REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

JR NO. 295 OF 2012 (AS CONSOLIDATED)

IN

IN THE MATTER OF APPLICATION FOR LEAVE TO APPLY FOR JUDICIAL REVIEW BY HON. LADY JUSTICE JEANNE GACHECHE

AND

IN THE MATTER OF THE CONSTITUTION OF KENYA, 2010

AND

IN THE MATTER OF THE VETTING OF JUDGES AND MAGISTRATES ACT, ACT NO. 2 OF 2011

AND

THE VETTING OF JUDGES AND MAGISTRATES BOARD……1ST RESPONDENT

JUDICIAL SERVICE COMMISSION…….....2ND RESPONDENT

AND

THE ATTORNEY-GENERAL…….....….INTERESTED PARTY

WITH

NAIROBI CONSTITUTIONAL PETITION NO. 438 OF 2012

HON. JUSTICE JOSEPH G. NYAMU…….…….....……...PETITIONER

AND

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

THE JUDICIAL SERVICE COMMISSION.....1ST INTERESTED PARTY

WITH

NAIROBI CONSTITUTIONAL PETITION NO. 434 OF 2012

HON. JUSTICE SEO BOSIRE…….....……PETITIONER

AND

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

THE ATTORNEY-ATTORNEY……..…….....….....2ND RESPONDENT

WITH

NAIROBI CONSTITUTIONAL PETITION NO. 433 OF 2012

HON. JUSTICE RSC OMOLO…….....…..PETITIONER

AND

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

THE ATTORNEY-ATTORNEY.…….....….2ND RESPONDENT

JUDICIAL SERVICE COMMISSION…….....…....3RD RESPONDENT

WITH

NAIROBI CONSTITUTIONAL PETITION NO. 261 OF 2013

HON. JUSTICE MARY ANG'AWA…….....……PETITIONER

AND

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

JUDICIAL SERVICE COMMISSION…….....2ND RESPONDENT

THE ATTORNEY-ATTORNEY……..…….....….3RD RESPONDENT

WITH

NAIROBI CONSTITUTIONAL PETITION NO. 235 OF 2013

HON. JUSTICE MUGA APONDI…….....…..……PETITIONER

AND

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

JUDICIAL SERVICE COMMISSION…….....……2ND RESPONDENT

THE ATTORNEY-ATTORNEY…….....…….3RD RESPONDENT

RULING

A. **INTRODUCTORY**

1. This ruling is in respect of the following matters, hereinafter referred to as "the Suits"):

   (a).Republic vs The Vetting of Judges and Magistrate's Board ex parte Honourable Lady Justice Jeanne W. Gacheche Nairobi High Court Judicial Review Application No. 295 of 2012.

   (b). Honourable Justice Muga Apondi vs. The Judges and Magistrates Vetting Board and Others Petition No. 235 of 2013.

   (c). Honourable Justice Mary Ang'awa vs. The Judges and Magistrates Vetting Board and Others Petition No. 261 of 2013.

   (d). Honourable Justice SEO Bosire vs. the Judges and Magistrates Vetting Board and Others Petition No. 434 of 2012.

   (e). Honourable Justice Joseph G Nyamu vs. the Judges and Magistrates Vetting Board and Others Petition No. 438 of 2012.

   (f). Honourable Justice RSC Omolo vs. Judges and Magistrates Vetting Board and Others Petition No. 433 of 2012.

   (g). Republic vs. The Vetting of Judges and Magistrate's Board ex parte Lady Justice Joyce Khaminwa Judicial Review Miscellaneous Application No. 113 of 2013.

2. Although Dr. Khaminwa, SC was emphatic that in these consolidated petitions he was only appearing for Lady Justice Ang'awa the Petitioner in Petition 261 of 2013 and not for the Petitioner in Petition No. 113 of 2013, we have perused the record of the proceedings in Petition No. 133 of 2013 and with due respect we are of the contrary opinion. On 13th March, 2014, the issue of whether the said petition could be referred to this Court as presently constituted was broached and Dr Khaminwa though initially agreeable to that course later thought otherwise. However, by his directions dated 24th March, 2014, the Hon. The Chief Justice directed that the said matter and all matters pertaining to litigation between the Board and former judges found by the Board to be unsuitable, should be heard by this bench. Subsequently, on 3rdApri, 2014, the said petition was referred to Lenaola, J pursuant to the said directions.
3. Those directions have not been set aside. Accordingly, Petition No. 113 of 2013 is one of the matters which fall for determination before this bench.
4. The genesis of this ruling are the directions given to the High Court by the Supreme Court (Mutunga CJ & P, Rawal DCJ & VP, Tunoi, Ojwang, Wanjala and Njoki SCJJ) in its judgment in **Petition No. 13A of 2013 (as consolidated with Petitions Nos. 14 and 15 of 2013)** of 5th November 2014.
5. In order (c) of the said judgment, the Supreme Court directed as follows:-

   "The respective Superior Court Divisions or stations having to adjudicate upon matters of any of the following categories shall list them for mention within 15 days of the date hereof, and shall dispose of them forthwith, in accordance with the terms of this judgment and these orders, that is to say:

i. ***Alleged lack of jurisdiction or merit on the part of the Vetting Board;***
ii. ***Alleged want of exclusive competence of the Vetting Board to determine the suitability of a Judge or Magistrate to continue in service;***
iii. ***Any contest to the Vetting Board's process (or outcome thereof) for determining the suitability of a Judge or Magistrate in service."***

B. **BACKGROUND**

a. **Historical Context**

6. Before delving into the substance of these matters, it is important to appreciate the historical context of the vetting of judges and magistrates in this country.
7. After a two-decade search for a new constitutional dispensation in Kenya, on the 4th of August, 2010, the people of Kenya voted at a national referendum to approve a new Constitution, which Constitution, in accordance with Article 263 thereof, came into force upon its promulgation on the 27th of August, 2010. The current constitutional dispensation is therefore anchored firmly in the sovereignty of the people of Kenya.
8. During the agitation for a new constitution, the Kenyan judiciary had come under sustained criticism for its perceived failure to uphold the rule of law due,*inter alia*, to allegations of incompetence and corruption in the said institution. Therefore, the constitutional provisions with regard to the judiciary must be understood in the light of the public perception of the judiciary in the period preceding the enactment and promulgation of the Constitution.
9. In the Sixth Schedule to the Constitution, section 23 provides as follows:-

"23(1) Within one year after the effective date Parliament shall enact legislation which shall operate despite Articles 160, 167 and 168, establishing mechanism and procedures for vetting within a timeline to be determined by the legislation, the suitability of all Judges' and Magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Article 10 and 159.

23 (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 review by, any court."

10. Pursuant to these provisions, Parliament enacted the **Vetting of Judges and Magistrates Act, 2011 [Act No. 2 of 2011]**(hereinafter referred to as "the Act"), which Act came into force on 22nd March, 2011. Section 6 of the Act establishes an independent board known as the Judges and Magistrates Vetting Board ("the Board"). At section 13, the Act provides for the functions of the Board as being, ***'To vet judges and magistrates in accordance with the provisions of the Constitution and this Act.'*** *Under* section 2 of the Act, the term *'vetting 'is* defined as, **'the *process by which the suitability of a serving judge or magistrate to continue serving in the judiciary is determined in accordance with this Act.'***

b. **Proceedings in the High Court**

11. Some of these suits were provoked by determinations made by the said Board, in which the Board in the exercise of its mandate under Section14 of the Act, found the petitioners and the applicants herein unsuitable to continue serving in the judiciary.
12. The petitioners and the applicants had prior to and after the said determinations moved the High Court in separate suits seeking various reliefs. The causes were consolidated and were set to be heard together in **Nairobi JR Application No. 295 of 2012**, **Eldoret Constitutional Petition No. 11 of 2012** and **Nairobi Petitions Nos. 433, 434 and 438 of 2012**.
13. Before the said suits could be heard however, a preliminary objection on a point of law was taken out on whether the High Court had jurisdiction to intervene in proceedings undertaken by the Board. In the end, the High Court (Havelock, Mutava, Nyamweya, Ogola and Mabeya JJ) held, on 30th October 2012, that it had jurisdiction to intervene and review the process and decisions of the Board and, to interrogate the question whether the Board had exceeded its constitutional and statutory mandate and whether it had breached the fundamental rights and freedoms of parties who had appeared before it.

c. **Proceedings in the Court of Appeal**

14. An appeal was lodged at the Court of Appeal against the decision of the High Court of 30th October 2012. The central ground of appeal was that the High Court fell into error in finding that it had jurisdiction to review the processes of the Board, and especially in holding that its mandate to interpret the Constitution and to enforce fundamental rights and freedoms are unlimited. The Court of Appeal (Kiage, Murgor, Sichale, Mohammed and Otieno-Odek JJA), in a majority decision,upheld the decision of the High Court.

d. **Proceedings in the Supreme Court**

15. A further appeal was filed at the Supreme Court. The critical issue was, once again, the jurisdiction of the High Court to review the decisions of the Board despite the ouster clause in Section 23 of the Sixth Schedule to the Constitution.
16. The Supreme Court in its decision of 5th November 2014 found that the jurisdiction of the High Court as set out in **Article 165** of the **Constitution** had been ousted by **Article 262** of the **Constitution** as read together with **Section 23(2)** of the **Sixth Schedule** to the **Constitution** with respect to the vetting of judges and magistrates. It declared that the superior courts – meaning the High Court, the Court of Appeal and the Supreme Court – had no jurisdiction whatsoever to audit the proceedings conducted by the Board or the outcome resulting from such proceedings.
17. The Supreme Court pronounced itself, at paragraphs 200 and 202 of its decision of 5th November 2014, as follows–

> ***'(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 court's 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 the exclusive mandate of determining the suitability of a Judge or Magistrate in service as at the date of promulgation of the Constitution, to continue in service...'***
>
> ***'(202) For avoidance of doubt, and in the terms of Section 23(2) of the Sixth Schedule to the Constitution, it is our finding that none of the Superior Courts has the jurisdiction to review the process or outcome attendant upon the operation of the Judges and Magistrates Vetting Board by virtue of the Constitution, and the Vetting of Judges and Magistrates Act.'***

C. **DIRECTIONS**

18. The decision of the Supreme Court of the 5th November 2014 in the said **Petition No. 13A of 2013** was thereafter transmitted to this five-judge bench of the High Court for enforcement. The said bench was empaneled by the Chief Justice on 27th November, 2013 when he directed that the judicial review application be heard by a bench of 5 judges comprising Lenaola, M. Ngugi, Nyamweya, Odunga and Musyoka, JJ. This culminated in this matter being placed, on 21st November 2014, before Lenaola, J, the Presiding Judge of the said five judge bench. In conformity with the directions of the Supreme Court aforementioned, Lenaola, J directed the parties to file written submissions on the import of the judgment of the Supreme Court, to be highlighted before the full bench.
19. Various parties filed their written submissions, complete with lists and copies of the authorities that they proposed to rely on.

D. **THE PARTIES' RESPECTIVE CASES**

20. The matter came up for hearing on 26th January 2015,when counsel appearing for the various

parties addressed the full bench on the import and impact of the decision of the Supreme Court.

a. **The Case for the Board and the Law Society of Kenya**

21. Mr. Kanjama submitted that the decision of the Supreme Court was final, and the orders to be executed were that the gazettement orders be discharged and that the High Court should dispose of all the cases. He argued that according to the orders of the Supreme Court, the High Court was required to apply two approaches in the disposal of the matters - it should comply with order (c) of the Supreme Court judgment, and secondly it should take into consideration the *ratio decidendi* in the said decision of the Supreme Court. He cited the decisions in ***Cassell & Co. Ltd vs. Broome & Another (No. 1)*** **(1972) UKHL 3** and ***Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others*****[2013] eKLR** to support his contention that it was not open to the High Court when applying a decision of a superior court to disagree with it.
22. He invited the court to peruse all the pleadings in the matters pending before it, to establish whether the Board had jurisdiction over the complaint, whether it lacked exclusive jurisdiction to vet judges, and whether the matters were a contest as to the process or outcome of the decision of the Judges and Magistrates Vetting Board. He in conclusion implored the High Court to dismiss all the petitions in terms of the directions of the Supreme Court.

(b) **The Case for the Judicial Service Commission**

23. Mr. Muite, SC submitted that the reason that the Supreme Court could not dismiss any of the suits herein was because the matter before it arose from a determination of a preliminary objection rather than a decision on the substance of the petitions or judicial review applications themselves. He argued that only the High Court could dismiss the matters for it is the court seized of them. He further submitted that the High Court was, by virtue of **Article 163(7)** of the **Constitution**, bound by the decisions of the Supreme Court. He stated that the issues raised by the petitioners and the applicants had the effect of inviting the High Court to sit on appeal over a decision of the Supreme Court. He submitted that the Supreme Court had found that the High Court did not have jurisdiction over matters before the Board and therefore that the matters before the High Court ought to be dismissed.

(c)The Case for the Attorney-General

24. Mr. Njoroge,for the Attorney-General, submitted that the High Court ought to implement the directions of the Supreme Court in terms of order (c) of its judgement and should look at each of the petitions to ascertain whether they fall within the parameters set out in order (c) of the said judgement. He argued that the said decision was final, and the High Court could not reopen it. He submitted that the High Court had no jurisdiction to inquire into the issues raised in the petitions; consequently, that the said petitions should be dismissed.

d. **The Case for the Applicant in JR No. 295 of 2012 - Honourable Lady Justice Jeanne W. Gacheche vs. The Vetting of Judges and Magistrate's Board & Others.**

25. In his submissions, Mr. Mwenesi, for the Applicant in JR No. 295 of 2012, stated that the judgement of the Supreme Court was not capable of implementation by the High Court. In his view the manner in which the judgement of the Supreme Court in **Petition No. 13A of 2013 (as consolidated with Petitions Nos. 14 and 15 of 2013)** had been amended was unprocedural as the parties were not notified of the intention to do so. He further submitted that there were two conflicting decisions of the Supreme Court, that is between the decision of the court **in Petition No. 29 of 2014** and **Petition No. 13A of 2013 (as consolidated with Petitions Nos. 14 and 15 of 2013)**. He submitted that these conflicting decisions of the Supreme Court meant that there was nothing for the High Court to implement. He wondered whether the decision of the Supreme Court was *in rem*, and expressed doubts as to the matters to which it applied. He argued that if the High Court had no jurisdiction to deal with the matters then the Supreme Court ought to have disposed of the matters that were before it instead of sending them to the High Court for disposal. He

therefore urged that the matters should be heard and determined by the High Court on their merits.

e. **The Case for the Petitioner in Petition No. 261 of 2013 - Honourable Justice Mary Ang'awa vs. The Judges and Magistrates Vetting Board and Others.**

26. Dr. Khaminwa, SC for the petitioner in Petition No. 261 of 2013, attacked the decision, stating that it was not a judgment for it had no title, and it commenced with the word 'introduction.' It was signed by all the judges, yet Mutunga CJ, Rawal DCJ and Ndung'u JSC wrote what was described in the document as "concurring opinions". Dr. Khaminwa wondered in that context as to who wrote the lead judgment or opinion. He submitted that this was a critical matter for every litigant was entitled to know the decision-maker. He concluded that there was no judgement for enforcement by the High Court. He also submitted that the decision could not be binding on persons who were not party to the proceedings. He proposed that all the matters be set down for hearing and the particular judge or judges seized of them would decide if they were to be bound by the decision of the Supreme Court.
27. Dr Khaminwa asserted that under Articles 22, 23 and 165 of the Constitution, the High Court is vested with jurisdiction to interpret the Constitution and it is the highest court in matters of human and fundamental rights, with the Court of Appeal and the Supreme Court being mere appellate courts. He submitted that it was a breach of the Constitution for the Supreme Court to purport to direct how the other courts are to handle matters before them. He stated that the Chief Justice sat in the Supreme Court bench in the matter in question as a judge, and could not therefore issue directions to the High Court as a judge. He asserted that the directions in order (c) of the purported judgement of the Supreme Court sent the wrong signal that the courts could be controlled. He dismissed the said directions as irregular and unlawful.
28. On whether the decisions and acts of the Board were amenable to judicial review, Dr. Khaminwa submitted that the Supreme Court had in its earlier decision, in *Dennis Mogambi Mong'are vs. Attorney-General* Civil Appeal No. 123 of 2012 (2014) eKLR, said that such decisions and actions were amenable to judicial review. He submitted that judicial review was an important component in the upholding of the Bill of Rights and the maintenance of the Rule of Law. He argued that for the Supreme Court to say that judicial review was not available with respect to violation of human and fundamental rights was an act of treason. He stated that each of the petitions ought to be heard on its merits instead of the court making a blanket order on all of them.

f. **The Case for the Petitioner in Petition No. 433 of 2012 - Honourable Justice RSC Omolo vs. Judges and Magistrates Vetting Board and Others.**

29. Mr. Ochieng Oduol for the petitioner in Petition Nos. 433 of 2012, while associating himself with the submissions by Mr. Mwenesi and Dr. Khaminwa, stated that the Constitution had at **Article 165(d)(ii)** bestowed on the High Court the privilege of pronouncing itself on all constitutional issues, and in doing so it does not act as a mechanical tool doing mechanical work as directed by another court. He submitted that the question of the High Court sitting on appeal in respect of the matters in the decision of the Supreme Court did not arise as there were no orders issued by the Supreme Court.
30. He submitted that the Supreme Court held two positions on the matter; on the one hand it has held that the High Court had no jurisdiction, and on the other, it had found that where the Board acted outside the timeframe given to it, the High Court had jurisdiction. He stated that the Supreme Court had not ordered the High Court to dismiss the cases but to dispose of them in accordance with the law, meaning that the High Court should exercise its mind and decide whether there was jurisdiction to look into each and every one of the petitions along the lines whether any order of the Supreme Court affected them specifically.

g. **The Case for the Petitioner in Petition No. 438 of 2012 - Honourable Justice Joseph G Nyamu vs. the Judges and Magistrates Vetting Board and Others.**

31. Mr. Ojiambo, SC for the Petitioner in **Petition No. 438 of 2012**, submitted that the High Court had the ultimate power to interpret the Constitution, and therefore it had power to safeguard

fundamental rights and freedoms including examining the processes of the Board to determine whether it was respecting the said rights and freedoms. He stated that the Supreme Court in **Petition No. 19 of 2014** asserted the jurisdiction of the High Court, and this court should therefore act on the basis of that decision. He asserted that all the petitions raised human rights issues and this court could not in the circumstances afford to adopt a dismissive approach. There must be judicial consideration of every issue, and therefore all the petitions ought to be heard on their merits, he concluded.

h. **The Case for the Petitioner in Petitions Nos. 235 of 2013 and 15 of 2015 – Honourable Justice Muga Apondi vs. The Judges and Magistrates Vetting Board and Others.**

32. Mr. Nyamodi submitted that the orders of the Supreme Court affected the petitioner herein though he was not party to all the previous proceedings, including those at the Supreme Court. In his view, this position, *prima facie*, amounted to a violation of the party's constitutional right to a fair hearing. He cited ***Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others*** **[2013] eKLR** in support of his argument, where, according to him, the Supreme Court ordained the High Court with jurisdiction to remedy violations of rights even by higher courts. He urged the court not to be complicit or accessory to the violation of the rights of the party he represented. With respect to his case, he stated that he had filed two petitions – **Petition No. 395 of 2013** and **Petition No. 13 of 2015**. He urged us to stay **Petition No. 395 of 2013**, and hear **Petition No. 13 of 2015** instead.

(i) Submissions on Behalf of the Kenya Magistrates and Judges Association

33. Mr. Alfred Ochieng for the Kenya Magistrates and Judges Association (KMJA) submitted that the opinion of the Supreme Court was not binding on the High Court, and the High Court should proceed to dispose of the matters as directed by the Supreme Court and determine the petitions on their merits as the judgement of 19th December 2014 was *in rem*.

(j) Rejoinder on Behalf of the Board and the Law Society of Kenya

34. Mr. Kanjama replied to the submissions of fellow counsel on the various matters they raised. On the integrity of the Supreme Court judgment, he submitted that a judgment of the Supreme Court, according to section 27 of the ***Supreme Court Act,*** should be in accordance with the opinion of the majority. In his view that is what should be valid and binding on the other courts. He stated that if a judge concurred with the majority opinion, then they were deemed to be party to the majority decision. He submitted that the separate concurring decisions in the decision of 5th November 2014 merely added to the jurisprudence of the Supreme Court. He concluded that the decisions of the Supreme Court to be enforced by the High Court include orders, decrees and judgments, each of which are equally authoritative and enforceable.
35. On correction of judgments of the Supreme Court, he stated that the ***Supreme Court Act*** grants the court opportunity to amend its decisions. He submitted that any question on the subject of errors in a judgment or ruling of the Supreme Court should be addressed to the Supreme Court itself. To invite the High Court to deal with such errors was to encourage judicial anarchy and constitutional violations. He submitted that it was a feature of the appellate system that a lower court cannot question a final decision of a higher court. He urged that there was on record a valid judgment to be enforced after the correction of the typographical errors.
36. On whether the two decisions of the Supreme Court in **Petition No. 13A of 2013** and **Petition No. 19 of 2014** are conflicting, Mr. Kanjama submitted that the two cases were different in terms of their import, as each litigant was challenging individual circumstances.He submitted that in **Petition No. 13A of 2013,** the Supreme Court made only two ousters, with regard to the mandate of the Judges and Magistrates Vetting Board to vet: (i) interpretation and (ii) application of the Constitution. He also emphasized on the power granted to the High Court with respect to constitutional interpretation, as set out in **Article 165(3) (d) (i) of the Constitution**.
37. On what was meant by the Supreme Court in its directive on the disposal of the matters, Mr. Kanjama submitted that, it meant hearing the matters even in the manner of the proceedings that

were being conducted on 26th January 2015. He stated that the matters could even be disposed of summarily. He submitted that every judicial body had a limited jurisdiction to determine whether it had jurisdiction. He urged that in conducting the hearing of 26th January 2015, the High Court was in effect asking itself whether it had jurisdiction to handle the matters or not.

38. He concluded by arguing that the decision of the Supreme Court bound all persons in the country including those that are not party to the proceedings. He stated that the Supreme Court was higher than the High Court in the hierarchy of courts, and therefore its decisions bind the High Court. Similarly, the said court has the mandate to direct the High Court in the actualization of the said hierarchy.

E. **ISSUES FOR DETERMINATION**

39. Having studied the written submissions and heard the oral submissions of counsel appearing in the matter, we identified the following issues as arising for determination –

a. Is the Supreme Court judgment of 5th November 2014 a valid judgment capable of enforcement, in view of the various issues raised about its integrity?
b. If the said judgment is found to be valid and enforceable, does it bind judicial officers whose matters were not before the Supreme Court?
c. Are there conflicting decisions from the Supreme Court regarding the jurisdiction of the High Court over determinations of the Board? If so, what approach is this Court to take?
d. What is the import and impact of the Supreme Court judgement by its order (c) in the said judgment?
e. Should this court order stay of **Petition No. 395 of 2013** pending hearing and determination of **Petition No. 13 of 2015**?

F. **ANALYSIS**

40. We shall consider, though not in a sequential manner, the issues identified in the foregoing paragraphs.

a. **Validity of the Judgment of the Supreme Court of 5th November 2014**

41. The first issue that we have to resolve is whether there is on record a valid judgment of the Supreme Court that this court can work with. Counsel for the Petitioners raised various issues concerning errors and processes with respect to the judgment of 5th November 2014. The main complaint was that the pronouncement that initially came from the Supreme Court dated 5thDecember 2014 purporting to be the decision of the said court in **Petition No. 13A of 2103 (as consolidated with Petitions. Nos. 14 and 15 of 2013)** was not a judgment for it was not intituled as such. The subsequent complaint was that the said determination was later unprocedurally altered to introduce a heading 'Judgment' and to correct a date that had been wrongly cited.

42. The Petitioners raised concerns about the process of amendment of the original pronouncement of the Supreme Court by the said court, arguing that the same should have been done after due notice to the parties. Concerns were also raised about the process of the transmission of the judgment to the High Court for enforcement, in terms of it not being in conformity with rule 22 of the ***Supreme Court Rules***, which provides that a decision of the Supreme Court can be executed and enforced by the Court as if it were a judgment of the High Court, and that the registrar of the Supreme Court should certify every decision of the court for transmission to the High Court for execution.

43. With respect, the competence or otherwise of the pronouncement or judgment of the Supreme Court delivered on 5th November 2104, its amendment and transmission to the High Court for enforcement are matters that are outside the mandate of the High Court. It is a matter that concerns a Supreme Court process which this court cannot interrogate. The pronouncement of the Supreme Court that was forwarded to this court by the Deputy Registrar of the Supreme Court vide her letter of 2nd December 2014 was properly intituled or headed 'Judgment' and was duly certified as

required by rule 22 of the ***Supreme Court Rules***. It is our position that we have before us a valid judgment which we must deal with as we shall hereby proceed to do.

b. **Alleged Conflicting Judgments of the Supreme Court of 5th November 2014 and 19th December 2014**

44. It was submitted before us that the Supreme Court had ruled in **Petition No. 13A (consolidated with Petitions Nos. 14 and 15 of 2013)- Judges and Magistrates Vetting Board & Others vs. The Centre For Human Rights And Democracy** that the Board had been immunized against any challenges to its jurisdiction, mandate or process; and therefore there could not be any contest to its jurisdiction, yet in **Petition No. 29 of 2014- Judges and Magistrates Vetting Board vs. Kenya Magistrates and Judges Association & Another [2014] eKLR** it was ruled that the superior courts had jurisdiction to deal with issues around the interpretation and application of the Constitution with respect to the operations of the Board. It was stated in that regard that the High Court had a general jurisdiction over, but it could not scrutinize the Board's exclusive competency, processes, outcome or its alleged violation of fundamental rights or freedoms.

45. Are the two decisions conflicting? In order to determine this issue it is important to reproduce what exactly the Supreme Court said in the two decisions and relevant to the issue before us. In **Petition No. 13A (consolidated with Petitions Nos. 14 and 15 of 2013)** the Court at paragraphs 193, 201 and 202 expressed itself as follows:

> ***"[193] It follows that a contest to the decision of the Judges and Magistrates Vetting Board, insofar 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.***
>
> ***[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 fulfilment of its transitional provisions, such as those relating to the vetting process for Judges and Magistrates.***
>
> ***[202] For the avoidance of doubt, and in the terms of Section 23(2) of the Sixth Schedule to the Constitution, it is our finding that none of the Superior Courts has the jurisdiction to review the process or outcome attendant upon the operation of the Judges and Magistrates Vetting Board by virtue of the Constitution, and the Vetting of Judges and Magistrates Act."***

46. In **Petition No. 29 of 2014,** on the other hand, the Supreme Court by a majority held *inter alia* as follows:

> ***"[40] In other words, this Court consciously articulated the state of the law, in accordance with the Constitution: the removal of a Judge or Magistrate, or a process leading to such removal by virtue of the operation of the Judges and Magistrates Vetting Act by the Vetting Board, cannot be questioned in any court of law. That remains the valid position, under the law.***
>
> ***[41] Today this Court, is faced with a different question: whether the Judges and Magistrates Vetting Board, in execution of its mandate as stipulated in Section 23 of the Sixth Schedule to the Constitution of 2010, can investigate the conduct of Judges and Magistrates who were in office on the effective date, on the basis of alleged acts and omissions arising after the effective date.***
>
> ***[42] In answering this question, the two superior Courts had to interpret Section 23 of the Sixth Schedule to the Constitution, as read with Section 18 of the Judges and Magistrates Vetting Act. It is their interpretation that has led to this appeal before us. This appeal was***

filed as of right, pursuant toArticle 163 (4) (a) of the Constitution, because it involves the interpretation or application of the Constitution.

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

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

47. From the view point of the Supreme Court, the decision in **Petition No. 13A (consolidated with Petitions Nos. 14 and 15 of 2013)** was limited to the general supervisory jurisdiction of the High Court and that court's mandate to safeguard fundamental rights and freedoms; it did not in that matter address its mind to the interpretation and application of the Constitution with respect to matters before the Board which was the subject matter of **Petition No. 29 of 2014**.
48. The Supreme Court having considered the issue of conflict between the two decisions and having determined that in fact there is no such conflict, it is our respectful view that we cannot revisit the same with a view to arriving at a contrary conclusion.
49. It is our understanding of the two decisions that whereas this Court has the power to entertain matters pertaining to the interpretation and application of the Constitution with respect to matters before the Board, the Court on the other hand has no jurisdiction to invoke its general supervisory jurisdiction in order to safeguard fundamental rights and freedoms. To do so would amount to the Court inquiring into the vetting Board's process and that is one of the powers the Supreme Court has determined this Court does not have.

c. **<u>Whether the Decision of the Supreme Court of 5th November 2014 affects Persons whose Matters were not Before the Supreme Court</u>**

50. The issue of fair hearing was raised with respect to persons who were not party to the Supreme Court proceedings. Order (c) of the judgment refers to all High Court divisions and stations having to deal with the matters that were being addressed by the Supreme Court.
51. Ordinarily, persons who are not parties to legal proceedings are never bound by decisions arising therefrom; See ***Ernest Orwa Mwai vs. Abdul S Hashid & Another*** Civil Appeal No. 39 of 1995, ***Kotis Sandis vs. Ignacio Jose Macario Pedro De Silva*** [1950] 1 EACA 95, ***The Town Council of Ol'kalou vs. Ng'ang'a General Store*** Civil Appeal No. 269 of 1997 and ***Sakina Sote Kaitany and Another vs. Mary Wamaitha*** Civil Appeal No. 108 of 1995.
52. That position, in our view, however only applies to judgments which can properly be described as being *in personam*. In ***Conflict of Laws***, R H Graveson, (7thEdn. 1974), at page 98, it is stated:

*"**An action is said to be in personam when its object is to determine the rights and interests of the parties themselves in the subject-matter of the action, however the action may arise, and the effect of a judgment in such an action is merely to bind the parties to it. A normal action brought by one person against another for breach of contract is a common example of an action in personam."***

(See also **Black's Law Dictionary,** 9thEdn. Page 862.)

53. However, the issue of the High Court's jurisdiction in matters arising from the Vetting Board was in our view not a matter which could be said to have been restricted to the parties before the Court since a decision on jurisdiction is a decision *in rem* which is defined as a final judgment or order or decree of a competent court which confers or takes away from any person any legal character, or to be entitled to any specific thing, not as against any specific person but absolutely; See ***Koech***

vs. African Highlands and Produce Limited and Another [2006] 2 EA 148.

54. The issue of the jurisdiction of the High Court, with respect to determinations of the Board, cannot be said to have been restricted only to the parties who were before the Supreme Court. In our view, by virtue of the principle of *stare decisis*, the decision of the Supreme Court in issue affects even persons who were not party to the Supreme Court process.

55. *Stare decisis* or precedent maintains that previous decisions are to be followed by the courts. According to ***Black's Law Dictionary***, 9th Edition, 1537, *stare decisis* is the doctrine of precedent, under which a court must follow earlier judicial decisions when the same points arise again in litigation.William M. Lile*et al*., in ***Brief Making and the Use of Law Books***, 321 (3rd edition 1914)on the doctrine of *stare decisis* states that –

*"**The rule of adherence to judicial precedents finds its expression in the doctrine of stare decisis. This doctrine is simply that, when a point or principle of law has been once officially decided or settled by the ruling of a competent court in a case in which it is directly and necessarily involved, it will no longer be considered as open to examination or to a new ruling by the same tribunal, or by those which are bound to follow its adjudications, unless it be for urgent reasons and in exceptional cases."***

56. **Article 165(7) of the Constitution** states the doctrine of *stare decisis* with respect to the decisions of the Supreme Court and underlines the binding force of the decisions of the said court on all the other courts. It states that '***All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.'***

57. This provision is a constitutional codification of the common law doctrine of stare decisis. As was held by **Emukule, J** in **Koinange vs. Commission of Inquiry Into The Goldenberg Affair Nairobi HCMCA No. 372 of 2006 [2006] 2 KLR 529**.

"The doctrine of stare decisis is predicated upon the principle of precedent under which it is necessary for a court to follow earlier judicial decisions when the same facts arise again in litigation. The phrase stare decisis literally means, "stand by things decided". This doctrine is simply that when a point or principles of law has been once officially decided or settled by the Ruling of a competent court in a case in which it is directly and necessarily invoked, it will no longer be considered as open to examination or to a new ruling by the same tribunal or by those which are bound to follow its adjudications, unless it be for urgent reasons and exceptional cases."

58. Therefore if the issues in this application were necessarily determined by the Supreme Court, it will no longer be open to this Court to examine the same with a view to arriving at a different decision. The said doctrine is so sacrosanct in our jurisprudence that even the highest court in the land will not lightly ignore the same and was recognised by Sir Charles Newbold, P in **Dodhia vs. National & Grindlays Bank Limited and Another [1970] EA 195,**where he pronounced himself thus on the doctrine -

"A system of law requires considerable degree of certainty and uniformity and such certainty and uniformity would not exist if the courts were free to arrive at a decision without regard to any previous decision of its own. But there is a great difference between a final court of appeal and a subordinate court of appeal. If it is considered that a decision of a subordinate court of appeal was wrong it would always be open to have it tested and if necessary rectified in the final court of appeal. Thus, on the face of it, there is a need for greater flexibility in a final court of appeal than there is any other court in the judicial hierarchy. Further, the need for such flexibility is the greater and not the less in a developing country, as there is a greater likelihood of rapid changes in the customs, habits and needs of its people, which changes should be reflected in the decisions of the final court of appeal. It should, moreover, be borne in mind that too strict an adherence to the principle of *stare decisis* **would, in fact, defeat the object of creating certainty, as a final court of appeal faced by a decision which was unsuited to the present needs of the community would seek to distinguish it. The result of distinguishing a decision when there was no real**

difference results in uncertainty, an uncertainty which would not exist if it were clearly stated that the old decision was no longer the law. It must also be remembered that the Privy Council, when it was the final court of appeal for Kenya, Tanzania and Uganda, never considered itself bound by its previous decisions. It would seem a retrograde step for the court, now that it has taken over the functions of a final court of appeal for these countries, to discard the flexibility previously possessed by the final court of appeal and instead adopt a position of rigidity."

59. In the same case, **Duffus, V.P,** said -

"The adherence to the principle of judicial precedent or *stare decisis* **is of utmost importance in the administration of justice in the Courts in East Africa and thus to the conduct of the everyday affairs of its inhabitants, it provides a degree of certainty as to what is the law of the country and is a basis on which individuals can regulate their behaviour and transactions as between themselves and also with the State. There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and subject to these decisions also to the decisions of the High Court in the particular State."**

60. Odunga, J in **Republic vs. Business Premises Rent Tribunal & another ex parte Albert Kigera Karume** [2015] eKLR observed:

"Whereas the current Constitution in Article 163(3) seems to deal only with the binding force of the decisions of the Supreme Court, it is my view that good order and proper administration of justice as well as the common law doctrine of *stare decisis* dictate that lower courts adhere to the decisions of courts of superior hierarchy where legally acceptable circumstances exist."

61. His Lordship cited the decision in **Rift Valley Sports Club vs. Patrick James Ocholla [2005] eKLR, where Musinga J said** on the doctrine,

"T**he doctrine of** *staredecisis* **is very important in our judicial system and must be respected as much as possible otherwise judicial decisions would be chaotic and unpredictable. It was unfortunate that the learned magistrate totally disregarded a five judge binding decision without citing any reasons for doing so."**

62. The Supreme Court itself in **its decision in Jasbir Singh Rai & 3 Others vs. Tarlochan Singh Rai & 4 Others [2013] eKLR** stated that -

"Adherence to precedent should be the rule and not the exception....the labour of judges would be increased almost to breaking point if every past decision could be reopened in every case, and one could not lay one's own course of bricks on the secure foundation of the courses laid by others who had gone before him."

63. By virtue of the Supreme Court being at the apex in the hierarchy of Kenyan court system, having addressed itself to the issues and having made a pronouncement on them, its decision is binding on this court so far as similar matters are concerned. This is the doctrine of vertical *stare decisis* which demands that a court must strictly follow the decisions handed down by higher courts within the same jurisdiction. The principles enunciated in that decision would apply to matters that had not been placed before that court and to parties who were not before the court, so long as the latter matters turn on similar facts and points of law as the matter that the Supreme Court was

seized of.

64. The circumstances in which a Court may decline to follow a decision which would otherwise be binding on it are (a) where there are conflicting previous decisions of the court; or (b), the previous decision is inconsistent with a decision of another court binding on the court; or (c) the previous decision was given *per incuriam.* As a general rule though not exhaustive, the only cases in which decisions should be held to have been given *per incuriam* are those of decisions given in ignorance or forgetfulness or some inconsistent statutory provision or of some authority binding on the court concerned: so that in such cases some part of the decision or some step in the reasoning on which it is based is found, on that account, to be demonstrably wrong; See **Lalitmohan Mansukhlal Bhatt vs. Prataprai Luxmichand and Another Civil Appeal No. 70 of 1963 [1964] EA 414.**

65. We are bound by the decision of the Supreme Court, by virtue of **Article 167(7)** of the Constitution. Persons who were not parties to the Supreme Court process and who are dissatisfied with the outcome of these proceedings have the liberty to appeal the outcome of the proceedings.

66. We wish to emphasise that the binding nature of the decision of the Supreme Court is not predicated on this Court's concurrence therewith but is based on the **requirements of certainty, uniformity** and predictability of judicial decisions**.** This was appreciated by a five judge bench of the Court of Appeal in **Mwai Kibaki vs. Daniel Toroitich Arap Moi Civil Appeal Nos. 172 & 173 of 1999 [2008] 2 KLR (EP) 351; [2000] 1 EA 115** where it was held that:

> **"The High Court, while it has the right and indeed the duty to *critically examine* the decisions of the Court of Appeal, must in the end follow those decisions unless they can be distinguished from the case under review on some other principle such as that *obiter dictum* if applicable. It is necessary for each lower tier to accept loyally the decisions of the higher tiers. Even in the same tier, where it has taken the freedom to review its own decisions, it will do so cautiously. Precedent is regarded as an indispensable foundation upon which to decide what is the law and its application to individual cases. It provides at least some degree of certainty upon which individuals can rely in the conduct of their affairs, as well as an orderly development of legal rules…"** [Underlining ours].

67. A similar view was expressed by the Court of Appeal in **National Bank of Kenya Ltd vs. Wilson Ndolo Ayah Civil Appeal No. 119 of 2002 [2009] KLR 762** where it was held:

> **"It is good discipline in courts for the proper smooth and efficient administration of justice that the doctrine of precedent be adhered to. If for any reason a Judge of the High Court does not agree with any particular decision of the Court of Appeal, it has been the practice that one expresses his views but at the end of the day follows the decision which is binding on that court. The High Court has no discretion in the matter."**

68. We therefore decline the invitation to investigate the correctness or otherwise of the decision of the Supreme Court with a view to deciding whether to follow it or not. Our view in this respect is supported by the decision of **Ringera, J** (as he then was) in **Deposit Protection Fund Board vs. Sunbeam Supermarket Limited & 2 Others Nairobi (Milimani) HCCC No.3099 of 1996 [2004] 1 KLR 37** where the learned Judged opined that under the doctrine of *stare decisis* the High Court is bound by the decision of the Court of Appeal regardless of whether the decision is agreeable to it or not.

69. Order (c) of the judgment of the Supreme Court has mandated the High Court to proceed to dispose of the pending petitions if they raise issues falling within the three categories set out in the order.

d. **What is the import and impact of the Supreme Court judgement by its order (c) in the said judgment?**

70. Questions have arisen about what the Supreme Court meant by directing the High Court to 'dispose of' the matters. The ordinary straightforward meaning of 'dispose of' is to deal with or get rid of or finish or kill. ***Ballentines Law Dictionary*** at page 147 defines the word "dispose" as

"*to end; to settle; to resolve; to finalize…To get rid of; to discard.*" The same work defines "disposition" as "A court's ruling, decision, or judgement in a case…The act of settling something, particularly a case". We understand the Supreme Court to be directing us to deal with the matters with a view to finishing or finalizing them. We are, in doing so, to follow the criteria set out in order (c) of the judgment.

71. In our view the decision of the Supreme Court cannot be construed to mean that the Supreme Court was directing the High Court to either dismiss the matters before it or allow the same but simply directed that the same be determined or finalized in accordance with its said decision. Had the Supreme Court directed the Court to dispose of the matters before it in a particular manner such as by directing this Court to dismiss this application, it would well be argued that its said decision would either have been *obiter* or *per incuriam*. It would have been *obiter* because that was not one of the prayers sought and the parties whose matters are pending before this Court were not necessarily parties to the matter before the Supreme Court. It would, subject to the binding effect of the decision of the Supreme Court, have been *per incuriam,* to the extent that its effect would have been to lock out the parties from being heard by tying the hands of this Court to make a specific determination based on the facts before it, and that would have been contrary to Article 160 of the Constitution which mandates this Court in the exercise of its judicial authority to be subject only to the Constitution and the law and not subject to the control or direction of any person or authority. As was appreciated in **Mary Anne Njuguna vs. Joseph Njuguna Ngae Civil Application No.Nai. 195 of 1997:**

"One great hallmark of a judicial decision is that it can only be validly made after the parties to it have been heard…The directions of the Chief Justice are not binding on the trial judge as they do not constitute an order directed at the Judge..."

72. In that case it was held that the Chief Justice cannot direct a Judge to overrule himself.
73. It was argued that where the Supreme Court gives directions which are illegal or unconstitutional, this Court is not bound to adhere to them since this Court is enjoined by the Constitution and the oath of office to only dispense justice in accordance with the law and the Constitution. That submission is generally correct. As was held in **Uhuru Highway Development Limited vs. Central Bank of Kenya Limited & 2 Others Civil Appeal No. 36 of 1996**, a Judge of the superior court runs his court in his own way and he is not under the directions of the Chief Justice in regard to the findings or observations on any matter before him.
74. However, we see nothing wrong in the Supreme Court pointing out to this Court that in determining the matters before it, it ought to take into account the determination of the Supreme Court, a factor which this Court is bound to take into account even without it being pointed out. To paraphrase **Mwai Kibaki vs. Daniel Toroitich Arap Moi** (supra), the judges of the High Court who decide matters at the very least know that they are bound by the decisions of the Supreme Court. It is therefore our understanding that the Supreme Court did not direct the Court to make a pre-determined outcome in the matters before this Court.
75. In our view, which view was shared by a majority, if not all the parties to these proceedings, this Court must consider each of the Petitions and Judicial Review Applications forming the subject of this ruling and make a determination thereon in so far as the decision of the Supreme Court is concerned.
76. The three categories in order (c) of the judgment cover broadly the jurisdiction granted to the High Court by Article 165 of the Constitution, including the court's supervisory jurisdiction over quasi-judicial agencies and the mandate to safeguard fundamental rights and freedoms.
77. The Supreme Court has held that none of the superior courts have jurisdiction over the Board's processes and therefore there is no jurisdiction in the High Court to deal with the pending matters. Consequently, the only mode of disposal of the said matters available to the High Court is to strike them out for want of jurisdiction should it find that they fall within the parameters set out in order (c) of the judgment.

(e) Whether to Stay Petition No. 235 of 2013 Pending Hearing and Determination of Petition No. 13 of 2015

78. The Supreme Court having directed that this Court determines the matters herein, this Court by staying any of the proceedings covered by the Supreme Court decision would be reversing the said decision. Accordingly, any decision to stay any of the said matters can only be made by the Supreme Court. We therefore believe we do not have to exercise our minds on whether one of the two petitions ought to be stayed, in view of our finding above, that the High Court has no jurisdiction over the processes of the Board in exercise of its quasi-judicial function.

G. **DISPOSAL**

79. Taking our findings above into account, we have resolved to peruse the individual court files in each of the matters where the process(es) and decision(s) of the Board was under challenge to determine whether the matters fall within the categories set out in order (c) of the judgment. Should we find any of them to be within the said categories, we shall proceed to strike them out on the grounds of want of jurisdiction. Matters falling outside of the said categories would be within the jurisdiction of the High Court, and the court shall fix them for hearing and dispose of them in the usual way.
80. In that regard, we called for all the court files in respect of the said matters and perused through all of them. We accordingly, hereafter set out a summary of the facts of each of the matters under consideration in this ruling and the orders sought by the respective parties in order to determine whether or not they fall within or outside the categories set out in order (c) of the said judgment.
81. In **Republic vs. The Vetting of Judges and Magistrate's Board ex parte Honourable Lady Justice Jeanne W. Gacheche Nairobi High Court Judicial Review Application No. 295 of2012,** the applicant contended that the process of vetting was grounded on section 23(1) of the said Schedule, pursuant to which the Act was enacted. This Act, it was averred, provided for the mechanisms and procedures for vetting within a time frame determined by the Act. The applicant therefore posed the question whether the repeal of section 23(2) of the Act removing the time frame under the Act was unconstitutional, taking into account the fact that, according to her, the time frame for the vetting under the Act having expired on 23rd May, 2012 without being extended in accordance with the Constitution. She further posed the question whether her summon to appear before the Board was lawful and constitutional when in her view, ***Statute Law (Miscellaneous Amendments) Act, 2012*** which repealed section 23(2), was itself unlawful and unconstitutional.

1. The applicant therefore sought substantially the following orders:

> **(a). Certiorari to bring into the High Court and to quash the proceedings of the 1st Respondent, the Vetting of Judges and Magistrates Board, and the determination therein to serve on the Applicant the Notice to Appear dated 9thJuly, 2012 and served upon the Applicant soon thereafter in July, 2012.**
>
> **(b). Prohibition to prohibit the 1st Respondent, the Vetting of Judges and Magistrates Board, from commencing, and if they will have commended, from continuing with, the vetting of the Applicant pursuant to that Notice to Appear dated 9th July, 2012 and served upon the Applicant soon thereafter in July, 2012 and making any determination founded or based upon tat Notice to Appear whether pursuant to the Vetting of Judges and Magistrates Act, 2011 and the Vetting of Judges and Magistrates (Procedure) Regulations, 2011 or otherwise.**
>
> **(c) Prohibition to prohibit the 1stRespondent whether alone or in concert with the 2nd Respondent from issuing and presenting or serving the Applicant with any Notice to Appear for the purpose of vetting whether pursuant to the Vetting of Judges and Magistrates Act, 2011 and the Vetting of Judges and Magistrates (Procedure) Regulations, 2011 or otherwise, the time for vetting of judges and magistrates having expired under section 23 of the Vetting of Judges and Magistrates Act, 2011 and having not been extended in accordance**

with the Act, the Constitution of Kenya, 2010 or otherwise.

2. This application was clearly a judicial review application based on the supervisory jurisdiction of the High Court pursuant to Article 165(6) of the Constitution. With respect to this jurisdiction, Mutunga, P expressed himself at paras 213 and 214 of Petition No. 13A as follows:

> **"…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, and indeed the jurisdiction of any other Court, should remain in abeyance during the vetting process – as this is what the Kenyan people demanded. The people's 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…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 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."**

3. It is therefore clear that the Supreme Court was emphatic that the supervisory jurisdiction under which this Court exercises its judicial review jurisdiction was temporarily kept in abeyance with respect to matters of vetting of judges and magistrates. This Court consequently has no jurisdiction in the exercise of its supervisory jurisdiction to entertain matters questioning the Board's process (or outcome thereof) for determining the suitability of the Applicant.

82. In **Petition No. 235 of 2013 (Hon. Justice Muga Apondi vs. The Judges and Magistrates Vetting Board and others)** –

1. In this petition, the Petition contended that the Board's decision regarding the legality of his being allocated land lawfully annexed from the Government and the Petitioner's opinion on the integrity of some members of the civil society implied that as a judicial officer, the Petitioner did not enjoy the freedom of conscience, belief and opinion, and the freedom of expression enshrined in the Constitution. Further, in castigating the Petitioner's interaction with the members of the executive, it was contended that the said determination implied that the Petitioner does not enjoy the freedom of association and the right to acquire and own property.
2. It was contended that the Board disregarded the totality of the Petitioner's 34 years impeccable service, whose various positive attributes form the bulk of the criteria under the Act. It was the Petitioner's position that the 1st Respondent denied the Petitioner the right to equality and freedom from discrimination, by implying that as a judicial officer, the Petitioner does not enjoy the right to fair labour practices under Article 41(1) as enjoyed by other Kenyans.
3. It was the Petitioner's case that the 1st Respondent acted in excess of its constitutional mandate by derogating from the constitutional values and principles and instead took into account irrelevant, arbitrary, extra-constitutional, and extra-statutory considerations. Further, the 1st Respondent violated the rules of natural justice and contravened the Petitioner's right to fair hearing. In its determination, the 1st Respondent was accused of failure to apply the proportionality doctrine and to guard against the rule against bias.
4. The Petitioner accordingly sought the following orders:

a. **A DECLARATION that the determinations of the 1st Respondent dated 15th January 2013**

and 22nd March 2013 in respect of the Petitioner are unconstitutional, and therefore null and void;

b. **A DECLARATION that the process of vetting and decision of the 1stRespondent as contained in the Determinations dated 15thJanuary 2013 and 22nd March 2013 in respect of the Petitioner have infringed on the rights and fundamental freedoms of the Petitioner under Articles 25, 27, 28, 32, 33, 36, 40, 41, 47, 50, of the Constitution and are therefore null and void;**

c. **A DECLARATION that the process of vetting and decision of the 1st Respondent as contained in the Determinations dated 15th January 2013, and 22nd March 2013 in respect of the Petitioner exceeded its constitutional and statutory mandates under the Constitution and the Judges and Magistrates Vetting Board;**

d. **A PROHIBITORY INJUNCTION directed at the 2nd Respondent and the Government Printer, against de-gazetting the Petitioner as a Judge of the High Court, pending the final determination of the Petition;**

e. **A CONSERVATORY ORDER directed at the 2ndRespondent, to the extent that the Petitioner's terms of services under the Judicial Service be maintained as if he was on suspension, pending the final determination of the Petition.**

5. From the foregoing it is clear that this Petition was mainly concerned with the failure by the 1st Respondent to consider relevant factors and its consideration of what the Petitioner viewed irrelevant factors. Although the issue of excess jurisdiction was raised, this issue was tied to the process of arriving at the determination by the 1st Respondent. In our considered view, this petition substantially point to a contest to the Board's process or its outcome, matters which pursuant to the Supreme Court's decision, this Court has no jurisdiction to entertain.

83. **Petition No. 261 of 2013 (Hon. Justice Mary Ang'awa vs. The Judges and Magistrates Vetting Board and another)** –

1. In this petition, the Petitioner contended that since the review provision in the Act is neither a review by the Court nor by an independent and impartial tribunal, but the same panel which conducted and decided the vetting, the same contravenes Article 47(3)(1) of the Constitution while section 22(1) of the Act is inconsistent with the Constitution and is null and void. It was therefore contended that the determinations of 20th March, 2013 were also null and void as they were arrived at in violation of the Petitioner's right to fair administrative action as well as the right to fair trial under Article 50 of the Constitution.
2. It was contended that the Petitioner was treated differently from other persons in similar circumstances on whom the Board made determinations hence the Petitioner was discriminated against contrary to Article 27(4) and (5) of the Constitution.
3. It was further contended that the Board's decision was ultra vires because it admitted in the review proceedings false facts upon which it based its decision. It was further contended that the Board convicted the Petitioner on complaints which she had not been charged hence its decision was contrary to natural justice as she was ultimately convicted on those complaints.
4. It was the Petitioner's case that the Board condemned her as unsuitable for adherence to her conscience, personal beliefs and opinions and thereby denied and/or violated the Petitioner's right to freedom of conscience, thought, belief and opinion contrary to Article 32(1). It was therefore averred that in denying the Petitioner her rights and fundamental freedoms and the due process of the law, the Petitioner is convinced that the Board failed to respect and protect her inherent dignity thereby breaching Article 28 of the Constitution.
5. The orders sought by the Petitioner in this matter were –

a. **A Declaration that the Petitioner's rights under Articles 21, 22, 23, 24, 25, 26, 27, 32, 47, 50, 57, 159 and 160 of the Constitution have been infringed, violated, breached and/or threatened;**

b. **A Declaration that the Board lacked jurisdiction to make any determination after 28th**

February 2013;

c. **A Declaration that Section 22(1) of the Vetting of Judges and Magistrates Act, is inconsistent with Article 47(3) and is thus void to the extent of providing for a review process that is not consistent with that required by Article 47(3) of the Constitution;**
d. **A Declaration that the acts of the Board constituting the Review application by the Hon. Lady Justice Mary Ang'awa including the Determination of the Board dated 20th March 2013 in reliance upon Section 22 of the Vetting of Judges and Magistrates Act (which is inconsistent with the Constitution), are acts in contravention of the Constitution (Article 44(3)) and are and each is thus invalid by reason of Article 2(4) of the Constitution of Kenya**
e. **Pursuant to Article 23(3), of the Constitution, the Petitioner prays for judicial review and consequential orders and reliefs;**
f. **An Order of Certiorari to remove into the High Court of Kenya and quash the Determination in Review by the Judges and Magistrates Vetting Board dated the 2oth March 2013 determining that the Petitioner Lady Justice Mary Ang'awa is 'unsuitable' to continue serving as a judicial officer;**
g. **An Order of Certiorari to remove into the High Court of Kenya and quash the Determination in Review by the Judges and Magistrates Vetting Board dated the 2oth March 2013 determining that the Petitioner Lady Justice Mary Ang'awa is 'unsuitable' to be a Judge of the High Court of Kenya and upholding the Board Determination of 21st December 2912;**
h. **An Order of Prohibition directed to the Government Printer prohibiting the gazettement in the *Kenya Gazette* of the removal of the Hon. Lady Justice Ang'awa as a Judge of the High Court of Kenya;**
i. **An Order of Prohibition directed to the Judicial Service Commission and or the Treasury prohibiting it, its officers, servants and agents from in any manner impeding the continuation of the payment of the salary of the said Hon. Justice Ang'awa as Judge of the High Court of Kenya;**
j. **An Order for Certiorari to issue to bring into the High Court and quash the determination of the Vetting of Judges and Magistrates Board dated 20th March 2013 dismissing the Applicant's Application for Review which was filed before the Vetting of Judges and Magistrates Board on 8th January 2012;**
k. **An Order of Certiorari to issue to bring to the High Court and quash all the proceedings of the Vetting of Judges and Magistrates Board leading to the Determination of the Vetting Board dated 20th March 2013;**
l. **An Order of Prohibition do issue forbidding all the Respondents from acting on or effecting the Determinations of the Vetting of Judges and Magistrates Board dated 21st December 2012 and 20th March 2013 or any other Orders and Determinations made by the Board relating to the Applicant herein;**
m. **That pending the hearing and determination of the Petition herein in relation to the prayers for Certiorari and Prohibition the same do operate as a stay of the proceedings, Determinations and Orders by the Vetting of Judges and Magistrates Board pending the hearing and determination of this Petition;**
n. **That an order is hereby made prohibiting the discontinuation of the remittance of salary to the Petitioner pending the determination of this Petition;**
o. **Such further and or other or consequential orders, reliefs and directions under Article 23 of the Constitution of Kenya as this Honourable Court may consider appropriate for the purpose of enforcing or securing the enforcement of any provision of the Bill of Rights that it may find [has been] denied, violated or infringed.**

6. It is clear that the Petitioner's challenge was to the process adopted by the Board in arriving at its decision which process according to the Petitioner did not meet the Constitutional threshold of fairness and contravened the Petitioner's freedoms and fundamental rights enshrined in the Constitution. The reliefs sought in this petition fall within order (c) (i) and (iii) of the said judgment as they raise questions touching on the jurisdiction of the Board and they also challenge the manner in which the Board managed its processes. Taking into account the binding nature of

the Supreme Court decision, we have no jurisdiction to entertain this Petition.

84. **Petition No. 434 of 2012 (Hon. Justice SEO Bosire vs. the Judges and Magistrates Vetting Board and another) –**

1. This petition was based on the fact that,save for two grounds, the Board dismissed all the complaints raised against the Petitioner. These two grounds which the Board relied upon to find the Petitioner unsuitable were the alleged defiance of a Court order in the Judicial Commission of Inquiry into the Goldenberg Affair in the High Court at Nairobi Misc. Civil Application No. 1279 of 2004 and the Petitioner's role as Judge Advocate in the 1982-83 Court Martials under the Armed Forces Act. Cap 199 Laws of Kenya. The petitioner's case was that the alleged defiance of the court order was not one of the complaints levelled against the Petitioner hence he was not notified of the same in order for him to adequately respond to the same. In any case that the alleged defiance of the Court order was vindicated by the Court of Appeal in Civil Application Nai. 310 of 2004 between the Republic and Hon. Jackson Mwalulu and Others. To the Petitioner, the Board's finding thereon was premised on an invitation to execute an illegality and override the protection provided by law to the persons who were the subject of the said cases. It was therefore his view that the adverse comments of the Board in respect of the said ground constitute an outright violation of the Petitioner's right to fair hearing, fair administrative action, procedural fairness and the principles of natural justice.
2. On the Court Martial issue, it was similarly contended that this ground was not one of the complaints levelled against the Petitioner hence the action of ambushing him with the same without adequate notice violated his right to fair hearing. It was further contended that the Board's findings that cruel and unlawful methods of instilling terror and securing convictions had been used during the Petitioner's watch were not borne out of evidence and was a prejudicial assumption on record hence constituted an error on the face of the record.
3. The Petitioner further complained that he was not notified of the determinations in advance prior to publishing the same to the members of the public. It was the Petitioner's case that the Board's purported exercise of its review jurisdiction was undertaken pursuant to an unconstitutional amendment to section 23(1) of the Act thus rendering its decision illegal and unconstitutional.
4. It was also contended that the decisions by the Board were unconstitutional, unfair, unreasonable, discriminatory and failed to guarantee the minimum international best practices and the benefit of the Rules of natural justice thereby making the purported Determinations fail to meet the threshold of decisions envisaged under sections 23(1) of the Sixth Schedule to the Constitution.
5. In the Petitioner's view, the Board had no powers to remove judges in light of Article 168(2) of the Constitution which provides that the removal of a Judge may be initiated only by the 3rd Respondent acting on its own motion or on the petition of any person to the 3rd Respondent.
6. The Petitioner therefore sought the following orders: –

> '**A DECLARATION THAT the vetting process as conducted by the Board on 26th March 2012 and the Determination of 25thApril 2012 violated the Petitioner's fundamental rights and freedoms guaranteed under the Constitution and is therefore null, void and without any legal effect;**

a. **A DECLARATION THAT the vetting process as conducted by the Board on 26th March 2012 and the Determination of 25thApril 2012 violated the Petitioner's fundamental rights and freedoms guaranteed under the Constitution as Judge of Appeal and is therefore null, void and without any legal effect;**
b. **A DECLARATION THAT the vetting process as conducted by the Board on 26th March 2012 violated the Petitioner's right to a fair hearing by an independent Board as envisaged in and guaranteed by Articles 1(1) and (3)(c); 2; 3(1); 10; 20(1), (3)and (4); 21(1); 50(1); 159(1) and 259 of the Constitution and the Petitioner's right to fair administrative action guaranteed by Article 47 of the Constitution and is therefore null, void and without any legal effect;**
c. **A DECLARATION THAT the vetting process as conducted by the Board on 26th March**

2012 as regards the Petitioner herein was contrary to the Rules of Natural Justice as codified in sections 5, 13 and 19(3)(4) of the Act and guaranteed by Article 50(1) of the Constitution and is therefore invalid, null, void and without any legal effect;

d. **A DECLARATION THAT the Determination of the Board of 25th April 2012 relating to the Petitioner herein is invalid, null, void and without legal effect in so far as and to the extent that it relied on issues and complaints not notified by the Board to the Petitioner and not raised by members of the Public in accordance with Sections 18 and 19(4) of the Act;**
e. **A DECLARATION THAT the Petitioner's legitimate expectation that the vetting process would be conducted in accordance with the provisions of the Constitution and the Act as provided for by Sections 5 and 13 of the Act was violated;**
f. **A DECLARATION THAT the provisions of the Statute Law (Miscellaneous Amendments) Act, No. 12 of 2012 were inapplicable to the Petitioner's review application was and could not have been retrospectively applied as the Board purported to do;**
g. **A DECLARATION THAT Section 23(1) of the Sixth Schedule is inapplicable to the Board's Determination of 25thApril 2012 in relation to the Petitioner herein for the Constitution does not envisage and would not permit a decision made in blatant breach of the provisions of the Constitution and the Act;**
h. **A DECLARATION THAT the Board's Decision on Review in relation to the petitioner herein is null and void as it sought to uphold activities and conduct which contravene the provisions of the Constitution and the Act**
i. **A DECLARATUION THAT the provisions of Section 2 of the Vetting of Judges and Magistrates Act No. 2 of 2011 contravene the Rules of Natural Justice and are therefore unconstitutional, invalid, unlawful, illegal, null and void and are hereby struck out;**
j. **A DECLARATION THAT the provisions of section 2 of the Vetting of Judges and Magistrates Act No. 2 of 2011 contravene the provisions of Articles 10, 23, 27, 28, 47, 50, 165(3), 258 and 259 of the Constitution of Kenya and are therefore null and void and are hereby struck out;**
k. **A DECLARATION THAT a Judge appearing before the Judges and Magistrates Vetting Board is entitled to the full enjoyment and benefit of the provisions of Articles 10, 23, 27, 28, 47, 50, 165(3), 258 and 259 of the Constitution, the rules of natural justice and that he or she is entitled to have his or her case heard by an independent tribunal consisting of a different panel or tier either of the Board or such other panel as the court or parliament may direct including the right to recourse to a court of law where there has been a breach of the rights guaranteed in the Bill of Rights or misapplication of constitutionally sound provisions of the Act;**
l. **A DECLARATION THAT any application for review and or any other reconsideration of any matter heard by the Board in the vetting process in the first instance should be reconsidered either on review or appeal by a body other than the Board and or a different tier or composition of the Board;**
m. **A DECLARATION THAT a Judge appearing before the Board is entitled to the full enjoyment and benefit of the provisions of Articles10, 23, 27, 28, 47, 50, 165(3), 258 and 259 of the Constitution, the Rules of Natural Justice and that the Petitioner was entitled to have review heard by an impartial panel of the Board consisting of a different panel or tier of the Board;**
n. **A DECLARATION THAT the Decision on request for review made on 20thJuly 2012 is unconstitutional and violated the Petitioner's guaranteed rights in so far as it was heard by the same panel which made the determination of 25thApril 2012 for reasons that the Board had a predetermined outcome and further that the Board could not make an impartial and independent decision from their own determination, could not sit on appeal in their own cause, was not fair or just and at any rate could not have been seen to be fair and just;**
o. **A DECLARATION THAT Section 22(3) of the Act that purports to make the decision of Board final is unconstitutional , illegal, null and void, contravenes the Rules of Natural Justice, does not and cannot oust the jurisdiction of the court to hear any dispute, complaint or an application arising from any decision of the Board where the decision is *ultra vires* and a nullity in law or is unconstitutional or contravened the Petitioner's rights as guaranteed in the Bill of Rights;**

p. **A DECLARATION THAT the provisions of Section 23(2) of Schedule Six of the Constitution does not oust , supersede and/or render inapplicable the provisions of Articles 10, 23, 27, 28, 47, 50, 165(3), 258 and 259 of the Constitution and that a Judge appearing before the Board where Jurisdiction exists is entitled to the full enjoyment and benefit of the rights guaranteed by the said Articles of the Constitution;**

q. **A DECLARATION THAT any and all proceedings and/or the determinations made by the Board under the provisions of Section 22 of the Act are unconstitutional, unlawful, illegal, null and void as relates to the Petitioner herein and should therefore be set aside in so far as the same contravene the provisions of the Constitution and the Rules of Natural Justice;**

r. **A DECLARATION THAT the provisions of the Statute Law (Miscellaneous Amendments)Act No. 12 of 2012 repealing Section 23(2) of are unconstitutional and contravene the provisions of Section 23(1) is therefore invalid and is hereby struck out;**

s. **A DECLARATION THAT the powers and the jurisdiction of the Board to exercise any power and/or conduct any proceedings and or render any decision and or conduct any Review under the Act terminated by operation of law pursuant to the provisions of Section 23(1) of the Act;**

t. **A DECLARATION THAT all proceedings and the decisions made by the Board after 23rd May 2012 and or after 12thJuly 2012 are unconstitutional, invalid, illegal, null, void and are therefore of no legal effect;**

u. **A DECLARATION THAT the decision of the Board declaring the Petitioner as unfit to hold office and or removing him from office is unconstitutional, illegal, null and void for want of jurisdiction and for contravening the provisions of Articles 168(2), 172(a) and 249 of the Constitution of Kenya 2010.**

7. From the pleadings filed herein, it clear to us that the petition seeks orders that challenge the jurisdiction or merit on the part of the Board as well as the Board's competence and its processes. The Petitioner also seeks to challenge the decisions of the Board based on the evidence that was presented before it, the Board's mandate pursuant to statutory amendments, the alleged failure to adhere to the rules of natural justice and the fairness of the vetting process. The Supreme Court however held that 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 hence this Court lacks the requisite jurisdiction to entertain the Petition.

85.**Petition No. 438 of 2012 (Hon. Justice Joseph G Nyamu vs. the Judges and Magistrates Vetting Board and another)**–

1. The Petitioner averred that he was notified of only one complaint against him which complaint was immaterial and was not relied upon in the actual determination of his suitability to continue performing his functions of the office of judge. According to him, the Board having found that it was not empowered to make findings on the merits of the said one matter ought to have exonerated him. However the Board proceeded to deal with extraneous matters relating to the said case and made its determination based on the same thus took the role of complainant, judge, jury and executioner in the Petitioner's cause. In his view, the course adopted contravened the Act, the Constitution and principles of natural justice as to notice and fair trial as well as his fundamental right to fair administrative action.
2. According to the Petitioner, the excursion into an assessment of his judicial pronouncements when there was no complaint thereon was a gross violation of the constitutional principle of judicial independence; the rules of natural justice; the obligation to uphold and protect judicial independence; well settled principles of international law; and fell way below the best international practice and is therefore a question amenable to the jurisdiction of this Court in the context of a constitutional petition.
3. The Petitioner therefore sought: –

i. **A declaration that the absence of a provision for independent review and/or appeal to a determination of the suitability of a judge under section 22 and 23 of the Vetting of Judges**

and Magistrates Act is unconstitutional, inconsistent with applicable international law and best international best practice;

(ii) a declaration that the determination dated 25th April 2012 and the review dated 20th July 2012 by the 1st respondent as relates to the petitioner are unconstitutional to the extent that the same violate (a) the Constitution, (b) the provisions of the Vetting of Judges and Magistrates Act, and (c) applicable principles of international law and international best practice as enunciated in United Nations Basic Principles on the Independence of the Judiciary and the Bangalore Principles of Judicial Conduct, 2002;

iii. **A declaration that the evaluation of the merits of the judicial pronouncements by the Petitioner and the substitution of the reasoning, pronouncements of law and findings of fact in those pronouncements as a basis for the Petitioner's removal as a judge is ultra vires the Vetting of Judges and Magistrates Act and unconstitutional to the extent that the same is inconsistent with the obligation to protect and uphold the notion of judicial independence;**

(iv) an order of certiorari to remove into the High Court and quash the decision of the 1st Respondent delivered on 25thApril 2012 to the extent that the said decision was made in express contravention of the letter, spirit and structure of the Vetting of Judges and Magistrates Act and the Constitution;

(v) an order of certiorari to remove into the High Court and quash the decision of the 1st Respondent delivered on 20thJuly 2012 to the extent that the said decision was made in express contravention of the letter, spirit and structure of the Vetting of Judges and Magistrates Act and the Constitution;

(vi) a conservatory order that pending hearing and determination of the Petition herein, all actions, decisions, processes and events consequential to the findings of the 1st Respondent be stayed;

(vii) an order for damages for an injury on the ascertainment of the quantum thereof…'

4. Our view of the Petitioner's case is that the Petitioner herein was challenging the fairness of the Board's decision vis-à-vis the process adopted by it in arriving at its decision. The Petitioner alleged that he was never afforded an adequate opportunity to deal with the issues which formed the basis of the Board's decision and that the Board relied on extraneous matters in arriving at its decision to deal with this matter. The Petitioner also specifically questioned the jurisdiction of the Board. As was held by the Supreme Court, none of the Superior Courts has the jurisdiction to review the process or outcome attendant upon the operation of the Judges and Magistrates Vetting Board by virtue of the Constitution, and the Vetting of Judges and Magistrates Act. We therefore have no jurisdiction in the matter.

86. **Petition No. 433 of 2012 (Hon. Justice RSC Omolo vs. Judges and Magistrates Vetting Board and others)**–

1. In this petition, the Petitioner's case was that though he had not been furnished with the complaints relating to the findings in the Ringera, the Ndungu and the Ouko Reports, he was confronted with the same for the first time during the vetting process contrary to the principles of natural justice. Similarly, the Board relied on the Report of the Judicial Service Commission Proceedings during the Petitioner's interview for the post of the Chief Justice. It was further contended that the Board relied on alleged complaints received from other bodies yet these complaints were not brought to the Petitioner's attention and that the Petitioner was confronted with issues not brought to his attention prior to the vetting so as to enable him prepare himself

adequately. At the time of the review, it was contended the Board applied the provisions of an amendment which did not exist at the time the Petitioner requested for the review. It was therefore the Petitioner's case that the Board failed to apply its mind and correct the manifest breaches of his right to a fair hearing before an impartial tribunal or body, fair administrative action, legitimate expectation as well as due process hence its decision was unconstitutional, unfair, unreasonable, discriminatory and failed to guarantee the minimum international best practices.

2. According to the Petitioner, by repealing section 23(2) of the Act relating to the time frame for vetting, Parliament acted unconstitutionally.
3. The Petitioner therefore sought the following orders:

a. **A DECLARATION THAT the vetting process as conducted by the Board on 23rd February 2012 and the Determination of 25th April 2012 violated the Petitioner's fundamental rights and freedoms guaranteed under the Constitution and are hence null, void and without any legal effect;**
b. **A DECLARATION THAT the vetting process as conducted by the Board on 23rd February 2012 and the Determination of 25th April 2012 violated the Petitioner's fundamental rights and freedoms as a judge of Appeal guaranteed under the Constitution and are therefore null, void and without any legal effect;**
c. **A DECLARATION THAT the vetting process conducted by the Board on 23rdFebruary 2012 violated the Petitioner's right to a fair hearing by an independent Board as envisaged under Articles 1(1)(3)(c), 2, 3(1), 10, 20(1)(3)(4), 21(1), 50(1) and 259 of the Constitution and the Petitioner's right to fair administrative action provided for under Article 47 of the Constitution and is therefore null and void and without legal effect;**
d. **A DECLARATION THAT the vetting process conducted by the Board on 23rdFebruary 2012 as regards the Petitioner herein was contrary to the Rules of Natural Justice as codified in Articles 5, 13 and 50(1) of the Constitution and is therefore invalid, null, void and without legal effect;**
e. **A DECLARATION THAT the Determination of the Board of 25th April 2012 relating to the Petitioner herein is invalid, null, void and without any legal effect in so far as and to the extent that it relied on issues and complaints not notified by the Board to the Petitioner and not raised by members of the Public in accordance with Sections 18 and 19(4) of the Act is null and void;**
f. **A DECLARATION THAT the Petitioner's legitimate expectation that the vetting process would be conducted in accordance with the provisions of the Constitution and the Act as provided for by Sections 5 and 13 of the Act was violated;**
g. **A DECLARATION THAT the Provisions of the Statute Law (Miscellaneous Amendments) Act, No. 12 of 2012 were inapplicable to the Petitioner's review application, was and could not have been retrospectively applied as the Board purported to do;**
h. **A DECLARATION THAT Section 23(1) of the Sixth Schedule is inapplicable to the Board's Determination of 25th April 2012 in relation to the Petitioner herein for the Constitution does not envisage and would not permit a decision made in blatant breach of the provisions of the Constitution and the Act;**
i. **A DECLARATION THAT the Board's decision on Review in relation to the Petitioner herein is null and void as it sought to uphold activities and conduct which contravene the provisions of the Constitution and the Act;**
j. **A DECLARATION THAT the provisions of Section 22 of the Vetting of Judges and Magistrates Act No. 2 of 2011 contravene the Rules of Natural Justice and are therefore unconstitutional, invalid, unlawful, illegal, null and void and are hereby struck out;**
k. **A DECLARATION THAT the Provisions of Section 22 of the Vetting of Judges and Magistrates Act No. 2 of 2011 contravene the provisions of Articles 10, 23, 27, 28, 47, 50, 165(3), 258 and 259 of the Constitution of Kenya and are to that extent unconstitutional and therefore null and void and are hereby struck out;**
l. **A DECLARATION THAT a Judge appearing before the Judges and Magistrates Vetting Board is entitled to the full enjoyment and benefit of the provisions of Articles 10, 23, 27, 28, 47, 50, 165(3), 258 and 259 of the Constitution, the Rules of natural justice and that he or she**

is entitled to have his or her case heard by an impartial panel of the Board in the first instance and where the case so requires to a review and/or an appeal before an independent tribunal consisting of a different panel or tier either of the Board or such other panel as the court or parliament may direct including the right to recourse to a court of law where there has been breach of the rights guaranteed in the Bill of Rights or misapplication of constitutionally sound provisions of the Act;

m. **A DECLARATION THAT any application for review and or any other reconsideration of any matter heard by the Board in the vetting process in the first instance should be reconsidered either on review or appeal by a body other than the Board and or a different tier or composition of the Board;**

n. **A DECLARATION THAT a Judge appearing before the Board is entitled to the full enjoyment and benefit of the provisions of Articles 10, 23, 27, 28, 47, 50, 165(3), 258 and 259 of the Constitution, the Rules of Natural Justice and that the Petitioner was entitled to have his review heard by an impartial panel of the Board consisting of a different panel or tier of the Board;**

o. **A DECLARATION THAT the decision on request for review is unconstitutional and violated the Petitioner's guaranteed rights in so far as it was heard by the same panel which made the determination of 25th April 2012 for reasons that the Board had a predetermined outcome and further that the Board could not make an impartial and independent decision from their own determination, could not sit on appeal in their own cause, was not fair and just;**

p. **A DECLARATION THAT Section 22(3) of the Act that purports to make the decision of the Board final is unconstitutional, illegal, null and void, contravenes the Rules of Natural Justice, does not and cannot oust the jurisdiction of the court to hear any dispute, complaint, or an application arising from any decision of the Board where the decision is *ultra vires* and or a nullity in law or is unconstitutional or contravened the Petitioner's rights as guaranteed in the Bill of Rights;**

q. **A DECLARATION THAT the provisions of Section 23(2) of Schedule Six to the Constitution does not oust, supersede and or render inapplicable the provisions of Articles 10, 23, 27, 28, 47, 50, 165(3), 258 and 259 of the Constitution and that a judge appearing before the Board where Jurisdiction exits is entitled to full enjoyment and benefit of the right guaranteed by said Articles of the Constitution;**

r. **A DECLARATION THAT the transitional provisions of the Constitution do not override the entrenched provisions of the Constitution;**

s. **A DECLARATION THAT any and all proceedings and/or the determinations made by the Board under the provisions of Section 22 of the Act are unconstitutional, unlawful, illegal, null and void as relates to the Petitioner herein and should therefore be set aside in so far as the same contravene the provisions of the Constitution and the Rules of Natural Justice;**

t. **A DECLARATION THAT the provisions of the Statute Law (Miscellaneous Amendments) Act No. 12 of 2012 repealing Section 23(2) are unconstitutional and contravene the provisions of Section 23(1) of the Sixth Schedule to the Constitution and that the said Section 23(2) is therefore invalid and should be struck out;**

u. **A DECLARATION THAT the powers and the jurisdiction of the Board to exercise any power and/or conduct any proceedings and or render any decision and or conduct any Review under the Act were terminated by operation of law pursuant to the provisions of Section 23(1) of the Act;**

v. **A DECLARATION THAT all proceedings and the decisions made by the Board after 23rd May 2012 and or after 12th July 2012 are unconstitutional, invalid, illegal, null, void and therefore of no legal effect;**

w. **A DECLARATION THAT the decision of the Board declaring the Petitioner unfit to hold office and or removing him from office is unconstitutional, invalid, illegal, null and void for want of jurisdiction and for contravening the provisions of Articles 168(2), 172(a) and 249 of the Constitution of Kenya 2010;**

x. **A DECLARATION THAT the decision of the Board has failed to obey, respect and uphold the Constitution of Kenya and all other laws of the Republic and to faithfully and fully, impartially and to the best of their ability, to discharge the trust and perform the functions**

and exercise the powers devolving upon them by virtue of their appointment without fear, bias, favour, affection, ill-will or prejudice in respect of your Petitioner.

4. In our view, the petitioner herein was questioning the legality of the ***Statute Law (Miscellaneous Amendments) Act, 2012*** and its operation. Further, the Petitioner took issue with the vetting process which did not accord him a fair hearing as it did not satisfy the requirements of the rules of natural justice. In our view this Petition is substantially a contest to the Board's process in the petitioner's case, with marginal challenges to the competence and jurisdiction of the Board. The matter therefore falls within the parameters set out in order (c) of the Supreme Court judgment and hence we lack the jurisdiction to entertain the Petition.

87. **Republic vs. The Vetting of Judges and Magistrate's Board ex parte Lady Justice Joyce Khaminwa, Judicial Review Miscellaneous Application No. 113 of 2013.**

1. In this Application, the applicant contended that the Board considered other grounds which were not provided in law in that it based its decision largely on the medical status/condition of the ex parte Applicant without evidence thereon.
2. It was contended that the Respondent's determinations were therefore an illegality as they lacked any basis in the relevant law and exhibited manifest errors of law including serious violations of the fundamental rights of the Applicant in view of the Applicant's legitimate expectations and rights as enshrined in the Bill of Rights.
3. It was the Applicant' view that it would be against the principles of rule of law and justice if determinations of subordinate bodies are left outside the supervisory jurisdiction of the High Court and such acts, if left unchecked, would create a municipality of injustices.

4. The Applicant therefore sought substantially the following orders:

> **(a). Certiorari to bring into the High Court and to quash the determination of the Respondent which thereby declared the ex parte Applicant unfit to hold office as a Judge of the High Court of Kenya.**
>
> **(b). Prohibition to issue against the Respondent to prohibit the effecting of the determination made against the ex parte applicant.**
>
> **(c) An order compelling the reinstatement of the ex parte Applicant to her duties as a Judge of the High Court of Kenya.**
>
> **(d) Costs of the application**

5. This application, being a judicial review application, was clearly based on the supervisory jurisdiction of the High Court pursuant to Article 165(6) of the Constitution. We have hereinabove set out the Supreme Court's position on the High Court's jurisdiction under Article 165(6) of the Constitution with respect to the powers conferred upon the Board. Based on the same reasoning we have no hesitation in finding that this Court's supervisory jurisdiction over the Board was ousted by the Constitution and we are unable to entertain the Judicial Review Application**.**

H. **FINAL ORDERS**

88. Finally, in light of our findings set out above and by virtue of the directions given in order (c) of the judgment of the Supreme Court dated 5th November 2014 and whatever views we may have on the merits of the maters before us, the only lawful option open to us is to hereby strike out, which we hereby do, the following Petitions and Judicial Review Applications for want of jurisdiction and other reasons given above-

a. **Republic vs. The Vetting of Judges and Magistrate's Board & Others ex parte Honourable Lady Justice Jeanne W. Gacheche Nairobi High Court Judicial Review Application No. 295**

of 2012.

b. **Petition No. 433 of 2012 (Hon. Justice RSC Omolo vs. Judges and Magistrates Vetting Board and others).**
c. **Petition No. 438 of 2012 (Hon. Justice Joseph G Nyamu vs. the Judges and Magistrates Vetting Board and another).**
d. **Petition No. 434 of 2012 (Hon. Justice SEO Bosire vs. the Judges and Magistrates Vetting Board and another).**
e. **Petition No. 261 of 2013 (Hon. Justice Mary Ang'awa vs. The Judges and Magistrates Vetting Board and another).**
f. **Petition No. 235 of 2013 (Hon. Justice Muga Apondi vs. The Judges and Magistrates Vetting Board and others).**
g. **Republic vs. The Vetting of Judges and Magistrate's Board ex parte Lady Justice Joyce Khaminwa Judicial Review Miscellaneous Application No. 113 of 2013.**

89. There shall be no order as to costs, for obvious reasons.

Ruling read, signed and delivered in open court this 24th day of April 2015

I LENAOLA

JUDGE

MUMBI NGUGI

JUDGE

P NYAMWEYA

JUDGE

G V ODUNGA

JUDGE

W MUSYOKA

JUDGE