REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA AT NAIROBI

(CORAM: MWONGO, PJ; KORIR, J; MEOLI, J; ONG'UDI, J; KARIUKI, J.)

MILIMANI LAW COURTS

CONSTITUTIONAL AND HUMAN RIGHTS DIVISION

IN THE MATTER OF ARTICLE 22(1) AND 23 OF THE CONSTITUTION

AND

IN THE MATTER OF ALLEGED CONTRAVENTION OF RIGHTS AND FUNDAMENTAL FREEDOMS UNDER THE CONSTITUTION INCLUDING ARTICLES 20, 21(1), 22, 24, 10, 25(C), 27(1), 28,40,47,50 & 57

PETITION NO. 244 OF 2014

JUSTICE PHILIP K.TUNOI……..……..…1ST PETITIONER

JUSTICE DAVID O. ONYANCHA…….....…...……2ND PETITIONER

VERSUS

THE JUDICIAL SERVICE COMMISSION……...…1ST RESPONDENT

THE JUDICIARY……...……...…..…2ND RESPONDENT

AND

ATTORNEY GENERAL…….……INTENDED *AMICUS CURIAE*

CONSOLIDATED WITH

PETITION NO 495 OF2014 OF 2014

BETWEEN

JUSTICE LEONARD NJAGI…….....…….…….PETITIONER

AND

THE JUDICIAL SERVICE COMMISSION…….……1ST RESPONDENT

THE JUDICIARY……..2ND RESPONDENT

AND

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

RULING

Background

1. The two petitions Nos. 244 of 2014 and 495 of 2014 were certified, pursuant to **Article 165(4)** of the **Constitution**, for appointment of an uneven bench by Odunga, J, on 12th and 13th February, 2015, respectively. The Chief Justice empanelled a five judge bench comprising Mwongo, PJ (Presiding), Kimaru, J, Meoli, J, Ong'udi, J, and Kariuki, J, through directions dated 24th February, and 25th February, 2015, respectively. Amongst other directions issued by the Chief Justice, was that the two petitions be consolidated.

2. After empanelment, Kimaru, J, recused himself in the presence of parties, on the grounds that he would have an interest in, and be affected by, the outcome of the matters. Mbogholi, J, who was appointed to replace Kimaru, J, also recused himself in writing, on similar grounds. The Chief Justice then appointed Korir, J, on 8th April, 2015, to substitute Mbogholi, J.

3. By a ruling delivered on 14th April, 2015, pursuant to two notices of objection by the petitioners in Petition 244 of 2014, this bench held that the petitions shall remain consolidated until the determination of the present applications as brought by the Attorney-General (the AG) to be enjoined in Petition 244 of 2014 as *Amicus Curiae*, and by the Petitioners' application for the vacation of the Chief Justice's directions in the two matters.

4. This Ruling relates to the two applications. The first is the Notice of Motion dated 5th April, 2015, by the AG, in which he seeks to be enjoined as *Amicus*. The second is the Notice of Motion dated 16th March, 2015, by the Petitioners in Petition 244 of 2014, seeking orders vacating the directions given by the Chief Justice on 24th February, 2015 and 25th February, 2015, respectively.

5. For clarity, we have dealt with each application separately, just as they were heard separately and consecutively. However, we have written a single ruling covering all matters canvassed in the two notices of motion herein.

Notice of Motion dated 5.3.2015 by Attorney General to be enjoined as *Amicus*

6. The motion seeks the following orders: -

> ***"a. That leave be and is hereby granted for the Attorney-General to be enjoined in this Petition as Amicus Curiae.***

b. ***That the court do order that the Attorney-General be enjoined in this Petition as Amicus Curiae.***
c. ***That the Petitioners do serve the Attorney-General petition filed herein within 2 days upon granting of leave.***
d. ***That the Attorney-General files and serves its written submissions within 14 days upon service of all other pleadings by the Petitioners."***

7. The Motion sets out the grounds and is supported by the Affidavit of Mr. Mwangi Njoroge, the

Deputy Chief Litigation Counsel in the office of the AG and Department of Justice. In his Affidavit, Mr. Mwangi avers that the AG is a party to a similar Petition, No.495 of 2014, where the main question for determination also pertains to the retirement age of judges who were appointed before the promulgation of the new Constitution. Further, that it would neither be in the interest of justice nor in the public interest to lock out the AG in one matter and retain him in another identical matter, yet the AG's role shall be to merely present the position of the law regarding the issues to be determined. It is also averred that the AG shall not be partisan and can only stand for what he believes is the proper position of law and the court will still have to make a determination.

8. Counsel further deposes that the issue of the retirement age of judges is a matter of public interest and not personal to the Petitioners. In addition, both respondents and concerned national government departments will have to deal with the effects of the judgment, yet the latter may not get an opportunity to be heard in court.

9. According to Mr. Mwangi's deposition, the AG in participating as *Amicus* will be fulfilling his exclusive constitutional mandate bestowed upon him by **Article 156** of the **Constitution**. Further to this, it is the belief of the AG that the court will benefit from his input in this matter and that no prejudice shall be occasioned on either party herein if the AG is enjoined as *Amicus Curiae*.

10. The AG submits that the Constitution, statutes and authorities recognise his expertise by mandating him to represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings.

11. Counsel specifically cites **Article 156(4)** of the **Constitution** which provides that:

> ***" the Attorney General shall represent the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings."***

In addition, **Section 5(1)** of the **Office of Attorney General Act, 2012** states that the AG is responsible for:

> ***"(b) advising the Government on all matters relating to the Constitution…human rights …***
>
> ***(i) representing national government in all civil and Constitutional matters in accordance with Government proceedings Act."***

Whilst **subsection 5(2)** of the **Office of the Attorney General Act,** provides that:

> ***"The Attorney General provides efficient and professional legal services to the Government and public for the purposes of facilitating and monitoring the rule of law, the protection of human rights and democracy."***

And **Section 12 of Government Proceedings Act** allows the AG to defend the government interest in any case where the National Government has been enjoined as a party.

12. The AG also cites the case of **JUDICIAL SERVICE COMMISSION –VS- THE SPEAKER OF THE NATIONAL ASSEMBLY AND ANOTHER (2013) e KLR** which defines *amicus* as:

> ***"… a person who shows that he is possessed of some expertise relevant to the matters for determination before the court. Such a person as is expected of experts is required to be non-partisan and his role is meant to enable the court get a clear picture of the issues in dispute in order to enable court to arrive at an informed and just decision."***

The AG thus argues that his role in the matter is to merely present the position of law regarding the issues to be determined.

13. The AG further submits that the letter dated 12.3.2014 annexed in the affidavit of the 1st Petitioner is inadmissible as he had no authority to access or produce as evidence the same letter, as it was marked "Confidential". The AG argued that reliance on the letter would be in breach the holding in the case of **BASELINE ARCHITECTS & 2 OTHERS LTD. –VS- NHIF BOARD MANAGEMENT [2008] eKLR** where Warsame J, (as he then was) said:

> ***"…. I hold that the documents emanating from the applicant are privileged and confidential and confidential and it does not lie in the mouth of the respondents to say that we have obtained documents belonging to the applicant which is confidential and privileged and which is also prejudicial to the interest of the applicant, nevertheless we are bound to use them.***
>
> ***Plainly such conduct is in contravention of the law and a party cannot be allowed to use a benefit which he obtained in contravention of the law "***

The AG prays for the orders sought.

14. The application is opposed by the Petitioners in Petition 244 of 2014, who filed an affidavit deposed by Hon. Justice Philip K. Tunoi, in reply, and also filed written submissions. The gist of his reply is that the AG is a member of the 1st Respondent and was involved with the issue of retirement of the Petitioners even prior to the commencement of this Petition. He also deposes that the AG did in fact, present to the 1st Respondent a purported 'opinion' marked as **PKT-1** dated 12th March, 2014, which opinion influenced the ultimate decision taken by the 1st Respondent in relation to this Petition. According to the deponent, the AG took a partisan position in the opinion which cannot be viewed as a scholarly analysis of the issues in dispute but rather as a defence to the action which was contemplated at the time.

15. With regard to Petition No.495 of 2014, the Petitioners additionally contend that there are matters peculiar only to that petition, including: that the Petitioner therein has challenged the decision made by the Judges and Magistrates Vetting Board which found the Petitioner unsuitable to serve as a Judge of the High Court; that the AG is named in the Petition as the 3rd Respondent; and that Orders are sought by the Petitioner against the AG. It was submitted that none of the foregoing matters are subject of Petition No 244 of 2014 to which the AG seeks to be enjoined.

16. The Petitioners contend that it is erroneous for the AG to justify his admission as *amicus curiae* in this Petition on the basis of being a Respondent in Petition No.495 of 2014. To the contrary, being a Respondent in Petition No.495 of 2014 reveals the partisan position that the AG must take in that Petition and in Petition No. 244 of 2014 herein. It was further contended: that the application by the AG was not made timeously and no explanation for the delay has been tendered; that the AG has demonstrated bias against the Petitioners; that the proceedings are adversarial and the AG has not demonstrated the nature of assistance he shall provide which the parties are not able to tender; and that at best, the AG shall repeat the defences and arguments advanced by the Respondents.

17. The Petitioners submit that on the authority of **RAILA ODINGA –VS- IEBC & OTHERS (*supra*)**, the Supreme Court held that:-

> ***"… in adversarial proceedings, if a party alleges a proposed applicant for Amicus Curiae is biased or hostile to one or more of parties or where the Applicant through previous conduct appears to be partisan on the issue before the court, then we must consider such an objection seriously."***

18. The Petitioners conclude by asserting that the application was filed late and the inordinate delay is not explained; and that there being manifest bias on account of the opinion alluded to, if the AG is admitted as *Amicus*, he will repeat same arguments contained in the Respondent's arguments. The Petitioners thus seek that the motion be dismissed.

19. The 1st and 2nd respondents in Petition No 495 of 2014 support the AG's application on the grounds that there is already a consolidating order in that Petition in which the AG is a party. As such, it would be convenient and in order for the AG to be enjoined in Petition No. 244 of 2014. Further, they argue that the issues in Petition Nos. 244 of 2014 and 495 of 2014 are largely the same. In those circumstances, it was submitted, the court can enjoin any party on its own motion under **Rule 5(d)** of the **Mutunga Rules**.

20. The Petitioner in Petition No 495 of 2014 opposes the motion, principally on the ground that the AG will be partisan. He submits that since the two petitions are consolidated and the AG is a party in Petition No 495 of 2014, the *amicus* application is misplaced. The AG should instead be admitted as a respondent.

Analysis and Determination

21. In our view, the following issues arise on this application:-

1. Whether the AG has met the threshold to be admitted as *Amicus Curiae* in the circumstances of the case?
2. What is the appropriate order in the circumstances of the instant matter?

22. **Rule 2** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules (Mutunga Rules)** defines ***'a friend of the court '***as:

> ***"…. an independent and impartial expert on an issue which is the subject of proceedings but is not party to the case and serves to benefit the court with their expertise.***"

23. The Supreme Court, when presented with a similar application by the AG in **RAILA ODINGA & OTHERS –VS- INDEPENDENT ELECTORAL AND BOUNDARIES COMMISSION & 3 OTHERS (2013) e KLR**, observed that:

> "**a)**.***The Chief Officer of the state Law Office who was the Attorney General was the custodian of the legal instruments of the Executive Arm of Government and the recognised advisor of the state in matters of Public interest.***
>
> ***b). The Attorney General's office was the main player in the performance of the Executive's role vis-a-vis the operationalization of the Constitution.***
>
> ***c). The Constitution had expressly provided that in certain instances, the Attorney General may obtain the court's permission to appear as amicus curiae.***
>
> ***d) The court, which was the custodian of the rules of validity, propriety and fair play under the Constitution and the law, remained in charge in regulating such precise role as the Attorney General may play if admitted as amicus curiae. "***

24. It is not in doubt that for an applicant to fit into the shoes of *amicus curiae*, one should be possessed of or demonstrate expertise in the area of controversy. This was observed by the court in the case of **JUDICIAL SERVICE COMMISSION –VS- SPEAKER OF THE NATIONAL ASSEMBLY & ANOTHER, Petition No.518 of 2013**, where it was held that:

> ***"Amicus Curiae …. is defined as 'an expert on an issue which is the subject matter of***

proceedings but is not party to the case and serves to benefit the court with their expertise'. Amicus curiae is therefore a person who shows that he is possessed of some expertise relevant to the matters for determination before the court. Such a person as is expected of experts is required to be non-partisan and his role is meant to enable the court get a clear picture of the issues in dispute in order for the court to arrive at an informed and just decision."

25. The AG's contention is that it is a fundamental duty of the state and every state organ to observe, respect, protect, promote and fulfil the rights and fundamental freedoms as provided for under **Article 21 (1)** of the **Constitution**. Thus, with the State bearing such weighty obligations under the Bill of Rights, it is imperative that the AG who has the mandate to represent the State in court pursuant to **Article 156 (4)** assists the court in the determination of this matter. **Article 156(4) of the Constitution** provides that:

"The Attorney General shall have authority, with the leave of the court to appear as a friend of the court in any civil proceedings to which the Government is not a party."

26. It is of import that the AG is defined as the principal legal adviser to the Government and, under **Article 156(4)**, he represents the national government in court or in any other legal proceedings to which the national government is a party, other than criminal proceedings. Further, under **Section 5 (1) (a)** and **(b)** of the **Office of the Attorney General Act, 2012**, the AG is responsible for:

"(a) advising Government Ministries, Departments, Constitutional Commissions and State Corporations on legislative and other legal matters.

(b) advising the Government on all matters relating to the Constitution…human rights…"

In addition, under **Section 6 (2)(a)** of the same Act, the AG is empowered:

"with leave of the court or tribunal to appear at any stage of proceedings, appeal, execution or any incidental proceedings before any court or tribunal;"

27. Also of great import, is **Section 7 (1)** of the same Act which further stipulates the broad and unlimited scope of the AG's power of representation and right of audience in respect of matters of state, and in particular, in relation to the three arms of government. That provision states :

"Despite the provisions of any written law to the contrary or in absence of any other written law, the <u>Attorney General shall have the right of audience in proceedings of any suit or inquiry</u> in any administrative body which the Attorney General considers:

a. ***To be of public interest or involves public property or***
b. ***To involve the legislature, <u>the Judiciary</u> or an independent department or agency of the government."*** *(underlining added)*

28. The 2nd Respondent in this matter is the Judiciary. Even if we do not consider it appropriate to enjoin the AG as *amicus curiae*, it is argued, then we should consider that the AG, being the principal legal adviser to the government and in representing the national government in court, also normatively represents the Judiciary which is an arm of government.

29. **Section 2(3) of the Government Proceedings Act** which was pointed out to us provides that:

"Any reference in part IV or Part V of this Act to civil Proceedings by or against the Government, or to civil proceedings to which the Government is a party, shall be construed to include a reference to civil proceedings to which the Attorney General, or any Government department, or any officer of the Government as such, is a party."

30. We are in agreement that the AG is the constitutional and normative legal adviser and representative of the Judiciary as an arm of government. This is a position that is beyond contention, and cannot be opposed with any seriousness when due consideration is taken of the constitutional and statutory provisions concerning the roles, responsibilities and rights or entitlements to audience of the AG. When due note of all such provisions as stated above is taken, the inevitable conclusion is that the AG is in a special representative position in respect of all matters that involve the Constitution and the three arms of government.

31. The AG has raised objection to the admissibility of the letter dated 12.3.2014, annexed to Hon. Justice Tunoi's affidavit, on the grounds that the same was marked **"Confidential"** and the Petitioners have neither disclosed its source nor commented on the Attorney General's submissions and reliance on the **BASELINE CASE** (supra). We adopt the reasoning in the BASELINE case and hold that the said letter cannot be admitted on the basis of that authority.

32. Notwithstanding the foregoing, there is sufficient material that in the circumstances of this case renders the AG partisan. The National Government is sued in the matter via the Judiciary, the 2nd Respondent, which is one of its arms of Government. By virtue of **Article 156(4)(b)** of the **Constitution,** the Attorney General is expected to represent the Judiciary in the matter. The mandate is further extended under **section 5(1)(i)** of the **Office of the Attorney General Act** which mandates the AG to represent the National Government in civil and constitutional matters in accordance with the **Government Proceedings Act Cap.40.**

33. We note, and it is not disputed, that the issue of retirement of judges shall affect the consolidated fund administration under **Article 160(3**) which is managed by the National Government. We also note that the AG is already a party in Petition No 495 of 2014 which is presently consolidated with Petition No. 244 of 2014.

34. Given all the foregoing and our view that the AG is likely to be or to be seen to be partisan, we find that his application for enjoinment *as Amicus Curiae* does not meet the criteria for *Amicus* in the instant petition. However, we do see the inherent necessity for the AG to have audience in these proceedings, and shall deal with that point whilst considering the next application, to which we now turn.

Notice of Motion dated 16th March, 2015, by the Petitioners in Petition 244 of 2014

35. The Petitioners in Petition No. 244 of 2014 filed this Notice of Motion seeking the vacation of the directions given by the Chief Justice on 24th February 2015 in Petition No 244 of 2014, and on the 25th February 2015 in Petition No 495 of 2014. The directions are on appointment of a bench to hear the Petition, and on consolidation and the expeditious hearing of the Petitions.

36. The directions of the Chief Justice which are sought to be impugned in this application are as follows:

In Petition No 244 of 2014 dated 24th February, 2015, directions that –

> ***" (i). The petition will be heard by a 5 Judge bench comprising of Mwongo PJ (Presiding); Kimaru J; Meoli J; Ong'undi J and Kariuki J.***
>
> ***(ii). The Petition will be heard on a priority basis and on two consecutive dates not later than March 26, 2015;***
>
> ***(iii). Judgment on the petition should be delivered on or before April 30, 2015"***

In Petition No 495 of 2014 dated 25th February, 2015, the directions are **–**

"(i). The petition will be consolidated with Petition 244 of 2014 and heard by the 5 judge bench already constituted to hear Petition 244 of 2014;

(ii). Directions given under Petition 244 of 2014 will also apply to this petition"

37. The Petitioners' application is premised on the following grounds, namely:

"1. The Constitution has been contravened by the said directions and the making thereof and/or is threatened; and

2 The Petitioners rights and fundamental freedoms under the Bill of Rights have been denied, violated, infringed and or threatened.

3. The directions given on 25th February 2015 in the High Court Petition No.495 of 2014, Justice Leonard Njagi vs. Judicial Service Commission & 2 Others that; the said Petition (i.e No 495 of 2014) be consolidated into this Petition, be declared not binding in this Petition and be expunged from the record of this Petition by reason that, no such directions has been made in this Petition;

4. Directions made in other proceedings to which the Petitioners herein are not party do not bind the Petitioners.

5. Directions made in other proceedings in which the Petitioners herein were neither heard nor afforded any or any real opportunity to be represented, do not bind the Petitioners;

6 The Constitution has been contravened by the said direction and in giving thereof and or is threatened; and

7. The Petitioners rights and/or fundamental freedoms under the Bill of Rights have been denied, violated, infringed and/or threatened."

Petitioners' Case

38. Mr. Nowrojee and Mr. Ngatia on behalf of the petitioners and in support of the application urged that the Chief Justice does not have jurisdiction under **Article 165(4)** to issue the directions that he did. These are the directions issued after constituting the bench, whose effect is to micromanage the case including directions stating the date of issuance of judgment. Mr. Nowrojee argued that such jurisdiction cannot be conferred by invoking overriding jurisdiction or inherent power.

39. It was further argued that the Chief Justice, acting in his administrative capacity, could not make judicial decisions such as consolidation and case management, as these are provided for under **Rule 17** of the **Constitution of Kenya (Protection of Rights and Fundamental Freedoms) Practice and Procedure Rules, 2013**. In this regard, it was argued that the **Rules** state that the court may on its own motion consolidate several petitions. However, such power is vested by the Chief Justice on the court hearing the petition at the hearing stage and not at the stage of assignment of a bench by the Chief Justice. On this point, it was further submitted that since **Rule 37** of the **Mutunga Rules** vests in the Chief Justice power to review the rules, and since the same has not been done since 2013, such powers of consolidation have not been altered to vest in the Chief Justice.

40. It is submitted that contrary to the prayers of the other parties, **Article 159** of the **Constitution** only applies in cases of interpretation and only when there is ambiguity in words giving rise to possible different interpretations. In this case, it is argued, there are no words under **Article 165(4)** of the **Constitution** that could be interpreted to mean that the Chief Justice can order consolidation or case management. It was therefore submitted that **Article 165(4)** is unambiguous.

The petitioners thus oppose constructing **Article 165(4)** by adding into it such words as ***"and give such other directions as he (Chief Justice) thinks fit."***

41. It was also Mr. Nowrojee's submission that the directions that go beyond the **Article 165(4)** jurisdiction threaten to violate the provisions under **Article 160(1)** of the **Constitution** on independence of the judiciary. It was thus argued that the Chief Justice was neither acting as an appellate judge to this bench nor was he sitting as a Supreme Court judge. All he was entitled to do in this matter is play his administrative role as "*any other person or authority."* Counsel sought to rely on the case of **UNITED STATES VS. ABD AL RAHIM AL NASHIRI** in which the court held that the exercise of unlawful command influence appeared to unlawfully taint the military judge. According to Mr. Nowrojee, the Chief Justice's administrative command to his juniors is as devastating, since it ultimately has the appearance of unlawful command influence. Accordingly, it was counsel's submission that the taint and appearance of administrative command influence in this case must be removed all together, and that the consolidation of Petition No. 495 of 2014 with Petition No 244 of 2014 be reversed entirely.

42. Counsel placed reliance on **Hood Phillips & Jackson: Constitutional and Administrative Review Law, 8th Edition, at paragraph 31-015** which discusses, *inter alia*, cases where a decision may be quashed not because of the likelihood or reasonable suspicion of bias, but because of the principle that justice may, or has not been seen to be, done. It was urged that, under **Articles 50, 25** and **160(1)** of the **Constitution**, rights on justice must be seen to be done. Mr. Nowrojee pointed out that in this case, the Chief Justice is the Chair of the 1st Respondent and head of the Judiciary, the 2nd Respondent. Thus, it was argued that where a party wears two hats, there is an added need for caution. Whilst the Chief Justice may have acted with the best of intentions, good intentions cannot be effected badly, and where there are errors, such errors would result in a nullity.

43. In reaction to the written submissions raising the argument that the certifying judge opined that the petitions should be heard together, Counsel submitted that what the Judge there said was *obiter dicta* and had no relation to certification under **Article 165(4)**. It was further submitted that Odunga J expressed his opinion on a different date, and no such opinion on Petition No 244 of 2014 had been made. It was therefore argued that the Chief Justice took into account a matter that the parties in Petition No 244 of 2014 were never privy to.

44. On the argument that the petitioners should have filed a petition to challenge the directions by the Chief Justice, it was Mr. Nowrojee's submission that one must apply to the court before which one stands. It was urged that what the petitioners are raising is in fact a question of the jurisdiction of the Chief Justice, which can be raised in any proceeding. Review, it was urged, is a branch of law with entirely different considerations. On this limb, the petitioners sought to rely on **Article 159** of the **Constitution** as well as the overriding objective principles.

45. On prejudice, Counsel argued that the constitutional position is not that one cannot violate a right which has not arisen. Counsel concluded by urging the court to allow the application.

1st & 2nd Respondents' Case

46. Mr. Muite, together with Mr. Issa and Ms. Chepkurui argued the 1st and 2nd Respondents' case. Mr. Muite in his submissions impugned the petitioners' reliance on the **United States** case (*supra*) pointing out that it was based on a newspaper article produced in the ***Miami Herald***. He stated that in the newspaper article cited by the petitioners, the judge in that case was an Air Force Colonel presiding over a military trial in Guatanamo bay and as such, it is not an authority to be relied upon by a constitutional trial presided over by judges of a High Court.

47. It is argued that the Chief Justice exercises powers under **Article 165(4)** and in doing so, reads the Constitution as a whole. Counsel thus submitted that the Constitution ought not to be construed in

a narrow mechanical manner resulting in an unacceptable interpretation. According to counsel, the Chief Justice is supposed to factor in all the other pertinent provisions like **Article 159** and **Article 22** of the **Constitution**. Doing so is not in violation of the Constitution. It is urged, however, that what the Chief Justice cannot do and has not done, is to interfere with the adjudicative discretion of the court. It was submitted that applying the aforementioned provisions in his directions cannot be a violation of any law.

48. Mr. Muite argues that a perception was being created suggesting that the Chief Justice was acting *suo motu* with an end in mind. In seeking to dispel this perception, it is the respondents' case that Odunga J, who heard the application for certification in Petition No. 495 of 2014, stated, *inter alia*, that the two petitions be heard by the same bench. It is further submitted that it is not fair as suggested in one of the petitioners' prayers that to retain the Chief Justice's directions will taint the minds of the judges sitting on the bench through what was referred to as "command influence".

49. According to the Respondents, the Chief Justice's consolidation of the two petitions is desirable given the nature of the matters. Further, it was argued that as long as the directions do not cross the parameters of the administrative nature of the Chief Justice's role and in accordance with **Article 161(2)(a)**, then they cannot be impugned. Senior counsel concluded by urging the court to dismiss the petitioners' application.

The Attorney General's – 3RD Respondent's Case in Petition No. 495 of 2014

50. Mr. Kamunya arguing the case for the AG opposed the application, and associated himself with the sentiments of the respondents. He stated that the petitioners have used a restrictive reading of the law in stating that the Chief Justice can only empanel a bench and cannot issue any other directions. Counsel sought to rely on the case of **ALPHONSE MWANGEMI MUNGA & 10 OTHERS VS. AFRICAN SAFARI CLUB LIMITED [2008] e KLR,** which states as follows:

> ***"the Constitution is the supreme law of the land but it has to be read together with other laws made by Parliament and should not be construed as to be disruptive of other laws in the administration of justice…. "***

Thus, the constitution should be interpreted as a whole, and not restrictively.

51. It was submitted that the Chief Justice is empowered to act under **Article 165(4)** read together with **Articles 159(2)(b) & (d), and 161(2)(a), Section 5** of the **Judicial Service Act, 2012** and **Rule 17 of the Mutunga Rules** on consolidation. Further, that under the **Mutunga Rules**, there are also overriding objectives introduced in **Rule 2** and underpinned by the Constitution. Under **Rule 3(4),** the court is expected to facilitate expeditious conclusion of cases, and **Rule 3(5) (b)** places an obligation on the court to ensure its administrative resources are used prudently. It was also submitted that **Rule 3(8)** reaffirms the court's inherent powers to make such orders as to achieve the ends of justice and prevent the abuse of the court process. Counsel submitted that the petitioners have not stated what prejudice will be occasioned by the directions made by the Chief Justice. Further, that it has not been demonstrated that the petitioners will be unable to prosecute their petition. On this premise, counsel urged the court to dismiss the application.

Petitioner's Case- Hon. Justice Leonard Njagi, Petition No. 495 of 2014

52. Mr. Mwenesi for the Petitioner in Petition No. 495 of 2014 also associated himself with the sentiments of the respondents. He stated in his submissions that the question of who is the Chief Justice **under Article 160** of the Constitution had not been dealt with. It was submitted that under this provision, the Chief Justice is a judge of the Supreme Court and its president. He is also the head of the judiciary, one of the organs petitioned against. It was submitted that the applicants do not take issue with the head of the judiciary exercising his powers under **Article 165(4).** It was further submitted that the Office of the Chief Justice is a special constitutional organ, thus when it

makes decisions, one must proceed against it in the proper manner. Counsel thus submitted that the parties should proceed constitutionally and lawfully. According to counsel, this bench as a product of that organ's decision, cannot be properly asked to review the order of the organ that created it.

53. It was submitted that the petitioners' application states that the discretion contravenes the Constitution. According to counsel, the petitioners should have filed a petition and sought a declaration of nullity or an order to rectify the directions impugned. However, what is before the court is a Notice of Motion in Petition No. 244 of 2014, and it was urged that the same is unconstitutionally before the court. Having not followed the constitutional path to their application, it was submitted that no manifest justice will be seen to be done.

54. It was counsel's submission that, **Rule 4(1)** and **10** of the **Mutunga Rules** do not contravene **Article 159 (2) (e)** as they are made as procedural rules under the **Article 22(3)** of the **Constitution**. Thus, the proper way of bringing to book the alleged violator (the Chief Justice) is to bring him to court through a petition. On this, counsel relied on the case of **EX-CHIEF PETER ODOYO & OTHERS VS. IEBC & 14 OTHERS [2013] E KLR,** in which it is stated that the way to review a constitutional body's orders, is to do so by petition. It was further argued that, even if judicial review was the apt procedure, that would be achievable by originating motion and not by notice of motion as was done in this case. It is therefore the Petitioner's case that the High Court has a broader power of review of administrative action which must be by an originating process and not by interlocutory motion. Counsel thus submitted that constitutional review is not a process for attending to error but for dealing with legality.

55. Mr. Mwenesi submitted that the allegation that the Chief Justice overstepped the bounds of judicial independence is a serious allegation and, as such, there should be a petition against him demonstrating this violation of rights.

56. Counsel also submitted that if there is a question as to the nature of joinder, then the real issue relates to the retirement age of judges appointed prior to year 2010, when the Constitution was promulgated. Further, that under **Rule 5(b)** of the **Mutunga Rules**, a petition shall not be defeated merely by reason of misjoinder. Mr. Mwenesi submitted that since the empanelment of the bench is not in question and the judges have been not asked to recuse themselves, then the court should consider itself entitled and empowered to deal with the substantive questions in the petitions so as to enable the parties know their status on the merits. Thus, if that question affects many judges, it may be better to quickly get into the substance of the matter. Counsel in urging the court to dismiss the application, concluded by stating that this court may guide the Chief Justice on how to act under **Article 165(4)** of the **Constitution**.

Analysis and Determination

57. Having heard the parties and considered the documents and authorities produced, we consider that the primary issue for determination is whether the Chief Justice, in empanelling a bench under **Article 165(4)** of the **Constitution,** can issue further directions and more specifically, directions as to consolidation and case management of various petitions.

58. **Article 161(2) (a)** of the **Constitution** establishes the Office of the Chief Justice, who is the head of the Judiciary. The Chief Justice is also the president of the Supreme Court as enshrined under **Article 163(1) (a)** of the **Constitution**. **Section 5** of the **Judicial Service Act, 2011** sets out the functions of the Chief Justice. These include the exercise by the Chief Justice of judicial and administrative functions as the head of the Judiciary and president of the Supreme Court.

59. The Chief Justice is also empowered by legislation to make rules in the overall administration of justice. One such provision is enshrined under **Article 22(3)** of the **Constitution**, pursuant to which, read together with **Article 165 (3)(b)** of the **Constitution**, the Chief Justice made **The Mutunga Rules.**

60. The Constitution also provides that the aforesaid rules shall satisfy the criteria that the formalities relating to the proceedings, including commencement of the proceedings, are kept to the minimum. In particular, there is provision that the court shall, if necessary, entertain proceedings on the basis of informal documentation. Further, the court, while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. It is important to observe that the court is enjoined under **Article 159** of the **Constitution** to ensure that justice shall be administered expeditiously and without undue regard to procedural technicalities.

61. The overriding objective of the **Mutunga Rules** is to facilitate access to justice for all persons as required under **Article 48** of the **Constitution.** Further, the **Rules** are to be interpreted in accordance with **Article 259 (1)** of the **Constitution,** and shall be applied with a view to advancing and realizing the rights and fundamental freedoms enshrined in the Bill of Rights, and the values and principles in the Constitution. Further to this, the court in exercise of its jurisdiction under the **Rules** is required to facilitate the just, expeditious, proportionate and affordable resolution of all cases. For the purpose of furthering the overriding objectives, the **Rules** provide that the court shall handle matters presented before it to achieve the just determination of the proceedings as well as efficient use of the available and administrative resources.

62. We have earlier on set out the directions issued by the Chief Justice in the petitions herein. It is the Petitioners' case that the Chief Justice, in issuing directions *inter alia* consolidating the two petitions, is not within the powers vested in that office under **Article 165(4)** of the **Constitution**. That **Article** provides that:

> ***"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."***

63. Prior to certifying the matter in Petition No. 495 of 2014 on 13th February, 2015, Odunga J, stated as follows:

> ***"….Since the issues in this petition are similar to the issues in Petition 244 of 2014 which on 12th February, 2015 this court certified under Article 165(4) of the Constitution and referred to the Chief Justice for purposes of empanelling of a bench of uneven number of judges….this petition is transmitted to the Chief Justice for purposes of empanelling the bench which should preferably hear and determine both petitions. Further directions to await the directions of Hon. the Chief Justice."*** [Emphasis supplied]

64. What the petitioners assert and seek is that the Chief Justice's direction consolidating petition No. 244 of 2014 with Petition No. 495 of 2014 should be declared not binding in Petition 244 of 2014, and should thus be expunged from the record. In considering this contention, we are enjoined to keep in mind, in addition to the law, principles of efficiency, effectiveness and expedition. All these must be viewed in the perspective of the court's powers under **Rule 17** of the **Mutunga Rules**. That **Rule** provides that:

> ***"The Court may on its own motion or on application by any party consolidate several petitions on such terms as it may deem just."*** [emphasis supplied]

65. What is the scope of the Chief Justice's role in appointing a bench under **Article 165(4)**? His express role is, of course, to appoint a bench. We also think that the Chief Justice in his administrative role and as the head of the Judiciary can, where necessary and convenient, issue general directions. For instance, having empaneled a bench, it follows that he may – and that has been the practice – set a mention date before the bench. In this case, the Chief Justice is in the unique position of wearing two hats: as the chair of the 1st Respondent and the head of the 2nd Respondent, and as the assigning or empaneling authority under **Article 165(4)** of the **Constitution.** In such circumstances one may be tempted to agree with the Petitioners'

exhortation that to avoid a perception of undue influence there is need for extra caution when issuing directions that go beyond the appointment of the bench.

66. This is the thrust of the position of the now well established principle articulated in the **THE KING VS. SUSSEX JUSTICES EX.P McCARTHY [1924] 1KB 256,259 where Lord Hewart L.C.J. said:**

> ***" A long line of cases shows that it is not merely of some importance, but is of fundamental importance that justice should not only be done but should manifestly and undoubtedly be seen to be done."***

67. **Rule 17** of the **Mutunga Rules** as set out above, provides for consolidation and states that it is for the *Court* on its own motion or on application by any party to determine the issue of consolidation of several petitions. The courts established under the Constitution are the superior courts and the subordinate courts in which proceedings are instituted. The Rules, however, are applicable only to and specifically identify as courts, the Supreme Court, the Court of Appeal and the High Court in the definitions provision. **Rule 17** falls under **Part III** (**Rules 4** to **19**) of the **Rules** on instituting court proceedings in the High Court.

68. The **Rules** specifically provide that the court may effect consolidation on its own motion, or on application by a party. In this instance, the parties did not make any application for consolidation. Both petitions were before Odunga J, who certified both matters as raising a substantial question of law, but did not consolidate them, save for stating – without determining the point – that the issues in both petitions were similar.

69. **Rule 21** of the **Mutunga Rules,** makes provision for directions for case management where it states:

> ***"(1) In giving directions on the hearing of the case, a Judge may require that parties file and serve written submissions within fourteen days of such directions or such other time as the Judge may direct.***
>
> ***(2) A party who wishes to file further information at any stage of the proceedings may do so with the leave of the Court.***
>
> ***(3) The Court may frame the issues for determination at the hearing and give such directions as are necessary for the expeditious hearing of the case."***

70. From the foregoing it is explicit, and we so determine, that substantive directions are to be issued by the court actually seized of the matter, and not any other 'person' or 'authority'. Directions, when issued, form part of the judicial exercise or the road map in the overall conduct of a matter. In our view, the situation is fraught with danger where the Chief Justice issues directions as to the hearing date or the date when the court ought to render judgment, because this ceases to be an administrative function and can be construed as bordering on interfering in the judicial conduct, or road map, of a matter. In any case, the court seized of the matter is obliged in law to dispose of all matters in an expeditious manner.

71. Having stated as above, we note that the directions issued by the Chief Justice on timelines have not been complied with. For now, only the direction on consolidation remains extant and in issue. The question that arises therefore, is whether the petitions before this court may be consolidated.

72. In determining whether matters can be consolidated in accordance with **Rule 17** of the **Mutunga Rules**, one must look closely at the petitions and the reliefs sought by the parties in the various petitions. The rationale for consolidation of cases was explained by the Supreme Court in the case of **Law Society of Kenya vs. Centre for Human Rights & Democracy & 12 Others [2014] e KLR** where the court held thus:

"The essence of consolidation is to facilitate the efficient and expeditious disposal of disputes, and to provide a framework for a fair and impartial dispensation of justice to the parties…..In the matter at hand, this court would have to be satisfied that the appeals sought to be consolidated turn upon the same or similar issues."

The pleadings in the two petitions before us appear to replicate each other. Gleaning through the reliefs sought in both petitions, we note that the issues raised and reliefs sought by the parties in each petition are identical. To demonstrate this we have set out below the core reliefs in each Petition.

73. Petition 244 of 2014 *inter alia* seeks for orders that:

> *"**C. A Declaration that the retirement age of the Judges who were in service as at the promulgation of the 2010 Constitution namely as at 27th August 2010, is the age of 74 years.***
>
> ***D. An Order of Certiorari to bring into the High Court the decision by Resolution of the Judicial Service Commission made on 24th March 2014 that the retirement age for all Hon. Judges is seventy (70) years, and accordingly all Hon. Judges who were due for retirement having attained the stated retirement age will be issued with notice of retirement, and quash the same."***

74.Petition 495 of 2014 of 2015 *inter alia* seeks for orders that:

> ***"B. A Declaration that the retirement age of the Judges who were in service as at the promulgation of the Constitution of Kenya, 2010 namely as at 27th August 2010, is the age of 74 years.***
>
> ***C. An Order of Certiorari to bring into the High Court the decision by Resolution of the Judicial Service Commission made on 24th March 2014 that the retirement age of all Honourable Judges is seventy (70) years, and accordingly all Honourable Judges who are due for retirement having attained the stated retirement age will be issued with notice of retirement, and quash the same."***

75.From the above, we discern no difference in the overall thrust of the Petitions. Indeed, in his affidavit dated 2nd October, 2014 in support of his Petition, in Petition No. 495 of 2014, the Hon. Mr. Justice Leonard Njagi at paragraph 24 deposed that:

> ***'… I wish to thank my brother judges Honourable Mr. Justice Philip K. Tunoi of the Supreme Court and Honourable Mr. Justice David A. Onyancha and their counsel Mr. Frederick Ngatia for sharing with me and my advocates the wealth of their learning and sharing it freely with us in the preparation of these proceedings. I believe that it was not necessary to reinvent the wheel of justice when my Brother Judges and their counsel had already shown how it is done. We have relied on and copied heavily form (sic) their pleadings.'***

76.In light of the foregoing, we hereby determine that the reliefs sought in the two petitions are similar in that they substantially concern the retirement age of judges appointed in the period prior to the promulgation of the **2010 Constitution**. Accordingly, we conclude that this court can, and should, *suo motu* consolidate the petitions.

77.Mr. Mwenesi argued before this court that the petitioners, in filing the Notice of Motion, are not properly before the court for want of procedural form. However, we consider that the Constitution demands that justice be administered without undue regard to procedural technicalities. In addition, **Article 22(3)** of the **Constitution** provides that formalities relating to the proceedings, including the mode of commencement of the proceedings, are kept to the minimum. Further, the

court while observing the rules of natural justice, shall not be unreasonably restricted by procedural technicalities. On this basis, the argument by Mr. Mwenesi cannot stand.

78. As earlier noted, the timelines directed by the Chief Justice were not adhered to during the proceedings before this court and have been overtaken by events. They thus abated, and the Petitioners' fears should be allayed by the turn of events, as nothing further turns on them.

79. With specific regard to the direction on consolidation, we agree with the Petitioners that it was not within the province of the Chief Justice, in exercise of the jurisdiction under **Article 165(4)** of the **Constitution**, to order consolidation that being a matter reserved for this court in terms of **Rule 17** of the **Mutunga Rules**.

Disposition

80. In conclusion, we thus issue the following orders in respect of the two applications before us:

1. The Notice of Motion dated 5.3.2015 whereby the Attorney General seeks to be enjoined as *Amicus Curiae* is hereby dismissed.
2. In respect of the application for setting aside of the Chief Justice's directions:
    a. the said directions on timelines have been overtaken by effluxion of time and we need say no more thereon; and
    b. the order of consolidation made on 24th February, 2015, has no binding effect on this court.
3. The Court, in exercise of its power under **Rule 17** of the **Mutunga Rules** does, on its own motion consolidate Petition No 244 of 2014 and Petition No 495 of 2014 for hearing and determination.
4. The leading file is Petition No 244 of 2014 and the parties shall appear in the following order:

    Justice Philip K Tunoi……..…….…..…First Petitioner

    Justice David A Onyancha ….…..…….....Second Petitioner

    Justice Leonard Njagi……..…..…….……...Third Petitioner

    Judicial Service Commission…..…..……. First Respondent

    The Judiciary……..... The Second Respondent

    The Attorney General…….……....The Third Respondent

5. In terms of proceeding with the petitions, we deem all pleadings and submissions filed by the parties as properly filed in the consolidated petition.
6. There shall be no orders as to costs.

DATED AND DELIVERED AT NAIROBI THIS 8TH DAY OF MAY 2015

_____

R MWONGO, PJ

_____

W KORIR, J

_____

C MEOLI, J

H ONG'UDI, J

C KARIUKI, J.

In the presence of:

1. _____
2. _____
3. _____
4. _____
5. _____