



**IN THE COURT OF APPEAL**

**AT NAIROBI**

**(CORAM: GATEMBU, M'INOTI & MURGOR, JJ.A.)**

**CIVIL APPEAL NO. 93 OF 2014**

**BETWEEN**

**THE JUDGES & MAGISTRATES**

**VETTING BOARD.....1ST APPELLANT**

**THE ATTORNEY GENERAL.....2ND PPELLANT**

**AND**

**THE KENYA MAGISTRATES &**

**JUDGES ASSOCIATION.....3RD RESPONDENT**

**(Appeal from the judgment of the High Court of Kenya at Nairobi (Ngugi, J.) dated 26th March, 2014 in**

**HCCC No. 64 of 2014)**

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**JUDGMENT OF THE COURT**

The real protagonists in this appeal are two institutions that are critical players in the justice sector in Kenya. The *1st appellant, the Judges and Magistrates Vetting Board (the JMVB)* is a statutory body, established under the *Vetting of Judges and Magistrates Act, No. 2 of 2011*, pursuant to the express requirement of *Clause 23 of Schedule Six of the Constitution of Kenya, 2010*. Its mandate is to vet and determine the suitability of judges and magistrates appointed under the former Constitution, to continue serving under the Constitution of Kenya, 2010. The respondent, the *Kenya Magistrates and Judges Association (the KMJA)*, is registered under the *Societies Act, Cap 108, Laws of Kenya*, and is for all intents and purposes, a trade union of judges and magistrates that among other things, champions their interests and welfare, as well as protection and promotion of the independence of the judiciary and the rule of law.

Shorn of all semantics, the real dispute between these two institutions is whether the JMVB, in determining the suitability of judges and magistrates to continue serving, may rely on complaints that arose after 27th August, 2010, being the date when the Constitution of Kenya, 2010 was promulgated and came into force. The JMVB asserts that it has power to consider all complaints whether, arising before or after the promulgation of the Constitution. The KMJA, on the other hand contends

that the mandate of the JMVB is limited to determining the suitability of judges and magistrates on the basis of complaints arising or pending **before** the promulgation of the Constitution and that any complaints arising **after** the promulgation of the Constitution is the exclusive province of the **Judicial Service Commission (the Commission)** established by **Article 171 of the Constitution**. When the dispute came to a head, KMJA, on 7th February, 2014, filed **Constitutional Petition No 64 of 2014** in the High Court seeking a declaration that the JMVB, in the exercise of its functions, cannot lawfully investigate the conduct, acts or omissions of judges and magistrates arising after 27th August, 2010 and a further declaration that any vetting of judges and magistrates conducted by JMVB on the basis of post 27th August, 2010 complaints was unconstitutional, null and void. The final prayer in the petition, which has attracted a lot of attention in this appeal, was for the High Court to **“read in the provisions of section 18 of the Vetting of Judges and Magistrates Act immediately after the word ‘consider’ in subsection (1) the words “in relation to conduct, acts and omissions of judicial officers allegedly arising or arising on or before the effective date.”**

The JMVB resisted the petition in the High Court vide a replying affidavit sworn on 13th February, 2014 by its Chief Executive Officer and Secretary, **Mr Reuben Chirchir**. Its direct response to the petition was that it had discharged its functions strictly in accordance with the Constitution and that the central issue raised in the petition was a nonissue because the

affected judges and magistrates had submitted themselves to the jurisdiction of the JMVB, without ever raising any objection regarding the date of the complaints against which their suitability was evaluated. In the view of the JMVB, there was no bar, either under the Constitution or under the Vetting of Judges and Magistrates Act, to consideration by the JMVB of complaints arising after 27th August, 2014.

The petition was heard by **Ngugi, J.** who on 26th March, 2014 found in favour of KMJA and granted the three reliefs sought in the petition. Aggrieved by the judgement, the JMVB lodged the appeal before us, in which it raised four grounds of appeal, contending that the learned judge had erred in law and fact by:

- “1. holding that the issues before the court were not res judicata;**
- 2. finding that the 1st appellant could not vet judicial officers with respect to acts or omissions occurring after the effective date;**
- 3. finding that judicial officers vetted in respect of allegations arising after 27th August, 2010 were subjected to unlawful and unfair treatment contrary to Article 27 of the Constitution; and**
- 4. finding that the court had jurisdiction to ‘read in’ into section 18 of the Vetting of Judges and Magistrates Act words that would confine vetting to acts and omissions occurring on or before the effective date.”**

**Mr Njoroge**, learned counsel for the appellants argued all the four grounds globally, laying particular emphasis on whether the JMVB could in law conduct vetting of judges and magistrates on the basis of complaints arising after 27th August, 2010. Learned counsel invited us, in determining this appeal, to be guided by **Article 259** of the Constitution and interpret clause 23 of the Sixth Schedule, which provides for vetting of judges and magistrates, together with the Vetting of Judges and Magistrates Act, in a manner that among other things, promotes the purpose, values and principles of the Constitution and contributes to good governance.

Counsel urged that vetting of judges and magistrates in office as of 27th August 2010 was a clear purpose, principle and value of the Constitution intended to reform the judiciary, eradicate malpractices and ensure an efficient, corruptionfree and professional institution delivering fair administration of justice, defending the rights and freedoms of the citizens and upholding and promoting the rule of law. In counsel's view, that constitutional purpose should be given full effect, instead of being undermined by a narrow construction of the JMVB's mandate. We understood learned counsel's argument therefore to be that in holding that the JMVB could not rely on complaints post 27th August, 2010, the High Court had failed to give full effect to an undisputed constitutional value and principle.

Mr Njoroge also invoked the national values and principles of governance in **Article 10** of the Constitution and submitted that all state organs, including the judiciary, are bound, whenever they apply or interpret the Constitution, to give effect to among others, good governance, integrity, transparency and accountability. In counsel's view, the vetting of judges and magistrates was underpinned by those values and principles, and upholding the mandate of the JMVB to consider post 27th August, 2010 complaints would amount to giving effect to the national values and principles of governance in Article 10.

Learned counsel invited us also to be guided by the spirit of the Constitution in determining whether the JMVB could base its evaluation of suitability of the concerned judges and magistrates on complaints arising after 27th August, 2010. In his view, the spirit of the Constitution left no doubt that vetting of judges and magistrates could be based on complaints before or after the effective date. Relying on the decision of the Constitutional Court of Uganda in **TINYEFUZA VS ATTORNEY GENERAL, Constitutional Appeal No. 1 of 1997**, learned counsel invited us to adopt a holistic interpretation of the Constitution.

Mr Njoroge further submitted that a correct reading of **section 18** of the Vetting of Judges and Magistrates Act must lead to the conclusion that there was no restriction on the complaints that the JMVB could consider in evaluating the suitability of judges and magistrates, and to that extent the JMVB could consider complaints arising even after the effective date. In counsel's view, it was not helpful to see the vetting of judges and magistrates as a mere transitional mechanism, because no judge or magistrate who was in office on the effective date could continue serving unless he or she was cleared by the JMVB. The transition, Mr Njoroge opined, could not end until all judges and magistrate in office on the effective date were vetted. On the same vein, counsel contended, no judge or magistrate could be cleared by the JMVB until all pending complaints against him or her were considered and those pending complaints could well have arisen after the effective date. Learned counsel further submitted that unless and until a judge or magistrate was vetted by the JMVB and found suitable to continue serving, such judge or magistrate was not amenable to the Commission procedures. It was Mr Njoroge's further argument that under section 18 as read with section 2, the only restriction on the complaints that can be considered by the JMVB is that such complaints should be received by the JMVB at least 14 days before the vetting.

Lastly counsel submitted that the High Court did not have jurisdiction to '**read in**' words into a statute because that was tantamount to amending legislation, which is the preserve of the legislature. In counsel's view, the High Court had overstepped its mandate and usurped a role reserved for the legislature. The dicta of **Potter, JA** in **NGOBIT ESTATE LTD VS CARNEGIE (1982) KLR 437** that the function of the judiciary is to interpret the statute law, not to make it and that it is the duty of the judge to apply the law as it stands, was invoked to criticize the learned judge for reading words into a statute instead of applying the statute as enacted.

**Mr Ongoya**, learned counsel for the respondent vigorously opposed the appeal and defended the judgement of the High Court. Addressing the grounds of appeal sequentially, learned counsel submitted that the case of **DENNIS MOGAMBI MONG'ARE VS ATTORNEY GENERAL & 3**

**OTHERS, HC Petition No. 146 of 2011 and DENNIS MOGAMBI MONG'ARE VS ATTORNEY**

**GENERAL & 3 OTHERS, CA No 123 of 2012** did not address the issues presently before us, and therefore the defence of *res judicata* could not be validly raised by the appellant.

On whether the JMVB could vet judges and magistrates on the basis of complaints arising after the effective date, learned counsel submitted that the vetting of judges and magistrates was a transitional measure. Support for that view was found in the fact that clause 23 of the Sixth Schedule which provides for vetting of judges and magistrates is found in the transitional and consequential provisions of the Constitution. In counsel's view, a transition was akin to a bridge from one point to another; from the old order to the new order. The old order, counsel submitted, ended on 27th August 2010 and the new order commenced on the same day. Consequently we were urged to find that in respect of suitability to continue serving, the mandate of the JMVB is restricted to complaints arising before the effective date, while complaints arising after the effective date were the responsibility of the Commission.

Learned counsel further submitted that the transition was for a specific and defined period, to the intent that the JMVB could not continue in perpetuity. Upon the establishment of the Commission after the effective date, it was submitted, the intendment was that it would be the Commission rather than the JMVB which would deal with complaints arising after the effective date.

Like his learned friend for the appellants, Mr Ongoya invoked the national values and principles of governance in Article 10 of the Constitution, this time round to support the argument that the Constitution should be interpreted and applied in a manner that promotes equality and non discrimination, so that likes are treated alike. Counsel dismissed as a fallacy, the appellants' view that a judge or magistrate who was in office before the effective date was subject to the concurrent jurisdictions of the JMVB and the Commission with regard to complaints arising after the effective date. In his view, that would amount to treating judges and magistrates in office before the effective date differently from those appointed after the effective date, with regard to complaints arising after the effective date. Counsel urged that in such a scenario, one group of judges and magistrates would be subject to the jurisdiction of only one body, while the other group was subjected to the jurisdiction of two different bodies.

Lastly learned counsel defended the 'reading in' of words into the statute, which he submitted was not the same as amending the statute. Rather, counsel argued, the practice was merely one of the remedies available to an aggrieved party in constitutional law and entailed no more than reading a statute in a manner that would lead to the achievement of a constitutional value or purpose. The practice was also defended as consistent with **Article 20 (3) of the Constitution** which requires the courts, when applying a provisions of the Bill of Rights, to develop the law to the extent that it does not give effect to a right or fundamental freedom.

We have considered the record of proceedings, the judgment of the High Court, the grounds of appeal, the submissions of learned counsel, the authorities cited, and the law. It would have been useful to include the Commission, at least as an interested party, in these proceedings as ultimately its jurisdiction in post 27th August 2010 complaints against judges and magistrates took centre stage. Be that as it may, the absence of the Commission in these proceedings is not a bar to determination of the appeal before us.

It is axiomatic that the vetting of judges and magistrates who were in office on the effective date is imperative, not the least, as a clear constitutional principle, value and object which by dint of Article 259(1) of the Constitution, must be given full effect. Vetting of judges and magistrates is part and parcel of the innovative provisions that on the whole have earned the Constitution of Kenya, 2010, the

description of a transformative document that seeks to effect fundamental and large scale transformation of our political and social institutions through a democratic and legal process. In **THE SPEAKER OF THE SENATE & ANOTHER VS THE ATTORNEY GENERAL & OTHERS**, *SC Advisory Opinion Reference No 2 of 2013*, the Supreme Court recognised the principles embedded in the Constitution as incorporating the transformative ideals of the Constitution of Kenya, 2010.

That the process is constitutionally underpinned, well intentioned, in the best interest of the country and fully supported by the people of Kenya, has not spared it all manner of objections and challenges, including charges that it is unconstitutional and in breach of the very Constitution that provides for it. As we consider this appeal, the Supreme Court is seized of a final appeal on the constitutionality of the process. In many respects, the vetting of judges and magistrates provided for under the Constitution has not escaped the malaise that plagued and thwarted previous efforts to fundamentally reform the Kenya judiciary. In light of all these challenges, real and potential, to survive and achieve its intended constitutional purpose, the vetting process must walk a tight rope and be conducted strictly in accordance with the Constitution.

The background and rationale of the vetting of judges and magistrates was succinctly summarized by the ***Committee of Experts***, the body that was charged with the responsibility of finalizing the draft Constitution of Kenya before it was submitted to a national referendum. The Committee stated as follows in its ***Final Report***:

***“Submissions to the Committee of Experts on the Judiciary were virtually unanimous on one point: the judiciary must be reformed. The Committee of Experts received a number of submissions on how this should be done. These submissions can be classified into two groups: those that proposed that the entire judiciary should be reappointed (with all judicial officers or at least all judges being treated as having lost their jobs but permitted to reapply); and those that proposed a more gentle approach that judicial officers remain in office but are required to take a new oath and undergo a ‘vetting process.’ ”***

...

***Informed by submissions, the weight of opinion at a technical consultation on the issue, the concerns of many of those directly involved in the justice system and its own understanding of the issue, the CoE decided that to retain the status quo and simply allow members of the judiciary to continue in office was not appropriate. In addition, on careful consideration of the options suggested in submissions, the CoE decided that wholesale reappointment of the judiciary was not appropriate. Instead, it decided that some form of vetting of the current judges should take place as was done in BosniaHerzegovina, East Germany, the Czech Republic and elsewhere in Eastern Europe and as proposed by the CKRC and Bomas Drafts. This approach is also similar to that proposed by the August 2009 report of the Task Force on Judicial Reforms.”***

(See **FINAL REPORT OF THE COMMITTEE OF EXPERTS ON CONSTITUTIONAL REVIEW**, 11th October, 2010).

It will be noted that the Committee of Experts’ recommendation on vetting was restricted to judges only and did not include magistrates. However, before the draft Constitution was submitted to and approved in the national referendum, the vetting process was extended to cover both judges and magistrates who were in office on the effective

day.

With that background in mind, we now turn to consider the issues raised in this appeal.

The first issue taken up by the appellant is the defence of *res judicata*, the contention being that the issues raised in this appeal had already been heard and settled by a court of competent jurisdiction in a previous suit between the parties. In our jurisdiction the defence of *res judicata* springs from the provisions of **section 7 of the Civil Procedure Act, Cap 21** which prohibits courts from trying suits in which the matters directly and substantially in issue were directly and substantially in issue in an earlier suit between the same parties or between parties under whom they claim; and the former suit was heard and finally determined by a court of competent jurisdiction. The rationale behind this rule is the eminently common sense proposition that litigation must come to an end and that issues that have been resolved by a court of competent jurisdiction between the same parties, should not be reopened.

In **UHURU HIGHWAY DEVELOPMENT LTD VS CENTRAL BANK OF KENYA LTD & OTHERS, CA No 36 of 1996** this Court identified the conditions under which the defence of *res judicata* will arise, as follows:

***“In order to rely on the defence of res judicata there must be:***

- (i) a previous suit in which the matter was in issue;***
- (ii) the parties were the same or litigating under the same title.***
- (iii) a competent court heard the matter in issue;***
- (iv) the issue has been raised once again in a fresh suit.”***

According to the appellant, the previous suit between the parties was **DENNIS MOGAMBI MONG'ARE VS ATTORNEY GENERAL & 3 OTHERS, HC Petition No. 146 of 2011** which came to this Court on appeal as **DENNIS MOGAMBI MONG'ARE VS ATTORNEY GENERAL & 3 OTHERS, CA No 123 of 2012**. While both the appellants in this appeal were parties to the earlier suit and the respondent was enjoined as an interested party, the issues in dispute in the earlier suit are totally different from the issues in this appeal and the petition from which it arose. In the earlier suit, the issue was the constitutionality of the vetting of judges and magistrates. The decision of this Court was broadly that the vetting process was constitutional. In the present litigation, the constitutionality of the vetting process is not in issue; indeed for the purposes of this litigation the respondent has accepted that the process is constitutional. The only issue that is raised in the present litigation is what the JMVB should consider when discharging its constitutional mandate to vet judges and magistrates.

We are satisfied that there is no basis for the application of the defence of *res judicata* in this appeal and that the learned judge arrived at the correct decision in declining to uphold the defence of *res judicata* as urged by the appellant.

The second, and the main issue in this appeal, is whether the JMVB, in vetting judges and magistrates, is entitled to take into account complaints against them that have arisen **after** the effective date. To answer that question entails interpretation of the relevant parts of the Constitution as well as the Vetting of Judges and Magistrates Act. In the interpretation of a transformative Constitution, the limitation inherent in a textual and literal reading and application are readily apparent. The Hong Kong Court of Final Appeal, in **NG KA LING & ANOTHER VS THE DIRECTOR OF IMMIGRATION (1999) 1 HKLRD 315**, after appreciating the constraints of literal interpretation of their Constitution (Basic Law), rejected that approach, in the following

terms:

***“As to the language of its text, the courts must avoid a literal, technical, narrow or rigid approach. They must consider the context. The context of a particular provision is to be found in the Basic Law itself as well as relevant extrinsic materials including the Joint Declaration. Assistance can also be gained from any traditions and usages that may have given meaning to the language used.”***

That Court settled for a contextual and purposive interpretation, not dissimilar to that adopted by our courts. The Court justified the purposive approach as follows:

***“It is generally accepted that in the interpretation of a constitution such as the Basic Law a purposive approach is to be applied. The adoption of a purposive approach is necessary because a Constitution states general principles and expresses purposes without condescending to particularity and definition of terms. Gaps and ambiguities are bound to arise and, in resolving them, the courts are bound to give effect to the principles and purposes declared in, and to be ascertained from, the Constitution and relevant extrinsic materials. So, in ascertaining the true meaning of the instrument, the courts must consider the purpose of the instrument and its relevant provisions as well as the language of its text in the light of the context, context being of particular importance in the interpretation of a constitutional instrument.”***

Here at home, in ***THE SPEAKER OF THE SENATE & ANOTHER VS THE ATTORNEY GENERAL & OTHERS (supra)*** the Supreme Court has recently reiterated that in the interpretation of the Constitution, we must take into account its context, design and purpose; the values and principles enshrined in the Constitution as well as the vision and ideals reflected in it. We shall be so guided.

Clause 23 of the Sixth Schedule to the Constitution provides as follows:

***“(1) Within one year after the effective date, parliament shall enact legislation, which shall operate despite Article 160, 167 and 168, establishing mechanisms and procedures for vetting, within a timeframe to be determined in the legislation, the suitability of all judges and magistrates who were in office on the effective date to continue to serve in accordance with the values and principles set out in Articles 10 and 159.***

***(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.”***

Pursuant to the above provision, Parliament enacted the Vetting of Judges and Magistrates Act, No. 2 of 2011, as the legislative framework for vetting of judges and magistrates. The Act sets up a nine person Board made up of six Kenyans and three non Kenyans, competitively recruited. The inclusion of non Kenyans in the vetting process was certainly intended to enhance objectivity, transparency and professionalism. The mandate of the Board under section 13 of the Act is to vet judges and magistrates ***in accordance with the Constitution and the Act***. Part III of the Act makes elaborate provisions on the vetting procedure and in particular section 18

prescribes the considerations to be taken into account by the Board in determining the suitability of a judge or magistrate to continue serving. The relevant part of section 18 of the Act provides as follows:

**18. (1) The Board shall, in determining the suitability of a judge or magistrate, consider**

**(a) whether the judge or magistrate meets the constitutional criteria for appointment as a judge of the superior courts or as a magistrate;**

**(b) the past work record of the judge or magistrate, including prior judicial pronouncements, competence and diligence;**

**(c) any pending or concluded criminal cases before a court of law against the judge or magistrate;**

**(d) any recommendations for prosecution of the judge or magistrate by the Attorney-General or the Kenya AntiCorruption Commission; and**

**(e) pending complaints or other relevant information received from any person or body, including the –**

**(i) Law Society of Kenya;**

**(ii) Kenya AntiCorruption Commission;**

**(iii) Advocates Disciplinary Committee;**

**(iv) Advocates Complaints Commission;**

**(v) AttorneyGeneral;**

**(vi) Public Complaints Standing Committee;**

**(vii Kenya National Human Equality  
) Rights and ty**

**Commission;**

**(viii  
) National Intelligence Service;**

**(ix) Police; or**

**(x) Judicial Service Commission.**

We have no doubt in our minds that the vetting process under the Constitution and the Vetting of Judges and Magistrates Act, by intent and design is a transitional mechanism. Beyond the fact that this mechanism is provided for in the transitional and consequential provisions of the Constitution, we note that as initially enacted, **Section 23 (1)** of the Vetting of Judges and Magistrates Act strictly limited the vetting process to a timeframe of one year after commencement, with a similarly strictly limited extension of only one year. Inherent in a transition is the idea of closure of one chapter and the opening of another. As we noted earlier, it was primarily due to the time lost through litigation challenging the process, rather than negation of the transitional nature of the vetting, that

Parliament was compelled to amend the Act several times to extend the time for vetting, culminating in the last amendment vide **Act No 43 of 2013**, which extended the process to 31st December, 2015.

It is also very significant to us that the Committee of Experts, in its report which we have cited above, indicates that the vetting process provided for in the Constitution was informed by and modeled on similar processes in BosniaHerzegovina, East Germany, the Czech Republic and elsewhere in Eastern Europe. In those countries, the vetting process was a transitional mechanism to postauthoritarian societies. (See generally **Alexander Mayer Rieckh & Pablo de Greiff (eds.), JUSTICE AS PREVENTION: VETTING PUBLIC EMPLOYEES IN TRANSITIONAL SOCIETY**, Social Science Research Council, New York, 2007, in which vetting is identified as one of the categories of transitional justice measures frequently adopted by countries in transition to peace and or democracy).

In our view, a proper reading of section 18(1) of the Act, informed by the above background and context, supports the respondent's contention that the vetting of judges and magistrates in Kenya was a transitional mechanism

focusing on among others, the conduct of judges and magistrates up to the effective date, to the intent that the judges and magistrates who were found suitable to continue serving, would be subjected, just as judges and magistrates appointed after the effective date, to the new substantive institutions created by the Constitution, in the event of any complaints arising against them after the effective date.

Section 18(1) leaves no doubt, in our view, that its focus is the pre effective date conduct of judges and magistrates. That is largely the reason why it addresses such matters as "*past work record of the judge or magistrate*" (S. 18(1) (b)); "*pending or concluded cases before a court of law against the judge or magistrate*" (S. 18(1) (c)); "*any recommendation for prosecution of the judge or magistrate*"; and "*any pending complaints*" before the institutions specified in S. 18 (1) (e). The reference in section 18 (1) to pending matters must refer to

matters pending as of the effective date and not matters pending on the date of the vetting, however long that vetting takes place, after the effective date. For the same reasons, the reference to matters pending before the Commission in section 18(1)(e)(x) must refer to matters that were pending before the Commission established under section 68 of the former Constitution rather than under Article 171 of the current Constitution.

The above conclusion is further fortified, in our view, by a consideration of the mandate of the Commission under the current Constitution. Under Art 168 (2) of the Constitution, it is the exclusive mandate of the Commission to initiate the removal of a judge of a superior court, which typically is preceded by receipt and consideration of some form of complaint. Under Article 172 (1) (c), it is also the exclusive mandate of the Commission to receive complaints, investigate and remove from office or otherwise discipline magistrates. This is a mandate that was conferred on the Commission by the Constitution ***with effect from the effective date***. On our part, we would eschew, by a very wide berth, any interpretation of the Constitution that would entail a constitutional organ like the Commission purporting to cede its exclusive mandate regarding complaints that arose ***after*** the effective date, to another organ which was intended to address matters that arose ***before*** the Commission came into being.

The real Achilles Heel in the position held by the appellants, in our view, is the argument that after the effective date, a judge or magistrate who is to be vetted is subject to the concurrent jurisdiction of the

Commission and the JMVB in respect of complaints that arise after the effective date. Such judge or magistrate, according to the appellant, is free to elect which of the two institutions should consider complaints against him or her arising after the effective date. If that were really the case, and in our view it is not, it is difficult to fathom the JMVB's problem, since none of the concerned magistrates has elected to be vetted by it in lieu of the Commission, on complaints arising after the effective date.

Once it is conceded, as the JMVB does, that the Commission has the mandate to handle complaints after the effective date, the argument for concurrent jurisdiction with the JMVB flounders, because its basis is not apparent. It is also an argument fraught with uncertainties, for no rational method or criteria is suggested to determine, in respect of the concerned judges and magistrates, which of the post effective date complaints should be heard by the JMVB and which by the Commission. On an issue implicating the critical constitutional values of decisional independence of judges and magistrates, the security of tenure of judicial officers and the institutional independence of the judiciary, we are of the firm view that uncertainty in the institution and procedures for addressing misfeasance and malfeasance by judicial officers must be avoided.

On our part, we prefer an interpretation of the Constitution that in addition to compliance with Article 259 also fosters certainty, order and harmony of constitutional institutions. In the circumstances of this appeal, the interpretation that satisfies those ends is the one that confines complaints that arose before the effective date to the JMVB and those after, to the Commission.

Vetting of judges and magistrates is a constitutional imperative which must be carried out to its logical conclusion. The interpretation of the Constitution that was adopted by the High Court and which we hereby uphold, does not in any way undermine the vetting of judges and magistrates as a constitutional goal and principle, for the simple reason that it ensures that no complaint against a judge or magistrate goes uninvestigated and unaddressed. Complaints arising before the effective date will be considered by the JMVB. If a judge or magistrate is found suitable to serve after vetting on the basis of such complaints, that officer will still have to contend before the Commission with any complaints that have since arisen after the effective date, and to that extent the judge and magistrate will be subjected to the same mechanisms and standard as all other judges and magistrates that were appointed after the effective date. That approach seems to us the better way to build a unified judiciary, one which does not subject its officers to different procedures or perpetuates unnecessary classification and categorization of its officers. Consequently the argument, as that pressed by the appellant, that restricting the complaints that may be considered by the JMVB to those arising before the effective date undermines the vetting of judges and magistrates, is with respect, a red-herring.

On the foregoing premises we are disinclined to adopt a literal interpretation of the phrase "*pending complaint*" as defined in section 2 of the Act. Under that provision, "*pending complaint*" means a complaint filed or registered with the specified institutions at least fourteen days before the judge or magistrate is vetted. That provision cannot confer on the JMVB power to vet judges and magistrates on the basis of post effective date complaints, consideration of which, by the substantive provision of the Constitution, is the exclusive responsibility of the Commission. We would therefore interpret the provision as one restricted to complaints arising or pending before the effective date but registered at least 14 days before the vetting of the judge or the magistrate. In that sense the provision is also intended to secure fair hearing by eliminating "*on the spot*" complaints against judges and magistrates at the time of the vetting.

An attractive, though fatuous argument founded on the provisions of section 18 (1) (e) of the Act may be advanced to bolster the appellant's contention that the JMVB may consider even post

effective date complaints in vetting judges and magistrates. The argument is that some of the institutions listed in section 18 (1) (e) of the Act before which complaints may be pending were established after the effective date. For complaints to be pending before such institutions, such complaints must have arisen after the institutions were created, which is, after the effective date. Otherwise a complaint cannot be pending before an institution when the institution is not in existence. Among such institutions are the Ethics and AntiCorruption Commission (established by Act No. 22 of 2011), the Advocates Disciplinary Tribunal (by Statute Law (Miscellaneous Amendments) Act No. 12 of 2012), the Commission on Administrative Justice (by Act No. 23 of 2011), the Kenya National Human Rights Commission (by Act No 14 of 2011), the National Intelligence Service (by Act No. 28 of 2012) and the National Police Service Commission (by Act No. 30 of 2011).

The short response to that fortuitous argument is the same as we have put forward in respect of the Commission. Those institutions as listed are successor institutions to those that were in existence before the effective date. Thus for example, the Ethics and AntiCorruption Commission is the successor of the Kenya AntiCorruption Commission and the Commission on Administrative Justice is the successor of the Public Complaints Standing Committee. By dint of the provisions of **clause 33 of Schedule Six** of the Constitution, the listed institutions are the legal successors of the previous institutions in existence before the effective date, whether known by the same or a new name. Thus, the mere reference in section 18(1) (e) of the Act to institutions created after the effective date does not in itself render support to the view that the JMVB is entitled to consider post effective date complaints. In the Vetting of Judges and Magistrates Act, those institutions are identified by the names they were known by at the time of the enactment of the Act, which does not negate the view that the complaints intended were those that were pending as of the effective date, before the predecessor institutions.

The last ground of appeal challenges the court's choice of remedy and relates to the question whether the High Court erred in "reading in" in section 18 (1) of the Vetting of Judges and Magistrates Act the words "***in relation to conduct, acts and omissions of judicial officers allegedly arising or arising on or before the effective date.***" In our view, it was possible for the

High Court, without resorting to "reading in", to interpret the Vetting of Judges and Magistrates Act as against the Constitution and arrive at the conclusion that a proper interpretation of section 2 and 18 (1) of the Act restricted the JMVB to consideration of complaints that arose before the effective date. This is particularly the case where Articles 20 and 259 of the Constitution are applied, and the contextual and purposive interpretation adopted. The undertaking would have entailed no more than giving the text of the Act the meaning that would be more consistent with the Constitution.

But having said that, we do not perceive any error on the part of the High Court, in reading in words into section 18(1) of the Act, for the avoidance of any doubt. The end result would have been the same, only that in "reading in", it becomes much easier to charge the court, as the appellant does, with usurping the role of the legislature and engaging in legislative drafting.

In the quest to achieve and give meaning to constitutional principle, value, goal or purpose, the courts, when called upon to interpret legislation against the Constitution, may opt for various remedies such as declaring a provision null and void, severance and striking out, reading down or reading in. These remedies have been well developed in other jurisdictions with written constitutions, significantly so, in Canada, South Africa and Hong Kong.

Where the court finds that the provisions and purpose of a statute are at variance with the Constitution, it may declare the statute null and void to the extent of the inconsistency. That is the import of Article 2(4) of the Constitution which declares any law that is inconsistent with the Constitution to be void to the extent of the inconsistency. Where however, the court finds that on the whole it is a mere

provision of the enactment that is contrary to the Constitution and that the constitutionality of the rest of the statute is not in question, the court may sever or strike out the offensive words or phrases, leaving the rest of the statute that is consistent with the Constitution intact.

Thus for example in NG KA LING & ANOTHER VS THE DIRECTOR OF IMMIGRATION (*supra*) the Hong Kong Court of Final Appeals found that some provisions of the Immigration (Amendment) (No 3) Ordinance were inconsistent with and in breach of the Basic Law. The court concluded that the unconstitutional parts could be severed from the rest of the Ordinance, which were constitutional. The court formulated the following test to determine whether the provision was severable:

***“whether the unconstitutional parts are distinct from the constitutional parts so that what is unconstitutional may be severed from what is constitutional, leaving what is constitutional intact”.***

In reading down, the Court interprets a provision of a statute, often an overly broad provision, in a narrower or limited manner than the text would ordinarily entail, so as to avoid an unconstitutional meaning or outcome. Again in HKSAR VS LAM KWONG WAI (2006) 3 HKLRD, 808, the Hong Kong Court interpreted a provision of the Firearms and Ammunition Ordinance that placed the burden on an accused person to prove that he had in his possession an imitation firearm for an innocent purpose, as imposing on the accused person no more than a mere evidential burden of proof. (See also the decision of the same Court in HKSAR VS HUNG CHAN WA (2006) 3 HKLRD, 841).

By reading in, the court adds words or phrases to a statute which, on the face of it, is unconstitutional, so as to render it constitutional. In SCHACHTER VS CANADA (1992) 2 SCR 679, the leading Canadian case on constitutional remedies, the Supreme Court of Canada affirmed that “**reading in**” is a valid remedy for a breach of the Canadian Charter of Rights and Freedoms. The Court stated:

***“Reading in should therefore be recognized as a legitimate remedy akin to severance and should be available under s. 52 in cases where it is an appropriate technique to fulfil the purposes of the Charter and at the same time minimize the interference of the court with the parts of legislation that do not themselves violate the Charter.”*** (See also BODNAR VS BLACKLOCK ESTATE (2000) A.J. No 1248).

We do not see any valid reason why “reading in” is not a remedy under the transformative Constitution of Kenya. In light of the provisions of Articles 20 and 259 of the Constitution, the value of the pre 2010 dicta of Potter JA in NGOBIT ESTATE LTD VS CARNEGIE as relates to interpretation of a statute in a constitutional context, and which the appellant urged us to follow, is very doubtful.

We nevertheless think that it is important to always bear in mind the limits of reading in as a constitutional remedy. Thus in SCHACHTER VS CANADA, (*supra*), the Supreme Court of Canada expressed the view that reading in should be opted for in “*the clearest of cases*” where it can be done with sufficient precision; is consistent with the legislative objective and is less drastic than striking down the whole statute; will not impose a substantial budgetary burden on the government; and will not significantly alter rest of the statute. Similarly in SAND VS JOHNSON (2001) A.J. No. 390, the view was expressed that where the proposal to read in words into a statute involves

pressing social policy issues, it is more appropriate to opt for legislative solution to the problem than to read in words. We can also quote the Court of Final Appeals of Hong Kong in HKSAR VS NG PO ON (2008) 4 HKLRD, 176 where it was stated:

***“The Court cannot take up a curative measure which is so fundamentally at odds with the intent of the legislation in question that adoption of such a measure properly calls for legislative deliberations.”***

We respectfully agree that the above are relevant considerations to be borne in mind in determining the appropriateness or otherwise of reading in as a constitutional remedy.

Ultimately we have come to the conclusion that the High Court did not err in holding that in the discharge of its mandate, the JMVB is restricted to consideration of complaints against judges and magistrates that arose before the effective date and that complaints arising after the effective date are the concern of the Commission. Accordingly the appeal is hereby dismissed.

This dispute has involved principally two important institutions in the justice sector in Kenya and has brought to the fore an important issue of judicial and general public interest. Despite the plea by the respondent to the contrary, we are convinced that in the circumstances, the most appropriate order to make on costs is that each party should bear their own costs. Those are our orders.

**Dated and delivered at Nairobi this 11th day of July, 2014**

**S. GATEMBU KAIRU**

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**JUDGE OF APPEAL**

**K. M'INOTI**

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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

**DEPUTY REGISTRAR**