



Kenya Hotel Properties Limited v Attorney General & 5 others (Civil Appeal 404 of 2018) [2020] KECA 427 (KLR) (7 August 2020) (Judgment)

Kenya Hotel Properties Limited v Attorney General & 5 others [2020] eKLR

Neutral citation: [2020] KECA 427 (KLR)

**REPUBLIC OF KENYA
IN THE COURT OF APPEAL AT NAIROBI
CIVIL APPEAL 404 OF 2018
MSA MAKHANDIA, PO KIAGE & AK MURGOR, JJA
AUGUST 7, 2020**

BETWEEN

KENYA HOTEL PROPERTIES LIMITED APPELLANT

AND

ATTORNEY GENERAL 1ST RESPONDENT

JUDICIAL SERVICE COMMISSION 2ND RESPONDENT

JUDGES AND MAGISTRATE'S VETTING BOARD 3RD RESPONDENT

WILLEDEN INVESTMENTS LIMITED 4TH RESPONDENT

ETHICS & ANTI-CORRUPTION COMMISSION 5TH RESPONDENT

KENYA REVENUE AUTHORITY 6TH RESPONDENT

(An appeal against the Judgment of the High Court of Kenya at Nairobi Constitutional & Human Right Division (Chacha Mwita, J.) dated 28th September, 2018 In Constitutional Petition No. 438 of 2015)

JUDGMENT

1. This appeal and the totality of its antecedents is most disturbing, not least because the legal battle between its main protagonists has been within the corridors of justice in various forms and shapes through a multiplicity of suits and has engaged judicial minds and time for over two decades. As time went by it sucked in additional parties. From the look of things and the deep-seated intransigence and unremitting sense of grievance at play, the dispute may be with us for longer yet.
2. Willesden Investment Ltd, the 4th respondent herein (Willesden), which was at all material times the registered proprietor of L.R. No. 209/12748 IR No. 66986 from 15th September 1995, filed HCCC



No. 367 of 2000 at the Milimani Commercial Courts against the appellant Kenya Hotel Properties Ltd. It sought damages for trespass to land and mesne profits arising from the appellant's use of the said property as a parking lot. The appellant had been so using the land having leased it from the Nairobi City Council even before Willesden became the registered proprietor. The High Court by the Judgment dated 14th December 2006 awarded Willesden Kshs. 54,102,400 mesne profits; Kshs. 10,000,000 general damages for trespass, Kshs. 6,000,000 for loss of business opportunity plus interest and costs.

3. Dissatisfied, the appellant made its first journey to this Court over that dispute by filing Civil Appeal No. 149 of 2007 against Willesden and, by a judgment delivered on 2nd April 2009, that award was reduced to Kshs. 22,729, 800 with interest at court rates from January 1994 to the date of payment.
4. Further dissatisfied, the appellant filed an application which, through styled one for correction of errors, was essentially asking this Court to review its judgment in that appeal citing some four grounds which we do not consider necessary to set out herein. The appellant has consistently referred to the said application as a review application and that is the terminology we shall employ. The same bench that had heard the substantive appeal (O'Kubasu, Onyango-Otieno and Aganyanya, JJ.A) delivered its ruling on that application effecting one correction that interest at court rates be from 15th September, 1995 but otherwise dismissing it with costs.
5. When the Judges and Magistrates Vetting Board came into being pursuant to section 23 of the 6th Schedule to the 2010 Constitution and the statute passed thereunder, a complaint was lodged by one Mr. Katiku who was the appellant's lawyer, against O'Kubasu J.A over his handling of Civil Appeal No. 149 of 2007 aforesaid. The Board by its decision issued on 25th April 2012 made a determination that O'Kubasu JA was not suitable to hold the position of a Judge because the judgment therein, principally authored by him; in the opinion of the Board contained various anomalies on whether arguments made on behalf the appellant there had been considered, the basis on which damages were computed and the manner in which interest was calculated. The Board expressed the view that O'Kubasu JA's "resolute failure to consider and reflect upon what appear to be manifest inequities" went to suggest "a worrying lack of capacity on his part for objective and persuasive reasoning."
6. O'Kubasu J.A filed an application for review of that decision but the Board dismissed it on 20th July 2012, and so he stood removed.
7. More than three years later, on 16th October 2015, the appellant filed a petition at the Constitutional & Human Rights Division of the High Court seeking several orders. We set them out in full as they are germane to a full appreciation of what the High Court had to contend with, and our decision on his appeal:
 1. A declaration that the Court of Appeal judgment dated 2nd April 2009 in Nairobi Civil Appeal NO. 149 of 2007 Kenya Hotel Properties v Willesden Investment Limited is a nullity and should be set aside on account of judicial bias following the removal of the Judge of Appeal Emmanuel Okelo O'Kubasu by the Judges and Magistrates Vetting Board on 25th April 2012 following a complaint over his handling of the appeal.
 2. A declaration that the petitioner's right to a fair trial under Article 50 of the Constitution was infringed by the bias shown by the presiding judge in Nairobi Civil Appeal No. 149 of 2007 Kenya Hotel Properties v Willesden Investments Limited.
 3. A declaration that the judgment dated 2nd April 2009 in Nairobi Civil Appeal No. 149 of 2007 Kenya Hotel Properties v Willesden Investment Limited cannot stand following the



removal of the presiding judge by the Judges and Magistrates Vetting Board on 25th April 2012 and the appeal should be retried de novo by the Court of Appeal.

4. An order of certiorari be issued quashing the Court of Appeal judgment dated 2nd April 2009 in Nairobi Civil Appeal No. 149 of 2007 Kenya Hotel Properties v Willesden Investments Limited.
5. An order directing that the appeal arising from the judgment and decree of the High Court of Kenya at Nairobi (Mutungi J) dated 14th December 2006 in HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited be heard de novo by the Court of Appeal.
6. A permanent injunction be issued restraining the 1st and 3rd Interested Parties, their servants or agents from executing the decree in any manner whatsoever in Milimani HCCC No. 367 of 2000 Willesden Investment Limited v Kenya Hotel Properties Limited and calling up the bank guarantee issued by Development Bank of Kenya.”
8. That petition contained the background we have already set out herein. The petitioner also mentioned that the Kenya Anti- Corruption Commission, now Ethics and Anti-Corruption Commission (EACC), which is the 5th respondent, herein on 3rd February 2010 filed ELC No. 35 of 2020 in which it sought to restrain Willesden from dealing with the subject property and to injunct the appellant herein from paying the decretal sum in HCCC No. 367 of 2000 to Willesden. That was on the basis that the latter had obtained the land irregularly, illegally and fraudulently the same having been public property reserved for a public road. That suit was dismissed for being res judicata.
9. The appellant then filed Constitutional Petition No. 13 of 2011 against the Attorney-General and other parties including Willesden seeking various orders including:
 - (a) A permanent injunction be issued preventing the 2nd respondent its servants or agents from executing the decree in Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited pending the enactment of legislation under Article 62 of the Constitution to investigate illegally acquired public land and the setting up of the National Land Commission under Article 67.
 - (b) A declaration that the 2nd respondent did not acquire the suit land L.R No. 209/12748 I.R No. 66986 that was acquired unlawfully and therefore does not warrant protection under Article 40(6) of the Constitution.
 - (c) A declaration that it would be against public policy and the Constitution for the 2nd respondent to derive any benefit from the decree in Milimani HCCC No. 367 of 2000 Willesden Investments Limited v Kenya Hotel Properties Limited based on illegality acquired property.
10. The appellant’s application for conservatory orders in that petition was dismissed. It successfully applied for stay of execution of that decision vide this Court’s ruling dated 4th April 2013 in Civil Application No. 24 of 2012 filed by the appellant against Willesden & Others. As at the time the petition leading to this appeal was filed, and to date, we would hazard, the substantive appeal relating to the appellant’s petition based on the challenge to Willesden’s title to the suit property, to wit Civil Appeal No. 184 of 2013 is still pending determination by this Court.
11. In the petition leading to this appeal, the appellant pleaded that following the Supreme Court’s determination in Samwel Kamau Macharia & Anor Vs. Kenya Commercial Bank & 2 Others, Application No. 2 of 2011, that section 14 of its constitutive statute was unconstitutional, the High



court retained exclusive jurisdiction to entertain and redress complaints of violations of fundamental rights, including those arising from operation of law through the court system, even if the case had gone through the appellate level. The stricken section 14 of the Supreme Court Act had purported to confer upon the apex court a special jurisdiction to review the judgments and decisions of any judge “(1)...(b) removed from office pursuant to the Vetting of Judges and Magistrates Act (Cap 8B) ...”

12. The appellant in its petition contended that following the Macharia decision (*supra*) the Supreme Court in *Jasbir Rai & 3 Others Vs. Tarlochan Singh Rai (estate of) & 4 others* [2013] eKLR, gave certain directions on the position that cases that lead to the removal of a Judge as being amenable to the High Court’s exclusive jurisdiction. It averred that it opted not to file a petition until there was a determination by the courts on whether they could review a decision of the Vetting Board, which determination was an emphatic negative pronounced by the Supreme Court in *Judges & Magistrate’s Vetting Board & 2 Others Vs. Centre For Human Rights & Democracy & 11 others* [2014] eKLR on 5th November 2014.
13. In the petition it eventually filed, the appellant complained that if this Court’s decision in Civil Appeal No. 149 of 2007 stands, it would suffer irreparable loss in making payment of the decretal sum of Kshs. 22,729,800 which had risen to Kshs. 77,385,939 before costs as at 30th September 2015 and it therefore stood to lose its property in future. It contended that as O’Kubasu JA had been adjudged by the Vetting Board to be not suitable to hold office, that was “an express indictment and proof of judicial bias and the entire judgment must be nullified and set aside.” It further contended that O’Kubasu JA as Presiding Judge over Civil Appeal No. 149 of 2007 breached its fundamental rights including the national values and principles of governance in Article 10(2); the right to property under Article 40; and fair trial under Article 50, which is a right not to be limited by virtue of Article 25 of the Constitution.
14. One Mariane Ndegwa Jordan, a director of the appellant swore an affidavit on 15th October 2015 in support of the petition which reiterated the contents thereof and exhibited various documents in demonstration of the facts averred. The petition was later amended on 12th November 2015 to enjoin the Vetting Board, limited to providing the Hansard proceedings concerning O’Kubasu JA. A new prayer to that effect was included by amendment.
15. In opposition to that petition, Willesden, which had been named as the 1st Interested Party therein, filed an affidavit sworn by one Ben Muli, one of its directors. He dismissed the petition as an abuse of the process of the court calculated to derail and/or avoid and prevent compliance with the judgment and decree in HCCC 367 of 2000 and subsequent related decisions of this Court. It was also an after-thought and a cross attack on the various decisions by the High Court and this Court on the subject property. It was an attempt to reopen a finalized suit and to continue evading and denying Willesden the fruits of its judgment. The deponent castigated the appellant for not disclosing that courts had on several occasions noted that the appellant was guilty of delaying tactics, abuse of court process and trying to reopen by launching collateral attacks on finalized cases. He cited and quoted some four rulings in which these two courts had so expressed themselves. He also swore that the petition was an attempt to re-open HCCC No. 367 of 2000 when it had made like attempts that had been rebuffed both at the High Court and this Court. The matter was therefore *res judicata* and showed the appellant would go to any lengths in creating farcical scenarios in order to avoid compliance with orders that were already more than 17 years old.
16. Willesden attacked the appellant for seeking to join the Vetting Board for the purpose only of discovery and production of the very documents the appellant had in its possession for over four years already. It stated further that the removal of O’Kubasu JA was not based solely on his role in the appeal arising from HCCC No. 367 of 2000. Moreover, the decision of this Court was a unanimous one by three



competent Judges. The allegations that the appellant's fair trial rights were violated were therefore gross fallacies considering, especially, that this Court reduced the award of the High Court against the appellant from Kshs. 54,902,000 to Kshs. 22,000,000. Its director stated that from the Vetting Board's own determination, O'Kubasu JA was absolved from the allegations of corruption or bias. It was prayed that the petition be dismissed.

17. The Judicial Service Commission (JSC) as 2nd respondent in the petition filed grounds of opposition stating that there was no reasonable cause of action disclosed against it and that the appellant had not sought any relief as against it.
18. The Kenya Revenue Authority (KRA) which was the named 3rd respondent in the petition filed grounds of opposition in which it stated that the petition was devoid of merit, amounted to an abuse of the court process and was but a mere attempt at circumventing the law. It also stated that the petition as against it disclosed no cause of action and sought no relief so that it was wrongly joined in the matter. Its last point was as follows;

That without prejudice to the foregoing, the decision sought to be challenged was delivered by a three judge bench of Justice E.O O'Kubasu, Justice J.W. Onyango Otieno and Justice D.K. Aganyanya. The said decision cannot therefore be divorced and categorized as the decision of an individual judge rather is the decision of the entire bench.”

19. The petition proceeded to hearing before Chacha Mwita, J., who, on the basis of the written submissions filed by the parties and upon hearing their respective counsel, by a judgment delivered on 28th September 2018 declined and dismissed the same for not meeting the threshold for redress of a denial, violation or infringement of, or threat to a fundamental freedom as contemplated on Article 23(1) of the Constitution. His decision turned majorly on the question of the High Court's jurisdiction over the matter, which he found to be lacking.
20. Aggrieved by that decision, the appellant filed this appeal in which it complains that the learned Judge erred in law by;

Restricting himself to one issue of determination concerning jurisdiction.

Failing to apply the spirit in Articles 10 and 259 of the Constitution to advance the rule of law, fundamental freedoms, equity, social justice and equity and find a miscarriage of justice.

Failing to consider the purpose of section 23(1) of the 6th Schedule to the Constitution.

Failing to consider that the judgment in Civil Appeal No. 149 of 2007 could not stand after O'Kubasu JA's removal and set it aside

Failing to consider that judicial bias undermined confidence in the Judiciary and infringed fair trial under Article 50, an unlimited right under Article 25 of the Constitution and that the High Court had jurisdiction

Failing to correctly apply the Supreme Court's dicta in the RAI (supra) case.

21. The appellant's prayer in the appeal is for setting aside the learned Judge's judgment and substituting it with an order allowing the amended petition the prayers whereof we set out earlier in this judgment. It is germane to point out that the prayers in the petition to declare the judgment of this Court in Civil Appeal No. 149 of 2007 a nullity and set it aside, to declare that the same cannot stand and should be quashed and the appeal be heard de novo in essence and effect amount to an invitation to this Court to revisit, relook or review the said judgment. This is the very prayer sought, for basically the same reasons,



in an application for review that the appellant filed in Civil Appeal No.149 of 2007, which we heard together with this appeal and to which our decision herein relates as well.

22. Prior to the hearing of the appeal via video link due to the prevailing Covid-19 Pandemic, the main parties filed written submissions which were highlighted before us, albeit virtually. We have considered the said submissions, the record of appeal and the bundles of authorities filed.
23. Going first, Mr. Gachuhi, learned counsel for the appellant gave a brief background of the appeal which is as we have already highlighted. He stated that after the judgment of this Court in Civil Appeal No. 149 of 2007 and the subsequent review application which was partly successful, the 2010 Constitution introduced a new dimension to the dispute between the appellant and Willesden through the vetting process for Judges and Magistrates, one of whose casualties was O’Kubasu JA. Counsel stated that Civil Appeal No. 149 of 2007 was one of the reasons for O’Kubasu JA’s removal.
24. Mr. Gachuhi in dealing with the appeal proper approached it in two prongs, faulting the learned Judge for;
 - (i) Failing to consider evidence and determining the petition on the basis of jurisdiction; and (which, really is a restatement of the first);
 - (ii) Failing to consider constitutional violations and remedies therefor.
25. According to counsel, the learned Judge posed and answered the wrong question, the one of jurisdiction, instead of addressing the more fundamental question of judicial bias and fair trial. To him, once O’Kubasu JA was removed by the Vetting Board, the judgment tied to him could not stand as it meant the judgment was not by a competent three-Judge bench. Citing dicta from the judgment of Mutunga C.J. in the RAI (supra) case, and that of Chief Justice Marshall in the American case of Marbury vs. Madison 5US 137 he submitted there was no injustice the courts could not cure as there can be no right without a remedy. The appellant’s right to a fair trial having been infringed by judicial bias it was within the High Court’s exclusive jurisdiction to pronounce itself on the matter and the learned Judge erred in failing to do so. To him, the learned Judge erred in denying a jurisdiction the Supreme Court had declared to exist.
26. Citing this Court’s decision in Willy Kimutai Kitilit vs. Michael Kibet [2018] eKRL and Mativo J’s decision in Centre For Rights Education And Awareness & 2 others vs. Speaker of the National Assembly & 6 others [2017] eKLR, counsel emphasized the centrality of equity and social justice which courts ought to uphold when interpreting the Constitution, to make the point that the learned Judge was wrong to take a narrow view of the matter limited to jurisdiction.
27. Counsel relied on De Lacy & Anor vs. South African Post Office [2011] ZACC 17, a decision of the South African Constitutional Court, to submit that a judgment in which a Judge who was later removed by the Vetting Board participated was void ab initio because of the bias which amounted to infringement of constitutional rights. He buttressed the point by expounding on what judicial bias entails as espoused by this Court in Standard Chartered Financial Services Ltd & 2 Others Vs. Manchester Outfitters (suing Division) Ltd (king Wollen Mills Ltd & 2 Others 2016 eKLR which held that in appropriate cases it had jurisdiction to set aside its judgment on account of bias and hear an appeal afresh. Other cases on judicial bias from further afield were relied on including R vs. Gough [1993] 2 All Cr 724; Metropolitan Properties Ltd Vs. Lannon [1969] 1qb 577; Webb Vs. The Queen [1994] 181 Clr 41; And R Vs. Bowstreet Metropolitan Stipendiary Magistrate Ex Parte Pinochet Ugarte [2000] 1ac 119 (in Re Pinochet).
28. There was no appearance for the Hon. Attorney General but we had been notified that he would be relying on the submissions on record, which we have considered. It was the position of the Hon.



Attorney General as it was before the Court below, where it had emphasized his constitutional duty under Article 156(6) to “promote, protect and uphold the rule of law and defend the public interest”, that the High Court lacked jurisdiction to nullify a decision of this Court as the appellant had sought. Moreover, the decision the appellant had complained of before the Vetting Board belonged to three Judges and could not be nullified an account of O’Kubasu JA’s removal. It was further submitted that given the express provisions of Article 165(6) of the Constitution, the High Court did not have supervisory jurisdiction over a superior court and the only recourse open to the appellant would have been an appeal to the Supreme Court which it did not pursue.

29. The Attorney General further submitted that even on the merits, there was no evidence placed before the court that O’Kubasu JA was biased. Indeed, no application was ever made for his recusal and so, whereas indeed the right to a fair trial cannot be limited by virtue of Article 25 of the Constitution, the appellant had not pleaded with precision, less still prove, that O’Kubasu JA was biased. The determination of the Vetting Board did not make a finding of bias. We were urged to dismiss the appeal as the learned Judge did not err.
30. For Willesden, learned counsel Mr. Oyatta relied on his written submissions and urged us to uphold the decision of the learned Judge that the High Court was devoid of jurisdiction to entertain the petition and make the orders the appellant had sought before it. He could not make such orders against a superior court, and one senior to him at that. He urged us to dismiss the appeal.
31. Mr. Rutto, learned counsel for EACC did not file submissions in this appeal but he associated himself with those of the appellant and invited us to consider the ones he had made before the High Court. There, too, EACC had supported appellant, urging that the petition be allowed “considering the issues that were raised by the Vetting Board with regard to handling of Civil Appeal No. 149 of 2007,” and because, according to it, “the suit property having been part of a road, was unlawfully alienated,”
32. For the JSC, its learned counsel Mr. Issa submitted that whereas the appellant does make an important point on the right to fair trial, it was not open to the High Court to inquire into decisions of the Court of Appeal or the Supreme Court. The High Court’s inability to overturn the decision of this Court is also predicated on the Constitution. He urged us to tread carefully because were we to allow the appeal before us, “there would be anarchy” as that would unsettle the hierarchy of courts, which is a fundamental aspect of the administration of justice. He concluded his address by urging us to consider as obiter dicta the remarks by Mutunga CJ in which the appellant relies to urge that the High Court had jurisdiction over the matter, and to dismiss the appeal.
33. Mr. Gachuhi replied to those submissions by stating, rather extravagantly, that there cannot be a judicial coup against the Constitution and, as the new Constitution led to a new opportunity, the learned Judge should have seized it and allowed the petition, which he urged us to do and order that Civil Appeal No. 149 of 2007 be heard de novo.
34. We have gone through the record of appeal, the authorities cited and have considered the rival submissions made in support and in opposition to the appeal. As this is a first appeal our mandate is to proceed with it by way of re-hearing and we essentially put ourselves in the shoes of the learned Judge. If the matter is one that lay in his discretion, we would be slow to interfere with his decision even where we would ourselves have decided otherwise were we the first instance decider. We would not hesitate to overturn such a decision, however, if it were shown that it was based on no evidence, proceeded from a misapprehension of the evidence, or it entailed an error of law or principle or is otherwise patently wrong and resulted in injustice. This has been the stance of this Court in numerous cases including *Shah Vs. Mbogo & Anor* [1967] Ea 116 And *United India Insurance Co. Ltd Vs. East African Underwriters (kenya) Ltd* [1985] KLR 898.



35. The twin issues that emerge from this appeal are whether the learned Judge erred in holding that he had no jurisdiction to grant the orders sought for the annulment of a judgment of this Court and whether he was wrong not to consider the merits of the petition. The issues are really two sides of the same coin, as they are so closely intertwined, like inseparable Siamese twins, that a finding on the former is dispositive of the latter.
36. As we stated at the beginning of this judgment this appeal is disturbing. The multiplicity of endless proceedings around the same dispute does not bode well for the administration of justice. It is wholly unedifying and goes to create a numbing cynism, for a dispute to be marching endlessly from court to court making twists and turns in a dizzying labyrinthine maze since the High Court first became engaged with it some twenty years ago. It does not assure citizens much confidence in the judicial process that a judgment entered on 14th December, 2006 by the High Court and affirmed with modification by this Court on 2nd April, 2009 still hangs in limbo and unsatisfied so many years later. In the meantime interest has mounted bringing the decretal sum to unmanageable levels. Despite several declarations of finality made by various Judges of the High Court and benches of this Court, the matter appears to have an uncanny capacity for reincarnation.
37. Its latest rising is the most baffling of all because the petition filed before the High Court sought strange prayers in that the court there was being asked to annul, strike out, reverse or rescind a judgment of this Court, its elder sibling. In a system of law that is hierarchical in order, such as ours is, it seems to us that such a thing is quite plainly unheard of and for reasons far greater than sibling rivalry. The Constitution itself clearly delineates and demarcates what the High Court can and cannot do. One of things it cannot do by virtue of Article 165(6) is supervise superior courts.
38. Moreover, under Article 164(3) of the Constitution, this Court has jurisdiction to hear and determine appeals from the High
39. Court. Its decisions are binding on the High Court and all courts equal and inferior to it. It is therefore quite unthinkable that the High Court could make the orders the appellant sought as against a decision of this Court to quash or annul them, or that it could purport to direct this Court to re-open and re-hear a concluded appeal. We consider this to be a matter of first principles so that the appellant's submission that the issue pits supremacy of the courts against citizens' enjoyment of fundamental rights is really misconceived because rights can only be adjudicated upon by properly authorized courts. Any declaration by a court that has no jurisdiction is itself a nullity and amounts to nothing.
40. It matters not how strongly a court feels about a matter, or how impassioned it may feel or how motivated it may be to correct a perceived wrong: without jurisdiction it would be embarking on a hopeless adventure to nowhere. We think the Supreme Court in the S.K MACHARIA case captured the essence of the need for courts to respect and stay within jurisdictional tethers and constraints thus;

“A Court jurisdiction flows from either the Constitution or legislation or both. Thus, a Court of law can only exercise jurisdiction as conferred by the constitution or other written law. It cannot arrogate to itself jurisdiction exceeding that which is conferred upon it by law. We agree with counsel for the first and second respondents in his submission that the issue as to whether a Court of law has jurisdiction to entertain a matter before it, is not one mere procedural technicality; it goes to the very heart of the matter, for without jurisdiction, the Court cannot entertain any proceedings. This Court dealt with the question of jurisdiction extensively in, In the Matter of the Interim Independent Electoral Commission (Applicant), Constitutional Application Number 2 of 2011. Where the Constitution exhaustively provides for the jurisdiction of a Court of law, the Court must



operate within the constitutional limits. It cannot expand its jurisdiction through judicial craft or innovation.”

(Emphasis added)

41. With such a clear and authoritative pronouncement from the Supreme Court, we think that the appellant was in effect inviting the learned Judge to defy the constitutional barriers to the extent of his jurisdiction and tread on forbidden ground. He was right to reject the invitation as he had to, terming it “unconstitutional and illegal” at paragraph 35 of his judgment. There was no error in so holding.
42. Once the learned Judge found that he did not have jurisdiction to grant the orders sought by the petitioner, he did the logical, sensible thing of going no further to purport to make any findings on the merits of the petition save for some inevitable observations. The appellant faults the learned Judge for not going further to still pronounce himself on the merits but we have no hesitation rejecting this complaint. It would defeat the very meaning and effect of want of jurisdiction were a Judge or judicial officer to still go ahead and pronounce on that which he is neither authorized nor competent to pronounce. Such pronouncement would be not only futile but also a nullity. The law on what follows from a judgment of non-jurisdiction was well captured by Nyarangi, JA in the off-cited case of *The Owners Of The Motor Vessel Lillian’s Vs Caltex Oil* [1989] KLR 1.
43. I think that it is reasonably plain that a question of jurisdiction ought to be raised at the earliest opportunity and the court seized of the matter is then obliged to decide the issue right away on the material before it. Jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceeding pending other evidence. A court of law downs tools in respect of the matter before it the moment it holds the opinion that it is without jurisdiction.”
(Our Emphasis)
44. We think that given the crystal clear position of the law the High Court’s want of jurisdiction in the matter as was framed and presented in the Appellant’s petition, the sentiments of Mutunga, CJ in the *S.K. MACHARIA* (supra) case and the incontestable position that there can be no wrong without a remedy do not avail the appellant much in the circumstances. Indeed, we are inclined to agree with Mr. Issa that Mutunga CJ’s comments were in fact quite obiter. They certainly did not, alone or together with the full decision of the rest of the Supreme Court, confer upon the High Court a jurisdiction not granted and in fact expressly denied by the Constitution. The High Court must indeed fashion appropriate remedies but can only do so within jurisdiction.
45. We therefore come to the firm conclusion that the learned Judge did not err in holding that he did not have jurisdiction to entertain or grant the prayers in the appellant’s petition and in downing his tools in deference to and compliance with the express jurisdictional caveat explicit in **Article 165(6)** of the Constitution. The entire appeal premised on the twin issues we have identified is without merit and must fail.
46. As we leave the appeal we must observe that we think the learned Judge on the basis of all the material before him, saw the petition for what it was when he delivered himself as follows;

“That notwithstanding, a careful perusal of the petition before this court and more so the reliefs sought, gives the impression that all the petitioner wants is to have second chance to litigate its appeal. This view is informed by the fact that, first; although the petitioner says that the Judge was biased, it has not attacked the other members of the bench who sat with Justice O’Kubasu and rendered that decision.



Second, the petitioner only complains about the Court of Appeal decision and wants it annulled by this Court supposedly exercising its jurisdiction under Article 165 of the constitution. It does not question the decision of the High Court that gave rise to that appeal.”

47. It is that second bite at the cherry, again, that the appellant seeks in its application for review. As is plain from the record, Civil Appeal No. 149 of 2007 was decided substantially in the appellant’s favour which reduced the High Court’s award from Kshs.54,902,400, Kshs.10,000,000 general damages for trespass and Kshs.6,000,000 for loss of business opportunity to Kshs.22,729,800 with interest at court rates from January 1994. The appellant then moved the Court by way of an application for correction of errors which it calls in its submissions before us an application for review, seeking an order it paraphrases as;
48. The judgment be corrected by striking out Kshs.22,729,800 with interest at court rates from January 1994 and substituting the words Kshs,1,894,150 with interest at court rates from 14th December, 2006.”
49. The same bench that heard the appeal fully considered that application and in its decision thereon re-affirmed its judgment save to order that the interest at court rates would apply from 15th September 1995.
50. We say at the outset that the review jurisdiction of this Court, which is not even provided for in our rules, is an exceptional relief to be sparingly exercised under the Court’s inherent powers to meet the ends of justice, and only in the most deserving of cases. We do not apprehend that a party or person aggrieved by a decision of this Court is entitled to seek review and rehearing on any and every grievance. It is a relief that must necessarily be constricted and confined to what this Court identified in the Manchester Outfitters (supra) case. And we have grave doubts and reservations whether a party who has already made an application for review that has been determined by the Court can approach the Court for yet another application for review of the same judgment. We think it would make a travesty of this Court’s appellate character and strike a fatal blow at the doctrine of finality were parties to be free to relitigate and re-agitate concluded appeals through endless reviews. We do hold and find in principle that there can be no right of second review. We say so cognizant that the Court in its decision refused to reopen the appeal but was nonetheless emphatic that it had gone over its judgment which it affirmed and endorsed as correct.
51. On the merits, this latest application for review is anchored on allegations of judicial bias as against O’Kubasu, JA. The allegations are not based on any specific conduct or associations of his during or surrounding Civil Appeal 149 of 2007 as would cause, in the words of Lord Goff in R. vs. Gough (supra), “right minded people (to) go away thinking ‘the judge was biased.’” Rather, the appellant/applicant extrapolates, if we understand it alright, that as the Vetting Board did find O’Kubasu, JA not to be suitable to continue serving as a Judge of this Court, then he was biased.
52. Now, had the Vetting Board made a finding that O’Kubasu, JA was biased in the handling of Civil Appeal No. 149 of 2007, then perhaps the applicant’s complaint might have some leg to stand on. We say might, because it is a debatable point whether such a finding, not being a judicial pronouncement as such, and being even then by a body inferior to this Court, would have been binding on us in a judicial adjudicatory sense. Fortunately it is not a matter we need to decide as the Vetting Board made no such finding. The removal decision was based on more than just Civil Appeal No. 149 of 2007 and as far as that appeal went, it is not bias that the Board found but “a worrying lack of capacity on the part of the Judge for objective reasoning,” which statement it qualified and limited on review.



- 53. We are thus not persuaded that bias, whether actual or perceived, as discussed in the various authorities of this Court and from elsewhere that were placed before us, could be inferred, less still established from the determinant of the Vetting Board, without more. This would not be a case fit for a setting aside of the Court’s decision as the former House of Lords did in the Pinochet case (supra) on account of Lord Hoffman’s bias.
- 54. We think, with respect, that it would be to set a pernicious precedent that would entirely unsettle the jurisprudence of this Court and undermine the judgments of numerous of our courts and unleash untold juridical chaos were we to hold, as the applicant/appellant seeks to persuade us, that judgments by Judges, and by extension Magistrates, who were removed by the Vetting process are ipso facto null and void and should be set aside.
- 55. We say no more.
- 56. In the end, both the appeal and the application for review are devoid of merit and they are accordingly dismissed with costs.

DATED AND DELIVERED AT NAIROBI THIS 7TH DAY OF AUGUST, 2020.

ASIKE MAKHANDIA

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JUDGE OF APPEAL

P.O. KIAGE

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JUDGE OF APPEAL

A.K. MURGOR

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JUDGE OF APPEAL

I certify that this is a true copy of the original.

Signed

DEPUTY REGISTRAR

