REPUBLIC OF KENYA

IN THE HIGH COURT OF KENYA

AT NAIROBI

CONSTITUTIONAL & HUMAN RIGHTS DIVISION

PETITION NO. 406 OF 2015

NICHOLAS RANDA OWANO OMBIJA.....PETITIONER

VERSUS

THE JUDGES AND MAGISTRATES VETTING BOARD……RESPONDENT

JUDGMENT

Introduction

1. The Petition herein was filed on 25th September 2015. The Petitioner sought the following declaratory reliefs:

a. ***A declaration that the Respondent's second determination delivered on 21st December, 2012 after its determination of the 10th September, 2012 is unconstitutional.***
b. ***A declaration that the Respondent's determination, in regard to the Petitioner, of the 10th of September 2012 resulting to a tie in vote 4 to 4 was final and the Petitioner has been found SUITABLE to continue serving as a Judge in the Judiciary.***
c. ***A declaration that upon the review application being upheld by the Respondent's decision of 20th March, 2013 the appropriate and legitimate order that the Respondent was constitutionally and statutorily bound to make was that the Petitioner was suitable to serve as a Judge in the Judiciary.***
d. ***A declaration that the Respondent has no authority under the Constitution or any Act of Parliament to order the Petitioner to be vetted afresh.***
e. ***A declaration that the Petitioner's right to fair hearing by the Respondent body as an impartial and independent tribunal has been infringed.***
f. ***A declaration that the Respondent's invitation of the Petitioner for afresh vetting for complaints not previously made within time or at all is in violation of Articles 47 and 50 (1) of the Constitution.***
g. ***The Honourable Court do issue such other orders and give such further directions as it may be fit to meet the ends of justice.***

2. Alongside the Petition, the Petitioner also filed a Notice of Motion. The Notice of Motion sought interlocutory conservatory orders.
3. The statutory life of the Respondent is scheduled to lapse on 31 December 2015. As a case management strategy therefore, I directed that the Petition be fast-tracked and heard as a matter of

urgency to enable the ends of justice to be met. The intermediary application for conservatory orders was consequently deemed spent.

Parties, Background Facts and Relevant Chronology.

Parties

4. The Petitioner is a Judge of the High Court of Kenya. He was appointed to the office of a Judge on 4th October 2001.He has served in various court stations within the Republic of Kenya.
5. The Respondent on the other hand is a body corporate constituted under the Vetting of Judges and Magistrates Act (Cap 8B) Laws of Kenya. The Act was promulgated and the Respondent constituted pursuant to Section 23 of the Sixth Schedule to the Constitution of Kenya 2010.
6. The Respondent's main mandate was and is to ascertain the suitability of judges and magistrates, who were serving as such judges and magistrates as at the time the Constitution was promulgated, to continue serving as judges and magistrates under the new constitutional dispensation.

Background and chronology

7. The Petition's history may be extravagantly traced back to the year 2010.In August of that year the Constitution of Kenya was promulgated.
8. Pursuant to Article 262 as to the transitional and consequential provisions of the Constitution, Section 23 of the Sixth Schedule to the Constitution obligated Parliament to enact legislation setting the mechanisms and procedure for vetting the suitability of all judges and magistrates then holding office. The Respondent was consequently constituted to vet the suitability of the then serving judges and magistrates to continue to serve as judges and magistrates in accordance with the values and principles set out in Articles 10 and 159 of the Constitution.
9. In earnest, the Respondent commenced its task in time but was unable to complete the process within the prescribed time. The time span was extended by Parliament on 14 Dec 2012. It was again extended by Parliament on 10 Jan 2014, for the last time or so stated Parliament.
10. The Petitioner's constitutional and statutory brush with the Respondent dates back to 10th July 2012 when the Respondent served the Petitioner with a Notice to appear alongside a Notice (of Complaints and) to file response. The Petitioner filed his response. Later, in the company of his legal counsel, the Petitioner appeared before the Respondent. The Petitioner was interviewed, in private.
11. A vote was apparently taken by the members of the Respondent on the Petitioner's suitability. The result was a tie: 4 to 4. That was on 10th September 2012. The decision was never pronounced.
12. It is not very clear what truly and really happened. Apparently one member disqualified him/herself from voting. Another voted when she should not have been voting. The Respondent then later regrouped, reconsidered the Petitioner's case , voted again and was ready with a determination on the Petitioner's suitability to serve.
13. On 21st December 2012, the Respondent finally and publicly rendered itself on the suitability of the Petitioner. The verdict was that the Petitioner was unsuitable to continue serving.
14. Timeously, the Petitioner filed a request for review of the Respondent's Determination of 21st December 2012. The request for review was filed on 27th December 2012 pursuant to Section 22(1) of the Vetting of Judges and Magistrates Act (Cap 8B).
15. The Respondent, upon a consideration of the application for review, determined that the proceedings concerning the Petitioner were a nullity. The Respondent found it fit to confirm that the proceedings and happenings leading to the determination of 21st December 2012 were not beyond reproach. The result was that the Petitioner had effectively not been found to be either suitable or unsuitable. There was no determination on the Petitioner. The Respondent had thus not fulfilled its constitutional compulsion. The Respondent in the decision on the request for review stated as much.
16. Fast-forward, and on 18th September 2015 the Respondent served the Petitioner with a Notice to file Response within 10 days for purposes of "*a fresh vetting"*.
17. The Notice of 18th September 2015 prompted this Petition.

Petitioner's Case

18. The Petitioner's case which is predicated upon the background chronologically stated above is that the Respondent is *functus officio*.
19. It was the Petitioner's contention that the Petitioner was vetted and that the Respondent having not made a statement on whether or not the Petitioner was suitable to continue serving, the Petitioner was entitled to be declared suitable to continue serving as a Judge. This was on the basis that the Respondent had treated similar cases as such. The Petitioner contended that the Respondent should have stood by its decision of 10th September 2012.
20. The Petitioner also contended that in not following its own decisions, the decision to have the Petitioner undergo fresh vetting was discriminatory and contrary to Article 27 of the Constitution.
21. Further the Petitioner asserted that the order by the Respondent to have the Petitioner undergo another round of vetting was unconstitutional and illegal as both the Constitution and the Vetting of Judges and Magistrates Act do not provide or allow for fresh vetting.
22. The Petitioner further asserted that in arriving at the decision of 21st September 2012 without giving the Petitioner a hearing, the Respondent violated the Petitioners right to a fair hearing as provided for under Article 50 (1) of the Constitution and also the right to have any dispute determined by an independent and impartial tribunal.
23. The Petitioner also contended that the Respondent in receiving fresh complaints illegally on 11th June 2013 acted in total breach of the principles of fair administrative action as guaranteed under Article 47 of the Constitution.
24. The Petitioner finally contended that the Respondent was partial and had consistently exhibited bias and prejudice against the Petitioner.

Respondent's Case.

25. The Respondent case may be gathered from the Preliminary Objection and the Replying Affidavit of Reuben Chirchir filed on 7th October 2015. The case may be shortly stated as follows.
26. This court lacks the necessary jurisdiction to supervise the Respondent's decision making process pursuant to Section 23 of Schedule 6 to the Constitution.
27. That the Petitioner went through a vetting process, was found unsuitable, applied for review which was allowed and a fresh vetting directed as the previous determination of 21st December 2012 was in the Respondent's view, null and void. In these respects, the Respondent contended that the Respondent properly exercised its jurisdiction. The Respondent further stated that the Respondent had previously adapted the same approach in some cases where requests for review were successful.
28. The Respondent also contended that it was in a position to impartially vet the Petitioner and accord the Petitioner the requisite opportunity to state his case.
29. The Respondent was firm that the Petitioner was yet to be vetted and a final determination made pursuant to the requirements of the law.

Arguments

30. As a way of expeditiously disposing of the Petition, I directed that the objection *in limine* raised by the Respondent as to jurisdiction of the court be argued simultaneously with the merit of the Petition. The issue as to jurisdiction will shortly constitute the first part of my judgment.
31. The Petition was heard by way of oral submissions and affidavit evidence on record for two consecutive days.

Petitioner's submissions

32. The Petitioner filed skeletal written submissions on 19th October 2015.
33. Mr. Wasuna appeared for the Petitioner and advanced the following arguments.
34. Foremost, Mr. Wasuna submitted that the Petitioner was not challenging the process of vetting the Petitioner's suitability. Neither was the Petitioner challenging the determination by the

Respondent on the suitability or otherwise of the Petitioner to continue serving as a Judge of the High Court. Counsel's position was that the point has been settled in the case of **Judges and Magistrates Vetting Board & 2 Others –v- Centre for Human Rights and 11 Others Petition No. 13A of 2013(SCK) (Consolidated) [2014]eKLR** and the court only had jurisdiction to determine whether or not the Respondent had acted or was acting within or outside its mandate under the Vetting of Judges and Magistrates Act. In this regard counsel also referred the court to the case of **Judges and Magistrates Vetting Board –v- Kenya Magistrates and Judges Association & Another , Petition no. 29 of 2014(SCK) [2014] eKLR.**

35. Mr. Wasuna contended that the Respondent had no statutory or constitutional mandate to vet the Petitioner as the time for interviewing (vetting) Judges under both the Constitution and the Vetting of Judges and Magistrates Act had expired. According to counsel no Judge could be vetted after the 28th March 2013 which was the time set originally by Parliament for the completion of both the interviews and any preferred reviews. Counsel referred to Section 23(3) of the Vetting of Judges and Magistrates Act.
36. As regards the Petitioner, counsel stated that the Petitioner was vetted on 30th July 2012 and the public decision delayed until 21st December 2012. The Respondent determined that the Petitioner was unsuitable prompting a request for review by the Petitioner. The review was heard and the Respondent then determined that the Petitioner had to be re-vetted. A decision by the Respondent to re-vet the Petitioner after 28th March 2013 was consequently outside the statutory time frame and would equate an illegality. Counsel submitted that the Petitioner, in view of the time lapse could not be subjected to any additional vetting. Counsel stated that the Respondent was solely to blame for the delay that led to the time lapse and the Respondent ought not be allowed to take advantage of its own lethargy. Counsel insisted that the time frame provided under the statute was mandatory and could not be ignored by the Respondent.
37. Next, Mr. Wasuna submitted that the Respondent was *functus officio*. Counsel submitted that the Respondent had on 10th September 2012 taken a decisive vote on the Petitioner's suitability. That there was a tie of 4:4 amongst the members of the Respondent. On that basis and following the Respondent's own previous decisions, the Petitioner ought to have been declared suitable and that ought to have marked the end of the Petitioner's vetting process. Consequently, the decision of 21st December 2012 was a fraudulent one. The same applied to the subsequent decision on review made on 20th March 2013.
38. Counsel proceeded further to submit that as the decision to re-vet the Petitioner was based on an illegality and based on illegal proceedings, the decision to re-vet could not stand. For this proposition counsel relied upon the case of **McFoy –v- United Africa Ltd [1961] 3 All ER 1169.**
39. Counsel next submitted that the Respondent could not under the relevant law review its own decision. To the Petitioner, review was an avenue only open to a judge or magistrate dissatisfied with the final determination by the Respondent. The judge or magistrate applying for review must also have been found unsuitable as provided for under Section 22 of the Vetting of Judges and Magistrates Act. Counsel wound up by submitting that in purporting to review its own decision of 10th September 2012, the Respondent had acted outside the scope and mandate donated to it by statute.
40. The final submissions by the Petitioner's counsel touched on the question on whether the Respondent could handle fresh complaints, different from or in addition to the original complaints, if the Petitioner was to be re-vetted. Counsel submitted that the Respondent could not. In counsel's view, this was the recluse of the Judicial Service Commission under the Judicial Service Act (Cap 185B) Laws of Kenya . In this regard counsel relied upon the case of **Judges and Magistrates Vetting Board –v- Kenya Magistrates & Judges Association & Another *(supra)*** and added that it was never the intention of the statute or Constitution to allow endless complaints against judges and magistrates.
41. For completeness, Mr. Wasuna submitted that even if the re-vetting process was allowed to proceed the Petitioner was unlikely to be interviewed and judged impartially and fairly by the Respondent as the Respondent had already pre-judged and determined that the Petitioner was unsuitable. In this regard, counsel referred the court to a newspaper article which was published in September 2014.

Respondent's Submission

42. The Respondent's case was urged by Mr. Charles Kanjama.
43. Mr. Kanjama stated that the Respondent relied on both the Replying Affidavit as well as the Preliminary Grounds of objection.
44. For starters, Mr. Kanjama stated that the court lacked the jurisdiction to entertain and adjudicate upon the Petition following the Supreme Court's decisions in **Judges and Magistrates Vetting Board & 2 Others –v- Centre for Human Rights and 11 Others Petition No. 13A of 2013(SCK) (Consolidated) [2014]eKLR** and **Judges and Magistrates Vetting Board –v- Kenya Magistrates & Judges Association & Another , Petition no. 29 of 2014(SCK) [2014] eKLR** as well as the High Court decision in **Justice Jeanne Gacheche & 5 Others –v- Judges and Magistrates Vetting Board & 2 Others High Court JR. Appl No. 295 of 2012 (Consolidated) [2015]eKLR.**
45. Then referring to the case of **The Owners of the Lillian 'S' –v- Caltex Oil Kenya Ltd [1989] KLR 1 ,** Mr. Kanjama stated that the moment the court determined that it lacked jurisdiction the court had to immediately down its tools and effectively that meant the Petition stood to be dismissed. He asked the court to do likewise in the instant case.
46. Mr. Kanjama submitted further that the constitutionality of the process undertaken or being undertaken by the Respondent could not be questioned and that is what the Petitioner was trying to do. Referring to the case of **Dennis Mogambi Mongare –v- Attorney General ,Court of Appeal in Civil Appeal No. 123 of 2012(NBI)**, counsel submitted that the Court of Appeal had settled the law that any process undertaken by the Respondent, including review, was constitutional.
47. Mr. Kanjama then looped in by stating that once the Respondent exercised its jurisdiction under the vetting of Judges and Magistrates Act the decision by the Respondent was not open to question before the High Court and neither could the process be questioned. In this regard counsel referred the court to the decision of the Supreme Court in **Judges and Magistrates Vetting Board & 2 Others –v- Centre for Human Rights and 11 Others Petition No. 13A of 2013(SCK) (Consolidated) [2014]eKLR** where the court noted and held that if the process was questioned then the court's supervisory jurisdiction was being invited and this was itself outlawed by the Constitution.
48. Counsel next submitted that in line with the Supreme Court's decision in **Judges and Magistrates Vetting Board –v- Kenya Magistrates & Judges Association & Another , Petition no. 29 of 2014(SCK) [2014] eKLR**, the Respondent could investigate all misconduct alleged to have taken place prior to 27th August 2010 (the effective date) but not after the effective date. Consequently any fresh complaints could be entertained as the Petitioner had not been vetted with finality.
49. Mr. Kanjama also submitted that the process of ordering a re-vetting following a review request was not novel to the Petitioner. The Respondent had previously adapted a similar approach and the Petitioner's case was not an exception.
50. On the issue as to whether the Respondent was *functus officio*, the Respondent's counsel submitted that once again the Petitioner was questioning a decision already made by the Respondent. Counsel stated that the Petitioner had raised the issue of the Respondent being *functus officio* during the hearing of the request for review and the Respondent had ruled that it was not. Consequently, to raise the issue before the court would be tantamount to an appeal to or review by the court of a decision of the Respondent.
51. The Respondent also asserted that there was nothing legally wrong or unusual in ordering a re-vetting as where a party has the option of appeal or review and opted for either, the tribunal or court in the case of review could always order a retrial or rehearing. Counsel referred the court to the case of **R -v- Bow Street Metropolitan Stipendiary Magistrate and Others ex parte Pinochet Ugarte (No. 2)**.
52. For completeness, counsel submitted that the Petitioner was interviewed and found unsuitable to serve. The Petitioner applied for review. The review determination declared the previous proceedings a nullity and directed fresh vetting. As it were there was no determination on the Petitioner's suitability and come the end of the year the Petitioner would not have transitioned as he would be deemed not to have been vetted and consequently unsuitable to serve.
53. In the Respondent's view, if the Petitioner was to continue serving without a decision on his suitability, it would be contrary to the aspirations of Kenyans who sought to have all judges and

magistrates vetted before continuing to serve.

Petitioner's Rejoinder

54. In a brief response, the Petitioner's counsel reiterated that the Petitioner is not challenging the process of his vetting but rather the scope of the Respondent's mandate in relation to the Petitioner's vetting and especially at the review stage. Counsel posed: "The question is whether the Judges and Magistrates Vetting Board can[at the review stage] go beyond turning a decision from unsuitable to suitable and order a fresh vetting?". Counsel then also reiterated that the Respondent was bound by its decision of 10th September 2012 and could not thereafter change its view and that the decision of 21st December 2012 declaring the Petitioner unsuitable was itself void.
55. On the submissions that time was running out for the Petitioner, the Petitioner's counsel pointed out that the Respondent was the cause of all the delay and could not now cry foul.

Discussion and Determination

56. Having heard counsel and read the Petitioner's written submissions and having also read the pleadings on record, including the Preliminary Objection, I would identify the main issues arising from the Petition as follows:

i. **Has this court the necessary jurisdiction to hear and to determine this Petition. If so;**
ii. **Whether the Respondent's mandate to conduct any proceedings in relation to the Petitioner expired on 28th March 2013.**
iii. **If not, whether the Respondent was *functus officio* as of 10th September 2012 in so far as the Petitioner's vetting is/was concerned.**
iv. **If not, whether the Respondent's mandate to conduct proceedings in relation to the Petitioner was time- barred as of 28th March 2013?**
v. **If not, whether in conducting a review the Respondent has any statutory mandate to order for a re-vetting of the Petitioner.**
vi. **If yes, whether the Respondent could on a re-vetting process accept fresh complaints and require the Petitioners response to such complaints.**
vii. **And,whether in requiring the Petitioner to undergo a re-vetting exercise, the Respondent had discriminated against the Petitioner in violation of Article 27 (1) of the Constitution and also violated the Petitioner's right to fair administrative action pursuant to Article 47 (1) of the Constitution.**

57. The above issues have been framed and adopted largely (but not entirely) from the parties's submissions and the Petition itself. A determination of the first issue however is pertinent.

Jurisdiction or lack thereof

58. There is no doubt that the court always possesses, through the dogma of *Kompetenz-Kompetenz,* the remit to determine its own jurisdiction: see the case of **Rafiki Enterprises Limited –v- Kingsway Tyres & Another CACA No. 375 of 1996 (UR) (unreported)** where the Court of Appeal stated as follows:

> "***Every court has a duty to determine whether or not it has jurisdiction in a particular matter".***

59. When the issue of jurisdiction arises the court must then immediately deal with it at the outset, for the reason that without it the entire proceedings and ultimate rendition are a nullity. As was stated by Nyarangi JA in the case of **The Owners of the Lillian 'S' –v- Caltex Oil Kenya Ltd [1989] KLR 1, 14.**

> ***"Jurisdiction is everything. Without it a court has no power to make one step, where a court has no jurisdiction there would be no basis for a continuation of proceedings pending other evidence and a court of law down its tools, in respect of the matter before it, the moment if holds the opinion that it is without jurisdiction".***

60. The principle behind those immortal and invincible words of Nyarangi JA were further expounded by Ojwang J (as he then was) in **Boniface Waweru –v- Mary Njeri & another Misc. Appl. No. 639 of 2005** when he stated that:

> ***"Jurisdiction is the first test in the legal authority of a court or tribunal and its absence disqualifies the court or tribunal from determining the question".***

61. I am certainly bound by such unassailable finding and reasoning. I am guided accordingly.
62. For starters, the epistemology or 'jurisdiction' has been variously dealt with by this court as well as other courts of a higher hierarchy. Most recently in the cases of **Fazleabbas Mohammed Chandoo –v- A.I. Hussein & 4 Others NBI HCCP No. 374 of 2015 [2015] eKLR** and **Patrick Musimba –v- National Land Commission & 4 Others [2015] eKLR** the court held that the extent of the jurisdiction of a court is basically to be discerned from the instrument creating the court.
63. In **Patrick Musimba –v- National Land Commission & 4 Others (*Supra*)** the court considered the term 'jurisdiction' and its converse appellation "the court has no jurisdiction". The court reviewed the holdings and statements in the cases of **Guaranty Trust Co. of New York –v- Hannay & Co [1915] 2 K B 536, Garthwaite –v- Garthwaite [1964] 2 ALL ER 233, The Lillian S [1989] KLR 1, Wachira –v- Ndanjeru [1986 -89] 1 EA 577, Samuel Kamau Macharia –v- Kenya Commercial Bank & 2 Others [2012] eKLR, Africog –v- Ahmed Isaack Hassan & Another [2013] eKLR** and **Seven Seas Technologies Ltd –v- Erick Chege [2014] e KLR.** The court in **Patrick Musimba v National Land Commission & 4 Others *(supra)*** also considered various treatises including John Beecroft Saunder's **Words & Phrases Legally Defined vol. 3**, **Halsbury's Laws of England 4th Ed. Vol. 9** and **Mullahs Code of Civil Procedure 12th Ed** and came to the finding that:

> ***"[47]…Put very shortly ….in its strict sense the "jurisdiction" of a court refers to the matters the court as an organ not an individual is competent to deal with and reliefs it is capable of granting. Courts are competent to deal with matters that the instrument, be it the Constitution or a piece of legislation, creating them empowers them to deal with. Such jurisdiction may be limited expressly or impliedly by the instrument creating the court...".***

64. The court then held that with regard to the High Court

> ***"[50] … the jurisdiction of the High Court is unlimited save only as limited by the Constitution".***

65. There is certainly no doubt that the High Court has an unlimited jurisdiction and especially in matters outlined under Article 165 (3) (d) of the Constitution. The clause grants this court the jurisdiction to hear any question regarding the interpretation of the Constitution including determination of the question whether anything said to be done under the authority of the Constitution or any law is inconsistent with or in contravention of the Constitution. Article 165 (3) (d) is relatively clear and there would be no need to delve further. The court is under a duty to ensure that any act done or said to be done pursuant to the provisions of the Constitution are truly constitutional and legal.
66. However due to the submissions made on the Preliminary point of law taken as to jurisdiction and in particular that there is a clawback to this Court's jurisdiction under Section 23 of the Sixth Schedule to the Constitution as confirmed by the Supreme Court of Kenya recently, it would be important to address this Court's remit vis-a-vis the Respondent.

The Judges and Magistrates Vetting Board and the High Court's remit

67. History reveals that question as to whether the High Court has supervisory jurisdiction over the Judges and Magistrates Vetting Board is not a novel one in judicial discourse.
68. The litigation involving or challenging the Respondent its process and its constitutionality all started with the case of **Dennis Mogambi Mongare –v- Attorney General & 2 Others NBI HCCP No. 146 of 2011.** The Petitioners in the case contested the constitutionality of Section 23 of the Sixth Schedule ("*the ouster clause*"). The ouster clause provides that the removal or a process leading to the removal of a Judge from office by the Respondent is not subject to question in or review by any court. The High Court **in Dennis Mogambi Mongare –v- Attorney General & 2 Others (*Supra*)** held that the ouster clause did not conflict with the provisions of the Constitution. It was also held that various sections of the Vetting Judges and Magistrates Act which echoed the ouster clause were valid.
69. The High Court's decision in **Dennis Mogambi Mongare –v- Attorney General (*Supra*)** was later affirmed and upheld by the Court of Appeal (in Civil Appeal No. 123 of 2012) when the Court of Appeal also affirmed that the Constitution had through the ouster clause shut out the possibility of any appeal by a dissatisfied Judge to the higher court.
70. Thereafter followed a plethora of cases challenging the Respondent, its mandate as well as processes.
71. Perhaps of relevance to the instant Petition are the three decisions I was referred to by both the Petitioner and the Respondent.
72. The decisions are **Judges and Magistrates Vetting Board & 2 Others –v- Centre for Human Rights and 11 Others (SCK) Petition no. 13A of 2013 (Consolidated) [2014] e KLR** (**hereinafter "JMVB-1"**), **Judges and Magistrates Vetting Board –v- Kenya Magistrates & Judges Association & Another (SCK) Petition No. 29 of [2014]eKLR** (**"JMVB2"**) and **Justice Jeanne Gacheche & 5 Others –v- Judges and Magistrates Vetting Board & 2 Others High Court JR. No. 295 of 2012 (Consolidated) [2015]eKLR** (**"JMVB-3"**). All the three cases touched on the interpretation of the ouster clause. **JMVB-1** and **JMVB-2** originated from the High Court and wound up in the Supreme Court. **JMVB-3** is a decision of the High Court.

JMVB-1- Setting the pace and limiting the remit

73. **JMVB-1** involved a question of whether the High Courts remit was limited by the ouster clause and whether the High Court had supervisory jurisdiction over the Respondent. A five judge bench of the High Court, constituted pursuant to Article 165 (4) of the Constitution, held that the court's remit under Article 165 could not be taken away. An appeal was preferred to the Court of Appeal.
74. The Court of Appeal held that the non-derogable right to fair trial under Article 50 as read together with Article 25 of the Constitution meant that the remit of the High Court under Article 165 could not be ousted. The decision in the Court of Appeal was a majority decisions upholding the High Court decision.
75. Another appeal was preferred against the majority decision to the Supreme Court.
76. Again the question before the Supreme Court was whether the High Court had jurisdiction to review decisions of the Respondent despite the ouster clause. The Supreme Court held that courts had no jurisdiction to entertain challenges to proceedings conducted by the Respondent or the outcome rendered by the Respondent.
77. The Supreme Court stated as follows:

> ***"[200] We find that neither the High Court's Ruling of 30th October, 2012 nor the Court of Appeal's decision of 18th December, 2013 achieved clarity as to the relationship between the Courts' jurisdiction, on the one hand, and the jurisdiction of the Judges and Magistrates Vetting Board, on the other hand. We would clarify that by the terms of the Constitution itself, the High Court's general supervisory powers over quasi-judicial agencies, and its mandate in the safeguarding of the fundamental rights and freedoms of the Constitution, by no means qualify the ouster clause which reserves to the Judges and Magistrates Vetting Board the exclusive mandate of determining the suitability of a Judge or***

Magistrate in service as at the date of promulgation of the Constitution, to continue in service. The basis of the said ouster clause is found in the history attending the Constitution; in the requirement of the Constitution for essential transitional arrangements; and in the express terms of the Constitution, by virtue of which the Vetting Board was established to determine the suitability of certain judicial officers, for the purposes of the values and principles declared in the Constitution itself.

[201] The intent of the Constitution is to be safeguarded by the High Court, even when that Court acts within its supervisory remit in relation to quasi-judicial bodies, with the recognition that a holistic interpretation of the Constitution requires the fulfillment of its transitional provisions, such as those relating to the vetting process for Judges and Magistrates.

[202] For the avoidance of doubt, and in the terms of Section 23(2) of the Sixth Schedule to the Constitution, <u>it is our finding that none of the Superior Courts has the jurisdiction to review the process or outcome attendant upon the operation of the Judges and Magistrates Vetting Board</u> by virtue of the Constitution, and the Vetting of Judges and Magistrates Act." *(emphasis)*

JMVB-2: The remit is mystified

78. The decision in **JMVB-2** was handed down by the Supreme Court one and a half months after the decision in **JMVB-1**. The Supreme Court , it may be argued, now ruled that the superior courts meaning the High Court, the Court of Appeal and the Supreme Court itself, had jurisdiction to deal with issues around the interpretation and application of the Constitution with respect to the mandate of the Respondent.
79. While restating the position in **JMVB-1** that the removal of a Judge or the process leading to such removal by virtue of the operations of the Respondent could not be questioned in any court of law expressed itself as follows:

''[40] In other words, this Court consciously articulated the state of the law, in accordance with the Constitution: the removal of a Judge or Magistrate, or a process leading to such removal by virtue of the operation of the Judges and Magistrates Vetting Act by the Vetting Board, cannot be questioned in any court of law. That remains the valid position, under the law.

[41] Today this Court, is faced with a different question<u>: whether the Judges and Magistrates Vetting Board, in execution of its mandate as stipulated in Section 23 of the Sixth Schedule to the Constitution of 2010, can investigate the conduct of Judges and Magistrates who were in office on the effective date, on the basis of alleged acts and omissions arising after the effective date.</u>

[42] …

[43] We do not see how our decision in JMVB (1), which was responding to a different question, can deprive this Court of its jurisdiction to interpret and apply the Constitution, in conformity with Article 163 (4) (a) thereof.

[44] Learned counsel, Mr. Rao was well aware of the jurisdictional position when he submitted thus:

> ***"Today's case is different; it is not about individual vetting decisions. It is about a mandate itself. What is at stake in this case is fidelity in the interpretation of that mandate and giving true and accurate effect to the Constitutional and Legislative***

provisions that define it."

> ***[45] We have no hesitation in finding that this appeal is properly before us, and that this Court has jurisdiction in every respect, to determine the issue. In this regard, we are unconvinced by the submissions of learned counsel, Mr Kanjama to the contrary. To decline to determine the question as framed, on the basis of an unsubstantiated claim of lack of jurisdiction, would defeat the vetting process, notwithstanding the clear terms of the Constitution.***
>
> ***[46] …***
>
> ***[47] …***
>
> ***[48] The historical context and rationale of the vetting process have been fully considered by this Court in JMVB (1). What remains to be clarified in light of the main issue before us, is the extent and reach of that vetting process. How far back, and how far ahead, can the Vetting Board go in determining the suitability of Judges and Magistrates who were in office to continue to serve? This, in our view, is the essence of the issue before us. To it may be added the ancillary, yet equally important question, for how long?***
>
> ***[49] …***
>
> ***[63] We find and hold that the Judges and Magistrates Vetting Board, in execution of its mandate as stipulated in Section 23 of the Sixth Schedule to the Constitution of 2010, can only investigate the conduct of Judges and Magistrates who were in office on the effective date on the basis of alleged acts and omissions arising before the effective date, and not after the effective date. To hold otherwise would not only defeat the transitional nature of the vetting process, but would transform the Board into something akin to what Lord Mersey once called "an unruly dog which, if not securely chained to its own kennel, is prone to wander into places where it ought not to be" (Lord Mersey in G & C Kreglinger v. New Patagonia Meat & Cold Storage Co. Ltd (1913). Lord Mersey used the analogy of "a dog" to refer to the "Equity of Redemption" in the law of mortgages. Here, we use it to refer to "a jurisdictional mandate" within our constitutional set-up; and not, the Board per se.***

80. My understanding of the two decisions, which the Supreme Court itself laboriously twinged to explain especially in **JMVB-2** ,is that in matters touching on the process adopted by the Respondent as well as decisions by the Respondent, this court has no jurisdiction. But in matters where the jurisdictional mandate of the Respondent is exceeded then this court may intervene just the same way the Supreme Court intervened in **JMVB-2**. My further understanding of both **JMVB-1** and **JMVB-2** is that the Supreme Court stated that it did not have and neither did both the High Court and the Court of Appeal have the jurisdiction to invoke its general supervisory jurisdiction in order to safeguard any fundamental rights and freedoms. The reasoning is that in such cases, as to fundamental rights, the court would have to interrogate the Respondent's process and the Supreme Court has already made itself clear that this court lacks the remit to vet the Respondent's process.

JMVB-3: All Challenges are exorcised

81. The issue of the two decisions in **JMVB-1** and **JMVB-2** was discussed by this court in **JMVB-3**.
82. The decision in **JMVB-3** was prompted by the Supreme Court. The Supreme Court in **JMVB-1** directed the High Court do deal with all pending cases challenging the Respondent's process or outcome in accordance with the decisions in **JMVB-1**.
83. In **JMVB-3**, no less than five Petitioners were lumped together by this court. Arguments were

heard on the effect of **JMVB-1**. Arguments were heard on the alleged conflict between **JMVB-1** and **JMVB-2**. Arguments were heard on the doctrines of precedent and *stare decisis*. Arguments were even heard on the validity of the **JMVB-1**.

84. Ultimately the court in **JMVB-3** found and held that **JMVB-1** was valid and binding. That even if there was any conflict between **JMVB-1** and **JMVB-2** the High Court was bound by the Supreme Court's decision in **JMVB-1**. The supervisory jurisdiction of this court had to be put in abeyance when it came to the processes and decisions of the Respondent. The court then proceeded to strike out all the Petitions consolidated in **JMVB-3** for want of jurisdiction. All the cases contesting the Respondent's process, jurisdiction, merit or competence were all dismissed. The challenges had been exorcised.
85. Then along, came this Petition.
86. I am not bound to follow **JMVB-3**. I am however bound by the decisions of the Supreme Court in **JMVB-1** and **JMVB-2** not just because of the twin doctrines of stare decisis and precedent but also because of Article 163(7) of the Constitution. Article 163(7) which reads as follows.

> ***"163(7). All courts, other than the Supreme Court are bound by the decisions of the Supreme Court".***

87. The Supreme Court has made it clear in **JMVB-1** that the court cannot entertain challenges on alleged lack of jurisdiction or merit on the part of the Respondent. The Supreme Court has also made it clear that any question as to the Respondent's competence to determine the suitability of a Judge or Magistrate to continue in service may not be questioned by the court. Finally, the Supreme Court has also made it clear that any contest as to the process and or outcome thereof for determining the suitability of a Judge to continue in service is not to be questioned.
88. I am duly guided and bound even if I was to hold the view that the Supreme Court's decision in **JMVB-1** was erroneous: see **Dodhia –v- National & Grindlays Bank [1970] 1 E A 195, Mohamed –v- Bahati & Others [2005] 2 E A 213, Actavis UK Ltd-v- Merck & Co Inc [2009] 1 WLR 186.** With unfeigned respect to the Supreme Court, I must however point out that the binding nature of the court's decision does not necessarily mean that I am in agreement. I say so because it is apparent that in **JMVB-2** the Supreme Court appreciated that the Respondent cannot be allowed to act and wander like the unruly dog.
89. I must consequently ascertain if the issues raised by the Petitioner relate to the process and or decision of the Respondent as such.

Functus Officio

90. The Petitioner first contended that the Respondent was *functus officio* after the 10th September 2012.
91. This issue pre-occupied the parties.
92. The Petitioner contended that the Respondent had after 10th September 2012 no authority to determine any matter attendant on the vetting of the Petitioner. The Respondent contended that the vetting of the Petitioner has never been finalized. The version of the facts leading to 10th September 2012 was largely not contested by the Respondent. The Respondent however stated that the internal discussions and proceedings of the Respondent leading to any adjudication were a "private affair" to which the Petitioner was not privy. The Respondent also asserted that the Petitioner had previously challenged the Respondent on this point and the Respondent had ruled that the Respondent was not *functus officio*. That was in the determination of the request for review made by the Petitioner.
93. The concept of "*functus officio*" as understood in law is relatively simple. Functus officio is a latin phrase meaning "*having performed his or her office"*. With regard to an officer or an official body it means without further authority or legal competence because duties and functious have been fully accomplished: see **Black's Law Dictionary 9th Ed Page 696** as well as the 1863 United States of America case of **Bayne –v- Morris 68 US 97.**
94. For the doctrine to apply there must have been a final decision. The Supreme Court of Kenya has re-affirmed the position of this concept when in **Raila Odinga & 2 Others –v- IEBC & 3 Others [2013] eKLR (**of functus officio) it relied on the holding in the case of **Jersey Evening Post Ltd**

–v- A. Thani [2002] JLR 542 .

95. In **Jersey Evening Post Ltd v A Thani (supra)** at page 550 it was stated that:

> "***a court is functus when it has performed all its duties in a particular case. The doctrine does not prevent a court from correcting errors nor does it prevent a judicial change of mind even when a decision has been communicated to the parties. Proceedings are only fully concluded and the court functus when its judgment or order has been perfected. The purpose of the doctrine is to provide finality. Once proceedings are finally concluded the court cannot review or alter its decision; any challenge to its ruling on adjudication must be taken to a higher court if that right is available.*** (emphasis)

The court emphasized that the Judgment or decision must be perfected. It must also be final.

96. Local decisions are also to the same effect. In **Kamundi –v- Republic [1973] EA 540** the court had to answer the question as to when a court becomes *functus officio.* The Court of Appeal stated that it does so when it finally makes an order disposing of the case. And for the decision or order to be binding upon the court and the parties it must be pronounced: see **Mapalala –v- British Broadcasting Corporation [2002] 1 EA 132.**

97. Its apparent to me that the issue as to whether the Respondent in this Petition became functus involves a question of process as well as decision. Documents on record which I have read reveal that the Respondent adopted a particular procedure or process on 10th September 2012 and shortly thereafter. A decision was made on how to proceed.

98. Besides, on 20th March 2013 the Respondent in reaction to a challenge by the Petitioner that the Respondent was *functus officio,* also returned the verdict that the Respondent was not yet functus officio. It would amount to a challenge or an appeal against that decision.

99. The Supreme Court stated in **JMVB-1** that processes and decisions of the Respondent are not open to challenge before this court. It may be true that the Respondent did not behave in a favorable manner to the Petitioner as stated and alleged by the Petitioner but my hands are tied and I cannot interrogate the process as well as reasons behind the happenings after 10th September 2012.

100. I decline consequently to answer the question as to whether or not the Respondent could after 10th September 2012 hear or rehear or reopen or even review the Petitioner's case. I also decline to answer the specific question whether the Respondent was *functus officio* as of 10th September 2012.

To re-vet or not to re-vet

101. The Petitioner also questioned the Respondent's mandate to order for a re-vetting of Petitioner. I view this as a process adopted towards ascertaining the Petitioner's suitability. The parties were in agreement that it is a process the Respondent has adopted previously. As any process adopted or followed by the Respondent may not be questioned by any party before this court, I cannot entertain or determine that issue.

102. That applies to the related questions as to whether the Respondent in ordering for the Petitioner's re-vetting violated the Petitioner's right to fair administrative action under Article 47 of the Constitution. To answer this question, I would have to make a minute inquiry and investigation into the process. This court has no jurisdiction in that regard.

An issue of time lapse

103. The Petitioner also questioned the Respondent's competence to vet the Petitioner or any Judge for that matter after the 28th March 2013. The Petitioner relied upon Section 23(3) of the Vetting of Judges and Magistrates Act (Cap 8B). Section 23(3) of the Cap 8B deals with the time frame.

104. The Respondent's period for vetting the judges and senior magistrates was limited by statute.

Vetting is expected to come to an end on 31st December 2015.

105. The Supreme Court in **JMVB-1** had occasion to address this issue. It considered and reviewed the various amendments effected by Parliament to Section 23 of the Vetting of Judges and Magistrates Act. The Court found that the Respondents span of time would lapse on 31st December 2015. Judges could be vetted before then. The Court rendered itself thus:

> ***''[99]By virtue of the above amendments, the legislature changed the initial time- frame within which the Vetting Board would carry out the vetting process, at the request of the Board itself. First, the legislature extended the vetting process to a period exceeding the initial one year, upon request. Second, it extended the period of completion of the vetting process after its commencement, from 31st December, 2013 to 31st December, 2015 – an additional two years as from the initial conclusion date. This time-frame gives the valid span of time within which the Vetting Board carries out its functions, and any functions outside the said time-frame would be contrary to the law.''***

Conclusion

106. As one reads the documents filed herein, it is easy to form an impression. An impression that the processes have been involved in confusion. There has been procrastination, perhaps by both parties. The Petitioner took issue with the vetting process which he claims did not afford him a fair hearing. He also took issue with a decision to re-vet him. It is to be noted though that there is as yet no final determination pronounced by the Respondent on the Petitioner's suitability or otherwise.

107. The Petition contests majorly the Respondent's process with certain challenges on competence and jurisdiction. These facts fall within the guidelines of the Supreme Court in **JMVB-1**. I lack the jurisdiction to entertain the Petition.

108. The Supreme Court in both **JMVB-1** and **JMVB-2** emphatically expressed itself. The court seemed determined to drum further the African saying that a monkey should never arbitrate a dispute between the fire and the forest. The High Court is never to superintend the Respondent. I have no alternative but to stop any further interrogation too.

Disposal

109. In light of my findings above and by virtue of the decision in **JMVB-1**, I have no option but to strike out the Petition for want of jurisdiction. I accordingly strike out the Petition.

110. The Petitioner genuinely believed this court had jurisdiction in view of the decisions in **JMVB-1** and **JMVB-2**. I see no reason to order any costs to be paid by him. There will be no order as to costs

Dated, signed and delivered at Nairobi this 3rd day November, 2015

J.L.ONGUTO

JUDGE

Delivered in the Presence of

Mr. Wasuna for the Applicant

Mr. Kanjama for the Respondent

C/Clerk: Richard