



**Dari Limited & 5 others v Supreme Court of Kenya; Mwilu & 7 others
 (Interested Parties) (Petition E582 of 2024) [2025] KEHC 8545 (KLR)
 (Constitutional and Human Rights) (19 June 2025) (Ruling)**

Neutral citation: [2025] KEHC 8545 (KLR)

**REPUBLIC OF KENYA
 IN THE HIGH COURT AT NAIROBI (MILIMANI LAW COURTS)
 CONSTITUTIONAL AND HUMAN RIGHTS
 PETITION E582 OF 2024
 LN MUGAMBI, J
 JUNE 19, 2025**

BETWEEN

**DARI LIMITED 1ST PETITIONER
 RAPHAEL TUJU 2ND PETITIONER
 MANO TUJU 3RD PETITIONER
 ALMA TUJU 4TH PETITIONER
 YMA TUJU 5TH PETITIONER
 S.A.M COMPANY LIMITED 6TH PETITIONER**

AND

SUPREME COURT OF KENYA RESPONDENT

AND

**PHILOMENA MWILU INTERESTED PARTY
 MOHAMED IBRAHIM INTERESTED PARTY
 SMOKIN WANJALA INTERESTED PARTY
 NJOKI NDUNGU INTERESTED PARTY
 WILLIAM OUKO INTERESTED PARTY
 JUDICIAL SERVICE COMMISSION INTERESTED PARTY
 LAW SOCIETY OF KENYA INTERESTED PARTY
 ATTORNEY GENERAL INTERESTED PARTY**



RULING

Introduction

1. The instant Petition is dated 23rd October 2024. The Petition stems from an appeal, SCPT/E012/2023(Dari Limited and 5 others versus East Africa Development Bank) that had been filed in the Supreme Court by the Petitioners. The Petitioners were displeased with the manner the 1st to 5th Interested Parties were handling their appeal and lodged a complaint with the 6th Interested Party. They then sought stay of proceedings before the Supreme Court pending determination of the said complaint.
2. On 11th October, 2024, the Respondent delivered a Ruling on the Petitioners Application for stay of proceedings. In the said Ruling, the 1st to 5th Interested Parties and recused themselves from hearing the Petitioners Appeal.
3. The Petitioners take issue with the recusal of the 1st to 5th Interested Parties considering that a matter before the Superior Court must be determined by an adequate quorum of the bench.
4. The Petitioners assert that the Respondents have violated their constitutional rights under Articles 25, 47, 48 and 50 of the [Constitution](#).

The Preliminary Objection

5. In rejoinder, the Respondent and the 1st to 5th Interested Parties, jointly filed a Notice of Preliminary Objection dated 14th November 2024 opposing the Petition. The objection is based on the following grounds:
 - i. The Petition is fatally defective as it seeks to challenge the Ruling and Recusal Order issued on 11th October 2024 in Supreme Court Petition No. E012 of 2023, Dari Limited and 5 others versus East Africa Development Bank.
 - ii. Pursuant to Article 163(7) of the [Constitution](#), the decisions of the Supreme Court (whether in exercise of its original or appellate jurisdiction) are binding on all the other Courts (including this Court) except the Supreme Court.
 - iii. Pursuant to Article 165(5) of the [Constitution](#), this Court is expressly prohibited from exercising jurisdiction over matters reserved for the exclusive jurisdiction of the Supreme Court or in which it exercises its appellate jurisdiction under Article 163(4)(a) & (b) of the [Constitution](#). The Ruling and the Resultant Recusal Order having been made in proceedings where the Supreme Court was exercising its exclusive appellate jurisdiction (to hear appeals from the Court of Appeal) this Court has no jurisdiction to entertain any proceedings in respect of that order.
 - iv. The Petition as presented thus offends the provisions of Articles 165 (5)(a) of the [Constitution](#). In the circumstances, this Court lacks jurisdiction to call, review, examine or quash the Ruling and Recusal Order issued on 11th October 2024 in Supreme Court Petition No. E012 of 2023, Dari Limited and 5 others versus East Africa Development Bank subject of these proceedings.
 - v. Pursuant to Article 165(6) the supervisory jurisdiction of this Court does not extend to superior courts. Consequently, this Court cannot open or review the Ruling and Recusal



Order of the Supreme Court issued on 11th October 2024 in Petition No. E012 of 2023, Dari Limited and 5 others versus East Africa Development Bank.

- vi. The Petition offends the principle set out by the Supreme Court in *Kenya Hotel Limited v Attorney General & 5 Others* (Petition 16 of 2020) (2022) KESC 62 (KLR).
- vii. The 1st – 5th Interested Parties have been wrongly impleaded in these proceedings as they enjoy judicial immunity under Article 160(5) of the *Constitution* as read together with Section 6 of the *Judicature Act* and Section 45(1) of the *Judicial Service Act*, 2011 and are protected from civil proceedings by virtue of decisions made by them while discharging their judicial duties.
- viii. Consequently, and on the binding authority of the Supreme Court in Supreme Court Petition No. 42 of 2018, *Bellevue Development Company Ltd v Francis Gikonyo & 3 others* [2020] eKLR and reiterated in SC Petition No. E001 of 2023, Hon. Justice Said Juma Chitembwe vs *The Tribunal Appointed to Investigate the Conduct of The Hon. Justice Said Juma Chitembwe*, Judge of the High Court no proceedings can be brought as against them as done in the present Petition.
- ix. The Petition is bad in law, frivolous, vexatious and an abuse of the process of this Court. The Respondents and Interested Parties hereby give notice that that they shall seek to have the Petition struck out in limine.

Respondent and 1st to 5th Interested Parties Submissions

6. In support of their case, these parties through Triple OK law LLP filed submissions dated 9th December 2024. Counsel raised two issues: whether this Court has jurisdiction to entertain this suit and whether the 1st to 5th Interested Party were properly joined in this suit.
7. The following excerpt in *Seven Seas Technologies Limited Vs Eric Chege*(2014)eKLR was cited by Counsel for the 1st -5th Interested Parties:

“The authority which a court has to decide matters which are litigated before it or to take cognizance of the matters presented before it in a formal way for its decision. The limits of this authority are imposed by the Statute, charter or commission which constituted and may be extended or restricted by the like means. If no restriction 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 to the area over the jurisdiction shall extend, or it may partake of both these characteristics.”
8. Similarly, the 1st -5th Interested Parties relied on matter of the Interim Independent Electoral Commission [2011] KESC 1 (KLR) , *Owners of the Motor Vessel “Lilian S” v Caltex Oil (Kenya) LTD* (1989) KLR 1 and *Samuel Kamau Macharia vs Kenya Commercial Bank Limited & 2 others* [2012]eKLR.
9. It was submitted on their behalf that Article 165(6) of the *Constitution* grants this Court supervisory jurisdiction only over subordinate courts and not the Superior courts. Counsel pointed out that the Petitioners confirm the hierarchy of courts in that being aggrieved by the Court of Appeal’s decision they proceeded to appeal to the Supreme Court. The subject matter of this proceeding is now a matter before the Supreme Court.
10. It was pointed out that the Petition is premised on the allegation that the Supreme Court violated their constitutional rights under Articles 25, 47, 48 and 50 of the *Constitution*. The case of *Okiya*



Omtata Okoiti and another v Attorney General and 2 others [2015]eKLR was cited in response to that allegation, where the Court held:

“It can be argued that since Article 165(3)(d)(ii) of the Constitution empowers this Court to determine questions whether anything said to be done under the authority of the Constitution or of any law is inconsistent with, or in contravention of, the Constitution, then the decisions of the Supreme Court are within the reach of this Court. That would however be a constitutional heresy as the same Constitution at Article 165(5)(a) forbids this Court from having jurisdiction in matters reserved for the exclusive jurisdiction of the Supreme Court. By virtue of Article 163(6) of the Constitution, advisory jurisdiction falls in the province of the Supreme Court. Once the Supreme Court formed the opinion that the gender-equity question was a matter befitting determination through an advisory opinion, the power of this Court to address that question was taken away. Any attempt by this Court to circumvent the decision of the Supreme Court is an affront to the Constitution. The same reasoning applies to decision of my sister Mumbi Ngugi, J. Any attempt to delve into the issues that were addressed in her judgement will go against Article 165(6) of the Constitution.”

11. Further reliance was placed on *Sonko v Supreme Court of Kenya and another* [2023]KEHC 17295, *Kenya Hotel Properties Limited v Attorney General & 5 others* [2020]eKLR, *Justice Jeanne W Gacheche & 5 others v Judges and Magistrates Vetting Board & 2 others* [2015]eKLR.
12. It was contended that the Petitioners are inviting this Court to examine the Supreme Court’s recusal Ruling with the aim of having this Court declare that it violated their constitutional rights which is untenable. On this basis, Counsel submitted that it was evident that this Court does not have jurisdiction to entertain this matter.
13. On the second issue, Counsel submitted that the 1st to 5th Interested Party are protected by Article 160(5) of the Constitution and are thus wrongly joined in the suit. The case of *Karani v Judicial Service Commission* [2022] eKLR relied upon where the Supreme Court posited:

“We found that Judicial immunity ‘is meant to provide protection to judicial officers from third parties’ interference, influence, or obstruction. Judicial immunity is also necessary to protect the reputation and perception of the judiciary, to maintain the trust of the public and ensure transparency and accountability. A judge acting in his official judicial capacity thus enjoys immunity from liability for judicial acts performed within the scope of his or her jurisdiction’ [par 65].

We further found that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from criminal or civil suit arising from acts taken within or even in excess of his jurisdiction, and further that the protection or immunity of a judge also goes into administrative acts. We concluded that Judges and judicial officers remain unquestionably immune as long as they do not take actions that intentionally and plainly prevent litigants from enjoying their constitutional and statutory rights.”

14. Equal dependence was placed in *Bellevue Development Company Ltd* (supra).
15. Counsel further stated that it was worthy to note that these parties had not applied to be joined as parties in this suit as provided under Rule 7 of the Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules. Reliance was placed in *Joan Akoth Ajuang*



& another v Michaels Owuor Osodo - Chief Simur Kondiek, Ukwala Location & 3 others; Malaika Foundation (Proposed Interested Party) [2020] KEHC 5840 (KLR) where it was held that:

“The broad principles which govern disposal of an application for joinder of interested parties are that the court can, either on an application made by any interested party or on its own motion direct any person as party to be enjoined in the proceedings.

The elements to be satisfied where a party seeks to be enjoined in proceedings as an interested party are: the intended interested party must have “an identifiable stake” or legal interest or duty in the proceedings.”

The test is not whether the joinder of the person proposed to be added as an interested party would be according to or against the wishes of the petitioner or whether the joinder would involve an investigation into a question not arising on the cause of action averred by the petitioner. It is whether the intended interested party has an identifiable stake, or a legal interest or duty in the proceedings.”

6th Interested Party’s Submissions

16. The 6th Interested Party did not file a response or submissions to the preliminary objection. However, the 6th Interested Party filed submissions in relation to its grounds of opposition which also raise similar arguments as those contained in the preliminary objection.
17. The 6th Interested Party’s Advocate, Martin Machira filed submissions dated 15th January 2025 in support of its own grounds of opposition against the Petition. The key issues being: the lack of jurisdiction of this Court to entertain the Petition and the constitutional independence of the Judiciary.
18. For the 6th Interested Party, it was submitted that Article 165(5)(a) of the Constitution clearly stipulates that the High Court shall not have jurisdiction in respect of matters reserved for the exclusive jurisdiction of the Supreme Court. It was noted that, Section 3 of the Supreme Court Act further explicitly states that the Supreme Court has final judicial authority to interpret and apply the Constitution as further affirmed in Samuel Kamau Macharia & Another (supra).
19. As such, it was the 6th Interested Party’s submission that this Court lacks jurisdiction to entertain the Petition as formulated, terming it an attempt to sit on appeal over decision of the Supreme Court.
20. Moreover, it was contended that under Article 160(5) of the Constitution as read with Section 6 of the Judicature Act, Judges are protected from personal liability for acts done or omitted to be done in good faith during the lawful performance of their duties. Reliance was placed in Maina Gitonga vs. Catherine Nyawira Maina & Another [2015] eKLR where it was held that:

“It is undoubted that under the established doctrine of judicial immunity, a judicial officer is absolutely immune from a criminal or civil suit arising from acts taken within or even in excess of his jurisdiction...Judicial immunity is necessary for various policies. The public interest is substantially weakened if a judge or a magistrate allows fear of a criminal or civil suit to affect his decisions. In addition, if judicial matters are drawn into question by frivolous and vexatious actions, ‘there never will be an end of causes: but controversies will be infinite...I agree with Bosire J that judicial officers should not be put in a position which forces them to look over their backs every time they make a decision. Whenever a judicial officer has to make a decision, he should make such a decision in good faith and without fear that he will be taken to court for making the decision. Whenever a party wants to challenge



the decision of a judicial officer by way of a judicial review, he should not make the judicial officer who made the decision a respondent.”

21. Comparable reliance was placed in *Sirros vs Moore* (1975) 1 Q.B, *Judicial Service Commission v. Speaker of the National Assembly & Another* [2013] eKLR and *Nairobi High Court Petition No. 204 of 2016* (Consolidated with *Petition No. 218 of 2016*); *Apollo Mboya vs JSC & Others*.

7th Interested Party’s Submissions

22. The 7th Interested Parties response and submissions are not in the Court file or Court Online Platform (CTS).

8th Interested Party’s Submissions

23. In support of the Preliminary Objection, the 8th Interested Party through Chief State Counsel, Emmanuel Bitta, filed submissions dated 28th November 2024.

24. The 8th Interested Party submitted that the Court lacks jurisdiction to entertain any suit challenging the decision of the Supreme Court by virtue of Article 165(6) of the *Constitution*. It was argued that the provisions make it plain that the High Court’s supervisory jurisdiction under Article 165 of the *Constitution* is over subordinate bodies, it does not extend to Superior courts.

25. It was argued that the Petitioners are calling upon this Court to determine the lawfulness of both the conduct and decision of the Supreme Court which amounts to an exercise of supervisory jurisdiction over the Supreme Court.

26. To buttress this point reliance was placed in *Peter Nganga Muiruri vs Credit Bank Limited and 2 others* Nairobi Civil Appeal No. 203 of 2006 where it was held that:

“It would be a usurpation of power to push forward such an approach, and whatever decision emanates from a court regarding itself as a constitutional court, with powers of review over decisions of concurrent or superior jurisdiction, such decision is at best a nullity”

27. Similar holding was reached in *Bellevue Development Company Ltd* (supra), *Kombo vs Attorney-General* (1995-98) 1EA 168 and *Civicon Limited v Kenya Revenue Authority & another* [2014] eKLR.

28. Additionally, Counsel submitted that entertaining this suit would contravene the purposes of the Article 163 (7) of the *Constitution* that expressly provides for the binding nature of the decisions of the Supreme Court over all courts. Reliance was placed in *Geoffrey M. Asanyo & 3 others v Attorney-General* [2020] eKLR where the Court held that:

“Article 163 (7) of the *Constitution* provides that “All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.” The nature of that provision is absolute. This court expounded this principle in the case of *Gatirau Peter Munya v Dickson Mwenda Kithinji & 2 others* [2014] eKLR, as follows (para. 196): “article 163 (7) of the *Constitution* is the embodiment of the time-hallowed common law doctrine of stare decisis. It holds that the precedents set by this court are binding on all other Courts in the land. The application, utility and purpose of this constitutional imperative are matters already considered in several decisions of this court: *Jasbir Singh Rai v Tarlochan Singh Rai & others*, and quite recently, in *George Mike Wanjohi v Steven Kariuki & others* *Petition No 2A of 2014*. In addition to the benchmark decisions to which this court adverted in *Wanjohi v Kariuki* (supra),



regarding the importance of the doctrine of stare decisis, we would echo the dictum in *Housen v Nikoaisen* (2002) 2 SCR: “It is fundamental to the administration of justice that the authority of decisions be scrupulously respected by all courts upon which they are binding. Without this uniform and consistent adherence, the administration of justice becomes disordered, the law becomes uncertain, and the confidence of the public in it undermined. Nothing is more important than that the law as pronounced ... should be accepted and applied as our tradition requires; and even at the risk of that fallibility to which all Judges are liable, we must maintain the complete integrity of relationships between the courts.”

29. In like manner, the instant Petition is accused of being a direct assault on judicial immunity under Article 160 of the Constitution that a member of the Judiciary is not liable in an action or suit in respect of anything done or omitted to be done in good faith in the lawful performance of a judicial function. As such, Counsel argued that joinder of the 1st to 5th interested party was unconstitutional and that they ought to be struck out from the proceedings. To buttress this point reliance was placed in *Bellevue Development Company Ltd* (supra) where it was held that:

“The protection offered to judicial officers in Article 160(5) of the Constitution is inherent in the independence of the judiciary as a state organ within the doctrine of separation of powers. The protection encapsulates protection from being sued in a personal capacity in a cause of action based on an act or omission emanating from the lawful performance of a judicial function. I am convinced; this is intended to make the cover against personal liability complete, especially to prevent the essential substance of the protection from oozing out. If it were to be the contrary, that kind of interpretation will result into an absurdity, because, allowing the officer to be sued and appear in his personal capacity in a suit based on an act he did in the lawful performance of a judicial function, will already have blown away the very constitutional cover for the officer’s fallibility provided under Article 160(5) of the Constitution.”

30. Further reliance was placed in *Jasbir Singh Rai & 3 Others vs Tarlochan Singh Rai & 4 Others*, Civil Application No. 307/2003.

Petitioners’ submissions

31. Okatch and Partner Advocates on behalf of the Petitioners filed submissions dated 24th January 2025 in answer to the Preliminary Objection. The Petitioners submitted on whether this Court has the Jurisdiction to hear and determine the Petition, whether the Petition is seeking to review or appeal against the ruling of the Supreme Court, whether the 1st to 5th Interested Parties have been wrongfully joined in these proceedings.
32. On the first issue, Counsel noted relying in *Samuel Kamau Macharia* (supra) that a Court of law can only exercise jurisdiction as conferred by the Constitution or other written law. It cannot arrogate to itself jurisdiction to entertain a matter exceeding that which is conferred upon it by law.
33. In relation to this suit, Counsel submitted that Article 22(1), 23(1) as read with Article 165 of the Constitution provides that the High Court has jurisdiction to determine the question whether a right or fundamental freedom in the Bill of Rights has been denied, violated, infringed or threatened. To buttress this point reliance was placed in *Cami Graphics Limited versus Chief Land Registrar of the*



Judiciary and 2 Others; Commissioner of Lands and 4 Others (Interested Parties) (Constitutional Petition 543 of 2022) [2024] KLR where it was held that:

“Where a party moves this Court under Article 22 of the Constitution, the Court has jurisdiction in terms of Articles 23(1) as read with Article 165(3)(d) to determine the Petition. However, the claim must be that the action complained of violates or threatens a right or fundamental freedom and the relief sought must be aimed at redressing the violation.”

34. Counsel asserted that the dispute in this matter falls squarely within the jurisdiction of this Court, as it is the Court vested with exclusive jurisdiction to hear matters on constitutional violations under Article 165(3)(b) of the Constitution. Reliance was placed in Constitutional Petition No. E565 Of 2024 (Consolidated with Kerugoya Petition No. E013 of 2024; Kerugoya Petition No. E014 of 2024, Kerugoya Petition No. E015 of 2024, Nairobi Petition No. E550 of 2024, Nairobi Petition No. E570 of 2024 and Nairobi Petition No. E572 of 2024 where it was held that:

“Within this framework, the jurisdiction conferred under Article 165(3) extends to adjudicating any alleged infringement of the Bill of Rights and interpreting the Constitution. In this context, Article 165(3)(d)(ii) expressly grants the High Court the authority to determine whether any act purporting to have been one under the authority of the Constitution or any law is inconsistent with, or in contravention of, the Constitution. This reinforces the High Court’s pivotal role as the guardian of constitutional integrity, ensuring that all actions by state organs, or individuals, are in full compliance with constitutional dictates.”

35. Like dependence was placed in Brian Patrick De Lacy & another v South African Post Office [2011] ZACC 17, Marete versus Attorney General [1987] KLR 690 and Constitutional Petition 13 of 2015- Hon. Justice Muga Apondi versus The Attorney General.
36. Turning to the second issue, Counsel submitted that a perusal of the relief sought, establishes that the Petitioners are not seeking to review or quash the decision of the Supreme Court but is premised on Article 23(3) of the Constitution and the constitutionality of the 1st to 5th Interested Parties decision to recuse themselves. According to Counsel the 1st to 5th Interested Parties decision is an infringement of the Petitioner’s right to access justice.
37. Reliance was placed in Gladys Boss Shollei & Another v Judicial Service Commission & another [2018] KESC 42 (KLR) where it was held that:

“Every judge has a duty to sit, in a matter which he duly should sit. So that recusal should not be used to cripple a judge from sitting to hear a matter...”

38. Like dependence was placed in Constitutional Petition 13 of 2015- Hon. Justice Muga Apondi versus The Attorney General and Law Society of Kenya v Supreme Court of Kenya & another; Abdullahi SC & 19 others [2024] KEHC 7819 (KLR).
39. On the third issue, Counsel argued that judicial immunity had been invoked improperly, as the decision was not as a result of lawful performance of a judicial duty and only applies where an act was done in good faith. It was contended that in this dispute, the issue is violation of constitutional rights. That said, Counsel pointed out that no order has been sought against the 1st to 5th Interested Parties only the Respondent.



40. Reliance was placed in Bellevue Development Company Ltd (supra) where it was held that:

“There was a clear distinction between judicial immunity and impunity, and it was important that judicial officers understand that they needed not find themselves on the side of latter. Article 160(5) of the *Constitution* drew the line between immunity and impunity; the line crossed where acting lawfully and in good faith met willful and negligent abandonment of the oath of office to uphold the integrity and independence of the Judiciary and to dispense justice without fear or favour. Article 160(5) was not blind to that inherent distorted character between judicial immunity and impunity, and thus provided a resonating standard for judicial officers to act according to the tenets enunciated under the *Constitution*; to ensure that there was rule of law, protection of fundamental rights and freedoms in the Bill of Rights and to do justice to all. The latter point spoke to the lawful action qualification as it did to the good faith expectation.”

41. Additional dependence was placed in *Attorney- General & 2 others v Ndi & 79 others; Dixon & 7 others (Amicus Curiae) (Petition 12, 11 & 13 of 2021 (Consolidated))* [2022] KESC 8 (KLR) and Law Society of Kenya (supra).

Analysis and Determination

42. Upon careful review of the grounds raised in the 1st to 5th Interested Parties Notice Preliminary objection vis-à-vis the grounds of opposition thereto as well as the Parties rival submissions, it is my considered view that there is only one singular issue for determination

Whether this Court has jurisdiction to hear and determine this Petition in view of the legal contentions raised via the preliminary objection by the 1st to 5th Interested Parties.

43. Firstly, it is important to restate the fundamental legal characteristics of proper a preliminary objection as affirmed by the Supreme Court in the Hassan Ali Joho & another v Suleiman Said Shahbal & 2 others (2014)eKLR. The Court held:

“(31) To restate the relevant principle from the precedent-setting case, Mukisa Biscuit Manufacturing Co Ltd –vs. - West End Distributors (1969) EA 696:

“a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit. Examples are an objection to the jurisdiction of the court or a plea of limitation or a submission that the parties are bound by the contract giving rise to the suit to refer the dispute to arbitration....a preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion”.



44. In like manner, the Court in *Kyule v Gitaari* [2024] KEHC 5819 (KLR) echoed as follows:

“7. The case of *Mukisa Biscuits Manufacturing Ltd v West End Distributors* (1969) EA 696 is notorious on the issue of what constitutes a preliminary objection. The court observed thus:-

.....a preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

8. Sir Charles Newbold P. stated:-

A preliminary objection is in the nature of what used to be a demurrer. It raises a pure point of law which is argued on the assumption that all the facts pleaded by the other side are correct. It cannot be raised if any fact has to be ascertained or if what is sought is the exercise of judicial discretion. The improper raising of preliminary objections does nothing but unnecessarily increase costs and on occasion, confuse the issue, and this improper practice should stop.

9. Similarly the Supreme Court in the case of *Hassan Ali Joho & another v Suleiman Said Shabal & 2 others* SCK Petition No 10 of 2013 [2014] eKLR held that:-

A preliminary objection consists of a point of law which has been pleaded or which arises by clear implication out of pleadings and which if argued as a preliminary point may dispose of the suit.

10. Further in the case of *Hassan Nyanje Charo v Khatib Mwashetani & 3 others*, [2014] eKLR the court held that:-

Thus a preliminary objection may only be raised on a ‘pure question of law.’ To discern such a point of law, the court has to be satisfied that there is no proper contest as to the facts. The facts are deemed agreed, as they are prima facie presented in the pleadings on record.

11. Evidently, a preliminary objection must be founded upon a settled and crisp point of law, to the intent that its application to undisputed facts, leads to but one conclusion: that the facts are incompatible with the point of law.”

45. Clearly, factual controversies cannot be entertained in a proper preliminary objection and if they arise, the Court must disallow such a Preliminary Objection. Further, a proper Preliminary Objection is one which when argued successfully, it has the ability to terminate the entire suit without a full trial on merits. Finally, it is not a proper preliminary objection if it will depend on the exercise of the Court’s discretion for the decision to be made or reached.

46. A matter that touches on the jurisdiction of the Court is critical for without jurisdiction, the Court is deprived the ability to entertain the dispute. In *Benson Makori Makworo v Nairobi Metropolitan Services & 2 others* [2022] KEHC 26937 (KLR), the Court re-affirming this principle stated:

“I will, however, briefly reiterate what the Court of Appeal stated in *Nakuru Civil Appeal No. 119 of 2017 Public Service Commission & 2 Others vs. Eric Cheruiyot & 16 Others* consolidated with *Civil Appeal No. 139 of 2017 County Government of Embu & Another*



vs. Eric Cheruiyot & 15 Others (unreported) in a decision rendered on 8th February, 2022 on the doctrine of jurisdiction in general as follows: -

36. Jurisdiction is everything, it is what gives a court or a tribunal the power, authority and legitimacy to entertain a matter before it. John Beecroft Saunders in “Words and Phrases Legally Defined”, Volume 3 at Page 113 defines court jurisdiction as follows:

“By jurisdiction is meant the authority which a court has to decide matters that are litigated before it or to take cognizance of the 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 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 the jurisdiction of an inferior court or tribunal (including an arbitrator) 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; but, except where the court or tribunal has been given power to determine conclusively whether the facts exist. Where a court takes it upon itself to exercise a jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgment is given...”

47. A jurisdictional issue forms the basis of raising a preliminary objection. To ascertain whether the Court has jurisdiction, the Court must examine the relevant law conferring it with the jurisdiction and the pleadings or the subject matter of the dispute before it. In *Phoenix of E.A. Assurance Company Limited v S. M. Thiga t/a Newspaper Service* [2019] KECA 767 (KLR) the Court of Appeal held as follows:

“Jurisdiction is primordial in every suit. It has to be there when the suit is filed in the first place. If a suit is filed without jurisdiction, the only remedy is to withdraw it and file a complaint one in the court seized of jurisdiction. A suit filed devoid of jurisdiction is dead on arrival and cannot be remedied. Without jurisdiction, the Court cannot confer jurisdiction to itself... In another locus classicus in this subject, this Court pronounced; *Owners of the Motor Vessel “Lillian S” v Caltex Oil (Kenya) Ltd.* (1989):

“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 its tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction....Where a court takes it upon itself to exercise jurisdiction which it does not possess, its decision amounts to nothing. Jurisdiction must be acquired before judgement is given.”



48. The Supreme Court in *Kenya Hotel Properties Limited (supra)* determining a comparable challenge observed as follows:

“38. Article 165(3) of the *Constitution* confers on this court with very wide jurisdiction to deal with any matter that falls within its jurisdiction. That jurisdiction is not exhaustive given that Article 165(3)(e) states that the court can have any other jurisdiction, original or appellate, conferred on it by legislation. In terms of Article 165(3)(d)(ii), the court has jurisdiction to determine 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, the *Constitution*. Article 23(1) also states that the court has jurisdiction to hear and determine applications for redress of denial, violation or infringement of or threat to a right or fundamental freedom in the Bill of Rights. This jurisdiction is to be exercised in accordance with article 165 of the *Constitution*. Article 23(3) of the *Constitution* undoubtedly confirms the extent of the width of the jurisdiction of this court to grant appropriate relief.”

47. The High Court however noted that such supervisory power is only limited to a jurisdiction over the subordinate courts but not over a superior court. It opined in that context as follows:

46. Turning to the facts of this petition, the judgment sought to be annulled is by the Court of Appeal. It is therefore not in dispute that the impugned judgment is by a court superior to this court in terms of judicial hierarchy. It is a judgment binding on this court in terms of precedent. From the jurisdictional perspective of article 165 of the *Constitution*, this court has wide jurisdiction which is exhaustively provided for by the *Constitution*. However, the *Constitution* itself places a constitutional caveat that this court cannot supervise other superior courts.

47. Article 165(6) states in plain language that this court has supervisory jurisdiction over the subordinate courts and over any person, body or authority exercising a judicial or quasi-judicial junction but not over a superior court. Superior courts in terms of article 162(1) of the *Constitution* are the Supreme Court, the Court of Appeal, the High Court and courts of equal status namely; the Employment and Labour Relations Court and the Environment and Land Court. The edict in article 165(6) is in form of a constitutional limitation imposed on this court not to do anything that would amount to supervising or superintending other superior courts.

48. Based on the above analysis, can this court answer the petitioner’s grievance in the affirmative and annul a decision of the Court of Appeal taking into account the pecking order of the superior courts in this country? And can this court issue an edict to the Court of Appeal directing that court to reopen a closed appeal and hear it de novo? My answer to the above questions must be in the negative. If what the petitioner asks of this court were to happen, it would certainly amount to undermining the authority of the Court of Appeal by another superior court but inferior to it. It would be against clear words of article 165(6).”



48. It is on the above analogy that the High Court declined to assume jurisdiction and determine the appellant's petition.
49. Similarly, the Court of Appeal in agreeing with the High Court, noted the absurdity of asking a High Court to purportedly re-open a decision of the Court of Appeal, noting that no such jurisdiction exists by holding:

“Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the court there was being asked to annul, strike out, reverse or rescind a judgment of this court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. the Constitution itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of article 165(6) is supervise superior courts.

Moreover, under article 164(3) of the Constitution, this court has jurisdiction to hear and determine appeals from the High Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this court to quash or annul them, or that it could purport to direct this court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing.

It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong: without jurisdiction it would be embarking on a hopeless adventure to nowhere...

57. The appellant, having exercised his right of appeal (albeit unsuccessfully) to a higher court, in this case, the Court of Appeal, cannot proceed to launch an attack upon a judgment of the Court of Appeal, by making an application for redress under article 23 of the Constitution to the High Court, another superior court nonetheless, but one inferior to the court that delivered such judgment. To allow such an action, would in the view of this court be quite subversive to the principle of rule of law as enshrined in our Constitution.”

49. The Supreme Court further in *Republic v Manyeso* [2025] KESC 16 (KLR) observed as follows:

- “56. The ultimate objective in the application of stare decisis is to ensure consistency, predictability of the court's decisions and judicial integrity. In *Rai & 3 Others v Rai & 5 others* (Petition 4 of 2012) [2013] KESC 21 (KLR),



this Court recognized the value of upholding the doctrine of stare decisis, or binding precedent by stating as follows:

“(42) The immediate pragmatic purpose of such an orientation of the judicial process, is to ensure predictability, certainty, uniformity and stability in the application of law. Such institutionalization of the play of the law gives scope for regularity in the governance of commercial and contractual transactions in particular, though the same scheme marks also other spheres of social and economic relations.”

57. Article 163 (7) is particular as to the binding nature of the Supreme Court decisions upon courts below as it provides as follows:

“(7) All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.”

58. In the case of *Gatirau Peter Munya (supra)*, we were categorical that precedents set by this Court are binding on all other courts in the land. It is also imperative for all courts bound by decisions to rigorously uphold their authority, ensuring the effective functioning of the administration of justice. Without this steadfast and uniform commitment, the legal system risks ambiguity, eroding public trust, and causing disorder in the administration of justice.

59. The binding nature of precedents and the place of certainty in law was also explained by the East Africa Court of Appeal in *Dodhia v National & Grindlays Bank Limited and Another* [1970] EA 195, where it was held that:

“There can be no doubt that the principle of judicial precedent must be strictly adhered to by the High Courts of each of the States and that these courts must regard themselves as bound by the decision of the Court of Appeal on any question of law, just as in the former days the Court of Appeal was bound by a decision of the Privy Council, or in England as the Court of Appeal or the High Courts are bound by the decisions of the House of Lords, and of course, similarly the magistrates courts or any other inferior court in each State are bound on questions of law by the decisions of the Court of Appeal and, subject to these decisions, also to the decisions of the High Court in the particular State.”

60. The Court of Appeal has itself in several decisions cautioned the High Court regarding its failure to abide by its decisions (See; *National Bank of Kenya Ltd v Wilson Ndolo Ayah Civil Appeal No. 119 of 2002* [2009] KLR 762, *Martin Nyaga Wambora v County Assembly of Embu & 37 Others, Civil Appeal No. 194 of 2015*; [2015] eKLR, *Deposit Protection Fund Board v Sunbeam Supermarket Limited & 2 Others HCCC No. 3099 of 1996* [2004] 1 KLR 37, *Mohamed Abushiri Mukullu v Minister for Lands and Settlement & 6 others, Civil Appeal No. 158 of 2007* [2015] eKLR)



61. By express provision of the Constitution under Article 163 (7), requiring courts below to abide by decisions of the Supreme Court, a constitutional duty is imposed on all those courts. Failure to adhere to precedent set by the apex court and indeed superior courts may disrupt the uniformity, consistency and predictability of decisions. In *Wanjohi v Kariuki & 2 others* (Petition 2A of 2014) [2014] KESC 26 (KLR) Rawal, DCJ in her concurring opinion observed that the principles set by this honourable Court in the course of its constitutional adjudication are principled and well considered. Therefore, an argument to consider a departure from these principles or to distinguish either restrictively or un-restrictively must be weighed against the most serious inclinations of justice and social utility. As such, any departure from the decisions of this Court by a lower Court must be based on well-reasoned distinction of the facts.”

50. The instant Preliminary Objection challenges this Court’s jurisdiction to hear this Petition against the Respondent which is established which as the Apex Court under Article 163 of the Constitution. Article 163 (7) of the Constitution which provides that:

All courts, other than the Supreme Court, are bound by the decisions of the Supreme Court.

51. This Court’s jurisdiction to hear and determine constitutional disputes is anchored on Article 165 of the Constitution which states as follows:

1. There is established the High Court, which—
 - a. shall consist of the number of judges prescribed by an Act of Parliament; and
 - b. shall be organised and administered in the manner prescribed by an Act of Parliament.
2. There shall be a Principal Judge of the High Court, who shall be elected by the judges of the High Court from among themselves.
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 appointed under this Constitution to consider the removal of 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 of justice.
52. Even a cursory reading of the above Constitutional provisions; it is crystal clear that the High Court lacks jurisdiction to review or examine judicial decisions of other Superior Courts, which include the specialized courts referred to in Article 162 (2) and the Court of Appeal, let alone the Respondent which is the Apex Court.
53. The Petitioner advances the view that the Petition is not challenging the recusal perse but the fact that he has been left without any remedy which is an infringement of his right of access to justice, fair trial and the right to fair administrative action. It is possible for a Court to make an interpretation or decision that fails to uphold rights and fundamental freedoms as is alleged but the remedy for that must sought through legal and/or constitutionally compliant processes before a competent forum.
54. The Petitioner urges this Court to find that under Article 22, 23 and 165 (3) (b); this Court is clothed with jurisdiction to determine violations of rights and fundamental freedoms and thus find that this Petition is properly laid before it. The cited provisions may not however be read in isolation. As was held in the Matter of the Kenya National Human Rights Commission, Supreme Court Advisory Opinion Reference No. 1 of 2012; [2014] eKLR, the Constitution must be read holistically, meaning that in the contextual analysis of a constitutional provision, it must be read alongside and against other provisions so as to maintain a rational explication of what the Constitution provides.
55. This implies that Article 22, 23, 165 (3) (b) have to be read alongside Articles 163 (7), 165 (5) & (6) of the Constitution as well. Even though the Constitution has given the High Court expansive jurisdiction on matter of enforcement of fundamental rights, it is careful to ensure that that is done within the permissive limits that does not overthrow the Court's hierarchical structure such that the High Court can be asked to inquire into constitutionality of a decision of the Court superior to it. Article 165 (5) & (6) renders such a determination constitutionally implausible.
56. Where does that leave the Petitioners? All is not lost. May be the Petitioners might want to consider persuading the Supreme Court to reconsider its decision possibly by way of review in view of the



impact of its decision on the right of access to justice and the implication of its ruling on the right to a fair trial that cannot be derogated from. The Supreme Court held in the case of Fredrick Otieno Outa v Jared Odoyo Okello & 3 others Petition 6 of 2014 (2017) eKLR; that even though the Court may in principle not sit on appeal over its own decisions or review the same except to correct obvious errors; in exercise of its inherent power, the Supreme Court may review its decision (s) in exceptional circumstances to meet the ends of justice. The Court stated:

“91. Having reached this Conclusion, based largely on the fact that, neither the Constitution, nor the law, explicitly confers upon the Court, powers to review its decisions, does this render this Court entirely helpless? Aren’t there situations, so grave, and exceptional, that may arise, that without this Court’s intervention, could seriously distort its ability to do justice? Of course, litigation must come to an end. But should litigation come to an end, even in the face of an absurdity? The Supreme Court is the final Court in the land. But most importantly, it is a final Court of justice. This being the case, the Court is clothed with inherent powers which it may invoke, if circumstances so demand, to do justice. the Constitution from which this Court, and indeed all Courts in the land, derive their legitimacy decrees that we must do justice to all...”

57. A pronouncement by the Supreme Court in a judicial proceeding cannot be questioned before this Court or indeed before any other Court in the Republic. A ruling of recusal is a judicial pronouncement made by the Supreme Court in the exercise of its judicial function. Whatever the nature of grievances that the Petitioner might have against that decision, the remedy does not lie before this Court as the decision of the Supreme Court is by constitutional design beyond the reach of this Court or any other Court in the Republic. The Petitioner might have a genuine grievance, and this Court may empathize with the Petitioner, but it cannot legally correct the perceived wrong as it has no jurisdiction to do so.

58. As was observed by Justice Robert Jackson of United States in *Brown v Allen* 344 U.S. 443 (1953), the decisions of the Supreme Court are binding, not because the decisions are faultless, but because in so far as the legal system is concerned, the Supreme Court’s word is final, its decisions are neither appealable nor reviewable before any other Court other than itself. The often-quoted statement by Justice Roberts Jackson about the Supreme Court of United States applies in equal force here, that is:

“We are not final because we are infallible, we are infallible because we are final”

59. The judicial pronouncement of the Supreme Court cannot be made a subject of litigation before this Court. That would be a recipe for judicial anarchism. That temptation must be vehemently resisted. I need not consider any other issue.

60. My finding is that the instant Petition is incompetent. The preliminary objection is upheld. The Petition is struck out with no orders as to costs.

DATED, SIGNED AND DELIVERED VIRTUALLY AT NAIROBI THIS 19TH DAY OF JUNE, 2025.

.....
L N MUGAMBI

JUDGE

