REPUBLIC OF KENYA
IN THE HIGH COURT OF KENYA
AT NAIROBI (MILIMANI LAW COURTS)
JUDICIAL REVIEW 295 OF 2012
BETWEEN

HON. LADY JUSTICE JEANNE W. GACHECHE.....APPLICANT

AND

THE JUDGES AND MAGISTRATE'S VETTING BOARD.....1ST RESPONDENT

THE JUDICIAL SERVICE COMMISSION.....2ND RESPONDENT

AND

THE ATTORNEY GENERAL AS THE

ATTORNEY TO THE NATIONAL GOVERNMENT AND AS AN AFFECTED PARTY.....1STINTERESTED PARTY

LAW SOCIETY OF KENYA.....2ND INTERESTED PARTY

KENYA MAGISTRATES AND JUDGES ASSOCIATION.....3RD INTERESTED PARTY

HON. JUSTICE E.O'KUBASU.....4THINTERESTED PARTY

WITH ELDORET CONSTITUTIONAL PETITION 11 OF 2012

BETWEEN

THE CENTRE FOR HUMAN RIGHTS AND DEMOCRACY.....1ST PETITIONER

RICHARD ETYAN'GA OMANYALA.....2ND PETITIONER

BISHOP FRANCIS RANOGWA OZIOYA.....3RD PETITIONER

AND

THE JUDGES AND MAGISTRATE'S VETTING BOARD.....1ST RESPONDENT

THE JUDICIAL SERVICE COMMISSION.....2ND RESPONDENT

AND

HON. JUSTICE MOHAMMED IBRAHIM.....1ST INTERESTED PARTY

HON. JUSTICE ROSLYNE NAMBUYE.....2ND INTERESTED PARTY

WITH NAIROBI CONSTITUTIONALPETITION NO. 433 OF 2012

HON. JUSTICE R. S. C. OMOLO.....PETITIONER

AND

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

THE ATTORNEY GENERAL.....2ND RESPONDENT

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

WITH NAIROBI CONSTITUTIONALPETITION NO. 434 OF 2012

HON. JUSTICE S. E. O. BOSIRE.....PETITIONER

AND

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

THE ATTORNEY GENERAL.....2ND RESPONDENT

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

WITH NAIROBI CONSTITUTIONAL PETITION NO. 438 OF 2012

JOSEPH G. NYAMU.....PETITIONER

AND

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

THE ATTORNEY GENERAL.....2ND

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

RULING

1. INTRODUCTION

This matter comes in the background of the new Constitution promulgated by the people of Kenya in the year 2010. Before the approval of the Constitution in the Referendum of 2010**,** Kenyans had spent almost two decades in the search for a new Constitutional dispensation. The joys and the aspirations of Kenyans upon the enactment of the new Constitution were expressed at the Preamble to the Constitution in the following manner:-

"We the people of Kenya; ACKNOWLEDGING the Supremacy of the Almighty God of all creation, HONOURING those who heroically struggled to bring freedom and justice to our land; PROUD of our ethnic, cultural and religious diversity, and determined to live in peace and unity as one indivisible sovereign nation; RESPECTFUL of the environment, which is our heritage, and determined to sustain it for the benefit of future generations, COMMITTED to nurturing and protecting the well-being of the individual, the family, communities and the nation; RECOGNISING the aspirations of all Kenyans for a Government based on the essential values of human rights, equality, freedom, democracy, social justice and the rule of laws; EXERCISING our sovereign and inalienable right to determine the form of governance of our country and having participated fully in the making of this Constitution; ADOPT, ENACT and give this Constitution to ourselves and to our future generations. GOD BLESS KENYA."

It is easy to understand that the new Constitution adopted by Kenyans in 2010 is a reformist Constitution and a radical departure from the old constitutional dispensation in many ways, not the least of which is the recognition of the sovereignty of the people of Kenya and the identification, preservation and development of human rights, both at the individual level and at the communal level.

It is a delicate and complex process to transit from an old constitutional dispensation to a new one. The change of the *grundnorm* normally brings upheavals, and so many entrenched interests, values and traditions may be affected. A new constitutional dispensation requires that certain savings are provided for the purposes of smooth transition. This explains the existence of the transitional and consequential provisions of the Sixth Schedule, which are enacted pursuant to Article 262 of the Constitution. The Sixth Schedule made transitional provisions including, *inter alia,* suspension of some provisions of the new Constitution; extension of application of certain provisions of the old Constitution;and interim provisions that will apply during the transition period.

The Sixth Schedule is the bridge between the old and the new constitutional dispensations. As regards the Judiciary, the new Constitution was promulgated in the background of widespread public concern over the performance of the Judiciary over the years. The people of Kenya aspired for an independent, efficient and impartial Judiciary. The outcome in this regard was the transitional provisions in section 23 of the Sixth Schedule, that all Judges and Magistrates who were in office on the effective date of the Constitution, be vetted with respect to their suitability to continue to serve as such. The section provided that the vetting process leading to the removal of a judge shall be protected from interference by any court. The section further provided that the vetting legislation was to be enacted within one year of the effective date of the new Constitution. The Vetting of Judges and Magistrates Act (hereinafter the "Vetting Act") was accordingly enacted by Parliament and came into force on 22nd March 2011.

Since then, the Vetting of Judges and Magistrates Board, (hereinafter referred to as "the Vetting Board"), established under the Vetting Act, has been vetting Judges. The vetting process was seen as one of the key pillars in restoring public confidence in the Judiciary. The Application and Petitions before us arise from proceedings of and decisions made by the Vetting Board to-date.

2. THE APPLICATION AND PETITIONS

Before the court is one Application and four Petitions.

The first matter to be filed was Nairobi Judicial Review Application No. 295 of 2012 dated 20th July, 2012 and filed on the same day by Hon. Lady Justice Jeanne Gacheche. The applicant is a Judge of the High Court of Kenya. The Respondents are the Vetting Board and the Judicial Service Commission (hereinafter referred to as "the JSC"). In the course of time, interested parties were enjoined to the Application by leave of Court. The said Application seeks orders against the Respondents,*inter alia*, to quash the proceedings of the Vetting Board and the decision to serve the Applicant with a notice to appear. The Application further seeks to prohibit the Vetting Board from commencing and or continuing with the vetting of the Applicant.

The second matter is Eldoret Petition No. 11 of 2012 dated 10th August, 2012 and filed on 13th August, 2012. The Petitioners are the Centre for Human Rights and Democracy, Richard Etyan'ga Omanyala and Bishop Francis Ranogwa Ozioya. The Respondents are the Vetting Board and the JSC. Interested parties were also enjoined to the Petition by leave of Court. The Petition seeks declaratory orders against the Respondents,*inter alia,* that Section 22 of the Vetting Act contravenes Articles 10, 23, 27, 28, 47, 165(3), 258 and 259 of the Constitution; and that the proceedings and decisions made by the Vetting Board between 23rd May, 2012 and 12th July, 2012 are unconstitutional, invalid, illegal, null and void.

The third matter is Nairobi Petition No. 433 of 2012 dated 25th September, 2012 and filed on 26th September, 2012. The Petitioner is Justice Riaga Omolo, a Judge of the Court of Appeal of Kenya who has undergone the initial and review stages of the vetting process pursuant to the Vetting Act, 2011. The Respondents are the Vetting Board, the Attorney General and the JSC. The Petition seeks declaratory orders against the Respondents,*inter alia,* that the determination of 25th April, 2012 and the decision on request for review dated 20th July, 2012 violated the Petitioner's fundamental rights and freedoms, and that the provisions of Section 22 of the Vetting Act contravenes Articles 10, 23, 27, 47, 50, 165(3), 258 and 259 of the Constitution.

The fourth matter is Nairobi Petition No. 434 of 2012 dated 25th September, 2012 and filed on 26th September, 2012. The Petitioner is Hon. Justice S.E Bosire, a Judge of the Court of Appeal of Kenya who has undergone the initial and review stages of the vetting process pursuant to the Vetting Act, and the Respondents are the Vetting Board, the Attorney General and the JSC. The Petition seeks for declaratory orders against the Respondents *inter alia* that the vetting process as conducted by the Vetting Board on 26th March, 2012 and the determination of 25th April, 2012 violated the Petitioner's fundamental rights and freedoms, and that the provisions of Section 22 of the Vetting Act contravenes Articles 10, 23, 27, 47, 50, 165(3), 258 and 259 of the Constitution.

The last matter is Nairobi Petition No. 438 of 2012 dated 26th September, 2012 and filed in court on 27th September, 2012. The Petitioner is Hon. Justice Joseph Nyamu and the Respondents are the Vetting Board and the Attorney General. The Petitioner sought conservatory orders that pending the hearing of the Petition all actions, decisions, processes and events consequential upon the findings of the Vetting Board of 25th April 2012 and 20th July 2012 be stayed.The Petition also sought various declaratory orders against the Respondents on the ground that the said findings of the Vetting Board were *ultra vires* and unconstitutional.

3. EMPANELLMENT OF COURT AND HEARING ON PRELIMINARY POINT ON JURISDICTION

The Chief Justice empanelled this Court to hear and determine all these matters. When the parties first appeared before us on 12th October 2012, we directed that the matters be heard and determined separately but be consolidated for purposes of the determination of the issue raised by the Law Society of Kenya (hereinafter referred to as "the LSK") as to whether this Court has jurisdiction to hear the matters. The

LSK, which is the 3rd Interested Party in Petition No. 11/2012 made this challenge in its Notice of Motion dated 5/10/2012. The grounds were set out on the face of the application. Parties were also directed by the Court to file and exchange written submissions.

At the hearing of the preliminary point on jurisdiction the parties were represented by counsel as follows; Dr. John Khaminwa for the 1st Petitioner in Eldoret Petition No. 11 of 2012, Hon. Paul Muite for the JSC, Mr. Fred Ojiambo for the Petitioner in Nairobi Petition No. 438 of 2012, Mr. Musalia Mwenesi for the Applicant in Nairobi Judicial Review Application No. 295 of 2012, Mr. Peter Simani for the 2nd Interested Party in Eldoret Petition No. 11 of 2012, Mr. Ochieng Oduol for the Petitioners in NairobiPetitions Nos. 433 and 434 of 2012, Mr. Paul Gicheru for the 3rd Petitioner in Eldoret Petition No. 11 of 2012, Mr. Micheal Mubea for the Kenya Magistrates and Judges Association, Mr. Wilfred Nderitu and Mr. Ekuru Aukot for the Vetting Board, Mr. Charles Kanjama for the LSK, Mr. Katwa Kigen for the 2nd Petitioner in Eldoret Petition No. 11 of 2012, Mr. Fred Athuok for the 1st Interested party in Eldoret Petition no. 11 of 2012, and Mr. Mwangi Njoroge and Mr. Gideon Kiage for the Attorney General.

4. ISSUES FOR DETERMINATION

From the pleadings and submissions made by the various parties, it appears to us that the issues for determination by this Court are as follows:

1. Whether the High Court's general jurisdiction is subject to limitation.

2. Whether section 23 (2) of the Sixth Schedule to the Constitution ousts the jurisdiction of the High Court.

3. Whether the High Court has supervisory jurisdiction over the Vetting Board, and

4. Whether the conservatory orders made in these matters should remain in force.

We were addressed at length on these issues, and shall now proceed to examine and consider the submissions made on the same.

5. THE HIGH COURT'S GENERAL JURISDICTION AND LIMITATIONS THERETO

We will commence by addressing the submissions made on the general jurisdiction of the High Court. It was LSK's argument that the High Court's general jurisdiction is not absolute and/or exclusive, and that conceptual limitations exist that intrinsically curtail the High Court's jurisdiction. Mr.Kanjama, learned counsel for the LSK raised the issue of the scope and limitation of this Court's jurisdiction, and relied on the Court of Appeal's decision in **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** [**1989] KLR 1** in which it was held as follows:

"Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect the matter before it the moment it holds the opinion that it is without jurisdiction. Before I part with this aspect of the appeal, I refer to the following passage...

'By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of matters presented in a formal way for its decision. The limits of this authority are imposed by the statute, charter or commission under which the court is constituted, and may be extended or restricted by the like means. If no restriction or limit is imposed, the jurisdiction is said to be unlimited. A limitation may be either as to the kind and nature of the actions and matters of which the particular court has cognizance, or as to the area over which the jurisdiction shall extend, or it may partake of both these characteristics. If jurisdiction... depends on the existence of a particular state of facts, the court or tribunal must inquire into the existence of the facts in order to decide whether it has jurisdiction... Where a court takes it upon itself to exercise a jurisdiction it does not

possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given.'

***See* Words and Phrases Legally Defined (Vol 3:I)**

It is for this reason that a question of jurisdiction once raised by a party or by a court on its own motion must be decided forthwith on the evidence before the court."

LSK submitted that the High Court's jurisdiction as now provided in Article 165 of the Constitution is limited in various ways.

We were referred to the Ruling of the Supreme Court of Kenya in **Re Interim Independent Electoral Commission (Advisory Opinion) Constitutional Application 2 of 2011** wherein it was stated that this court does not have exclusive jurisdiction to interpret the Constitution.

It was also submitted that this Court has already held in the case of **United States International University (USIU) vs The Attorney General (2012) eKLR** that it is not only the High Court that has jurisdiction to interpret constitutional rights, and that the Court had in that case transferred a matter concerning workers' rights to the Industrial Court. It was Mr. Kanjama's submission that the Vetting Board also has jurisdiction to entertain disputes before it that raise constitutional questions, and had indeed determined these issues in its "Fourth Announcement on Determinations on Suitability and Requests for Review" dated 21st September 2012.

These arguments were supported by Hon. Muite, the learned counsel for the JSC. He submitted that the jurisdiction that is granted to the High Court by the Constitution in Article 165 (3) is a very wide jurisdiction, and is subject to the rules of interpretation in Article 259. He further argued that while the High Court has a residual jurisdiction under Article 165 (3) to determine whether the statute enacted by Parliament to govern the vetting process is inconsistent with or in contravention of the Constitution, a higher threshold should be met before that jurisdiction is exercised. The JSC relied on the decision in **Dennis Mogambi Mong'are vs the Attorney General & 3 Others, Petition No. 146 of 2011** for the proposition that there was great public interest in the vetting process, and that therefore the Court should be hesitant to interfere with the same.

Mr. Nderitu, the learned Counsel for the Vetting Board and Mr. Njoroge, the learned Counsel for the Attorney General, also supported the LSK position and associated themselves with the pronouncement of the Court of Appeal in **Owners of Marine Vessel Lillian 'S' Caltex Oil (Kenya) Limited [1989] KLR 1**.

The other parties opposed the LSK'S application and Dr. Khaminwa argued that Article 23 (1) and Article 165 of the Constitution leave no doubt as to the High Court's constitutional mandate to determine questions requiring the interpretation of the Constitution. Further, that in its constitutional adjudication stream, the High court is vested with four types of jurisdiction, namely; supervisory jurisdiction; reference jurisdiction; jurisdiction for the protection of property rights; and enforcement jurisdiction in respect of fundamental rights and freedoms.

On his part, Mr. Ojiambo submitted that the Court's jurisdiction is drawn from Article 23 (3) and Article 165 (3), (6) and (7) in connection with the protection of accrued fundamental rights and freedoms, as well as the High Court's supervisory jurisdiction over "***any person, body or authority exercising a judicial or quasi-judicial function***." He further submitted that with regard to allegations of violation of constitutional principles, the provisions of Article 258 expressly provide that any person "***has the right to institute court proceedings, claiming that this Constitution has been contravened, or is threatened with contravention***." Mr. Ojiambo therefore implored the Court to consider two issues in the determination of the question whether it has jurisdiction to entertain his Petition. Firstly, the general jurisdictional provisions relating to the court's scope to adjudicate matters generally, and secondly, the specific circumstances of a case and whether the matters contained in the pleadings disclose justiciable issues upon which the court can make findings on the orders sought.

Mr. Mwenesi agreed with Mr. Kanjama on the observations of the Court of Appeal in **Owners of Motor Vessel "Lillian S" v Caltex Oil (Kenya) Ltd** [**1989] KLR 1**, and on the submission that there are general limitations to the jurisdiction of the High Court. The learned Counsel however, submitted that every superior court has inherent jurisdiction which gives it the authority to uphold and protect the judicial function of administering justice according to the law.

Mr. Gicheru submitted that Articles 22, 23, 165 and 258 of the Constitution give the High Court various jurisdictions. He urged that the Supreme Court in **Re Interim Independent Electoral Commission (Advisory Opinion) Constitutional Application 2 of 2011** held that the provisions of Article 165 (3) entrust the High Court with the mandate to interpret the Constitution and hear Petitions arising from the interpretation of the Constitution in the first instance. The Supreme Court, in addition, held that though the High Court had this jurisdiction, the jurisdiction was not exclusive because both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution by way of the appellate process, certainly in respect of matters resolved in the first instance by the High Court.

It was also Mr. Gicheru's submission that this Court's jurisdiction should be exercised in accordance with the Constitution, written laws and doctrines of common law and equity as at 12th August 1897, as held in the case of **Republic vs The Judicial Service Commission of Inquiry into the Goldenberg Affair & 3 others ex-parteThe Honourable Jackson Mwalulu& 8 Others (Miscellaneous Civil Application No. 1279 of 2004).**

The issue of the general jurisdiction of the High Court was also addressed in the submissions by Mr. Oduol who argued that in addition to Article 165(3),Article 23 (1) of the Constitution expressly vests in the High Court the jurisdiction and power to hear and determine questions whether fundamental rights have been breached. MrOduol also referred us to the ruling by the Supreme Court of Kenya in **Re Interim Independent Electoral Commission (Advisory Opinion)** (Supra) and the observations made at paragraphs 29 and 30 of that Ruling.

It was Mr. Oduol's submission that it is clear from the decision of the Supreme Court that jurisdiction flows from the law and in the case of the jurisdiction of the High Court, its jurisdiction flows from the Constitution. He relied on the decision in **Centre for Rights, Education and Awareness & 7 others – Vs – the Attorney General [2011] eKLR** for the proposition that the High Court has jurisdiction. Counsel also explained to the Court the context in which the case of **United States International University (USIU) vs The Attorney General (2012) eKLR** was decided**.**

Mr. Kigen on his part submitted that Article 165 (3), (4), (5) and (6) set out exhaustively the powers and jurisdiction of this court. The limits of the court's jurisdiction are also provided for therein. Counsel contended that these provisions equally apply to judges and relied on the case of **Hon. Mr. Justice Moijo Mataiya Ole-Keiwua – Vs – the Hon. the Chief Justice of Kenya & 6 Others, Civil Appeal No. 296 of 2006** wherein the Court of Appeal asserted the High Court's unqualified jurisdiction to entertain all petitions made by all parties, including Judges, to claim rights and freedoms.

Mr. Kigen also argued that this court is given powers under Article 165 (4) to certify a matter as raising a substantial question of law under Article 165 (3) (b) or (d),and that a total of nineteen (19) questions were so certified by the five (5) judges who first dealt with these matters at the preliminary stage. It was his submission therefore that considering that up to five (5) High Court judges with jurisdiction had certified up to nineteen (19) substantial questions, then this court is bound to entertain and determine the matters as "substantial questions".

Mr. Athuok, Mr. Simani and Mr. Mubea all reiterated and supported the submissions made by the opposing parties.

After considering the various submissions made and authorities cited on this Court's general jurisdiction, it is clear to us that this Court has jurisdiction and must assume jurisdiction in the instances that are provided for in Articles 22, 23, 165 and 258 of the Constitution. Article 165 of the Constitution is the Article that establishes the High Court of Kenya as one of the superior courts, and also delineates the

High Court's jurisdiction. Relevant to the question of jurisdiction are the provisions of Article 165(3)-(7) which provide as follows:

(3) Subject to clause (5), the High Court shall have—

(a) unlimited original jurisdiction in criminal and civil matters;

(b) jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened;

(c) jurisdiction to hear an appeal from a decision of a tribunal a person from office, other than a tribunal appointed under Article 144;

(d) jurisdiction to hear any question respecting the interpretation of this Constitution including the determination of—

(i) the question whether any law is inconsistent with or in contravention of this Constitution;

(ii) the question whether anything said to be done under the authority of this Constitution or of any law is inconsistent with, or in contravention of, this Constitution;

(iii) any matter relating to constitutional powers of State organs in respect of county governments and any matter relating to the constitutional relationship between the levels of government; and

(iv) a question relating to conflict of laws under Article 191; and

(e) any other jurisdiction, original or appellate, conferred on it by legislation.

(4) Any matter certified by the court as raising a substantial question of law under clause (3) (b) or (d) shall be heard by an uneven number of judges, being not less than three, assigned by the Chief Justice.

(5) The High Court shall not have jurisdiction in respect of matters—

(a) reserved for the exclusive jurisdiction of the Supreme Court under this Constitution; or

(b) falling within the jurisdiction of the courts contemplated in Article 162 (2).

(6) The High Court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial function, but not over a superior court.

(7) For the purposes of clause (6), the High Court may call for the record of any proceedings before any subordinate court or person, body or authority referred to in clause (6), and may make any order or give any direction it considers appropriate to ensure the fair administration".

We must however hasten to clarify that we do not think that the certification of a matter as raising a substantial question under Article 165 (4) does *ipso facto* confer jurisdiction upon the Court. In our view, such certification is but a preliminary procedural step that is undertaken before such substantial questions can be substantively heard and determined. It is therefore not the position that the certification referred to by Mr. Kigen substantively determined the issue as to whether this Court has jurisdiction.

Two decisions however merit our further consideration in relation to the argument put forward that the Vetting Board can also exercise the jurisdiction given to the High Court. The first is the decision of this Court (Majanja J.) in the case of **United States International University (USIU) vs The Attorney General (2012) eKLR.** We agree with Mr. Oduol's submission that this case is distinguishable and indeed deals with a limitation on the High Court's jurisdiction, and a conferment of jurisdiction on the Industrial Courtexpressly provided for in the Constitution by Article 165(5) and Article 162. In our view

that case does not support the view that the Vetting Board has jurisdiction to interpret the Constitution.

The second decision is the ruling by the Supreme Court in **Re Interim Independent Electoral Commission (Advisory Opinion) Constitutional Application No. 2 of 2011.** We think that it is prudent to address the context in which the observations in that case were made. The application before the Supreme Court invoked the Advisory Opinion jurisdiction of the Supreme Court under Article 163(6) of the Constitution of Kenya, 2010. The applicant, the Interim Independent Electoral and Boundaries Commission, prayed for the Opinion of the Supreme Court on the following question:

"What, in the light of the above provisions and the other provisions of the Constitution of Kenya and the other continuing applicable provisions of the former Constitution, is the date or are the contingent dates, for the next election for the aforesaid offices of President, Members of the National Assembly and the Senate, Members of County Assemblies and Governors?"

The application for this Advisory Opinion came in the wake of several causes lodged in the High Court, the most direct one of which was **Milton Mugambi Imanyara and Two Others v. The Attorney-General and Two Others, Nairobi H.C. Const. Petition No. 65 of 2011,** dated 19th April, 2011, seeking a declaration that the nextgeneral election for President, National Assembly, County Assemblies and County Governors "shall be held at the same time, on the second Tuesday of August, 2012." When the said Petition came up for mention before Majanja, J. on 13th October, 2011 counsel informed the learned Judge that an application had already been filed seeking the Supreme Court's Advisory Opinion on the question of election dates, it immediately became apparent that an issue had arisen as to the respective jurisdictions of the two Courts, and this touched on the future conduct of proceedings before the High Court. Majanja J. then ordered that in light of the hierarchy of Courts the issue be dealt with by the Supreme Court first.

The application before the Supreme Court elicited preliminary objections, one of which was that the Supreme Court lacked jurisdiction as the original grievance in the High Court was a justiciable question, entailing constitutional interpretation, hence falling within the jurisdiction of the High Court. It is on this preliminary objection that the Supreme Court ruled as follows:-

"Quite clearly, the High Court has been entrusted with the mandate to interpret the Constitution. This empowerment by itself, however, does not confer upon the High Court an exclusive jurisdiction; for, by the appellate process, both the Court of Appeal and the Supreme Court are equally empowered to interpret the Constitution, certainly in respect of matters resolved at first instance by the High Court…"

The Supreme Court observed that matters of constitutional interpretation can indeed be undertaken by various bodies including constitutional organs in their day to day functions, but proceeded to distinguish the place of the High Court in constitutional interpretation as follows:

"…..where litigation takes place entailing issues of constitutional interpretation, the matter must come in the first place before the High Court, with the effect that interpretation of the Constitution by both the Court of Appeal and the Supreme Court will have been limited to the appellate stages..."

It is therefore clear from the said decision of the Supreme Court that the issue of the High Court not having exclusive jurisdiction to interpret the Constitution was being discussed in the context of the appellate jurisdiction of the Court of Appeal and Supreme Court. We find therefore that in matters involving litigation that raises issues of constitutional interpretation, as do the matters before us, the High Court has original and exclusive jurisdiction, subject to the limitations set out in Article 165 (3)–(7).

The LSK also raised a number of conceptual limitations on the jurisdiction of this Court that we need to consider. The first limitation was that of the sovereignty of the people of Kenya vis-à-vis the exercise of judicial power. Mr. Kanjama submitted that judicial power is delegated, not absolute. The constitutional basis for this argument was Article 1(1), Article 2(3) and Article 3 of the Constitution. Article 1(1) of the Constitution provides that all sovereign power belongs to the people of Kenya and shall be exercised only

in accordance with the Constitution. Article 2(3) states that the validity or legality of the Constitution is not subject to challenge by or before any court or other State organ, while Article 3 states that every person has an obligation to respect, uphold and defend the Constitution. In this regard, counsel argued that this Court has no jurisdiction to question the content of section 23(2) of the Sixth Schedule which is an exercise of the people's constituent power.

Closely related to this argument was the submission that the High Court's jurisdiction is subject to the supremacy of the Constitution, and courts have no jurisdiction to question the legality of the Constitution, or to amend or change the meaning of the Constitution, which may only be done by Parliament and the people via referendum. Counsel relied on Article 2(1) and (2) and Articles 255 to 257 of the Constitution in this respect. These arguments were also supported by Counsel for the JSC and the Vetting Board.

We have considered the said arguments and recognise that sovereign power vests in the people of Kenya, and that they retain residual authority to amend and change the Constitution as provided for in Articles 255-257. The people of Kenya in the exercise of their sovereign and constituent power also decided to delegate their judicial power to the Judiciary, as provided in Article 1(3) and Article 159 (1) of the Constitution.

Article 1(3) states as follows:

"Sovereign power under this Constitution is delegated to the following State organs, which shall perform their functions in accordance with this Constitution—

(a) Parliament and the legislative assemblies in the county governments;

(b) the national executive and the executive structures in the county governments; and

(c) the Judiciary and independent tribunals."

Article 159(1) states that judicial authority is derived from the people and vests in, and shall be exercised by the courts and tribunals established by or under the Constitution. It is therefore our finding that it is indeed the people of Kenya who, in the exercise of their sovereignty, have given the courts express authority to exercise jurisdiction by reason of the endorsement in a referendum of Articles 1(3), 22, 23, 159(1), 165 and 258 of the Constitution. These Articles will continue to be valid until the people or Parliament decides otherwise by amending the Constitution.

We must nevertheless emphasize in this regard that Courts are bound to observe and uphold the Supremacy of the Constitution in the exercise of their judicial power as provided for in Article 2(2), and to adhere to the principles set out in Article 159. It is our finding however that having been given the jurisdiction to interpret the Constitution and resolve any inconsistencies that may arise therein, Courts cannot thereby be said to be challenging the legality of the Constitution. A challenge to the legality of the Constitution in our opinion constitutes a claim that the entire constitution-making process and outcome thereof is void. The purpose of Article 2(3) is therefore to uphold the legitimacy of the Constitution and to ring-fence the constitution-making process and the very existence of the Constitution from challenge.

It is also our finding that an interpretation of the Constitution by the Courts does not amount to a change or amendment of the Constitution. This is because the Courts are given clear guidelines as to how to interpret the Constitution in Article 259(1) of the Constitution which states as follows:

(*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.

We are therefore bound to adopt a purposive approach that gives effect to the purpose and key values and principles underlying the provisions of the Constitution that are found particularly in Article 10. In addition, ours must be a liberal approach that promotes the rule of law and human rights; a jurisprudential approach is called for that must take into account and expand the time-tested concepts of law for prosperity; and lastly, it must be a contextual approach that is grounded in the socio-economic and political realities of our country, and takes into account and addresses the governance challenges that present themselves in any particular case. These approaches in our view are meant to give life to the provisions of the Constitution, not to change it.

The second conceptual limitation to the High Court's jurisdiction that was raised was the constitutional doctrine of separation of powers. It was the LSK's submission that this Court has no jurisdiction to rule on political questions, which are reserved for the Legislature, or to determine policy directions, which are reserved for the Executive. Examples that were given by Mr. Kanjama in this respect were that the Legislature has exclusive competence to impeach the President and make laws, and that Courts have no jurisdiction to question or supervise impeachment proceedings, or even to supervise on-going Parliamentary processes. Articles 117 and 165(3)(c) were quoted in this respect. The second example was that the Executive has exclusive competence in certain reserved matters like the decision to make war, and the policy review in the State of the Nation address under Article 143(2). It was argued that the vetting of judges is one such political process, and that is why it has been removed from the ambit of the Courts, and the responsibility given to the Vetting Board.

Counsel referred us to the decision in **Nixon v United States** 506 US 224 (1993, US Supreme Court) and he relied on the following passages of the decisionat pages 228-30:

"A controversy is non-justiciable i.e. involves a political question where there is a "textually demonstrable constitutional commitment of the issue to a coordinate political department..."

Counsel also relied on this Court's decision in **Patrick Ouma Onyango& 12 others v Attorney General & 2 others[2005] eKLR** wherein it was stated as follows at page 72.

"***Sound constitutional law must be founded on the bedrock of commonsense and the courts must now and in the future appreciate the limitations on formulation of policy, legislative process and practical politics because the courts are ill equipped to handle such matters..."***

We have considered the argument on the political question and the authorities cited. It is clear from these authorities that a limitation on the grounds of the political question doctrine is raised when an issue before the Court is considered not to be justiciable. In the case of **Patrick Ouma Onyango& 12 others (supra)** the Court extensively discussed the concept of justiciability at pages 92 – 93 as follows:

"In order for a claim to be justiciable…, it must present a real and substantial controversy which unequivocally calls for adjudication of the rights asserted. In part, the extent to which there is a "real and substantial controversy is determined under the doctrine of standing" by an examination of the sufficiency of the stake of the person making the claim, to ensure the litigant has suffered an actual injury which is fairly traceable to challenge action and likely to be redressed by the judicial relief requested… that in determining if a question is a political question the appropriateness under our system of Government of attributing finality of the action of the political department and also the lack of satisfactory criteria for judicial determination are dominant considerations…." (Emphasis ours)

In our view, the issues of justiciability and the political question doctrine are not jurisdictional issues, but substantive issues that can only be determined once a Court is seized of a matter and has heard and considered the arguments on the merits. For the LSK to raise these issues at this stage is, with respect, to put the cart before the horse.

6. CONCEPTUAL FRAMEWORK OF OUSTER CLAUSES

The second issue we raised for determination was whether the ouster clause contained in section 23(2) of the Sixth Schedule operates to oust the jurisdiction of the High Court. We shall determine this issue by first considering the emerging jurisprudence on the subject, before turning to the specific question itself.

Ouster clauses have been defined as provisions placed in legislation which exclude certain actions and decisions from judicial review, ostensibly in the interests of the smooth administration of justice. They operate to deny members of the public the right to have decisions reviewed by courts, in the public interest. They in effect restrict or eliminate judicial review.

The extent to which ouster clauses operate to restrict or preclude the exercise of ordinary jurisdiction of courts is a subject that has perennially engaged legal scholars and courts alike, world over. In our view, there remains an inherent competition for jurisdictional space between courts on the one hand and administrative bodies and tribunals exercising judicial and quasi-judicial functions whenever ouster clauses are invoked and thrust into the way of judicial scrutiny of decisions of the latter bodies. This phenomenon, we feel, will continue to manifest in our justice system as long as Parliament shall remain amenable to inserting ouster clauses to legislative instruments.

In the matter before us, the contest referred to above is clearly manifest. It is indeed at the centre of the jurisdiction question that we are confronted with. Proponents and opponents to the debate as to whether this court has jurisdiction to entertain matters arising out of proceedings and decisions of the Vetting Board have arguably, in equal measure, inundated us with scholarly and judicial precedents in which efforts have been expended to answer what, in effect, should be the province of the court in seeking to inquire into the purport of an ouster clause.

We therefore find it opportune to join the fray and set out the conceptual framework for consideration of the question of jurisdiction *vis-a-vis* ouster clauses and, in doing so, attempt to provide a considered position for the Kenyan jurisdiction as to the optimal length and breadth of judicial intervention to proceedings in which attempts have been made to curtail or preclude court inquiry through ouster clauses. To guide us in this quest, we have found it necessary to undertake a comparative analysis of what approaches and treatment various jurisdictions have accorded the subject.

We will therefore examine a number of jurisdictions of common law inclination that we feel share similar circumstances with the Kenyan jurisdiction. Most of the useful submissions and authorities cited to us by counsel will be applied in this endeavor.

i. United Kingdom

Sir William Wade and Christopher Forsyth in their celebrated book **Administrative Law Seventh Edition** address the effect of "final and conclusive' and similar clauses as follows:-

"Many statutes provide that some decision shall be final. That provision is a bar to any appeal. But the courts refuse to allow it to hamper the operation of judicial review. As will be evident in the following sections, there is a firm judicial policy against allowing the rule of law to be underlined by weakening the power of the court. Statutory restrictions on judicial remedies are given the narrowest possible constructions sometimes even against the plain meaning of the words. This is a sound given policy, since otherwise administrative authorities and tribunals would be given uncontrollable power and could violate the law at will. 'Finality is a good thing but justice is a better". (Emphasis ours).

The Scholars go ahead to underline the scope of finality clauses as follows:

"If a statute details that the decision or order of some administrative body or tribunal' 'shall be final' or 'shall be conclusive' for all intents and purposes this is held to mean merely that there is no appeal. Judicial review of legality is unimpaired. "Parliament only gives the impress of finality to the decision of the tribunal on condition that they are reached in accordance with the law." This has been the consistent doctrine for three hundred years. It safeguards the whole area of judicial review, including (formerly) error on the face of the record as well as ultra vires. The normal effect of a finality clause is

therefore to prevent any appeal. The causes which lead to tribunals being set up also militate against rights of appeal or review being against their decisions. The courts nevertheless go to great lengths to find implied limitation which water down the literal meaning of ouster clauses". (Emphasis ours).

In terms of the approach that English Courts have adopted in this area, the undoubted leading authority is the House of Lords decision in the case of **The Anisminic Ltd vs The Foreign Compensation Commission and Another(1969)2 A.C 147, (1969)2 W.L.R. 163, 113 S.J. 55; (1969) I ALL E.R. 208 (House of Lords)**. This case has been referred to by a number of parties involved in the matter before us. In the leading judgment in that case, Lord Reid had this to say:-

"It is a well-established principle that a provision ousting the ordinary jurisdiction of the court must be construed strictly – meaning, I think, that if such a provision is reasonably capable of having two meanings, that meaning shall be taken which preserves the ordinary jurisdiction of the court.

Statutory provisions which seek to limit the ordinary jurisdiction of the court have a long history. No case has been cited in Parliament in which any other form of words limiting the jurisdiction of the court has been held to protect a nullity of the draftsman or Parliament had intended to introduce a new kind of ouster clause so as to prevent any enquiry even whether the document relied on was a forgery. I would have expected to find something much more specific than thebold statement that a determination shall not be called in question in any court of law. Undoubtedly such a provision protects every determination which is not a nullity. But I do not think it is necessary or even reasonable to construe the word "determination" as including everything which purports to be a determination but which is in fact no determination at all. And there are no degrees of nullity. There are a number of reasons why the law will hold a purported decision to be a nullity. I do not see how it could be said that such a provision protects some kinds of nullity but not others; if that were intended it would be easy to say so."

Later in his judgment Lord Reid amplified on the question of the court jurisdiction detailing as follows:-

"It has sometimes been said that it is only where a tribunal acts without jurisdiction that its decision is a nullity...But there are many cases where, although the tribunal had jurisdiction to enter on the enquiry, it has done or failed to do something in the course of the enquiry which is of such a nature that its decision is a nullity. It may have given its decision in bad faith. It may have made a decision which it had no power to make. It may have failed in the course of the enquiry to comply with the requirements of natural justice. It may in perfect good faith have misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it. It may have refused to take into account something which it was required to take into account. Or it may have based its decision on some matter which under the provisions setting it up, it had no right to take into account. I do not intend this list to be exhaustive. But if it decides a question remitted to it for decision without committing any of those errors it is as much entitled to decide that question wrongly as it is to decide it rightly… if a tribunal has jurisdiction to go right, it has jurisdiction to go wrong. So it has if one uses "jurisdiction" in the narrow original sense. If it is entitled to enter on the enquiry and does not do any of those things which I have mentioned in the course of the proceedings, then its decision is equality valid whether it is right or wrong subject only to the power of the court in certain circumstances to correct an error of law." (Emphasis ours).

In the same case, Lord Peace expressed his view with regard to the general jurisdiction of court as follows:

"My lords, the courts have a general jurisdiction over the administration of justice in this country. From time to time Parliament sets up special tribunals to deal with special matters and gives them jurisdiction to decide these matters without any appeal to the courts. When this happens the courts cannot hear appeals from such a tribunal or substitute their own views on any matters which have been specifically committed by Parliament to the tribunal. Such tribunals must, however, confine themselves within the powers specially committed to them on a true construction of the relevant Acts of Parliament. It would lead to an absurd situation if a tribunal, having been given a circumscribed area

of enquiry, carved out from the general jurisdiction of the courts, were entitled of its own motion to extend that area by misconstruing the limits of its mandate to enquire and decide as set out in the Act of Parliament… Lack of jurisdiction may arise in various ways. There may be an absence of those formalities or things which are conditions precedent to the tribunal having any jurisdiction to embark on an enquiry. Or the tribunal may at the end make an order that it has no jurisdiction to make. Or in the intervening stage, while engaged on a proper enquiry, the tribunal may depart from the rules of natural justice; or it may ask itself the wrong questions; or it may take into account matters which it was not directed to take into account. Thereby it would step outside its jurisdiction. It would turn its enquiry into something not directed by Parliament and fail to make the enquiry which Parliament did direct. Any of these things would cause its purported decision to be a nullity. Further it is assumed, unless special provisions provide otherwise, that the tribunal will make its enquiry and decision according to the law of the land. For that reason the courts will intervene when it is manifest from the record that the tribunal, though keeping within its mandated area of jurisdiction, comes to an erroneous decision through an error of law. In such a case the courts have intervened to correct the error. The courts have, however, always been careful to distinguish their intervention whether on excess of jurisdiction or error of law from an appellate function. Their jurisdictionover inferior tribunals is supervision, not review. That supervision goes to two points: one is the area of the inferior jurisdiction and the qualifications and conditions of its exercise; the other is the observance of the law in the course of its exercise… If the tribunal is intended, on a true construction of the Act, to enquire into and finally decide questions within a certain area, the courts' supervisory duty is to see that it makes the authorised enquiry according to natural justice and arrives at a decision whether right or wrong. They will intervene if the tribunal asks itself the wrong questions (that is questions other than those which Parliament directed it to ask itself). But if it directs itself to the right enquiry, asking the right questions, they will not intervene merely because it has or may have come to the wrong answer, provided that this is an answer that lies within its jurisdiction."

With reference to a tribunal such as the Vetting Board, Lord Wilberforce had this to say;

"It is now well established that specialised tribunals may, depending on their nature and on the subject-matter, have the power to decide questions of law, and the position may be reached, as the result of statutory provision that, even if they make what the courts might regard as decisions wrong in law, these are to stand. The Commission are certainly within this category; their functions are predominantly judicial, they are a permanent body, composed of lawyers, with a learned chairman and there is every ground, having regard to the number and the complexity of the cases with which they must deal, for giving a wide measure of finality to their decisions. There is no reason for giving a restrictive interpretation to section 4(4) which provides that their "determinations" are not to be "called in question" in courts of law."

From the foregoing, it is discernible and does emerge that in the English jurisdiction, courts would not hesitate to invoke their jurisdiction and intervene where the decision of a tribunal is shown to have been made in contravention of the principles of natural justice and good faith;has acted *ultra vires* its powers; failed to do something in the course of the inquiry which is of such a nature that its decision is a nullity; made its decision in bad faith; made a decision which it had no power to make; misconstrued the provisions giving it power to act so that it failed to deal with the question remitted to it and decided some question which was not remitted to it; refused to take into account something which it was required to take into account; or based its decision on some matter which under the provisions setting it up, it had no right to take into account. As the court underlined in the **Anisminic Case**, the list is not exhaustive. In our view however, the areas isolated by the court do point to one common conclusion – the court would not intervenein proceedings governed by an ouster clause unless the tribunal conducting such proceedings veers off its statutory parameters.

ii. Bahamas

The position in the Bahamas was typified by the case of the **Attorney General (of the Bahamas) vs Ryan (1980) AC 718.** In that case, the question before the court was whether the court had jurisdiction to review the decision of a Minister where the applicable statute provided that the decision of the Minister in

respect of an application for registration as a citizen of the Bahamas was not subject to appeal or review in any court. At page 729 under the heading "The effect of the Ouster clause" the Court had this to say;

"…It is by now well-established law that to come within the prohibition of appeal or review by an ouster clause of this type, the decision must be one which the decision making authority, under this Act, the Minister, had jurisdiction to make. If in purporting to make it he has gone outside his jurisdiction, it is ultra vires and is not a "decision" under the Act. The Supreme Court, in the exercise of its supervisory jurisdiction over inferior tribunals, which include executive authorities exercising quasi-judicial powers, may, in appropriate proceedings, either set it aside or declare it to be a nullity."

In the same case, Lord Diplock stated (at p 730) as follows:

"It has long been settled law that a decision affecting the legal rights of an individual which is arrived at by a procedure which offends against the principles of natural justice is outside the jurisdiction of the decision making authority. As Lord Selborne said as long ago as 1885 in Spackman v Plumstead District Board (1885) 10 App Case 229, 240: 'There would be no decision within the meaning of the statute if there were anything ….done contrary to the essence of justice'. See also Ridge v Baldwin (1964) AC 40".

What emerges from the above position in the Bahamas is that the Court has jurisdiction to intervene where the authority exercising the mandate insulated by the ouster clause acted outside its jurisdiction.

iii. Barbados

We found the case of ***Austin v Attorney General Case No. 1982 of 2003*** representative of the position in Barbados with regard to the subject under review. In that case, High Court Judge William Chandler summarized the position of Constitutional ouster clauses as follows:

"In my judgment these strict approaches to constitutional ouster clauses cannot be applied to every case. In fact, Hyatali C.J. in his reasoning recognised that an ouster clause may be usurped if there are 'strong and compelling reasons'. In light of this, I am of the opinion that the breach of fundamental human rights and breaches of natural justice are enough to satisfy the test of 'strong and compelling reasons' and that where such breaches are alleged an ouster may be ignored. There is sufficient authority to support this"

Thus the approach taken in Barbados is similar to its Caribbean neighbours in that where the Constitution itself excludes such questions, the courts do not lose their jurisdiction to entertain these questions where there are strong and compelling reasons.This position, in our analysis, takes a slightly divergent angle from the positions in the UK and Bahamas discussed above.

iv. Trinidad & Tobago

Three cases were cited from this jurisdiction:

In the case of **Jones v. Solomon, Civil Appeal No. 85 of 1986**, the Court of Appeal of Trinidad and Tobago stated:

"when the court is called upon to deal with the effect of an ouster clause contained in a Constitution, ….it must so interpret the ouster clause that the Supremacy of the Constitution is preserved."

Similarly in **Harrikisson v. Attorney General of Trinidad and Tobago Civil Appeal No: 59 of 175, Hyatali CJ**stated:

"I am firmly of the opinion that a court would be acting improperly if a perfectly clear ouster provision in the Constitution of a country which is its Supreme law is treated with little sympathy or scant respect, or is ignored without strong and compelling reasons."

In **Endell Thomas v. Attorney General of Trinidad and Tobago (1982) AC 113**the Judicial Committee of the Privy Council held that an ouster clause is not efficacious in the light of an infringement of the Bill of Rights.

Three lessons emerge from these cases: firstly,courts must interpret ouster clauses in a manner that preserves the Constitution. Secondly, an ouster clause may be usurped if there are "strong and compelling reasons". Thirdly, an ouster clause cannot operate in the face of infringement of the Bill of Rights.

v. India

The position in India is established by a number of cases cited before us.

In the case of **Kihoto Hollohan vs Zachillhu and Others in 1992 SCR (1) 686, 1992 SCC Supl. (2) 651** the Supreme Court of India held as follows with regard to a finality clause:

"A finality clause is not a legislative magical incantation which has the effect of telling off Judicial Review. Statutory finality of decision presupposes and is subject to its consonance with the statute. The principle that is applied by the courts is that in spite of a finality clause it is open to the Court to examine whether the action of the authority under challenge is ultra vires the powers conferred on the said authority. An action can be ultra vires for the reasons that it is in contravention of a mandatory provision of the law conferring on the authority the power to take such an action. It will also be ultra vires the powers conferred on the authority if it is vitiated by mala fides or is colourable exercise of power based on extraneous and irrelevant consideration… The finality clause with the word "final" … does not completely exclude the jurisdiction of the court…but it does have the effect of limiting the scope of the jurisdiction… An ouster clause confines judicial review in respect of actions falling outside the jurisdiction of the authority taking such action but precludes challenges to such action on the ground of an error committed in the exercise of jurisdiction vested in the authority because such an action cannot be an action without jurisdiction..."(Emphasis ours).

In **Durga Mehta v. Raghuraj Singh AIR 1954 SC 520** the order of the Election Tribunal was made final and conclusive by section 105 of the Representation of the People Act, 1951. The contention was that the finality and conclusiveness clauses barred the jurisdiction of the Supreme Court under Article 136. This contention was repelled through the following observation:

"….but once it is held that it is a judicial tribunal empowered and obliged to deal judicially with disputes arising out of or in connection with election, the overriding power of this Court to grant special leave, in proper cases, would certainly be attracted and this power cannot be excluded by any parliamentary legislation. …..but once that Tribunal has made any determination or adjudication on the matter, the powers of this Court to interfere by way of special leave can always be exercised…"

In **Union of India v. Jyoti Prakash Mitter, (1971) 3 SCR 484** the court held as follows in respect of a finality clause:

"Notwithstanding the declared finality of the order of the President, the Court has jurisdiction in appropriate cases to set aside the order, if it appears that it was passed on collateral consideration or the rules of natural justice were not observed, or that the President's Judgment was coloured by the advice or representation made by the exercise or it was founded on no evidence".

In our analysis, the approach taken by Indian courts more or less tally with that obtaining in the United Kingdom. The grounds identified in the **Anisminic Case** which entitle courts to assume jurisdiction notwithstanding an ouster clause are the same grounds featuring in the Indian cases reviewed.

vi. Pakistan

The Supreme Court of Pakistan case of **Khan vs Musharaf and Others (2008) 4 LRC 157** had this to say:

"We have ourselves considered the question of ouster of jurisdiction of this court. A somewhat similar objection was dealt with in Zafar Ali Shah's case in which the following observations were made:

'220. It seems quite clear that the army takeover of 12 October 1999 was extra-constitutional. The superior courts of Pakistan have laid down that they retain the power of judicial review despite the ouster of jurisdiction which came either from within the Constitution, or by virtue of martial law orders or by legislation. Even 'non obstante clauses' in these cases had failed to prevent such objectives of the incumbent administrations. Thus visualized, the purported ouster in the proclamation and the provisional Constitution Order No. 1 of 1999 of the jurisdiction of the superior courts is an exercise in futility and the power of judicial review remains intact. Both under Islamic doctrines as well as under its constitutional/judicial personality, the superior courts would, continue to exercise this power". (Emphasis ours).

In our review, we find that the Supreme Court of Pakistan comes out as the boldest of all by proclaiming that it would not shy to undertake judicial review irrespective of whether the ouster clause in question is contained in the Constitution itself or is conferred by martial law orders or by ordinary legislation.

Overall, we do not see our investment of time, space and ink in the above extensive comparative analysis of the approaches other jurisdictions have taken in dealing with ouster clauses as a mere academic excursion. Quite the contrary, these jurisdictions share laws and legal systems that are strikingly similar to the Kenyan jurisdiction. Kenya is a part of the common law family of nations and cannot stand alone in matters that cut across common law jurisdictions. We are therefore confident that the parameters of intervention by courts emerging from these jurisdictions should apply to our Kenyan jurisdiction, albeit *mutatis mutandis*.

In the premises, and borrowing from the sister jurisdictions aforesaid, we see the following as the core general principles that a Kenyan court confronted with an ouster clause seeking to eliminate its jurisdiction should apply to determine the extent, if any, to which that it can interfere notwithstanding the envisioned ouster:

a) Statutory provisions tending to oust the jurisdiction of the Court should be construed strictly and narrowly. It would be a travesty of justice if ouster clauses are applied at face value as tribunals, bodies, authorities or persons in position conferred with power may run amok, act with impunity or abuse that power to the detriment of our people.

b) The court will not normally intervene where the authority under challenge acts within its permitted field, even when the emerging decisions are wrong.

c) In spite of a finality clause, it is open to the court to examine whether the action of the authority under challenge is in excess of its jurisdiction or contravenes a mandatory provision of the law conferring on the authority the power to take such action.

d) Breach of the principles of natural justice, including the right to a fair hearing, opens up the decision of the tribunal to review even if there is an ouster clause.

e) Breach of fundamental rights and freedoms enshrined in the Constitution including the right to protection of the law and respect for fundamental human rights will entitle a court to intervene, notwithstanding the existence of a finality or ouster clause.

f) An ouster clause may, ultimately, be usurped if there are strong and compelling reasons.

These then, should, in our view, now constitute the test governing interpretation of ouster clauses in Kenya.

7. APPLICATION OF SECTION 23 OF THE SIXTH SCHEDULE *VIS-À-VIS* JURISDICTION OF THE HIGH COURT

Having established the broad parameters of the extent to which courts may intervene in proceedings and decisions shielded by ouster clauses, we must now narrow down that interrogation to its application in the matter before us. The question of whether or not this Court has jurisdiction over the Vetting Board's processes and decisions is arguably the single most important determination that we are required to make at this phase of establishing jurisdiction. Essentially, we are required to answer the probing question of whether or not Section 23(1) of the 6th Schedule of the Constitution (hereinafter called "the ouster clause") in effect operates to absolutely unseat the jurisdiction of this Court as conferred by the Constitution of Kenya, 2010.

Section 23(2) of the Sixth Schedule to the Constitution provides:

"A removal, or a process leading to the removal of a judge from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review, by any court".

Heated competing arguments were exchanged before us on the question.

The proponents of the argument that this court lacks jurisdiction to consider the matters before us were led by the LSK. The other proponents were the Vetting Board, the JSC and the Attorney General.

Mr. Kanjama, for the LSK enjoined the court to recognize that judicial authority was delegated and was not absolute. In that regard, the court was required to recognize that various situations existed when the jurisdiction of this Court under Article 165 of the Constitution was limited or even excluded altogether. Some of these instances, as elaborated above, were the court's inability to amend or change the meaning of the Constitution; the court's lack of jurisdiction to rule on political questions; the court's limitation of jurisdiction under the constitutional doctrine of hierarchy of courts; and the principle of finality of litigation.

In terms of constitutional matters, Mr. Kanjama submitted that the above recognition had already taken root in the courts as was discernible from, *inter alia*, the case of **R v Public Procurement Administrative Review Board & anor exp. Selex Sistemi Integrati**, where **Nyamu J** (as he then was) held that in constitutional matters, even the High Court had limitations and had to confine itself to constitutional limits or delineations notwithstanding that section 60 of the then Constitution of Kenya bestowed upon the court unlimited original jurisdiction in civil and criminal matters. Mr. Kanjama further urged us to be guided by the Ruling of the Supreme Court in **Re: Interim Independent Electoral Commission (Advisory Opinion)**, which we have already cited above.

The LSK therefore urged us to accord the ouster clause similar interpretation and find that as between Article 165 of the Constitution and the ouster clause, the latter, being transitional, was to be given effect during this transitional period. In addition, under the concept of constitutional harmonization, the ouster clause, being a particular constitutional provision was to be given effect over Article 165, a general provision. We were further urged to give effect to the intentions of the Kenyan people who through the ouster clause intended that the vetting process be insulated from judicial scrutiny. In any event, as the words of the ouster clause were clear and unambiguous, we were urged to give effect to its plain and ordinary meaning, under the **Elmannian doctrine**. It was further submitted that The Committee of Experts had clearly expressed their intention of drawing up a transition schedule in their Final Report dated 11th October 2010 by stating as follows:

"When a new constitution is introduced, a range of provisions are needed to ensure that the move from the old order to the new order is smooth, and, in particular, that the changes expected by the new constitution are implemented effectively and those institutions that are retained under the new constitution continue to function properly. The "transitional" provisions that do this are usually not included in the body of the constitution because they have a temporary lifespan. Instead they are included in a schedule which is part of the constitution but, because it is appended at the end of the constitution, its provisions will not interfere with the 'permanent' provision of the constitution in the future".

We were therefore urged to give effect to the intent of the Committee of Experts, and find that Section 23(2) applied to fully oust the jurisdiction of the court under the Constitution.

On his part, Mr. Nderitu, for the Vetting Board, submitted that Section 6(1) of the Vetting Act established the Board as an independent board subject only to the Constitution and the Act. He submitted that the Board was therefore not subject to the control or direction of any person or authority, including the courts. He submitted that the Board was operating under a strict timeline within which to complete its work and that there was immense public interest in favour of the Board being allowed to do its work. There was equally considerable investment of public funds in the process. Mr. Nderitu however admitted that the High Court can correct the Vetting Board if it embarked on matters that were beyond the extent of its statutory remit.

Hon. Muite for the JSC submitted that the issue that the court was confronted with was how to reconcile Section 23 of the Sixth Schedule with Article 165(3) of the Constitution. He however admitted that the High Court had residual jurisdiction under Article 165(3) to determine whether the statute enacted by Parliament to govern the process was inconsistent with or in contravention of the Constitution. He submitted that in doing so, the Court will be upholding and defending the Constitution. He further submitted that the court could exercise its jurisdiction of interpreting the Constitution with a view to upholding the Constitution and developing the rule of law.

For the Attorney General, Mr. Njoroge submitted that the Constitution provided the keys that were to serve as a guide in interpreting and construing its provisions. These were enshrined in Article 259 of the Constitution and required an interpretation that promotes the purpose, values and principles of the Constitution; advances the rule of law, human rights and fundamental freedoms, permits the development of the law, and contributes to good governance. In that regard, the purposive interpretation of Section 23 of the Sixth Schedule was that the mandate of the Vetting Board under the Vetting Act, was that the vetting process was to be carried out expeditiously and without any limitation.

On their part, those contending that the court had jurisdiction to entertain petitions before it included all the petitioners in the four petitions before us as well as parties who had joined in the petitions as interested parties.

In his submissions as to whether Section 23(2) of the transitional provisions of the Sixth Schedule ousted this court's jurisdiction, Mr. Oduol submitted that the section was enacted with the legitimate expectation that the vetting of judges would be carried out in strict compliance with the Constitution as well as the Vetting Act. The purpose of the provision was to insulate an examination of the merits of the Board's decision. However, where the Board contravened the provisions of the Constitution and the Act, this court as the delegate of the sovereign power of the people tasked with the responsibility to protect and enforce fundamental rights and freedoms, was enjoined to exercise that mandate and could not down its tools. Doing so would amount to going against the rules of natural justice.

Mr. Fred Ojiambo submitted that under Articles 165(3), 165(6) and 165(7), the Court had jurisdiction in connection with protection of accrued fundamental rights and freedoms. The Court also had supervisory jurisdiction over any person, body or authority exercising a judicial or quasi-judicial function. In that regard, as the Petitioner alleged violation of his fundamental rights and freedoms by the Vetting Board, this Court had jurisdiction to hear the petition. He further submitted that the Petitioner was pursuing the petition in the public interest as he wished the court to consider whether the Board was usurping the role of the Judiciary in determining the accuracy of judicial pronouncements. He argued that the Vetting Board was an ordinary statutory body and not a constitutional body as LSK sought to claim. The Board was therefore amenable to the court's supervisory jurisdiction. He added that by excluding the operation of Articles 160, 167, and 168 of the Constitution in Section 23(1) of the Sixth Schedule and omitting Article 165 from that section, the draftsmen of the Constitution intended that the exercise of the court's jurisdiction under Article 165 was not in any way excluded by the ouster clause. He therefore urged the court to find that it had jurisdiction to entertain the Petition and to hear it on its merits.

Mr. Mwenesi submitted that the inherent jurisdiction of the court could not be fettered by legislation. He

submitted that the Board was a state corporation *strictu sensu* which has been exempted from the operation of the State Corporations Act, Cap 446 of the Laws of Kenya by the legislation made under section 23(1) of the Sixth Schedule to the Constitution of Kenya 2010 instead of under Cap 446 directly. It is the classical body of persons of which the case of **Kadamas v Municipality of Kisumu (1985) KLR 954** held that *"**Acts of a body of persons having legal authority to determine questions affecting the rights of subjects, and having the duty to act judicially, are subject to judicial review whenever they act in excess of their legal authority**"* He pointed out that the Vetting Board in its preliminary ruling as regards Hon. Justice Jeanne Gacheche had clearly stated as follows with regard to jurisdiction:

"The Board is aware of the fact that it cannot determine its own jurisdiction, which is given to it by statute. This is a matter which rests with the court… any final decision on whether the Board has the power to carry on with the vetting must lie with the court"

In his view, Mr. Mwenesi told the court that the Board had conceded to the jurisdiction of the court and there was no contrary view in the material placed before the court on the Board's view with regard to jurisdiction. Mr. Mwenesi further echoed the sentiments already expressed to the court regarding the fact that the Vetting Board was a statutory body subject to the court's jurisdiction as well as the court's jurisdiction with respect to enforcement of fundamental rights and freedoms.

Mr. Katwa Kigen echoed the above submissions in favour of jurisdiction, but pointed out one issue that he felt the court had jurisdiction to consider. This issue was whether the Vetting Board had jurisdiction to do a re-vetting of vetted judges. He also took issue with the question of extension of the Board's term and argued that as things stood, there were two conflicting and inconsistent dates of expiry of the term. On these two fronts, he urged the court to find that it had jurisdiction to hear the 2nd Petitioner's petition.

Mr. Mubea submitted that judges and magistrates comprised of men and women who had taken oath to protect, uphold and defend the Constitution. While not opposed to the vetting process, judges and magistrates wished the process to be conducted in tandem with the Constitution and with the Rule of Law. The court's jurisdiction under Article 165(3) of the Constitution was therefore available in cases where the vetting process was conducted in an unconstitutional manner. He submitted that the Vetting Board was a quasi-judicial body subject to the supervisory jurisdiction of the High Court under Article 165(6) of the Constitution.

On his part, Mr.Simani adopted the submissions by other counsel in favour of the contention that this court had jurisdiction over the vetting process.

Having carefully evaluated the above arguments for and against ouster of jurisdiction, we hold the following view on the effect of the ouster clause to the jurisdiction of this court over questions arising from decisions or processes of the Vetting Board.

Article 1 of the Constitution confers sovereign power to the people of Kenya. Under Article 1(3) of the Constitution, the exercise of the people's sovereign power is delegated to a number of State organs, including the Judiciary and independent Tribunals. Under Article 159(1) of the Constitution, judicial authority is derived from the people of Kenya and is vested in the courts and tribunals established by or under the Constitution. Without more therefore, the jurisdiction of the High Court derives directly from the people of Kenya and the Court is enjoined to exercise that jurisdiction to the fullest extent permitted by the people under the Constitution. Such is expected of the independent Tribunals and other bodies or authorities exercising judicial or quasi-judicial function.

Article 165(3) of the Constitution of Kenya vests upon the High Court unlimited original jurisdiction in civil and criminal matters; jurisdiction to determine the question of whether a right or fundamental freedom in the Bill of Rights has been denied, violated or infringed; jurisdiction to hear appeals from decisions of Tribunals established to consider the removal of a person from office, save that of the President under Article 144; jurisdiction to hear any question respecting the interpretation of the Constitution; and any other jurisdiction, original or appellate, conferred upon it by legislation. Article

165(6) further vests upon the High Court jurisdiction to supervise subordinate courts and any person, body or authority exercising judicial or quasi-judicial authority. This extensive jurisdiction is only fettered to the extent set out in Article 165(5) which bars the High Court from exercising jurisdiction over matters reserved to the exclusive jurisdiction of the Supreme Court and matters falling within the jurisdiction of the courts set out under Article 162(2) of the Constitution. This, then, begs the question: does Section 23 of the Sixth Schedule completely preclude the High Court from exercising its stated wide original and appellate jurisdiction over any question relating to the decision or process of removal of a judge by the Vetting Board?

A number of authorities cited before us place consideration of this question into perspective.

The text **Administrative Law** by William Wade 7th Edition at pg 734 already quoted above confirms that ouster clauses do not prevent the court from intervening in the case of excess of jurisdiction.

The above position in England was underscored in the case of **Anisminic vs. Foreign Compensation Commission and Another [1969] All ER** and particularly in the holding of Lords Reid, Pearce and Wilberforce cited above.

While considering the interpretation of the Constitution of the United Republic of Tanzania regarding a restriction on access to court, the Court of Appeal for Tanzania in the case of **Ndyanabo vs. the Attorney General (2001) 2 EA 485, at pg 493** had this to say:

"We propose… to allude to general principles governing constitutional interpretation… These principles may, in the interest of brevity be stated as follows. First, the Constitution of the United Republic of Tanzania is a living instrument, having a soul and consciousness of its own as reflected in the Preamble and Fundamental Objectives and Directive Principles of State Policy. Courts must, therefore, endeavor to avoid crippling it by construing it technically or in a narrow spirit. It must be construed in time with the lofty purposes for which its makers framed it… Secondly, the provisions touching fundamental rights have to be interpreted in a broad and liberal manner… Restrictions on fundamental rights must be strictly construed". (Emphasis ours).

In the case of **David Tinyefuza vs. the Attorney General, Constitutional Petition No. 1 of 1996 (unreported),** the Ugandan Court of Appeal held:

"The second principle is that the entire constitution has to be read as an integrated whole, and no one particular provision destroying the other but each sustaining the other. This is the rule of harmony, rule of completeness and exhaustiveness and the rule of paramountcy of the written constitution… I think it is now also widely accepted that a court should not be swayed by considerations of policy and propriety while interpreting provisions of a Constitution". Emphasis ours).

Closer home, Musinga J in the case of **Centre for Right Education and Awareness (Creaw) and others vs. Attorney-General [2011]1EA 83** held that in interpreting the Constitution, the Court is bound by the provisions of Article 259 which requires that the same be interpreted in a manner that promotes its purposes, values and principles, advances the rule of law and human rights and fundamental freedoms in the Bills of Rights, permits the development of the law and contributes to good governance. This is otherwise known as the purposive interpretation.

As regards ouster of this court's jurisdiction, the Court of Appeal in **Narok County Council v Trans Mara County Council (2000) 1 EA**held:

"Section 60 of the Constitution does give the High Court unlimited jurisdiction but I do not understand it to mean that it can be used to clothe the High Court with jurisdiction to deal with a matter while a statute has directed that it should be done by a Minister as part of his Statutory duty. Clearly if section 270(b) of the Act had simply provided that the two local authorities should agree on the appointment without indicating what is supposed to be done in the event of a disagreement, then in that case I would agree with the Learned Judge that even without an express

provision that in that event the dispute should be taken to the court, the High Courtwould have jurisdiction under section 60 of the Constitution of Kenya to deal with the matter and make a determination".

From the foregoing, it is clear that in considering the issue raised before us, the position of Section 23 of the Sixth Schedule to the Constitution *vis-a-vis* Article 165 of the Constitution, we should make an interpretation guided by the principles of giving effect to the rights and freedoms under the Bill of Rights, restricting the application of the ouster clause in favour of the rights, interpreting the Constitution as a whole, harmonising the provisions of Section 23 with Article 165 and, above all, give a purposive meaning of the Constitution in terms of Article 259 of the Constitution.

The Vetting Board is established under the Vetting Act, which statute is constitutionally mandated under Section 23(1) of the Sixth Schedule to the Constitution. The Act encompasses the entire statutory mandate of the Vetting Board which mandate is exercisable in accordance with the Constitution and the Act. Instructively, Section 23(1) of the Sixth Schedule provides that the legislation that Parliament shall enact to establish mechanisms and procedures for vetting shall operate ***"despite Article 160, 167 and 168 of the Constitution"*** (emphasis added). Article 160 provides that judicial authority shall be exercised without the control or direction of any person or authority; Article 167 provides for the tenure of office of the Chief Justice and judges while Article 168 sets out the procedure for removal of a judge. By suspending the operation of these three provisions, Section 23(1) of the Sixth Schedule sought to provide that the removal of a judge through the vetting process would not be fettered by the constitutional safeguards relating to the constitutional independence of the Judiciary as well as the necessity to comply with the ordinary constitutionally prescribed procedure for removal of judges.

However, in spite of the above gallant effort to insulate the vetting process from the operation of constitutional provisions that the drafters of the Constitution felt would mar the admittedly time-bound and fairly transitional vetting process, we observe with a keen eye that the drafters did not deem it fit to exclude the operation of Article 165 of the Constitution to the vetting process. In the event, and whether by design or sheer inadvertence on the part of the drafters, Article 165 of the Constitution was left unscathed by the ouster clause constituted in Section 23 of the Sixth Schedule to the Constitution. *Ipso facto*, therefore, we find that the High Court has jurisdiction to exercise any of the constitutional mandate conferred by the people of Kenya under Article 165 even in the face of Section 23 of the Sixth Schedule.

In addition, we note that some of the Petitions over which the decisions of the Vetting Board are sought to be challenged hinge upon breach of fundamental rights and freedoms of the affected judges, including the right to a fair hearing. In this regard, Article 23(1) of the Constitution of Kenya gives the High Court jurisdiction exercisable in line with Article 165 to hear and determine applications for redress of a denial, violation or infringement of a right or fundamental freedom in the Bill of Rights. We observe that the ouster clause does not insulate the vetting process from the operation of Article 23 of the Constitution. We further and particularly observe that under Article 25 of the Constitution, the right to a fair trial is a right that the Constitution has decreed and classified as among the fundamental rights and freedoms that may not be limited or derogated from under the Constitution. In effect therefore, we find the ouster clause incapable of eliminating this court's jurisdiction over petitions cushioned upon alleged breaches of fundamental rights and freedoms including the right to a fair trial.

With deep respect, we cannot agree with submissions made by the learned counsel for the LSK that the **Anisminic case (Supra*)*** as regards the administrative jurisdiction of the High Court on finality or ouster clauses applies (as it was an English case) only in the absence of a written statute. We also cannot agree with counsel's submission that the cases only applied to the Caribbean Islands, India and Pakistan as their constitution were colonial relics not passed by the people in referendum. We look upon the **Anisminic case** as the definitive authority in relation to the former writ of certiorari and the Administrative jurisdiction of this court by way of review and we adopt the same accordingly. We find that this court has the right to review a decision for error of law apparent on the face of record of the Vetting Board which may be an error going to jurisdiction thereof as distinguished from error with its jurisdiction.

8. HIGH COURT'S SUPERVISORY JURISIDCTION OVER THE VETTING BOARD

The next issue we need to consider is the status of the Vetting Board. It was argued that the Board is not an inferior Tribunal. It was further argued that because the Board was established to vet Judges of the High Court, Court of Appeal and High Court Judges in the Supreme Court, the Board cannot be inferior to those it was vetting but rather superior to the High Court and has the same power to that of the Supreme Court. Reliance was placed in the case of **Justice Joseph Vitalis Juma – vs – The Chief Justice of Kenya & 6 Others[2010]e KLR**. The Respondents supported this position. On their part, the Petitioners and other Interested Parties urged that the Vetting Board was a creation of statute, it was not a constitutional body and was therefore inferior to this court.

Our view is that, the vetting process was entrenched in our Constitution through Section 23 (1) of the Sixth Schedule. The operative words in that section are:-

"….Parliament shall enact legislation which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting…." (Emphasis ours).

The question that arises is whether it is section 23(1) of the Sixth Schedule that creates the Vetting Board. This can only be discerned, by the meaning of the words of the section. In the case of **Republic – vs – E. L. Mann [1969] EA 357,** the Court held:-

"We do not deny that in certain context a liberal interpretation may be called for but in one cardinal respect, we are satisfied that a Constitution is to be construed in the same way as any other legislative enactment, and that is where the words are precise and un-ambiguous, they are to be construed in their ordinary and natural sense. It is only where there is some imprecision or ambiguity in the language that any question arises whether a liberal or restricted interpretation should be put upon the words." (Emphasis ours).

Our view is that the words of Section 23 (1) of the Sixth Schedule are clear and precise. The section directs Parliament to enact legislation that will establish mechanisms and procedures for vetting. Our reading of the section is that it does not create any Board, Tribunal or Authority. If the intention of the drafters was to create the Board under that section, nothing would have been easier than to expressly say so. We were referred to section 6 of the Vetting Act which provides:-

"6 (1) There is established an independent board to be known as the Judges and Magistrates Vetting Board.

(2) The board shall be a body corporate with perpetual succession and a common seal and shall, in its corporate name, be capable of –

(a) suing and being sued;

(b) . . .

(c) doing or performing all such other things or acts for the proper discharge of tis functions under the Constitution and this Act as may be lawfully or performed by a body corporate."

Clearly this provision establishes the Vetting Board. It is clear that the Board came into being upon enactment of this Act and its functions and powers are clearly spelt out in this legislation. Accordingly, our view is and we so hold that the Vetting Board is a creation of an Act of Parliament. That being the case, the Board cannot be equated to this Court, leave alone the Supreme Court. The fact that it vets the Judges of this Court, the Court of Appeal or the Supreme Court, does not confer it with any powers or status superior to or akin to those of this Court.

We have considered the case of **Joseph Vitalis O. Juma vs The Chief Justice of Kenya** relied on by the LSK. Our view is that the superiority or otherwise of the tribunal in that case was never an issue as the status of the Board is now before us. In that case, the court was considering whether or not by virtue of the constitutional proceedings before it, the court was called upon to sit as an appellate court or a

Constitutional court. In our view, the issue of whether the matters before us are in the nature of appeals against the decisions of the Board or not cannot be gone into at this preliminary stage. That has to await the consideration of the matters on merit. It can only be considered when affidavit evidence is reviewed which we cannot do at this stage.

In view of the foregoing, we hold that the Vetting Board is akin to any Tribunal which is susceptible to the jurisdiction of this court under Article 165 (6) of the Constitution. The only exception is that while exercising its said jurisdiction under Article 165 aforesaid, this court will do so having in mind the strict directions set out in Section 23 (2) of the Sixth Schedule to the Constitution as to the process and the decisions of the Vetting Board.

9. EXTENT OF HIGH COURT'S JURISDICTION OVER THE VETTING PROCESS

In the upshot of the foregoing, we think that the question that should now engage us is not whether the court has jurisdiction over the vetting process but, rather, the extent to which such jurisdiction is exercisable. In prodding this question, we acknowledge and remain sensitive to the undeniable clear intention of the people of Kenya that the vetting process should be allowed to proceed to conclusion seamlessly and without needless judicial fetters. This intention is clearly manifest in the ouster clause comprised in Section 23(1) of the Sixth Schedule to the Constitution and was saluted and underscored by the Court of Appeal in the **Dennis Mong'are case**(supra) in the following unequivocal terms:

"There is no doubt in our collective minds that the issue before us is one of considerable public interest. No one denies that the Kenyan people resoundingly voted for the vetting process by approving the Constitution at the Referendum. The judicial officers themselves have said that they are not opposed to the vetting process. Their complaint is essentially with some parts of the Act, which they believe are unlawful, and an infringement of their fundamental rights. They want the process to be fair and lawful".

The above sentiments were echoed by our brother Hon. Justice Kimondo in his dissenting ruling in the case of **Centre for Human Rights& Democracy vs. Vetting Board ,Eldoret Constitutional Petition No. 11 of 2012.**

We are faithful servants of the law. We are truthful to our oath of office. We remain alive to the immense public interest that surrounds the vetting of judges and magistrates in the country. Yet as the constitutionally mandated custodians of justice of the original and unlimited recourse, we consider that we would be abdicating our constitutional mandate if we downed our tools in the face of legitimate quests for our intervention amid the deafening public interest or indeed the attempted ouster of our jurisdiction under section 23(2) of the Sixth schedule aforesaid. We must protect the aspirations of Kenyans as pronounced in the Preamble of the Constitution wherein they pronounced:-

"COMMITTED to nurturing and protecting the well-being of the individual, the family, communities and the nation.RECOGNISING the aspirations of all Kenyans for a Government based on the essential values of human rights, equality, freedom, democracy, social justice and rule of laws."

In our view therefore, we see it our duty to carve out a delicate balance that will ensure that the exercise of the court's jurisdiction does not undermine the substratum of the vetting process or whittle down the clear intention of the ouster clause of shielding the mandate of the Vetting Board from judicial intrusion. In furtherance of this balance, we will ensure that the court only intervenes to the extent permissible by law and by the dictates of justice. That balance will have been created if this court is able to ensure that the Vetting Board shall retain its place as the constitutionally mandated body to authoritatively, impartially and independently adjudicate upon matters relating to the removal or the process leading to the removal of judges as contemplated by Section 23(2) of the Sixth Schedule of the Constitution, with the only caveat that no aspect of the exercise of its function shall drift beyond the four corners of the mandate.

Having carefully considered the court's constitutional mandate *vis-a -vis* that of the Vetting Board, and in

delineating the balance aforesaid that we think will best serve the interests of the Board as well as those subjected to its process or decisions, we take the view that the court's jurisdiction over the vetting process or decisions deriving from the process should be defined in the following terms:

1. The High Court shall not stop the process of vetting of judges and magistrates pursuant to the Vetting of Judges and Magistrates Act, 2011, save to the extent determined as merited in individual cases.

2. The High Court shall have jurisdiction to intervene and review the process and decisions of the Vetting Board to the extent that the exercise of the Board's mandate is shown to have exceeded its constitutional and statutory mandate under the Constitution and the Vetting Act.

3. The High Court shall have jurisdiction to consider and adjudicate upon alleged breaches of fundamental rights and freedoms arising from the exercise of the Vetting Board's mandate under the Constitution and under the Act.

4. The High Court shall have jurisdiction to consider matters relating to extension of time of the Vetting Board effected pursuant to Article 259(9) of the Constitution.

5. The High Court shall have jurisdiction to issue, review, uphold or vacate conservatory orders in connection with the vetting process.

6. The High Court shall have jurisdiction to determine any questions ancillary to or consequential upon the vetting process.

10. CONCLUSION AND DIRECTIONS

The upshot of the foregoing is that we are minded to make the following orders:-

1. All the Conservatory Orders made herein and extended from time to time are hereby set aside, and the Vetting Board is at liberty to continue with the vetting of Judges pending the hearing and determination of the Application and Petitions filed herein.

2. As regards the Judges whose vetting process has been determined by the Vetting Board as complete, we recognize that they will suffer irreparable loss and damage should their de-gazettement as Judges be effected before the Application and Petitions filed herein have been heard and determined. We therefore order that pending the determination of the said Application and Petitions, the affected Judges shall not be de-gazetted.

3. As regards the Judicial Review Application and the Petitions filed herein, we direct that each shall be heard separately and determined by this Court applying the principles that we have outlined herein.

4. Costs, where applicable, shall be in the causes.

DATED, SIGNED and DELIVERED at Nairobi this 30th day of October, 2012.

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J. HAVELOCK J.MUTAVA P.NYAMWEYA E.OGOLA A.MABEYA
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