



**Mugo v Judges and Magistrates Vetting Board & 2 others (Constitutional Petition 325 of 2013)  
[2018] KEHC 8891 (KLR) (Constitutional and Human Rights) (27 September 2018) (Ruling)**

*Murugi Gateria Mugo v Judges and Magistrates Vetting Board & 2 others [2018] eKLR*

Neutral citation: [2018] KEHC 8891 (KLR)

**REPUBLIC OF KENYA**

**IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)**

**CONSTITUTIONAL AND HUMAN RIGHTS**

**CONSTITUTIONAL PETITION 325 OF 2013**

**BT JADEN, J WAKIAGA, GWN MACHARIA, JM MATIVO & JO NYARANGI, JJ**

**SEPTEMBER 27, 2018**

**BETWEEN**

**HON LADY JUSTICE MURUGI GATERIA MUGO ..... PETITIONER**

**AND**

**THE JUDGES AND MAGISTRATES VETTING BOARD ..... 1<sup>ST</sup> RESPONDENT**

**THE HONOURABLE THE ATTORNEY GENERAL ..... 2<sup>ND</sup> RESPONDENT**

**THE JUDICIAL SERVICE COMMISSION ..... 3<sup>RD</sup> RESPONDENT**

**RULING**

1. The Petitioner herein, Hon. Lady Justice Murugi Gateria Mugo moved this court on 21<sup>st</sup> June 2013 through her Petition of even date brought pursuant to Articles 23 and 258 of the Constitution, Section 23 of the Sixth Schedule to the Constitution 2010 and Order 53 of the Civil Procedure Rules, 2010 seeking declarations and orders as follows:-
  - a) A declaration that on 7<sup>th</sup> August 2012 and thereafter when the Judges and Magistrates Vetting Board served Notice to File Response on the Petitioner and thereafter the Judges and Magistrates Vetting Board lacked jurisdiction under the Constitution of Kenya, 2010 as read with the Vetting of Judges and Magistrates Act, 2011 to vet or in any other manner deal with the Petitioner under the Vetting of Judges and Magistrates Act, 2011.
  - b) A declaration that the vetting, if any, of the Petitioner was inconsistent with the Constitution and is void and any determination by the 1<sup>st</sup> Respondent on the suitability of the Petitioner to continue to serve in the Judiciary as a Judge of the High Court or any other position she may be fit for is set aside.



- c) An order of certiorari is issued directed to the 1<sup>st</sup> Respondent calling up and quashing the record of the proceedings of the 1<sup>st</sup> Respondent, the Judges and Magistrates Vetting Board , and the determination made by the Board on the 21<sup>st</sup> December 2012.
  - d) An order of certiorari is issued directed to the 1<sup>st</sup> Respondent calling up and quashing the record of the proceedings of the 1<sup>st</sup> Respondent the Judges and Magistrates Vetting Board on the Petitioner’s application for review of the Board’s Determination of 21<sup>st</sup> December 2012 and the decision of the Board made on the 20<sup>th</sup> march 2013.
  - e) An order of prohibition is issued directed to the 3<sup>rd</sup> Respondent its servants, agents and employees prohibiting them not to take any action to facilitate or effect the removal of the Petitioner as a Judge of the High Court of Kenya based on the proceedings and Determination of December 21<sup>st</sup>, 2012 and Decision on review dated 20<sup>th</sup>, March 2013 of the 1<sup>st</sup> Respondent concerning the Petitioner.
  - f) An order of prohibition is issued directed to the 3<sup>rd</sup> Respondent, its servants, agents and employees prohibiting them not to take any action to facilitate or effect any early retirement of the Petitioner as a Judge of the High Court of Kenya based on the proceedings and Determination of December 21<sup>st</sup>, 2012 and Decision on Review dated 20<sup>th</sup> March of the 1<sup>st</sup> Respondent concerning the Petitioner.
  - g) An order of mandamus is issued and directed at the 3<sup>rd</sup> Respondent and the 2<sup>nd</sup> Respondent to jointly and severally ensure the independence of the Judiciary and to advise the State and concerned State officers and organs not to effect any removal of the Petitioner from the Judiciary as a Judge of the High Court of Kenya based on the proceedings and Determination of December 21, 2012 and Decision on Review dated 20<sup>th</sup> March of the 1<sup>st</sup> Respondent concerning the Petitioner.
  - h) A declaration that the Petitioner shall continue to be a Judge of the High Court of Kenya entitled to all her benefits and perks of office unless and until she reaches the retirement age of 74.
  - i) An order that the state shall pay the Petitioner such sum as to the court seems just and proper to compensate the Petitioner as general damages for loss of reputation and standing and unlawful and unconstitutional interruption of her service as a Judge of the High Court of Kenya.
  - j) An order for costs as the Court may deem reasonable and just to grant in the circumstances of the case.
  - k) Pending the hearing and determination of the Petition and interim and conservatory order of stay is issued to stay the Determination of the 1<sup>st</sup> Respondent dated 21<sup>st</sup> December 2012 and the Decision on Review dated 20<sup>th</sup> March 2013 and to preserve the status of the Petitioner as a Judge of the High Court of Kenya entitled to her full remuneration and all perks of office extant at 21<sup>st</sup> December 2012 so that the Petitioner remains a Judge of the High Court of Kenya pending the hearing and determination of this Petition and all interlocutory application connected with the Petition.
  - l) Or that such other order as this honorable court shall deem just be made and issued.
2. The Petition is premised on grounds on the face of it and a verifying/supporting affidavit of the Petitioner sworn on 21<sup>st</sup> June 2013 wherein she challenged the determination of the Vetting Board (1<sup>st</sup> Respondent) declaring her unsuitable to continue serving as a Judge on grounds that she was found to



be incorrigible and temperamental. It was the Petitioner's contention that both the determination and subsequent dismissal of her review application on 20<sup>th</sup> March 2013 were in contravention of Section 23 (1) of the 6<sup>th</sup> Schedule of the Constitution in that, she was vetted outside the contemplated statutory time permissible under the said Section and Constitution thus exposing the Vetting Board to lack of jurisdiction to make any determination leading to her removal from service and that any action outside the stated time is unconstitutional and a violation of her rights.

3. The main grounds and arguments upon which this Petition is anchored can be summarized as follows:-
  - a. that the period within which Parliament could enact any legislation on the vetting process and its mechanisms and procedures was strictly limited by the Constitution to be "within one year after the effective date" hence the last date for any legislation was on the 27<sup>th</sup> August 2011;
  - b. that there was no authority in the Constitution for enlarging time beyond 27<sup>th</sup> August 2011 within which legislation for time frames and mechanisms and procedures could be made;
  - c. that the Petitioner was unprocedurally declared unsuitable outside the contemplated legislation; that section 22(1) of the Vetting of Judges and Magistrates Act providing for review of the Board's decisions was unconstitutional and in contravention of Article 47(3) with regard to fair administrative action as well as denial to the right to fair hearing contrary to Article 50; . that commission of ultra vires actions by the Board in considering complaints from the Rift Valley Law Society of Kenya among them temperament which complaint had long been settled in the year 2006;
  - e. that the Board's allegation that its decision was arrived at by a full Board is false and a procedural defect calling for it to be set aside since the determination was made by a panel of three; that the Petitioner was condemned of a spent complaint made by one Mulwa Advocate who never appeared before the Board to prove his case hence a breach of the rules of natural justice;
  - f. that by conducting a review process before the same panel that had found her unsuitable was akin to making a Judge sitting on his own cause;
  - g. that the Board's decision was not substantiated based on materials before it hence deviating from its previous bench marks;
  - h. that the Board's decision did not meet legitimate expectations of the Petitioner based on express promise by the Board that its decisions were to be fair, just, equitable, reasonable and constitutional a promise it failed to deliver;
  - i. that the exercise of bias against the Petitioner as the Board's decision was pre-determined;
  - j. failure to honour the principle of proportionality test in that it acted against public interest as no litigant was called upon to confirm being a victim of the Petitioner's temper.
4. Simultaneously filed with the Petition is the Chamber Summons dated 21<sup>st</sup> June 2013 supported by an affidavit sworn on the same date by the Petitioner seeking; leave for judicial review orders of certiorari, prohibition and mandamus as pleaded in paragraph 22 of the Petition; conservatory interim order of stay to the 1<sup>st</sup> Respondent's determination of 21<sup>st</sup> December 2012 and review dated 20<sup>th</sup> March 2013 pending hearing and determination of the Petition and lastly; stay orders against the 2<sup>nd</sup> and 3<sup>rd</sup> Respondents being chief government legal advisor and employer to the Petitioner respectively directing that she should not be removed from service and that all her benefits pertaining to the office of a Judge be retained.



5. The aforesaid prayers were granted on 24<sup>th</sup> June 2013 at the ex parte stage. The Respondents were subsequently served with the Petition and application. At the same time, the court referred the file to the Hon. The Chief Justice to constitute a three Judge bench in compliance with Article 165 (4) of the Constitution to consider and determine the novel issues in controversy. Consequently, the bench was constituted.
6. On the 9<sup>th</sup> September 2013, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed a replying affidavit to the Petition sworn on the 6<sup>th</sup> September 2013 by one Reuben Chirchir, the Chief Executive Officer and Secretary to the 1<sup>st</sup> Respondent in which he averred that the vetting process was legally and procedurally conducted and carried out in accordance with the law and that the applicant was given a fair hearing including review process. The 1<sup>st</sup> Respondent basically contended that the extension of the timelines was done within the parameters of the constitutional and statutory provisions and that the vetting process of the Petitioner was not outside the time frames and therefore not unconstitutional. At Paragraph 24, they intimated of raising a Preliminary Objection on a point of law citing lack of jurisdiction by the High Court pursuant to Section 23 (2) of the 6<sup>th</sup> Schedule of the Constitution.
7. In response to the replying affidavit, the Petitioner filed a further affidavit dated 5<sup>th</sup> November 2017 and filed on 17<sup>th</sup> November 2017 emphasizing that the vetting process was outside the contemplated legislation.
8. From the court record, the 3<sup>rd</sup> Respondent does not appear to have filed any response to the Petition.
9. On 8<sup>th</sup> December 2014, Mr. Mwenesi then appearing for the Petitioner, Mr. Njoroge for the 1<sup>st</sup> and 2<sup>nd</sup> Respondents and Mr. Issa for the 3<sup>rd</sup> Respondent engaged in a detailed argument regarding the jurisdiction of the court in hearing the matter in view of the Supreme Court decision in Judges and Magistrates Vetting Board & 2 Others vs. Centre for Human Rights and Democracy & 11 Others (2014)eKLR (hereinafter referred to as JMVB1), in which the court declared that the decision of the 1<sup>st</sup> Respondent was final. The Petitioners therein were ordered to list their cases for disposal within 15 days.
10. After hearing arguments from the parties on the issue, the court referred the file to the Honourable The Chief Justice recommending that the matter be placed before a bench of five Judges already handling similar issues in various Petitions consolidated and heard under Judicial Review application, namely, Justice Jeanne W. Gacheche & 5 others v Judges and Magistrates Vetting Board & 2 others [2015] eKLR.
11. Subsequently, the matter was placed before a bench of five Judges which was also handling the above case, but, on 24<sup>th</sup> April 2015 the court held that it had no jurisdiction to entertain any Petition challenging the 1<sup>st</sup> Respondent's decisions. The Court directed that the Petitioner was at liberty to pursue her Petition independently as she was not directly affected by the Supreme Court decision in JMVB 1.
12. On 15<sup>th</sup> July 2016, parties were directed to file their submissions in readiness to proceed with hearing of the Petition. During the intervening period, the five Judge bench was reconstituted and the current bench empanelled. By the time the new bench was sitting on 20<sup>th</sup> July 2017, the 1<sup>st</sup> Respondent's extended tenure had lapsed hence, there was no appearance for the 1<sup>st</sup> Respondent as Mr. Kanjama then appearing for the Board had ceased acting for lack of instructions. Nevertheless, the Hon. Attorney General came on record for the 1<sup>st</sup> Respondent. At the same time Mr. Mwenesi withdrew from acting for the Petitioner and in his place the firm of Ongoya & Wambola came on record for the Petitioner.



13. On 4<sup>th</sup> December 2017, the 3<sup>rd</sup> Respondent filed a Preliminary Objection dated 29<sup>th</sup> November 2017 stating:-
  - a. That this honourable court has no jurisdiction to hear and determine the Petition herein by dint of the orders issued by the Supreme Court in its judgment delivered in Petition No. 13A of 2013 (as consolidated); Judges and Magistrates Vetting Board and 2 others vs Center for Human Rights and Democracy and 11 Others (2014) eKLR.
14. On 19<sup>th</sup> April 2018, this matter came up for directions for hearing of the Preliminary Objections before the full bench. With the consent of the parties, the court directed that the Preliminary Objections proceed first and directed the parties to file written submissions on the objections and scheduled the matter for highlighting on the 24<sup>th</sup> May 2018. Subsequently, the 1<sup>st</sup> and 2<sup>nd</sup> Respondents filed their submissions together with authorities on 26<sup>th</sup> April 2018. The 3<sup>rd</sup> Respondent filed its submissions together with its list of authorities on 18<sup>th</sup> May 2018 and the Petitioner responded by filing hers including authorities on 31<sup>st</sup> May 2018. On 31<sup>st</sup> May 2018, parties appeared for highlighting on their submissions.

#### **Issues for determination.**

15. We have carefully considered the facts of the case and the respective rival submissions. We have deduced that the following issues arise for determination:-
  - a. Whether the objection raised by the Respondents raises pure points of law.
  - b. Whether the Petitioner was vetted outside the vetting period under the contemplated legislation.
  - c. Whether the issues presented in this Petition have conclusively been determined by the Supreme Court of Kenya, and whether by dint of Article 163 (7) of the Constitution, this Court lacks jurisdiction.

#### **Whether the objection raised by the Respondents raises pure points of law.**

16. The 1<sup>st</sup> and 2<sup>nd</sup> Respondents' Preliminary Objection stems from an averment in paragraph 24 of the Replying Affidavit of Mr. Chirchir in which he averred that the court has no jurisdiction in light of the ouster clause provided in section 23 (2) of the Sixth Schedule of the Constitution. Mr. Marwa adopted his arguments presented in Nairobi High Court Petition Number 320 of 2013 between Hon. Justice Leonard Njagi vs The Judges and Magistrates Vetting Board & 2 Others in which a similar objection was raised. The said case and the instant one were heard on the same day. Mr. Marwa's argument in both cases was that the ouster clause under the said provision is a pure point of law which qualifies to be a Preliminary Objection.
17. The 3<sup>rd</sup> Respondent's Preliminary Objection is premised on one point, namely, that the issues presented in this Petition have conclusively been determined by the Supreme Court in Judges and Magistrates Vetting Board and 2 others vs Center for Human Rights and Democracy and 11 Others (2014)eKLR (herein after referred to as JMVB1). M/s Lipwop also adopted her submissions in Petition Number 320 of 2013 (supra) in which she argued that the prayers sought cannot be granted by virtue of the principle of stare decisis under Article 163 (7) of the Constitution.
18. Counsel argued that in view of the Supreme Court decision in JMVB1 on section 23 (2) of the Sixth Schedule to the Constitution, this Court is bound to down its tools for want of jurisdiction. She cited



the case of Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR and Leonard Njagi vs Judicial Service Commission (2015) eKLR.

19. In response, Mr. Ongoya for the Petitioner adopted the submissions rendered by Mr. Mwenesi for the Petitioner in Petition Number 320 of 2013 (supra). In the said case, Mr. Mwenesi opposing the objection urged the court to carefully and critically consider the parameters for consideration before granting a Preliminary Objection. He opined that before a court could grant a Preliminary Objection, there must be a pure point of law for it to succeed. He argued that the inquiry the Petitioner is calling for cannot be taken in the determination of a Preliminary Objection. In his view, the Preliminary Objection is asking this court to examine the Petition to see whether there are facts or points of law in it which meet the categories of matters determined by the Supreme Court. He maintained that there is no pure point of law on which the Preliminary Objection is premised.
20. Mr. Mwenesi cited the case of John Mundia Njoroge and 9 others vs Cecilia Muthoni Njoroge and Another (2016) eKLR where the court outlined the essentials for consideration before allowing a Preliminary Objection. Further reliance was placed on Mukhisa Biscuit Manufacturers vs West End Distributors (1969) EA 696.
21. In addition, Mr. Ongoya in his written submissions filed on 31<sup>st</sup> May 2018 argued that a Preliminary Objection must be able to dispose of a suit in limine and that it should be argued on the assumption that all facts pleaded by the other side are correct.
22. The key question here is, whether the Preliminary Objection under consideration raises a pure point of law. The Black's Law Dictionary 10<sup>th</sup> Edition defines a Preliminary Objection as:-

“In a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary”.
23. In the case of Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd. (supra), the court shed light on what constitutes a Preliminary Objection as follows:-

“...a Preliminary Objection raises a pure point of law, which is argued on the assumption that all the facts pleaded by the either side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion.”
4. A similar position was held by the Supreme Court in the case of Hassan Ali Joho and Another vs Suleiman Said Shabal and 2 Others, (2014) eKLR where the court stated that:-

“...a Preliminary Objection consists a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit”.
25. In the well celebrated and most frequently referred to case of Owners of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (supra) Nyarangi JA 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 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”.



26. This position was pronounced in the case of Kalpana H. Rawal and 2 Others vs Judicial Service Commission and 6 Others (2016) eKLR where the court held:-

“(28) – it is important to note that although preliminary objections are more often than not based on lack of jurisdiction, it is not the only ground. It is for that reason that, Law J.A in Mukhisa Biscuit Co. gave jurisdiction and limitation of time only as examples of the grounds of raising Preliminary Objection. The list should not therefore be regarded as closed depending on the facts of raising a Preliminary Objection”.

27. In John Mundia Njoroge and 9 Others vs Cecilia Muthoni and Another (Supra) the Court held that:-

“..., a Preliminary Objection can be raised on any of the following grounds –

- (a) Lack of jurisdiction over the subject matter of the action or the person of the defendant, improper venue or improper form or service of a writ of summons or complaint.
- (b) Failure of a pleading to conform to law or rule of court or inclusion of scandalous or impertinent matter.
- (c) Insufficient specificity in a pleading.
- (d) Legal insufficiency of a pleading (demurrer).
- (e) Lack of capacity to sue, non-joinder of a necessary party or mis-joinder of a cause of action;
- (f) Pendency of a prior action or agreement for alternative dispute resolution.

28. The Supreme Court of Kenya addressing the effect of Preliminary Objections in disposing of matters pronounced itself as follows in the case of Independent Electoral and Boundaries Commission vs Jane Cheperenger & 2 Others (2015) eKLR:-

“(21) -The occasion to hear this matter accords us an opportunity to make certain observations regarding the recourse by litigants to Preliminary Objections. The true Preliminary Objection serves two purposes of merit. Firstly, it serves as a shield for the originator of the objection – against profligate deployment of time and other resources. And secondly, it serves the public cause, of sparing scarce judicial time, so it may be committed only to deserving cases of dispute settlement. It is distinctly improper for a party to resort to the Preliminary Objection as a sword, for winning a case otherwise destined to be resolved judicially, and on the merits”.

29. The Respondents' Preliminary Objections are premised on the following two grounds:- First, that the issues raised in this Petition have been determined by the Supreme Court. This objection is grounded on Article 163 (7) of the Constitution which provides that all courts, other than the Supreme Court are bound by the decisions of the Supreme Court. To us, this is a pure point of law.

30. Second, the other objection is based on Section 23 (2) of the Sixth Schedule to the Constitution which 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." A clear reading of the dictionary and judicial pronouncements of what constitutes a pure point of law leads us to the irresistible conclusion that this is a pure point of law.

**Whether the Petitioner was vetted outside the vetting period under the contemplated legislation.**

31. Mr. Marwa adopted his submissions in Petition Number 320 of 2013 (supra) where he submitted that the vetting process was a creature of the Constitution which process was undertaken lawfully and in compliance with the law as set out in section 18 of the Vetting Act. He submitted that the Act came into force on 22<sup>nd</sup> March 2011 and was extended to 28<sup>th</sup> February 2012 and later to 31<sup>st</sup> December 2013. That the term of office for the 1<sup>st</sup> Respondent was procedurally extended in accordance with section 23(1) of the Sixth Schedule the legality of which the Supreme Court acknowledged in its Judgment in JMVB1 at paragraph 99.
32. On this issue, Mr. Ongoya again adopted Mr. Mwenesi's submissions in Petition Number 320 of 2013 (supra). In the said case, Mr. Mwenesi submitted that the Petitioner in the said case was declared unsuitable after the expiry of the Board's term of office, hence, his vetting and determination of unsuitability to serve was unlawful and unconstitutional. Mr. Mwenesi also argued that the one year extended mandate of the Board could not be said to be within the contemplated legislation pursuant to Section 23 (1) & (2) of the Sixth Schedule and Article 261 of the Constitution which provided for extension of the Board's term for only one year. He stated that the legislation for the mechanisms for vetting was to be enacted within one year from 27<sup>th</sup> August 2010, that is, by 27<sup>th</sup> August 2011 and argued that clause (2) of Article 261 empowered the National Assembly to pass a resolution extending the time within which the legislation could be enacted. In Mr. Mwenesi's words, there could be only one extension not exceeding one year. He added that the time could only be extended by a positive resolution of the National Assembly to 27<sup>th</sup> August 2012. Also, he argued that there is no evidence anywhere of any positive resolution of the National Assembly to permit any amendment to the Vetting of Judges and Magistrates Act, 2011 let alone to enact such amendment beyond 27<sup>th</sup> August 2012. He added that the Petitioner cannot suffer out of an illegality which this court cannot close its eyes to, worse still, on an issue that the Supreme Court never addressed.
33. Additionally, Mr. Ongoya submitted that the Petitioner was vetted, declared unsuitable on 21<sup>th</sup> December 2012 and her review dismissed on 20<sup>th</sup> March 2013 which was totally outside the contemplated legislation. He urged the court to determine whether the Board had time jurisdiction over the Petitioner as at the time it purported to vet and determine her unsuitability to serve.
34. Learned Counsel asserted that Article 261 (1), (2) and (3) which provided for expansion of the Board's mandate for not more than one year must be read conjunctively and not disjunctively in that extension of the Board's timelines was permitted only once upon the Speaker's certificate to the National Assembly stating exceptional circumstances. He further argued that any extension more than once as it happened in this case was unconstitutional and that the court cannot down its tools, close its eyes and conduct an illegality perpetrated without question. Referring to the case of Anisminic Ltd. vs foreign Compensation Commission (1968) APPLR 12/17, Mr. Ongoya urged the court to give Article 261(1) & (3) of the Constitution its strictest interpretation.
35. Lastly, Mr. Ongoya pleaded with the Court not to dismiss the Petition at the preliminary stage as the same has raised pertinent Constitutional issues which should be canvassed substantively in exercise of the High Court's inherent supervisory powers under Article 165(6) of the Constitution and a determination made on merit without resorting to shortcuts by way of preliminary objections which have no basis and do not meet the criteria.



36. Turning on to the issue under consideration, Section 23 (1) of the Sixth Schedule provides as follows:-

“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 time frame to be determined in the legislation, the suitability of the Judges and Magistrates who were in office in the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159”.

37. Pursuant to the above provision, Parliament enacted the Vetting Act. Section 23(1) (2) thereof reads as follows:-

- (1) The vetting process once commenced shall not exceed a period of one year, save that the National Assembly may, on the request of the Board extend the period for not more than one year.
- (2) The vetting process once commenced shall be concluded not later than the 31<sup>st</sup> December, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.

38. Needless to state, the contemplated legislation under section 23 (1) of the Sixth Schedule is the Vetting Act which was assented to on 21<sup>st</sup> March 2011 and commenced on 22<sup>th</sup> March 2011. One year after the commencement date lapsed on 21<sup>st</sup> March 2012. Any extension beyond the latter date would only be effected in conformity with Article 261 (1) (2) & (3) of the Constitution which provide as follows:- 261.

- (1) Parliament shall enact any legislation required by this Constitution to be enacted to govern a particular matter within the period specified in the Fifth Schedule, commencing on the effective date.
- (2) Despite clause (1), the National Assembly may, by resolution supported by the votes of at least two-thirds of all the members of the National Assembly, extend the period prescribed in respect of any particular matter under clause (1), by a period not exceeding one year.
- (3) The power of the National Assembly contemplated under clause (2), may be exercised—
  - (a) only once in respect of any particular matter; and
  - (b) only in exceptional circumstances to be certified by the Speaker of the National Assembly.

39. The vetting period having expired, Parliament enacted the Vetting of Judges and Magistrates (Amendment) Act, No. 43 of 2012 which was assented to on 13<sup>th</sup> December 2012 and commenced on 14<sup>th</sup> December 2012, extending the vetting process to 31<sup>st</sup> December 2013. Section 8 thereof provides that:-

“Section 23 of the principal Act is amended by deleting subsections (2) and (3) and substituting therefore the following subsections-

- (2) The vetting process, once commenced, shall be concluded not later than the 31<sup>st</sup> December, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.



- (3) Despite subsection (2), the Board shall conclude the process of vetting all the Judges, chief Magistrates and principal Magistrates not later than the 28<sup>th</sup> March 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.
40. The above period expired and Parliament enacted The Vetting of Judges and Magistrates (Amendment) Act No. 43 of 2013 which was assented to on 24<sup>th</sup> December, 2013 and commenced of 10<sup>th</sup> January, 2014. This amendment provided that Section 23 of the principal Act is amended- (a) in subsection (1) by deleting the words "a period of one year, save that the National Assembly may, on the request of the Board, extend the period for not more than one year" and substituting therefore by the words "the period specified by this section"; (b) in subsection (2) by deleting the expression "2013" and substituting therefore the expression "2015."
41. Consequently, the principal Act was amended. The relevant provision provides as follows:-
23. Time frame
- (1) The vetting process once commenced shall not exceed the period specified by this section.
- (2) The vetting process, once commenced, shall be concluded not later than the 31<sup>st</sup> December, 2015 and any review of a decision of the Board shall be heard and concluded within the above specified period.
- (3) Despite subsection (2), the Board shall conclude the process of vetting all the Judges, chief Magistrates and principal Magistrates not later than the 28<sup>th</sup> March, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.
42. The Petitioner's argument is that the vetting process and the resultant determination declaring her unsuitable to continue to serve as a Judge of the High Court rendered on 21<sup>st</sup> December 2012 and the subsequent review delivered on 20<sup>th</sup> March 2013 was unconstitutional on the ground that the process was undertaken outside the contemplated legislation.
43. A perusal of the Petitioner's Hansard before the Board at pages 322 and 420 of the Petitioner's bundle of documents reveals that the Petitioner appeared before the Board for vetting on 27<sup>th</sup> November 2012 and on 3<sup>th</sup> December 2012 respectively. As stated above, the Act commenced on 22<sup>nd</sup> March 2011 and expired on 21<sup>st</sup> March 2012. Thus, her appearance before the Board on 27<sup>th</sup> November 2012 and 3<sup>rd</sup> December 2012 was evidently after the Board's term had lapsed and before the term was extended pursuant to Article 261 of the Constitution. This is confirmed by the fact that the extension was effected on 14<sup>th</sup> December 2012 which extension was to remain valid until 31<sup>st</sup> December 2013. However, we note that the determination and Review made on 21<sup>th</sup> December 2012 and 20<sup>th</sup> March 2013 respectively were within the time frame.
44. A similar issue was considered by the Supreme Court in JMBV1 where the Court rendered itself at paragraph 99 as follows:-
- “By virtue of the above amendments, the legislature changed the initial time frame- within which the vetting board would carry out the vetting process, at the request of the board itself. First, the legislature extended the vetting process to a period exceeding the initial one year, upon request. Second, it extended the period of completion of the vetting process after



its commencement, from 31<sup>st</sup> December 2013 to 31<sup>st</sup> December 2015- an additional 2years as from the initial conclusion date. This time-frame gives the valid span of time within which the vetting board carries out its functions, and any functions outside the valid time frame would be contrary to the law."

45. At paragraph 234 of JMVB1, the Supreme Court proceeded to state inter alia that "...it is finally time for this Court to affirm with finality, that the vetting process was a constitutional-transitional imperative, a kin to a national duty upon every judicial officer to pave way for judicial realignment and reformulation."
46. As stated elsewhere in this ruling, Supreme Court determinations are binding to this court by dint of Article 163 (7) of the Constitution. However, as stated above, a simple tabulation of time as enumerated above leaves us with no doubt that as at the time the Petitioner appeared before the Board for the first time, its lifespan had lapsed. It appears to us this issue was not specifically addressed by the Supreme Court when it held that no court in Kenya has jurisdiction to entertain cases relating to determinations rendered by the Board. In view of the binding nature of Supreme Court decisions, we find no need to address this issue further.

**Whether the issues presented in this Petition have conclusively been determined by the Supreme Court of Kenya, and whether by dint of Article 163 (7) of the Constitution, this court lacks jurisdiction.**

47. Regarding the issue under consideration, Mr. Marwa adopted his submissions made in Petition Number 320 of 2013 (supra) whereby he submitted that the Petitioner went through due process and was given a fair hearing in obedience to Article 50 of the Constitution which included review process as provided under the Vetting Act. That Section 23 (2) of the Sixth Schedule insulated decisions made by the Board as they were final when it came to determination affecting removal or process leading to removal of a Judge from office hence courts have no authority to question or review the decision in question.
48. He maintained that in the face of the Supreme Court decision declaring the Board's decision final and not subject to question or review by any court of law, this court is bound by that determination. He referred to JMVB1 in which the court held that:-

Paragraph-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 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".

49. He also referred to the High Court case of Nicholas Randa Ombija vs Judges and Magistrates Vetting Board (2015) eKLR, and the Supreme Court decision in Judges and Magistrates Vetting Board vs Kenya Magistrates and Judges Association and Another (2014) eKLR (hereinafter referred to as "JMVB2") in which both courts held that the decision of the Board was final and not subject to any question or review by any superior court. Counsel urged the court to find that the Petition was unmeritorious and a waste of judicial time hence should be dismissed with costs.



50. To buttress his position, counsel referred the court to the authority in the case of Speaker of the National Assembly vs James Njenga Karume(1992) e KLR where the court held that:-

“in our view, there is considerable merit in the submission that where there is a clear procedure for the redress of any particular governance prescribed by the Constitution or an Act of Parliament, that procedure should be followed”.

51. He contended that jurisdiction of any court flows from the law and that courts are bound by the same with any limitations embodied therein. To support his proposition, counsel referred the court to the case of In Re matter of Interim Independent Electoral Commission (2011) eKLR where the Supreme Court said:-

“The Lillian "S" case establishes that jurisdiction flows from the law, and the recipient Court is to apply the same, with any limitations embodied therein. Such a Court may not arrogate to itself jurisdiction through the craft of interpretation, or by way of endeavors to discern or interpret the intentions of Parliament, where the wording of legislation is clear and there is no ambiguity. In the case of the Supreme Court, Court of Appeal and High Court, their respective jurisdictions are donated by the Constitution.”

52. The 3<sup>rd</sup> Respondent’s Preliminary Objection is basically anchored on the determination of the Supreme Court’s decision in JMVB1 in which the Supreme Court held that no superior court had jurisdiction to interrogate a decision of the Board. Counsel for the party adopted her submissions in Petition Number 320 of 2013 (supra) in which she argued that the Petitioner had raised and relied on grounds and issues that had already been determined by the Supreme Court which overruled both the High Court and Court of Appeal who had previously held that a High Court had powers to question 1<sup>st</sup> Respondent’s decisions.

53. To bolster her position, learned counsel referred the court to the Supreme Court’s decision on similar issues in the case of JMVB 2 in which the court held:-

Paragraph-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”.

54. Based on the Supreme Court holding in the two Petitions, M/s Lipwop urged the court not to depart from the same as it is binding in compliance with Article 163 (7) of the Constitution. Further, learned counsel contended that the Petitioner’s prayers have been overtaken by events, courtesy of the Supreme Court’s decision hence no need to waste valuable judicial time on a matter that has already been settled and rested.

55. M/S Lipwop further referred the court to the constitutional requirement under Section 23 (2) of the Sixth Schedule of the Constitution which is a finality clause to the extent that the removal or process leading to the removal of a Judge is not subject to question or review by any court thus arguing that this court has no jurisdiction to hear the Petition and therefore should down its tools. To fortify her sentiments, learned counsel made reference to the celebrated case of the owners of the motor vessel “Lilian S” vs Cartex (Kenya) Ltd (supra).



56. As indicated earlier, Mr. Ongoya adopted Mr. Mwenesi's submissions in Petition Number 320 of 2013 (supra). In the said submissions, Mr. Mwenesi argued that:-

“... none of the superior courts, the Supreme Court included have ever ousted the supervisory jurisdiction of the High Court as provided under Article 165 (6) of the Constitution.

...the Supreme Court decisions in the stated Petitions did not oust the High Court's Jurisdiction in questioning decisions of the Vetting Board that were not compatible with the constitutional dictates in particular section 23(1) of the Sixth Schedule. He urged the court to interrogate the Constitution and more particularly the relevance and applicability of Section 23 (2) of the Sixth Schedule.

Mr. Mwenesi wondered as to where a litigant affected by blatant violation of his constitutional rights will go if the High Court were to shut its doors as suggested by the Respondents. He further stated that this court has powers to interrogate ultra vires, obiter dicta and per incurium findings of any precedent. Counsel referred the court to Paragraph 172 of the Supreme Court decision in JMVB1 where the Supreme Court recognized exercise of supervisory jurisdiction by the High Court hence called upon the court to distinguish the Supreme Court's finding in Paragraph 202 of the said Petition where it held that no court can question the decision of the Vetting Board and Paragraph 172 where it recognized the High Court as having supervisory powers over any other tribunal. Counsel referred the court to the Supreme Court Petitions JMVB1 and JMVB2 for consideration and the need to distinguish the two.”

57. In addition, Mr. Ongoya acknowledged the binding nature of the Supreme Court decision in the two Petitions pursuant to Article 163(7). He went further and argued that if the two Supreme Court decisions are read together, the court will arrive at a conclusion that it has marginal latitude to interrogate some aspects, hence the court can assume jurisdiction to question decisions made by the Board.

58. We have carefully and critically examined the above submissions and the law. The question that falls for determination is whether this court has jurisdiction in light of Section 23 (2) of the Sixth Schedule to the Constitution to exercise its supervisory jurisdiction under Article 165(6) of the Constitution in view of the Supreme Court's decision. Our task is to resolve the question whether this court can be called upon to exercise its supervisory jurisdiction over the Board's decisions. We have had the opportunity of evaluating the wording of Section 23 (1) of the Sixth Schedule and its import which boils down to constitutional and statutory interpretation with regard to the finality of the decisions of the Board. In *Bernard James Ndeda & 6 others v Magistrates and Judges Vetting Board & 2 others* [2018] eKLR, the court expounded on the meaning of interpretation of a statute as follows:-

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”. See *Natal Joint Municipal Pension Fund vs Endumeni Municipality* 2012 (4) SA 593 (SCA) at Paragraph 18.

59. It is trite that, in construing a statutory provision, the first and 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 in its plain, grammatical and ordinary language. If the provision is unambiguous and if from that provision the legislative intent is clear, the other rules of construction of its statutes need not be called into aid



save when the legislation intention is not clear. However, the courts would not be justified in so straying the language of the statutory provision as to ascribe the meaning which cannot be warranted by the words displayed by the legislature. In the words of Lord Greene M.R in the case of *Re A debtor* (No. 335 of 1947) (1948) 1 ALL ER 533 at Page 536 it was stated that:-

“there is one rule of construction for statutes and other documents, it is that you must not imply anything in them which is inconsistent with the words expressly used”.

60. If the language is clear and explicit, the court must give effect to it, for in that case the words of the statute speak the intention of the legislature. (See *War Bruton vs Loveland* (1832) 2 B at 480 for *Jindal CJ* at P 489) and (*Major General Tunyefunza vs A.G* Court of Appeal petition no.1 of 1996).

61. In the case of *P. Asokan vs Western India Plywoods Cannanore* AIR 1987 KER 103 the court expounded and shed more light on statutory interpretation as follows:-

“...in relation to the interpretation of statutes, courts have a positive role to play. If a section yields two different interpretations, that which leads to an arbitrary or shockingly unreasonable result has to be eschewed. If an interpretation is such that it will expose the enactment to a distinct peril of interpretation such that it will expose the enactment to a distinct peril of invalidation as offending a constitutional provision, the courts would be fully justified in reading down the provision and giving it an interpretation consistent with its constitutionality. Even the courts, without much of enthusiastic exuberance of judicial activism, can bring about just results by meaningful interpretation”.

62. It is indisputable that in construing a statute or constitutional provision, all provisions must be read in harmony and construed together (See *Olum and Another vs Attorney General* (2002) 2 EA 508). It is our view that the words used in Section 23(2) are plain, clear and unambiguous to the extent that, decisions of the Board established pursuant to Section 6 of the Vetting Act are final when it comes to removal, or a process leading to removal, of a Judge. Section 23(2) does not leave room for any form of intervention by any court of law. The provision is couched in mandatory terms and this court cannot change the meaning or imply something else other than pronounce the will of the people and the legislature.

63. What mischief was the finality clause in section 23 (2) of the Sixth Schedule intended to cure? Obviously, the process was insulated against litigation in any court of law as it was intended to be fast enough without subjecting it to unnecessary rules of evidence which would then clog the process and provoke conflict of interest by the then sitting Judges and Magistrates who were the subject of vetting.

64. Mr. Ongoya as we understood him, conceded that Section 23(2) ousts the jurisdiction of this court, but his contestation was that the Petitioner was not vetted in the manner contemplated under the Constitution and the Vetting Act. Further, he argued that where violations of the constitutional rights are alleged, this court should not cede its jurisdiction. He also submitted that the vetting process was undertaken outside the contemplated legislation, hence, his plea to this court to declare the process and the determination unconstitutional.

65. A common ground of the Preliminary Objections raised by the Respondents was that the issue of jurisdiction by any superior court in questioning or reviewing decisions of the Board has been sealed or determined by the Supreme Court in *JMVB1* and *JMVB2* hence no other superior court can review or question the same.

66. The issue of the High Court having what Mr. Ongoya referred to as marginal latitude (residual supervisory powers) in interrogating decisions of the Board under Article 165(6) has been subject of



deliberations in all the superior courts. Mr. Ongoya re-stated that the Supreme Court had recognized the role of the High Court in exercise of its supervisory powers at paragraph 172 of JMVB1 in which the court held that:-

“The ultimate power of interpretation of the Constitution, or the statutes, rests with the court. The Courts, therefore, will always jealously guard their jurisdiction, and save it from being inappropriately curtailed. The preliminary question as to whether the High Court has jurisdiction, eminently falls in the first place to that Court. The High Court has the obligation to consider the question carefully, in the light of all relevant law, and on the basis of legal reasoning and of constructive precedent, thereafter determining whether or not it has jurisdiction in that particular instance. In a case such as the instant one, in which it was alleged that the Constitution’s fundamental rights and freedoms had been violated, the High Court, on a prima facie basis, indeed had the jurisdiction to determine whether or not it had jurisdiction, in the light of the ouster clause.”

67. However, in the same Judgment at paragraph 213, Mutunga, CJ in a concurring opinion dismissed the argument that the High Court had any residual supervisory powers in questioning the 1<sup>st</sup> Respondent’s decisions and rendered himself thus:-

Paragraph 213-“Thus, the ouster clause in issue in this matter ought to be strictly construed as a transitional clause, in the context of Kenya’s unique historical background. The supervisory jurisdiction of the High Court, should remain in abeyance during the vetting process-as this is what the Kenyan people demanded. The peoples’ voice is clearly and unambiguously sounded in the Constitution, and it remains supreme. What Kenyans wanted and envisaged was a new Judiciary, that they would have confidence in-with the new Judges being selected through a competitive process by the Judicial Service Commission, and the sitting Judges undergoing a vetting process, undertaken by an independent body, the Vetting Board. The voice of the people cannot be silenced or subverted by any Court of law, or any other institution.”

68. From the two holdings, it is clear that any intervention by the High Court has no room and therefore not within its remit to review the decision of the Board which is final. The holding in paragraph 213 is worded in such language that subdues paragraph 172 which can apply in the absence of constructive precedent. In this case there is precedent that the High Court has no jurisdiction. To that extent, we are of the considered view that we do not have jurisdiction under section 23 of the Sixth Schedule to question the 1<sup>st</sup> Respondent’s decision.
69. The issue of jurisdiction of the High Court to exercise its supervisory power over subordinate courts or tribunals in this case the Board under Article 165(6) has been an endless subject in the Kenyan judicial system. The High Court has also pronounced itself on the subject in *Dennis Mogambi Mong’are v Attorney General & 3 others* [2011] eKLR which decision was upheld by the Court of Appeal in *Dennis Mogambi Mong’are v Attorney General & 3 others* [2014] eKLR where it was held by both courts that the High Court had jurisdiction to question the 1<sup>st</sup> Respondent’s decisions if found to be in violation of the Constitution. However, the Supreme Court being the apex court in the land held to the contrary to the effect that no superior court has powers to question any decision of the Board, thereby overruled the above decisions.



70. For clarity purposes, we wish to reproduce the specific texts and/or pronouncements made by the Supreme Court in JMVB1 where the court held that the High Court lacks jurisdiction to adjudicate upon decisions of the Board regarding the suitability of a Judge or magistrate to continue serving.

Paragraph-190-Both superior courts held that a right of appeal from the determination made by the Judges and Magistrates Vetting Board could not be read from the terms of the Judges and Magistrates Vetting Act, or from Section 23 of the Sixth Schedule to the constitution. It was held that the Constitution had foreclosed the possibility of appeal to a higher court, and such a right could not be judicially implied.

Paragraph-191-In our perception, just as in that of the learned High Court and Court of Appeal Judges in the Dennis Mogambi Mong'are case, the ouster clause is not devoid of valid and defective grounding in law. The Constitution itself speaks from the platform of Article 262 (on "transitional and consequential provisions"), and by Section 23(2) of its Sixth Schedule, declaring thus:

"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 review by any court".

Paragraph-192-Hardly any cogent argument has been advanced before this Court, that the Judges and Magistrates Vetting Act, which implements the ouster clause, is not indeed the legislation contemplated under Section 23(1) of the Sixth Schedule to the Constitution; and as there is no other legislation such as would claim that status, we have come to the conclusion that there is nothing out of harmony in the common purpose of the Constitution, Section 23 of its Sixth Schedule, and the relevant statute – the Judges and Magistrates Vetting Act.

Paragraph-193-It follows that a contest to the decision of the Judges and Magistrates Vetting Board, in so far as such a decision affects particular Judges involved in the vetting process, is in effect, a collateral challenge to the Board's authority: and this would be inconsistent with the terms of the Constitution.

Paragraph-194-The foregoing point clearly falls within the relevant historical context. It is to be recalled that the vetting process for judicial officers was the people's command, for the purpose of aligning the Judicial Branch to the new Constitution. Such a design is clear from the fact that the vetting process was defined by a restricted, transitional time-frame the logistics of which were regulated by a dedicated Schedule to the Constitution. The transitional concept is well depicted in the dissenting Judgment of Lady Justice Sichale at the Court of Appeal, as follows:

"When a new Constitution is introduced, a range of provisions (is)needed to ensure that the move from the old order to the new order is smooth and, in particular,...the changes expected by the new Constitution are...effectively [implemented] [so as to sustain] [the] institutions that are retained under the new Constitution... [Such]transitional provisions...are usually not included in the body of the Constitution because they have a temporary lifespan. Instead they are included in a schedule which is part of the Constitution but, because it is appended at the end..., its provisions will not interfere with the permanent provisions of the Constitution in the future".



Paragraph-198-It emerges, as we have set out in detail, that the process of vetting for Judges and Magistrates is a requirement of the Constitution of Kenya, 2010; and that by a valid ouster clause, the main question which relates to the suitability of a judicial officer to continue in service under the new constitutional dispensation, is a matter reserved by law to the Judges and Magistrates Vetting Board. Not only is this the only tenable position in our perception, but it also emerges from relevant authority relied upon by Sichale, JA in her dissenting opinion: *Harrikison v Attorney General of Trinidad and Tobago* (1979) 31 WIR 348. The learned Judge made the following apposite inference:

“I am of the opinion that a court would be acting improperly if a perfectly-clear ouster provision of the Constitution of a country [in] which it is [the] supreme law is treated with little sympathy or [with] scant respect, or is ignored, without strong and compelling reasons”.

Paragraph-199-This is the background against which we now proceed to resolve the main question brought before this court. That question is “whether Section 23( 2) of the Sixth Schedule to the Constitution of 2010 ousts the jurisdiction of the High Court to review the decision of the Judges and Magistrates Vetting Board declaring a Judge (or Magistrate) as being unsuitable to continue serving as such.

Paragraph-200-We find that neither the High Court’s Ruling of 30<sup>th</sup> October, 2012 nor the Court of Appeal’s decision of 18<sup>th</sup> December 2013 achieved clarity as to the relationship between the Courts’ jurisdiction, on the one hand, and the jurisdiction of the Judges and Magistrates Vetting Board, on the other hand. We would clarify that by the terms of the Constitution itself, the High Court’s general supervisory powers over quasi-judicial agencies, and its mandate in the safeguarding of the fundamental rights and freedoms of the Constitution, by no means qualify the ouster clause which reserves to the Judges and Magistrates Vetting Board and exclusive mandate of determining the suitability of a Judge or Magistrate in service as at the date of promulgation of Constitution, to continue in service. The basis of the said ouster clause is found in the history attending the Constitution; in the requirement of the Constitution for essential transitional arrangements; and in the express terms of the Constitution, by virtue of which the Vetting Board was established to determine the suitability of certain judicial officers, for the purposes of the values and principles declared in the Constitution itself.

Paragraph-201- The intent of the Constitution is to be safeguarded by the High Court, even when that court acts within its supervisory remit in relation to quasi-judicial bodies, with the recognition that a holistic interpretation of the Constitution requires the fulfillment of its transitional provisions, such as those relating to the vetting process for Judges and Magistrates.

Paragraph-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 had 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.

Paragraph-214-This court has also found that no provision of the Constitution is “unconstitutional”. Thus, although the Constitution does not obliterate judicial review, the fundamental principles of judicial review, the fundamental principles of judicial review can be suspended as a transitional matter. The Vetting of Judges and Magistrates Act bears fidelity to the ouster clause, signaling that the intention was to suspend judicial review, in the transitional period. However, the Act has provisions to ensure that due-process concerns are duly addressed. The Court of Appeal (Odek, JA) in this matter, held that the Bill of Rights must be seen and read as part and parcel of the vetting procedures (at



paragraph 53, P. 67). The Act specifically preserves judicial officers' due process rights, and allows them to seek review before the Board (Section 22 of the Act).

Paragraph-215-In the context of such painstaking care on rights-issues, in the conception of the vetting scheme, I have great difficulties with the argument that the ouster clause could have subverted, or even suspended the human rights of the Judges being vetted. The act comprehensively addresses these constitutional concerns, as Justice Odek rightly finds. It is on this basis that the ouster clause is harmonized with the provisions of Bill of Rights, in Chapter 4 of the Constitution.

Paragraph-216-Once the historical context of the ouster clause is appreciated, its harmonization with the provisions on the supervisory jurisdiction of the High Court, and the suspension of that jurisdiction during the transitional period, cannot be doubted. In the apposite words in the Ugandan case, *Tinyefuza vs Attorney General Constitutional Appeal No. 1 of 1997, [1997] UGCC 3*:

“...the entire Constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written Constitution”.

71. Based on the above excerpts from the Supreme Court decision, does Paragraph 172 of the said judgment confer jurisdiction to the High Court to review the Board's decision in this case? Is it in conflict with paragraphs 202 and 213 which unequivocally state that under no circumstances should a High Court entertain any question or review over the decision of the Board?
72. Mr. Ongoya stated that if the Supreme Court assumed jurisdiction in JMVB2, which they should not have had under paragraph 202 of its own decision in JMVB1, this court can as well as assume jurisdiction. He however, remained silent on paragraph 40 of JMVB2 where the Supreme Court categorically stated that the High Court has no supervisory jurisdiction over a determination of the Board.
73. For avoidance of doubt, we here below reproduce the said Paragraph 40 which reads as follows:-

“In other words, this court consciously attributed 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”.
74. Clearly, the Supreme Court has pronounced itself on the above issue. 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. The interpretation of Section 23 (1) & (2) of the Sixth Schedule in the above cases by the Supreme Court is binding on this court by dint of Article 163 (7) of the Constitution. The binding nature of the Supreme Court decisions under the said provision is absolute. The provision is an edict firmly addressed to all courts in Kenya that they are bound by the authoritative pronouncements of the Supreme Court 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. Accordingly, we find that we have no latitude whether marginal or otherwise to assume jurisdiction as we are being invited to.
75. Our above finding is fortified by the fact that various courts in our jurisdiction have held that Supreme Court decisions are binding and no court can deviate from that obligation. See *Grace L. Nzioka vs Judges & Magistrates Vetting Board and 2 others (2015)eKLR* where the court held that in the face of the Supreme Court decision in JMVB1 it had no jurisdiction to entertain any Petition challenging



the decision arising from the Board. Similar position was stated recently by the High Court in Michael Kizito Oduor vs JMVB and Another (2018) eKLR as well as in Wilson Kaberia Nkunja vs JMVB and Another (2018)eKLR.

76. To amplify the absolute nature of the Supreme Court decisions, the Court pronounced itself as follows in the case of Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others [2014] eKLR [196] Article 163 (7) of the Constitution is the embodiment of the time-hallowed common law doctrine of stare decisis. It holds that the precedents set by this Court are binding on all other courts in the land. The application, utility and purpose of this constitutional imperative are matters already considered in several decisions of this court: Jasbir Sing Rai vs Tarlochan Singh Rai & Others, and quite recently, in George Mike Wanjohi v Steven Kariuki & Others Petition No. 2A of 2014.

In addition to the benchmark decisions to which this court adverted in Wanjohi vs Kariuki (supra), regarding the importance of the doctrine of stare decisis, we would echo the dictum in Housen v Nikoaisen (2002) 2 SCR:

“It is fundamental to the administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence, the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced ... should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all Judges are liable, we must maintain the complete integrity of relationships between the courts.”

77. The doctrine of stare decisis is such a critical legal weapon in streamlining and commanding certainty, predictability, consistence and integrity in the corridors of justice and for the consumption of the consumers of justice. This is the practice globally acceptable even in the most developed judiciaries in terms of jurisprudence. A classical example on how sacrosanct the doctrine of stare decisis is held is well reflected in an excerpt from the India Supreme Court case of Markio Tado v Takam Sorang Civil Appeal No. 8260 of 2012 in which the court resonated with the binding nature of Supreme Court judgments. At paragraph 22 where it was observed:-

“The Judge clearly ignored that the law declared by this Court is binding on all courts within the territory of India under Article 141 of the Constitution of India, and judicial discipline required him to follow the mandate of the Constitution,... however he proceeded to act exactly contrary to the direction emanating from the dismissal of M.C. (EP) No. 5 (AP of 2010), which amounts to nothing but judicial indiscipline and disregard to the mandate of Article 141 of the Constitution of India. This is shocking, to say the least, and most unbecoming of a Judge holding a high position such as that of a High Court Judge. We fail to see as to what made the Judge act in such a manner, though we refrain from going into that aspect. It is unfortunate that such acts of judicial impropriety are repeated in spite of clear judgments of this court on the significance of Article 141 of the Constitution. Thus, in a judgment by a bench of three Judges in Dwarkesh Sugar Industries Ltd. v. Prem Heavy Engineering Works (P) Ltd and Anr., reported in (1997) 6 SCC 450, this court observed, “32. When a position, in law, is well settled as a result of judicial pronouncement of this Court, it would amount to judicial impropriety to say the least, for the subordinate courts including the High Courts to ignore the settled decisions and then to pass a judicial order which is clearly contrary to the settled legal position. Such judicial adventurism cannot be permitted and we strongly deprecate the tendency of the subordinate courts in not applying the settled principles and in passing whimsical orders which necessarily has the effect of



granting wrongful and unwarranted relief to one of the parties. It is time that this tendency stops.”

78. We also refer to Paragraph 28 of the Supreme Court of India decision in State of West Bengal & Ors. v. Shivanand Pathak and Ors., reported in (1998) 5 SCC 513, wherein this court observed:-

“If a judgment is overruled by the higher court, the judicial discipline requires that the Judge whose judgment is overruled must submit to the judgment. He cannot, in the same proceedings or in collateral proceedings between the same parties, rewrite the overruled judgment....”

79. From the determination of the Supreme Court in JMVB1 and JMVB2 Petitions, it is apparent that this court has no room left to interfere or address any form of constitutional violation against any litigant by the Board. We have no latitude to disregard the sanctity and authority of judicial precedent, more particularly from the Supreme Court. That does not mean that Supreme Court is not infallible. It is a constitutional obligation for sound and orderly management of court business on the understanding that the higher the court the lesser mistakes there are.

80. In a nutshell, it is our finding that in light of the Supreme Court decisions in the above cases, this court has no jurisdiction to entertain any question or review emanating from the Board decisions.

#### **Conclusion**

81. Having extensively evaluated and examined the Preliminary Objections herein, and having arrived at the conclusion that this court has no jurisdiction to entertain this case, we find and hold that the Respondents' Preliminary Objections must succeed. Consequently, we uphold the objections. We accordingly dismiss the Petition dated 20<sup>th</sup> June 2013.

82. On the question on costs, courts have been reluctant to award costs in constitutional Petitions seeking to enforce constitutional rights like the instant case. Such an order, in our opinion, 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 justice. Accordingly, we find that it would be inappropriate to penalize the Petitioner to pay costs in this case. In the circumstances we order that each party shall bear own costs.

**SIGNED, DATED AND DELIVERED AT NAIROBI ON THIS 27<sup>TH</sup> DAY OF SEPTEMBER 2018.**

**B. THURANIRA JADEN**

**JUDGE**

**J. WAKIAGA**

**JUDGE**

**G. W. NGENYE-MACHARIA**

**JUDGE**

**JOHN MATIVO**

**JUDGE**

**JOHN ONYIEGO**

**JUDGE**

