



**Njagi v Judicial Service Commission & 2 others (Petition 495 of 2014)
[2015] KEHC 6962 (KLR) (Constitutional and Human Rights) (11 December 2015) (Judgment)**

Leonard Njagi v Judicial Service Commission & 2 others [2015] eKLR

Neutral citation: [2015] KEHC 6962 (KLR)

**REPUBLIC OF KENYA
IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
CONSTITUTIONAL AND HUMAN RIGHTS
PETITION 495 OF 2014**

**RM MWONGO, CW MEOLI, HI ONG'UDI, CM KARIUKI & WK KORIR, JJ
DECEMBER 11, 2015**

BETWEEN

THE HONOURABLE MR JUSTICE LEONARD NJAGI PETITIONER

AND

THE JUDICIAL SERVICE COMMISSION 1ST RESPONDENT

THE JUDICIARY 2ND RESPONDENT

THE ATTORNEY GENERAL 3RD RESPONDENT

Determination of retirement age of all serving judges at the time of the promulgation of the Constitution of Kenya, 2010

The Judges and Magistrates Vetting Board found the petitioner unsuitable to continue serving as a judge of the High Court. The petitioner and others were notified by the Judicial Service Commission (JSC) that the retirement age of all judges serving at the time of promulgation of the Constitution of Kenya, 2010 was 70 years. That was a variation to JSC's earlier circular to judges communicating a retirement age of 74 years. Thereafter, the petitioner and others received a letter from the Secretary to the JSC and Chief Registrar of the Judiciary giving them notice of retirement. The court held that upon the petitioner's removal by the Vetting Board, the question as to whether he ought to retire at 70 or 74 became moot.

Reported by Teddy Musiga

Constitutional Law – tenure of judges – retirement age of judges – effect of Supreme Court's decision in *Petition No. 13A* ousting the jurisdiction of the High Court with regards to decisions from the Judges and Magistrates Vetting Board on matters that were not before the Supreme Court – whether the Judicial Service Commission was guilty of disobeying court orders granted in *Petition No. 320 of 2013* by issuing the petitioner with a retirement notice – Constitution of Kenya, 2010, article 163(7); section 23, 31(1) of the sixth schedule.



Jurisdiction – jurisdiction of the High Court – ouster clauses – jurisdiction of the High Court to review decisions of the Judges and Magistrates Vetting Board - effect of Supreme Court’s decision in Petition No. 13A ousting the jurisdiction of the High Court with regards to decisions from the Judges and Magistrates Vetting Board on matters that were not before the Supreme Court – Constitution of Kenya, 2010, Sixth Schedule, section 23, 31(1).

Brief facts

By a determination of the Judges and Magistrates Vetting Board on December 21, 2012, the petitioner was found unsuitable to continue serving as a judge of the High Court. His removal was arrested by a temporary conservatory order issued in Petition No. 320 of 2013 that preserved his status as a judge of the High Court with all perks pending the hearing and determination of the main petition. Subsequently, the petitioner and others received a communication from the Judicial Service Commission (JSC) notifying them that the retirement age of all judges serving at the time of promulgation of the Constitution of Kenya, 2010 was seventy years. That was a variation to JSC’s earlier circular to judges communicating a retirement age of seventy four years. Thereafter, the petitioner and others each received a letter from the Secretary to the JSC and Chief Registrar of the Judiciary (CRJ) giving them notice of retirement. Aggrieved by the retirement notice, the petitioner filed the instant petition contending that he was yet to attain the age of seventy years and that the CRJ ought to observe the rule of law, respect the Constitution and obey the order in Petition No. 320 of 2013.

Issues

- i. What is the effect of the Supreme Court Petition No. 13A of 2013 that ousted the jurisdiction of the High Court with regards to decisions from the Judges and Magistrates Vetting Board on matters that were not before the Supreme Court?
- ii. Whether the Judicial Service Commission was guilty of disobeying the conservatory orders granted in Petition No. 320 of 2013 by issuing the petitioner with a retirement notice.

Held

1. The decision of the Supreme Court in Petition No. 13A of 2013 in *Justice Jeanne W. Gacheche & 5 others v Judges and Magistrates Vetting Board & 2 others* (2015) was a judgment of general application affecting all cases at large in the Republic of Kenya, concerning the issues identified in that judgment to wit; the issue of jurisdiction of the High Court with respect to determinations of the Board, could not be said to have been restricted only to the parties who were before the Supreme Court.
2. The orders of the Supreme Court were as clear as they could be that the cases that were identified by the court for disposal by the High Court were effectively determined; and even if no formal mention or order was recorded in the individual files, those matters were for all intents and purposes terminated.
3. The conclusion of that Supreme Court’s decision was that the High Court had no jurisdiction over the process and outcome of vetting. Thus, the instant court needed not to resort to Petition No. 320 of 2013 in order to reach the same conclusion as that reached by the Supreme Court. That was to say that the petitioner was removed from the Judiciary upon rejection of his application for review by the Vetting Board.
4. In view of article 163(7) of the Constitution of Kenya, 2010, the Supreme Court’s decision in Petition No. 13A of 2013 was final and binding on the instant court. That was not to say that the instant court, through the instant judgment had made orders in respect of Petition No. 13A of 2013. The petitioner was at liberty to pursue the petition. In light of the aforesaid conclusion, it naturally followed that the retirement age of the petitioner was no longer governed by article 167 (1) of the Constitution. That was because section 23(1) of the Sixth Schedule was clear that article 167 was among the provisions of the Constitution suspended or precluded by the vetting process.
5. Section 23(1) of the Sixth Schedule to the Constitution of Kenya, 2010 was clear that a judge who was in office on the effective date could be removed from office through vetting despite the fact that article 167 provided a judge’s tenure of office. Since the petitioner’s case was hinged on the argument



- that section 31(1) of the sixth schedule overrode article 167(1), his case was torpedoed by his removal under section 23(2) of the sixth schedule.
6. That article 167(1) of the Constitution of Kenya, 2010, was indeed not operational in regard to a judge removed through the vetting process was buttressed by the provision in section 24 of the Vetting of Judges and Magistrates Act, 2011. A removal through vetting was a statutorily imposed early retirement. It could not be equated to voluntary or elective retirement upon the attainment of age of sixty five years that was prescribed in article 167(1) of the Constitution.
 7. Upon the petitioner's removal by the Vetting Board, the question as to whether he ought to retire at 70 or 74 became moot. The question no longer called for the engagement of judicial minds. Answering that question amounted to engaging in a judicial exercise.

Petition dismissed. Each party were to bear their own costs.

Citations

Statutes

None referred to

Advocates

Mr Mwenesi for Petitioner

Mr Muite, Mr Issa & M/s Chepkurui for Respondents

Mr. Njoroge for Attorney General

JUDGMENT

Introduction

1. This is the *second* of a trio of petitions filed by judges of the superior courts of Kenya challenging the age of retirement of judges under **Article 167(1)** of the Constitution of Kenya, 2010. The petitions were all heard consecutively by this bench, for purposes of decisional consistency and expedition.
2. In addition to the present suit, these cases include: **Petition No. 244 of 2014 Justice Philip Tunoi and Justice David Onyancha v. The Judicial Service Commission and the Judiciary**; and **Petition No. 386 of 2015 Lady Justice Kalpana Rawal and the Judicial Service Commission, the Secretary of the Judicial Service Commission; International Commission of Jurists (Kenya Chapter) and Kituo Cha Sheria** (both as Amicus), and **Okiya Okiiti Omtatah** (as Interested Party)
3. The Petitions were brought in the wake of communications to Judges by the Judicial Service Commission (JSC) notifying them of its decision that the retirement age of all Judges serving at the time of promulgation of the Constitution, 2010, had been determined to be seventy years. This was a variation to JSC's earlier circular to judges communicating a retirement age of seventy four years. Subsequently, each of the Petitioner received a letter from the Secretary to the Judicial Service Commission and Chief Registrar of the Judiciary, giving them notice of retirement. Aggrieved by the retirement notices, the Petitioners herein filed this petition on 27th May, 2014, together with a Notice of Motion under certificate of urgency.
4. This Petition and **Petition No. 244 of 2014** had previously been consolidated by order of this bench. On appeal to the Court of Appeal, however, a deconsolidation had been achieved by consent in that Court. Further, as a means of efficacious case management, it was agreed by consent during mentions that the three petitions be heard separately but in the same period. Consequently, **Petition No. 386** was heard on 26th, 27th and 29th October, 2015. **Petition No. 244** was heard on 28th October, 2015,



and this Petition (**No. 495**) was heard on 29th and 30th October, 2015. This bench set one date for the delivery of the separate judgments in each of the three cases, namely, 4th December, 2015, which was rescheduled to 11th December 2015.

The Parties

5. The Petitioner, Justice Leonard Njagi is a Judge of the High Court. The Judicial Service Commission (JSC), a constitutional Commission established under **Article 171(1)** and incorporated under **Article 253** of the 2010 Constitution, is the 1st Respondent. The 2nd Respondent is the Judiciary which is a State organ under **Article 1(3)(c)** of the 2010 Constitution. The Judiciary exercises judicial authority and power as delegated to it by the people, and is specifically governed by **Chapter Ten** of the Constitution. The 3rd Respondent, the Attorney General is an office established under **Article 156(1)** of the 2010 Constitution and whose core functions include being the principal adviser to the Government and the representative of the national government in court or in any other legal proceedings, other than criminal proceedings.

The Petition

6. Upon perusal of the Court record, we have found that the Petitioner application dated 20th March, 2015 seeking to amend his Petition was not prosecuted and neither did the Court issue any orders in respect of that application. The purportedly “Amended Petition” is therefore not properly before this Court and that being so we will rely on the original Petition dated 2nd October, 2014 and filed in Court on 3rd October, 2014.
7. Through the said Petition, the Petitioner seeks the following reliefs:
 - a. A Declaration that the date of retirement of the Petitioner is the date upon which the Petitioner will attain the age of 74 years. The Petitioner’s date of compulsory retirement is neither 2nd June 2014 nor 2nd October 2014.
 - b. A Declaration that the retirement age of the Judges who were in service as at the promulgation of the Constitution of Kenya, 2010 namely as at 27th August 2010, is the age of 74 years.
 - c. An Order of Certiorari to bring into the High Court the decision by Resolution of the Judicial Service Commission made on 24th March 2014 that the retirement age of all Honourable Judges is seventy (70) years, and accordingly all Honourable Judges who are due for retirement having attained the stated retirement age will be issued with notice of retirement, and quash the same.
 - d. An Order of Certiorari to bring into the High Court the decision and Letter of the Judiciary dated April 28th 2014 to the Petitioner Ref. PJ 14732, and quash the same in its entirety.
 - e. An Order of Prohibition prohibiting the Respondents whether jointly or severally or otherwise howsoever by themselves, their officers, servants or agents or otherwise howsoever from removing the Petitioner during his term of office from his office of Judge of the High Court, save in accordance with Article 167, Constitution of Kenya.
 - f. An Order of Prohibition prohibiting the Judicial Service Commission and the Judiciary from causing or aiding or authorizing or in any manner offering the Petitioner Pension and any other retirement benefits to be processed in any manner other than as set out in the Letter of the Judiciary dated 24th May 2011.



- g. An Order of Mandamus directed to the Respondents jointly and severally directing them to obey the Orders of the High Court issued on 26th June 2013 concerning the Petitioner's continued tenure of office for so long as the orders are in force and have not been set aside and are not spent.
 - h. A Declaration that as regards determination of seniority and/or benefits accruing thereto, Judicial Service Commission and the Judiciary should take into account the length of continuous service effective from the date that the Petitioners and/or any Judge joined the Judiciary.
 - i. Interim Conservatory Order to prohibit the Judicial Service Commission and/or the Judiciary by themselves, their officers, servants or agents or otherwise howsoever from removing and/or retiring the Petitioner from service as a Judge of the High Court of Kenya during his term of office save in accordance with Article 167 of the Constitution of Kenya.
- And the Petitioner do prays that this Honourable Court do:
- j. Make such orders, issue such writs and give such directions as it may consider appropriate for the purpose of enforcing and or securing the enforcement herein of any of the applicable rights and freedoms in Articles 19-57 of the Constitution.
 - k. Make such further, other or consequential orders as this Honourable Court shall deem just.
 - l. Make such order as to costs as this Honourable Court deems just.”
8. The Petitioner avers that he was appointed a puisne judge on 6th June, 2003. Upon the promulgation of the Constitution, he continued serving as a judge of the High Court. By the Determination dated 21st December, 2012 of the Judges and Magistrates Vetting Board (the Vetting Board), established in pursuance of Section 23 of the Sixth Schedule of the 2010 Constitution, he was found unsuitable to continue serving as a judge. His removal was arrested by a temporary conservatory order issued in Nairobi High Court Petition No. 320 of 2013 Honourable Leonard Njagi v The Judges and Magistrates Vetting Board, the Judicial Service Commission and the Attorney General (hereinafter referred to as Petition No.320 of 2013). It also preserved his status as a Judge of the High Court of Kenya with all perks “...so that the Petitioner remains a judge of the High Court of Kenya pending the hearing and determination of this Petition and all interlocutory applications connected with the Petition.”
9. The Court also restrained:
- ...the Respondents by themselves, their agents, servants or howsoever from removing the Petitioner from office, stopping salary and privileges and/or doing anything prejudicial to the Petitioner until this application is heard inter-partes and determined.”
10. The Petitioner asserts that the orders in **Petition No. 320 of 2013** are yet to be discharged, and it is trite that the orders remain in force and ought to be obeyed and observed unless they have been set aside or dismissed or are for any other reason no longer in force.
11. The Petitioner avers that conservatory orders were also issued in the present proceedings on 3rd October, 2014 prohibiting the 1st and 2nd Respondents in particular, by themselves, their officers, servants or agents or otherwise howsoever from removing or retiring him from service as a judge.
12. The Petitioner case is that through a Circular dated 24th May, 2011 the JSC informed him and other puisne judges that the retirement age of judges who were in service on the effective date of the



Constitution is 74 years. It is his position that this Circular is in accord with the Constitution and all the relevant statutes.

13. According to the Petitioner, despite the existence of the Circular and Order issued in Petition No. 320 of 2013, in May, 2014 he received a letter dated 28th April, 2014 from the Chief Registrar of the Judiciary (CRJ) and Secretary to the JSC notifying him that the JSC had by a resolution determined and required him to retire on the 2nd June, 2014. This, despite the fact that he was due to attain the age of 70 years on 2nd October, 2014. He avers that several letters addressed to the CRJ beseeching the Respondents to observe the rule of law, respect the Constitution and obey the Court Order in Petition No. 320 of 2013, have gone unheeded.

The Petitioner's Submissions

14. The Petitioner attack on the decision to retire him at the age of 70 is multi-faceted. Firstly, the Petitioner asserts that although Article 167(1) of the Constitution provides for the retirement from office by a judge upon attaining the age of 70 years, his retirement age of 74 years as provided by Section 9 of the Judicature Act, Cap. 8 Laws of Kenya is in accordance with Section 62(1) of the former Constitution, which was saved by Section 31(1) of the Sixth Schedule of the Constitution. According to the Petitioner, the latter provision entitles him to continue to hold office for the unexpired term under the former Constitution.
15. It is the Petitioner assertion that by virtue of Article 262, the transitional and consequential provisions set out in the Sixth Schedule were to come into force on the effective date, meaning that Section 31(1) which is applicable to him, took effect on the effective date.
16. His view is that Article 167 does not override Section 31 of the Sixth Schedule for several reasons, including the fact that the drafters included Section 31 of the Sixth Schedule with full knowledge of Article 167. Further, that once a judge had successfully undergone the vetting process under Section 23 of the Sixth Schedule, he remained in office for the unexpired tenure pursuant to Section 31(1). It is the Petitioner position that apart from Section 23 there was no other express transiting provision relating to judges besides Section 31(1). His view therefore is that his retirement age to date remains 74 years.
17. It is the Petitioner position that the JSC communicated a similar position through its Circular of 24th May, 2011 that:

...the period of service of all judges who were in office on the effective date of the Constitution was saved under Section 31(1) of the Sixth Schedule of the Constitution of Kenya, and that they shall therefore retain their retirement age of seventy-four years.”
18. The Petitioner submits that the JSC's resolution and decision of 18th April, 2011 which led to the issuance of the Circular of 24th May, 2011 has not been rescinded, and the JSC's purported subsequent resolution of 24th March, 2014 declaring his retirement age as 70 years, is un-procedural and *ultra vires* and consequently invalid.
19. The second ground upon which the Petitioner bases his case is that in accordance with Section 32 of the Sixth Schedule, save where excluded by express words of the Constitution, the law applicable to a holder of a constitutional office under the former Constitution “shall be either the law that was in force at the date on which benefits were granted to him or any law in force at a later date that is not less favourable to the person.” It is his case that this transitional principle applies to the computation of pensions, gratuities and other benefits of those who held constitutional offices under the former Constitution. The Petitioner contends that having held the constitutional office of puisne judge under



the former Constitution, the law applicable to him in respect of his pension is that set out in Section 32 of the Sixth Schedule.

20. Accordingly, pursuant to this transitional principle, the Petitioner retirement age is 74 years. It is his position that the law in force at a later date is Article 167(1) which grants him the term of 70 years and is therefore “less favourable” to him, and the law that is favourable, namely Section 9 of the Judicature Act providing for retirement at 74 years, “shall” be applicable.
21. The Petitioner understanding of Section 32 is that the section commences by identifying “the law applicable to pensions,” and it further refers to “the date on which those benefits were granted” In his view, this means that the principle therein not only applies to pensions but also to “gratuities and other benefits.” He concludes that the length of term and tenure are certainly ‘other benefits’ as the pension payable is commensurate to the length of service.
22. Turning to his third ground, the Petitioner contends that the clear intention of the Constitution is to uphold pre-existing rights. In that regard, Section 6 of the Sixth Schedule of the 2010 Constitution provides in respect of rights, duties and obligations of the State, as follows:
 - “6. Except to the extent that this Constitution expressly provides to the contrary, all rights and obligations, however arising, of the Government or the Republic and subsisting immediately before the effective date shall continue as rights and obligations of the national government or the Republic under this Constitution.”
23. The Petitioner concludes this argument by submitting that his rights under Section 32 of the Sixth Schedule are protected by virtue of the State’s reserved obligations under Section 6 of the Sixth Schedule, unless truncated by mutual agreement or for other legitimate and constitutional reason.
24. The Petitioner fourth ground is based on Commonwealth precedent. He states that the question confronting this Court is not novel as a similar situation arose in the English jurisdiction. There, the law relating to the term of office of the judges was altered from life to a date on attaining a certain age. Following that amendment, he argues, judges who joined after the new age limit was prescribed, were bound by the new age limit but those who had been appointed earlier retained their right to office for life. He cited the example of Lord Denning, former Master of the Rolls, as having continued in service well past the new age limit, as he had the vested right to an appointment for life.
25. As his fifth ground, the Petitioner contends that the Respondents’ second decision retiring him at 70 years breached his legitimate expectation that they would not resile from their first decision contained in the Circular dated 24th May, 2011. It is his case that he had acted on the first decision and he legitimately expected that the JSC and the Judiciary would abide by the Constitution and the Sixth Schedule. In summary, he urges the view that the resolutions, decisions and actions of the JSC and the Judiciary have disregarded and violated his legitimate expectations.
26. The Petitioner final ground is hinged on the argument that the decision to retire him at 70 years violates various constitutional provisions. Starting with **Article 47** which provides for the right to fair administrative action, he asserts that the JSC does not have power to determine his retirement age or that of any judge. Further, that the decision of the JSC communicated to him through the letter dated 28th April, 2014 was contrary to the earlier decision that all judges who were in office on the effective date retained their retirement age of 74 years.



27. It is the Petitioner case that the JSC did not afford him an opportunity to be heard before arriving at the decision to retire him at 70 years. This, in his view, was in clear breach of the rules of natural justice contrary to Article 47.
28. In addition, the Petitioner submits that the decision of the respondents was arbitrary, and hence unreasonable. Further, that the JSC exercised its discretion unreasonably by failing to take into account relevant matters, to wit, Sections 31 and 32 of the Sixth Schedule, Article 262 of the Constitution and the interlocutory orders made in Petition No. 320 of 2013.
29. Also violated by the Respondents' decision, the Petitioner asserts, is Article 168 that provides in sub-article (1), the grounds and procedure for removal of a judge. He argues that the decision to retire him at 70 years constitutes an illegal removal.
30. The Petitioner asserts that any person has a right to acquire and own property of any description in any part of Kenya, pursuant to **Article 40**. Citing the definition of property in **Article 260**, he contends that the right to a fixed term of service, that is to say 74 years, constitute vested and contingent rights. He therefore contends that the decision to retire him "prematurely" violated that vested right to his pension based on the tenure of 74 years.
31. The Petitioner, also submits violation by the Respondents of the right to equal protection of the law and freedom from discrimination as protected by **Article 27(1)**. His position is that after the promulgation of the Constitution, the Respondents have allowed or permitted some judges to serve up to the age of 74 years. He consequently asserts that it is discriminatory for the Respondents to demand that he retires at 70 years whilst allowing similarly placed judges to retire at the age of 74 years. He surmises that all judges in similar situations should be treated equally.
32. Tied to the alleged violation of **Article 27(1)**, the Petitioner submission is that the action of the JSC is in breach of his right to dignity, protected by **Article 28**. The Petitioner does not expound on this point but maintains that the Respondents have a constitutional duty to protect his rights.
33. The Petitioner also submits that, by virtue of the retirement notice, the Respondents have failed to protect and promote his rights under **Article 57(1)** requiring the State, State officers and State organs to take measures to ensure the enjoyment of the rights of older members of society.
34. Finally, the Petitioner identified **Article 10** and the principle of judicial independence as having been violated by the Respondents through abbreviation of his tenure. He did not elaborate on this complaint.

The 1st and 2nd Respondents' Case

35. In opposition to the Petition, the 1st and 2nd Respondents on 11th November, 2014 filed a Replying Affidavit sworn on 6th November, 2014 by the Registrar of the JSC, Winfrida Mokaya.
36. In summary, the 1st and 2nd Respondents' case as it emerges from the said affidavit is that, principally, the Petitioner **Petition No. 320 of 2013** was effectively terminated by the judgment delivered on 5th November, 2014 by the Supreme Court in **Petition No. 13A of 2013 (as consolidated with Petition No. 14 of 2013 and Petition No. 15 of 2013), Judges and Magistrates Vetting Board and 2 Others v The Centre for Human Rights and Democracy & 11 Others**. (We shall hereafter refer to that case as **Supreme Court Petition No. 13A of 2013**).
37. Consequently, she avers, the disputed retirement notice dated 28th April, 2014 is of no effect, the conservatory orders in **Petition No. 320 of 2013** having been effectively discharged by the Supreme



Court judgement. Accordingly, the determination of the Vetting Board stands reinstated and the Petitioner is deemed to have been removed from office as a Judge of the High Court.

38. In addition, she deposes that the Constitution governs the Petitioner's terms of office and he must retire at 70 years notwithstanding the provisions of **Section 31(1)** of the **Sixth Schedule**. She contends that **Section 31(2)** of the **Sixth Schedule** provides that a person in a public office on the effective date would continue to hold that office only insofar as is consistent with the 2010 Constitution as if he was appointed to the position under the said Constitution.
39. In conclusion, the 1st and 2nd Respondents state that **Section 9** of the **Judicature Act** which prescribes the retirement age of 74 years is inconsistent with **Article 167** of the Constitution and as such is null and of no effect.
40. The 1st and 2nd Respondents filed a further affidavit sworn by the Registrar of the JSC, exhibiting a certified copy of the decision of the Supreme Court in Petition No. 13A of 2013.

The 3rd Respondents Case

41. The 3rd Respondent opposed the Petition through grounds of opposition dated 18th November, 2014 as follows:
 1. That the Petition suffers from a clear misinterpretation and misapplication of Article 167 and section 31 of the Sixth Schedule of the Constitution.
 2. That the Petition is in contravention of the expression of the sovereign will of the People.
 3. That the Petition seeks to invite the court to question or interpret the constitutionality of the Constitution itself.
 4. That the Petition does not precisely describe which fundamental rights and freedoms have been violated or stand to be violated and the manner in which they were violated. The Petition therefore fails to meet the requirements of a Constitutional Petition.”

Issues for Determination

42. Based on the pleadings, submissions and the documents availed by the parties, we consider the following to be the issues that are the subject of the controversy herein:
 1. What is the effect of the Supreme Court Petition No. 13A of 2013 on this Petition?
 2. The historical background, nature and context of the Kenyan Constitution.
 3. The nature and function of the transitional and consequential provisions and principles of interpretation of the Constitution.
 4. Whether the JSC's notification of retirement violated the Petitioner constitutional rights.
 5. Whether the JSC's Memo of 27th March, 2014 was in breach of the Petitioner's legitimate expectation to retire at seventy four (74) as conveyed by the Circular dated 24th May, 2011.
 6. The role of the JSC in the retirement of judges.
 7. What is the retirement age of Judges who were in office prior to the promulgation of the 2010 Constitution?
 8. Costs.



Analysis and Determination

43. Notwithstanding the many issues in controversy, it is our view that it is only after we address the first issue that we will decide whether the other issues will need to be determined.
44. In summary, the Respondents' view is that the Judgment in Supreme Court Petition No. 13A of 2013 confirmed the decision of the Vetting Board removing the Petitioner from office as a Judge of the High Court. They thus take the position that the Supreme Court decision effectively terminated this matter. For his part, the Petitioner maintains that, notwithstanding the said decision, he remains a Judge by virtue of the conservatory orders issued in Petition No. 320 of 2013.
45. Submitting on this question, the 3rd Respondent asserts that based on the decision of the Supreme Court no challenge can be mounted against the Determination of the Vetting Board removing the Petitioner. Further, that at any rate, the issues raised in this Petition are spent by virtue of the doctrine of *res judicata* as captured in Section 7 of the Civil Procedure Act.
46. The 3rd Respondent emphasised the position of the Supreme Court as the final judicial authority. Reliance was placed on Section 3 of the Supreme Court Act and the decision of the U.S. Supreme Court in *Ablemen v Booth* 62 U.S. 506 (1859), to emphasise that courts must follow the decisions of higher courts.
47. The 3rd Respondent also contends that the doctrine of *stare decisis* obligates and compels the High Court in Petition No. 320 of 2013 to formally effect the decision of the Supreme Court. It is the 3rd Respondent's argument that in light of the Supreme Court's decision, the Petitioner case has collapsed.
48. Finally, the 3rd Respondent submits that the decision and directions of the Supreme Court ought to be complied with in Petition No. 320 of 2013 before the present Petition is determined.
49. In response the Petitioner swore a further replying affidavit on 8th December, 2014 in which he stressed that the decision of the Supreme Court did not affect Petition No. 320 of 2013 currently pending before the Court properly seized thereof.
50. In support of his submission that Petition No. 320 of 2013 could not have been determined by the Supreme Court decision in Petition No 13A of 2013 without being heard, he cited the case of *Jasbir Singh Rai & 3 Others v Tarlochan Singh Rai Estate & 4 Others* [2013] eKLR where the Chief Justice observed:
 - (111) Therefore, while accepting Senior Counsel Nowrojee's contentions that there have been injustices in this case, the choice of forum is in question. The Kenyan Constitution has given the High Court the exclusive jurisdiction to deal with matters of violations of fundamental rights (Article 23 as read with Article 165 of the Constitution).
 -
 - (113) Thus, in answer to Mr. Nowrojee's first two questions posed to the Supreme Court, my answer is this: There is no injustice that the Constitution of Kenya is powerless to redress."
51. It is the Petitioner's view that the power and jurisdiction of the High Court to hear him and grant orders in the instant Petition and in **Petition No. 320 of 2013** has not been extinguished by the Supreme Court Judgment until he is heard on merit and the appeal process is exhausted. This, he argues, is his right guaranteed by **Article 48** and **Article 50 (1)** of the Constitution.



52. The Petitioner states that he was neither a party to **Supreme Court Petition No. 13A of 2013**, nor did the Respondents to that case apply for consolidation of his matters with those that were being considered by the Supreme Court. Further, that the JSC is a party to both this Petition and **Petition No. 320 of 2013** but has never sought to set aside the conservatory orders in either case. It was also the Petitioner's case that no decree has been extracted and served upon him in **Supreme Court Petition No. 13A of 2013**. Accordingly, he is unaware of any decision binding this court by virtue of **Article 163 (7)** of the 2010 Constitution.
53. In his opinion **Article 160** of the Constitution guarantees that every judicial officer enjoys independence and is subject only to the Constitution and the law. Thus the Supreme Court cannot surreptitiously determine a matter pending before another court of competent jurisdiction.
54. Upon perusal of the documents placed before us, we find that it is indeed true that the Petitioner was not a party to **Supreme Court Petition No. 13A of 2013**. It is also a correct statement that **Petition No. 320 of 2013** was not among the matters struck out on 24th April, 2015, in the judgement in **Justice Jeanne W Gacheche & 5 others v Judges and Magistrates Vetting Board & 2 others [2015] eKLR** in compliance with the Supreme Court's decision in **Petition No. 13A of 2013**. Further, the Petitioner counsel told us, and we have no reason to doubt him, that the conservatory orders in **Petition No. 320 of 2013** have not been discharged, although the court file cannot be traced.
55. We take cognisance of the facts in the above paragraph. We set out here-below the Supreme Court's orders in **Petition No. 13A of 2013**:

"(235) We make the following Orders, in relation to such matters as have come up before the Superior Courts, with regard to the vetting of Judges and Magistrates:

- (a) The Petition before this Court is hereby allowed.
- (b) The Orders of 30th October, 2010 stopping the de-gazettement of Judges or Magistrates found unsuitable to continue in service are hereby discharged.
- (c) 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 to continue in service.
- (d) The parties shall bear their own respective costs." (Emphasis added)



56. Although the Petitioner asserts that the said orders are not applicable to him as he was not a party to the proceedings before the Supreme Court, his assertion is not new. The same argument was taken up by some of the judges in the case of **Justice Gacheche** (supra).
57. On the binding nature of **Supreme Court Petition No. 13A of 2013** and its effect on matters that were not before the Supreme Court, the Court in the **Justice Gacheche** case stated:
- "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." (Emphasis added)
58. We agree with that thinking. The decision of the Supreme Court is a judgment of general application affecting all cases at large in the Republic of Kenya, concerning the issues identified in that judgment. There must have been a reason that drove the Supreme Court into fashioning those orders. It is not upon us to second-guess the thinking of the Supreme Court in arriving at that position.
59. A reading of the judgement clearly shows that the decision of the Supreme Court was unambiguous. At paragraphs 200 to 202 the Court stated:
- "(200) We find that neither the High Court's Ruling of 30th October, 2012 nor the Court of Appeal's decision of 18th December, 2013 achieved clarity as to the relationship between the Courts' jurisdiction, on the one hand, and the jurisdiction of the Judges and Magistrates Vetting Board, on the other hand. We would clarify that by the terms of the Constitution itself, the High Court's general supervisory powers over quasi-judicial agencies, and its mandate in the safeguarding of the fundamental rights and freedoms of the Constitution, by no means qualify the ouster clause which reserves to the Judges and Magistrates Vetting Board 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. The basis of the said ouster clause is found in the history attending the Constitution; in the requirement of the Constitution for essential transitional arrangements; and in the express terms of the Constitution, by virtue of which the Vetting Board was established to determine the suitability of certain judicial officers, for the purposes of the values and principles declared in the Constitution itself.
- (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.”

(Emphasis added).

60. There is no doubt regarding what the Supreme Court intended to achieve through its decision. The orders are as clear as they can be that the cases that were identified by the Court for disposal by the High Court were effectively determined; and even if no formal mention or order is recorded in the individual files, those matters were for all intents and purposes, terminated.
61. The Petitioner lamented the impact of the Supreme Court decision on his right to be heard. As already stated, the judgement was one that addressed the question of the jurisdiction of this Court in regard to the matters that were proceeding before the Vetting Board. The conclusion was that this Court has no jurisdiction over the process and outcome of vetting. No doubt that outcome was based on an exercise of the Vetting Board’s constitutional mandate. It is therefore beyond our remit to judge the fairness or otherwise of the decision to the Petitioner.
62. The Supreme Court, having through that decision clearly determined that the High Court has no jurisdiction to intervene in the vetting process, this Court need not resort to Petition No. 320 of 2013 in order to reach the same conclusion as that reached by the Supreme Court. That is to say that the Petitioner was removed from the Judiciary upon rejection of his application for review by the Vetting Board.
63. In view of Article 163(7) of the 2010 Constitution, the Supreme Court’s decision in Petition No. 13A of 2013 is final and binding on this Court. That is not to say that we have, through this judgement, made orders in respect of Petition No. 320 of 2013, in terms of Order (c) of the Supreme Court’s disposition in Petition No. 13A of 2013. The Petitioner is at liberty to pursue the said Petition.
64. In light of our aforesaid conclusion, it naturally follows that the retirement age of the Petitioner is no longer governed by Article 167(1) of the Constitution. We say so because section 23(1) of the Sixth Schedule is clear that Article 167 is among the provisions of the 2010 Constitution suspended or precluded by the vetting process.
65. Section 23(1) of the Sixth Schedule states:
 23. (1) Within one year after the effective date, Parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.”
66. That section is clear that a judge who was in office on the effective date could be removed from office through vetting despite the fact that Article 167 provides a judge’s tenure of office. Since the Petitioner case is hinged on the argument that Section 31(1) of the Sixth Schedule overrides Article 167(1), his case is torpedoed by his removal under Section 23(2) of the Sixth Schedule.



67. That Article 167(1) is indeed not operational in regard to a judge removed through the vetting process is buttressed by the provision in Section 24 of the Vetting of Judges and Magistrates Act, 2011. That section states:

"24. Voluntary retirement and terminal benefits

1. A judge or magistrate shall, within three months of the commencement of this Act, elect-
 - a) whether to be subjected to the vetting process; or
 - b) to leave the judicial service voluntarily.
2. A judge or magistrate who elects to leave the judicial service voluntarily or is found unsuitable after vetting shall be entitled to terminal benefits for early retirement.
3. For the avoidance of doubt, a judge or magistrate who voluntarily leaves service or is found unsuitable after vetting shall be deemed qualified for early retirement."

(Emphasis added)

68. A removal through vetting is a statutorily imposed early retirement. It cannot be equated to the voluntary or elective retirement upon attainment of the age of sixty-five years that is prescribed in Article 167 (1) of the Constitution.

69. It is therefore clear to us that upon the Petitioner's removal by the Vetting Board, the question as to whether he should retire at 70 or 74 became moot. The question no longer calls for the engagement of our judicial minds. Answering that question will amount to engaging in an academic exercise.

70. In saying so, we are in agreement with the statement of the High Court in *Okiya Omtatah Okoiti & 3 Others v Attorney General & 5 Others* [2014] eKLR that:

"It is not in dispute that a Court of law should only engage itself in actual disputes between the parties before it. Judicial authority should not be directed at matters that are academic in nature."

71. In our opinion, the core question raised by the Petitioner herein, to wit, the retirement age of a judge in office on the effective date, is no longer a justiciable matter in light of the circumstances the Petitioner now finds himself in.

72. Looking at the Petitioner case from another angle, we hear him submit that the conservatory orders issued in Petition No. 320 of 2013 barred his removal as a Judge up to retirement at 74 years. He asserts that Court orders must be obeyed. In that respect he cited the case of *Alken Connections Limited v Safaricom Limited & 2 others* [2013] eKLR in which Odunga, J, stated that:

"...the law is well established that Court orders are not made in vain and are meant to be complied with and therefore a party should not take it upon himself to decide on the validity or otherwise of Court orders. Once a Court order is made in a suit the same is valid unless set aside on review or on appeal."

73. The Petitioner is therefore saying that the Respondents were guilty of disobeying the conservatory orders granted in Petition No. 320 of 2013 by issuing him with a retirement notice. Pursuing his



argument to its logical conclusion would mean that that the Petitioner is implicitly prosecuting contempt of court proceedings through this matter. His Petition would therefore be bad in law as one cannot file a fresh petition in order to enforce orders issued to him in a different matter. Secondly, as we have demonstrated, the conservatory orders have been overtaken by the decision of the Supreme Court in Petition No 13A of 2013.

Disposition

- 74. For all the reasons we have highlighted, we do not find it appropriate to explore the question of the Petitioner retirement age, or any of the other identified issues. It is not without sympathy or heavy hearts that we are compelled to tell the Petitioner that he has reached the end of the road. His Petition is therefore dismissed.
- 75. On the question of costs, we appreciate the fact that this Petition was filed prior to the decision by the Supreme Court in Petition No. 13A of 2013. At that time, the question of the Petitioner’s retirement age was an issue that called for judicial opinion. For that reason, and also considering that the 1st and 2nd Respondents stated that they were not averse to bearing their costs of these proceedings, we order that each party will meet their own costs.
- 76. Orders Accordingly.

SIGNED AND DATED AT NAIROBI THIS 11TH DAY OF DECEMBER, 2015.

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R MWONGO
PRINCIPAL JUDGE

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W KORIR
JUDGE

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C.MEOLI
JUDGE

.....

H.ONG’UDI
JUDGE

.....

C. KARIUKI
JUDGE

In the presence of:

- Mr. Mwenesi for Petitioner
- Mr., Muite, Mr. Issa & M/s Chepkurui for Respondents
- Mr.Njoroge for Attorney General

