Kenya Hotel Properties Ltd v Attorney General & 2 others; Willesden Investments Limited & 2 others (Interested Parties) (Constitutional Petition 438 of 2018) [2018] KEHC 3255 (KLR) (Constitutional and Human Rights) (28 September 2018) (Judgment)

Kenya Hotel Properties Limited v Attorney General & 5 others [2018] eKLR

Neutral citation: [2018] KEHC 3255 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 438 OF 2018

EC MWITA, J

SEPTEMBER 28, 2018

BETWEEN

KENYA HOTEL PROPERTIES LTD ..... PETITIONER

AND

THE ATTORNEY GENERAL ..... 1ST RESPONDENT

JUDICIAL SERVICE COMMISSION ..... 2ND RESPONDENT

JUDGES AND MAGISTRATES VETTING BOARD ..... 3RD RESPONDENT

AND

WILLESDEN INVESTMENTS LIMITED ..... INTERESTED PARTY

ETHICS & ANTI-CORRUPTION COMMISSION ..... INTERESTED PARTY

KENYA REVENUE AUTHORITY ..... INTERESTED PARTY

The High Court has no jurisdiction to annul a Court of Appeal judgment.

The main issue before the court was whether the High Court had jurisdiction to hear and determine a matter in which the annulment of a Court of Appeal judgment was sought. The High Court held that the impugned judgment was made by a court which was superior to the High Court in terms of judicial hierarchy. The judgment was binding on the Court in terms of precedent. The High Court had wide jurisdiction but there was a constitutional caveat to the effect that the High Court could not supervise other superior courts.

Reported by Beryl A Ikamari

Jurisdiction *- jurisdiction of the High Court-supervisory jurisdiction of the High Court - claim for, inter alia, the grant of orders of certiorari, for the High Court to quash a Court of Appeal judgment, on grounds that one of*

the judges in the three judge bench that issued the judgment was biased - whether the High Court could exercise supervisory jurisdiction over the Court of Appeal - Constitution of Kenya 2010, articles 22, 23 & 165(3).

***Constitutional Law** - judiciary - Judges and Magistrates Vetting Board - judges found to be unsuitable to continue serving in the judiciary - the status of judgments delivered by judges who were found to be unsuitable to continue serving - whether such judgments would be annulled upon the making of an application for annulment.*

Brief facts

In HCCC No 367 of 2000 the 1st Interested Party obtained a High Court judgment against the petitioner for Kshs. 54,902,400 for *mesne profits*, Kshs. 10, 000,000 general damages for trespass and Kshs. 6,000,000 for loss of business opportunity. The petitioner appealed to the Court of Appeal, where a three judge bench, reduced the amount owed to Kshs. 22,729,800/=. The petitioner filed an application for a review of the judgment but the application was dismissed except that the rate of interest was reviewed.

Subsequently, the 3rd respondent, the Judges and Magistrates Vetting Board (the Board), was established. The Board found Justice Okubasu unsuitable to serve and he was removed from office. The petitioner said that the decision on suitability to serve was an indictment and proof of bias against one of the judges who presided over its appeal at the Court of Appeal. According to the petitioner, the Court of Appeal's decision should be annulled. The petitioner also alleged that there had been a violation of its right to a fair trial recognized in article 50 of the Constitution.

Issues

i. Whether the High Court had jurisdiction to hear and determine a matter in which the annulment of a Court of Appeal judgment was sought.

ii. The status of judgments delivered by judges that were found to be unsuitable to continue serving by the Judges and Magistrates Vetting Board.

Held

1. The jurisdiction of a court entailed the authority reposed on the court of law to take cognizance of matters placed before it for adjudication. That jurisdiction may be general or specific, limited or unlimited. Jurisdiction of a court may be conferred by the Constitution, statute or both and jurisdiction could only be exercised by the court as conferred upon it by the law.
2. The court had to exercise jurisdiction conferred upon it by the Constitution or statute or both. It could not exercise jurisdiction that it did not have or exceed the jurisdiction conferred upon it or even confer jurisdiction upon itself through some form of innovation. Any action taken by the court without jurisdiction or in excess of jurisdiction would be unconstitutional or illegal.
3. Article 165(3) of the Constitution conferred on the court very wide jurisdiction but it was not exhaustive and in article 165(3)(e) the High court could have any other jurisdiction, original or appellate, conferred on it by legislation. The jurisdiction conferred on the High Court included jurisdiction to determine questions relating to the constitutionality of an act said to be done under the authority of the Constitution and questions relating to the enforcement of fundamental rights and freedoms.
4. There was no remedy that the High Court was unable to grant under the Constitution. Under article 23 (3) of the Constitution, the High Court was empowered to grant appropriate relief including declaration of rights, injunctions and conservatory orders among others.
5. Granting an appropriate relief meant that the court may have to fashion new remedies to ensure the protection and enforcement of fundamental rights and freedoms. An appropriate relief had to mean an effective remedy. The appropriate relief would depend on the nature of the right infringed and the nature of the infringement.
6. Articles 22 and 23 as read with article 165(3) of the Constitution were to the effect that the High Court would redress a denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. That implied that a petitioner would have to move the court alleging a violation of

rights and fundamental freedoms and on being satisfied as to the violations, the court would prescribe appropriate redress based on the facts and circumstances of the case.

7. The impugned judgment was made by a court which was superior to the High Court in terms of judicial hierarchy. The judgment was binding on the court in terms of precedent. The High Court had wide jurisdiction but there was a constitutional caveat to the effect that the High Court could not supervise other superior courts.
8. Article 165(6) of the Constitution provided that the High Court had supervisory jurisdiction over subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial authority but not over a superior court. Superior courts in terms of article 162 (1) of the Constitution were the Supreme Court, the Court of Appeal, the High Court and courts of equal status namely; the Employment and Labour Relations Court and the Environment and Land Court.
9. Considering the High Court's place in terms of judicial hierarchy, the High Court could not direct the Court of Appeal to reopen a closed appeal and hear it *de novo*. That would amount to undermining the authority of the Court of Appeal and it would be contrary to the wording of article 165(6) of the Constitution.
10. The Board's finding that one of the judges on the bench that issued the impugned decision was unfit to continue serving did not grant the High Court jurisdiction to annul a Court of Appeal judgment. The High Court could not attempt to exercise jurisdiction which it did not have and direct the Court of Appeal to open a closed appeal and re-hear it.
11. The constitutional court division of the High Court did not have superior or special jurisdiction over the court that heard and determined HCCC No 367 of 2000. It was a court of concurrent jurisdiction and for that reason it could only exercise jurisdiction conferred on it by the Constitution or legislation where appropriately moved.
12. Judicial bias would constitute an infringement on the right to fair hearing which was a core value in Kenya's constitutional set up. Accusations of bias, however frivolous, were capable of tarnishing the officer concerned as well as public confidence in the Judiciary as an institution.
13. The impugned judgment was issued by a bench of three judges and a claim of bias was only made against one of them. The judicial officer against whom the claim of bias was made was not a party to the proceedings. The reliefs sought gave the impression that the petitioner wanted a second chance to litigate his appeal. While seeking to have the Court of Appeal judgment annulled, the petitioner did not seek to have the High Court judgment that gave rise to the appeal annulled. The High Court should not take a judicial misadventure and attempt to annul a decision of a superior court as it was not sitting on appeal over the decision of another superior court.
14. The decisions of the Court in *Standard Chartered Financial Services v Manchester Outfitters* [2016] eKLR and *Re Pinochet* [1999] UKHL 52 (January 1999) could be distinguished from the petition. The two cases were set aside by the Court of Appeal and the House of Lords, respectively, and not by inferior courts.

Petition dismissed.

Citations

Statutes

None referred to

Advocates

None mentioned

JUDGMENT

1. Kenya Hotel Properties limited, the Petitioner, filed a petition dated15th October 2015 and amended on 12th November 2015 against the Attorney General, Judicial Service Commission, and Judges and Magistrates Vetting Board, the respondents, as well as Willesden Investments Limited, Ethics and Anti-Corruption Commission and Kenya Revenue Authority, the 1st 2nd and 3rd interested parties respectively. According to the petition, the 1st interested party had sued the petitioner in HCCC No 367 of 2000 seeking damages for trespass and mesne profits over a property previously leased to the petitioner by the then Nairobi city Council to which the petitioner was paying rent.

2. The 1st interested party obtained judgment against the petitioner for Kshs54, 902,400 for mesne profits, Ksh10, 000,000 general damages for trespass and Kshs6, 000,000 for loss of business opportunity. The petitioner lodged an appeal to the Court of Appeal against that judgment being Civil Appeal No 149 of 2007. In a judgment delivered on 2nd April 2009 the Court of Appeal bench presided over by Justice Okubasu, reduced the amount to Ksh22,729,800/=. The petitioner filed an application for review of the said judgment on a number of aspects but the Court of Appeal only agreed to review its decision in so far as the date of interest was concerned but dismissed the rest of the application.

3. In the meantime the 2nd interested party filed ELC No 350 of 2010, Kenya Anti-corruption Commission v Willesden Investment Ltd & 7 others for injunction seeking to restrain Willesden from dealing with the parcel of land which was at the heart of the dispute in HCCC No 367 of 2000 and the resultant decree. An injunction was also sought restraining the petitioner from paying Willesden the amount in that decree. ELC 35 of 2010 was dismissed and according to the petitioner, it filed an application before the court of appeal seeking stay of its case against the 1st interested party following the dismissal of the ELC Case but the Court of Appeal Presided over by Justice Okubasu, dismissed that application.

4. The petitioner then filed Constitutional Petition No 13 of 2011 against the Attorney General and 7 others seeking some conservatory orders to prevent execution of the decree in HCC No 367 of 2000 but the application for conservatory orders was dismissed. The petitioner filled another application for stay in the Court of Appeal being Civil Application No 24 of 2012 and obtained stay from the Court of Appeal.

5. According to the petitioner, following the establishment of the Judges and Magistrates Vetting Board, the 3rd respondent, complaints against Judges and Magistrates who were serving on the effective date (27th August 2010), were lodged and heard by the Board. One of the complaints was against Hon Mr. Justice Okubasu who was subsequently found unsuitable to serve and was removed. Following the removal, the petitioner filed the present petition contending that he was aggrieved by the decision of the Court of Appeal in Civil Appeal No 149 of 2007 in which it had been ordered to pay Kshs22, 729,800/= plus interest from 15th September 1995, contending that it would lose property unless that judgment in Civil Appeal 149 of 2007 was annulled.

6. It is the petitioner's contention that it's fundamental rights have been violated since the Vetting Board had determined that Hon. Mr. Justice Okubasu was unfit to serve as a judge yet he had principally authored the impugned judgment as the presiding judge. According to the petitioner the finding by the Vetting Board that Justice Okubasu was unsuitable to serve as a judge was an indictment and proof of judicial bias hence the judgment he had presided over should also be annulled.

7. The petitioner filed the present petition seeking the following reliefs:-

1. A declaration that the Court of appeal judgment dated 2nd April 2009 in Nairobi Civil Appeal No 149 of 2007 Kenya Hotel Properties v Willesden Investments Limited is a nullity and should be set aside on account of judicial bias following the removal of the Judge of appeal Emmanuel Okelo Okubasu by the Judges and Magistrates Vetting Board on 25th April 2012 following a complaint over his handling of the appeal.

2. A declaration that the petitioner's right to a fair trial under Article 50 of the Constitution was infringed by the bias shown by the presiding judge in Nairobi Civil Appeal No 149 of 2007 Kenya Hotel Properties v Willesden Investments Limited.

3. A declaration that the judgment dated 2nd April 2009 in Nairobi Civil Appeal No 149 of 2007 Kenya Hotel properties v Willesden Investments Limited cannot stand following the removal of the presiding judge by the judges and Magistrates Vetting Board on 25th April 2012 and the appeal should be retried de novo by the court of appeal.

4. An order directing the Judges and magistrates Vetting Board to furnish copies of all the Hansard proceedings concerning Honourable justice Emmanuel Okelo Okubasu to the petitioner's advocates within 10 days of the order of this court.

5. An order of certiorari be issued quashing the Court of Appeal judgment dated 2nd April 2009 in Nairobi Civil Appeal No 149 of 2007 Kenya Hotel Properties v Willesden Investments Limited.

6. An order directing that the appeal arising from the judgment and decree of the High Court of Kenya at Nairobi (Mutungi J) dated 14th December 2006 in HCCC No 367 of 2000 Willesden investments Limited v Kenya Hotel properties Limited be heard de novo by the court of appeal.

7. A permanent injunction be issued restraining the 1st and 3rd interested parties, their servants or agents from executing the decree in any manner whatsoever in Milimani HCCC No 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited and calling up the bank guarantee issued by Development Bank of Kenya limited pending the determination of the appeal to be heard de novo by the court of appeal.

2nd respondent's response

8. The 2nd respondent filed grounds of opposition dated 6th March 2018 and filed on 7th March 2018 contending that the petition does not disclose any violation of constitutional rights by the 2nd respondent; that the petitioner has not sought any reliefs against the 2nd respondents; that the 2nd respondent can only investigate claims of misconduct against judges but cannot set aside, vary or overrule decisions of judges; that under Article 160 of the constitution in exercise of its authority, the Judiciary is only subject to the constitution and the law; and that under Article 171 the mandate of the 2nd respondent is to promote and facilitate independence and accountability of the judiciary and the efficient, effective and transparent administration of justice. The 2nd respondent contends, therefore, that it has no mandate to interfere with judges' decisions.

1st Interested Party's response

9. The 1st interested party filed a replying affidavit by Ben Muli, its director, sworn on 23rd march 2018 and filed in court on 8th March 2018, contending that the petition is an abuse of the court process and that it is aimed at preventing the petitioner from complying with the judgment and decree in HCCC No 367 of 2000. Mr. Muli deposes that the petitioner is already enjoying stay orders obtained from

the Court of Appeal in Civil Appeal No 325 of 2013 hence there was no logic for filing the present petition.

10. According to Mr. Muli, the petitioner's true intention is to deny the 1st interested party enjoyment of fruits of the judgment given in the decision of the Court of Appeal made on 4th April 2008 and the decree issued on 2nd April 2009 thus finalizing that matter. He also contends that the current petition is a collateral attack on the final decision of the Court of Appeal and is thus an abuse of the court process.

11. It is Mr. Muli's further deposition that the petitioner is attempting to re-open closed litigation hence this petition is res judicata; that that the Vetting Board's decision that Justice Okubasu was not suitable to serve was not based on the decision he had made in the impugned Civil Appeal and that the decision the petitioner wants annulled was by a bench of three Judges of the Court of Appeal and not Justice Okubasu alone. He contends that the petitioner's rights and fundamental Freedoms could not be violated by a decision of three judges acting as a bench yet he complains about only one member of the bench.

    Mr. Muli states that there is no way the petitioner's right to fair hearing could have been affected by that decision and that no novel issue arises in this petition and, therefore, petition as a whole goes against the principles enshrined in Article 159 of the constitution that justice be administrative without delay.

3rd Interested Party's response

12. The 3rd interested party also filed grounds of opposition dated 16th May 2018 and filed on 18th May 2018 contending that the petition is devoid of merit; that it amounts to abuse of the court process and that it is an attempt to circumvent the law. The 3rd Interested Party further contends that the petition does not disclose any involvement of the 3rd interested party in the issues raised in the petition; that no relief has been sought against the 3rd interested party; that the petition challenges a decision in which the 3rd interested party was neither a party nor affected by it and that the 3rd interested party is wrongly enjoined in these proceedings.

Petitioner's submissions

13. Mr. Allen Gichuhi, learned counsel for the petitioner submits, highlighting their written submissions dated 13th April 2018 and filed in court on the same day, that the petition seeks nullification of the judgment of the Court of Appeal in Civil Appeal No 149 of 2007 delivered on 2nd April 2009 and that the appeal be heard de novo; a permanent injunction restraining the 1st and 3rd interested parties from executing the decree in HCCC No 367 of 2001.

14. Mr. Gichuhi contends that a complaint lodged against Justice Okubasu for miscarriage of justice in Civil Appeal No 147 of 2007 was heard by the 2nd respondent and the Judge was found unsuitable to serve and was removed. Learned counsel argues that although section 14 of the Supreme Court Act had given the Supreme Court jurisdiction to re-open and consider decisions by any of the judges found unsuitable to serve if those decisions were the bases of removal, the section was declared unconstitutional.

15. According to learned counsel, in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estates & 4 others [2013] eKLRthe Supreme Court observed that where a party claims of violation of fundamental rights by the judgment that led to removal of a judge he should file a petition. That according to learned counsel means such a petition should be filed in the High Court. Learned counsel, therefore, relies on the Rai case for this submission.

16. Mr. Gichuhi further submits that fundamental rights under Articles 10 and 50 as read with Article 259 of the constitution form the basis of this petition. learned counsel contends that judicial bias is an infringement of fair trial and relies on the South Africa case of Brian Patrick De- Lacy v South African Post Office [2011] ZACC17 on judicial bias and Standard Chartered Financial Services v Manchester Out fitters [2016] eKLR where the Court of Appeal agreed to set aside its own judgment on the basis of bias.

17. Learned counsel argues that since the Vetting Board found justice Okubasu unsuitable to serve as a Judge, the judgment in Civil Appeal 149 of 2007 should be set aside and the appeal heard de novo. He relies on the Manchester Outfitters case for this contention. Learned counsel justifies this argument contending that since Justice Okubasu was the Presiding Judge in the impugned decision it should be annulled.

18. Reacting to the respondents' and 1st and 3rd interested parties' submissions, Mr. Gichuhi contends that the submissions do not address the unique question of unconstitutionality of the impugned decision given that the people of Kenya had sought a clean-up of the Judiciary and its officers when they decided that Judges and Magistrates serving on the effective date go through vetting process. Counsel urges that the amended petition be allowed as prayed with costs.

2nd Interested Party's submissions

19. Miss Okwaro, learned counsel for the 2nd interested party relies on their written submissions dated 7th May 2018 and filed in court on the same day in support the petition and urges the court to allow the petition as prayed. In the written submissions the 2nd interested party submits that it received a complaint over the disputed property which had been seized by the 1st interested party; commenced investigations and filed ELC No. 35 of 2010 but the court dismissed an application. It is submitted that the petitioner filed an appeal Civil Appeal No. 325 of 2013 which is yet to be heard. It is the 3rd interested party's contention that the property in the Civil Appeal No. 325 of 2013 was the subject matter in HCCC No. 367 of 2000 and Civil Appeal No. 149 of 2009 and whose judgment is the subject of this petition.

1st And 3rd respondents' submissions

20. Mr. Marwa, learned counsel for the 1st and 3rd respondents, submits relying on their written submissions dated 16th May 2018 and filed on the same day, that given that the petitioner seeks to declare a judgment of the Court of Appeal invalid, such a request is not in line with the constitution. Learned counsel argues that Article 165(6) of the constitution bars this court from exercising oversight role over superior courts. Mr. Marwa contends that Article 164(3) gives the Court of Appeal jurisdiction to hear appeals from the High Court and other tribunals but not otherwise.

21. According to learned counsel, this court is subject to decisions of the Court of Appeal hence the decision in Civil Appeal No 149 of 2007 being a decision of an Appellate Court and a unanimous decision of that Court with no dissenting opinion by any of the three judges, there is no way one member of that bench can be faulted, neither can one of the members of the bench be said to have been biased as a basis for annulling the judgment of that court.

22. Mr. Marwa submits that under sections 75 of the Vetting Board Act, (repealed), the Board had to consider various factors in determining suitability of a judge. According to counsel, the appeal was heard by three judges and that Article 160(5) of the constitution grants immunity to judicial officers from liability for actions done in the course of their duties.

23. Relying of the Supreme Court decision in Samuel Kamau Macharia & another v Kenya Commercial Bank and another [2012] eKLR, learned counsel submits that jurisdiction of the court flows from the constitution or written law and in that context, counsel argues that jurisdiction of this court flows from Article 165(3) and therefore this court must limit itself within the jurisdiction granted by the constitution. He contends that there is no evidence that Justice Okubasu was biased and argues that the authorities relied on by the petitioner in fact do support the respondents' case.

2nd Respondent's submissions

24. Miss Mugo, learned counsel for the 2nd respondent submits relying on their grounds of opposition dated 6th March 2018 and filed in court on 7th March 2018, that the petitioner has not raised a cause of action against the 2nd respondent and that there was no allegation of violation of the petitioner's fundamental rights by the petitioner. According to learned counsel, the petitioner's mandate is provided for under Article 171 of the constitution.

25. Miss Mugo contends that Article 162(1) is clear on the hierarchy of courts hence there is an appellate process for any aggrieved party. Counsel relies on the decision in Samuel Kamau Macharia & another v Kenya Commercial Bank and another (supra) to submit that this court has no jurisdiction to handle cases that have been heard and determined the Court of Appeal. She submits that the decision in Re Pinochet [1999] UKHL 52(January 1999) was made by the same court and not by an inferior court as the petitioner asks of this court. Learned counsel further submits that Justice Okubasu is not a party to this petition and, therefore, no adverse findings can be made against him without giving him an opportunity to be heard.

1st Interested party's submission

26. Mr. Oyatta, learned counsel for the 1st interested party opposes the petition relying on the replying affidavit by Ben Muli. Learned counsel submits that the undisputed facts of the petition are captured in the various court rulings and judgments. Highlighting their written submissions dated 9th May 2018 and filed in court on the same day, learned counsel states that the petitioner has been instigating various cases to delay execution of the decree obtained in favour of the 1st interested party. Mr. Oyatta submits that when the petitioner lodged a complaint before the Vetting Board, they were reminded that the Vetting Board was not sitting on appeal. Learned counsel contends that the petitioner's case in the Court of Appeal was not the basis of Justice Okubasu's removal and that the Vetting Board did not find that the judge had been influenced.

27. He therefore submits that the issue of bias raised by the petitioner to support his petition is not valid. According to learned counsel, the impugned decision by the Court of Appeal was by a bench of 3 Judges including Justice Okubasu as the presiding judge and, for that reason; it was not his judgment but that of the bench. Counsel submits that the petitioner has not established bias against Justice Okubasu and urges that this petition be dismissed with costs.

Determination

28. I have considered this petition; responses thereto, submissions by counsel for the parties and authorities relied on. Although counsel addressed a wide range of issues, only one issue, in my view, arises for determination in this petition, namely; whether this court has jurisdiction to grant the reliefs sought in the petition.

29. The facts of this petition are not in dispute. The petitioner and 1st interested party have been involved in a number of litigations which ended up in the Court of Appeal. The relevant litigation in so far as this

petition is concerned was in HCCC No 367 of 2000 between the 1st interested party and the petitioner which was determined in the 1st interested party's favour. The petitioner lodged Civil Appeal No 149 of 2007 challenging that decision. The appeal was as usual heard by a bench of three Judges of Appeal presided over by Hon. Mr. Justice Okubasu but the petitioner lost the appeal.

30. After the promulgation of the new constitution and establishment of Judges and Magistrates Vetting Board, a complaint was lodged with the Board against Justice Okubasu. The Board considered the complaint and adjudged Justice Okubasu unfit to continue serving as a Judge leading to his removal as Judge of Appeal. The petitioner has now filed this petition contending that the judge was biased towards him in that appeal and as a result his rights and fundamental rights were violated. The petitioner in principle urges this court to annul the decision of the Court of Appeal and order that appeal to be heard afresh.

31. The respondents, 1st and 3rd interested parties have argued that this court has no jurisdiction to grant the reliefs sought and that there is no proof that there was bias towards the petitioner. They further contend that the impugned judgment was delivered by a bench of three judges and not justice Okubasu alone hence there could not have been bias by one Judge. They see no merit in the petition.

Whether the Court has Jurisdiction to grant the reliefs sought

32. Jurisdiction of a court is that authority reposed on the court of law to take cognizance of matters placed before it for adjudication. That jurisdiction may be general or specific, limited or unlimited. Jurisdiction of a court may be conferred by the constitution, statute or both. Whatever the case, the court as a creature of the constitution and the law, must only exercise the jurisdiction conferred on it.

33. The Supreme Court has spoken to this issue in a number of decisions. In the case of Samuel Kamau Macharia & another v Kenya Commercial Bank Ltd & another (supra) the Court stated;

> "(68) A Court's jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law."

34. The Supreme Court went on to refer to its earlier decision In the Matter of the Interim Independent Electoral Commission, Constitutional Application Number 2 of 2011 and stated;

> "Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation. Nor can Parliament confer jurisdiction upon a Court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of a Court of law or tribunal, the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

35. The legal position flowing from the above decisions is that a court of law must only exercise jurisdiction conferred on it either by the constitution, the law or both but cannot exercise jurisdiction it does not have, exceed jurisdiction conferred on it or even confer jurisdiction on itself through some form of innovation. Any action taken by the court without jurisdiction or exceeding jurisdiction would be unconstitutional and illegal.

36. To answer the issue before this court, the starting point must be the constitution itself. This court is established under Article 165(1) of the constitution. Its jurisdiction is donated by Article 165(3) which provides;-

> "(3) Subject to clause (5), the High Court shall have—
>
> (a) unlimited original jurisdiction in criminal and civil matters;
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> (b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;
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> (c) jurisdiction to hear an appeal from a decision of a tribunal appointed under this Constitution to consider the removal of a person from office, other than a tribunal appointed under Article 144;
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> (d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—
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> (i) the question whether any law is inconsistent with or in contravention of this Constitution;
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> (ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;
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> (iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and
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> (iv) a question relating to conflict of laws under Article 191; and
>
> (e) any other jurisdiction, original or appellate, conferred on it by legislation."

37. The petitioner has asked this court to annul the decision of the Court of Appeal in Civil Appeal No 149 of 2009 and order that appeal to be heard de novo. It has also sought in junctive reliefs to restrain execution of the decree in HCC No 367 of 2000 in a judgment that was delivered by a court of concurrent jurisdiction to this court, pending the hearing and determination of Civil Appeal No 149 of 2009 upon this court nullifying the said judgment.

38. Article 165(3) of the constitution confers on this court with very wide jurisdiction to deal with any matter that falls within its jurisdiction. That jurisdiction is not exhaustive given that Article 165(3) (e) states that the court can have any other jurisdiction, original or appellate, conferred on it by legislation. In terms of Article 165(3) (d) (ii), the court has jurisdiction to determine the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, the constitution. Article 23(1) also states that the court has jurisdiction to hear and determine applications for redress of denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. This jurisdiction is to be exercised in accordance with

Article 165 of the Constitution. Article 23(3) of the constitution undoubtedly confirms the extent of the width of the jurisdiction of this court to grant appropriate relief.

39. Mr. Gichuhi relies on the decision of the Supreme Court, (Mutungi, CJ (as he then was) in the case of Jasbir Singh Rai & 3 others v Tarlochan Singh Rai Estate & 4 others (supra) to argue that in case of violation of constitutional rights there is no remedy this court cannot grant. In the Rai cse, just like the case before this court, the Supreme Court was called upon to answer the question of injustice that was said to have been visited on the parties by the Court of Appeal and Mr. Nowrojee had gone to the Supreme Court and seeking to know whether the Constitution could countenance an injustice without redress; whether the Constitution could grant a right that, upon its violation and breach, there would be no remedy and whether there was an injustice the Supreme Court would be unable to redress.

40. Responding to those questions, Chief Justice Mutunga expressed himself thus;

> " [111]...The Kenyan Constitution has given the High Court the exclusive jurisdiction to deal with matters of violations of fundamental rights (Article 23 as read with Article 165 of the Constitution). The High Court, on this point, has correctly pronounced itself in a judgment by Justices Nambuye and Aroni, in Protus Buliba Shikuku v R, Constitutional Reference No. 3 of 2011, [2012] eKLR.
>
> (112) The Shikuku Case fell within the criminal justice system; it involved a claim of violation of the petitioner's fundamental rights by the Court of Appeal, in a final appeal. The trial Court failed to impose against the petitioner the least sentence available in law, at the time of sentencing. On the issue of jurisdiction, the learned judges, relying on Articles 20, 22, 23 and 165 of the Constitution, rightly held that the High Court had jurisdiction to redress a violation that arose from the operation of law through the system of courts, even if the case had gone through the appellate level. In so holding, the High Court stated with approval the dicta of Shield J, interpreting the provisions of the 1963 Constitution in Marete v. Attorney General [1987] KLR 690:
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> > "The contravention by the State of any of the protective provisions of the Constitution is prohibited and the High Court is empowered to award redress to any person who has suffered such a contravention."
> >
> > (113) Thus, in answer to Mr. Nowrojee's first two questions posed to the Supreme Court, my answer is this: There is no injustice that the Constitution of Kenya is powerless to redress."

41. In the Shikuku case, the High Court was considering a petition in which shikuku had claimed that his constitutional rights had been violated when he was sentenced to hang, which he argued was a maximum sentence and amounted to cruel and inhuman treatment. In that case, the court observed that the mandate of the court as spelt out in Article 23(1) is to be exercised in accordance with Article 165 of the Constitution. It stated that the mandate of the court is to hear and determine applications for "redress of denial, violation or infringement of, or threat to a right or fundamental freedom in the Bill of Rights."

42. I entirely agree with His Lordship, the retired Chief Justice, that there is no remedy the High Court is unable to grant under the constitution. This fact emerges clearly from Article 23 (3) of the constitution on the remedies the court can grant. The court is empowered to grant appropriate relief, including

declaration of rights, injunctions and conservatory orders among others, leaving no doubt that the reliefs grantable by the court are inexhaustible. They are at the discretion of the court depending on the facts and circumstances of each case.

43. As to what an "appropriate remedy" is I can do no better than refer to the definition adopted by the constitutional court of South Africa in the case of Fose v Minister of Safety and Security 1997(3) SA786 (CC) (7) BCLR 851 CC that;

> " [A]ppropriate relief will in essence be relief that is required to protect and enforce the Constitution. Depending on the circumstances of each particular case the relief may be a declaration of rights, an interdict, a mandamus or such other relief as may be required to ensure that the rights enshrined in the Constitution are protected and enforced. If it is necessary to do so, the courts may even have to fashion new remedies to secure the protection and enforcement of these all-important rights...In our context an appropriate remedy must mean an effective remedy"(emphasis)

44. And in Minister of Health & others v Treatment Action Campaign & others [2002] ZACC 15; 2002(5) SA 721 BCLR (CC), the same court observed that where a breach of any right has taken place, a court is under a duty to ensure that effective relief is granted, the nature of the right infringed and the nature of the infringement providing guidance as to the appropriate relief in the particular case.

45. In that regard, therefore, it is clear from both Articles 22 and 23 as read with Article 165(3) of the constitution that the court is to redress denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. That implies a petitioner would have to move the court for purposes of determining violation of rights and fundamental freedoms and thereafter, the court on being satisfied as to the violations, would prescribe appropriate redress on the basis of the facts and circumstances of the case.

46. Turning to the facts of this petition, the judgment sought to be annulled is by the Court of Appeal. It is therefore not in dispute that the impugned judgment is by a court superior to this court in terms of judicial hierarchy. It is a judgment binding on this court in terms of precedent. From the jurisdictional perspective of Article 165 of the constitution, this court has wide jurisdiction which is exhaustively provided for by the constitution. However, the constitution itself places a constitutional caveat that this court cannot supervise other superior courts.

47. Article 165(6) states in plain language that this court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial junction but not over a superior court. Superior courts in terms of Article 162 (1) of the constitution are the Supreme Court, the Court of Appeal, the High Court and courts of equal status namely; the Employment and Labour Relations Court and the Environment and Land Court. The edict in Article 165(6) is in form of a constitutional limitation imposed on this court not to do anything that would amount to supervising or superintending other superior courts.

48. Based on the above analysis, can this court answer the petitioner's grievance in the affirmative and annul a decision of the Court of Appeal taking into account the pecking order of the superior courts in this country? And can this court issue an edict to the Court of Appeal directing that court to reopen a closed appeal and hear it de novo? My answer to the above questions must be in the negative. If what the petitioner asks of this court were to happen, it would certainly amount to under mining the authority of the Court of Appeal by another superior court but inferior to it. It would be against clear words of Article 165(6).

49. The petitioner contends that one of the Judges on the bench that rendered the impugned decision was found unfit to serve by the Vetting Board hence that decision should not stand. That in my respectful view, cannot on its own grant this court jurisdiction to annul the judgment of the Court of Appeal and order the appeal to be heard afresh. Neither can this court attempt to exercise jurisdiction it does not have and direct the Court of Appeal to re-open a closed appeal and re-hear it. Moreover, the judgment was delivered on 2nd April 2009 while the Judge was removed on 25th April 2012. There was also no agreement among the parties that the sole reason why the judge was removed was that appeal. To my mind, it would amount to the highest degree of judicial mockery to grant the reliefs as the constitution contemplates no such action from this court either sitting as the High court or Constitutional court exercising its jurisdiction under Article 165 as read with Article 23(1) of the constitution.

50. This is also the case with regard to the judgment in HCC No 367 of 2000 that was delivered by a Judge of this court exercising judicial authority conferred by the constitution. This court though sitting as a constitutional court division of the High court does not have superior or special jurisdiction over the court that heard and determined HCCC No 367 of 2000. It is a court of concurrent jurisdiction and for that reason it can only exercise jurisdiction conferred on it by the constitution or legislation where appropriately moved, lest it acts beyond that jurisdiction.

51. In that regard therefore, although this court has wide jurisdiction to hear any dispute and grant appropriate relief, that is not a carte blanche to hear petitions and grant just about every relief merely because a party has come before it seeking some or other relief. The court must weigh the case before it and grant appropriate relief that circumstances of the case justify. A petitioner must first establish breach of the constitution, violation or infringement of rights and fundamental freedoms before the court can intervene which is not the case here.

52. When Chief Justice Mutunga stated in the Rai case that the High Court is empowered to award redress to any person who has suffered a contravention, he must be understood to have meant that where a party's rights and fundamental freedoms have been violated the party can move this court for "redress" because there is no right without a remedy. This would however imply that the party would have to establish violation of rights and fundamental freedom by actions or conduct of the respondent including decision(s) made by such a respondent. It was also in that context that Chief Justice Mutunga referred to the Protus Buliba Shikuku case with regard to the jurisdiction of this court to redress violations of rights and fundamental freedoms.

53. Mr. Gichuhi argues that Justice Okubasu was biased towards the petitioner and for that reason the judgment of the Court of Appeal in Civil Appeal No 149 of 2007 should be annulled. He relies on the decision of the constitutional of South Africa in Brian Patrick De Lacy & another v South African Post Office [2011] ZACC 17, contending that bias is a violation of constitutional rights which calls for this court's intervention in exercise of its jurisdiction under Article 165 as read with Article 23(1) of the constitution and annul the impugned judgment of the Court of Appeal.

54. In the Brian Patrick De Lacy decision, Moseneke DCJ, writing for the Court stated;

> "(47) A complaint of perceived judicial bias is a constitutional matter. There are several reasons for this, but stating a few should make the point. Judicial authority is an integral and indispensible cog of our constitutional architecture. Our supreme law vests judicial authority in the courts. It commands that courts must function without fear, favour or prejudice, and subject only to the Constitution and the law. It follows that, at all times, the judicial function must be exercised in accordance with the Constitution. At

a bare minimum this means that courts must act not only independently but also without bias, with unremitting fidelity to the law, and must be seen to be doing so.

(48) Thus when a litigant complains that a judicial officer has acted with bias or perceived bias he is in effect saying that the judicial officer has breached the Constitution and her oath of office. This is so because courts are final arbiters on the meaning of the Constitution and the law – a high duty that must be discharged without real or perceived bias. The issue is one of grave constitutional concern that demands the unfailing attention of the court seized with the complaint.

(49) Here, too, the trenchant indictment of judicial bias or of its apprehension instantly attracted constitutional concern. Another consideration is that once a claim of judicial bias is made, the judicial officer concerned would generally be entitled to a definitive outcome on the accusations. An accusation of bias, however frivolous, if not dispelled, may tarnish the judicial officer concerned and corrode public confidence in the judiciary as a whole. We are indeed seized with a constitutional matter."

55. I am in complete agreement with His Lordship that judicial bias would constitute an infringement on the right to fair hearing which is a core value in our constitutional set up. However, as Moseneke DCJ correctly observed, where a claim of judicial bias is made, the judicial officer concerned would be entitled to a definitive outcome on the accusations because accusation of bias, however frivolous, if not dispelled, may tarnish the officer concerned as well as erode public confidence in the judiciary as an institution.

56. In the present petition, the issue of bias is only being raised as the basis for this court's intervention to annul the judgment of the Court of Appeal merely because the court was presided over by Justice Okubasu who was later found unsuitable to serve as a judge and removed. Justice Okubasu is not a party to these proceedings even though no relief is sought against him as a person and the court has not heard from him either. That notwithstanding, a careful perusal of the petition before this court and more so the reliefs sought, gives the impression that all the petitioner wants is to have a second chance to litigate its appeal. This view is informed by the fact that, first; although the petitioner says that the Judge was biased, it has not attacked the other members of the bench who sat with Justice Okubasu and rendered that decision.

57. Second, the petitioner only complains about the Court of Appeal decision and wants it annulled by this court supposedly exercising its jurisdiction under Article 165 of the constitution. It does not question the decision of the High court that gave rise to that appeal. I am therefore, not persuaded that this court should take such judicial misadventure and attempt to annul a decision of a superior court for it is not sitting on appeal over the decision of another superior court. This court being a creature of the constitution, must exercise only the jurisdiction conferred on it by clear text of the constitution. Article 165(6) limits this court's jurisdiction in so far as supervision of other superior courts is concerned and for that reason, it cannot venture outside its jurisdiction without being seen to act unconstitutionally.

58. This calls for an interpretation of the jurisdiction of this court purposively and holistically to promote values and principles of the constitution as required by Article 259(1). A holistic reading of Articles 23(1) and 165 including 165(6) shows that this court cannot take the route the petitioner has asked it to go but must refrain from it and remain faithful to the constitution.

59. The petitioner relies on the decisions of the Court of Appeal in Standard Chartered Financial Services v Manchester Out fitters (supra) and Re Pinochet (supra) for the submission that courts set a side decisions in those cases and urges this court to do the same with regard to the impugned Judgment. The two cases are distinguishable from the petition before this court. What is clear in the two cases is that those decisions were set aside by the same courts that is; the Court of Appeal and the House of Lords respectively but not by inferior courts.

60. In my view, if the petitioner believed that its fundamental rights were violated by the decision of the Court of Appeal, its cause of action would have been to file a claim for redress of infringement and violation of rights and fundamental freedoms and prove infringement and violations after which the court would consider the appropriate remedy to grant. It did not have to seek this courts assistance in annulling a decision of a superior court and direction to that court to hear the appeal afresh. That would clearly violate the constitution and breach judicial hierarchical norm. To my mind, the intention of the framers of our constitution in including Article 165(6) was to confine the jurisdiction of this court to matters referred to in Article 165(3),(4) and (7) even when exercising its jurisdiction under Articles 22 and 23(1), (3) of the constitution in enforcing the Bill of Rights

61. It is true that Article 23(1) of the Constitution gives the court jurisdiction to be exercised in accordance with Article 165, to hear and determine application for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedom in the Bill of rights. That means this court can only redress denial, violation or infringement of, or threat to, a right or fundamental freedom. The redress contemplated in Article 23(1) is not in my view, in the nature of the reliefs sought in the present petition.

62. Looking at the prayers in the present petition, it is plain to me that petitioner not only seeks to have the judgment of the Court of Appeal annulled and the appeal heard a fresh, but also suspension of any execution of the judgment and decree of the decision of the High Court that gave rise to that appeal. I must state plainly and without equivocation that this Court, sitting a Constitutional and Human Rights Division of the High Court, has no jurisdiction to do s.

63. Before concluding, I must observe here, at the risk of repeating myself, that there seems to be a notion that is gaining currency that this court exercises special supervisory jurisdiction over other superior courts despite clear constitutional typology in Article 165(6). The Constitutional and Human Rights Division is not a creature of the Constitution and does not have special jurisdiction over Courts of concurrent jurisdiction, equal status or other superior courts and its decisions cannot override decisions of other Superior Courts. Neither can it attempt to undo decisions of those courts.

64. In Peter Muiruri v Credit Bank Limited and others (Civil Appeal No 23 of 2003) the Court of Appeal rejected this notion stating;

> " There is no provision in the Constitution which establishes what Nyamu J. referred to as the Constitutional Court. In Kenya we have a Division of the High Court at Nairobi referred to as "Constitutional and Judicial Review" Division. It is not an independent Court but merely a Division of the High Court. The wording of Section 67 of the constitution which donates the power to the High Court to deal with questions of interpretation of Sections of the Constitution or parts thereof does not talk about a Constitutional Court. Instead it talks about the High Court..... The Hon. The Chief Justice must have been aware that no such Court is established under the Constitution and that, we think, would explain why he created a Constitutional Division and not a Constitutional Court. The creation of the Constitutional and Judicial Review Division was an administrative act with the sole

> object of managing the cause list. The Chief Justice would have no jurisdiction to create a Constitutional Court as opposed to creating a Division of the High Court....The fact that a Constitutional Division was established did not by such establishment create a Court superior to a single judge of the High Court sitting alone. It would be a usurpation of power to push forward such an approach and whatever decision which emanates from a Court regarding itself as a Constitutional Court with powers of review over decisions of judges of concurrent or superior jurisdiction such decision is at best a nullity. Courts must exercise the jurisdiction and powers vested in them. ..." (emphasis)

65. This decision was followed by Lenaola, J(as he then was) in Philip Moi v Pluda Moi (Petition No 65 of 2012) and Mumbi Ngugi J who dealt with the same issue in the case of Robert Mwangi v Catering Ltd and another [2012]eKLR, rejecting as fallacious the notion that this court can undo decisions of other superior courts. (See also Robert Alai Onyango v Cabinet Secretary in charge of Health & 7 Others [2017] eKLR) and Construction and Contracting limited v Attorney General & another[2018] eKLR)

66. In conclusion therefore, having given due consideration to the petition, submissions, precedent and the law, and applied my mind to the constitution as well as the circumstances of this case, I am not persuaded that the petition meets the threshold for an application for redress of a denial, violation or infringement of, or threat to, a right or fundamental freedoms as contemplated in Article 23(1) of the constitution. For that reason the petition dated 15th October 2015 and amended on 12th November 2015 is declined and dismissed with costs to the 1st interested party.

DATED, SIGNED AND DELIVERED AT NAIROBI THIS 28TH DAY OF SEPTEMBER 2018

E C MWITA

JUDGE