REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

CONSTITUTION PETITION NO 64 OF 2014

THE KENYA MAGISTRATES & JUDGES ASSOCIATION.....PETITIONER

VERSUS

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

THE HON ATTORNEY GENERAL.....2ND RESPONDENT

JUDGMENT

Introduction

1. This petition challenges the power of the 1st respondent (hereafter **'the Board'**) to vet magistrates in relation to complaints that arose after the promulgation of the Constitution of Kenya 2010 on 27th August 2010. The Board was established pursuant to the provisions of section 23 in the Sixth Schedule to the Constitution and the Vetting of Judges and Magistrates Act, 2011 (hereafter "the Act").

The Petitioner's Case

2. In the affidavit sworn in support of the petition on 7th February 2014, **Daniel Sepu Mayabi**, the Executive Director of the petitioner, deposes that the petitioner, **the Kenya Magistrates and Judges Association**, is an association whose membership is derived from among judicial officers in Kenya. Its objectives are to safeguard the independence of the Judiciary and the rule of law; to promote and protect the interest, welfare and dignity of judicial officers; and to promote the development of jurisprudence through programs of research, training and educational exchange, among others. He avers that the Constitution of Kenya 2010, which was promulgated and came into force on 27th August 2010, pronounces the supremacy of the Constitution; provides that it binds all persons and all state organs; and at Article 2(2), prohibits any person from claiming or exercising state authority except as authorized by the Constitution; and further, that it provides at Article 2(4) that any law that is inconsistent with the Constitution is void to the extent of the inconsistency, and any act or omission that is in contravention of the Constitution is invalid.

3. The petitioner avers that section 23 of the Sixth Schedule to the Constitution requires Parliament to enact, within one year after the effective date, a mechanism and procedure for vetting 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 of the Constitution; and pursuant to this provision, Parliament enacted the Vetting of Judges and Magistrates Act 2011.

4. The petitioner also avers that the Constitution has set up the mechanisms of dealing with the suitability of judicial officers to continue serving in the judiciary after the effective date. These are the procedure for removal of judges contained in Article 168 of the Constitution and the functions of the Judicial Service Commission under article 172(1)(c) of the Constitution. The petitioner states that, in violation of these provisions, the Board has, in the execution of its mandate under the Act, issued notices to judicial officers and made determinations in respect of some judicial officers in respect of conduct for acts and omissions purportedly done after the effective date.

5. The petitioner has set out in Mr. Mayabi's affidavit particulars of complaints entertained by the Board which arose after the effective date. They include the determination of 20th December 2013 contained in the 9th announcement in which the Board determined, amongst others, complaints against Hon. Anne Ireri Ruguru as unsuitable to serve as a magistrate on account of a complaint in Limuru Children's Case No 28 of 2011; a complaint in respect of Hon Musa Machage in respect of Mombasa PMCC No 148(b) of 2011; and complaints in respect of Kisii CMCC No 62 of 2011 Kisii CMCC No 334 of 2012 and Kisii CMCC No 666 of 2012, all of which on the face of it arose well after the effective date, in respect of Hon. Gilbert Kimutai Too.

6. The petitioner asserts therefore that a constitutional question has arisen as to whether a reading of the constitutional jurisdictional basis of the Board authorizes it to entertain complaints against judicial officers in respect of conduct purportedly arising after the 27th of August 2010.

7. The petitioner avers that the vetting of Acting Senior Resident Magistrates started on 4th February 2014; that this group of officers was hired in July 2010 and started working in September 2010 and, therefore, reasonably, their complaints can only have arisen after the promulgation of the Constitution. They aver further that there is reasonable apprehension that if the trend of dismissing officers based on allegations that came after 2010 is not stopped immediately, then these issues will be used by the Vetting Board to make adverse findings against judicial officers to their extreme prejudice.

8. The petitioner contends that the Board, in the exercise of its functions in accordance with section 23 of the Sixth Schedule to the Constitution of Kenya 2010, cannot lawfully investigate the conduct, acts, omissions and information on the part of a judicial officer purportedly arising after 27th August 2010.

9. Mr. Mayabi deposes that judicial officers who were subjected to the exercise of vetting by the Board in respect of allegations purportedly arising after the 27th August 2010 were subjected to unlawful and unfair treatment contrary to the provisions of articles 3, 47, and 50(1) of the Constitution of Kenya 2010 and such treatment was, therefore, null and void to the extent of its reference to such conduct, acts, omissions and information.

10. In the petition dated 7th April 2014, the petitioner therefore seeks the following orders:

> ***a. A declaration that the 1st respondent, in the exercise of its functions in accordance with section 23 of the sixth schedule to the constitution of Kenya 2010, cannot lawfully investigate the conduct, Acts omissions and information on the part of a judicial officer purportedly arising after the 27/8/2010.***
>
> ***b. A declaration that judicial officers who were subjected to the exercise of vetting by the 1st respondent in respect of allegation purportedly arising after the 27/8/2010 were subjected to unlawful and unfair treatment contrary to the provisions of articles 3, 47 and 50(1) of the Constitution of Kenya 2010 and such treatment was, therefore, null and void to the extent of its reference to such conduct, acts, omissions and information.***
>
> ***c. The High Court does hereby read in the provisions of section 18 of the Vetting of Judges and Magistrates Act immediately after the word 'consider' in subsection (1) the words "in relation to conduct, acts and omissions of judicial officers allegedly arising or arising on or before the effective date".***

d. Costs of this application

e. Such other orders that the court may deem just.

The Response

11. The respondents have filed a replying affidavit sworn by **Mr. Reuben Chirchir,** the Chief Executive Officer and Secretary of the Judges and Magistrates Vetting Board, on 13th February 2014. Mr. Chirchir, deposes that he is aware of the proceedings before the Board which seek to determine the suitability of individuals to serve as judicial officers as stipulated in the Constitution; that the Constitution provides for the enactment of legislation to establish mechanisms and procedures for vetting the suitability of all judges and magistrates that were in office on the effective date of the Constitution to continue to serve in accordance with the values and principles set out in Article 10 and 159 of the Constitution; that the Act was enacted and came into force on 22nd March 2011; and was amended by Act No 43 of 2012 whose commencement date is 14th December 2012; and a further amendment was made in December 2013 with an effective date of 10th January 2014. Mr. Chirchir deposes that the last amendment extended the vetting period to 31st December 2015.

12. The Board states that the provisions of the Constitution in Article 10 and 159 provide comprehensive and objective factors that guide the vetting process, including the national values and principles of governance at Article 10; that the petitioner's members, among them Anne Ireri Ruguru, Musa Machage, and Gilbert Kimutai Too were appointed prior to the effective date and therefore had to be subjected to vetting; that in executing its duty, the Board was guided by the principles and standards of judicial independence, natural justice and international best practices. The Board has set out in Mr. Chirchir's affidavit the criteria used in the process of vetting.

13. According to the Board, it received complaints from various institutions and members of the public in respect of the petitioner's members. The Board maintains that the petitioner's members were given a chance to respond to the complaints and an opportunity to respond; to be heard in person and to be represented by counsel of their choice; that they were also given an opportunity to question complainants and witnesses; and that they did not raise an objection at the hearing to the jurisdiction of the panel and the complaints that they were asked to respond to. It is the Board's contention that these issues have been raised after the said members were declared unsuitable to serve in the judiciary. It terms the issues being raised by the petitioner as non-issues and meant to cause confusion and delay the vetting process further.

14. The Board contends that section 18(1)(e) of the Judges and Magistrates Vetting Act states that any pending or concluded criminal case before a court of law against the judicial officer shall be considered during vetting; that pending complaints or other relevant information received from a person or body named in the section shall be considered during vetting; that section 2 of the Act defines pending complaints as a complaint filed or registered with any person or body listed under section 18(1)(e) at least fourteen days before the judge or magistrate is vetted; and there is no bar to the Board inquiring into any complaint filed after 27th August 2010 provided it is filed or registered 14 days before the judge or magistrate is vetted. The Board concludes therefore that it has jurisdiction to deal with complaints. Acts and omissions purportedly arising before and after 27th August 2010.

15. Mr. Chirchir avers therefore that the petitioner's members were not subjected to unlawful and unfair treatment which would be contrary to the provisions of Articles 3, 47 and 50(1) of the Constitution of Kenya 2010; and that should the Court issues the orders prayed for, the vetting process will be disrupted indefinitely and this will not be in the public interest.

The Submissions

Submissions by the Petitioner

16In his submissions on behalf of the petitioner, Mr. Wambola argued that the Board is entertaining

complaints against judicial officers which arise after the effective date; that the Board should confine itself to conduct and complaints against judicial officers which arose on or before the effective date; that section 23 of the Sixth Schedule to the Constitution mandates the Board to investigate the history of the judicial officer from the effective date backwards; and that it does not have the mandate to investigate or entertain complaints that arise after the effective date as there are institutions established under the Constitution to deal with such issues.

17.The petitioner argues that Article 168 and 172 of the Constitution have established mechanisms for dealing with such issues as arise subsequent to the effective date; that the Board is a transitional body, intended to aid with the transition from the old era to the new, after the promulgation of the Constitution; and was not supposed to have a continuous mandate as this would negate the principle of harmonious co-existence of institutions.

18. Mr. Wambola submitted that the constitutional rights of the petitioner's members are threatened with violation if the orders sought are not granted; that Article 27 provides that there should be no discrimination, and that like should be vetted as like. He contended that after the effective date, new judicial officers were recruited and served alongside the judicial officers who were in office on the effective date; and that there is no conduct or complaint in relation to the new judicial officers that has been or is the subject of vetting before the Board. Counsel argued therefore that subjecting the conduct of its members subsequent to the effective date negates the provisions of Article 47 on the right to fair administrative process; and that the Board has gone against the law by investigating complaints which are outside its scope.

19. According to the petitioner, the argument advanced by the respondents is that section 2 of the Vetting of Judges and Magistrates Act allows the Board to carry out vetting on matters that arose after the effective date; that the Board takes the view that pending complaints means a complaint registered at least 14 days before the Magistrate in question is vetted. Counsel submitted that to interpret the provisions of section 2 of the Act in this manner is wrong; that a complaint should be one that arose before the effective date but should be filed 14 days before the vetting by the Board; and that the Board's mandate or scope cannot be unlimited in terms of time. Mr. Wambola submitted that if the provisions of the section were to have the meaning assigned to it by the respondents, then the section would be unconstitutional.

20. The petitioner referred the Court to two articles titled **"Constitutions without Constitutionalism: Reflections on an African Political Paradox, by HWO Okoth-Ogendo in Isa G Shivji (Ed) State and Constitutionalism: An African Debate on Democracy** and **"Constitutionalism: A Comparative Analysis of Kenya and South Africa" by J Mutakha Kangu in Moi University Law Journal Vol. 2 April 2008 No. 1** for the proposition that arbitrariness, however well intentioned, is a recipe for bad governance; and that constitutionalism and the rule of law are the exact antithesis of arbitrariness. Mr. Wambola submitted that the arbitrariness currently being infused into the vetting process by the Board is the antithesis of constitutionalism and the rule of law.

21. In light of the foregoing matters, Mr. Wambola asked the Court to exercise its power to *"read in"* into section 18(1)(e) of the Vetting of Judges and Magistrates Act the words ***"in relation to conduct, acts and omissions of judicial officers allegedly arising or arising on or before the effective date"*** immediately after the word ***'consider'*** in subsection (1).

22. It was the petitioner's contention that such reading in would not, contrary to the respondents' argument, amount to amending the law; that Article 20(1)(a) allows the Court to develop the law to the extent that it does not give effect to a right or fundamental freedom; and that reading in the words would be to give an interpretation that would give effect to the intention of the Act and the Constitution.

Submissions by the Respondents

23. Ms. Mwangi, Counsel for the respondents, submitted that Section 23 of the Sixth Schedule gave Parliament the mandate to enact legislation to vet Magistrates and Judges who were in office before 27th August 2010, and that pursuant to this provision, Parliament enacted the Vetting of Judges and

Magistrates Act 2011 which came into force in accordance with the Sixth Schedule. Counsel contended that the Board has jurisdiction to vet conduct or omissions that occurs 14 days before the officer is summoned before it; that the contention that the Board cannot vet issues that came after 27th August 2010 is incorrect. According to the respondents, a complaint arising after 27th August 2010 can be dealt with by the Board or the JSC, and the complainant can choose the forum at which the complaint is to be dealt with.

24. Ms. Mwangi further argued that the issues the petitioner was raising were *res judicata*; that they had been dealt with by the Court of Appeal in **Civil Appeal No 123 of 2012- Dennis Mogambi Mong'are – vs- Attorney General** in which section 18 of the Vetting of Judges and Magistrates Act was declared constitutional.

25. To the petitioner's contention that its members were being treated in a discriminatory manner contrary to the provisions of Article 27 of the Constitution, Ms. Mwangi argued that none of the judicial officers being vetted has undergone discrimination; that when judicial officers are being recruited, they undergo vetting; that it is in the public domain that the recruitment for Judges and Magistrates after the effective date is vigorous; and that this is the same process going on in the vetting of the petitioner's members and there is therefore no discrimination.

26. Counsel argued further that for the Court to 'read in' words into section 18(1) of the Vetting of Judges and Magistrates Act is to change the section's current meaning completely; that the Court has no power to amend an Act of Parliament as only Parliament can do so; that the Court can only develop the law through precedents; and that Article 20 does not allow the Court to read in words into legislation as proposed by the petitioner.

27. According to the respondents, Article 95(3) of the Constitution gives the National Assembly the mandate to legislate, and under the doctrine of separation of powers, the Court cannot legislate. Counsel relied on the case of **Ngobit Estates Ltd. –vs- Carnegie (1982) KLR** for the proposition that the Court can only interpret but not legislate; and that it was the duty of the Court to interpret the law, not make it; that the Court should read section 2 and 18 of the Vetting of Judges and Magistrates Act as it is, and if the petitioner's members are not happy with it, they should lobby Parliament to amend it.

28. Counsel argued further that the petitioner was a party to the **Dennis Mogambi Mong'are** case; that it raised issues similar to what the petitioner now raises, which issues were overruled; that the vetting process is in the public interest and judicial officers should not be let off the hook; that if the prayers are granted, the respondent would have to recall the first person who was vetted; and that the Board should be allowed to do its work. Counsel termed the petition as frivolous and lacking in merit, and asked that it be dismissed with costs.

The Petitioner's Rejoinder

29. In his reply to the respondents' submissions, Mr. Wambola argued that the authorities relied on by the respondents were irrelevant; that **Dennis Mogambi Mong'are –vs- The Attorney (supra)** sought to declare provisions of the **Vetting of Judges and Magistrates Act** unconstitutional; that this is not what the petitioner was seeking to do but was asking the Court to give the sections in question a proper interpretation that will develop the law and bring it into conformity with the Constitution in terms of Article 20; and that the petition is not *res judicata* as the issues it raises are different from the issues raised in the **Dennis Mogambi Mong'are** case.

30. With regard to the argument by the respondents that the Board was mandated to investigate any complaint that occurs 14 days prior to the vetting, Mr. Wambola argued that the respondents were again misinterpreting the law; that the section required the reporting of complaints to occur 14 days before the vetting, and the reference was not to the occurrence of the complaint.

31. To the contention by the respondents that a person could choose the forum, between the Vetting Board and the Judicial Service Commission, where a complaint arising after the effective date could be

heard, it was Counsel's submission that the argument clearly demonstrated what the petitioner was contending: that the Board has now arrogated to itself powers of dealing with any complaint arising at any time alongside the Judicial Service Commission, and it was thereby creating uncertainty and disorder.

Determination

32. The parties to this matter have, in their respective written submissions, proposed the issues that they consider fall for determination in this petition. The petitioner takes the view that this Court should consider whether the Board, in the exercise of its functions under Section 23 of the Sixth Schedule to the Constitution, can lawfully interrogate acts and omissions on the part of a judicial officer purportedly arising after 27th August 2010; whether, depending on the answer to the first issue, judicial officers subjected to vetting in respect of allegations arising after 27th August 2010 were subjected to lawful and fair treatment as required under the Constitution; and finally, whether the Court should read into the provisions of section 18(1) of the Act immediately after the word 'consider' in subsection (1) the words ***"in relation to conduct, acts and omissions of judicial officers allegedly arising*** **on or before the effective date."**

33. On their part, the respondents ask the Court to determine the questions whether the Board acted in accordance with section 23 of the Sixth Schedule of the Constitution as read together with section 18 of the Vetting of Judges and Magistrates Act; whether the vetting exercise was free and fair or whether it was discriminatory against the petitioner's members; and whether the Court has jurisdiction to amend section 18 of the Vetting of Judges and Magistrates Act.

34. I believe the petitioner is not, in this petition, asking that the Board stops the vetting of its members. Rather, the crux of the petitioner's claim is that the Board has no mandate to vet judicial officers in respect of complaints that arose subsequent to the effective date, the 27th of August 2010. The response is that the Board has such mandate, provided the complaint is made 14 days before the vetting in accordance with section 2 of the Act.

35. In determining this matter therefore, and taking into account the issues proposed by the parties, I believe I am under a duty to determine four main issues with regard to the constitutional and statutory mandate of the Vetting Board set out in Section 23 of the Sixth Schedule to the Constitution and the provisions of the Vetting of Judges and Magistrates Act:

> ***i. Whether the Issues raised in this Petition are res judicata;***
>
> ***ii. Whether the Board can vet a judicial officer with respect to acts or omissions occurring after the effective date;***
>
> ***iii. Whether judicial officers subjected to vetting in respect of allegations arising after 27th August 2010 were subjected to lawful and fair treatment as required under the Constitution.***
>
> ***iv. Whether the Court has jurisdiction to 'read-in' into section 18(1) of the Act words that would confine the vetting to acts and omissions occurring on or before the effective date;***

36. In considering these issues, I will bear in mind that the Constitution has provided at Article 259 the principles to be applied in interpreting its provisions. It states as follows:

259.(1) This Constitution shall be interpreted in a manner that—

> ***(a) promotes its purposes, values and principles;***
>
> ***(b) advances the rule of law, and the human rights and fundamental freedoms in the Bill of Rights;***

(c) permits the development of the law; and

(d) contributes to good governance.

Whether the issues raised in this petition are *Res Judicata*

37. It is prudent to deal, first, with the argument by the respondents that the issues before the Court are *res judicata* as the same issues were the subject of the Court of Appeal decision in **Dennis Mogambi Mong'are –vs-The Attorney General (supra).** This is important as the issue of *res judicata* goes to the jurisdiction of the Court.

38. I have read the decision of the Court in that case. The issue before the Court was the constitutionality of the vetting process. The appellant/ petitioner in that case was seeking, as he had done in the High Court in **High Court Petition No. 146 of 2011**, a declaration that section 23 of the Transitional Provisions in the Sixth Schedule to the Constitution was unconstitutional in light of the provisions of Article 168 regarding the removal of judges. I fully agree with the decision of the Court of Appeal in that matter that the vetting process is constitutional.

39. As I understand it, the petitioner's complaint in the present petition is not that the Board has no mandate to vet its members. Its contention is that while it has such mandate, the complaints that it can address its collective mind to are such complaints as arose on or before the effective date. In this regard, even a cursory reading of the **Dennis Mogambi Mong'are** case will show that the question of the timing of the complaints against judicial officers, whether they were confined to the period before the effective date, or if they could include such complaints as arose with regard to acts of omission or commission after the effective date, was never at issue, either in the Court of Appeal or the High Court. I therefore find and hold that the issues raised in this petition are not *res judicata*.

Whether the Board can vet a Judicial Officer with respect to acts or omissions occurring after the effective date

40. The second issue relates to the mandate of the Board with regard to the vetting of judicial officers, specifically with regard to the time or period when the complaints in question arose. The provision of section 23 of the Sixth Schedule to the Constitution relevant to the present proceedings is subsection (1) which provides as follows:

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.

41. The **Vetting of Judges and Magistrates Act, Cap 8B** of the Laws of Kenya, was then enacted pursuant to the provisions of section 23. The title to the Act states that it is "***An Act of Parliament to provide for the vetting of judges and magistrates pursuant to section 23 of the Sixth Schedule to the Constitution; to provide for the establishment, powers and functions of the Judges and Magistrates Vetting Board, and for connected purposes.***"

42. At section 2 of the Act, a ***'pending complaint'*** is defined as ***"…a complaint filed or registered with any person or body mentioned in section 18 (1) (e) at least fourteen days before the judge or magistrate is vetted."***

43. Section 18(1) of the Act sets out the matters that the Board is to consider in the process of vetting of a judge or magistrate. It states that:

"The Board shall, in determining the suitability of a judge or magistrate, consider—

…

(e) pending complaints or other relevant information received from any person or body, including the-

(i) Law Society of Kenya;

(ii) Ethics and Anti-corruption Commission;

(iii) Advocates Disciplinary Tribunal;

(v)…

(x) Judicial Service Commission. (Emphasis added)

44. It is to be observed that the **Board** was intended, as submitted by the petitioner, to be a transitional body. Its mandate was to receive and hear complaints regarding the suitability of judicial officers who were in office on the 27th of August 2010. Such complaints could be such as were pending and emanating from, among other bodies, the **Judicial Service Commission (JSC)**. Is it then possible, as argued by the respondents, that both the Board and the JSC were intended to have jurisdiction to deal with complaints against judicial officers arising **after** the effective date?

45. Article 168 of the Constitution provides the circumstances under which a judge may be removed from office, and provides in particular that the removal may be initiated "***only by the Judicial Service Commission acting on its own motion, or on the petition of any person to the Judicial Service Commission."***

46. Article 172 sets out the powers of the JSC. It provides at Article 172 (1) (c) that the JSC shall:

(c) appoint, receive complaints against, investigate and remove from office or otherwise discipline registrars, magistrates, other judicial officers and other staff of the Judiciary, in the manner prescribed by an Act of Parliament; (Emphasis added)

47. The Act of Parliament which prescribes the manner in which the JSC is to conduct its functions is the **Judicial Service Act, Act No. 1 of 2011**. It sets out at section 32 and the Third Schedule to the Act the procedure for receiving and investigating complaints against, and disciplining, judicial officers, including magistrates, against whom cause for disciplinary action, including dismissal, may arise.

48. The Board was set up under the transitional provisions of the Constitution. It was to operate, for the period that it would be in place, 'despite' the provisions of the Constitution with regard to receipt of, and inquiry into, complaints against judges and magistrates. As observed by Murgor JA in her concurring judgment in the **Dennis Mogambi Mong'are** case:

"The clear and plain meaning of Section 23 of the Sixth Schedule clearly demonstrates that the intention of the people of Kenya was to establish a process to determine the suitability or otherwise of judges and magistrates in office before the promulgation of the Constitution, to remain in office. It was intended that vetting process would be insulated from judicial and other processes and procedures, and would be a one off procedure to be undertaken within a limited time frame during the transitional period." (Emphasis added)

49. It appears to me to be the case, therefore, and I fully agree with the sentiments of Murgor, JA above, that the existence and mandate of the Board is transitional. The constitutional intention behind the establishment of the Board was to check the suitability of those judicial officers who were in office on the effective date, and to establish their suitability for service in the new constitutional dispensation, upon consideration of such complaints as may have been pending against them before the bodies set out in section 18(1)(e), including the JSC. Any complaint, in my view, that arose subsequent to the effective

date could only be dealt with, under the Constitution and the law, by the JSC.

50. The respondents argue that the Board has the mandate to receive complaints even in relation to matters arising after the effective date. They argue further that a magistrate has the option to choose which forum to appear before, between the Board and the JSC in relation to complaints arising after the effective date.

51. This, in my view, is not a tenable argument. The Board was given a specific, time-bound mandate with regard to complaints against judicial officers who were in office on the effective date, the 27th of August 2010. That mandate related to the suitability of the officers as at that date, and related to complaints as at that date. To hold otherwise is to give the Board a mandate unintended by the Constitution, and would lead to an encroachment on the mandate of the Judicial Service Commission under Article 168 and 172 of the Constitution.

52. Further, to argue that the judicial officer has a choice of forum is to engage in wishful thinking. The Transitional Provisions of the Constitution were clear that judicial officers in office as at 27th August 2010 had to undergo the vetting process. They have no choice in the matter. This is indeed the essence of the decision of the Court of Appeal in the **Dennis Mogambi Mong'are** case, particularly paragraphs 44, 45 and 46 of the decision of Odek, JA, relied on by the respondents. All judicial officers who were in office as at 27th August 2010 are constitutionally obliged to undergo the vetting process.

53. Consequently, should the Court hold that the Board has the mandate to inquire into complaints arising **after** the effective date as urged by the respondents, the judicial officer has no option but to present himself or herself before the Board in respect of those complaints. Yet, under the Constitution, that officer is still answerable to the Judicial Service Commission. Such a finding would in effect be subjecting the judicial officer to two processes in respect of the same matter. Further, it would effectively extend the mandate of the Board beyond the transitional period intended by the Constitution. In my view therefore, and I so hold, the mandate of the Board is limited to complaints against judicial officers who were in office on or before the effective date, the 27th of August 2010, and arising on or before the said date.

54. The Board's mandate was transitional: it was supposed to vet the judges and magistrates who were in office as at 27th August 2010, and their conduct and any complaints arising from that period. Any issue arising subsequent to that date would fall under the mandate of the JSC. As submitted by the petitioners, it would be to obliterate the boundary between the transitional period, which falls under the Board, and the subsequent period in respect of which the constitution gives the JSC mandate by virtue of Article 168 and 172. Nothing bears this out more than the averments of the respondents. At paragraph 5 of his affidavit, Mr. Chirchir avers as follows:

> ***5. "The Vetting of Judges and Magistrates Act, 2011 was enacted and came to force on 22nd March 2011 and the Board's mandate as stipulated in the Act is to vet Judges and Magistrates in accordance with the provisions of the Constitution and the Judges and Magistrates Act of 2011. The Vetting Act was amended by Act No 43 of 2012 whose commencement date is 14th December 2012. Further amendment to the Vetting Act was made in December 2013 with an effective date of 10th January 2014. The last amendment extended the vetting period to 31st December 2015."***

55. The effect of the interpretation that the respondents wish to give to section 18(1)(e) is to make the Board, initially a transitional process intended by the people of Kenya to last a year to vet officers in respect of matters arising before 27th August 2010, a long term body that would exist alongside the Judicial Service Commission in which was vested by the Constitution power to exercise powers of discipline over judicial officers with regard to the period subsequent to the effective date of the new Constitution. I therefore find and hold, with respect to the second issue, that the Board cannot lawfully vet a judicial officer with respect to acts or omissions occurring after the effective date.

Whether Judicial Officers subjected to vetting in respect of allegations arising after 27th august 2010 were subjected to lawful and fair treatment as required under the Constitution.

56. The petitioner contends that by vetting their members on the basis of complaints arising after the effective date, the Board has violated their rights under Articles 3, 27, 47 and 50(1) of the Constitution. Article 3(1) of the Constitution, provides that ***"Every person has an obligation to respect, uphold and defend this Constitution."*** This Article imposes an obligation on all to act in accordance with the Constitution. While it does not impose a specific right on the petitioner's members and therefore no right can be said to have been violated in respect to it, it does impose a duty on the respondents to exercise its mandate in accordance with the dictates of the Constitution.

57. The petitioner also alleges violation of the provisions of Article 27 of the Constitution. Article 27(1) provides that ***"Every person is equal before the law and has the right to equal protection and equal benefit of the law."***

58. The petitioner's claim of discrimination against its members is on the basis that new judicial officers were recruited and served alongside the judicial officers who were in office on the effective date; but that while the conduct of its members who were in office on the effective date but which allegedly occurred after the effective date is being subjected to vetting by the Board, there is no conduct or complaint in relation to the new judicial officers that has been or is the subject of vetting before the Board.

59. There is, in my view, some merit to this argument. Subjecting the Magistrates who were in office on the effective date to a vetting process that includes such matters as were pending at the effective date and subsequent thereto would subject them to differential treatment and expose them to two different processes. This would be contrary to the provisions of Article 27 of the Constitution. The magistrates who were in office on 27th August should be subjected to the vetting process in respect of matters as at that date. Any issue arsing thereafter in their case, as in the case of judicial officers appointed after the promulgation of the Constitution and the attendant rigorous interview process, would fall within the mandate of the Judicial Service Commission and carried out in accordance with the provisions of the Judicial Service Act.

60. The petitioner also alleges violation of Article 47 and 50(1) in respect of its members. At Article 47(1), the Constitution guarantees to everyone ***"administrative action that is expeditious, efficient, lawful, reasonable and procedurally fair***." At Article 50(1), the Constitution states that ***" Every person has the right to have any dispute that can be resolved by the application of law decided in a fair and public hearing before a court or, if appropriate, another independent and impartial tribunal or body."***

61. I have not really heard the petitioner to complain that their members were subjected to a process that was not procedurally fair, or that the Board, in exercising its mandate, was not independent or impartial. Though not so expressed, the crux of the petitioner's complaint is that the Board has gone outside its mandate and therefore acted ultra vires its powers by purporting to vet the petitioner's members with regard to matters that arose after the effective date which fall within the mandate of the JSC. Where a body acts outside its mandate and assumes a jurisdiction that it does not have, then it is acting unlawfully, and the result is that its unlawful acts are a nullity.

62. Thus, to the extent that the provisions of section 18(1) of the Vetting of Judges and Magistrates Act is interpreted as allowing the Board to consider complaints arising after the effective date, it is inconsistent with the Constitution. The interpretation given to section 18(1) by the respondents, therefore, which gives the Board the right to vet magistrates on the basis of complaints arising after the effective date, would have the effect of violating the Constitution and violating the rights of such of the petitioner's members as have been subjected to vetting in respect of complaints arising after the effective date.

Whether the Court has jurisdiction to 'read in' into section 18(1) of the Act words that would confine the vetting to acts and omissions occurring on or before the effective date.

63. The next issue for consideration is how the Court is to deal with the issue in order to ensure

compliance with the Constitution while maintaining fidelity to its intentions to have judicial officers who were in office on the effective date subjected to the process of vetting.

64. The petitioner has proposed that the Court reads certain words into the statute to give it its full effect and to ensure that it complies with the Constitution. The respondents counter that to do this would amount to the Court amending the statute, which is the preserve of the legislature.

65. Article 20(3) of the Constitution provides as follows:

> ***(3) In applying a provision of the Bill of Rights, a court shall—***
>
> ***(a) develop the law to the extent that it does not give effect to a right or fundamental freedom; and***
>
> ***(b) adopt the interpretation that most favours the enforcement of a right or fundamental freedom.***

66. Further, at Article 259(a), the Court is enjoined to interpret the Constitution in a manner that ***"promotes its purposes, values and principles***". What does this require in considering the rights of the petitioner's members against the duty of the Board to carry out the process of vetting of judicial officers in office on the effective date? In my view, this requires giving the statute in question an interpretation that preserves the mandate of the Board under the Constitution to vet judicial officers who were in office as at 27th August 2010, while at the same time protecting and upholding the rights of the petitioner's members not to be subjected to a process that goes outside the scope of the mandate of the Board. I agree with the petitioner that this can only be done by using the principle of reading-in into the provisions of the Act words that clarify the scope and mandate of the Board.

67. The concept of reading in as a tool of statutory interpretation is not new. It has been adopted in various jurisdictions which have a system of law similar to ours such as Canada, United States and South Africa.

68. In the Canadian case of **Schachter -*v*-. Canada, [1992] 2 S.C.R. 679** the Court observed as follows:

> ***"Generally speaking, when only a part of a statute or provision violates the Constitution, only the offending portion should be declared to be of no force or effect. The doctrine of severance requires that a court define carefully the extent of the inconsistency between the statute in question and the requirements of the Constitution, and then declare inoperative (a) the inconsistent portion, and (b) such part of the remainder of which it cannot be safely assumed that the legislature would have enacted it without the inconsistent portion.***
>
> ***In the case of reading in, the inconsistency is defined as what the statute wrongly <u>excludes</u> rather than what it wrongly <u>includes</u>. Where the inconsistency is defined as what the statute excludes, the logical result of declaring inoperative that inconsistency may be to include the excluded group within the statutory scheme. The reach of the statute is effectively extended by way of reading in rather than reading down."***

69. In the case of **The State –vs- Samuel Manamela, Case CCT 25/99**, the Constitutional Court of South Africa (Madala, Sachs and Yacoob JJ) considered the circumstances under which a Court could read-in provisions into a statute. It cited with approval the decision of the Court in the case of **National Coalition for Gay and Lesbian Equality and Others -v- Minister of Home Affairs and Others (CCT10/99) [1999] ZACC 17; 2000 (2) SA 1; 2000 (1) BCLR 39 (2 December 1999)** in which the Court had adopted the principle of reading-in and stated as follows:

> ***[56] The principles applicable to "reading in" as a remedy for unconstitutionality are set out in the Gay and Lesbian Immigration judgment. They are:***

> ***"[74] The severance of words from a statutory provision and reading words into the provision are closely related remedial powers of the Court. In deciding whether words should be severed from a provision or whether words should be read into one, a court pays careful attention first, to the need to ensure that the provision which results from severance or reading words into a statute is consistent with the Constitution and its fundamental values and secondly, that the result achieved would interfere with the laws adopted by the legislature as little as possible…."***
>
> ***[75] In deciding to read words into a statute, a court should also bear in mind that it will not be appropriate to read words in, unless in so doing a court can define with sufficient precision how the statute ought to be extended in order to comply with the Constitution. Moreover, when reading-in (as when severing) a court should endeavour to be as faithful as possible to the legislative scheme within the constraints of the Constitution. …"***
>
> ***[76]…***

70. Like the Court in **Schachter *v.* Canada,** the Court in **National Coalition for Gay and Lesbian Equality and Others v Minister of Home Affairs** was concerned with the exclusion of certain groups from certain benefits accorded by the state, in the **Schachter case,** exclusion of adoptive parents from child benefits, and in **the Gay and Lesbian case,** exclusion of partners in same sex unions from benefits available to spouses in heterosexual unions.

71. In The **State –vs- Samuel Manamela** case however, the Constitutional Court of South Africa was concerned with the provisions of a statute that was deemed unconstitutional for being in violation of the rights of individuals. The Court therefore observed in that case as follows:

> ***[57] We would add that reading in is not necessarily confined to cases in which it is necessary to remedy a provision that is under-inclusive. There is no reason in principle why it should not also be used as part of the process of narrowing the reach of a provision that is unduly invasive of a protected right. Reading down, reading in, severance and notional severance are all tools that can be used either by themselves or in conjunction with striking out words in a statute for the purpose of bringing an unconstitutional provision into conformity with the Constitution, and doing so carefully, sensitively and in a manner that interferes with the legislative scheme as little as possible and only to the extent that is essential. There is no single formula. In appropriate cases it may be necessary to delete words from a provision and read in other words to make the provision consistent with the Constitution, where the deletion of the words alone would result in the declaration of invalidity to an extent greater than that required by the Constitution. The considerations referred to in the Gay and Lesbian Immigration case would then have to be borne in mind. But if they are met there is no reason why this should not be done."***

72. In the case before me, no authorities were cited by the petitioner, from this or other jurisdictions, with regard to the principle of reading-in. I appreciate also that this may well be the first time that this remedy has been canvassed in this jurisdiction as a relief to ameliorate the negative effects of legislation without striking it down as unconstitutional.

73. I am satisfied, however, that the principles set out above from the Canadian and South African cases are useful and persuasive in dealing with the matter now before me, and are also consistent with the approach to interpretation that the Constitution provides at Articles 20 and 259.

74. As I have stated above, the provisions of section 18(1) of the Vetting of Judges and Magistrates Act result, because of the lack of clarity that leads to their misinterpretation, to not only violation of the petitioner's members' rights, but also to violation of the Constitution by the Board assuming a jurisdiction it does not have to receive complaints and discipline judicial officers outside the scope of its jurisdiction. The remedy that commends itself to me in the circumstances is to read into the legislation, as proposed by the petitioner, words that make clear what the scope and extent of the Board's jurisdiction was intended to

be under the Constitution and the legislation enacted pursuant to the constitutional provision.

75. For the avoidance of doubt, it must be emphasised that the Court is not stopping, and the petitioner, as I understand its case, does not seek to stop the vetting process. What it seeks, and what the Court deems merited, is a clarification of the provisions of section 18(1) of the Vetting of Judges and Magistrates Act by reading-in to the section words that clarify the mandate of the Board.

Relief

76. In the circumstances, I issue the following orders and declarations:

> ***a. I declare that the Vetting of Judges and Magistrates Board, in the exercise of its functions stipulated in Section 23 of the Sixth Schedule to the Constitution of Kenya 2010, cannot lawfully investigate the conduct, acts omissions and information on the part of a judicial officer purportedly arising after the 27th of August 2010.***
>
> ***b. I declare that judicial officers who were subjected to the exercise of vetting by the Vetting of Judges and Magistrates Board in respect of allegation purportedly arising after the 27th of August 2010 were subjected to unlawful and unfair treatment contrary to the provisions of Articles 27 of the Constitution of Kenya 2010 and such vetting was therefore null and void to the extent of its reference to such conduct, acts, omissions and information.***
>
> ***c. The Court does hereby read in the provisions of section 18 of the Vetting of Judges and Magistrates Act immediately after the word 'consider' in subsection (1) the words "in relation to conduct, acts and omissions of judicial officers allegedly arising on or before the effective date".***

77. Rule 26 of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013** provides that the award of costs is at the discretion of the Court. In the present case, given the nature of the claim and its importance to the public, I direct that each party shall bear its own costs of the petition.

Dated, Delivered and Signed at Nairobi this 26th day of March 2014

MUMBI NGUGI

JUDGE

Mr. Wambola instructed by the firm of Ongoya & Wambola & Co. Advocates for the Petitioner

Ms. Mwangi instructed by the State Law Office for the Respondents