Njagi v Judges and Magistrates Vetting Board & 2 others (Constitutional Petition 320 of 2013) [2018] KEHC 8890 (KLR) (Constitutional and Human Rights) (27 September 2018) (Ruling)

Leonard Njagi v Judges & Magistrates Vetting Board & another [2018] eKLR

Neutral citation: [2018] KEHC 8890 (KLR)

REPUBLIC OF KENYA

IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)

CONSTITUTIONAL AND HUMAN RIGHTS

CONSTITUTIONAL PETITION 320 OF 2013

BT JADEN, J WAKIAGA, GWN MACHARIA, JM MATIVO & JN ONYIEGO, JJ

SEPTEMBER 27, 2018

BETWEEN

HON. JUSTICE LEONARD NJAGI ..... PETITIONER

AND

THE JUDGES AND MAGISTRATES VETTING BOARD ..... 1ST RESPONDENT

THE HONOURABLE THE ATTORNEY GENERAL ..... 2ND RESPONDENT

THE JUDICIAL SERVICE COMMISSION ..... 3RD RESPONDENT

Decisions of the Judges and Magistrates Vetting Board on the suitability of a judicial officer to continue serving as such cannot be challenged in the High Court.

The main issue for determination was the jurisdiction of the High Court to review decisions of the Judges and Magistrates Vetting Board. The High Court held that the decisions of the Judges and Magistrates Vetting Board on the suitability of a judicial officer to continue serving as such cannot be challenged in the High Court.

Reported by Kakai Toili

Constitutional law*–vetting of Judges and Magistrates–mandate of the Judges and Magistrates Vetting Board–mandate to determine the suitability of a judicial officer to serve–where the Judges and Magistrates Vetting Board determined that a judicial officer was not fit to serve-where the decision was challenged in court-whether a decision of the Judges and Magistrates Vetting Board on the suitability of a judicial officer to continue serving as such could be challenged in court-Constitution of Kenya, 2010 article 163(7), Sixth Schedule, section 23; Vetting of Judges and Magistrates Act section 23*

Constitutional Law*- interpretation of the Constitution-interpretation of section 23(2) of the Sixth Schedule of the Constitution-what was the proper interpretation of section 23(2) of the Sixth Schedule of the Constitution with regard to decisions of the Judges and Magistrates Vetting Board - Constitution of Kenya, 2010, Sixth Schedule, section 23*

***Civil Practice and Procedure**-preliminary objections-raising of preliminary objections- what were the circumstances in which a preliminary objection could be raised*

***Statutes**-interpretation of statutes-interpretation of statutory provisions-what was the proper way of construing statutory and constitutional provisions*

***Precedents**-judicial precedents-doctrine of stare decisis-what was the purpose of the doctrine of stare decisis and whether a subordinate court could fail to follow a position which was settled by the Supreme Court when faced with a similar issue*

***Civil Practice and Procedure**-suits-termination of suits-factors to consider-mootness-where there was a claim for damages-whether claims for damages that sought compensation for past harm were moot*

***Words and Phrases** - preliminary objection-definition of preliminary objection- in a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary-Black's Law Dictionary, 10th Edition*

Brief facts

The Petitioner, who was a long serving judge, was on December 21, 2012 found by the 1st Respondent (the Board) as lacking in conduct and integrity hence declared unsuitable to continue serving. Aggrieved by the decision, the Petitioner filed a petition to the Court challenging the Board's decision. Contemporaneously filed with the Petition was an Application seeking leave to apply for judicial review orders of *certiorari*, prohibition and *mandamus*, conservatory stay orders thus retaining the Petitioner as a judge of the Court. Consequently, the Court granted the prayers sought in the Application on interim basis pending hearing and determination of the Petition.

In view of the Supreme Court decision in *Judges and Magistrates Vetting Board & 2 Others v Centre for Human Rights and Democracy & 11 Others* (2014)eKLR (*JMVB1*) which declared that the decision of the Board was final, the Court referred the file to 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 a Judicial Review Application. Subsequently, the matter was placed before a bench of five Judges. On April 24, 2015 the Court held that it had no jurisdiction to entertain any Petition challenging the Board's decision. The Court directed that the Petitioner was at liberty to pursue his Petition independently as he was not directly affected by the Supreme Court decision in JMVB1.

Aggrieved by the decision the 3rd Respondent filed a Preliminary Objection objecting the Court's jurisdiction to hear the Petition and that the prayers sought in the Petition were moot as the Petitioner had since retired

Issues

i. Whether a decision of the Judges and Magistrates Vetting Board on the suitability of a judicial officer to continue serving as such could be challenged in court.
ii. What was the proper interpretation of section 23(2) of the Sixth Schedule of the Constitution with regard to decisions of the Judges and Magistrates Vetting Board?
iii. What were the circumstances in which a preliminary objection could be raised?
iv. What was the proper way of construing statutory and constitutional provisions?
v. What was the purpose of the doctrine of *stare decisis* and whether a subordinate court could fail to follow a position which was settled by the Supreme Court when faced with a similar issue?
vi. Whether claims for damages that sought compensation for past harm were moot.

Relevant provisions of the Law

Constitution of Kenya, 2010

Article 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—*

1. *only once in respect of any particular matter; and*
2. *only in exceptional circumstances to be certified by the Speaker of the National Assembly.*

Sixth Schedule

Section 23

1. *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.*
2. *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."*

Vetting of Judges and Magistrates Act

Section 23

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 31st December, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.*

Section 23 - Time frame(as amended by Vetting of Judges and Magistrates (Amendment) Act No. 43 of 2013)

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 31st 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 28th March, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.*

Vetting of Judges and Magistrates (Amendment) Act, No. 43 of 2012

Section 8

" 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 31st 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 28th March 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.

Vetting of Judges and Magistrates (Amendment) Act No. 43 of 2013

Section 3

Section 23 of the Principal Act is amended

1. *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";*
2. *in subsection (2) by deleting the expression "2013" and substituting therefore the expression "2015."*
3.

Held

1. A Preliminary Objection raised a pure point of law, which was argued on the assumption that all the facts pleaded by either side were correct. It could not be raised if any fact has to be ascertained or if what was sought was the exercise of judicial discretion.
2. It was reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter was then obliged to decide the issue right away on the material before it. Jurisdiction was everything, without it, a court had no power to make one more step. Where a court had no jurisdiction, there would be no basis for continuation of proceedings pending other evidence. A court downed tools in respect of the matter before it the moment it held the opinion that it was without jurisdiction.
3. Mootness inquired whether events subsequent to the filing of a suit had eliminated the controversy between the parties. It included cases in which the Plaintiff challenged actions or policies which were temporary in nature, in which factual developments after the suit was filed resolved the harm alleged or in which claims had been settled. An actual controversy had to exist at all stages of a trial and not simply at the date the action was initiated. Mootness involved the situation where a dispute no longer existed. Mootness was a point of law.
4. The contemplated legislation under section 23 (1) of the Sixth Schedule of the Constitution was the Vetting of Judges and Magistrates Act(the Act) which was enacted and commenced on March 22, 2011. One year after the commencement date lapsed on March 21, 2012. Any extension beyond March 21, 2012 would only be effected in conformity with article 261 (1) (2) & (3) of the Constitution.
5. A perusal of the Petitioner's Hansard before the Board revealed that the Petitioner first appeared before the Board for vetting on November 13, 2012. The Act commenced on March 22, 2011 and expired on March 21, 2012. The Petitioner's appearance before the Board on November 13, 2012 was evidently after the Board's term had lapsed. The next extension was on December 14, 2012 and the extension was to remain valid until December 31, 2013. However, the determination and review made on December 21, 2012 and March 20, 2013 respectively were within the time frame.
6. In construing a statutory provision, the first and foremost rule of construction was that of literal construction. All that the Court had to see at the very outset was what the provision said in its plain, grammatical and ordinary language. If the provision was unambiguous and if from that provision the legislative intent was clear, the other rules of construction of its statutes needed not be called into aid save when the legislation intention was not clear. However, the courts would not be justified in so straying the language of the statutory provision as to ascribe the meaning which could not be warranted by the words displayed by the Legislature. If the language was clear and explicit, the Court had to give effect to it, for in that case the words of the statute spoke the intention of the Legislature.
7. In construing a statute or constitutional provision, all provisions had to be read in harmony and construed together. The words used in section 23(2) of the Sixth Schedule to the Constitution were plain, clear and unambiguous to the extent that decisions of the Board established pursuant to section 6 of the Act were final when it came to removal or a process leading to removal, of a judge. Section 23(2) did not leave room for any form of intervention by any court. The provision was couched in mandatory terms and the Court could not change the meaning or imply something else other than pronounce the will of the people and the Legislature.
8. The vetting process was insulated against litigation in any court 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.
9. The Supreme Court in *JMVB1* at paragraph 172 recognized the role of the Court in exercise of its supervisory powers. However, in the same Judgment at paragraph 213, the then Chief Justice in a concurring opinion dismissed the argument that the Court had any residual supervisory powers in questioning the Board's decisions. From the two holdings, it was clear that any intervention by the

Court had no room and therefore not within its remit to review the decision of the Board which was final. The holding in paragraph 213 was worded in such language that subdued paragraph 172 which could apply in the absence of constructive precedent. In the instant case there was precedent that the Court had no jurisdiction. To that extent, the Court did not have jurisdiction under section 23 of the Sixth Schedule of the Constitution to question the Board's decision.

10. The Supreme Court had pronounced itself on the issue of whether the Board's decisions could be challenged in court. Article 163 (7) of the Constitution explicitly provided that all courts, other than the Supreme Court were bound by the decisions of the Supreme Court. The interpretation of section 23 (1) & (2) of the Sixth Schedule by the Supreme Court was binding on the Court by dint of article 163 (7). The binding nature of the Supreme Court decisions under the said provision was absolute. The provision was an edict firmly addressed to all courts that they were bound by the authoritative pronouncements of the Supreme Court and that where the issues before the Court were determined by the Supreme Court, it was not open to the Court to examine the same with a view to arriving at a different decision.
11. The doctrine of *stare decisis* was 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. When a position in law was well settled as a result of judicial pronouncement of the Supreme Court, it would amount to judicial impropriety to say the least, for a subordinate court including the instant Court to ignore the settled decisions and then to pass a judicial order which was clearly contrary to the settled legal position. Such judicial adventurism could not be permitted.
12. From the determination of the Supreme Court in *JMVB1* and *JMVB2* Petitions, the Court had no room left to interfere or address any form of constitutional violation against any litigant by the Board. The Court had no latitude to disregard the sanctity and authority of judicial precedent, more particularly from the Supreme Court. That did not mean that the Supreme Court was not infallible. It was a constitutional obligation for sound and orderly management of court business on the understanding that the higher the court the lesser mistakes there were.
13. The Court's power to distinguish conflicting decisions was limited in operation, relevance and applicability. Binding decisions would be followed in the absence of a strong reason to the contrary.
14. A case was not moot so long as the plaintiff continued to have an injury for which the Court could award relief, even if entitlement to the primary relief had been mooted and what remained was small. Put differently, the presence of a collateral injury was an exception to mootness. As a result, distinguishing claims for injunctive relief from claims for damages was important. Since damage claims sought compensation for past harm, they could not become moot. Short of paying a plaintiff the damages sought, a defendant could do little to moot a damage claim. A case was moot, however, when the Court could not give any effectual relief to the party seeking it.
15. In the instant case, among the reliefs sought was an order that the State pays the Petitioner general damages for loss of reputation, standing, unlawful and unconstitutional interruption of his services as Judge of the High Court. Damage claims sought compensation for past harm, hence, they could not become moot.
16. The question of the Petitioner's retirement age was among the issues that the court framed, considered and determined in *Leonard Njagi v Judicial Service Commission*(2015) eKLR. No evidence was tendered to show that the Petitioner had appealed against the said decision. The decision of the Court in that case stood unless and until it was overturned by an appellate court. Accordingly, the Petitioner having raised the issue of retirement in the said case, he could not raise it in a subsequent suit. His remedy lay in challenging the said Judgment. The issue of retirement was not justiciable before the Court.

Respondents' Preliminary Objection allowed, Petition dismissed, each party to bear own costs

Citations

Statutes

None referred to

Advocates

None mentioned

RULING

Introduction

1. The realization and promulgation of the Kenyan Constitutional dispensation on the 27th August 2010 gave rise to critical transformation in the spheres of enhanced democratic and political rights, robust Bill of Rights as well as pertinent and radical judicial reforms. Key among the judicial reforms was the recognition and elevation of judicial independence courtesy of Article 160 (1) of the Constitution, vetting of serving Judges and Magistrates vide Section 23 of the Sixth Schedule of the Constitution giving rise to the enactment of the Vetting of Judges and Magistrates Act, No. 2 of 2011(hereinafter referred to as the "Vetting Act") which came into force on 22nd March 2011.

2. The Act set out a criteria upon which Judges and Magistrates then serving as at the effective date were subjected to a suitability test as stipulated under Section 18 of the Act ranging from procedural knowledge of the law, organizational and substantive skills, professional competence, written and oral communication skills, integrity, fairness, temperament, good judgment, diligence, legal and life experience among others. Those found unsuitable were retired from service.

3. Hon. Justice Leonard Njagi (herein referred to as "the Petitioner"), a long serving Judge in the Kenyan Judiciary having been appointed in the year 2003, was on 21st December 2012 found lacking in conduct and integrity hence declared unsuitable to continue serving. Among the grounds on which the removal was premised were that he had facilitated transfer of a government house to a private entity known as Rockville Ltd while he was serving as the Principal of the Kenya School of Law prior to his appointment as a Judge. Subsequently, his review application was dismissed on 20th March 2013 thus ending his career as a Judge of the High Court of Kenya.

4. Aggrieved by the decision, the Petitioner moved to this honourable court vide a Petition dated 20th June 2013 and filed the same day seeking various declarations and reliefs against the Judges and Magistrates Vetting Board being the body tasked with the vetting process, the honourable the Attorney General as the chief government legal advisor and the Judicial Service Commission as the employer of Judiciary employees (hereinafter referred to as the 1st, 2nd and 3rd Respondents respectively). Suffice it to state, the 1st Respondent, for purposes of this ruling shall also be referred to as the Board.

5. The Petition is expressed under Articles 23 and 258 of the Constitution, section 23 of the Sixth Schedule to the Constitution and Order 53 of the Civil Procedure Rules. It seeks the following declarations and orders:-

    (a) A declaration that on 7th August 2012 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 1st 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 he may be fit for is set aside.

(c) An order of certiorari is issued directed to the 1st Respondent calling up and quashing the record of the proceedings of the 1st Respondent, the Judges and Magistrates Vetting Board, and the determination made by the Board on the 21st December 2012.

(d) An order of certiorari is issued directed to the 1st Respondent calling up and quashing the record of the proceedings of the 1st Respondent, the Judges and Magistrates Vetting Board on the Petitioner's application for review of the Board's determination of 21st December 2012 and the decision of the Board made on the 20th March 2013.

(e) An order of prohibition is issued directed to the 3rd Respondent, its servants, agents and employees prohibiting them not to take any action to facilitate or effect the record of the Petitioner as a Judge of the High Court of Kenya based on the proceedings and determination of 21st December 2012 and decision on review dated 20th March 2013 of the 1st Respondent concerning the Petitioner.

(f) An order of prohibition is issued directed to the 3rd 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 21st December 2012 and decision on review dated 20th March 2013 of the 1st Respondent concerning the Petitioner.

(g) An order of mandamus is issued directed at the 3rd Respondent and the 2nd Respondent to jointly and severally ensure the independence of the Judiciary and to advise the State and the 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 the 21st December 2012 and decision on review dated 20th March 2013 of the 1st Respondent concerning the Petitioner.

(h) A declaration that the Petitioner is not and has never been a director of Rockville Limited.

(i) A declaration that the Petitioner shall continue to be a Judge of the High Court of Kenya entitled to all his benefits and perks of office unless and until he reaches the retirement age of 74.

(j) An order that the State shall pay the Petitioner such sum as 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 his services as Judge of the High Court of Kenya.

(k) An order for costs as the court may deem reasonable and just to grant in the circumstances of the case.

(l) Pending the hearing and determination of the Petition, an interim and conservatory order of stay is issued to stay the determination of the 1st Respondent dated 21st December 2012 and the decision on review dated 20th March 2013 and to preserve the status of the Petitioner as Judge of the High Court of Kenya entitled to his full remuneration and all perks of office extant at 21st 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 applications connected with the Petition.

(m) Or that such other order as this honourable court shall deem just be made and issued.

6. The Petition is premised on the grounds on the face of it and the Petitioner's verifying/supporting affidavit sworn on 20th June 2013 in which he averred that he was vetted out by the Board whose mandate, according to the Petitioner, had expired on 27th December 2011 and therefore not in consonance with the contemplated legislation under section 23(1) of the Sixth Schedule of the Constitution which process according to him was to be undertaken within one year from the effective date.

7. Contemporaneously filed with the Petition under Certificate of Urgency is the Chamber Summons of even date seeking leave to apply for judicial review orders of certiorari, prohibition and mandamus as pleaded in the reliefs sought and listed as (c), (d), (e), (f) and (g) in the Petition, conservatory stay orders thus retaining the Petitioner as a Judge of the High Court of Kenya with full benefits accruing to that office pending hearing and determination of the Petition.

8. Consequently, on 24th June 2013, the court granted the prayers sought in the application on interim basis pending hearing and determination of the Petition. At the same time, the court referred the file to the Hon. the Chief Justice to constitute a three Judge bench in accordance with Article 165 (4) of the Constitution to determine the novel issues in controversy. Subsequently, the Hon. the Chief Justice appointed a bench comprising of three Judges to hear and determine the matter.

9. Meanwhile, the 1st and 2nd Respondents filed a memorandum of appearance on 19th July 2013 and thereafter on 9th September 2013 filed a replying affidavit sworn on the 6th September 2013 by one Reuben Chirchir the Chief Executive Officer and Secretary to the 1st Respondent in response to the Petition. Mr. Chirchir averred that the vetting process was legally and procedurally carried out within the prescribed time frame and in accordance with section 23 of the Constitution and the criteria set out under section 18 of the Vetting Act. That the Petitioner was given a fair hearing including a review process and that none of his constitutional rights were violated. At paragraph 24 of the said replying affidavit, they intimated their intention to challenge the jurisdiction of the court in view of the ouster clause in section 23(2) of the Sixth Schedule of the Constitution which precluded any court of law from questioning any of the 1st Respondent's decisions.

10. From the court record, the 3rd Respondent does not appear to have filed any response to the Petition.

11. In response to the 1st and 2nd Respondents' replying affidavit, the Petitioner filed a further affidavit sworn on 15th November 2017 and filed on 17th November 2017 contending that the Petitioner was not vetted in accordance with the legislation envisioned under section 23(1) of the Sixth Schedule.

12. On 8th December 2014, Mr. Mwenesi, counsel for the Petitioner, Mr. Kanjama for the 1st Respondent, Mr. Njoroge for the 2nd Respondent and Mr. Issa for the 3rd 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 JMVB1), wherein the Supreme Court declared that the decision of the Board was final. The Petitioners therein were ordered to list their cases for disposal within 15 days.

13. In view of the above Supreme Court decision, an issue arose as to the implication of the said decision to the instant case. 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.

14. Subsequently, the matter was placed before a bench of five Judges which was also handling the above case, but, on 24th April 2015 the court held that it had no jurisdiction to entertain any Petition challenging the 1st Respondent's decisions. The court directed that the Petitioner was at liberty to pursue his Petition independently as he was not directly affected by the Supreme Court decision in JMVB1.

15. On 15th July 2016, parties appeared before the same five Judge bench in this Petition which directed them to file their submissions and be ready to proceed with the Petition. Before the matter could proceed, on 7th October 2016, Mr. Mwenesi applied for an adjournment to enable him to file an application to amend the Petition.

16. In the intervening period, the current bench was empanelled. By the time the full bench sat on 20th July 2017, the 1st Respondent's tenure had lapsed hence there was no appearance as Mr. Kanjama then appearing for it had ceased acting for lack of instructions. Nevertheless, the Hon. Attorney General came on record for the 1st Respondent. Meanwhile, the 3rd Respondent filed a Preliminary Objection dated 29th August 2017 objecting to this court's jurisdiction to hear this Petition, and that the prayers sought in the Petition are moot as the Petitioner had since retired pursuant to Article 167 (1) of the Constitution 2010.

17. On 17th November 2017, Mr. Mwenesi filed a Notice of Motion dated 15th November 2017 seeking leave to amend the Petition in terms of the draft Amended Petition annexed to the affidavit in support of the application and a further order that the supplementary affidavit supporting the application be admitted in evidence.

18. On 19th April 2018, this matter came up for directions for hearing of the Preliminary Objections before the full bench. However, Mr. Mwenesi for the Petitioner brought to the attention of the court that he had a pending application seeking leave to amend the Petition. He nevertheless informed the court that the Preliminary Objections take precedence. He applied for time to enable him to prepare for the Preliminary Objections. Counsel for the other parties agreed with Mr. Mwenesi that Preliminary Objections take precedence. The court directed that the Preliminary Objections proceed first. It also allowed Mr. Mwenesi's request for time to prepare for the Objection and directed the parties to file written submissions on the objection and scheduled the matter for highlighting on the 24th May 2018.

19. The 1st and 2nd Respondents filed their submissions on 26th April 2018, the 3rd Respondent filed theirs on 18th May 2018 and the Petitioner filed his on 31st May 2013 together with list of authorities. The parties highlighted their submissions on 31st May 2018 and a ruling date was reserved for 27th September 2018.

20. While this matter was pending ruling, the Petitioner's counsel vide a letter dated 4th June 2018 submitted a further list of authorities without the leave of the court. This development prompted the court to serve notices summoning all the parties for mention on 19th July 2018 before a full bench for further directions.

21. On the said date, Mr. Mwenesi formally sought the court's leave for his additional authorities to be admitted out of time. The Respondents' counsel had no objection to the request. The court accordingly admitted the additional authorities with corresponding leave to the Respondents to file additional authorities, if need be, within fourteen days from the said date. The date of the ruling was

maintained. At the close of the fourteen days, none of the Respondents had filed additional authorities, hence, we proceeded to write this ruling.

Issues for determination.

22. Upon considering the facts presented by the parties and the rival submissions presented by their respective advocates, we find that the following issues distil themselves for determination:-

    a. Whether the objection raised by the Respondents qualifies to be a Preliminary Objection.

    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.

    d. Whether this Petition is moot on grounds that the Petitioner has since retired from the service upon attaining the mandatory retirement age.

a. Whether the objection raised by the Respondents qualifies to be a Preliminary Objection.

23. Mr. Marwa for the 1st and 2nd Respondents submitted that the Preliminary Objection is based on pure points of law. He cited paragraph 24 of the Replying Affidavit of Mr. Chirchir in which it is 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. To him, the ouster clause is a pure point of law which qualifies to be a Preliminary Objection.

24. M/s Lipwop for the 3rd Respondent argued that their Preliminary Objection is premised on two points, namely, that the issues presented in this Petition have conclusively been determined by the Supreme Court, and, that the prayers sought cannot be granted since this case is now moot because the Petitioner retired from service pursuant to Article 167 (1) of the Constitution.

25. Counsel argued that in view of the Supreme Court decision in JMVB1 on section 23 (2) of the Sixth Schedule, this court is bound to down its tools for want of jurisdiction. She cited the case of Onwers of Motor Vessel "Lillian S" vs Caltex Oil (Kenya) Ltd (1989) KLR and Leonard Njagi vs Judicial Service Commission (2015) eKLR.

26. Mr. Mwenesi for the Petitioner 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 Objections is premised.

27. The learned counsel sought credence in support of his proposition by referring the court to 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.

28. The contestation here is whether the issues raised herein meet the threshold of a Preliminary Objection. A Preliminary Objection is defined in the Black's Law Dictionary 10th Edition as:-

> " In a case before an international tribunal, an objection that, if upheld, would render further proceedings before the tribunal impossible or unnecessary".

29. In the case of Mukhisa Biscuit Manufacturing Co. Ltd vs West End Distributors Ltd, (1969)EA 696, 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."

30. 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 of 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".

31. 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".

32. 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, JA, 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".

33. In John Mundia Njoroge and 9 Others vs Cecilia Muthoni and Another (Supra) where 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.

34. 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".

35. As stated earlier, the Respondents' Preliminary Objections are premised on the following 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.

36. 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.

37. Third, it was argued that this Petition is moot on the ground that the Petitioner has since retired from service.

38. Mootness inquires whether events subsequent to the filing of a suit have eliminated the controversy between the parties. It includes cases in which the plaintiff challenges actions or policies which are temporary in nature, in which factual developments after the suit is filed resolve the harm alleged, or in which claims have been settled.

39. Lord Bridge of Harwich put it more succinctly when he stated:- "It has always been a fundamental feature of our judicial system that the Courts decide disputes between the parties before them; they do not pronounce on abstract questions of law when there is no dispute to be resolved." (Ainsbury vs Millington {1987} 1 All ER 929 (HL) at 930, 13). The requirement of a dispute between the parties is a general limitation to the jurisdiction of the court. The existence of a dispute is the primary condition for the court to exercise its judicial function. (Nuclear Tests (Australia vs. France), Judgment, I.C.J.

Reports 1974, pp. 270-271, para. 55; Nuclear Tests (New Zealand v. France), Judgment, I.C.J. Reports 1974, p. 476, para. 58).

40. An actual controversy must exist at all stages of a trial and not simply at the date the action is initiated. Mootness involves the situation where a dispute no longer exists. This being the established legal position, and guided by the definition of what constitutes a Preliminary Objection, it is our view that mootness is a point of law.

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

41. Mr. Marwa 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 22nd March 2011 and was extended to 28th February 2012 and later to 31st December 2013.That the term of office for the 1st 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.

42. Mr. Mwenesi submitted that the Petitioner was declared unsuitable after the expiry of the Vetting Board's term of office, hence, his vetting and determination of unsuitability to serve was unlawful and unconstitutional. He 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 Vetting Board's term for only one year. In his submission he stated that the legislation for the mechanisms for vetting was to be enacted within one year from 27th August 2010, that is, by 27th August 2011. He 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 his 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 27th August 2012. 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 27th 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.

43. In a nutshell, Mr. Mwenesi argued that the question of the validity or otherwise of the extension of the Board's term is a matter that ought to be resolved after a full hearing of the Petition as opposed to a Preliminary Objection. He prayed for the court not to deny the Petitioner an opportunity to ventilate his case and have his day in court as the threshold set for upholding a Preliminary Objection has not been met.

44. We now determine 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".

45. 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 31st December, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.

46. Needless to state, the contemplated legislation under section 23 (1) of the Sixth Schedule is the Vetting Act which was enacted and commenced on 22th March 2011. One year after the commencement date lapsed on 21st 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.

47. The vetting period having expired, Parliament enacted the Vetting of Judges and Magistrates (Amendment) Act, No. 43 of 2012 which was assented to on 13th December 2012 and commenced on 14th December 2012, thus extending the vetting process to 31st 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 31st 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 28th March 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.

48. The above period expired again. Subsequently, Parliament enacted The Vetting of Judges and Magistrates (Amendment) Act No. 43 of 2013 which was assented to on 24th December, 2013 and commenced on 10th 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."

49. 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 31st 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 28th March, 2013 and any review of a decision of the Board shall be heard and concluded within the above specified period.

50. The Petitioner's argument is that the vetting process and the resultant determination declaring him unsuitable to continue to serve as a Judge of the High Court rendered on 21st December 2012 and the subsequent review delivered on 20th March 2013 was unconstitutional on grounds that the process was undertaken outside the contemplated legislation.

51. A perusal of the Petitioner's Hansard before the Vetting Board at page 201 of the Petitioner's bundle of documents in support of his Petition reveals that the Petitioner first appeared before the Board for vetting on 13th November 2012. As stated above, the Act commenced on 22nd March 2011 and expired on 21st March 2012. Thus, his appearance before the Board on 13th November 2012 was evidently after the Board's term had lapsed. Our view is reinforced by the fact that the next extension was on 14th December 2012 and the extension was to remain valid until 31st December 2013. However, we note that the determination and Review made on 21th December 2012 and 20th March 2013 respectively were within the time frame.

52. 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 31stDecember 2013 to 31st 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."

53. 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."

54. 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.

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.

55. Mr. Marwa 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 Vetting 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.

56. Mr. Marwa maintained that, in the face of the Supreme Court decision declaring Vetting Board's decision final and not subject to question or review by any court of law, this court is bound by that determination. Reference was made to the case of JMVB1 in which the court held that:-

> para 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".

57. Further reference was made to the cases of Nicholas Randa Ombija vs Judges and Magistrates Vetting Board (2015) e KLR, and, Judges and Magistrates Vetting Board vs Kenya Magistrates and Judges Association and Another (2014)eKLR (herein referred to as "JMVB2") wherein both courts held that the decision of the Vetting 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.

58. 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".

59. Learned counsel 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."

60. The 3rd 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 Vetting Board. M/s Lipwop, appearing for the party submitted 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 the High Court had powers to question the 1st Respondent's decisions.

61. 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:-

> para 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".

62. 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.

63. 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 "Lillian S" vs Caltex (Kenya) Ltd (supra).

64. Mr. Mwenesi stated 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.

65. It was Mr. Mwenesi's submission that 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. He asserted that the Petitioner was found unsuitable of a complaint maliciously instigated by the Anti-corruption Commission which complaint he was not aware of by the time he was served with the list of complaints and Notice to Appear. That the alleged act was committed long before joining service as a Judge contrary to the decision of the Supreme Court finding in JMVB2 where it was held that no Judge or Magistrate was liable to vetting of acts or omissions committed past effective date or prior to joining service. He stated that in the case of the Petitioner, he was vetted out for acts committed before he became a Judge hence the need for this court's intervention.

66. Learned counsel 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.

67. Whereas Mr. Mwenesi acknowledged the binding nature of the Supreme Court decision in the two Petitions pursuant to Article 163(7), he went further and stated that it is incumbent upon this court to exercise its powers and duty to critically examine the Petition visa vis the Supreme Court's decisions touching on matters in the Petition to determine whether there are distinguishing factors between the two Petitions (JMVBI and JMVB2). He further urged the court to interpret the Constitution in a manner that promotes its purpose, values and principles, addresses the rule of law, human rights and fundamental freedoms in the Bill of Rights and in a manner that promotes good governance (See Li Wen Jie and 2 Others vs Cabinet Secretary interior and coordination of National Government and 3 Others (2017) eKLR.

68. Regarding the conflicting findings of the Supreme Court in JMVBI and JMVB2, Mr. Mwenesi through a supplementary list of authorities submitted vide a letter dated 4th June 2018 opined that there are situations when the High Court could distinguish conflicting decisions rendered by courts Superior to it. Counsel referred us to the case of Wanyiri Kihoro & Others vs Attorney General and Another (2016) e KLR where the court made reference to the cases of R vs Nor. Electricity Co. (1955) or 431 and R vs Groves (1977) 17 or (2d) 65 in which it held that:-"there could be compelling reasons not to follow a binding precedent." Similar remarks were replicated in Federation of Women Lawyers Kenya (FIDA) v Attorney General & another [2018] eKLR.

69. Mr. Mwenesi implored the court to also seek guidance from the discussion and analysis in Canadian Legal Research and Writing Guide in a 1987 reference Paper by Paul M. Perell on how to handle conflicting decisions where the researcher observed that a Judge faced with such a scenario is at liberty to choose which of the two conflicting decisions to follow.

70. 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 decisions. 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 6th 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 S93 (SCA) at Paragraph 18.

71. 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".

72. 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).

73. In the case of P. Asokan vs Western India Plywoods Cannanore AIR 1987, 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".

74. 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.

75. 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.

76. Mr. Mwenesi 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.

77. A common ground of Preliminary Objection raised by both 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.

78. The issue of the High Court having residual supervisory powers in interrogating decisions of the Board under Article 165(6) has been subject of deliberations in all the superior courts. Mr. Mwenesi 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."

79. 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 1st Respondent's decisions and rendered himself as follows:-

> para 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."

80. 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 1st Respondent's decision.

81. The issue the High Court's supervisory jurisdiction 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 1st 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.

82. 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.

para 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.

para 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".

para 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.

para 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.

para 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".

para 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".

Para 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.

Para 200 - We find that neither the High Court's Ruling of 30th October, 2012 nor the Court of Appeal's decision of 18th 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.

Para 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.

Para 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.

Para 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).

Para 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.

SUBPARA Para216-

- 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".

83. 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 paragraph 202 and 213 which unequivocally states that under no circumstance should a High Court entertain any question or review over the decision of the vetting board?

84. Mr. Mwenesi in his argument solely relied on paragraph 172 cited above but remained silent on paragraphs 202 and 213 of JMVB1 where the Supreme Court categorically stated that the High Court has no supervisory jurisdiction over a determination of the Board.

85. A similar position was expounded at Paragraph 40 of the Supreme Court in Petition JMVB2 where it was held:-

> " 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".

86. 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.

87. Various courts 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.

88. 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."

89. 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 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."

90. 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...."

91. 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.

92. 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.

93. The other limb of Mr. Mwenesi's submission is the invitation to this Court to distinguish the holding of the Supreme Court in JMVB1 and JMVB2 to uphold the one that promotes fairness and justice under Article 22 of the Constitution. Mr. Mwenesi's argument is premised on paragraph 172 of the Supreme Court decision in JMVB1 reproduced above. However, in the same judgment at paragraphs 202, 213 and the succeeding paragraphs, the Supreme Court clarified the position. The contention here is that, the Petitioner was vetted out based on an incident that allegedly arose before he was appointed

as a Judge of the High Court. Also, he argued that the Petitioner was not given notice of the complaint before he appeared for vetting.

94. While admitting the binding nature of the Supreme Court decisions to this court, Mr. Mwenesi persuaded the court to find that it was perfectly within its remit and permissible under the doctrine of stare decisis to distinguish two or more conflicting decisions. Counsel correctly referred us to a decision in the case of Wanyiri Kihoro & Others vs Attorney General and Another (2016) eKLR and an article on Stare decisis and techniques of legal reasoning and argument by Paul M. Perell. The crux of the said decision and the article is that the decisions of a superior court are binding on all courts of inferior rank within the same jurisdiction, and though not absolutely binding on courts of co-ordinate authority nor on the court itself, will be followed in the absence of a strong reason to the contrary.

95. We have carefully considered the decision in the Wanyiri Kihoro case. It is clear from the said decision that the court's power to distinguish conflicting decisions is limited in operation, relevance and applicability. In the said case, the court observed that binding decisions will be followed in the absence of a strong reason to the contrary. In the words of the court:-

> " ... I think that "strong reason to the contrary" does not mean a strong argumentative reason appealing to the particular Judge, but something that may indicate that the prior decision was "given without consideration of a statute or some authority that ought to have been followed." I do not think "strong reason to the contrary" is to be construed according to the flexibility of the mind of the particular Judge."

96. Whereas we appreciate that the above reasoning still represents good law, in the instant case we are dealing with a situation where the Constitution of the land which is the supreme law explicitly decrees that Supreme Court decisions are binding to this court. In the circumstances, we have no latitude to distinguish or depart from the Supreme Court decision(s) without offending Article 163 (7) of the Constitution.

d. Whether this Petition is moot on grounds that the Petitioner has since retired from the service upon attaining the mandatory retirement age.

97. M/S Lipwop asserted that the Petitioner having retired from service in accordance with Article 167(1) of the Constitution, the Petition has been rendered moot hence the 3rd Respondent is obligated legally to remove him from the payroll and that the allegation of disobedience to the conservatory orders issued herein does not arise. To buttress her argument, she referred the court to the case of Leonard Njagi vs Judicial Service Commission (2015) eKLR.

98. On the issue of retirement, Mr. Mwenesi submitted that the decision declaring the Petitioner as having retired in Leonard Njagi vs Judicial Service Commission (supra) was appealed against and the same is still pending.

99. Generally, a case is not moot so long as the plaintiff continues to have an injury for which the court can award relief, even if entitlement to the primary relief has been mooted and what remains is small. (Chafin vs. Chafin, 133 S. Ct. 1017 (2013)). Put differently, the presence of a "collateral" injury is an exception to mootness. (In re Burrell, 415 F.3d 994, 998 (9th Cir. 2005).As a result, distinguishing claims for injunctive relief from claims for damages is important. Because damage claims seek compensation for past harm, they cannot become moot. (Board of Pardons vs. Allen, 482 U.S. 369, 370 n.1 (1987). Short of paying a plaintiff the damages sought, a defendant can do little to moot a damage claim. A case is moot, however, when the court cannot give any "effectual" relief to the party

seeking it. (See Knox v. Service Employees International Union, Local 1000, 132 S. Ct. 2277, 2287 (2012).

100. Applying the law to the facts of this case, we find that among the reliefs sought in this case is an order that the State pays the Petitioner such sum as the court deems just and proper to compensate the Petitioner as general damages for loss of reputation and standing and unlawful and unconstitutional interruption of his services as Judge of the High Court of Kenya. As stated above, damage claims seek compensation for past harm, hence, they cannot become moot.

101. However, the issue of retirement was one of the issues raised by the Petitioner in Leonard Njagi vs Judicial Service Commission (supra) and considered by the court. Addressing the question of the Petitioner's retirement, the court observed that "in our opinion, the core question by the Petitioner herein, to wit, the retirement age of a Judge in office on the effective date, is no longer a justiciable matter in light of the circumstances the Petitioner now finds himself in."

102. Further, the court proceeded to hold that "for all the reasons we have highlighted, we do not find it appropriate to explore the question of the Petitioner (sic) retirement age, or any of the other identical issues. It is not without sympathy or heavy hearts that we are compelled to tell the Petitioner that he has reached the end of the road. His Petition is therefore dismissed."

103. We have read the entire judgment in Leonard Njagi vs Judicial Service Commission (supra). The Petition was filed by the Petitioner in this case. We have read the reliefs sought in the said Petition, the issues framed by the court, the analysis of the issues and the determination. It is clear that the question of the Petitioner's retirement age was among the issues that the court framed, considered and determined. Counsel for the Petitioner argued that the Petitioner had appealed against the said decision. No evidence was tendered to that effect neither did we find any. In our view, the High Court decision still stands unless and until it is overturned by an appellate court. Accordingly, the Petitioner having raised the issue of retirement in the said case, he cannot raise it in a subsequent suit. His remedy lies in challenging the said judgment. The issue of retirement is not justiciable before this court.

Conclusion

104. In conclusion, having extensively evaluated and examined the Preliminary Objections, 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 Respondents' Preliminary Objections. Accordingly, we dismiss the Petition dated 20th June 2013.

105. On the question of 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 view must be viewed from the lens of our constitution which guarantees access to justice. The Court must exercise caution and ensure that costs do not become a barrier to access to 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 THI 27TH...DAY OF SEPTEMBER 2018.

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B. THURANIRA JADEN

JUDGE

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J. WAKIAGA

JUDGE

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G. W. NGENYE-MACHARIA

JUDGE

.....

JOHN MATIVO

JUDGE

.....

JOHN ONYIEGO

JUDGE