only be fair, it should appear to be fair. The law permitted the Board to receive complaints, investigate, ask for information from the affected Judge or Magistrate, prosecute the complaint, hear the matter and render a decision. Such a scenario, in our view offends the principles of natural justice.

84. As the Supreme Court of Appeal of South Africa observed[84] *"All statutes must be interpreted through the prism of the Bill of Rights."*This statement is true of decisions made by statutory bodies. It could not have been the intention of the Constitution to establish a body that receives complaints, investigates, adjudicates and renders decisions.

Summary of findings.

85. In view of our analysis of the law, authorities and conclusions herein above, we here below summarize our findings as follows:-

> *a) In ordinary use the word 'or' is a disjunctive that makes an alternative which generally correspondents to the word 'either.' The word "**or**" is used to introduce another possibility or alternative, that is either, or. It can also be used in interchangeably with the word "and." The dictionary definitions and judicial construction leave us persuaded beyond doubt that the use of the word "or" in Section **23 (2)** immediately after the word "removal," introduces another possibility, the first possibility being a removal. The second possibility is " a process leading to the removal, of a judge. In our view, the declaration by the Board that a Magistrate is unsuitable to continue serving amounts to a removal within the said provision.*
>
> *b) A literal and proper construction of the use of the word "or" in Section **23 (2)** of the Sixth Schedule which reads "A removal, or a process leading to the removal, of a judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or by, any court is that the said provision does not exclude the removal of a Magistrate .*
>
> *c) The word Magistrate appears at the preamble clearly indicating the clear intention of the legislature which is to give effect to Section **23** of the Sixth Schedule. We find no inconsistency between the provisions of the Act and the Constitution. We conclude and find that it was the intention of the drafters of the Constitution and the Act that all the serving Judges and Magistrates as at the effective date were to be vetted and their suitability to continue serving be determined in accordance with the Act. We find and hold that Section **23 (2)** of the Sixth Schedule expressly applies to a removal of a Magistrate, or, a process leading to the removal of a Judge.*
>
> *d) The High court's jurisdiction in determinations made by the Board has been the subject of determination by the Apex Court in Kenya. In particular, in Judges & Magistrates Vetting Board & 2 others vs Centre for Human Rights & Democracy & 11 others [85] the Supreme Court held that the High Court lacks jurisdiction to adjudicate upon the* suitability *of a Judge or a Magistrate to continue in service; and the responsibility for such a determination, during the period of transition, was constitutionally vested in the Judges and Magistrates Vetting Board.*
>
> *e) Article **163 (7)** of the Constitution explicitly provides that all courts, other than the Supreme court, are bound by the decisions of the Supreme Court. Clearly, the interpretation of Section **23 (1) (2)** of the Sixth Schedule in the above case by the Supreme Court is binding on this court by dint of Article **163 (7)** of the Constitution.[86] The binding nature of the Supreme Court decisions under Article **163 (7)** of the Constitution is absolute. Article **163 (7)** is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court[87] and that where the issues before the court were determined by the*

Supreme Court, it is not open to this court to examine the same with a view to arriving at a different decision.[88]

*f) Constitutional provisions touching on the same subject are to be construed together without one provision destroying the other but each provision sustaining the other. Section **23 (1)** of the Sixth Schedule expressly provides that "Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article **160, 167** and **168,** establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of **all Judges** and **Magistrates** who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles **10** and **159."** It is our view that Sub-section **(2)** of Section **23** cannot be read in isolation without considering sub-section **(1)** if the intention of the drafter(S) is to be effected.*

*g) From the preamble to the Act, it's clear that the intention of the statute was to provide for vetting of Judges and Magistrates pursuant to Section **23** of the Sixth Schedule, hence, the inclusion of the word Magistrate is Section **22 (4)** of the Act cannot have been a mistake. Further, it is also clear from the provisions that it was the intention of the drafters of the Constitution that both the serving Judges and Magistrates were to be vetted. The word Magistrate in Section **22 (4)** of the Act is conformity with the provisions Section **23 (1) & (2)** of the sixth Schedule.*

*h) That the vetting process is governed by the Act and in particular Sections **14** and **18** of the Act.*

i) By dint of the Supreme Court decision in Judges and Magistrates Vetting Board and 2 Others vs. Centre for Human Rights and Democracy and 11 Others,[89] *no Court has jurisdiction to review the process or the outcome of the vetting process. By dint of Article **163 (7)** of the Constitution, the Supreme Court decision is binding to this Court. Differently put, this Court may not examine the merits of the decision.*

*j) **Orbiter-** The statute created a body with powers to* **conduct an investigation, and act as an adjudicator***. The Act mandated the Board to hear applications for Review. Considering the implications of the ouster Clause, we are of the considered opinion that Parliament ought to have included in the Act provisions establishing an appellate mechanism to be undertaken by a totally different body as opposed to the same Board. This could have insulated the process from perceptions of bias.*

a) Courts have been reluctant to award costs in constitutional Petitions seeking to enforce constitutional rights. Such an order, in our view must be viewed from the lens of our constitution which guarantees access to justice. The Court must exercise caution and ensure that costs do not become a barrier to access to Courts. The rationale for refusing to award costs against litigants in constitutional litigation is that "an award of costs may have a chilling effect on the litigants who might wish to vindicate their constitutional rights."[90] *This is not an inflexible rule*[91] *and in accordance with its wide remedial powers, the Court has repeatedly deviated from the conventional principle that costs follow the result.*[92] *There may be circumstances that justify departure from this rule such as where the litigation is frivolous or vexatious. There may be conduct on the part of the litigant that deserves censure by the Court which may influence the Court to order an unsuccessful litigant to pay costs. The ultimate goal is to do that which is just having regard to the facts and circumstances of the case."*[93]

86. In view of our findings, the conclusion becomes irresistible that this Petition must fail. Consequently we dismiss this Petition with no orders as to costs.

Orders accordingly.

Signed, Delivered, Dated at Nairobi this **22nd** day of **June** 2018

Jessie Lesiit

Judge

J. Wakiaga

Judge

Grace Ngenye

Judge

John Mativo

Judge

John Onyiego

Judge

[1]**Njeri Githang'a, Law Reporter, June 2013, http://kenyalaw.org/kenyalawblog/a-compilation-of-summaries-of-selected-cases-on-the-interpretation-of-the-constitution-of-kenya-2010/. Accessed on 24th November 2017.**

[2] Article 10 (1) (a)-(e).

[3] Chapter six of the Constitution.

[4] Chapter thirteen of the Constitution.

[5] Article 159.

[6] Article 160.

[7] Article 1.

[8] Ibid.

[9] Act No. 2 of 2011.

[10] See Section 14 (1) (a) of the Act.

[11] See section 14 (2) (a).

[12] Ibid.

[13] Ibid.

[14] Section 18 (1) & (2).

[15] See Supreme Court Pet No 13A of 2013, *Judges and Magistrates Vetting Board vs The Centre for Human Rights and Democracy & 13 Others.*

[16] Judicial Review Case No. 295 OF 2012.

[17] Wallis JA dealt with the matter in *Natal Joint Municipal Pension Fund vs Endumeni Municipality* 2012 (4) SA 593 (SCA) at para [18].

[18] *Investigating Directorate: Serious Economic Offences and Others vs Hyundai Motor Distributors (Pty) Ltd and Others*: *In re Hyundai Motor Distributors (Pty) Ltd and Others vs Smit NO and Others* [2000] ZACC 12; 2001 (1) SA 545 (CC); 2000 (10) BCLR 1079 (CC) at para 24

[19] *Johannesburg Municipality vs Gauteng Development Tribunal and Others* [2009] ZASCA 106; 2010 (2) SA 554 (SCA) at para 39, which quoted *Jaga vs Dönges, N.O. and Another*; *Bhana vs Dönges, N.O. and Another* 1950 (4) SA 653 (A) at 664G-H.

[20] Supra note 9.

[21] *South Dakota vs. North Carolina*, 192 US 268(1940).

[22]This rule is restated by Joubert JA in *Adampol (Pty) Ltd vs Administrator, Transvaal 1989 (3) SA 800(A)* at 804BC.

[23] {1987} 1 SCC 424

[24]Katharine Clark and Matthew Connolly, Senior Writing Fellows, April 2006, *"A guide to reading, interpreting and applying statutes"* https://www.law.georgetown.edu/academics/academic-programs/legal-writing-scholarship/writing-center/upload/statutoryinterpretation.pdf.

[25] Christopher G. Wren and Jill Robinson Wren, *The Legal Research Manual: A game Plan for Legal Research and Analysis* (2d. ed. 1986).

[26] Plain meaning should not be confused with the "literal meaning" of a statute or the "strict construction" of a statute both of which imply a "narrow" understanding of the words used as opposed to their common, everyday meaning.

[27] Counsel *Anisminic Ltd vs Foreign Compensation Commission* {1968}APP. LR.

[28]Supreme Court Petition No. 29 of 2014.

[29]Counsel cited *The Owners of the Motor Vessel Lillian "S' vs Caltex Oil Kenya Ltd* (1989) KLR, *Kenya Magistrates & Judges*

Association & 2 Others vs Centre for Human Rights and 11 Others (SCK) Pet No. 13 A of 2013 (Consolidated) {2014} eKLR.

[30] Infra.

[31] {1989} KLR 1.

[32] The Supreme Court of Kenya In the matter of the Interim Independent Electoral Commission Constitutional Application No. 2 of 2011 (unreported).

[33] *Samuel Kamau Macharia vs. Kenya Commercial Bank and Two others*, Civ. Appl. No. 2 of 2011.

[34] 19 U.S. 264 (1821).

[35] Phillip A. Rubin, *War of the Words: How Courts can use Dictionaries in Accordance with Textualist Principles*, Duke Law Journal [Vol. 60:167

[36] Antonin Scalia, A Matter of Interpretation: Federal Courts and the Law 17 (1997).

[37] *Black-Clawson International Ltd vS Papierwerke Waldhof-Aschaffenburg* A/G [1975] AC 591, 629 (HL) Lord Wilberforce.

[38] Therasus.com.

[39] Third Edition, Longman, www.longmam.com.

[40] Published by Peter Haddock Limited, Bridlington, England, 1997.

[41] 6th Edition, Oxford University Press.

[42] Eleventh Edition, Oxford University Press.

[43] {2002}1 SCC 741 at 747.

[44]See Statutory Interpretation by Justice G.P. Singh, 8th Edition, 2001, p.370.

[45] {2003-I-LLJ-384, 387.

[46] {1999} (3) SC 573, 583.

[47] {1940} Edition.

[48] Infra.

[49] See final report of the committee of experts on constitutional review, 11th October, 2010.

[50] Judges & Magistrates Vetting Board & Attorney General v Kenya Magistrates &Judges Association [2014] eKLR.

[51] Ibid.

[52] SC Advisory Opinion Reference No. 2 of 2013.

[53]{2014} eKLR

[54]See Woods Manufacturing Co. vs The King {1951} S.C.R. 504 at page 515 and Youngsam R (On the Application of) vs The Parole Board {2017}EWHC 729.

[55] Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others {2017}eKLR.

[56] See Justice Jeane W Gacheche & 5 Others vs Judges and Magistrates Vetting Board & 2 Others {2015}eKLR citing Sir Charles Newbold, P in Dodhia vs National & Grindlays Bank Ltd & Another {1970} E.A. 195.

[57] {2014} eKLR [i.e. Petition No.13A of 2013 as consolidated with Petition No.14 f 2013 and 15 of 2013].

[58] {2014} eKLR.

[59] Supra.

[60] Supra note 57.

[61] MANU/SC/0047/1967.

[62] {1901} AC 495.

[63] {1898} AC 1.

[64] Ambica Quarry Works vs. State of Gujarat and Ors. MANU/SC/0049/1986.

[65] Ibid.

[66] Bhavnagar University v. Palitana Sugar Mills Pvt Ltd (2003) 2 SC 111 (vide para 59).

[67] In the High Court of Delhi at New Delhi February 26, 2007 W.P.(C).No.6254/2006, Prashant Vats Versus University of Delhi & Anr. (Citing Lord Denning).

[68] Ibid.

[69] Ibid

[70] Sir James Matthew, 19th Century jurist.

[71] 2 Mel Cousins BL (2005) *Public Interest Law and Litigation in Ireland*, Dublin: FLAC, October 2005 and see Stein R. & Beageant J., "*R (Corner House Research) vs the Secretary of State for Trade and Industry"* (2005) 17(3) Journal of Environmental Law 413.

[72] Toohey J.'s address to the International Conference on Environmental Law, 1989 quoted in *Blue Mountains Conservation Society Inc vs Delta Electricity* [2009] NSWLEC 150 [19].

[73]*Hotz and Others vs University of Cape Town* [2017] ZACC 10, citing *Biowatch Trust vs Registrar, Genetic Resources* [2012] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22 (Biowatch).

[74] Ibid.

[75] See, for example, *AB vs Minister of Social Development* [2016] ZACC 43; 2017 (3) BCLR 267 (CC) at para. 329; *Minister of Home Affairs vs Rahim* [2016] ZACC 3; 2016 (3) SA 218 (CC); 2016 (6) BCLR 780 (CC) at para 35; *Sali vs National Commissioner of the South African Police Service* [2014] ZACC 19; 2014 (9) BCLR 997 (CC); (2014) 35 ILJ 2727 (CC) at para 97.

[76] {2005} ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.

[77]*Biowatch Trust vs Registrar, Genetic Resources* [2012] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22 (Biowatch)

[78] Supra note 4.

[79] Supra note 32.

[80] Ibid.

[81] Ibid.

[82] Supra Note 32.

[83] *R vs Sussex Justices Ex p McCarthy* {1924} 1 KB 256 at 259. In the same year, Aitkin LJ similarly remarked that "[N]ext to the tribunal being in fact impartial is the importance of its appearing so": *Shrager vs Basil Dighton Ltd* {1924} 1 KB 274 at 284.

[84]Serious *Economic Offences vs Hyundai Motor Distributors (Pty) Ltd: In re Hyundai Motor Distributors (Pty) Ltd vs Smit NO and* [2000]

[85]{2014} eKLR

[86]See Woods Manufacturing Co. vs The King {1951} S.C.R. 504 at page 515 and Youngsam R (On the Application of) vs The Parole Board {2017}EWHC 729.

[87] Fredrick Otieno Outa vs Jared Odoyo Okello & 3 Others {2017}eKLR.

[88] See Justice Jeane W Gacheche & 5 Others vs Judges and Magistrates Vetting Board & 2 Others {2015}eKLR citing Sir Charles Newbold, P in Dodhia vs National & Grindlays Bank Ltd & Another {1970} E.A. 195.

[89] {2014} eKLR [i.e. Petition No.13A of 2013 as consolidated with Petition No.14 f 2013 and 15 of 2013].

[90]*Hotz and Others vs University of Cape Town* [2017] ZACC 10, citing *Biowatch Trust vs Registrar, Genetic Resources* [2012] ZACC 14; 2009 (6) SA 232 (CC); 2009 (10) BCLR 1014 (CC) at para 22 (Biowatch).

[91] Ibid.

[92] See, for example, *AB vs Minister of Social Development* [2016] ZACC 43; 2017 (3) BCLR 267 (CC) at para. 329; *Minister of Home Affairs vs Rahim* [2016] ZACC 3; 2016 (3) SA 218 (CC); 2016 (6) BCLR 780 (CC) at para 35; *Sali vs National Commissioner of the South African Police Service* [2014] ZACC 19; 2014 (9) BCLR 997 (CC); (2014) 35 ILJ 2727 (CC) at para 97.

[93] Affordable Medicines Trust vs Minister of Health {2005} ZACC 3; 2006 (3) SA 247 (CC); 2005 (6) BCLR 529 (CC) at para 138.