IN THE COURT OF APPEAL

AT NAIROBI

CORAM: G.B.M. KARIUKI, SICHALE & J. MOHAMMED, JJA)

CIVIL APPEAL NO. 281 OF 2015

NICHOLAS RANDA OWANO OMBIJA..... APPLICANT

AND

JUDGES AND MAGISTRATES VETTING BOARD ..... RESPONDENT

(Being an Appeal from the Judgment of the High Court of Kenya at Nairobi (Onguto J.) delivered on 3rd November, 2015 and Decree dated 6th November, 2015

in

H.C. PETITION NO.406 OF 2015

****

JUDGEMENT OF THE COURT

BACKGROUND

1. This appeal was set down for hearing in a record time after its institution on 23rd November 2015. We heard it on 1st December 2015. The reasons for this meteoric speed is not far to seek.

2. It was plain to see that the urgency of the matter was because the tenure of Judges and Magistrates Vetting Board comes to an end on 31st December 2015. The Judges and Magistrates Vetting Board (hereinafter referred to as "The Vetting Board") is intent on re-vetting Justice Nicholas Randa Owano Ombija, a Judge of the High Court, who is the appellant in this appeal, before its tenure comes to an end. That is why it summoned him.

3. The appellant reacted to the summons seeking to re-vet him by moving to the High Court with a petition challenging the Vetting Board's decision (to re-vet him). The Vetting Board raised a preliminary objection to the petition contending that the High Court had no jurisdiction to entertain the petition.

The High Court upheld the preliminary objection and struck out the petition on 6th November 2015 on the ground that it lacked jurisdiction to hear the petition, thus prompting this appeal.

PETITION TO THE HIGH COURT

4. The appellant's petition No.406 of 2015 to the High Court which the court struck out sought reliefs for

what the appellant called "apprehended and/or threatened violation" of the rights to fair administrative action, right to fair hearing and the right to equal protection and equal benefit of the law under Articles 47, 50, and 27 and Section 23 of the Sixth Schedule to the Constitution. The appellant prayed in the petition for the following reliefs –

> ***"1. A Declaration that the Respondent's second determination delivered on 21st December, 2012 after its determination of the 10th September, 2012 is unconstitutional.***

2. ***A declaration that the Respondent's determination in regard to the Petitioner of the 10th of September,2012 resulting to a tie in vote of 4 to 4 was final and the Petitioner has been found SUITABLE to continue serving as a Judge in the Judiciary.***

3. ***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 the at the Petitioner was suitable to serve as a Judge in the Judiciary.***

4. ***A declaration that the Respondent has no authority under the Constitution or any Act of Parliament to order the Petitioner to be vetted afresh.***

5. ***A declaration that the Petitioner's right to fair hearing by the Respondent body as an impartial and independent tribunal has been infringed.***

6. ***A declaration that the Respondent's invitation of the Petitioner for fresh vetting for complaints not previously made within time or at all is in violation of Articles 47 and 50 (1) of the Constitution.***

7. ***The Honourable Court do issue such other orders and give such further directions as it may fit to meet the ends of justice.***

8. ***Cost of and incidental to this suit be awarded to the Petitioner."***

STAY UNDER RULE 5(2)(B)

5. The appellant also made to this Court an application under rule 5(2)(b) of the Court of Appeal Rules seeking an injunctive order to stop the re-vetting pending the hearing and determination of the appeal. We heard it and granted a temporary injunction on 27th November 2015 restraining the Vetting Board (pending the hearing and determination of this appeal) from re-vetting the appellant.

APPELLANT CASE

6. We have perused the memorandum of appeal and the entire record of appeal including the impugned judgment of the High Court (Onguto J) dated 3rd November 2015. It is salient from the record of appeal that in his petition to the High Court, the appellant took the view, firstly, that the Vetting Board decision on his vetting on 10th September 2015 which was a tie on a vote of 4 to 4 should have resulted in a determination of his suitability and should have been in consonance with the Vetting Board's precedent in the vetting of the Hon. Lady Justice Koome in respect of whom the decision was a tie on a vote of 4 to 4 and a determination of her suitability was made; secondly that the Board's meeting of 19th December 2012 in which the Board voted 4 to 2 (in absence of one member, Justice Albie Sachs, who had voted in favour of the appellant in the vetting of 10th September 2012 when the voting tied 4 to 4 and determined that the appellant was unsuitable to continue serving as a judge on the ground that the appellant's "defect of temperament overshadowed his many good qualities" was illegal; thirdly that the review on 20th March 2013 of the determination of unsuitability of the appellant when the Vetting Board set aside the determination of 21st December 2013 and declared the whole proceedings a nullity and directed that a

new panel be constituted and the appellant be vetted afresh was ultra vires the Vetting Board's powers to vet; fourthly that the Vetting Board violated the appellants right to be vetted by an impartial and independent body and to have a fair administrative action as guaranteed under Articles 47 and 50(1) of the Constitution.

THE RESPONDENT'S CASE

7. The Vetting Board on its part took the view that the appellant voluntarily opted to be vetted and did not raise any objection to vetting and to the review hearing and that the vetting was fair and in the determination made on 21st December 2012, the appellant was found unsuitable to serve; that the appellant applied for review and the Vetting Board in its determination made on 20th March 2013 setting aside the determination of 21st December 2012 was alive to the need for the Vetting Board to observe high standards in vetting and to preserve at all costs the propriety of the process which must not only be fair but must also appear to be fair; that the Vetting Board found and declared the earlier vetting and determination of unsuitability of the appellant announced on 21st December 2012 null and void and consequently held that "when vetting proceedings are null and void it is necessary to start the process afresh"; that the Vetting Board in its affidavit sworn on 7th October 2015 by Reuben Chirchir, the Vetting Board's Chief Executive Officer, in reply to the appellant's Petition and chamber summons application in the High Court (for conservatory orders) both dated 24th September 2015 averred that that the Vetting Board exercised its jurisdiction and mandate properly by vetting the appellant and hearing his review application; that under section 23(4) of the Judges and Magistrates Vetting Act, a removal of a Judge or Magistrate from office under the Act shall not be subject to question in or reviewed by any court; that at any rate, several other Judges had had their review hearings declared null and void as a consequence of which the Vetting Board ordered fresh vetting; that the Vetting Board decision made on 20th March 2013 declared the interview and determination of 21st December 2012 null and void and required the appellant to be vetted again.

8. The appellant seems to have procured the minutes of the Vetting Board and was abreast of the actions taken by the Vetting Board including the results of the vetting of 10th September 2012. This seems to have prompted the Chief Executive of the Vetting Board to state in paragraphs 24, 25 and 26 of the affidavit sworn by him on 7th October 2015 in response to the Appellant's petition and chamber summons to the High Court that -

> ***"(24) that I am the custodian of the Board's Minutes and at no time did I ever release the Board's minutes to the Petitioner (appellant)***
>
> ***"(25) that any internal deliberation by the Board before announcement of its determination publicly is not official and the only valid and legal determination by the Board is the one signed, sealed, read and made public."***
>
> ***"(26) that purporting to use internal deliberations of the Board is akin to unlawfully obtaining a draft court judgment before the same is pronounced in court and purporting to argue that the said draft is the proper judgment of the court after a different one is formally in court."***

IMPUGNED JUDGMENT

9. As stated above, the appellant's petition in the High Court was struck out on the ground that the High Court lacked jurisdiction. The learned Judge stated in paragraphs 99, 100, 101, 102, 103, 106, 107, 108 and 109 of this judgment –

> ***"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 favourable 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.

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.

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.

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.

109. In light of my findings in the above and by virtue of the decision in JMVB1, I have no option but to strike out the Petition for want of jurisdiction. I accordingly strike out the Petition."

10. The appellant put forward in his memorandum of appeal the following 15 grounds of appeal as follows –

"(1) The learned Judge erred in law and fact in holding that the Court did not have jurisdiction to entertain any proceedings challenging the Respondent's mandate to conduct a re-vetting of the Applicant.

2. ***The learned Judge erred in law and in fact in failing to find and hold that the Applicant was questioning the jurisdiction and statutory mandate of the Respondent to conduct re-vetting rather than questioning the respondent's constitutional and statutory mandate on the question of his suitability.***

3. ***The learned Judge erred in law in failing to find that the Respondent did not have any statutory***

mandate to conduct a re-vetting of the Applicant.

4. ***The learned Judge erred in law and in fact when he failed to follow the doctrine of stare decisis and Article 163 (7) with regard to its jurisdiction and failed to appreciate that the Petition was based on the rationale of the latest Supreme Court Case being Judges and Magistrates' Vetting Board – vs – Kenya Magistrates & Judges Association & Another (SCK) Petition No 29 of 2014 eKLR in which case the Court held that the Superior Courts have jurisdiction to deal with issues around the interpretation and application of the constitution with respect to the mandate of the respondent.***

5. ***The learned Judge erred in failing to apply and uphold the Supreme Court's judgment in Judges and Magistrates Vetting Board –vs- Kenya Magistrates & Judges Association & Another (SCK) Petition No.29 of 2014 eKLR ("JMVB 2") which was binding on him.***

6. ***The learned Judge appreciating the decision of the Supreme Court (in Vetting Board –vs- Kenya Magistrates & Judges Association & Another 2014 eKLR hereinafter "JMVB-2") that in matters where jurisdictional mandate of the Respondent is exceeded then superior courts may intervene as it did in JMVB-2 but erred in concluding that the High Court has no jurisdiction to superintend Respondent.***

7. ***The learned Judge erred in law and in fact by failing to distinguish the case before him from the Supreme Court decision in Judges and Magistrates Vetting Board & 2 Others –vs- Centre for Human Rights & Democracy & 11 Others [2014] eKLR as the case before him was anchored in acts and jurisdiction assumed by the Respondent outside the Vetting of Judges and Magistrates Act.***

8. ***The learned Judge erred in law and in fact in failing to follow the rationale of the Supreme Court in JMVB-2 that the superior courts have jurisdiction to determine "the extent and the reach the vetting process". (emphasis added)***

9. ***the learned Judge erred in law and in fact in the following dissenting opinion in JMVB-2 in paragraphs 64-90 and well summarized in paragraphs 82, 89 and 90 as against the decision by the majority holding that the superior courts could intervene by interpreting and applying Section 23 of the 6th Schedule of the Constitution and Section 18 of the Vetting of Judges and Magistrates Act.***

10. ***The learned Judge erred in law and in fact in failing to appreciate the emphasis laid by the Supreme Court in JMVB-2 in Section 23 (2) of the Sixth Schedule to the Constitution that the ouster of the Superior Court's jurisdiction was only when the removal or process leading to removal was "by virtue of" Vetting of Judges and Magistrates Act. (emphasis added)***

11. ***the learned Judge erred in law and in fact in failing to interpret and apply the intention of the Constitution and the Vetting of Judges and Magistrates Act in the vetting process and the ouster clause.***

12. ***the learned Judge erred in law and in fact in failing to understand and appreciate the Applicant's Petition before him***

13. ***the learned Judge erred in law and in fact in failing to appreciate the merits of the Petition before him and the fact that this was an 'exceptional and extreme cases'.***

14. ***the learned Judge erred in fact and in law in failing to appreciate the tenor and effect of the Supreme Court Judgment in JMVB 2 which expressly upheld the right to challenge the constitutional and statutory jurisdiction of the Respondent on any question surrounding the suitability or a process leading to the suitability of a Judge.***

15. ***the learned Judge erred in law and fact in failing to appreciate that the Respondent violated Articles 47 and 50 of the Constitution by requiring the Appellant to respond to fresh complaints for the purpose of re-vetting exercise which complaints were not part of the initial complaints submitted to the Applicant during his vetting.***

11. The appellant prays in the memorandum of appeal for the appeal to be allowed with costs and the decision of the High Court striking out the order to be set aside and the reliefs prayed for in the petition to be granted.

HEARING OF THE APPEAL

12. The hearing of the appeal opened and concluded before us on 1st December 2015. Learned counsel Mr. F. E. Wasuna assisted by learned counsel Mr. R. Sagana appeared for the appellant. Learned counsel Mr. C. Kanjama appeared for the Vetting Board.

13. Mr. Wasuna argued the appeal under four grounds. Under grounds 1, 2, 4, 5, 6, 9, 10, 11, 12 and 13, he contended that the High Court erred in holding that it had no jurisdiction to entertain the petition by the appellant. He was in agreement that the Supreme Court decision in Judges and Magistrates Vetting Board and 2 Others v. Centre for Human Rights and Democracy and 11 Others [2014] eKLR [i.e. Petition No.13A of 2013 as consolidated with Petition No.14 f 2013 and 15 of 2013] has settled the legal point that with regard to the process of vetting or the outcome of vetting process by the Vetting Board, the courts have no jurisdiction to review that process or outcome. However, he contended that the High Court had jurisdiction to hear the petition on the question whether the appellant's rights had been violated and whether the Vetting Board acted within its powers and mandate. The Supreme Court held in the case that-

> ***"for the avoidance of doubt, and in the terms of Section 23(2) of the Sixth Schedule to the Constitution, 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 by virtue of the Constitution, and the Vetting of Judges and Magistrate Act."***

14. Mr. Wasuna submitted that the ouster of jurisdiction obtains only to the extent that the Vetting Board acts within Section 23 (1) of the Fifth Schedule to the Constitution (supra). He submitted that Parliament had discharged its mandate by enacting Section 23 of the Vetting of Judges and Magistrates Act (hereinafter referred to as "the Vetting Act") with regard to the time frame for the vetting process and Sections 17 to 23 of the said Act with regard to mechanisms and procedures of vetting process. Alluding to Section 23(2) and (4) of the Vetting Act, he contended that the ouster of jurisdiction of the courts to review the vetting process obtained only if the Board acted within the confines of Section 23(1) as regards the mechanisms and procedures of vetting and observed the time-lines laid down in the Vetting Act. Where the Vetting Board went outside the statutory provisions with regard to time lines or mechanisms and procedures, the High Court retained its power to review. This, said counsel, was the Supreme Court holding in the **Judges and Magistrates Vetting Board** and **2 Others versus Centre for Human Rights and Democracy and 11 Others** (supra).

15. It was Mr. Wasuna's further submission that jurisdiction cannot be assumed. It must be derived from the Constitution and the law. And the *"kenel to which the Vetting Board must be tethered"* said counsel, is Section 23 (supra). It cannot operate outside it, added counsel. For this reason, counsel contended that the Vetting Board could not vet the appellant again. Moreover, he said, Sections 21 and 22 of the Vetting Act show that the Vetting Board's powers are limited to determination of suitability or unsuitability and review of unsuitability of a judge or magistrate and that the decision was final under Section 22 (3). Under the Vetting Act, said counsel, the Vetting Board can only stand by its decision as regards suitability or unsuitability. Counsel contended that the Vetting Board has no power to re-vet. He drew the attention of the Court to the Vetting Board's decision of 10th September 2012 on the vetting of the appellant in which the Vetting Board tied 4 to 4 in its voting. He contended that the Vetting Board could not come up with a different decision as the tie should have resulted in a determination of suitability as was the case in the Vetting of Lady Justice Koome where there was a similar deadlock of votes and the Vetting Board determined that in the event of a deadlock on votes, the Judge should be declared suitable.

16. Counsel contended that the Vetting Board did not have jurisdiction to change suitability to unsuitability or to re-vetting. At any rate, submitted counsel, vetting beyond 28.3.2013 was outside the time frame and it was pointless that other judges have been vetted beyond the time limit or had succumbed to re-vetting.

17. On 21st December 2012, said counsel for the appellant, the Vetting Board did not have the 8 members who had tied 4 to 4 on 10th September 2012. The record showed, he said, that 4 members signed, one member was absent, and one member dissented, that totalled six members. Moreover, on vetting and determination of 10th September 2012, the complaints were different from the complaints in the decision of 21st December 2012. Even if re-vetting was permissible, he contended, under the law, it could only be on the basis of the same or original complaints and not on different complaints. Counsel drew the analogy of a retrial to re-vetting and contended that as a retrial can only be in respect of the same offence and not other or enhanced offences, so should a re-vetting.

18. Mr. Wasuna urged us to find that the High Court should have heard the appellant and found that the Vetting Board had no power to re-vet him. He urged us to allow the appeal and grant the reliefs sought.

19. Mr. Kanjama, the learned counsel for the Vetting Board commenced his submissions by telling us that he adopted the submissions he had made before us during the hearing of the appellant's application for stay under rule 5(2)(b) of this Court's Rules. Those submissions were in civil application No. Nai 275 of 2015 (UR 233/2015). We have perused them. Mr. Kanjama alluded to the primacy of the question of jurisdiction and drew our attention to the case of **Owners of the Motor Vessel "Lillians" V. Caltex Oil (K) Ltd [1989] KLR 1** that is popularly referred to as the **M V Lillians** case which, as correctly pointed out by him is the *locus classicus* on the question of jurisdiction. It is in it that Nyarangi JA uttered the following famous and oft quoted words –

> ***"jurisdiction is everything. Without it, a court has no power to make one more step. Where a court has no jurisdiction, there would be no basis for a continuation of proceedings pending other evidence. A court of law downs tools in respect of the matter before it the movement it holds the opinion that it is without jurisdiction..."***

20. Mr. Kanjama submitted that the Supreme Court has approved and adopted the decision in M. V. Lillans (supra) as correctly stating the law. He drew our attention to the Vetting Board's objection to the Petition in the High Court in which the Vetting Board contended –

1. ***That pursuant to Section 23 of Schedule six of the Constitution the High Court lacked jurisdiction to deal with the petition***

2. ***That the Supreme Court has rendered a decision in Petition No.13A of 2014 stating that the High Court lacks supervisory jurisdiction under Article 165 (6) of the Constitution over the respondent (Vetting Board)***

3. ***That the respondent's (Vetting Board's) decision making process is Privilege and it is not justiciable being an internal judicial or quasi-judicial process***

21. It was Mr. Kanjama's submission that the High Court was right in striking out the petition as it could not countenance a matter that would undermine the integrity of the vetting process. It was his submission that what the petition raised was a matter that was the subject of conclusive determination by the Vetting Board which was final.

He drew the court's attention to the Vetting Board's replying affidavit to the petition in the High Court and pointed out that the M. V. Lillians case was adopted in the IEBC Advisory opinion in the matter of the interim independent electoral commission (Applicant) where the Supreme Court stated that –

> ***"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. Nor can Parliament confer jurisdiction upon a court of law beyond the scope defined by the Constitution. Where the Constitution confers power upon Parliament to set the jurisdiction of the court of law or tribunal the legislature would be within its authority to prescribe the jurisdiction of such a court or tribunal by statute law."

22. It was Mr. Kanjama's submission that the High Court was correct in striking out the appellant's petition for want of jurisdiction because it could not countenance a matter that would undermine the integrity of the vetting process. Counsel also referred to the decision in the case of **Samuel Kamau Macharia and Another V. Kenya Commercial Bank Limited and 2 Others** [2012] e KLR to demonstrate that finality in litigation often sparks off allegations of oppression (as happened in Samuel Kamau Macharia's case (supra)). Under Section 22(3) of the Vetting Act, the decision of the Vetting Board was final, he said, and was not subject to review by any court. He cited **Judges and Magistrates Vetting Board and Others V. Centre for Human Rights and Democracy and Others** (Petition 13A, 14 and 15 of 2013) in which the Supreme Court emphasized in para 202 that –

"for the avoidance of doubt, and in the terms of Section 23(2) of the Sixth Schedule to the Constitution, 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 by virtue of the Constitution, and the Vetting of Judges and Magistrates Act."

23. Mr. Kanjama requested the Court to consider whether issues raised have been subjected to decision of the Vetting Board. He submitted that the Appellant's first vetting was on 21st December 2012 and the determination was by a majority of 4 to 2, with 2 members disqualifying themselves, and one member being absent. Aggrieved, the appellant sought review, said counsel. Mr. Kanjama urged us to find and hold that the review determination dealt with the same matter now before the Court. It was not the first time that the Vetting Board ordered re-vetting or reflected on its determinations. The key issue in this appeal, he said, was dealt with by the Vetting Board which ordered a re-vetting.

24. Further, Mr. Kanjama contended that the Vetting Board had power to review its own determinations if errors were found and in the appellant's case bias was alleged. He drew our attention to the House of Lords decision in the case, **Pinochet Urgarte (2) (R. V. Bow Street Metropolitan Stipendiary Magistrate and Others** ex parte Pinochet Urgarte (No.2) [1999] 1 All ER 577. The holding in the Pinochet case (supra) was that –

"The principle that a judge was automatically disqualified from hearing a matter in his own cause was not restricted to cases in which he had a pecuniary interest in the outcome, but also applied to cases where the judge's decision would lead to the promotion of a cause in which the Judge was involved together with one of the parties. That did not mean that the judge was involved together with one of the parties. That did not mean that judges could not sit on cases concerning charities in whose work they were involved, and judges would normally be concerned to recuse themselves or disclose the position to the parties only where they had an active role as trustee or director of a charity which was close allied to and acting with a party to the litigation. In the instant case, the facts were exceptional in that A1 was a party to the appeal, it had been joined in order to argue for a particular result and the Law Lord was a director of a charity closely allied to A1 and sharing its objects. Accordingly, he was automatically disqualified from hearing the appeal.

The petition would therefore be granted and the matter referred to another committee of the House for rehearing"

25. Mr. Kanjama also referred us to the challenges posed to the Vetting Board by time constraints in the discharge of its work and the extensions of time that have hitherto been effected including the 3 months after 31st December 2015 by dint of Act 11 of 2015. He urged us to find that the High Court correctly determined the question of jurisdiction and dismissed the petition. He did not delve into the issue of the records of the Vetting Board alluded to in paragraphs 24, 25 and 26 of the replying affidavit sworn by

Reuben Chirchir sworn on 7th October 2015 in response to the Petition and the appellant's application in the High Court.

26. In reply, Mr. Wasuna submitted that the Vetting Board had documented its decisions and that on review the decision in the record of 21st December 2012 ostensibly bore only 4 signatures although, said counsel, the entire panel of eight members should have signed as taking the decision. Even if two members had recused themselves, the remaining six should have signed but as one of them dissented, five members should have signed. They did not, he said. It was Mr. Wasuna's submission that the Board is seeking to extend its jurisdiction.

He contended that the Vetting Board has no power to re-vet as none has been donated to it. He contended that the mere fact that the Vetting Board may have re-vetted in other cases does not confer jurisdiction upon it nor does it cure illegality. As regards Act 11 of 2015, he expressed the view that it does not come into operation unless there is an ongoing vetting process that spills over beyond 31st December 2015.

EVALUATION

27. We have carefully perused the record of appeal and the authorities cited by both counsel. We have also duly considered the rival submissions made by the parties through their respective counsel.

28. This is a first appeal from the High Court sitting in exercise of its original jurisdiction. In pursuance with rule 31 of the Court of Appeal Rules, this Court has power to confirm, reverse or vary the decision of the High Court appealed against or to remit the proceedings to the High court with such directions as may be appropriate ..." In **Selle and Another V. Associated Motor Boat Company Ltd and Others** [1968] EA 123, the predecessor of this court held in holding (i) that –

> ***"(i) an appeal from the High Court (to this Court) is by way of retrial and the Court of Appeal is not bound to follow the trial Judge's findings of fact if it appears either that he failed to take account of particulars circumstances or probabilities or if the impression of the demeanour of a witness is inconsistent with the evidence generally."***

29. This being a first appeal our mandate as set out in rule 29(1) (supra) requires us to reappraise the evidence and to draw our own conclusions on the facts emerging from the evidence. In **Peters V. Sunday Post Limited** [1958] EA 424, the predecessor of this court (i.e. the Court of Appeal for Eastern Africa) had this to say with regard to the mandate of this court on a first appeal –

"whilst an appellate court has jurisdiction to review the evidence to determine whether the conclusions of the trial judge should stand, this jurisdiction is exercised with caution; if there is no evidence to support a particular conclusion, or if it is shown that the trial judge has failed to appreciate the weight or bearing of circumstances admitted or proved, or has plainly gone wrong, the appellate court will not hesitate so to decide." Watt V. Thomas,, [1947] 1 All E.R. 582; [1947] A.C. 984, applied

30. In Peters V. Sunday Post (supra) the court found that –

> ***"as there was documentary and other evidence which either tended strongly to confirm the appellant's evidence or, alternatively, to show that the respondent's principal witness was unworthy of credit, the full significance of which the trial Judge had apparently not appreciated, this was a case where the appellate court ought not to allow the conclusion reached by the trial Judge to stand."*** **The appeal was allowed.**

31. This appeal raises issues of law. It does not raise issues of fact or questions of credibility of witnesses. In effect, it does not invite calibration of evidence or credibility of witnesses which would entail assessment of evidence. If it did, it would behove this court to respect the findings of the trial court on issues of demeanor and credibility of witnesses. But it is important to appreciate the distinction between a point of law and a question of fact. In the case of **Gatiran Peter Munya v. Dickson Mwenda Kithinji and 2 Others** (Supreme Court of Kenya Petition No.25 of 2014) the Supreme Court of Kenya referred to

the decision in the judgment of the Supreme Court of Phillipines in **Republic V. Malabanan, G.R. NO. 169067**, Oct 632 SCRA 338, 345 and **New Rural Bank of Guimba V. Fermina** J. Abad and Rafael Susan in which the court drew the distinction between a point of law and a question of fact by stating thus –

> ***"we reiterate the distinction between a question of law and a question of fact. A question of law exists when the doubt or controversy concerns the correct application of law or jurisprudence to a certain set facts; or when the issue does not call for an examination of the probative value of the evidence presented, the truth or falsehood of facts being admitted. A question of fact exists when the doubt or difference arises as to the truth or falsehood of facts or when the query invites calibration of the whole evidence considering mainly the credibility of the witnesses, the existence and relevance of specific surrounding circumstances, as well as their relation to each other and to the whole ..."***

32. We are called upon to determine whether the learned Judge had jurisdiction to deal with and determine the appellant's petition and whether he was right in striking it out as he did and whether, if the appeal succeeds, the appellant is entitled to the reliefs he has prayed for. We hasten to state that the impugned decision was not made in exercise of the learned judge's discretion, if it was, we would be enjoined to examine the principles enunciated in the *locus classicus* case of **Mbogo & Another V. Shah** [1968] EA 93 at page 96 which shows that –

> ***"an appellate court will not interfere with the exercise of the discretion by the trial court unless it is satisfied that its decision is clearly wrong, or because it has misdirected itself or because it acted on matters on which it should not have acted or because it has failed to take into consideration matters which it should have taken into consideration and in doing so arrived at a wrong conclusion."***

33. What was before the learned judge of the High Court was (1) the appellant's petition supported by an affidavit sworn by the appellant to which were annexed exhibits and (2) a replying affidavit sworn by the Chief Executive Officer of the Vetting Board to which was annexed a notice to produce by the Appellant dated 12th October 2015 (requiring the Vetting Board to produce Minute No.31 of 10th September 2012 made on the 10th September 2012); a copy of notice of appeal dated 9th November 2015 addressed by the Vetting Board to the appellant; and a copy of the Vetting Board's written submissions in the High Court dated 14th October 2015.

34. Also before the learned Judge was the Vetting Board's Notice of Preliminary Objection dated 6th October 2015 objecting to the Petition and the appellant's application for conservatory orders and/or *stay of the Notice of the Response dated 10th July 2012 requiring the appellant to respond to 4 complaints received by the Vetting Board and all further proceedings before the Vetting Board in relation to the fresh vetting of the Petitioner (appellant) pending hearing and determination of the application.*

The application was lodged simultaneously with the Petition on 25th September 2015 and was heard ex parte on 25th September 2015 before the Hon. Lady Justice M. Ngugi who certified it urgent and issued a conservatory order of stay of the notice to file a response pending inter partes hearing of the application or further orders of the court.

35. Parties filed written submissions in the petition which was heard by way of oral arguments and affidavits on record. The hearing proceeded and concluded on 19th October 2015. Judgment was reserved and delivery on 3rd November 2015.

36. The facts emerging from the petition, the supporting affidavit, the annextures thereto and the replying affidavit and the annextures thereto in respect of which the learned Judge heard submissions show that the appellant was vetted on 10th July 2012; that on 10th September 2012 the Vetting Board made a determination when in its plenary one of the 9 members recused himself and the remaining 8 members

took a vote that resulted in a tie of 4 to 4; that on 21st December 2012 the Vetting Board rendered a determination in which it found the appellant unsuitable to serve whereupon the appellant sought review of the decision; that the Vetting Board's decision dated 21st December 2012 was signed by 4 members while one member dissented and one member was absent; that on 20th March 2013 the Vetting Board declared the proceeding of 21st December 2012 a nullity and directed that a new panel be constituted to vet the appellant afresh; that the Vetting Board served the appellant on 18th September 2015 with a notice to file Response within 10 days for the purpose of fresh vetting; that the first complaint in the notice was a new complaint; that the appellant then moved to the High Court and filed the petition and an application for conservatory orders; that the petition was struck out on 3rd November 2014 on the ground that the court had no jurisdiction; that this appeal was filed on 23rd November 2015.

37. Further, the pleadings also show that the Vetting Board's replying affidavit sworn by Reuben Chirchir on 7th October 2015 alluded, in relation to the appellant's vetting, only to the following dates, that is to say, 21st December 2012 and 20th March 2013 in paragraphs 7 and8, and in paragraphs 32 and 33.

38. It is salient that there was no averment of denial in the Vetting Board's replying affidavit that the Vetting Board vetted the appellant and held a meeting on the 10th of September 2012 to take a vote on the suitability of the appellant. There was also no denial in the Vetting Board's replying affidavit that the Vetting Board took a vote on the appellant's vetting that resulted in a tie with 4 members in favour of suitability of the appellant and 4 members against. The replying affidavit also did not refute the fact that the Vetting Board did not announce the results of the determination of 10th September 2012 nor did it deny that in the vetting of Lady Justice Martha Koome the Vetting Board tied in its voting 4 to 4 and made a determination of suitability in favour of Lady Justice Martha Koome as a result of which she continued to serve in the judiciary as a Judge. The Vetting Board's replying affidavit further did not refute the allegation that the determination made by the Vetting Board on 21st December 2012 was arrived at without any hearing in which the appellant participated and there was no response to the allegation made in paragraph 20 of the appellant's affidavit in support of the petition No.406 of 2015 in the High Court in which the appellant alleged that the Vetting Board failed in its attempt to conduct a second vetting after its determination of the 10th September 2012 and further that the second determination of the 21st December 2012 was arrived at without any hearing in which the appellant participated and that that was in violation of the applicant's right to a fair hearing as provided under Article 50(1) of the Constitution and in breach of the rules of natural justice.

39. But the Vetting Board's replying affidavit in paragraphs 24, 25 and 26 obliquely admitted existence of determination of the appellant's vetting on 10th September 2012 in the deponent's averments on oath which referred to the Vetting Board's minutes without specificity or denial of the allegations in respect of the vetting on 10th September 2012.

But the Vetting Board's replying affidavit otherwise stated in paragraphs 24, 25 and 26.

> ***"24. That I am the custodian of the Board's minutes and at no time did I ever release the Board's minutes to the Petitioner (Appellant)"***
>
> ***"25. That any internal deliberations by the Board before announcement of its determination publicly is not official and the only valid and legal determination by the Board is the one signed, sealed, read and made public."***
>
> ***"26. That purporting to use internal deliberations of the Board is akin to unlawfully obtaining a draft court judgment before the same is pronounced in court and purporting to argue that the said draft is the proper judgment of the court after a different one is formally in court."***

40. On the basis of the material before us, the issues emerging for our determination in this appeal on the

question whether the learned Judge was correct in his decision in striking out the petition appear to us to be –

1. Whether the appellant was vetted on 10th September 2012 and

2. If so, whether the determination was a tie on a vote of 4 to 4

3. If the answers to (1) and (2) above are in the affirmative, what the legal implication is on the power of the vetting board in relation to the decisions it made on 21.12.2012 and 20.3.2013. In short, whether there was validity in those decisions

4. whether the High Court had power to entertain and determine the question whether it had jurisdiction to hear and determine the petition.

5. If the answer to 1 is in the affirmative, what decision the court should have rendered in the face of the material before it and the law obtaining.

41. On the fourth issue, did the High Court have jurisdiction to entertain and determine the appellant's petition, both counsel in this appeal made elaborate submissions (for which we are grateful) on the question of jurisdiction of the Vetting Board and both drew our attention to the decisions of the Supreme Court of Kenya by which we are bound. They have interpreted the law on the Vetting of Judges and Magistrates.

42. The petition before the learned Judge challenged the power of the Vetting Board to re-vet the appellant. The appellant alleged in the petition that the Vetting Board vetted him on 10th September 2012 and that the determination thereof should have been one of suitability to continue serving in the judiciary. It also alleged that the Vetting Board's determinations of 21st December 2012 and 20th March 2013 were invalid. In effect the appellant contended in the petition that the Vetting Board had no jurisdiction to re-vet him. Was this assertion tantamount to a removal or a process leading to the removal from office of the appellant as a Judge which is not amenable to review by any court under Section 23(2) of the Sixth Schedule to the Constitution which states:-

> ***"23(2) A removal, or a process leading to the removal, of a Judge, from office by virtue of the operation of legislation contemplated under subsection (1) shall not be subject to question in, or review by, any court."***

43. In our view, the petition did not require the court to deal with any issue of removal or leading to removal of the appellant from office as a Judge nor did it deal with process of removal of the appellant from office as a Judge. Rather, it required the court to determine whether the Vetting Board had power under the law to re-vet the appellant as intended. The appellant alleged that he had been vetted and he contended that the further vetting on 21st December 2012 and the order of 20th March 2013 to re-vet him were illegal, on the ground that the Vetting Board did not have powers under the law to re-vet Judges and Magistrates.

44. To our mind the petition neither sought in its averments nor in the prayers seeking reliefs any order the effect of which touched on removal or process leading to the removal of the appellant from office as a Judge. Nowhere in any of the decisions of the Supreme Court has the Supreme Court suggested, let alone decided, that the law does not allow a Judge or a Magistrate to challenge the Vetting Board where it has acted beyond the amplitude of its powers. Clearly, a challenge on the jurisdiction of the Vetting Board with regard to re-vetting cannot be equated to challenge of its decision on removal or process leading to removal of a judge or magistrate from office. The distinction is as clear as daylight. In the case prohibited by Section 23(2) of the Sixth Schedule to the Constitution, the action prohibited is that which would be aimed either at nullifying removal or seeking to halt or stop process that would lead to removal. In our view, the Constitution did not give the Vetting Board a blanket insulation from litigation. The insulation was predicated on the parameters that the Vetting Board acting within the Constitution and the law would

enjoy the right to vet judges and magistrates without being challenged in a court of law either on account of removal of judges or magistrates from office or on account of process that would lead to removal of a judge or magistrate from office. Needless to state, the insulation of the Vetting Board from litigation as laid down in S.23(2) of the Fifth Schedule of the Constitution was necessary but it had to be within the parameters set in the Vetting Act which was enacted pursuant to Section 23(1) of the Sixth Schedule to the Constitution. If the Vetting Board acted outside the amplitude of its powers, the insulation could not hold. Mr. Wasuna was quite right in his contention that the ouster of jurisdiction of courts only held true where the Vetting Board acted within the confines of its powers and in particular Section 23 of the Sixth Schedule to the Constitution. If the Vetting Board, for instance, purported to vet after the expiry of the period set by the law, the vetting would be a nullity. If for instance it purported to vet non-judicial officers, its determination would be a nullity. So too, if it purported to re-vet a judge or a magistrate a second time after finding such Judge or magistrate suitable the first time, its decision to re-vet a second time would have to be sanctioned by the Constitution or statute to be valid. Any act done by the Vetting Board in relation to removal of a judge or a magistrate from office if outside its powers would be a nullity. In the latter case, it would be open to an aggrieved judge or magistrate to access the court for an order to stop the Vetting Board from breaching the law. In such action, the contention that the Vetting Board could not be challenged or that the court has no jurisdiction cannot hold true. Where the ouster of jurisdiction did not apply, judges and magistrates were entitled to access justice as did the appellant. Indeed this position is enunciated in JMVB2 wherein the Supreme Court made a distinction between JMVB1 and JMVB2. In effect, the Supreme Court reiterated that the respondent is not to be subjected to supervision if it acts within it's mandate. However, should the respondent go outside its mandate, then the ouster clause in Section 23 of the sixth schedule cannot be invoked.

45. In the petition before the High Court, the appellant was not only challenging the powers of the Vetting Board with regard to the intended re-vetting, but he was also contending that the Board had vetted him and taken a decision which was a tie and ipso facto entitled the appellant to be declared suitable to continue serving in consonance with the principle in the vetting of Justice Martha Koome. Clearly, the petition raised the legal question whether the Vetting Board had powers to re-vet a judge who had been vetted and found suitable. That could not be said to be a matter that relates to a removal or a process leading to the removal of a judge from office.

46. The Vetting Board remained mum in its replying affidavit in the face of the appellant's pleading that he was vetted on 10th July 2012 and that a determination on the vetting was made on 10th September 2012 in which members of the Vetting Board tied 4 to 4. The appellant contended that the Vetting Board had in a similar tie on the case of Justice Koome returned a determination of suitability and found the judge suitable to continue to serve in the judiciary. The appellant wanted alike treatment if the Vetting Board was to eschew a charge of discrimination. The appellant seemed to have kept abreast of the deliberations of the Vetting Board and to have obtained without the Board's permission minutes and documents relating to his vetting including the vetting of 10th September 2012 and 21st December 2012 and other documents.

47. As hereinabove stated, the averments in paragraphs 24, 25 and 26 of the replying affidavit filed by the Vetting Board left no doubt that the Vetting Board was aware that the appellant knew of the vetting determination of 10th September 2012. If the appellant was not vetted as he alleged, and if the determination of the vetting was not as stated by him, the Vetting Board should have been furious as that would have been a flagrant lie! One does not have far to seek to see that the Vetting Board intended to disregard and discard the appellant's vetting that resulted in the determination of 10th September 2015 which the appellant contends was a tie of 4 to 4. If the Vetting Board had not previously determined that Justice Koome whose determination was a similar tie was suitable to continue serving, the Vetting Board would have furiously denied it. Instead, the Vetting Board through its Chief Executive Officer, the custodian of the records and documents of the Vetting Board, merely retorted that the Appellant was not entitled to have the documents, and for that reason they amounted to nothing as the Vetting Board had not publicly announced the determination. The deponent did not leave much for imagination. As a custodian of the records and documents of the Vetting Board, he knew whether the appellant was telling the truth or not. He failed to deny. He had opportunity to do so. The only inference one can draw is that what the appellant averred on oath was true but the Vetting Board was intent on disregarding and discarding a

concluded vetting with a view to re-vetting him again, hence the 21st December 2012 and 20th March 2013 deliberations on the re-vetting of the appellant. It is hardly likely that the appellant would lie about the vetting to the Vetting Board. And it is even more unlikely that the Chief Executive Officer of the Vetting Board would remain taciturn or mum if the allegations by the Appellant were false. The latter had considerable amount of time from the time the Petition was filed in the High Court to the time the Record of Appeal was lodged and served to respond to the allegations.

48. Throughout the presentation of the Vetting Board's case, the latter omitted to focus on the allegations relating to the appellant's vetting of 10th September 2012. Yet it constituted the main thrust of the appellant's appeal.

49. The Record of Appeal shows that in paragraphs 7 and 9 of the appellant's affidavit in support of the petition, the appellant averred that the Board held a meeting on the 10th of September 2012 to take a vote on the suitability of the appellant. One of the members disqualified herself from the matter. After deliberations, the result from the remaining members was a tie of 4 to 4. Following the Board's precedent in Lady Justice Koome's case and the law, and because there was no majority in favour of unsuitability, the appellant was found suitable to remain in office.

50. If we understood the Vetting Board's argument correctly, it was that the determination of 10th September 2012 was of no effect because it was not publicly announced. Further, the replying affidavit states that the determination of 10th September 2012 was not signed and sealed and was not announced. The replying affidavit by the Vetting Board compared the appellant's vetting determination of 10th September 2012 to a court judgment that is not signed dated and delivered. The latter would not be valid unless signed and delivered. But the validity of a decision of the Vetting Board that has resulted in voting by members of the Board and a determination on the suitability or otherwise of a judge does not depend on being publicly announced or dated or signed. For starters, nowhere does the Vetting Act require the determination of suitability to be publicly announced. Section 21 (3) of the Vetting Act requires only the decision to remove a judge or magistrate from service to be made public. Under Section 33(1) of the Vetting Act, the Vetting Board is entitled to regulate its own procedure and make regulations generally for the better carrying into effect the provisions of the Vetting Act which regulations may provide the conduct of the Board's operations and proceedings. There is nothing to show that the tie of votes 4 to 4 in the determination of appellant's vetting was invalid nor is the comparison given in paragraph 26 of the replying affidavit with a court judgment that has not been dated, signed and delivered to the 10th September 2012 determination of suitability predicated on any legal provision. The Vetting Board did not refute the averment that its determinations are based on voting of members present. It did not refute the allegation that the appellant's determination on 10th September 2012 resulted in a tie of 4 votes to 4. If the Vetting Board determined the appellant's vetting that way, the argument that it was not dated, sealed and announced was misplaced unless the Vetting Board could point to a legal provision which was breached. The procedure for delivery of Court judgments is provided for in the Civil Procedure Rules which do not apply to proceedings before the Vetting Board. Rules of natural justice which apply to the proceedings before the Vetting Board by dint of Section 19 (6) of the Vetting Act do not support the contention advanced in the Vetting Board's replying affidavit.

51. What are the implications of the Vetting Board's failure to controvert the allegations made by the appellant regarding his vetting on 10th September 2012? The Vetting Board contended in its replying affidavit that it was of no consequence because the Vetting Board had not made it public and that in any case the documents did not find their way into the hands of the appellant in a proper or authorized manner. What does the law state regarding illegally obtained evidence? In the case of **Karuma, Son of Kaniu V. The Queen [1955] AC 197** which was an appeal to the Privy Council on a criminal conviction anchored on an illegally procured evidence, the Privy Council held that "the test to be applied both in civil and in criminal cases in considering whether evidence is admissible is whether it is relevant to the matters in issue. If it is, it is admissible and the court is not concerned with how it was obtained" In that case the Privy Council decision was supported by the decision in **Reg. V. Leatham** (1861) 8 Cox C.C.C 498 which was referred to in the judgment. In Re. V. Leatham (supra), it was said "it matters not how you get it if you steal it even, it would be admissible in evidence" In **Olmstead V. United States** (1928) 277

US 438 the Supreme Court of the United States of America opined that "the common law did not reject relevant evidence on the ground that it had been obtained illegally." In **Helliwell V. Piggot-Sims [1980] FSR 356** it was held that "so far as civil cases are concerned, it seems to me that the judge has no discretion. The evidence is relevant and admissible. The judge cannot refuse it on the ground that it may have been unlawfully obtained in the beginning."

52. There is no doubt that the documents relating to the appellant's vetting of 10th September 2012 are relevant as his case hinges on them. Common law principles show that evidence, if relevant, is admissible even if it has been illegally obtained. The case of **Karume V. The Queen** though a criminal case shows that common law principles developed in criminal law cases apply in civil cases.

53. As the Vetting Board did not controvert the allegations of the vetting of 10th September 2012 it is deemed to have implicitly admitted the fact of the said vetting and the determination thereof. The guiding principles in the Vetting Act which are stated to be *"the principles and standards of judicial independence, natural justice and international best practices"* would support admission of relevant evidence even if it is illegally obtained. The Vetting Board is a tribunal of a quasi-judicial character. It is bound to apply principles of natural justice. International best practices demand that in the context of this case, the Vetting Board's decision of 10th September 2014 be enforced in keeping with the values of transparency, rule of law, equity and integrity enshrined in Article 10 of the Constitution which binds all State organs, state officers, public officers, and all persons whenever any of them applies or interprets any law. Though the Civil Procedure Rules do not apply to proceedings before the Vetting Board, they offer a guide to the practice in legal proceedings. Under Order 2 Rule 11(I) of the Civil Procedure Rules, any allegation of fact made by a party in his pleading is deemed to be admitted by the opposing party unless it has been traversed by that party in his pleading or a joinder of issue under rule 10 operates as a denial of it. Rule 11(2) of the Civil Procedure Rules shows that *"a traverse may be made either by denial or by a statement of non-admission and either expressly or by necessary implication."*

54. It is our finding that the Appellant was vetted as he alleged on 10th July 2012 and that a determination on his vetting was made on 10th September 2012 and that the voting in the determination resulted in a tie of 4 members voting for the appellant's suitability and 4 members voting against it. The Vetting Board did not deny that in the vetting of the Hon. Lady Justice Koome, the determination was a similar tie on a voting of 4 to 4 just like in the Appellant's case and that the Vetting Board determined in Justice Koome's favour and found her suitable to continue serving in the Judiciary.

55. We have come to the conclusion that the learned judge erred in holding that he had no jurisdiction to entertain and determine the Petition and in striking out the petition. This answers the fourth question. We have already found that the appellant was vetted on 10th September 2012 and the determination should have been of suitability. That answers the first, second and fifth questions.

56. In answer to the third question relating to the implications on decisions by the Vetting Board on 21st December 2012 and 20th March 2013, nowhere in the Vetting Act has the Vetting Board been conferred with power to re-vet or to rescind a decision of suitability. Consequently, the Vetting Board's decisions taken on 21st December 2012 and 20th March 2013 were invalid for want of jurisdiction. That answers the 3.

57. We allow the appeal. We reverse the decision of the High Court striking out the Petition and order that declarations shall issue in terms of prayers 1, 2, 3, 6 in the Petition and we order that the appellant was found suitable to continue serving in the judiciary in Kenya in the determination of Vetting Board of 10th September 2012.

58. Each party shall bear its own costs.

Dated and made at Nairobi this *14th day of December, 2015*.

G.B.M. KARIUKI SC

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JUDGE OF APPEAL

F. SICHALE

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JUDGE OF APPEAL

J. MOHAMMED

.....

JUDGE OF APPEAL

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

DEPUTY REGISTRAR